

**WOULD THE REAL
FIRST AMENDMENT
PLEASE STAND UP?**

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Introduction

There are a few thin pieces of paper that have been given the job of keeping America the land of the free.

These parchment papers are called *The Constitution of the United States of America*. Among the key provisions of this centuries-old document, added on four years after its original formation, is a paragraph called “The First Amendment”. It’s supposed to protect us.

But suppose someone were to tell you that around 80 years ago, the text of the First Amendment was lifted out of the Constitution and replaced with a new version, and that over the years, this version was itself replaced with another, and so forth, again and again, with its protections eroded with each subsequent revision. What would you do?

If you’re like the average American, you’d probably *laugh*. This is an idea not only ludicrous to contemplate, but in this day of wide-open media exposure, a virtual impossibility, especially since those that would most be affected by this alteration (the media), would be the most likely to report it: power + motivation = transmission of information. If this happened, you’d know about it!

If you’re not like the average American, however, you’d decide to ignore this initial reaction, and check for yourself. You’d go to your copy of the Constitution, and this is what you’d read:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

You’d then take things a step further, and you’d check this version against a photocopy of the original handwritten version. Sure enough, you’d find they match. You’d breathe a sigh of relief. The First Amendment is safe after all, so totalitarianism can go skulking back into its corner and lick its wounds. Triumph!

Alas, I hate to be the bringer of bad tidings, but you need to take things even one step further. The First Amendment is, after all, a law, and a law is a law *on paper*. Yet the *observance* of this law — what turns writing into *reality* — is in the hands of *people*. And what the paper *says* is less relevant than what the people enforcing it claim that it *means*. If, for example, a law says “A = A” (where A is illegal), and the enforcers state that “A = B”, you’re going to be arrested for B, as well as for A. Ouch! If this happens, the real law is that both A *and* B are illegal, quite without regard to what’s on paper. Scary, huh?

Well, it's possible to imagine such a thing happening somewhere at some time with a law of lesser status, but how could such a thing happen with a "high-profile" law like the First Amendment? This *first* Amendment is not "obscure" or "difficult to understand", and it's not "fine print". Not only is the Amendment right out there in the sunshine, but there are several other reasons why the existence of what would be (in effect) a constitutional *coup d'etat* would be absurd:

- 1) Desecration of the First Amendment would affect the media, who presumably would be the first to report it and defend it against dilution;
- 2) The First Amendment is *absolute* ("no law"); how can an absolute term be evaded? The Amendment would thus be defended by "strict constructionists" of the Constitution.
- 3) The First Amendment is one of the most critical for maintaining the idea of other rights; since all other rights flow from it, lovers of other rights would come to its defense.
- 4) The First Amendment is supposedly one of the main constitutional provisions that separates us from "communist" or "totalitarian" countries (which control the flow of information), and so is more likely to be defended by patriotic Americans who make up the majority of citizens ("In America, we have the right to say anything we want.").
- 5) Most people "do" speech on a day-to-day basis (as opposed to housing soldiers for the military), so more people would be interested in changes to this amendment from a purely self-interested basis than other, less prominent amendments.
- 6) Protection of the First Amendment is supposedly on the agenda of the American Civil Liberties Union, meaning that there are supposedly funds allocated for its protection.
- 7) The First Amendment is value-neutral, and appeals to "conservatives", "liberals", "whites", "blacks", everybody at one time or another. That's a pretty good coalition.

It would seem that the massive numbers of people that would be opposed to the aforementioned dilution would reduce the probability of this dilution to almost nil. It would seem so, but that isn't the end of the story.

You see, unfortunately for the First Amendment, it too is a law, and like all other laws it is subject to *interpretation*. If changes to the text of the First Amendment were to be introduced (unlikely as this scenario may seem), they would make their unwelcome introductions via the interpretive mode. And these interpretations would not be made out

there in the sunshine, like the Amendment itself, but rather would take seed (later root) in the gloomy night of verbal obscurantism, linguistic filters in the haystack of hundreds of thousands of pages of legal documents (written over a span of many decades). While there's an antidote here — that if someone tells you the sun is green, they should be told to take off their sunglasses — most people won't get the message.

For purposes of this discussion, it ought to be noted that there is a thick line between *interpreting* and *ignoring* a law, but it's a line easily crossed. Take the following dialogue, for example:

Cop: (pulling Driver over) You were doing 80, and the speed limit is 65.

Driver: No problem, officer. I simply *interpreted* the term “65” mph to mean “80” mph. You see, I had a compelling private interest to go faster, and so I balanced the interests of the State against my interests — and the State came up short.

Cop: (filling out ticket) Hey, haven't I seen you on the Supreme Court?

You see, when the Government applies law to *people*, they don't allow alternative “interpretations” which are actually *re-writes* of statutes. And a good thing too. If they did, we wouldn't have law, we'd have anarchy. And we'd have the consequences that flow from the exercise of naked, unharnessed, anarchic power.

Unfortunately, not all laws are well-framed. Some laws, if strictly observed, would lead to absurd consequences, consequences that would lead many people to question the law, and ultimately to disrespect for the law. Assuming that a law is poorly-framed (e.g., a speed limit on the interstate highway of “5 mph”), there are four possible remedies the enforcers of the law and the people under the law would have as an option:

- 1) Obey the law, and suffer the consequences.
- 2) Obey the law, suffer the consequences, but seek to amend the law.
- 3) Ignore the law; pretend it doesn't exist.
- 4) “Interpret” the law to mean what it “should” mean.

While some of us might decide to choose one or the other of these remedies, the United States Constitution (the one on paper) has, in Article V, left only one remedy open to us: choice 2. Some may argue that this amending process is too unwieldy. Perhaps so, but the answer, again, is not to circumvent the process, but to amend it (“We the People”). That's what a Constitution is all about. The very least we should be able to say about a Constitution is that it is worth the paper it's printed on.

In this book, I will argue that the Supreme Court of the United States of America, supposedly the last bastion of defense for Constitutional clauses, has instead chosen choice 3, and more often, choice 4. They have taken this approach with virtually every significant clause of the Constitution. Consequently, the Constitution as it exists in practice is very different from the one on paper, and — much as it pains me to say this — not quite as enjoyable to read.

I have chosen to illustrate the Court's method of operation with an in-depth analysis of the First Amendment; specifically, the "speech" and "press" provisions. In this book, I will present extensive evidence that the Court has willfully and wantonly disregarded the Amendment's express provisions. I will also provide extensive evidence of unconstitutional legislation that is on the books as a consequence of this approach.

I have chosen to illustrate this phenomenon with the speech and press provisions of the First Amendment, because these provisions have a singular virtue: they are *absolute*, with the clearest of all constitutional meanings. If the Supreme Court can apply choices 3 and 4 with *absolute* provisions of a high-profile Amendment, just imagine what they can do with the vaguer, less prominent clauses.

To understand what has happened, let's first understand the speech and press provisions of the First Amendment (which hereinafter will be referred to simply as the "First Amendment"), in detail.

*The First Amendment, Annotated***Congress**

“Congress” is defined in Article I, Section I of the Constitution as consisting of “a Senate and House of Representatives.” Note that the word is “Congress,” not “Government” or “States,” nor the Executive or Judicial Branches, which have no lawmaking authority.

Shall

Not “should” — there is no option here.

Make

Create.

No

The word here is “no”, not “some.” The word “no” means “not at all” or “not even one”. For example, if a baseball player says “I had no hits last night”, this means that he *had not even one hit last night* — 0 hits.

Law . . .

A “law” is a writing by a Constitutionally-authorized legislative body (whether Federal, State, or municipal) that describes a) conduct to be forbidden or mandated (as precisely as possible), and b) the penalty or reward for engaging in the conduct to be enforced by a Constitutionally-authorized Executive branch (with monitoring by a Constitutionally-authorized Judicial branch). Sometimes the “law” is called by a different name, such as a “statute”, “rule”, “regulation”, “code”, or “ordinance”. At the Federal level, the procedure for making a law is defined by the Constitution, and the output of the legislative process is specifically referred to as a “law”. If a bill has not been “signed into law” by the President, it is not a “law”, and therefore has no legal force. Since Congress is not empowered to legislate in certain areas by the Constitution, “laws” in these areas signed by the President are not laws in fact.

Abridging the

“Abridging” means to diminish or limit. The word “abridging” is not preceded by “significantly” or “unreasonably”, indicating that any abridgement is forbidden, no matter how slight or reasonable.

Freedom of

“Freedom” is the power (combined with the right) of a person to engage in a particular form of conduct.

Speech

See press below.

Or of the

Not “and”.

Press . . .

The forms of conduct protected by the First Amendment. These terms are not defined in the Constitution, and are, unlike the previous terms, susceptible to interpretation due to their ambiguous content. If these terms are interpreted too narrowly, the Amendment would basically be useless: for example, Congress could pass a law allowing you to speak and publish materials on a printing press, with you in a sealed room and no contact with the outside world. Luckily, there is a broad societal consensus that these words should be seen broadly. The commonly accepted meaning of the terms today is communication of information via any media, whether book, comic book, newspaper, radio, television, CB radio, walkie talkie, braille, sign language, passing out leaflets, or just talking. “Speech” information may be seen as that information which is received through the sense of hearing, and “press” information maybe seen as that information which is received through the sense of sight or touch (as in Braille).

Understanding the First Amendment

When we analyze the words that make up the speech protection provisions of the First Amendment paragraph, we find a clear Constitutional directive: Congress cannot pass *even one* law that in any way, shape, or form limits the power of any person or body to speak or to publish.

From the standpoint of clarity, this is a beautiful amendment, which satisfies several key parameters for well-written legislation; it is *short, uncomplicated by irrelevant language, understandable, simple*, and about as *unambiguous* as you can get.

In fact, of the Amendment's 10 key terms, 8 are unambiguous. 2 of the terms (used in Boolean logic) have a rigor that allows them to be used in computer languages like C, Pascal, Fortran, Hypertalk, etc, with flow-chartable meaning: “**no**” and “**or**”. 2 other terms are defined in the Constitution: “**Congress**” (in Article I), and “**law**” at the Federal level (also in Article I, with a plain meaning at the State level and lower). The other 4 terms, “**make**”, “**shall**”, “**freedom**”, and “**abridging**”, have clear meanings in everyday language.

This leaves only 2 terms which can be seen as ambiguous, giving the green light for “broad” interpretation (“literal” interpretation is required for *unambiguous* provisions like “no”). “**Speech**” is tricky: is sign language “speech”? So is “**press**”: may writing on a poster be considered “press”, if no printing press is involved? And what about Braille, film, videotape, CD-ROM, and/or transmissions over the Internet? Some would claim that these forms of media should not fall under the First Amendment, because they weren't around when the Amendment was written. Unfortunately, to apply this “original understanding” approach to interpreting the First Amendment would be to *dilute it*, since most of the effective media for communication that exist today were not even conceived 200 years ago.

To have the maximum First Amendment protection, we will need to see these final two ambiguous terms in their *broadest* senses; that's permissible, since an ambiguous term, by definition, contains *more than one* meaning, and so the term itself declares the mode of permissible interpretation: broad interpretation is okay because more than one meaning is involved. There is no one literal interpretation *possible* with ambiguous terms, because there is no one single meaning to be seen literally. How can we see the term “reasonable” *literally*?

There is an important proviso here: *if* we are going to see these ambiguous terms in their most expansive senses, we must *consistently* take this approach, and not shift our standards from case to case as convenience dictates. Luckily, consistent expansive interpretation of these ambiguous terms is not a controversial idea. Most people, regardless of political persuasion, don't have any problem with giving sign language,

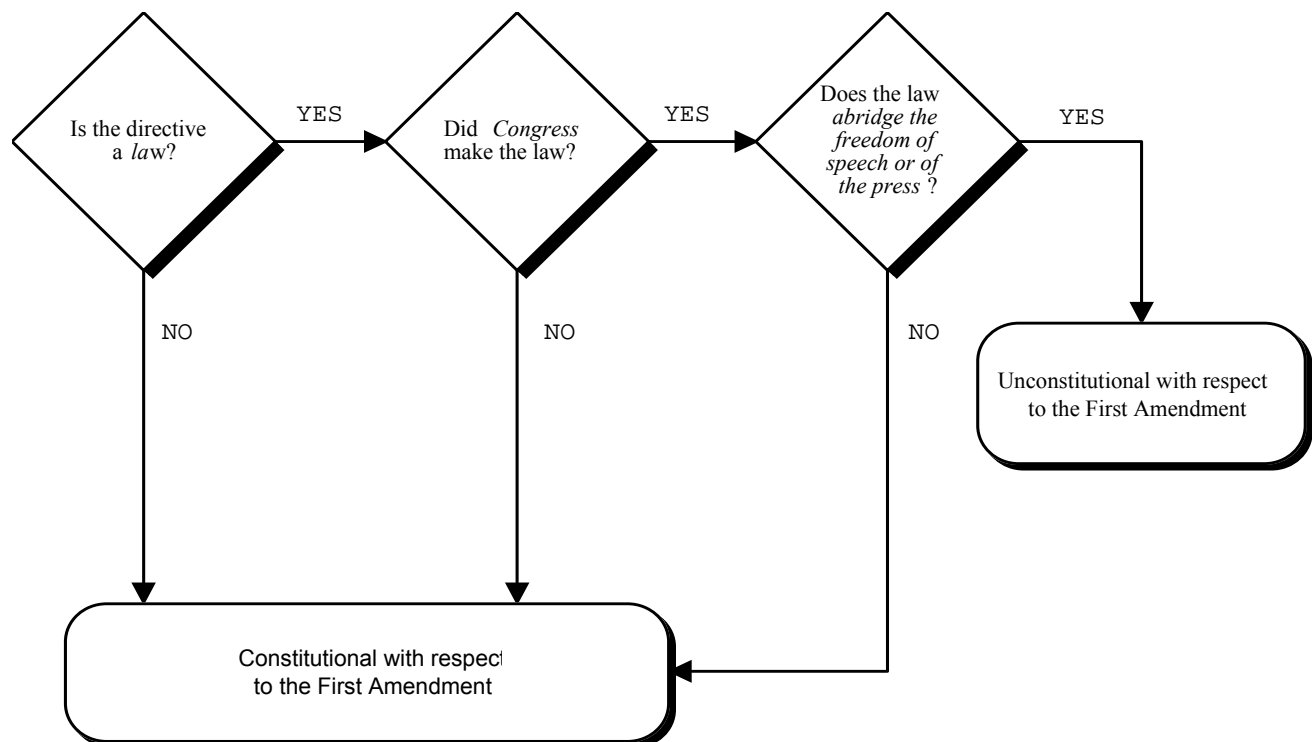
radio transmissions, film, television, Braille, and Morse Code First Amendment protection. And this final (political) decision removes the last barrier to First Amendment understanding.

When all is said and done, we have one of the most sterling examples of clear and unambiguous constitutional writing extant, so clear that we can break analysis down into three decision points, or *nodes*. With regard to directives regulating speech, the First Amendment tells us to ask three questions :

- 1) **Is the directive a *law*?**
- 2) **Did *Congress* make the law?**
- 3) **Does the law *abridge the freedom of speech or press*?**

If the answer to *all* three questions is “yes”, the law is *unconstitutional with respect to the First Amendment*. If the answer to any of the questions is “no”, then the law may or may not be unconstitutional on other grounds, but is definitely *constitutional with respect to the First Amendment*. (As stated before, the speech and press portions of the Amendment, the exclusive focus of this book).

These questions (“nodes”) are decision points (points of direction change), and can be put into a flow chart:



Now that you understand the procedure mandated by the speech and press provisions of the First Amendment, it's time to see this procedure in action. Remember, we're considering only the *First* Amendment here, and no other Amendments, under which one or more of the following directives might be considered unconstitutional.

