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DEMOCRACY AND THE PROBLEM OF FREE SPEECH

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With a New Afterword

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are sharp limits on government's power to be selective in the allocation of taxpayer funds for purposes of speech. I will also suggest that the government should have little power to regulate the political speech of corporations. Restrictions that are limited to corporations are unacceptably selective, even though government might well be permitted to limit the distorting effects of wealth in political campaigns.

My general conclusions can be summarized in this way. Deregulated economic markets are neither a sufficient nor a necessary condition for a system of free expression. In the first half of the book, I emphasize that free markets are not sufficient and that the relationship between deregulated markets and Madisonian goals is only partial and contingent. Reform of the market should therefore be upheld against constitutional attack. In the second half of the book, I emphasize that free markets are not constitutionally necessary, in the sense that legal controls on nonpolitical speech should often be upheld.

We should of course recognize the plurality and diversity of values served by a system of free expression. The First Amendment is not concerned only with politics; it has to do with autonomy and self-development as well. Any simple or unitary theory of free speech value would be obtuse. But we can acknowledge all this within the confines of a First Amendment that accords distinctive protection to political speech, and that is readier to allow regulation of nonpolitical speech.

Ultimately, I argue that many of our free speech disputes should be resolved with reference to the Madisonian claim that the First Amendment is associated above all with democratic self-government. The resulting system would resolve most of the current problems in free speech law without seriously compromising the First Amendment or any other important social values. But in order to reach this conclusion, it will be necessary to abandon or at least to qualify the basic principles that have dominated judicial, academic, and popular thinking about speech in the last generation.

Chapter 1

The Contemporary First Amendment

AMERICAN CHILDREN WATCH A GOOD DEAL of television—about twenty-seven hours per week—and American television contains a good deal of advertising. The average hour of television contains nearly 8 minutes of commercials. During most of its history, the Federal Communications Commission (FCC) imposed limits on the amount of advertising that could be screened on shows aimed at children. In 1984, however, the FCC eliminated the limits.

In the wake of deregulation, some stations show between 11 to 12 minutes per hour of commercials during children's programming on weekends, and up to 14 minutes on weekdays.[1] Some shows are actually full-length commercials, because the lead characters are products.[2]

In 1990 Congress tried to return to the pre-1984 period by enacting a law imposing, for children's programming, a limit of 10½ minutes of television commercials per hour on weekends, and 12 minutes on weekdays. But President Bush withheld his approval, invoking the First Amendment to the Constitution. According to the President, the Constitution "does not contemplate that government will dictate the quality or quantity of what Americans should hear—rather, it leaves this to be decided by free

media responding to the free choices of individual consumers."[3] The President did "not believe that quantitative restrictions on advertising should be considered permissible."

The Children's Television Act of 1990 nonetheless became law. Eventually it may be challenged on constitutional grounds. Perhaps the constitutional attack will be successful. Certainly the plausibility of the argument has played a central role in the debate over controls on children's advertising. It has deterred stronger efforts to encourage high-quality broadcasting for children. It has also contributed to the singularly weak enforcement of the 1990 Act, which produced no real changes well into its third year on the books.

This little-noticed episode is itself of considerable interest. But it reveals a broader point. Something important and perhaps even strange is happening to the First Amendment. In the 1940s, 1950s, and 1960s, the principal First Amendment suits were brought by political protestors and dissidents. The key cases of that period involved political extremists on the left or the right, or victims of McCarthyism, or civil rights protestors, or people challenging war efforts. Thus, for example, the great *Dennis* case, emblematic of the period, involved a federal prosecution of someone charged with criminal conspiracy because of his academic enthusiasm for the ideas of Marx and Lenin.[4] Most of the celebrated cases between 1930 and 1970 involved dissidents offering controversial contributions to democratic deliberation on public issues. Most of the victims of censorship were people who were rejecting current political orthodoxy.