- Jim's boss makes out a pink slip (a directive) firing Jim for leaking an internal office memo to the press.
 - 1) **Is the directive a law?** *NO*
CONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

- The Texas legislature makes a law prohibiting bookstores from selling fiction.
 - 1) **Is the directive a law?** *YES*
 - 2) **Did Congress make the law?** *NO*
CONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

- New York City's legislative body makes a municipal ordinance prohibiting the spray-painting of messages on subway cars.
 - 1) **Is the directive a law?** *YES* (an "ordinance" is a "law" with a different name)
 - 2) **Did Congress make the law?** *NO*
CONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

- Congress makes a law that no book can be longer than 300 pages.
 - 1) **Is the directive a law?** *YES*
 - 2) **Did Congress make the law?** *YES*
 - 3) **Does the law abridge the freedom of speech or of the press?** *YES*
UNCONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

- Congress makes a law proclaiming the existence of "National Pickle Week".
 - 1) **Is the directive a law?** *YES*
 - 2) **Did Congress make the law?** *YES*
 - 3) **Does the law abridge the freedom of speech or of the press?** *NO*
CONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

- Florida's legislature makes a law that will fine newspapers \$10,000 for each count of "slanderous publication."
 - 1) **Is the directive a law?** *YES*
 - 2) **Did Congress make the law?** *NO*
CONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

- A state judge orders television cameras out of his courtroom for a closed hearing.
 - 1) **Is the directive a law? NO**

CONSTITUTIONAL WITH RESPECT TO THE FIRST AMENDMENT.

As the above examples show, the First Amendment is widely misunderstood. This amendment is *not* (as generally believed) a catch-all directive against Government regulation of speech. In this regard, the first word of the First Amendment is its most important word: *Congress*. We're talking about the "Federal" government here, not "government" in the abstract. This view of the meaning of this *first* amendment contained in the original Bill of Rights is confirmed by the *last* amendment contained in the original Bill of Rights, the Tenth Amendment, which provides that

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In other words, Congress can't regulate speech: it doesn't have that power. That power flows down to one of the State governments in our Federalist system. If they choose not to exercise that power (available to them since not prohibited by Section X of Article I), the people retain it.

Consequently, the concern of the First Amendment is not *rights*, but *powers*. The First Amendment is concerned not with *protection of minority rights*, but rather with *Federalism*: who rules, Congress or the States? Let's make this perfectly clear:

**The issue under the First Amendment is not "can speech be abridged",
but "who can abridge speech?"**

And this is what saves (or should have saved) the First Amendment from arguments to evade or re-organize its clear procedure. Imagine society helpless before the following situations:

- Automated obscene (or threatening) phone calls are made to "latchkey kids" while Mommy and Daddy are at work;
- Graffiti is sprayed on the pulpit of a church;
- A newspaper vendor wants to sell child pornography;
- An ad is placed in a mercenary magazine for a "hit man";
- A restaurant copies the trademarks and menus of a more successful restaurant down to the last detail to get more customers;

- A magazine publishes troop movement schedules in wartime;
- A student copies another student's essay while taking an exam;
- A business submits a false competitive bid to the government;
- A newspaper prints false and defamatory stories about a group, manufacturing fake quotes to put in the words of the group leaders, with no right of reply;
- Radio frequencies clash so that *no* radio can get through.

Put enough “nothing we can do”s together, and a coalition of anti-First Amendment sentiment from people of the north, south, east (“left”), and west (“right”) would form. Disrespect for this critical Amendment would spread in the society.

Luckily, there is *something* we can do about child pornography and advertisements for “hit men” in the local paper: we just have to do it on a non-Federal level. And this is what should have saved the First Amendment from the excuse that following its clear procedure is “too harsh”.

Many of the difficulties that come about from a “literal” or “absolutist” or “rigid” interpretation of the First Amendment (i.e., a correct reading of the First Amendment) fall away when we realize that the Amendment does not prohibit *State governments* from legislating against speech. The First Amendment doesn't say “no” government is prohibited from passing laws against libel, slander, child pornography, and false advertising; rather, it says that regulation of these matters is *up to the States*. The authors of the First Amendment did not believe you could “say anything you wanted”; to the contrary. Under the First Amendment, Texas, Florida, and Alaska can shut you up tighter than a clam, if they want to.

At the Federal level, however, the Government's hands are tied. In case you had any doubts about this, you could do a reality check by reading the words of the two Supreme Court judges who were the greatest (though as we'll see, far from perfect) defenders of this Amendment — Hugo Black and William O. Douglas.

Before we do this, though we have to go off track for a second and bring up an important issue: citing the opinion of judges with reference to the meaning of constitutional text is a *potential trap*: after all, sometimes judges tell us that “ $2 + 2 = 4$ ”, and others that “ $2 + 2 = 5$ ”. And to cite the judge who says “ $2 + 2 = 4$ ” is to *implicitly endorse* the power of *another* judge to hold that “ $2 + 2 = 5$ ”!

However, citing the opinions of judges is permissible provided that we understand that these opinions are in no way *dispositive* of the meaning of Constitutional text, and *cannot in any way overrule the plain meaning of constitutional text*.

With this critical proviso in mind, let's look at some of this reality-checking language. According to Judge Douglas,

The First Amendment is written in terms that are absolute. Its command is that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press . . .’ That guarantee, can, of course, be changed by a constitutional amendment which can make all the press or segments of the press organs of Government and thus control the news and information which people receive. Such a restructuring of the First Amendment cannot be done by judicial fiat or by congressional action. The ban of ‘no’ law that abridges freedom of the press is **in my view** total and complete.¹

True, though “in my view” can be struck as irrelevant (and misleading). According to Judge Douglas, the Court does not have

carte blanche to design systems of supervision and control or empower Congress to read the mandate in the First Amendment that ‘Congress shall make no law . . . abridging the freedom . . . of the press’ to mean that Congress may, acting directly **or through any of its agencies such as the FCC** make ‘some’ laws ‘abridging’ freedom of the press.²

True, though under Article I, Section I of the Constitution, Congress cannot delegate its exclusive legislative power to any “agenc[y]”. According to Judge Black,

[T]he First Amendment’s language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press.’ I read ‘no law . . . abridging’ to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly ‘beyond the reach’ of **federal** power to abridge. . . . The contrary notion is, in my judgment, court-made not Constitution-made.³

True, though “federal” power should be amended to read “Congressional” power. Thomas Jefferson provided a reality-check from a non-judicial observer, and stated in 1798 that:

¹ Douglas, *CBS Inc. v. Democratic National Comm.*, 412 U.S. 94, 156 (1973). Unfortunately, Douglas did not follow through with this logic in this opinion. Ah well.

² Douglas, *CBS* at 160.

³ *Smith v. People*, 361 U.S. 147, 157,159 (1959).

[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press; insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of **federal tribunals**.⁴

True, though “federal tribunals” should be amended to read “Congress”. The idea advanced by some that the First Amendment was “old-fashioned” was no argument for not following its clear language:

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court’s only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted.⁵

True, though a little bug slipped in here. See if you see it in this restatement:

[I]t is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. There is unhappiness in some circles at the impotence of Government. But if there is to be a change, let it come by constitutional amendment.⁶

Did you find the error? I know, it’s subtle. Douglas refers to the impotence of “Government”. Ahh, but you see, the First Amendment doesn’t say that it is “Government” which is “impoten[t]” to regulate speech — the Amendment refers only to the legislative branch of the *Federal* government (a/k/a “Congress”). And the Tenth Amendment confirms this point of view, in case we had any doubts in the matter.

What is Douglas talking about?

⁴ 8 Jefferson, *Writings* (Ford ed. 1904), pp. 464-5, cited in *Smith*, p. 157.

⁵ *CBS* at 160-1.

⁶ *CBS* at 162.

The Fourteenth Amendment: First Amendment II?

The idea that only the Federal government is prohibited from regulating speech worries many people. After all, if Congress is prohibited from banning books, why shouldn't Texas be too? Many State governments today are far larger than our Federal government was in 1791, with (presumably) the same potential for tyranny.

Consequently, civil libertarians have had to look elsewhere for speech protection at the State level. The most obvious source for protection of these speech rights are the "First Amendment" provisions in every State constitution, which are supposed to do for State governments what the First Amendment is supposed to do for the Federal government. However, the obvious does not always obtain. Unfortunately for the Constitution (as we shall presently see), civil libertarians, on the lookout for a Federal solution where there was not even a State problem, have focused instead on the Fourteenth Amendment, which contains the following language:

No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law . . .

This Amendment has two clauses which could conceivably be cited by those looking to extend Federal speech protection to the States (even though State governments have jurisdiction over the speech legislative power, and have already granted rights in that area, and so therefore State freedom of speech cases could be brought under State "First Amendments"): the *privileges or immunities* clause, and the *due process* clause.

If the 14th Amendment has to be brought into this constitutional arena, then the *privileges or immunities* clause seems to be the best way to extend this protection, but there are two plausible readings of these terms regarding immunity which makes any automatic extension problematic:

- 1) A United States citizen is immune from *Government* regulation of speech (if we read the immunity as referring to *only the subject-matter of the right* in the First Amendment, not the body to which the subject-matter applies).
- 2) A United States citizen is immune only from *Congressional* regulation of speech (if we take the *entire Amendment* into account).

At first glance, the terms "privilege" or "immunit[y]" could be seen as referring to the right in the abstract (covering all governments), or merely the right to be free from Federal regulation of that right. But ultimately the more expansive interpretation will not

fly. While the *privileges or immunities* clause could plausibly be extended to those clauses of the Bill of Rights that, unlike the First Amendment, *do not explicitly refer to Congress*, it is impossible to see how a Floridian would be protected from Floridian speech regulation when protection from “State of Florida abridgment of speech and press” is most emphatically *not* a Constitutional “privilege” or “immunit[y]” of those “citizens of the United States” living in Florida; to the contrary, the First Amendment (in concert with the Tenth Amendment) flows power in this regard to Florida when it wishes to exercise it, given that the power was not removed from Florida’s legislative power in Section X of Article I of the Constitution.

This is the nit-picking of which massive constitutional re-interpretation is made. However, while it might seem that the *privileges or immunities* clause would be the most logical clause to contain the text of a transferred First Amendment, the Supreme Court rejected this view in the 19th-century *Slaughterhouse Cases*.⁷ And these cases have never been overruled. For many years thereafter, the Fourteenth Amendment was not seen by the Court as carrying the torch of First Amendment liberties to the State level. As late as 1922, the Court held that “neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about ‘freedom of speech’ . . .”⁸

But only three years later, however, the Court did an about-face, and began to institute the “trickle-down” theory of constitutional jurisprudence, better known as the *incorporation doctrine*. Under this view, the language of the First Amendment was to be “incorporated” — added into — the text of the Fourteenth Amendment, as if it were already present there. The Court decided not to use the *privileges or immunities* clause for this purpose (the more justifiable clause), but rather the more expansive *due process* clause (which extends protection not just to “citizens”, but to “any person”), **even though “due process” under the First and Tenth Amendments explicitly allowed for State regulation of speech!** In *Gitlow v. New York*, the Court decided that

For present purposes we may and do assume that freedom of speech and of the press — which are protected by the 1st Amendment from abridgment by Congress — are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the 14th Amendment from impairment by the states.⁹

Six years after *Gitlow*, the Court anchored this view, stating in *Near v. Minnesota*

⁷ 16 Wall. 36 (1873).

⁸ *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 (1922).

⁹ *Gitlow v. New York*, 268 U.S. 652, 666 (1925). They didn’t follow through with this view, though.

that “It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action.”¹⁰

This, of course, was a dramatic change to the meaning of the Constitution. Prior to 1931, the absolutely written First Amendment was defensible from attack from those who would throw out legitimate hypothetical situations to defend their view that the Amendment should be disobeyed. Prior to 1931, defenders of the First Amendment could claim, accurately, that those hypothetical situations could be regulated at the State level, thus successfully meeting these objections.

After 1931, however, this defense of the First Amendment was no longer available. Under this new interpretation, *no* State or Federal government could regulate speech in any way, shape, or form. Legislative jurisdiction of regulation of speech would then have to be transferred to the *City* (municipal) level, and at that level, it would be “anything goes” (assuming that the Tenth Amendment flow-chart transferring power to “the people” [not “the cities”] in the absence of State action to be written out of the Constitution — and it would have to be, because if it weren’t, *no* government entity could abridge speech or press in any way, shape or form, a potentially destabilizing state of affairs, as a survey of all the possible hypothetical circumstances would reveal).

It is astonishing to think that such an incredible change to the meaning of our Constitution could come in the space of just nine short years. And the implications of this incorporation strategy from a Constitutional checks and balances/separation of powers viewpoint are monumental. What an extraordinary change in public policy would result from this 1931 re-interpretation! The vast multiplicity of differing municipal laws that would be constitutional in a Tenth-Amendmentless world would mean that publishers and broadcasters would be subject to a vast number of differing laws: while Los Angeles would permit the use of the “seven dirty words” on the front of magazines, San Antonio would not. And Peoria and Madison would have their own views. A different edition of each magazine and book would have to be prepared for each municipality, a cost that simply could not be met, unless speech were “watered-down” to the level of the strictest of the regulations extant.

Perhaps to meet this policy objection, some judges of the Supreme Court held therefore that the incorporation of the First Amendment was not *total*; rather, in the process of incorporation into the Fourteenth Amendment, the language of the First Amendment itself was to be “watered-down”. In *Beuharnais v. Illinois*, Judge Jackson denied that

¹⁰ *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

[T]he ‘liberty’ which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the liberal and identical ‘freedom of speech or of the press’ which the First Amendment forbids only Congress to abridge . . . the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.¹¹

Unfortunately, as wise as this view may have been from a policy standpoint, it could not be justified from a Constitutional perspective. After all, the First Amendment is not “watered-down”. If the First Amendment was to be incorporated, then the phrase “no law” would have to be incorporated along with it. Otherwise, the Court would have to play the role of a surrogate Constitutional Convention, and decide the *scope* and *manner* of the “watering-down” to take place. Given that the Court was not given any such power by the Constitution (and given that this power was already expressly allocated to other bodies), the Court could only do such a thing *unconstitutionally*. Perhaps for this reason, this view of a “watered-down” Fourteenth Amendment has never (in theory) been accepted by the Court. As Judge Black expressed the supposedly reigning view, “the Fourteenth Amendment applies the First, with all the force it brings to bear against the Federal Government, against the States.”¹² As Judge Douglas put it,

There has been debate over the meaning of the First Amendment as applied to the States by reason of the Fourteenth. Some have thought that at the state level the First Amendment was somewhat ‘watered down’ and did not have the full vigor which it had as applied to the Federal Government. See *Roth v. United States*, 354 U.S. 476, 502-503 . . . So far, that has been the minority view. See *Malloy v. Hogan*, 378 U.S. 1, 10 . . .¹³

“So far, [this] has been the minority view”.

Is there hope for a view better justified in reason? Actually, there is a much more rigorous analysis that could be employed. In fact, if someone wanted to analyze whether or not the due process clause extends the First Amendment to the states, they would find 10 reasons why it does not. These 10 reasons are contained as an appendix to this book (see the final page). Analyze the reasons in the *Appendix*, and complete your analysis. Examine the Constitution yourself, and think about it. Hopefully you will find an

¹¹ 343 U.S. 250, 288 (1952) (dissent)

¹² *Smith v. People*, 361 U.S. 147, 157 (1959).

¹³ *CBS*, p. 156.

interpretation which is grounded in fact.

And this takes us to our next problem. Law is a subset of *language*, and language must be interpreted and given meaning by *everyday people* (not just government officials). There are facts on the page, and then there are the interpretations — opinions — people have *about* the facts. And these opinions can be wrong. When these opinions can be shown to fail to correspond with the facts, we must call them by another term: *mythology*.

When mythology is crowned as King, the text abdicates the throne.

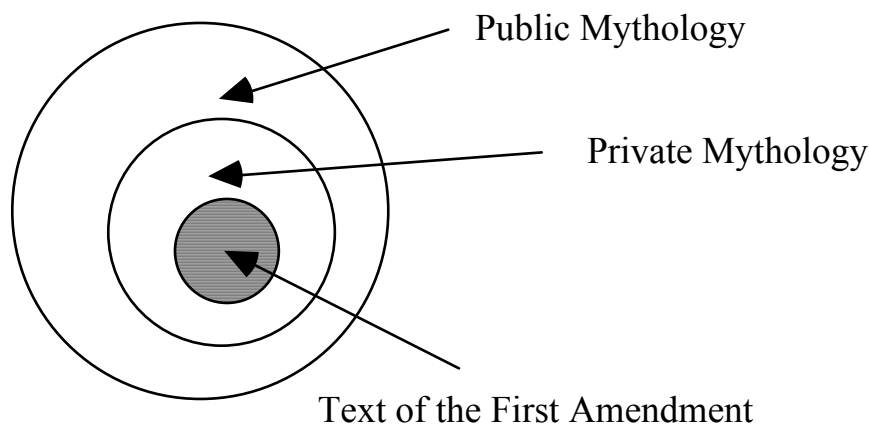
Mythology: The Filters Through Which We View the First Amendment

As an oyster coats a grain of sand in a coating of pearl, so is Constitutional text coated with the glosses of false perception. Our understanding of the *facts* is obscured (or obliterated) by *opinion* — in this case, demonstrably false opinion which masquerades as fact. For too many people, their *opinion* of what the First Amendment says is the First Amendment! The Amendment then effectively becomes what mythology declares it to be, contradictory though the mythology may be.