Many of the modern debates have a strikingly different character. They involve free speech claims by owners of restaurants featuring nude dancing; by advertisers who have shown false, deceptive, or misleading commercials; by companies objecting to securities laws; by pornographers and sexual harassers; by businesses selling prerecorded statements of celebrities via "900" numbers; by people seeking to spend huge amounts on elections; by industries attempting to export potential military technology to unfriendly nations; by speakers engaging in racial harassment and hate speech; by tobacco companies objecting to restrictions on cigarette advertising; by newspapers disclosing names of rape victims; and by large broadcasters resisting government efforts to promote quality, public affairs programming, and diversity in the

media. In these and other areas, people invoke the First Amendment not to ensure the preconditions for democratic deliberation, but to bring about a system in which speech is responsive to (in President Bush's words) "the free choices of individual consumers."

Many people think that a well-functioning economic market in speech is both necessary and sufficient for a well-functioning system of free expression. At most, we need a reliable antitrust law to break up monopolies; if we can do this, it is sometimes said, our basic problems will have been solved. The shift from the mid-century effort to protect political dissenters to a system of free speech "laissez-faire"—one that may or may not promote broad democratic debate—is surely a major one. How has all this happened?

In this chapter I try to answer this question. I do so by recovering an old debate in free speech cases and by showing how the resolution of that debate has led to the two key distinctions in current law. These are (1) the distinction between "low-value" and "high-value" speech and (2) the distinction among content-based, content-neutral, and viewpoint-based regulations of speech. With these distinctions in mind, we can identify the basic principles of current First Amendment doctrine, and we can see how the modern debates have come to take such surprising form.

A Dormant Debate

I have noted that President Bush's disapproval of the Children's Television Act reflects the mounting identification of free speech principles with free economic markets. Indeed, the identification has become so strong that it is sometimes hard even to see that the identification is both new and controversial, or that the free speech guarantee might be understood quite differently. For example, it may seem natural or even obvious to include commercial speech within the free speech guarantee; but for most of the nation's history, no serious person thought that commercial speech deserved constitutional protection. It may seem natural or even obvious that free markets in broadcasting are part and parcel of a system of freedom of expression; but until the 1980s, the dominant view was otherwise.

In 1949, the Federal Communications Commission famously

stated that the basic purpose of broadcasting is "the development of an informed public opinion through the dissemination of news and ideas concerning the vital public issues of the day."[5] The most striking development in free speech law is that marketplace thinking has become so dominant, and the competing views so dormant, that it is difficult even to identify those competing views. To begin to understand what has happened, we must step back a bit.

The American system of free expression is surprisingly young. The First Amendment has been in the Constitution since 1791, and our general tradition may well seem to be fiercely protective of free speech. But the free speech tradition really began well into America's second century, and in its speech-protective form, it has lasted for much less than half of our history. Before 1919, there were very few free speech cases in the federal courts. Government censorship did occur, and courts rarely concluded that such censorship violated the free speech principle. For example, and somewhat astonishingly, it was reasonably clear that the government was permitted to stop people from criticizing America's participation in a war. There were two governing ideas in the courts: the First Amendment was limited to "prior restraints"; and government could restrict speech so long as the speech had a tendency to cause harm.[6] This "harmful tendency" approach allowed government to restrict a wide range of material, including criticism of the nation during wartime and advocacy of left-wing causes.

It was not until a series of remarkable cases involving suppression of political speech during the World War I period that the Court moved slowly in the direction of a more protective standard, one that would allow government to suppress speech only if it could show a "clear and present danger." In the 1920s, the clear and present danger test became a serious alternative to the "harmful tendency" approach, and it received prominent support among the justices, particularly Justices Brandeis and Holmes.[7] In this period, the Court started to consider the possibility of offering a large degree of constitutional protection at least to political protests. Free speech had begun an era of dramatic expansion that has continued to this day.

It was in a period of about forty-five years—the central but relatively short era in American free speech law—that current understandings took on their present shape. From about 1925 to 1970, these understandings emerged during a long debate. That debate divided lawyers and judges—and the American public—along clear lines. On the one side were people approaching or even endorsing a form of First Amendment "absolutism." Their central claim was that the First Amendment is "an absolute," allowing no or very few exceptions. On the other side were the advocates of "reasonable regulation," calling for a form of balancing between the speech interests in the individual case and the harms feared by the state. The two sides could be identified by their attitudes toward five central ideas. I develop the competing views at some length, for they are of great relevance to current attitudes about the free speech principle both inside and outside the courts. Our contemporary debates are very much a product of these old disputes. Here, then, are the defining claims of the absolutists.

The first and simplest idea is that the government is the enemy of freedom of speech. Any effort to regulate speech, by the nation or the states, threatens the principle of free expression.

Second, the First Amendment should be understood as embodying a commitment to a strong conception of neutrality. Government may not draw any lines between speech it likes and speech that it hates. All speech stands on the same footing. The protection given to speech extends equally to Communists and Nazis, the Ku Klux Klan and the Black Panthers, Martin Luther King, Malcolm X, Huey Long, and George Wallace. Government should ensure that broadcasters, newspapers, and others can say what they wish, constrained only by the imperatives of the marketplace. Neutrality among different points of view is the government's first and most fundamental commitment. This conception of neutrality has emerged as a central feature of current law.

Third, the principle of free expression is not limited to "political" speech, or to expression with a self-conscious political component. There are two reasons for this conclusion. First, it is extremely difficult to distinguish between political and nonpolitical speech. Indeed, any such distinction is likely itself to reflect politics—in the form of the point of view of the judge—and this may well be illegitimate. Who is to say that literature or art is

"nonpolitical"? How would we be able to know that this is true? Second, and quite apart from issues of judicial bias and administrability, nonpolitical speech, like political speech, fully warrants constitutional protection, for it too promotes important social values. In the period from 1925 to 1970, few people claimed that all speech was entitled to the same high degree of protection as political speech. But many people believed that any exceptions should be few, narrow, and sharply defined.

On this view, the free speech principle extends not simply to speech that contributes to democratic deliberation, but also and equally to such forms of expression as sexually explicit speech, music, art, scientific speech, and commercial speech. It follows that the First Amendment should be understood to set out a principle not limited to its particular historical well-springs, which were largely political. "Speech" within the meaning of the First Amendment extends at a minimum to most forms of expression that are literally words; it covers other forms of expression as well, like art and "conduct," such as draftcard-burning, that are intended to set out some kind of message.

Fourth, any restrictions on speech, once permitted, have a sinister and nearly inevitable tendency to expand. Principled limits on government are hard to come by. To allow one kind of restriction is in practice to allow many other acts of censorship as well. Lawyers generally like "slippery slope" arguments—arguments to the effect that once you allow one, seemingly narrow outcome, you are on a "slippery slope" toward a range of outcomes that you will deplore. In the period from 1925 to 1970, as in the current era, many people thought that "slippery slope" arguments deserve an especially prominent place in the theory of free expression. This is because the risk of censorship is so serious and omnipresent, and because seemingly small and innocuous acts of repression can turn quickly into a regime of repression that is anything but innocuous.

Fifth, and finally, "balancing" of competing interests ought so far as possible to play no role in free speech law. Judges should not uphold restrictions on speech simply because government seems to have good reasons for the restriction in the particular case. Judges should not examine "the value" of the speech at issue, compare it against the "harm" of that speech, and announce a judgment based on weighing value against harm. In any such judgments, there is far too large a risk of bias and discrimination. If judges were to balance harm against value, they would be likely to uphold a wide range of laws censoring political dissent, literature, and other forms of speech.

In the past quarter-century, ideas of this general sort commanded enormous respect. They were set out most prominently by Justices William O. Douglas and Hugo Black in judicial writings in the 1950s and 1960s.[8] They were advocated with special enthusiasm by the press itself. But variations on these ideas came from many teachers in the law schools and the political science departments, and of course from numerous litigators, most notably those representing newspapers and the American Civil Liberties Union.

In the same period, the components of the opposing position are also easy to identify.[9] The opponents were led most vigorously by Justice Felix Frankfurter, who waged a crusade for balancing and against absolutism under the First Amendment and indeed in every area of constitutional law. Justice Frankfurter and others argued that balancing is a healthy and even an inevitable part of a sensible system of free expression. Judges should take into account the various conflicting interests that are inevitably at stake. Speech that threatens real harm may be stopped. This category includes speech calling for violent overthrow of the government, libel of racial groups, and speech threatening a judge with reprisal if he rules against one of the parties. "Reasonable regulation" should be upheld. The First Amendment should be understood by reference to history, including the relatively limited aims of the framers and the complexities of the Supreme Court's own precedents, which hardly point toward free speech absolutism.