Mythology, as transmitted by Presidents, trade groups, advertisers, legal commentators, judges, and the mass media, has three characteristics:

- 1) It is not truth; it is *illusion* based on and substituting for truth.
- 2) It is *stratified*: different classes in society have opposing myths (public and private) transmitted to them, allowing for opposing behaviors.
- 3) The fact of stratification enables two laws to co-exist simultaneously; *public* law (the one for *show*), and *private* law (the one for *tell*). If government doesn't "go by the book", the book is really a *cover*.

Note that mythology is generally not totally false. Both public and private mythologies gain their legitimacy from partial truths. Their mythological character is only revealed when we put them side-by-side with each other (and the truth), and show them to be incompatible. You peel off the mask to reveal — a mask!



You've seen the text of the First Amendment. Now let's examine these twin views of reality, and see how well they correspond to reality. We'll start with *public* mythology (the mythology of our *dreams*), and then move to *private* mythology (the mythology of our *nightmares*).

Public Mythology

Who else better to kick off our survey of the mythology transmitted to the public than the “Gipper” himself, Ronald Reagan. An ex-actor and spokesperson for General Electric, Reagan was perfectly suited to and well-practiced for delivering the lines we all want to hear. For example, in the *Message for the President for National Newspaper Week*, October 10-16, 1982, Reagan’s speechwriter stated the following:¹⁴

A free press is a cornerstone of our democracy.

This may be the most popular of the slogans bandied about. But there are real problems with it. For one thing, the First Amendment doesn’t mandate a “free press” in the abstract, only a press free from Congressional legislation. Also, this right, while a “cornerstone” in theory, was actually an add-on, as we’ll see; and a “cornerstone” is at the base of a building, not an add-on. Oh, and one more thing — we don’t live in a “democracy”, we live in a Republic.¹⁵

Otherwise, the slogan hits it on the money.

In the First Amendment to the Constitution, our Founding Fathers affirmed their belief that competing ideas are fundamental to freedom.

The “Founding Fathers” are the 55 men who attended the Philadelphia Constitutional Convention in the summer of 1787. These Fathers/Framers manifestly did not believe that “competing ideas are fundamental to freedom”, not only because the convention was held behind closed doors,¹⁶ with no reporting allowed out or competing ideas allowed in, but also because they rejected the idea of including a Bill of Rights in the Constitution on September 12, 1787, by 10 votes to 0!¹⁷ The Bill of Rights came four years later, due to pressure by opponents of the Constitution (not the Framers), and the First Amendment was drafted not by them, but by the First Congress (working from and altering significantly a resolution reluctantly¹⁸ proposed

¹⁴ American Library Association, “Banned Books Week ‘91” by Robert Doyle., p. 58.

¹⁵ See *If Triangles are Square, America is a Democracy* at <http://www.automatrix.com/~bak/triangles.html>.

¹⁶ 1 *Records of the Federal Convention* 17 (May 29, 1787), ed. by M. Farrand.

¹⁷ 2 *Records of the Federal Convention* 583. See also Alexander Hamilton’s arguments against a Bill of Rights in *Federalist* 84.

¹⁸ Madison called the project of gaining support for the amendments “nauseous”, but believed that creating a Bill of Rights would “kill the opposition everywhere” to the new Constitution. The Bill of Rights was the bone thrown to Anti-Federalists like Patrick Henry to stop the movement to have a second Constitutional convention. See *The Bill of Rights*, E.W. Hickock, Jr., p. 84 (Virginia: 1991), and generally books on the AntiFederalists.

by James Madison on June 8, 1789, an ex- "Founding Father" who submitted his¹⁹ resolution as a Representative of the State of Virginia²⁰). Contrary to Madison's proposal, the First Amendment ultimately passed by Congress permits State regulation of speech, and therefore rejects the idea that competing ideas are fundamental to freedom.

The message Reagan's speechwriter prepared appears not only in Presidential addresses, but frequently on posters: large type, limited space, and the need to "dumb down" the message for passers-by make posters the perfect medium for shallow, inaccurate messages unjustified by a little thing known as *evidence*.

Usually, you'll find these carriers of mythological ideology in public "schools", which are too often instead chilly edifices functioning sometimes as a government-administered babysitting service, and other times as the marketplace where the mythological-information transaction between babysitter (sender) and future citizen (receiver) takes place. These "buyers", of course, *in loco parentis*, aren't given the option of selecting from the intellectual menu. Unfortunately, the "trickle-down" theory of information predicts that a signal will pick up more and more noise as it makes its way down the information pipeline, and unfortunately for the kids, few of their teachers know enough about the Constitution to intervene and pick out the nits from the pablum.

For example, the American Bar Association (an organization which surely knows better) in the '90s distributed a poster to high schools which had on its right side a large picture of Martin Luther King addressing the 1963 civil rights march in Washington, D.C.²¹ On the left side was this caption:

The Bill of Rights guarantees freedom of speech.

Otherwise, it might all have been a dream.

The Bill of Rights doesn't "guarantee" freedom of speech, nor does the First Amendment, which explicitly allows regulation of speech by 50 of the 51 governments contained within the United States. The Fourteenth Amendment, which some see as extending speech protection at the State level, is not part of the Bill of Rights, a term which refers only to the first ten amendments.

¹⁹ The gist of the resolution was proposed by the Virginia Convention almost a year earlier. See *Creating the Bill of Rights*, ed. by Veit, Bowling, and Bickford (Johns Hopkins: 1991), p. 18.

²⁰ *Creating the Bill of Rights*, pp. 12-3.

²¹ Seen by the author. This poster was pinned to a bulletin board at Francis Lewis High School in Queens, New York (in the fall of 1994).

The American Library Association came out with a similar poster in 1991, when it celebrated the Bill of Rights by spreading false information about the content of those rights:

Celebrate YOUR FREEDOM TO READ

• Guaranteed by the First Amendment to the U.S. Constitution.

The First Amendment is focused on the sender of information, not the receiver, nor does it mention a generic “freedom to read”. Harvard may own the only known copy of a particular book in its library, but that doesn’t mean you have the freedom to force your way onto their property to read it. How does the First Amendment stop Texas from passing a law that no minor may purchase an “obscene” book?²²

During the Bill of Rights “celebration”, *Life* magazine came out with a “Fall Special” in 1991, titled “The Bill of Rights: A 200-year history of turbulence and triumph”. When we decode this message, we learn that the fight for rights was a tough battle (“turbulence”), but the battle is over now, and it had a happy ending (“triumph”). We won! Supposedly this means we can rest easy now from here to eternity, our rights inalienable forevermore. We can start *dreaming* again. Ahh, bliss!

On pages 4 and 5 of this commemorative issue we find an ad from tobacco company Philip Morris, which carried an original copy of the Bill of Rights in a tractor-trailer on its 52-stop country-wide “Bill of Rights Tour”. The ad trumpeted this achievement:

**[W]e have placed this cornerstone of democracy
within the reach of every American . . .**

*The cornerstone theory has been previously deconstructed.
As far as “reach” and “every” go, there were around 250,000,000 Americans alive when this ad was published, so we would have had to temporarily suspend the laws of physics to allow every American to fit into the truck holding the copy of the Bill of Rights (in only 52 stops), and to get every American to the truck to begin with, we would have had to release prisoners in penitentiaries and patients in intensive care units and mental homes, as well as fly back to the States those Americans who happened to be overseas.*

²² “Banned Books Week ‘91” by Robert Doyle. This ad appears on page 51.

[I]t has been protecting the rights of Americans for 200 years.

Which rights, and which Americans? Undoubtedly, the Bill of Rights has protected someone sometime in some way from having their rights infringed. But the more important issues are, who's rights (and which rights) haven't been protected, and why?

It is ironic that Philip Morris, of all companies, would try to tell the readers of *Life* that the Bill of Rights (specifically, the First Amendment within it) really protects speech and press “rights”, since the Federal Government violates the First Amendment by requiring this company to print messages it would rather not print — warning labels on cigarette packs! And have you seen any cigarette ads on television lately? No, none there. So what happened to Philip Morris’ “rights”? Where did they go? And if they really don’t have those rights, why are they telling us something that isn’t true?

But these are just posters on billboards and ad pages in a magazine. In the body of the magazine, we have more space, and more space gives *Life* more room to be more “spacy”. Join us as we enter *la-la land*:

The first of the 10 amendments launches us on a journey of self-discovery . . .

How does it do that, and how would the writer know how we feel?

As far as anyone knows, Huckleberry Finn never read the First Amendment,

Who could know differently? “Huckleberry Finn” was a fictional character invented by Mark Twain. Since “he” never lived, how could “he” have read it?

. . . yet he embodied it.

In what way could a fictional 19th century boy, or any boy (or girl) “embod[y]”

*“Congress shall make no law . . . abridging the freedom of speech,
or of the press . . . “?”*

**That jerry-built, troublesome afterthought to the Constitution did not merely
guarantee a range of personal freedoms . . .**

In what sense is the amendment “jerry-built”? There is no language in the First Amendment, Bill of Rights, or Constitution itself that creates a mechanism by which “personal freedoms” would be guaranteed, nor did the Amendment seek to guarantee any rights. Rather, the First Amendment sought to limit Congressional power — and retain the power of State legislatures to limit speech rights.

it said in effect that Americans are free to discover their moral selves . . .

The First Amendment didn't apply to the States, and says nothing about "morality", so this "free[dom]" is illusory.

to say and write whatever we wish, within reason . . .

The First Amendment doesn't say we can say and write whatever we wish — it allows the States to regulate speech. As applied to Congress, there is no "within reason" language in the First Amendment — at the Federal level, we can be "without reason" when we speak and write, and still be on firm legal ground.

Hope is what the First Amendment is based on, the hope that citizens, left to their own rafts and rivers, will behave well toward one another . . .

But if they don't, the States can step in. They've got one thing right: "Hope is what the First Amendment is based on . . .". Since there is no enforcement language in the Bill of Rights, and a system of checks and balances in the Constitution proper that will frustrate those Americans who wish to reverse a policy of governmental violations of the Constitution (coupled with mass media distortions of the text), we can only "hope" that the Congress and/or the Supreme Court does not decide to ignore (or re-write) the First Amendment.

When an American — black, yellow, female, whatever — reads the First Amendment today, it feels as if it was written for him or her alone.²³

Black, yellow, female, whatever would not like to be referred to as "it". Problematic grammar aside, what percentage of Americans have read the First Amendment? What studies has the writer read that state that 100% of the Americans who have read the First Amendment feel that "it was written for him or her alone"? More importantly, WHY would they feel that way, given that the Amendment allows State legislation against their speech acts? (Maybe they're paranoid!)

Now that we've peeled off the mask of public mythology, let's move to the one broadcast to far fewer people, the one underneath.

²³ All quotes from *Life's* Bicentennial "Fall Special," p. 9.

Private Mythology

Feel your brain turning into mush? That's what happens when you expose yourself repeatedly to mythology that is nearly 100% fact-free.

We're going to leave the mythology transmitted to the average American (too burnt out from a day of work to go into an intense scrutiny of mythology, an American who spent his formative years in a public school system which did not encourage the *scrutiny* of mythology, but rather its *absorption* [on posters and what-not]).

Now we'll explore a different mythology, that transmitted to a "different class" of people; specifically, attorneys, judges, politicians, and law school professors, a class of people who, unlike the average American, a) have *access* to the information regarding everyday government operation, and b) exposure to the *concepts* that allow them to *understand* this information and its significance, and c) have the *time and money* to acquire this information, and d) *work with* this information, and who are (presumably) less likely to be deluded by opinions masquerading as facts.

The key word here is "presumably". Like the *public* mythology, this private restating of the Constitution and the First Amendment is also false, but at least it represents "the way things are" — in large part because the myth is seen as "the way it is".

We can find this mythology stated by legal commentators. For example, in her massive six-pound, 1060 pages long book titled *Guide to the U.S. Supreme Court* (2d edition), Elder Witt gives us her version of the *private* mythology, a mythology far more subtle, but no less inaccurate:

Although the First Amendment is stated absolutely — "Congress shall make no law . . . " — few contend that the amendment is an absolute ban on governmental restriction of the amendment's guarantees.²⁴

Since the First Amendment refers to "Congress", it's surprising why anyone would contend that the Amendment refers to a ban on "governmental" (as opposed to "Congressional") regulation of speech.

Still, the purveyors of the public mythology would make that contention. The purveyors of the private mythology are here to tell them they're wrong, though not about their extension of a restriction on Federal law to all law, as we'll see.

They're headed down a different path.

²⁴ *Guide to the U.S. Supreme Court*, Elder Witt (Congressional Quarterly: Washington, D.C.), p. 389.

These observations aside, note that Witt does not quantify “few” (which could mean a thousand or a million or ten million, or fewer or greater), and she cites no studies that would back up her claim regarding minority contention. But if the First Amendment is “stated absolutely”, of what relevance is it that “few” or “many” would contend otherwise? Furthermore, even if were true that “few contend . . . the amendment is . . . absolute”, this doesn’t mean that this contention is legitimate. Rather, it could mean that “few” have read the First Amendment, or that “few” are interested in limiting Congressional power to regulate the speech or press, or that “few” have been able to resist a life-long bath in public and private mythology. Of course, we’re supposed to think that if “few contend” we should obey Federal Law, it’s okay to disobey it. However, Article V of the Constitution, wisely, does not allow for re-write, repeal, or violation of Federal Constitutional Law by what “few contend”.

Finally, note the doublethink built on illusion. The illusion: that the amendment has a “guarantee”. The doublethink: if “few contend” that the First Amendment means what it says, then there is obviously no “guarantee” that it will be observed!

The Supreme Court’s job has been to balance the scales so that personal rights are restricted only so much as needed to preserve an organized and orderly society.²⁵

Out there in the world is an image of a blindfold woman holding scales in her outstretched hand, presumably scales of “justice”. The accuracy of this image is already in question, since the vast majority of judges and lawmakers are male. And what this image actually means is anyone’s guess. It could mean that judges “weigh conflicting testimony”, or that they “weigh laws against natural rights”, or that they “weigh laws against the Constitution” (even though Constitutional provisions may violate natural rights) or that they “weigh the facts of the case against a plea-bargaining arrangement by the parties’ respective counsel”, or some other interpretation no one has thought of yet. Who can say? Perhaps it would be wise to incorporate this ambiguous image into the Constitution as text, but to date that has not been done. To date, the only laws we have on the books are textual, not pictorial, and so this image, compelling as it may be to some people, has no legal effect.

That leaves us with the words of the Constitution (that’s one of the nice things about a Constitution). There we find that the Supreme Court’s job description, such as it is, is contained in Article III, and you’ll find no language there about balancing “scales”

²⁵ Guide, p. 389.

or preserving an “organized and orderly society” with reference to “personal rights”. Here is their job description:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, [and Treaties, etc.] . . . in all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact . . . under such Regulations as the Congress shall make.²⁶

Here we have the jurisdiction of the judicial power, to be circumscribed by Congressional legislation.²⁷ No Congressional law to date has authorized the Supreme Court to “balance scales” and “preserve an organized and orderly society”. You won’t find those words in the Constitution, nor in 28 U.S.C. § 1 *et. seq.*, wherein lie the rules created by Congress that regulate the Supreme Court. Unfortunately, we still don’t know what is the nature of the judicial power.

To grant injunctions? To rule on political questions?

The Constitution lacks specificity on this point.