On this view, certain kinds of speech fall outside of the First Amendment altogether. The amendment does not protect advocacy of crime, commercial speech, hate speech, obscenity, and libel of individuals and groups. The government should also be allowed to maintain a civilized society. This principle means that government may guard against the degradation produced by (for example) obscenity, the risks to social order posed by speech advocating overthrow of the government, and the threats to equality and civility produced by racial hate speech.

It is increasingly difficult to remember the vigor and tenacity with which the two opposing camps struggled over their respective positions. Many of the basic commitments of the absolutist position are now cliches, even dogma—and this is so even though absolutism, taken as a whole, has failed to win over a majority of the members of the Supreme Court. Even if absolutism has had incomplete success, it is fair to say that the absolutist position is at least relatively ascendent, and that its basic commitments have left have a huge mark on the law. This is a remarkable development, for free speech absolutism was genuinely novel. As we have seen, the insistence on the supposedly unambiguous text—made most vivid in Justice Black's free speech writings[10]—was remarkably unpersuasive. Despite valiant efforts, the absolutists could never muster a lot of historical support on their behalf. Nonetheless, they have now won a dramatic number of victories in the Supreme Court. This is so especially with government efforts to restrict speech on the basis of its content. Here special judicial scrutiny and invalidation are routine, except for quite narrow categories of unprotected or partly protected speech (obscenity, "fighting words," private libel, and a few others).

The concrete results are nothing short of extraordinary. Constitutional protection has been given to commercial speech; to most sexually explicit speech; to many kinds of libel; to publication of the names of rape victims; to the advocacy of crime, even of violent overthrow of the government; to large expenditures on electoral campaigns; to corporate speech; to flag-burning; and to much else besides.[11]

Where We Are Now: The Two-Tier First Amendment

It is not an overstatement to say that, taken all together, these developments have revolutionized the law of free expression. We now appear to have a relatively simple system of law, one that makes it necessary to ask two separate questions. First: Does the speech at issue qualify as "low-value"? A distinction between low-value and high-value speech clearly operates in the cases, even though the Court has not made clear by what standard it distinguishes between the two. Second: Has government regulated the relevant speech in a sufficiently neutral way? The two questions

are cross-cutting. As we will see, government may not regulate "low value" speech if it does so on a discriminatory basis, and it may regulate even "high value" speech if it does so with the requisite neutrality.

Because current law makes it necessary to ask whether speech qualifies as "low value," it is clear that in spite of the important successes of the free speech absolutists, all speech is not the same. Here the law reflects a kind of compromise between the absolutists and the balancers. Some speech lies at the free speech "core." Such speech may be regulated, if at all, only on the strongest showing of harm. Other speech lies at the periphery or outside of the Constitution altogether. This "low value" speech may be regulated if the government can show a legitimate, plausible justification.

Ordinary political speech, dealing with governmental matters, unquestionably belongs at the core. Such speech may not be regulated unless there is a clear and present danger, or, in the Court's words, unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[12] Under this standard, a speech containing racial hatred, offered by a member of the Ku Klux Klan, is usually protected; so too with a speech by a member of the Black Panthers, or by Nazis during a march in Skokie, Illinois, the home of many survivors of concentration camps. The ordinary remedy for harmful speech is more discussion and debate, not suppression. But much speech falls into the periphery of constitutional concern. Commercial speech, for example, receives some constitutional protection, in the sense that it qualifies as "speech" within the meaning of the First Amendment. Truthful, nondeceptive advertising is generally protected from regulation. But government may regulate commercial advertising it if it is false or misleading.[13]

Or consider the law of libel. Here we have an explicit system of free speech tiers. To simplify a complex body of law: In the highest, most speech-protective tier is libelous speech directed against a "public figure." Government can allow libel plaintiffs to recover damages as a result of such speech if and only if the speaker had "actual malice"—that is, the speaker must have known that the speech was false, or he must have been recklessly indifferent to its truth or falsity. This standard means that the

speaker is protected against libel suits unless he knew that he was lying or he was truly foolish to think that he was telling the truth. A person counts as a public figure (1) if he is a "public official" in the sense that he works for the government, (2) if, while not employed by government, he otherwise has pervasive fame or notoriety in the community, or (3) if he has thrust himself into some particular controversy in order to influence its resolution. Thus, for example, Jerry Falwell is a public figure and, as a famous case holds, he is barred from recovering against a magazine that portrays him as having had sex with his mother.[14] Movie stars and famous athletes also qualify as public figures. False speech directed against public figures is thus protected from libel actions except in quite extreme circumstances.