However, we can discover what the judicial power is by starting with an analysis of what it is not, as follows:

The **judicial** power is not a **legislative** power (the power to make law), and not an **executive** power (the power to enforce the law). Those powers were already allocated in Articles I and II of the Constitution. So what’s left? The key words we have to go on in Article III are “cases”, “law”, and “fact”, and since the judicial power follows the other two, we must see the judicial power as the power to determine if the facts of the case warrant the application of an existing law on the books. Judges are to apply the “law” (made by the legislature) to the “facts” (as reported by the executive) of the

²⁶ Article III, Section II.

²⁷ Perhaps Witt drew her conclusion regarding scales after noting the word “equity” – after all, “equity” *does* mean fair. However, the Supreme Court has never drawn this conclusion, nor has Congress, which regulates the Supreme Court, and there’s no reason why either body should have. This word refers to the *source* of cases that fall under the Court’s jurisdiction, not the *manner* of that jurisdiction. The Constitution was written in 1787. Back then (according to *The Constitution and What it Means Today*, pp. 218-9), private actions were filed in regular courts, and applications for injunctions were “passed upon by the Lord Chancellor, as a matter of grace, and so were considered a *suit* ‘in equity.’ . . . By the Act of June 19, 1934, however, the Supreme Court was empowered to merge the two procedures “so as to secure on form of civil action . . .’ for both.” (p. 219). Fed Rule of Civil Procedure 2 states that “[t]here shall be one form of action to be known as ‘civil action.’” Today there is no case in “Equity” “arising under this Constitution” or “the Laws of the United States.”

“case” (as presented to the judge in a courtroom), and make a determination of guilt or innocence.

This concept is called the “separation of powers”.

As an example, the **legislature** makes a law that the speed limit is “65 mph”, and that violators of this law will pay a “\$100” fine. One fine day on the highway, you decide to do 80 mph. The **executive** (the cop) enforces the law by training his radar gun on you, and gets an 80 mph readout — you broke the law! The cop gives you a ticket, and you are summoned to appear in court, where the **judge** applies the law (65 mph is the speed limit) to the fact as stated in the readout (you did 80 mph), and says “you broke the law. Your fine, per the law, is \$100”. That’s the judicial power: not to arrest you, and not to say that the speed limit “is really” 85, or “should be” 85, or that the fine “is” \$200 or “should be” \$200.

If the law is constitutional (it is), and if you have violated that law (you have), the judge must find you guilty of violating the law: that is, under the Constitution, the law that regulates the judge’s behavior.

Assuming that the law applies to the facts, here are only two possible “outs” for the accused under our system: to challenge the veracity of the facts, or the constitutionality of the law. If for, example, you can prove in court that the radar gun is broken (or that the officer failed to properly calibrate the gun as required), you have damaged the State’s “case”, and the judge must release you. Or, if you can show that the law is unconstitutional — that the Constitution has removed the power of the legislature to make a law concerning speed-limits — then the judge must also release you, since there is no law on the books under which you could be found guilty, the legislature not being empowered by the Constitution to legislate on that issue.

You will note that judicial re-scripting of the law is not one of these “outs”.

Under the Constitution, the Supreme Court is given no power to add to or subtract from their job description when it feels a little societal disorganization and disorderliness coming on. Society’s order or disorder is irrelevant to the Supreme Court’s role under Article III, since under another section of the Constitution, Article VI, we find that the judges of the Supreme Court take an oath of office to “support this Constitution”, with no exceptions for “reasonable” oath violations. Thus, judges have no power to recognize “laws” which infringe personal rights in an unconstitutional manner (even though the society becomes disorganized and disorderly as a consequence of their decision); nor do they have the power to ignore laws which infringe personal rights in a constitutional manner (even though the society becomes disorganized and disorderly as a consequence of their decision). Judges have to obey

the law like all other government officials and all other citizens, regardless of the consequences, until Article VI of the Constitution is re-written to allow otherwise.

[T]here are forms of speech that merit no First Amendment protection whatsoever . . .²⁸

Not even an electron microscope could find the language in the First Amendment which excludes certain forms of speech from its “protection”. At this point, one may ask, “Ms. Witt, just what forms of speech are you referring to, and where in the First Amendment will we find mention of them?”

The Supreme Court’s task has been to answer two questions raised by this guarantee: What is protected speech and when may such speech be curbed?²⁹

There must be a typo in the first six words of this sentence: the word “not” was omitted from between “has” and “been”. Otherwise, the First Amendment is a “has-been”! The Supreme Court’s task is to obey the law, just like everybody else.

*Alternatively, here are two questions it is Witt’s task to answer:
if speech is “protected”, how can it be “curbed”, and if it can be “curbed”,
what happened to the “guarantee”?*

You’ll note at this point an interesting difference between the public and private mythologies. While the public mythology seeks to *expand* the First Amendment protection beyond the language on the paper, the private mythology seeks to *diminish* the protection on the paper. This can be referred to as the “Used-Car Salesman” theory of government: you buy into the system on the promise of *constitutional theory*, and are nailed by the system on the *fact* of everyday government operation.

The Court . . . recognizes the right of government to curb pure speech that threatens the national security or public safety.³⁰

*If by “government” Witt means “Congress”,
there remains this question:
How can the Court “recognize” what is false?*

²⁸ *Guide*, p. 393.

²⁹ *Guide*, p. 393.

³⁰ *Guide*, p. 393.

Certain forms of pure speech . . . fall outside the protection of the First Amendment because they are not essential to communication of ideas and have little social value.³¹

*Oh, yes, the “unessential” and “little social value” exceptions contained in the First Amendment.
How could I have missed them?*

Students of the Constitution — *real* students, those who have actually read it — will probably be a little perplexed at this point. Just where is the Supreme Court getting all this power Witt (and many others) think it has? Not from the *Constitution*. The power of the Court may be real in *fact*, but not in *law*. That the Supreme Court has this power in *law* is another myth, the Master Myth from which the private mythology flows.

³¹ *Guide*, p. 393.

The Myth of Supreme Court Omnipotence

Alexander Hamilton did not believe that Supreme Court was omnipotent — or at least, he didn't say so publicly. In *Federalist 78*, Hamilton described the power of the judiciary under the text of the 1787 Constitution, and why it was so weak in relation to the other two branches of government:

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. . . . liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . .

.³²

Hamilton's view is constitutional *theory*; the most powerful power of government, *the power to make law*, would not be given to an *unelected* body. This concept of legislation by *elected* representatives (who are accountable to the people for their actions) is the heart of the 1787 Constitution (as amended by the Seventeenth Amendment), found in Article I, Section I — if you're looking for a “cornerstone”, that's where you'll find it (the cornerstone itself has a cornerstone, the paragraph immediately preceding it, more commonly known as the *Preamble*).

In line with this idea that the most powerful of the powers should be in the hands of elected officials, we shouldn't be surprised to find that the 1787 Constitution gives

³² 78 *The Federalist Papers* 393-4 (Bantam) (footnotes omitted).

Congress the power to limit the Supreme Court in a vast number of ways.

These rules, designed to maintain accountability, create a subtle, but real pressure, on the Court to “tow the line”. The myth of Supreme Court omnipotence lies behind the false view that we have a “guarantee” that the Bill of Rights will be “enforced”. If the Court isn’t omnipotent in *law*, then the guarantee is illusory.

Let’s see how omnipotent the Court is. We’ll start with the number of members of the Court. Many people believe that this number is fixed for all time, which would prevent encroachments on the judicial power. But this isn’t true.

The Supreme Court will consist of nine judges.

For now. But this is due to the power of Congress, not by Constitutional direct allocation. The Supreme Court was established with 6 members in 1789, reduced to 5 in 1801, increased to 7 in 1807, increased to 9 in 1837, increased to 10 in 1863, reduced to 7 in 1866, and increased to 9 in 1869.³³ There is no reason why the membership of the Supreme Court can’t be decreased to 1, or increased to 500, and in the process, no reason why Congress cannot appoint judges who will carry out their will under threat of impeachment. This ability to change the number of judges decreases the power of the Court and increases the power of Congress. See 28 U.S.C §1.

The Constitution refers to the members of the Supreme Court as “justices”.

No it doesn’t. Expect judgment, not justice.

Judges on the Supreme Court serve for “life”.

There is no definite term length indicated in the Constitution for the Supreme Court, but this doesn’t mean “life”. Under Article III, Section I, the term of the judge is not for “life”, but for “good Behaviour”, and judges can be impeached at any time for “bad” behavior (as determined by Congress).

The Supreme Court must meet every year.

While Article I, Section IV, Clause II says that the Congress shall assemble “at least once in every Year”, there is no such provision for the Supreme Court. Under the authority of the “Necessary and Proper” clause in Article I, Section VIII, and the appellate jurisdiction regulation in Article III, Section II, Congress currently begins the session on the first Monday in October (see 28 U.S.C § 2), but it doesn’t have to.

It could begin the next session on the last Monday in October, year 3963.

³³ Guide, p. 958.

**Under the Constitution, the Supreme Court session
must be for a fixed length of time.**

Nope. There's no Constitutional provision that the Court's session must even be a session of significant length, nor that sessions held be of significant value. In fact, Congress has the power to shut down the Court entirely! Article I, Section IX, clause VII allows no money to be drawn from the Treasury except that which is appropriated. Consequently, Congress can withhold all funds from the court, other than the salaries of the judges, which cannot be reduced during their tenure (Article III, Section I), but can be reduced thereafter to \$1, or even a penny.

With no way to conduct legal research, no lights to see by, and no guard to unlock the door to the building, there would be no significant session.

The Supreme Court has the power to veto Federal laws.

No. Under the Constitution (and the laws written by Congress), only the President has the power to veto a law: and even then, the law goes back to Congress, which can re-pass the law over this Presidential veto. The Supreme Court only has the power to relieve entities (people, groups, etc.) from government consequences stemming from unconstitutional laws. This authority is implicitly granted by the Constitutional stricture that judges must take an oath of office to support the Constitution, and by the existence of the Bill of Rights, which limits the power of Congress to legislate in certain areas.

Note, however, that this "safety-valve" applies only to the immediate case before the Court! This local declaration of unconstitutionality (this case) isn't the same as a global declaration of unconstitutionality (all cases). Person after person can be brought up before the Court under the same unconstitutional law, and each person must be "let off" on an individual basis — as it turns out, however, only those who can afford to mount a protracted legal battle have the change to fight a law on the basis of unconstitutionality.

Constitutional analysts will here note a potential flaw in the Separation of Powers concept: the existence of two-tiered tailor-made protection, a double double standard. Not only is accusation selective, but so is defense of accusation. That is, the Executive can decide to arrest A, B, and C (but not D and E), and the Judiciary can decide to hear the case of C only (not A, politically incorrect, and certainly not B, who couldn't afford to get to the Court in the first place). So A & B go to jail, while C, D, & E go free.

You'll note that the First Amendment has yet another "loophole": the First Amendment declares what laws may not be legally passed, but does not provide a remedy for the contingency of "what happens when the First Amendment is violated?" There is no Federal law (nor Constitutional provision) providing a penalty for violators, nor a provision stating that if a Supreme Court judge says "X is unconstitutional", Congress is obligated to strike that "law" from the books. The Marbury v. Madison decision, which some see as granting this power, is not a "law" — it is an "opinion". Laws are made by Congress within the parameters proscribed in Article I and the Bill of Rights, and "opinions" by judges (or any other citizens) to the contrary cannot possibly act to veto these laws — at least, under the 1787 Constitution. More on this later.

**The Supreme Court has the power to re-write
"inconvenient" provisions of the Constitution.**

There is no such language in Article V of the Constitution, and no possible Congressional law that could give the Supreme Court this power. Any such power would have to be created by Constitutional Amendment.

The Supreme Court has the power to make law by precedent.

Article I, Section I of the Constitution vests "all" legislative power in "Congress", and none in "the Supreme Court". The Supreme Court has no lawmaking authority. The separation-of-powers destroying notion of judge-made law, called "common-law", was itself obliterated by the Constitution. Indeed, as Madison wrote in a letter to Peter Duponceau in August, 1824, "it cannot well be supposed that the Body which framed [the Constitution] with so much deliberation, and with so manifest a purpose of specifying its objects, and defining its boundaries, would, if intending that the Common Law shd. be a part of the national code, have omitted to express or distinctly indicate the intention."³⁴

We have the right to be heard in the Supreme Court.

Well, few can afford the process of appealing all the way to the Supreme Court, a process that can take years. This statement is not supported by the Constitution, nor by Congressional law, nor by the Rules of the Supreme Court itself. According to Rule 17 of the Supreme Court (effective June 30, 1980), "[a] review on writ of certiorari is not a matter of right, but of judicial discretion."³⁵ That is to say, the Court will recognize those "rights" it chooses to recognize. While the First Amendment discusses a "right to petition for grievances", it does not say that the Court must hear

³⁴ *Records of the Federal Convention of 1787, Supplement, ed. by James Hutson, p. 314 (Yale University Press: 1987).*

³⁵ *Guide, p. 980.*

the case, only that you have a right to petition the Court to hear the case. The Supreme Court will accept your petition, then file it in the circular file if it has bigger fish to fry. This seems to lend credence to the omnipotence myth, but see the next comment.

The Supreme Court has jurisdiction over every law of Congress.

A “quick-and-dirty” reading of Article III may lead one to that conclusion: there we find, in Section I, that “The judicial Power shall extend to all Cases . . . arising under this Constitution [and] the Laws of the United States . . . “ But that’s not the end of the matter. When we move to Section II, we find that this jurisdiction is qualified by these words: “In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make”.

Here’s where the myth of the “guarantee” is obliterated forever; not only does the Constitution provide for no enforcement of the Bill of Rights, nor a penalty for those officials who violate the Bill of Rights, nor even a right to have one’s case decided in case of rights violation, there is even what many will see as a “fatal flaw” in the 1787 instantiation of the separation of powers concept:

Congress can simply decide, when it passes an Unconstitutional law, to simultaneously withhold jurisdiction from the Supreme Court, preventing any judicial remedy for violations — Congress has the power to, on a law-by-law basis, effectively write Article III out of the Constitution!

For example, in the body of a bill banning the publication of “anti-government sentiments” would be this provision: “the Supreme Court has no appellate jurisdiction over any case arising from this legislation”. While the Court must obey the Constitution, the Constitution also says that the Supreme Court has no obligation or power to hear all cases involving unconstitutional laws!

To some, this idea of withholding jurisdiction of subject-matter is a “fatal flaw” in the Constitution; to others, it is a “safety-valve” against judicial usurpation of power. There are good arguments for both points of view. But however you want to characterize it, the power of Congress to prevent the Supreme Court from deciding the unconstitutionality of a law isn’t just a paper tiger — this tiger *bit*. The myths tell us the Court is all-powerful, but the reality tells us otherwise.

The case was *Ex Parte McCordle*, 7 Wall 506 (1869), required reading for first-year law school students around the country. Seeking to protect blacks and federal

officials in the South from harassment, Congress passed the *Habeas Corpus Act* in February 1867, which expanded the Supreme Court's jurisdiction to review denial of writs of *habeas corpus*.³⁶ After a round of post-Civil-War political bickering, Congress turned around and repealed the portion of the act which extended the Supreme Court's appellate jurisdiction over *habeas corpus* writs on March 27, 1868, over President Johnson's veto.³⁷

This case came about when McCardle, a southern editor, was arrested for his anti-Reconstruction writings. He took his case to the Court. A year later, on April 12, 1869, Chief Judge Chase spoke for the Court, holding (quite properly) that Congress had removed the Court's jurisdiction over the McCardle case :

The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the Legislature. We can only examine its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause . . .

It is quite clear, therefor, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.³⁸

In *Daniels v. Chicago & Rock Island Railroad Co.*, 3 Wall 250 (1866), the court reaffirmed the legitimacy of this power, holding that the power of the Court was “wholly the creature of legislation.”³⁹

If we view the text of the Constitution as controlling our government, we can see that the Supreme Court is far from the “guarantor” or “enforcer” of the Bill of Rights in the abstract; rather, it is allowed to enforce the Bill of Rights *provided that Congress approves*. The sad fact of the matter is that when we look to the text of the 1787 Constitution, we find that our “cornerstone [sic] of democracy [sic]” is a paper tiger —

³⁶ *Guide*, pp. 664-6.

³⁷ *Guide*, p. 258.

³⁸ *Guide*, p. 258.