But there is also a second tier of libelous speech, developed for libel suits brought by people who are not public figures. In these cases, actual malice need not be shown. The plaintiff may recover if he can show that the speaker was merely negligent. It is not necessary to demonstrate that the speaker knew that the statement was false or that he spoke with reckless indifference to the matter of truth or falsity.[15] There are some constitutional limits on libel actions by people who are not public figures, but the state have much more flexibility to punish libelous speech. Thus, for example, some speech that is constitutionally protected if directed against celebrities—say, a claim that a famous rock star is a drug addict—is not protected when the object of the libel is not famous. The important point here is that the Court has made a distinction between different kinds of libelous speech and thus created an explicit system of free speech "tiers."

Or consider the area of obscenity, one of the most controversial current areas of free speech law. I will devote a good deal of space to the subject of sexually explicit speech (see chapters 5 and 7). For the moment, the key point is that speech that qualifies as "obscene" is entirely without First Amendment protection; it is effectively defined outside of the First Amendment. Obscenity is understood to include a narrow category of speech that appeals to the prurient interest, is patently offensive, and lacks serious social value.[16] By contrast, ordinary art and literature are almost always protected. They may be regulated only on the basis of the strongest showing of harm; this is so even if the material is sexually explicit, indeed filled with graphic sexual acts. For constitutional purposes, most art is high-value. Obscenity is low-value.

There are many other kinds of "low-value" speech. Consider threats, attempted bribes, perjury, criminal conspiracy, price-fixing, criminal solicitation, unlicensed medical and legal advice, sexual and racial harassment. All these can be regulated without meeting the ordinary, highly speech-protective standards for demonstrating harm.

The Court has not set out anything like a clear theory to explain why and when speech qualifies for the top tier. At times the Court has indicated that speech belong in the top tier if it is part of the exchange of ideas, or if it bears on the political process.[17] But apart from these ambiguous hints, it has failed to tell us much about its basis for deciding that some forms of expression are different from others.

Where We Are Now: Different Methods of Abridgement

The second major building block of current law involves not the value of the speech, but the particular method by which government regulates speech. Here we are not concerned with whether the speech is high-value or part of the exchange of ideas; instead the issue is exactly what sort of line the government has drawn between what is permitted and what is proscribed. We need to distinguish among three possible kinds of restrictions on speech: content-neutral restrictions; viewpoint-based restrictions; and content-based restrictions.[18] The basic points are quite straightforward.

Often restrictions on speech are content-neutral, by which I mean that the content of the expression is utterly irrelevant to whether the speech is restricted. Imagine, for example, that the government bans all speech on billboards. Here the content of the speech does not matter to whether the restriction applies; it is in this sense that the restriction is content-neutral. Republicans and Democrats, Communists and Fascists, liberals and conservatives—everyone is treated exactly alike. We do not even need to know what the speech is in order to know whether it is banned. The restriction applies no matter what the speaker wants to say.

By contrast, some restrictions on speech are based on view-

point, in the sense that government makes the point of view of the speaker central to its decision to impose, or not to impose, some penalty. The government might, for example, ban anyone from criticizing a war, or from favoring homosexuality, or from speaking against the incumbent President, or from arguing on behalf of affirmative action programs. Here the government is trying to protect a preferred side in a debate and to ban the side that it dislikes. A viewpoint-based restriction is distinctive in the sense that it comes into effect only when a particular viewpoint is expressed. We know that we are dealing with a viewpoint-based restriction if and only if the government has silenced one side in a debate.

Third, some restrictions on speech are viewpoint-neutral but content-based. For example, the government might ban all political speech in a certain place, or say that people may not discuss racial issues. Here the content of speech is indeed critical; we do have to know what the speech is in order to know whether it is regulated. But the viewpoint of the speaker is not crucial, or even relevant, to the restriction. A viewpoint-neutral, content-based regulation does not depend on what side the speaker takes. A prohibition on political speech, or on speech dealing with race, applies regardless of whether the speakers are liberal or conservative, Marxist or Fascist, Democrats or Republican, or anything else. In this sense, such a restriction has a degree of neutrality.