³⁹ *Guide*, p. 258.

fierce on the page, toothless in the cage.

There is one final myth we'll explore; that the Supreme Court *will* enforce the First Amendment when Congress violates the Amendment and has not removed jurisdiction over the Amendment.

We know what the First Amendment means to us. Let's see what it means to the Supreme Court.

*The Supreme Court vs. The First Amendment*SCHENCK V. UNITED STATES, 249 U.S. 47 (1919)

Did you realize that notifying your fellow Americans of their constitutional rights was a Federal crime?

It was.⁴⁰ This is the famous “falsely shouting fire in a [crowded] theater” case, the real beginning of the end of the parchment-paper version of the First Amendment. But what does “falsely shouting fire in a [crowded] theater” have to do with notifying Americans of their constitutional rights? Read on.

In this case, Schenck and Company were convicted of violating the *Espionage Act of 1917*, a Federal law which, among other things, made it a crime to obstruct government draft recruiting and enlistment efforts.

Schenck printed 15,000 leaflets, many of which were to be mailed to draftees.⁴¹ The first page of the leaflet contained the text of Section I of the Thirteenth Amendment to the Constitution, and on the flip side of the leaflet were printed (among others) the following phrases: “Do not submit to intimidation”, “Assert your Rights”, “your right to assert your opposition to the draft”, and “If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.”⁴² Schenck was arrested for passing along this information.

Judge Holmes wrote the decision of the Court, and here’s how he sized up the situation:

The defendants were found guilty on all counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and . . . have argued some other points also of which we must dispose.⁴³

Well, the only rational thing to do when someone wants to “set up” a clause in the Bill of Rights as protecting what was formerly-thought-of as a right is to “dispose” of that argument — right?

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and

⁴⁰ Is?

⁴¹ *Schenck*, p. 49.

⁴² *Schenck*, p. 51 (underline emphasis here and otherwise supplied by author. Bold too. Italic, frequently).

⁴³ *Schenck*, p. 49.

causing a panic.⁴⁴

This latter hypothetical scenario of “falsely shouting fire in a theatre” is the one most frequently cited when people want to regulate speech, but in this case there are three major problems with citing it:

- 1) The judge took an oath to support the First Amendment, and that’s what he did not do here. A Federal “law” was involved which abridged the freedom of the press, so Schenck should have been released, the power of Congress to pass that law having been removed by the First Amendment.
- 2) Holmes presented no evidence that Schenck “falsely” stated anything; Schenck’s supposedly criminal activity was in printing and distributing the text of the Thirteenth Amendment to the Constitution, and his view of what behavior that text entailed. Consequently, the analogy to false speech is *irrelevant*.
- 3) While it may be true that preventing false speech may be sound public policy, the First Amendment (combined with the Tenth) implicitly *allows for* such regulation by State governments, so there was no need for Holmes to carve out an exception for “circumstances”, given that the exception was already pre-carved. While the Fourteenth Amendment may not allow this State regulation, depending on how it is interpreted, this is not a Fourteenth Amendment case.

Judge Holmes went on to say,

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.⁴⁵

Actually, since “Congress” does not have “a right to prevent” utterances of any kind, it is difficult to see how “no Court [could] regard [utterances in wartime hindering war efforts] as protected by any constitutional right”.

Amend that — *impossible* to see.

⁴⁴ *Schenck*, p. 52.

⁴⁵ *Schenck*, p. 52.

FROHWERK V. UNITED STATES, 249 U.S. 204 (1919)

This case, decided a week after *Schenck*, also upholds the “constitutionality” of the *Espionage Act of 1917*.

Judge Holmes:

[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.⁴⁶

This last point is an interesting argument to make on the floor of a Constitutional Convention, Judge (if you *were* on the floor of a Constitutional Convention, and not sitting on the bench of the Supreme Court). As interesting as it is irrelevant — and inaccurate.

Judge Holmes noted later that Frohwerk’s defense (that the First Amendment protected him) was “disposed of in *Schenck*”⁴⁷; proving that the *Schenck Amendment* to the First Amendment made only a week earlier was now the “law of the land”.

Well, that’s an efficient way to amend a Constitution! Why didn’t the Framers think of it?

GITLOW V. NEW YORK, 268 U.S. 652 (1925)

Benjamin Gitlow, “a member of the ‘left wing’ of the Socialist party”⁴⁸(?), wrote a paper repudiating the “moderate” wing of the party. But Gitlow didn’t just spout the typical rhetoric characteristic of the time. His speech went beyond mere abstract analysis and predictions; rather, it went into the area of tactics — *action*. For example, Gitlow had urged “mass strikes for the purpose of fomenting . . . disturbance”.⁴⁹ In doing this, Gitlow had committed a crime against the *State* of New York, which had a criminal anarchy law forbidding such conduct.

In this decision, Judge Sanford begins by seeming to understand that the first Amendment does not apply to *State* governments:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and

⁴⁶ *Frohwerk*, p. 206.

⁴⁷ *Frohwerk*, p. 215.

⁴⁸ *Guide*, p. 400.

⁴⁹ *Guide*, p. 400.

unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.⁵⁰

This paragraph, while false as applied to Federal law, is true as applied to law authored by State governments. So it would seem that Sanford's next move would be to point out, correctly, that the First Amendment is inapplicable here.

But Sanford had a better idea: rather than uphold the (constitutional) New York law, first "incorporate" the First Amendment into the Fourteenth, and then use the unpalatable situation that results (given the absolute language of the First) to point out the flaw of this incorporation doctrine! Here's the incorporating paragraph so well-known to American law students:

For present purposes we may and do assume that freedom of speech and of the press — which are protected by the 1st Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states.⁵¹

"For present purposes"? That's a curious phrase! Why is it only for "present purposes" that one makes such an extraordinary re-interpretation of the Constitution? Are we to infer that for "other purposes" these "rights" will not be protected? If that's true, then what are those purposes? And where in the Constitution does it say that the Constitutional flow-chart is to be revised whenever "present purposes" require it? We aren't told.

This famous "present purposes" paragraph was either an attempt at a slick maneuver, or an uncommonly stupid analysis of the Constitution. To insure *Gitlow* remained in the pokey, all Sanford had to do was remain consistent with the analysis expressed in *Prudential* only three years earlier that "neither the 14th Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' . . .".⁵², and say that the Fourteenth Amendment allowed speech regulation by the State of New York. Just stick to that! The First Amendment would be safe, and the speech offender quashed.

But this was far too simple for Sanford: how much better to ignore the clear language of the Constitution, obliterating the flow-chart of constitutional power in the process. Well, we must — *progress*? This is going to be a "watered-down" view of the Fourteenth Amendment, though (and now that the First Amendment has been dragged into the mud, it will be watered-down too, by extension, one of the prices we pay when

⁵⁰ *Gitlow v. New York*, 268 U.S. 652 (1925), 606.

⁵¹ *Gitlow*, p. 666.

⁵² *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 (1922).

they misanalyze the Constitution). The “State” has a job to do, and the Court can’t tie its hands:

The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler’s scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.⁵³

So not only does Gitlow remain incarcerated, but the First Amendment gets re-defined in the process. Two dead birds, a flock to go.

Kovacs v. Cooper, 336 U.S. 77 (1949)

In this incorporated (?) Fourteenth Amendment case involving the regulation of sound trucks, Judge Reed tells us that “even the fundamental rights of the Bill of Rights are not absolute.”⁵⁴ Not even the absolutely written ones, Judge? Reed goes on to say that “[t]he preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience.”⁵⁵

Well, I can find no text in my copy of the Bill of Rights that refers to citizen “comfort and convenience” as limiting A’s liberty to speak. But if I could, how could there be liberty for “all”, A’s liberty having been limited? And why would a people who “cherish[]” liberty for all allow for this exception? Because they cherish “comfort and convenience” over liberty?

Now there’s a nice amendment to the end of the Pledge of Allegiance:

[W]ith ~~liberty~~ **comfort and convenience** and justice for all.

FEINER V. NEW YORK, 340 U.S. 315 (1951)

In this incorporated (?) Fourteenth Amendment case, the Court upholds a conviction of a college student sentenced to 30 days in jail who “refused [the] request of police officers that he cease talking . . .”⁵⁶ As Judge Vinson tells us, “the imminence of greater disorder coupled with petitioner’s deliberate defiance of the police officers convince us that we

⁵³ *Gitlow*, p. 670.

⁵⁴ *Kovacs*, p. 85.

⁵⁵ *Kovacs*, p. 88.

⁵⁶ *Feiner*, p. 303.

should not reverse this conviction in the name of free speech.”⁵⁷

Another “non-watered-down” theory bites the dust.

POULOS V. NEW HAMPSHIRE, 345 U.S. 395 (1953)

In this incorporated (?) Fourteenth Amendment case, the Court upholds a conviction of a defendant who conducted open air meetings without a license. But didn't *Life* magazine tell us that we had a “guarantee”, a promise by government that we would be free to speak our minds as we saw fit? “Fooled ya!” says Judge Reed:

The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a nonsequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquillity without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion.⁵⁸

Promises, promises. *Life* talks the talk, but the Court offs the walk.

UNITED STATES V. 12 . . . REELS OF . . . FILM, 413 U.S. 126 (1973)

Is the following Federal statute (19 U.S.C § 1305(a)) unconstitutional?

All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing . . . or other article which is obscene or immoral . . .⁵⁹

It certainly would seem so. This statute, passed by Congress and signed into law by the President, prohibits the importation into the country of “immoral” “article[s]” — articles which are not explicitly defined (uh-oh). It also prohibits the importation of “obscene” books and other writings, and thus, certainly to that extent, abridges the freedom of speech and of the press. The problem for the legality of this statute (and a Court which wants to uphold it) is that the First Amendment makes no exception for “obscene” works.

Well, that problem is easily glossed over by a Court well practiced in the art of *glossification*. According to Judge Burger, “it is now well established that obscene

⁵⁷ *Feiner*, p. 321.

⁵⁸ *Poulos*, p. 405.

⁵⁹ *Film*, p. 124.

material is not protected by the First Amendment”.⁶⁰ The First Amendment re-defined by just *fifteen* short words! Note that the bald statement “obscene material is not protected by the First Amendment”, only *nine* words, doesn’t have quite the same ring to it. It’s that use of “it is now well established” preceding the bald statement that is supposed to throw the cloak of legitimacy around this subterfuge. The miracle of language! Or, as Stuart Chase put it, the “tyranny of words”.

The interesting question here, apart from the lack of specificity in the statute proper of what constitutes “obscenity” or “immoral[ity], is *how* this view could be “well established” without the benefit of an amendment to the Constitution. Burger doesn’t say. Even worse, in the rest of his opinion he fails to point out the greater problem with this statute, the prohibition against the importation of “other” “immoral” “article[s]” (which may or may not be “writing[s]”). “Other”, you see, could mean a) the article is *not* a “writing”, or b) the article *is* a writing, like the “other” aforementioned articles.

Well, you can’t catch everything.

U.S. CIVIL SERVICE COMM. V. LETTER CARRIERS, 413 U.S. 548 (1973)

The Court upholds the Hatch Act, which prohibits federal employees from taking an active part in political management or in political campaigns. Judge Douglas, in a dissent, listed the problems with this law:

The Hatch Act by § 9 (a) prohibits federal employees from taking ‘an active part in political management or in political campaigns.’ Some of the employees, whose union is speaking for them, want ‘to run in state and local elections for the school board, for city council, for mayor’; ‘to write letters on political subjects to newspaper’; . . . ‘to work at polling places in behalf of a political party.’

There is no definition of what ‘an active part . . . in political campaigns’ means. . . .

The chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration. . . . it is of no concern of Government what an employee does in his spare time, whether religion, recreation, social work, or politics is his hobby — unless what he does impairs efficiency or other facets of the merits of his job. . . .

The Commission, on a case-by-case approach, has listed 13 categories of prohibited activities, 5 CFR § 733.122(b), starting with the catch-all ‘include but are not limited to.’ So the Commission ends up with open-end discretion to penalize X or not to penalize him. For example, a ‘permissible’ activity is the employee’s right to ‘(e)xpress his opinion as an individual privately and publicly on political subjects and candidates.’ 5 CFR § 733.111(a)(2). Yet ‘soliciting votes’ is prohibited. 5 CFR § 733.122(b)(7). Is an employee safe from punishment if he expresses his opinion that candidate X is the best and candidate Y the worst? Is that crossing the forbidden line of soliciting votes?

A nursing assistant at a veterans’ hospital put an ad in a newspaper reading: ‘To All My Many Friends of Poplar Bluff and Butler County I want to take this opportunity

⁶⁰ *Film*, p. 126.

to ask your vote and support in the election, TUESDAY, AUGUST 7th. A very special person is seeking the Democratic nomination for Sheriff. I do not have to tell you of his qualifications, his past records stand. This person is my dad, Lester (Less) Massingham. THANK YOU WALLACE (WALLY) MASSINGHAM’.

He was held to have violated the Act. Massingham, 1 *Political Activity Reporter* 792, 793 (1959).

Is a letter a permissible ‘expression’ of views or a prohibited ‘solicitation?’ The Solicitor General says it is a ‘permissible’ expression; but the Commission ruled otherwise. For an employee who does not have the Solicitor General as counsel great consequences flow from an innocent decision. He may lose his job. Therefore the most prudent thing is to do nothing. Thus is self-imposed censorship imposed on many nervous people who live on narrow economic margins.

I would strike this provision of the law down as unconstitutional so that a new start may be made on this old problem that confuses and restricts nearly five million federal, state, and local public employees today that live under the present Act.⁶¹

CBS, INC. V. DEMOCRATIC NATIONAL COMMITTEE, 412 U.S. 94 (1973)

In 1970, the *Business Executives’ Move for Vietnam Peace* (BEM) complained to the FCC (“the Commission”) that radio station WTOP in Washington, D.C. had refused to sell it time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. Four months later, the Democratic National Committee (DNC) asked the FCC for a ruling in this case, since it intended to purchase time from radio and television stations to present party views, but knew that its prior experience in this area made it clear that it would “encounter considerable difficulty — if not total frustration of its efforts” without a ruling.⁶²

Both parties lost — the FCC rejected the notion of the right of an individual or organization to air “editorial advertisements” on the public airwaves. This decision, however, was reversed by a Court of Appeals, a decision which was itself reversed by the Supreme Court in this famous case, a case which illuminates all too clearly the nature of First Amendment “rights”. *This is a “smoking gun” case.*

In rejecting the idea of a right of public access to “public airwaves” and reversing the decision of the Court of Appeals, the Court cited favorably these chilling words of professor Zechariah Chafee:

Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government. . . . Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample

⁶¹ *Letter Carriers*, pp. 595-600.

⁶² *CBS*, pp. 98-9. Citations to other decisions omitted for brevity.

scope to do its job.⁶³

It was obvious that the Court wanted to “get away from the bare words of the [First] Amendment”, since the Court subsequently ignored Congress’ violation of the First Amendment by not only a) creating the *Communications of Act of 1934* (and abridging speech), but also by b) rejecting the “common carrier” model of communication in that Act, which gave preferential treatment to a particular class of persons — those with *licenses* to speak via broadcast (and thus to prevent everyone else from speaking via broadcast [in the days before the World Wide Web, that is]:

Congress specifically dealt with — and firmly rejected — the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues. . . . Congress rejected another proposal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues. Instead, Congress after prolonged consideration adopted § 3 (h), which specifically provides that ‘a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.⁶⁴

Savvy move by Congress. If broadcasters *were* to have been deemed “common carriers”, they would have been subject to 47 U.S.C. § 202, which provides that: ‘(a) It shall be unlawful for any common carrier to . . . make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.’⁶⁵ In rejecting the common carrier model, Congress rejected a sanction that could have been used against any government-licensed broadcaster who *did* give an “undue” or “unreasonable” preference or advantage to a particular class of persons. The rejection of the common carrier model allowed, therefore, not only *censoring* of speech, but *unreasonable* censoring of speech.

Of course, allowing uncensored speech would make impossible *accountability*, though the First Amendment specifically rejects the idea that *any* person or entity is “accountable” to the Federal government for their speech acts. Tell that to the Supreme Court, which noted with disdain that an open access policy would result in a “transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not.”⁶⁶

Accountable? People who broadcast in America are *accountable*? Accountable to whom? To Congress? But Congress has no power to regulate speech . . . or does it?

⁶³ *CBS*, pp. 102-3.

⁶⁴ *CBS*, pp. 105, 107-9.

⁶⁵ *CBS*, p. 137.

⁶⁶ *CBS*, p. 124.

According to the Court, if private individuals were allowed to air their views without censorship by licensed broadcasters, “. . . the congressional objective of balanced coverage of public issues would be seriously threatened.”⁶⁷

Hmmm . . . it turns out that contrary to the First Amendment (formerly known as the “supreme law of the land”), Congress is in the speech-abridgment business after all — it makes sure that the speech transmitted over “public” airwaves is “balanced”; that is, with reference to the Congressional notion of “balance”, which doesn’t necessarily jibe with your notion of it; you’ll remember that this so-called “balanced coverage” can be “undue”, “unreasonable”, and “prejudic[ial]”, since broadcasters were not deemed to be common carriers. This policy of censorship by government-licensed broadcasters to achieve what is referred to as “balance”

*gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be ‘robust, and wide-open’ does not mean that we should exchange ‘public trustee’ broadcasting, with all its limitations, for a system of self-appointed editorial commentators.*⁶⁸

In other words, if you want to send a message out over the public airwaves, your material will be scrutinized by broadcasters, who themselves are scrutinized by the Federal government. If the broadcasters offend the Congressional (a/k/a the Democrat-Republican party’s) notion of “balance” (or if broadcasters focus on “trivial” or “crackpot” issues which offend the government’s notion of the “public interest”), they risk *losing* their licenses to broadcast — licenses collectively worth hundreds of millions of dollars.

In a dissent, Judge Brennan, citing the Court of Appeals decision, noted the absurdity of this decision, given the status quo of a government/broadcasting nexus: “the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government — a relationship which puts that industry in a class with few others.”⁶⁹ After observing “the governmentally created preferred status of broadcast licensees” and “the pervasive federal regulation of broadcast programming”,⁷⁰ Brennan stated the political implications of this policy:

[W]e have consistently held that ‘when authority derives in part from Government’s thumb on the scales, the exercise of that power by private persons becomes closely akin,

⁶⁷ CBS, p. 124.

⁶⁸ CBS, p. 125 (italic emphasis supplied).

⁶⁹ CBS, p. 173.

⁷⁰ CBS, p. 173.

in some respects, to its exercise by Government itself.’⁷¹

This Government regulation was not minimal, but extensive:

[W]e are confronted, not with some minimal degree of regulation, but, rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry. Indeed, federal agency review and guidance of broadcaster conduct is automatic, continuing, and pervasive. Thus, as the Court of Appeals noted, *‘[a]lmost no other private business — almost no other regulated private business — is so intimately bound to government . . .’*⁷²

That’s a shocker! This is supposed to be the *least* regulated business by the Federal government! The crux of this law, that “the Communications Act of 1934 [47 U.S.C. § 501] makes it a criminal offense to operate a broadcast transmitter without a license”⁷³ was only the starting point. In footnotes 8 and 9 of his opinion, Brennan listed examples demonstrating the pervasive extent of this regulation:

[T]he Communications Act of 1934 authorizes the Federal Communications Commission to assign frequency bands, 47 U.S.C. § 303(c); allocate licenses by location, § 303(d); regulate apparatus, § 303(e); establish service areas, § 303(h); regulate chain ownership, § 303(i); require the keeping of detailed records, § 303(j); establish qualifications of licensees, § 303(l); suspend licenses, § 303(m)(1); inspect station facilities, § 303(n); require publication of call letters and other information, § 303(p); make rules to effect regulation of radio and television, § 303(r); require that television sets be capable of receiving all signals, § 303(s); regulate the granting of licenses and the terms thereof, §§ 307, 309; prescribe information to be supplied by applicants for licenses, § 308(b); regulate the transfer of licenses, § 310; impose sanctions on licensees, including revocation of license, § 312; require fair coverage of controversial issues, § 315; control the operation of transmitting apparatus, § 318; and prohibit the use of offensive language, 18 U.S.C. § 1464.

Pursuant to statutory authority . . . the Commission has promulgated myriad regulations governing all aspects of licensee conduct. See 47 CFR § 73.17 *et seq.* These regulations affect such matters as hours of operation, § 73.23; multiple ownership of licenses by a single individual, § 73.35; station location and program origination, § 73.30; maintenance of detailed logs of programming, operation, and maintenance, §§ 73.111–116; billing practices, § 73.124; the personal attack and political editorial fairness requirements, § 73.123; relationship of licensees to networks, §§ 73.131–139; permissible equipment, §§ 73.39–50. The above-cited regulations relate only to AM radio, but similar regulations exist for FM radio, § 73.201 *et seq.*, and television, §

⁷¹ CBS, p. 176.

⁷² CBS, pp. 176-7 (italic emphasis supplied).

⁷³ CBS, p. 175.

73.601 *et seq.*⁷⁴

Brennan further observed that “the Government has selected the persons who will be permitted to operate a broadcast station, extensively regulates those broadcasters, and has specifically approved the challenged broadcaster policy. . . . the Government ‘has so far insinuated itself into a position’ of participation in the challenged policy as to make the Government itself responsible for its effects.”⁷⁵

Supposedly the Fairness Doctrine⁷⁶ was to solve this problem; however, this was pie-in-the-sky “fairness”, since government-regulated broadcasters were given the power to decide what was or wasn’t “fair”:

[T]he Court’s reliance on the Fairness Doctrine as the sole means of informing the public seriously misconceives and underestimates the public’s interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen. Under the Fairness Doctrine, broadcasters decide what issues are ‘important,’ how ‘fully’ to cover them, and what format, time, and style of coverage are ‘appropriate.’ The retention of such absolute control in the hands of a few Government licensees is inimical to the First Amendment, for vigorous, free debate can be attained only when members of the public have at least some opportunity to take the initiative and editorial control into their own hands.

Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates. Under the Fairness Doctrine, however, accompanied by an absolute ban on editorial advertising, the public is compelled to rely exclusively on the ‘journalistic discretion’ of broadcasters, who serve in theory as surrogate spokesmen for all sides of all issues. This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression.

Finally, it should be noted that the Fairness Doctrine permits, indeed requires, broadcasters to determine for themselves which views and issues are sufficiently ‘important’ to warrant discussion. The briefs of the broadcaster-petitioners in this case

⁷⁴ CBS, pp. 176-7.

⁷⁵ CBS, p. 181.

⁷⁶ In two footnotes on p. 185 of the opinion, Brennan noted the history of this principle: “The Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Communications Act. Act of Sept. 14, 1959, § 1, 73 Stat. 557, 47 U.S.C. § 315(a). As amended, § 315(a) recognizes the obligation of broadcasters ‘to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.’ . . . The Fairness Doctrine was first fully set forth in *Report in the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), and was elaborated upon in *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed.Reg. 10415 (1964). The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the ‘Commission from time to time, as public convenience, interest, or necessity requires,’ to promulgate ‘such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of (the Act). . . .’ 47 U.S.C. § 303(r).”

illustrate the type of ‘journalistic discretion’ licensees now exercise in this regard. Thus ABC suggests that it would refuse to air those views which it considers ‘scandalous’ or ‘crackpot,’ while CBS would exclude those issues or opinions that are ‘insignificant’ or ‘trivial.’ Similarly, NBC would bar speech that strays ‘beyond the bounds of normally accepted taste,’ and WTOP would protect the public from subjects that are ‘slight, parochial or inappropriate.’⁷⁷

According to Brennan, “[t]he right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others.” Indeed, “there is simply no overriding First Amendment interest of broadcasters that can justify the absolute exclusion of virtually all of our citizens from the most effective ‘marketplace of ideas’ ever devised.”⁷⁸

So much for theory. In practice, the medium wasn’t going to allow every message.

[A]s the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects, and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate ‘trustee’ appointed by the Government to argue his case for him.⁷⁹

LEHMAN V. CITY OF SHAKER HEIGHTS, 418 U.S. 298 (1974)

We have learned that the Fourteenth Amendment has been seen to protect speech by extending the First Amendment stricture to interference by *State* government — but is a “city” a “State”?

This case presents the question whether a city which operates a public rapid transit system and sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office.⁸⁰

This is pretty easily analyzed under the two amendments they mention, standing alone. A “city” is not *Congress* (under the First Amendment), nor is a “city” a *State* (under the Fourteenth Amendment) if we read “State” the way the term is used over and over again in the Constitution (i.e., a *State* is one of those fifty subsidiary provinces in the United *States* which send Representatives and Senators to Congress). Consequently,

⁷⁷ *CBS*, pp. 188-9, 191.

⁷⁸ *CBS*, p. 199.

⁷⁹ *CBS*, p. 199.

⁸⁰ *Lehman*, p. 299.

“cities” *are* empowered to regulate speech — under these Amendments, standing alone.

A harsh observation. But does this mean a city can regulate political advertising? No, not necessarily. There are two other Amendments we could look to, the Ninth, whose very existence assumes the existence of other rights, but more specifically the Tenth, which says that the powers not reserved to “States” are reserved to “people”, which would presumably grant people the right to be free from *municipal* speech regulation. There is no “city” in the Constitutional power flow-chart; rather, “Congress”, then “States”, then “people”.

At this point, we’re at the stage of having to confront the many issues a strictly-construed Constitution (assuming Fourteenth Amendment First Amendment incorporation) would raise. These serious issues would more properly be addressed in a Constitutional Convention better equipped to mull over these thorny details. But the point to be clear on is that if one wants to stop cities from regulating speech, one has to look to the Ninth and Tenth Amendments, not the Fourteenth.

Not that this analysis makes any difference. In this decision, we learn that while a “city” is supposedly a “State” with respect to some speech issues, it isn’t where *political* speech (you know, the dangerous kind) is concerned. Let’s look at the facts:

In 1970, petitioner Harry J. Lehman was a candidate for the office of State Representative to the Ohio General Assembly for District 56. The district includes the city of Shaker Heights. On July 3, 1970, petitioner sought to promote his candidacy by purchasing car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. The general election was scheduled for November 3. Petitioner’s proposed copy contained his picture and read:

HARRY J. LEHMAN IS OLD-FASHIONED!
ABOUT HONESTY, INTEGRITY AND GOOD
GOVERNMENT
State Representative — District 56 [X] Harry J. Lehman.⁸¹

Sounds like a fairly innocuous ad. However, there was a hoop Harry had to jump through first:

Advertising space on the city’s transit system is managed by respondent Metromedia, Inc., as exclusive agent under contract with the city. The agreement between the city and Metromedia provides: ‘15. . . . The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder.’⁸²

⁸¹ *Lehman*, p. 299.

⁸² *Lehman*, pp. 299-300.

The city's legislation-by-contract was only the first hurdle, however. Poor Harry would also have to make it past the "Standards and Practices" department of Metromedia, Inc.:

(1) . . . Copy which might be contrary to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable. . . .

(3) All copy subject to approval. Rough sketches with proposed copy required on all political advertising.

(4) Metro Transit Advertising reserves the right at all times to decline both sides of any proposition and/or opposing candidates. . . .

(10) Political advertising will not be accepted on following systems: *Shaker Rapid* — Maple Heights — North Olmsted — Euclid, Ohio.⁸³

Oops, nailed by old clause 10, a function of the contract with the city (yes, folks, there's legislation in them thar "contracts"). The system, however, allowed other messages to be transmitted freely:

The system, however, accepted ads from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public-service oriented groups. There was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles.⁸⁴

On the Shaker Rapid, you can advertise the messages of companies which sell addictive products that cause lung cancer and liver damage — but not the messages of citizen-politicians who are looking to restore "good government". Well allrighty then!

For the Court, the issue here is not "is a city a State"? That will be assumed, and one would assume that ends the matter, and that Harry will be given permission by the Supreme Court to place his ad after all, thanks to a non-watered-down First Amendment incorporated into the Fourteenth. Not so fast, though. For the Court, there are two other issues. The first issue is "*Are car cards in public transportation a public forum?*" (even though there is no non-public forum exception written in the First Amendment).

And the answer is . . . *No*???

It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication 'regardless of the primary purpose for

⁸³ *Lehman*, pp. 309-10 (italic emphasis supplied).

⁸⁴ *Lehman*, pp. 300-1.

which the area is dedicated.’ . . .

We disagree. . . . ‘The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.’ *Public Utilities Comm’n. v. Pollak*, 343 U.S. 451, 468

. . .

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. . . .

Because state action exists, however, the policies and practices governing access to the transit system’s advertising space must not be arbitrary, capricious, or invidious.⁸⁵

But wait a second here — the way I read the First Amendment, Congress does not have the “discretion” to make *any* choices, “reasonable” or “unreasonable”! Wasn’t that the right that was “incorporated”? And how does the idea of “captivity” (true or false) obliterate the public nature of a streetcar?

Let’s sidetrack a bit and take a look at this fascinating idea of a “captive audience”. A radical hypothesis slipped in here, and by the Supreme Court of the United States, no less. It’s an Orwellian hypothesis, indeed, based on something you might expect to find in *1984*:

Riders of public transportation are not free — their sense of “freedom” is an illusion — they’re there not because they *want* to be, but because they *have* to be, and even if they think differently!

Economic realities, you know. The need to ride to work to eat to live. That makes you a “captive”, according to the Court. Hmmm . . . a fascinating perspective! I may want to follow that one up later . . .

But let’s assume the Court is right for now, even though they have not cited in the record any facts that would substantiate their hypothesis. Now, we all know it would be miserable being part of a “captive audience”, and that brings us to the Court’s second issue, which they have falsely framed. The second issue is not “are riders captives?”, but “*if riders are captives, why is A allowed to send a message to these captive riders, but not B?*” If the Court wants to use the “captive audience” rationale to allow the abridgment of speech, why allow *some* messages to be beamed to the captives, but not *others*?

The *primary* issue, “is this action by *Congress* or a *State*?” was disposed of when

⁸⁵ *Lehman*, pp. 301-3.

the Court explicitly stated, accurately or otherwise, that “state action exists.”⁸⁶ And that should have settled the matter, without regard to talk of “public forums” or “captives”. Recall that Judge Douglas (among others) told us that the Fourteenth Amendment “free speech” provision was not “watered-down”.⁸⁷

“Should” have settled the matter, but wouldn’t you know it, there’s a compelling “state” interest here, which weaseled its way in through the concept of city transit “discretion”. Well, that’s the nature of incorporation: you incorporate a “watered-down” Fourteenth Amendment from a “watered-down” First Amendment, and that gives you a watered-down watered-down “right”! Good thing too — look at all the problems that could result from allowing Harry Lehman to run his ad for “good government”:

Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.⁸⁸

Gee, Judge, with all due respect, I think you have it wrong here — I think the Constitution *does* require that “public facilities” be open even to “every would-be pamphleteer” and “politician”, *if* the Fourteenth Amendment is not “watered-down” (as you have put down in writing) and *if* the “city” may be considered a “State” (as you have stated) that has abridged the freedom of speech (as you freely admit).

See, you said, formerly, that decisions regarding a non-watered down Fourteenth Amendment were “precedents”, decisions which were the “law” (even though you have no lawmaking power), and that therefore following them was a “requirement”. But now you want to back off the “requirement”. Maybe that’s because they’re only precedents when you *want* them to be!

I’m getting a funny feeling here . . . when you say “[t]his the Constitution does not

⁸⁶ Since this *isn’t* “State” action, they can only make it so by incorporating the Fourteenth Amendment into the Ninth, or by broadening the definition of “State” in the Fourteenth Amendment and the Constitution proper from a *literal* State to the broader sense of “government.” How they are going to do this in the presence of a clear Tenth Amendment directive to the contrary, they don’t say.

⁸⁷ CBS, p. 156.