Viewpoint-based restrictions are a subset of the category of content-based restrictions. All viewpoint-based restrictions are, by definition, content-based; government cannot silence one side in a debate without making content crucial. But not all content-based restrictions are viewpoint-based. The key difference between a content-based and a viewpoint-based restriction is that the former need not make the restriction depend on the speaker's point of view.

The method of restriction is extremely important to current constitutional law. Whether a restriction will be upheld depends in large part on whether it is viewpoint-based, content-based, or content-neutral. Moreover, and significantly, this issue is entirely independent of the question of whether the speech at issue does or should belong in the upper tier. We could easily imagine *content-neutral restrictions on political speech*. Suppose, for example, that government bars anyone from distributing leaflets in airports, and that this ban is applied to the political statements made in such leaflets about a presidential election. Here we have a content-neutral restriction on "high-value" speech. Or suppose that government prohibits any speeches in subway stations. Someone who seeks to use a free space in the subway to protest civil rights policy might contend that his free speech rights have been violated. It is clear that his speech is political. It is not clear, however, that his constitutional rights have been abridged. The Court might uphold this content-neutral restriction on high-value speech, because the speaker has other means by which to communicate his message.

We could also imagine *viewpoint-based restrictions on low value speech*. Assume, for example, that government makes it a crime for anyone to engage in libelous speech[19] that is directed against conservatives. Or suppose that government imposes special penalties on threats directed against Democrats. Here we have viewpoint-based restrictions on unprotected speech.

Under current law, there is the strongest of presumptions against viewpoint-based restrictions. These restrictions are almost automatically unconstitutional. By contrast, a balancing test is applied to content-neutral restrictions, regardless of whether the speech at issue falls in the upper tier. The Court looks at the extent of the effect on speech and at the nature and strength of the government's interest. Frequently the Court is quite willing to accept the government's claim that its interest is sufficient to justify content-neutral restrictions. Thus the Court often accepts content-neutral restrictions on speech.

Finally, content-based restrictions face a strong, though not irrebuttable, presumption of unconstitutionality. In a few well-defined areas, content-based restrictions are perfectly acceptable. For example, government may regulate obscenity, false or misleading commercial speech, and private libel, even though all of these restrictions are content-based. (Notably, none of these restrictions is viewpoint-based; the bans apply regardless of the viewpoint of the speaker.) Moreover, some viewpoint-neutral, content-based restrictions have been upheld quite outside the context of the few well-defined areas of unprotected speech. Thus the Court has allowed government to ban political advertising on

buses, and it has said that partisan political campaigning can be prohibited at army bases.[20]

So much for the structure of current law. How should we evaluate it? Some people think that the new law is an occasion for a sense of triumph and, perhaps, a belief that the principal difficulties with First Amendment doctrine have been solved. The remaining problems might be thought ones of applying this hard-won legal wisdom to the ever-present threats of censorship. Thus some observers think that the current efforts to censor pornography, often coming from feminist groups, are just the same as the old, discredited efforts to censor Joyce's *Ulysses* and Lawrence's *Sons and Lovers*. Others think that the new efforts to control racial hate speech are merely a new version of the old efforts to forbid speech by Communists and other political dissidents. This is indeed the view that emerges from most recent writing on freedom of speech.[21] Perhaps modern law has settled on an admirable set of principles. Perhaps our only task is to apply those principles to current dilemmas.

I think that we should hesitate before accepting this view. In the last decade, the commitments that emerged from the previous generation of free speech law have come under severe strain. At the very least, we should be willing to examine whether the commitments applied to the issues of the 1960s continue to make sense for the new issues of the 1990s and beyond. Consider the problems raised by campaign finance regulation. Should a candidate be allowed to spend unlimited sums to broadcast his message? If Congress cannot restrict expenditures on campaigns, might not the democratic process be skewed by wealth? Other hard questions arise in cases involving pornographic services over the telephone, speech in connection with the sale of securities, sexual and racial harassment in the workplace, scientific speech, nude dancing, commercial advertising, pornography, and regulation designed to produce quality and diversity in broadcasting. With these developments, previous alliances have come badly apart. Sometimes the old belief in "reasonable regulation" has been resurrected for the new disputes.