⁸⁸ Lehman, p. 304 (emphasis supplied).

require”, *just what Constitution are you referring to?*

All this talk of “incorporation” and “absolute rights which aren’t absolute, well, they really are, but only sometimes, except when they’re watered-down, which they *can’t* be, unless they *have to be*”, and a Constitution “which should always be obeyed except when ‘would-be’ pamphleteers are involved and/or unless government entities not explicitly covered under the Constitution have not permitted individuals or groups to send political messages to ‘captives’ who have privacy rights not explicitly described under the Constitution that *cannot* be ignored (unless they *are* ignored), ‘captives’ who have every right (but no power) to be freed from the possibility of having to view (certain) messages which have slid past the filters of a commercial enterprise regulated by a government entity for display in a public ‘facility’ which is not a public ‘forum’ (except for *some* members of the public), under (illegal) precedents which we either *need not* or *have to* recognize, distinguish, or ignore, depending on the facts as we see or report them” is getting me very *confused!*

Perhaps order in the Court will be restored by the hero on the bench — William O. Douglas, the “liberal” judge, the defender of “free speech” in so many dissents (opinions that had no precedential value). Time after time, in decision after decision, when Douglas was in the minority, he portrayed himself as a defender of the Constitution. Yeah, but what happens when the decision is 4-4, and you’re the swing vote?

Well, I guess that’s the time to show your true colors!

Here’s Douglas, discussing the Supreme Court’s First Amendment (not the old-fashioned one on paper, an archaic irrelevancy), and concurring with the majority:

In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.⁸⁹

Well, we wouldn’t want to “force” Government to obey the Constitution, no matter whose version — that would mean that we *have* a Constitution, no matter whose, and we can’t have that! But wait . . . Douglas *himself* told us that the Fourteenth Amendment wasn’t “watered-down”. What happened? What happened to the “cornerstone of democracy”?

(reads Constitution)

Oh, I see, it’s not a “democracy” after all. So they pulled out the “cornerstone” — they said it was “waterlogged”! That explains that “funny feeling” I’m having: it’s

⁸⁹ *Lehman*, pp. 306-07 (emphasis supplied).

nausea, the kind of nausea you feel when you're on a toppling building.

Still, there's my golden parachute. *Life* magazine said I have a "guarantee" — maybe I can get my money back! Back in a moment . . .

(Calls Life, gets response, hangs up).

Hmm, turns out it was a "30-day" money-back guarantee — and we're past the 75,000th day. Damn — that's what I get for not reading the "fine print"!

Note here that we find "privacy" set against "speech" to be used as a rationale to stop communication, even though the Constitution says nothing explicit about privacy, and much explicit about free speech and press.

Of course, the question remains why tobacco and liquor companies have the right to "force" a "captive audience" to be constantly exposed to the message "buy addictive substances that can kill you", even though the said captives' supposed "privacy rights" are supposed to prevent this sorry state of affairs. Let me make a call and check on it. Be right back . . .

(Calls Supreme Court, gets response, hangs up).

Oh, I see, the "reach" of "privacy" doesn't extend that far. See, the Judges are "humanitarians", and too much privacy would not allow these judges to *shorten* riders' lives, and thus reduce the *misery* these poor captives must be feeling!

So that's why they call themselves "justices" — I was wondering about that!

In a dissent, Judge Brennan pointed out the real rights of the captives:

Commercial and public service advertisements are routinely accepted for display, while political messages are absolutely prohibited. Few examples are required to illustrate the scope of the city's policy and practice. For instance, a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate, such as Lehman, would be barred from informing the public about his candidacy, qualifications for office, or position on particular issues.⁹⁰

This is "impermissible", according to Brennan:

These, and other examples, make perfectly clear that the selective exclusion of political advertising is not the product of evenhanded application of neutral 'time, place, and manner' regulations. Rather, the operative — and constitutionally impermissible — distinction is the message on the sign.⁹¹

⁹⁰ *Lehman*, p. 317.

⁹¹ *Lehman*, pp. 317-8.

Yeah, well, if it's "impermissible", why are they *permitting* it? Maybe because *physical* captives are *mental* captives as well:

A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program. . . . Advertisements for travel, foods, clothing, toiletries, automobiles, legal drugs — all these are acceptable, but the American Legion would not have the right to place a paid advertisement reading, 'Support Our Boys in Viet Nam. Send Holiday Packages.'⁹²

Well, that makes sense. Doesn't it?

BROWN V. GLINES, 444 U.S. 348 (1980)

Apart from its speech and press provisions, the First Amendment gives all people (not just citizens) a specific right to petition the government:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

Suppose Congress wants to diminish this provision by statutory amendment. Can it? "Sure!", says the Court.

Here are the facts according to the Court:

Albert Glines was a captain in the Air Force Reserves. While on active duty at the Travis Air Force Base in California, he drafted petitions to several Members of Congress and to the Secretary of Defense complaining about the Air Force's grooming standards. Aware that he needed command approval in order to solicit signatures within a base, Glines at first circulated the petitions outside his base. During a routine training flight through the Anderson Air Force Base in Guam, however, Glines gave the petitions to an Air Force sergeant without seeking approval from the base commander. The sergeant gathered eight signatures before military authorities halted the unauthorized distribution. Glines' commander promptly removed him from active duty, determined that he had failed to meet the professional standards expected of an officer, and reassigned him to the standby reserves.⁹³

⁹² *Lehman*, pp. 317-8.

⁹³ *Glines*, p. 351.

Here was the petition in question:

Dear Secretary of Defense:

We, the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem.⁹⁴

The first problem for Glines was Air Force Reg. 30-1 (9) (1971), which prohibited “any person within an Air Force facility’ and ‘any [Air Force] member . . . in uniform or . . . in a foreign country’ from soliciting signatures on a petition without first obtaining authorization from the appropriate commander.”⁹⁵

A second, and more serious, problem for Glines was 10 U.S.C § 1034, which provided in pertinent part that “[n]o person may restrict any member of an armed force in communicating with a member of Congress, **unless** the communication is unlawful or violates a regulation necessary to the security of the United States.”⁹⁶ Note that the “unless” language of this statute, if legal, would clearly diminish the **“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances”** language of the First Amendment, which has no such exceptions/qualifications. Of course, Article V of the Constitution plainly renders 10 U.S.C § 1034 null and void. Let’s see how the Supreme Court sees it:

Glines contends that this law protects the circulation of his collective petitions as well as the forwarding of individual communications. We find his contention unpersuasive. . . . In construing a statute that touches on such matters, therefore, courts must be careful not to ‘circumscribe the authority of military commanders to an extent never intended by Congress.’ *Huff v. Secretary of Navy*. . . 575 F. 2d 907, 916 (1978) . . . The unrestricted circulation of collective petitions could imperil discipline. We find no legislative purpose that requires the military to assume this risk and no indication that Congress contemplated such a result. We therefore decide that § 1034 does not protect the circulation of collective petitions within a military base.⁹⁷

⁹⁴ *Glines*, p. 351.

⁹⁵ *Glines*, p. 349.

⁹⁶ *Glines*, p. 358.

⁹⁷ *Glines*, pp. 358, 360-1.

Have to blame Gline's attorneys for this one. They claimed the statute protected Glines, when it was really the First Amendment which was supposed to.

Guess it would help to *read* the First Amendment. Or would it?

CON. ED. V. PUBLIC SERVICE COMMISSION, 447 U.S. 530 (1980)

In this case, the Court prevents the New York Public Service Commission from ordering utilities not to discuss, as part of their monthly billing materials, the desirability of nuclear power. Rather than quote from the decision, let's drop in on a conversation between A and B:

- A: I'm kind of new at this business of interpreting the Constitution. I have some questions. Could you answer them?
- B: Be happy to!
- A: Are the utilities commercial monopolies regulated by Government?
- B: Yes.
- A: So a branch of government doesn't have the right to tell a "commercial" entity what to say, even though that entity is itself a government-regulated monopoly.
- B: Of course not.
- A: But we, the ratepayers, can be forced to pay (through higher utility bills) for messages we'd rather not receive, since this entity has been given a monopoly by the government.
- B: Yup.
- A: But aren't we a "captive audience"?
- B: No, the United States mail isn't a "public" forum.
- A: Oh, the home is "private", so it's a "private" forum.
- B: Yes.
- A: So don't I have a right of "privacy" to not be forced to pay for messages sent to my home without my consent?
- B: No, your "privacy" is bounded by the right of the utility to charge you for the messages they want to send you.
- A: Well, suppose I don't want to pay for that message?
- B: That's not your right.
- A: I see . . . well, do I get a 'right of reply' to send a message I *do* want to receive?
- B: No, that's opposed to the First Amendment.
- A: But the First Amendment refers only to Congress!
- B: Oh yeah . . . that's opposed to the Fourteenth Amendment.
- A: So that means that a government-regulated monopoly can enhance its (private) profit by forcing the public to not only *subsidize* its profit-enhancing messages (without allowing the public to share in the spoils), but also by compelling the public to *receive* these messages *without the corresponding ability to reply to them*?
- B: Sure — it's a little something called the "Constitution" — why don't you read it sometime?

U.S. POSTAL SERVICE V. COUNCIL OF GREENBURGH, 453 U.S. 114 (1981)

Suppose you want to designate the mailbox you've paid for (that is, your private property) to act as a receptacle to receive messages from a group. Can you? No.

In this case, the Court holds constitutional 18 U.S.C. § 1725 which provides: "Whoever knowingly and willfully deposits **any** mailable matter *such as* statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than \$300."⁹⁸ The italicized examples in the statute pertain to commercial speech, but the abstraction refers to "any" mailable matter. They just didn't happen to cite non-commercial examples. An oversight, of course.

Judge Rehnquist began by correctly analyzing the main issue:

However broad the postal power conferred by Art. I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution. In this case we are confronted with the appellees' assertion that the First Amendment guarantees them the right to deposit, without payment of postage, their notices, circulars, and flyers in letterboxes which have been accepted as authorized depositories of mail by the Postal Service.⁹⁹

The Court noted that even though the examples given might lead one to conclude that this statute wouldn't effect political speech, one needed to read more carefully:

We reject appellees' additional assertion raised below that 18 U.S.C. §1725 cannot be applied to them because it was intended to bar the deposit of commercial materials only. The statute on its face bars the deposit of "any mailable matter" (emphasis added) without proper postage, and . . . the legislative history makes clear that both Congress and the Postal Service understood the statute would apply to noncommercial as well as commercial materials.¹⁰⁰

Rehnquist then cited favorably the words of Judge Brandeis in *Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407 (1921):

There, Justice Brandeis goes into a more detailed analysis of the relationship of the mails to the prohibitions of the First Amendment, and states: '**The Government might, of**

⁹⁸ *Postal Service*, p. 116 (emphasis supplied).

⁹⁹ *Postal Service*, pp. 126-7.

¹⁰⁰ *Postal Service*, p. 127.

course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of service; **and it would not thereby abridge the freedom of the press**, since to all papers other means of transportation would be left open.’ Id. at 431 . . . It seems to us that that is just what the Postal Service here has done . . .

The “Government [could] decline . . . to distribute newspapers”, but that wouldn’t abridge the freedom of the press?!! Really? Let’s hope that there aren’t any other statutes on the books prohibiting *private* delivery of the mail, like, say, for example, 18 U.S.C. § 1696.

After amazing us with this bizarre quote, Rehnquist goes on to analyze other “precedent”:

[A] letterbox, once designated an ‘authorized depository’, does not at the same time undergo a transformation into a ‘public forum’ of some limited nature to which the First Amendment guarantees access to all comers. There is neither historical nor constitutional support for the characterization of a letterbox as a public forum. . . . it is difficult to accept appellees’ assertion that because it may be somewhat more efficient to place their messages in letterboxes there is a First Amendment right to do so. . . . Indeed, it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base in *Greer v. Spock*, 424 U.S. 828 . . . , the jail or prison in *Adderley v. Florida*, 385 U.S. 39 . . . and *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119. . . . , or the advertising space made available in city rapid transit cars in *Lehman v. City of Shaker Heights*, 418 U.S. 298. . . . In all these cases, this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer v. Spock*, supra, the Court cited approvingly from its earlier opinion in *Adderley v. Florida*, supra, wherein it explained that ‘[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.’” 424 U.S., at 836 . . .¹⁰¹

Yes, it’s hard to imagine why the Supreme Court would treat a homeowner’s mailbox as different from a “jail”, “prison”, or “military base”. In a dissent, Judge Marshall pondered the significance of this decision:

I remain troubled by the Court’s effort to transform the letterboxes entirely into components of the governmental enterprise despite their private ownership. Under the Court’s reasoning, the Postal Service could decline to deliver mail unless the recipients agreed to open their doors to the letter carrier — and then the doorway, or even the room inside could fall within Postal Service control. . . . The brute force of the criminal sanction and other powers of the Government, I believe, may be deployed to restrict free expression only with greater justification.¹⁰²

¹⁰¹ *Postal Service*, pp. 128-130.

¹⁰² *Postal Service*, pp. 151-2.

How about “no” justification? (Just a suggestion). Judge Stevens dissented:

The mailbox is private property; it is not a public forum to which the owner must grant access. If the owner does not want to receive any written communications other than stamped mail, he should be permitted to post the equivalent of a “no trespassing” sign on his mailbox. A statute that protects his privacy by prohibiting unsolicited and unwanted deposits on his property would surely be valid. The Court, however, upholds a statute that interferes with the owner’s receipt of information that he may want to receive. If the owner welcomes messages from his neighbors, from the local community organization, or even from the newly arrived entrepreneur passing out free coupons, it is presumptively unreasonable to interfere with his ability to receive such communications. The nationwide criminal statute at issue here deprives millions of homeowners of the legal right to make a simple decision affecting their ability to receive communications from others.

Mailboxes cluttered with large quantities of written matter would impede the efficient performance of the mail carrier’s duties. Sorting through papers for mail to be picked up or having no space in which to leave mail that should be delivered can unquestionably consume valuable time . . . [but] to the extent that the law prevents mailbox clutter, it also impedes the delivery of written messages that would otherwise take place.¹⁰³

Note that the issue isn’t restricted to “clutter”, but also political speech! The First Amendment prevents Congress from regulating “clutter”, but there’s nothing in the First Amendment that says clutter is a necessity: Florida can regulate mailbox access, as can Texas. If you want to receive all mail sent to you, move to Texas. If you want to avoid clutter, move to Florida. The idea that States have the authority to create this legislation under the Tenth Amendment has gone virtually unmentioned.

METROMEDIA, INC. V. CITY OF SAN DIEGO, 453 U.S. 490 (1981)

On the face of it, this looks like a “liberal” decision. In this case, the Court strikes down a San Diego ordinance limiting the contents of billboards to commercial messages and a *particular class* of non-commercial messages; according to the Court, an ordinance can ban *all* billboards if it wants to, but cannot discriminate between *commercial* and *non-commercial* messages, and then allow only *non-commercial* messages.

Well, the Court strikes down a municipal ordinance under an incorporated First Amendment rationale. Many legal scholars see this case as a “victory” for the First Amendment. It’s not — it’s a victory for the *Tenth* Amendment. Even so, once you read the “fine print”, you find what Judge Rehnquist referred to as a “virtual Tower of Babel”

¹⁰³ *Postal Service*, pp. 152, 154-5.

from which “no definitive principles can be drawn,”¹⁰⁴ with many anti-First Amendment pronouncements. Thus, even those decisions that to the undiscriminating eye seem to follow the non-watered-down incorporation doctrine need to be fine-tooth-combed for the exceptions and qualifications that can be used against the real First Amendment in subsequent decisions.

Our first clue as to the meaning of this decision under the surface will be given to us by the Court:

This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression. See, e.g., *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530 . . . (billing envelope inserts); *Carey v. Brown*, 447 U.S. 455 . . . (picketing in residential areas); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 . . . (door-to-door and on-street solicitation); *Greer v. Spock*, 424 U.S. 828 . . . (Army bases); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 . . . (outdoor movie theaters); *Lehman v. City of Shaker Heights*, 418 U.S. 298 . . . (advertising space within city-owned transit system). Even a cursory reading of these opinions reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson’s remark in *Kovacs v. Cooper*, 336 U.S. 77, 97 . . . (1949): Each method of communicating ideas is ‘a law unto itself’ and that law must reflect the ‘differing natures, values, abuses and dangers’ of each method. We deal here with the law of billboards.¹⁰⁵

The problem for the Court is that “even a cursory reading” of the First Amendment reveals that *at all times* First Amendment values *need not* “yield to other societal interests”, (since this is supposedly an incorporation case, not “watered-down”). When the Supreme Court states that “[e]ach method of communicating ideas is a law unto itself”, what they’re really saying is that each decision of the Supreme Court holding this view is a “law unto itself”, since there is no such language in the First Amendment.