There are abundant ironies in all this. For one thing, the new

coalitions have spurred plausible arguments of hypocrisy and brinksmanship. Free speech advocates say that the liberal's commitment to free speech has been abandoned as soon as it turns out that the commitment is inconvenient, or requires protection for causes that are unpopular with liberals. Hence it is said that some people have abandoned their own principles in order to endorse the "politically correct" orthodoxy of campus hate speech codes, or the new fashions said to have been brought about by the feminist attack on pornography. Indeed, it has been charged that for many, the apparently strong commitment to free speech stands revealed as merely contingent and convenient, and far from principled at all.

On the other hand, the broad enthusiasm for application of free speech principles to the new settings seems ironic as well, especially when it comes from conservatives usually respectful of tradition and of the need for restrained use of the Constitution. The constitutional protection given to commercial speech, for example, is extremely new, and it was rejected by (among many others) Justices Douglas and Black,[22] probably the most vigorous advocates of free expression in the history of the Supreme Court. The notion that the First Amendment protects libel of ethnic groups, or hate speech, is itself a quite modern development (to the extent that it is a development at all, an issue I take up in chapter 6). Indeed, libel on ethnic and racial grounds is prohibited in many flourishing democracies, with apparently little harmful effect on the system of free expression. The First Amendment has not until recently been thought to cast any doubt on the laws regulating speech connected with the sale of stocks and bonds. Before the last few decades, the states had very broad authority to regulate sexually explicit material. How the free speech principle interacts with campaign spending and broadcasting surely raises complex and novel issues.

In these circumstances, it may seem a bit puzzling or even cavalier to insist, as many do, that any regulatory efforts in these areas will really endanger the kind of freedom that is a prerequisite for democratic government, or reflect convenience rather than principle, or inevitably pave the way toward many dangerous incursions on speech. Insistence on the protection of all words and pictures seems especially odd when it is urged by people who oth-

erwise proclaim the need for judicial restraint, for the liberation of democratic processes from constitutional compulsion, and for a firm attention to history. Such ideas would, in these contexts, argue most powerfully against use of the First Amendment. Often, at least, they would suggest that courts should respect the outcomes of democratic processes, even when those processes produce some controls on speech.

Through a series of remarkable judicial interpretations, we have acquired a new First Amendment. The past forty years have witnessed nothing short of a revolution. But the law now faces new constitutional problems raised by campaign finance laws, hate speech, pornography, rights of access to the media and to public places, and government funds accompanied by conditions on speech. These problems have shattered old alliances, and they promise to generate new understandings of the theory and practice of freedom of expression. Might anything be done about an electoral process that places a high premium on wealth, "soundbites," and short-term sensationalism? What can be said to victims of hate speech and violent pornography? Might legal controls improve television programming for children? What forms of public deliberation can government encourage?

In coming to terms with these questions, I propose that at a minimum, we should strive to produce an interpretation of the First Amendment that is well-suited to democratic ideals. As we will see, a reconnection of the First Amendment with democratic aspirations would require an ambitious reinterpretation of the principle of free expression. But the reinterpretation would have many advantages. It might help bring about an alliance among those who appear on both sides of old and new debates. It might even help promote a New Deal for speech, one that is simultaneously alert to time-honored free speech goals and to the novel settings in which those goals might be compromised. It is to this possibility that I now turn.

Chapter 2

A New Deal for Speech

FOR THE MOST PART, the system of free expression in America is now approaching a system of unregulated private markets.[1] Its operation is broadly similar to that of other markets, like those for cars, brushes, cereal, and soap. Through this market, you will indeed be widely heard if you can persuade a newspaper or a broadcasting station to allow you to speak. Of course if you have enough money to buy access to a newspaper or a broadcasting station, many people will hear what you have to say. Both political electioneering and commercial advertising offer countless examples; the recent efforts of Ross Perot, whatever else they may reveal, show the extraordinary power of money in bringing speech to the attention of the public. And you will have an especially wonderful opportunity to communicate your message to a large audience if you have enough money to own a newspaper or a radio station.

Newspapers and broadcasting stations in turn operate largely, though far from exclusively, on the profit principle. They will allocate the right to speak largely in accordance with the goal of increasing financial returns. Of course many owners are willing to sacrifice money in return for better performance. The norms and principles of the newspaper and television businesses affect the