In case you were wondering why the Framers didn’t give lawmaking power to the Court, this might be a clue. But let us proceed further.

The Court goes on to say that “it has been necessary for the courts to reconcile the government’s regulatory interests with the individual’s right to expression”,¹⁰⁶ though the First Amendment plainly states that the individual’s right to be free of Federal interference with “expression” plainly supersedes any Congressional (and therefore State governments [via incorporation]) regulatory interests. Furthermore, the Court goes on to say that it will “continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in

¹⁰⁴ *Metromedia*, p. 569.

¹⁰⁵ *Metromedia*, pp. 500-01.

¹⁰⁶ *Metromedia*, p. 502.

situations where the latter could not be”¹⁰⁷, even though “the” distinction they “observe” appears nowhere in the First Amendment, and quite without regard to their opinions elsewhere that noncommercial speech could be regulated in a way that commercial speech was not; for example, *Lehman*.

I know, I know, your eyes are starting to glaze over. I know the feeling. Go ahead, rub your eyes, put some caffeine in your blood stream. I’ll be here when you get back.

(Pause for coffee break)

One reason that this distinction between commercial speech and its counterpart would not be in law is the *difficulty* of distinguishing between the two “types”. As Judge Brennan noted,

I would be unhappy to see city officials dealing with the following series of billboards and deciding which ones to permit: the first billboard contains the message ‘Visit Joe’s Ice Cream Shoppe’; the second, ‘Joe’s Ice Cream Shoppe uses only the highest quality dairy products’; the third, ‘Because Joe thinks that dairy products are good for you, please shop at Joe’s Shoppe’; and the fourth, ‘Joe says to support dairy price supports; they mean lower prices for you at his Shoppe.’ Or how about some San Diego Padres baseball fans — with no connection to the team — who together rent a billboard and communicate the message ‘Support the San Diego Padres, a great baseball team.’ May the city decide that a United Automobile Workers billboard with the message ‘Be a patriot — do not buy Japanese-manufactured cars’ is ‘commercial’ and therefore forbid it? What if the same sign is placed by Chrysler?¹⁰⁸

The Court ignores this policy problem, and continues, stating that “the difference between commercial . . . advertising and ideological communication permits regulation of the former ‘that the First Amendment would not tolerate with respect to the latter.’”¹⁰⁹ Once again, we must note that the First Amendment does not tolerate *any* such distinction; moreover, if it did, why wasn’t this reasoning used in the *Lehman* decision? The Court also states, ignoring the “captive audience” exception to the First Amendment it formerly “recognized”, that “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”¹¹⁰

Where in the Constitution do they find *that* wording? It’s not in my copy — I must be working off an obsolete version. Yes, it has to be obsolete, because on page 507, the Court cites a “four-part test” for determining the First Amendment “validity of government restrictions on commercial speech”, even though the First Amendment, in

¹⁰⁷ *Metromedia*, p. 506 (emphasis supplied).

¹⁰⁸ *Metromedia*, pp. 538-9.

¹⁰⁹ *Metromedia*, p. 507.

¹¹⁰ *Metromedia*, p. 507.

the version I own, has only a “three-part” test:

- 1) **Is the directive a law?**
- 2) **Did Congress make the law?**
- 3) **Does the law abridge the freedom of speech or press?**

“No, that’s not it”, says the Court. “That’s the 1791 edition”. Since 1791, the First Amendment has been revised to account for changing times. Here’s their new, improved version as it relates to commercial speech:

- (1) **The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it**
- (2) **seeks to implement a substantial governmental interest,**
- (3) **directly advances that interest, and**
- (4) **reaches no further than necessary to accomplish the given objective.**¹¹¹

Well, if that’s the new version, why can’t I buy a copy of the Constitution that contains it? More importantly, why wasn’t this contemporary version ratified by 3/4 of the State Legislatures as required under Article V? After all, that’s the Constitutional requirement for constitutional amendments — isn’t it?

(Calls Supreme Court, talks, hangs up)

Oh, no, that’s the “old version” of Article V, which has long since been replaced in the same manner as the First Amendment and all the other Articles of the Constitution have been. No wonder I was confused! Now everything is becoming a lot clearer!

The Court then goes on to a line of reasoning that Harry Lehman could have used seven years earlier:

The fact that the city may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others.

As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. . . . the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.¹¹²

¹¹¹ *Metromedia*, p. 507.

¹¹² *Metromedia*, p. 513.

Hey, this looks like progress! On the face of it, it would appear that the Court is going to overrule the *Lehman* decision. In that case, as you'll recall, Shaker Heights concluded that "the communication of commercial information . . . is of greater value than the communication of noncommercial messages", since it allowed tobacco and liquor advertisements, but not Harry Lehman's non-commercial political ad. According to the Court, a city "may not" conclude this.

Well, it might *seem* they will overrule *Lehman*, but were you aware that the *Lehman* case is the *opposite* of this one? It is!

[T]his case presents the opposite situation from that in *Lehman v. City of Shaker Heights*, 418 U.S. 298 . . . and *Greer v. Spock*, 424 U.S. 828 In both of those cases a government agency had chosen to prohibit from a certain forum speech relating to political campaigns, while other kinds of speech were permitted. In both cases this Court upheld the prohibition, but both cases turned on unique fact situations involving government-created forums and have no application here.¹¹³

Opposite? From the standpoint of government regulation of a private concern it looks exactly the same to me, but to the Court, it is "opposite", since in the *Lehman* case, the forum was a "city" forum (a car card), and in the *Metromedia* case, the forum is a "private" forum (a billboard), even though in both cases the space on which the advertising to appear in question was handled by private entities (in both cases, *Metromedia, Inc.*), and the regulation was by the city (Shaker Heights in the first, San Diego in the second)!

This is a textbook example of one of the Court's master techniques for preserving inconsistent decisions; since every case has a unique fact-pattern, all the Court has to say is that "the facts are different here, therefore that case doesn't apply". In so doing, the Court preserves its power to "pick and choose" from a "line" of cases to support any point of view they desire. In this manner, both A and not-A can be true, the ultimate in political power!

In a dissent, Judge Stevens did not agree with this "distinction":

[I]n *Lehman* . . . we upheld a municipal policy allowing commercial but not political advertising on city buses. I cannot agree with the plurality that *Lehman* "ha[s] no application here". . . . Although *Lehman* dealt with limited space leased by the city and this case deals with municipal regulation of privately leased space, the constitutional principle is the same . . .¹¹⁴

"Dissents", of course, are the judicially-authorized junkpiles where the Court

¹¹³ *Metromedia*, p. 514.

¹¹⁴ *Metromedia*, p. 568.

frequently disposes of logical thought, so you don't need to see this point of view as legitimate.

Instead, let's examine "logic" Supreme-Court-style. Since *Lehman* was not overruled, *both* of the following two views are now the "law of the land", according to the Supreme Court:

LEHMAN: ban on noncommercial speech only okay

[T]he [Shaker Heights] managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. . .¹¹⁵

METROMEDIA: ban on noncommercial speech only not okay

Insofar as the city [San Diego] tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.¹¹⁶

And so are these!

LEHMAN: government must prevent the spread of ideas

[T]he right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas . . .¹¹⁷

METROMEDIA: government must not prevent the spread of ideas

The fact that the city [San Diego] may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others. . . . 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.'¹¹⁸

Bravo! . . . Bravo?

¹¹⁵ *Lehman*, p. 304.

¹¹⁶ *Metromedia*, p. 514.

¹¹⁷ *Lehman*, p. 307.

¹¹⁸ *Metromedia*, p. 513-4.

I hope you can see what's happening here. The Court is allowing opposite "rules" to remain on the books; depending on the case which comes before them, they can simply quote from one or the other, depending on how they want to rule. If the "opposition" cites a contradictory case (and they will!), all the Court need do is focus on one of the thousand facts on which the cases differ, and pronounce, triumphantly, that "that case has no application here".

Presto-chango, watch ze law disappear! Watch the Court pull a rabbit *out of* its hat, while it claims it is putting the rabbit back *into* its hat. No, it's not a "rabbit", it's a "hare". And that's not a "hat", it's a "cap". No, wait, it is a "rabbit" after all, but a "brown" rabbit, not a "white" rabbit, so it's "different". And it *is* a "hat" after all, but the hat has now gone "out-of-fashion". Or has it? It depends on the show, pre-dinner, during, or after. It keeps 'em coming back for more!

And will the average person have any knowledge about this Houdinizing of the Constitution? Only if they pay the price of admission, and wade through the "Tower of Babel" to find out, not on everyone's "A" list of fun ways to spend a weekend.

Well, if a *city* can't regulate billboards in this manner, we know that *Congress* cannot. After all, the Fourteenth Amendment may be considered to be "watered-down", but we know the First Amendment can't be. *Congress cannot make laws that abridge speech*. So something good will come out of this decision after all; the Court will proclaim the unconstitutionality of 23 U.S.C. § 131!

The federal Highway Beautification Act of 1965, Pub.L. 89-285, 79 Stat. 1028, as amended, 23 U.S.C. § 131 . . . requires that States eliminate billboards from areas adjacent to certain highways constructed with federal funds. The Federal Government also prohibits billboards on federal lands. 43 CFR § 2921.0-6 (a) (1980).¹¹⁹

Surely unconstitutional, right? After all, this Federal legislation "requires" that States "eliminate billboards" from certain areas — we know *that's* an abridgment of speech. Also, we find that the billboards are prohibited entirely on "federal lands" — *that's* a clear abridgment of speech too. And indeed, towards the end its decision, the Court states that "[t]here can be no question that a prohibition on the erection of billboards infringes freedom of speech. . ."¹²⁰

That settles it then — what an excellent opportunity for the Court to uphold the First Amendment! Why let the Federal Government do what San Diego can't? The Court will declare unconstitutional 23 U.S.C. § 131!

[W]e need not reach any decision in this case as to the constitutionality of the federal Highway Beautification Act of 1965. That Act, like the San Diego ordinance, permits on-

¹¹⁹ *Metromedia*, p. 510.

¹²⁰ *Metromedia*, p. 520.

site commercial billboards in areas in which it does not permit billboards with noncommercial messages. 23 U.S.C. § 131 (c) (1976 ed., Supp.III). However, unlike the San Diego ordinance, which prohibits billboards conveying noncommercial messages throughout the city, the federal law does not contain a total prohibition of such billboards in areas adjacent to the interstate and primary highway systems. [*It doesn't need to, to be unconstitutional — ANY prohibition by Congress of billboards is unconstitutional with respect to the First Amendment -- BK*]. As far as the Federal Government is concerned, such billboards are permitted adjacent to the highways in areas zoned industrial or commercial under state law or in unzoned commercial or industrial areas. 23 U.S.C. § 131 (d). [*Irrelevant. Furthermore, the Federal Government DOES "totally prohibit" billboards on Federal land, a fact he doesn't cite here, for obvious reasons -- BK*] Regulation of billboards in those areas is left primarily to the States. For this reason, the decision today does not determine the constitutionality of the federal statute. Whether, in fact, the distinction is constitutionally significant can only be determined on the basis of a record establishing the actual effect of the Act on billboards conveying noncommercial messages.¹²¹

Puzzled? That's because you haven't adopted *Court-think*. Let Judge Stevens explain it for you:

The unequivocal language of the First Amendment prohibits any law 'abridging the freedom of speech.' That language could surely be read to foreclose any law reducing the quantity of communication within a jurisdiction. I am convinced, however, that such a reading would be incorrect. My conviction is supported by a hypothetical example, by the Court's prior cases, and by an appraisal of the healthy character of the communications market.¹²²

Everything clear now?

PERRY EDUCATION ASSN. V. PERRY L. EDUC. ASSN., 460 U.S. 37 (1983)

In this case, the Court rules that one class of citizens has a right of access to a government-maintained channel of communication, while another class does not, a classic case of "content-based" regulation of speech, supposedly a real "no-no". To the Court, however, this is a "yes-yes". Judge White explains the issue:

A collective-bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mailboxes in the Perry Township schools. The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival

¹²¹ *Metromedia*, p. 515.

¹²² *Metromedia*, p. 549.

teacher group, violates the First and Fourteenth Amendments.¹²³

Here comes that bug again. Why is the Court, supposedly expert in Constitutional law, constantly misanalyzing the First Amendment? *This is not a First Amendment case!*

One answer is that in the process of misanalyzing this “cornerstone of democracy”, they give themselves permission to misanalyze in the future, to re-define the First Amendment as meaning something it does not; after a few hundred repetitions of this misanalysis, we begin to believe that the First Amendment says something it never said to begin with.

Well, *we* know this denial of access to an opposing union doesn’t violate the *First* Amendment. If anything, it violates the *Fourteenth* Amendment (depending on the status of incorporation). However, the Court’s citation of the absolute First Amendment (to be incorporated in the Fourteenth as written) indicates how this case should be decided — the denial of access is unconstitutional, assuming that there is a “law” involved.

The real issue in this case is, is a “collective-bargaining agreement” a “law”? The Court must think there is a “law” involved, since they cite the two Amendments, which refer only to laws.

The Court’s final answer is this, and strap yourselves in:

The “agreement”, *not* a law, *may not be* considered “legislative action”; however, the “agreement” is “legislative action” with respect to the Fourteenth Amendment; however, this “legislative action” does not violate the Fourteenth Amendment.

Capeche?

There’s a lot of octopus ink coming up — put on your goggles! Those of you without goggles and whose eyes are starting to form cataracts may want to skip over the following discussion to the next case.

Here are the facts as reported by the Court:

The Metropolitan School District of Perry Township, Ind., operates a public school system of 13 separate schools. Each school building contains a set of mailboxes for the teachers. Interschool delivery by school employees permits messages to be delivered rapidly to teachers in the district. The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages and individual school building principals have allowed delivery of messages from various private organizations. . . . Local parochial schools, church groups, YMCAs, and Cub Scout units have used the system.¹²⁴

¹²³ *Perry*, p. 39.

¹²⁴ *Perry*, p. 39.

So, the School District has opened the channel to other organizations, even local parochial schools and church groups. That was nice of them.

This raises an interesting side issue. In a footnote, the Court tells us that the Post Office focused on this side issue in a brief filed with the court:

The United States Postal Service . . . suggests that the interschool delivery of material to teachers at various schools in the district violates the Private Express statutes, 18 U.S.C. §§ 1693-1699 (1976) and 39 U.S.C. §§ 601-606 (1976), which generally prohibit the carriage of letters over postal routes without payment of postage. We agree with the Postal Service that this question does not directly bear on the issues before the Court in this case. Accordingly, we express no opinion on whether the mail delivery practices involved here comply with the Private Express statute or other Postal Service regulations.¹²⁵

Well, if the “question does not directly bear on the issues”, then why would the Postal Service take the trouble to notify the court that “the interschool delivery of material to teachers at various schools in the district violates the Private Express statutes”? In refusing to express an opinion, and in refusing to state that the statutes in question are unconstitutional (they are), the Court leaves open the door for future regulation of speech, in a case where the question *does* “directly bear”. Another opportunity to uphold the real First Amendment squandered!

Back to the facts as reported by the Court. We are told that in 1977 an election was held between the two unions, and that the *Perry Education Association* (PEA) beat the *Perry Local Educators’ Association* (PLEA) in that election:¹²⁶

Following the election, PEA and the school district negotiated a labor contract in which the school board gave PEA ‘access to teachers’ mailboxes in which to insert material’ and the right to use the interschool mail delivery system to the extent that the school district incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA ‘acting as the representative of the teachers’ and went on to stipulate that these access rights shall not be granted to any other ‘school employee organization’ — a term of art defined by Indiana law to mean “any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their employer.”¹²⁷

Theoretically, this contract was *illegal* under an Indiana Statute which provided that it is an unfair labor practice under state law for a school employer to “dominate,

¹²⁵ *Perry*, p. 39.

¹²⁶ *Perry*, pp. 40-1.

¹²⁷ *Perry*, pp. 40-1.

interfere or assist in the formation or administration of any school employer organization or contribute financial or other support to it.”¹²⁸ However, the Indiana Education Employment Relations Board held that a school employer *could* contractually exclude a minority union from organizational activities which take place on school property and *could* deny the rival union “nearly all organizational conveniences”¹²⁹, including, apparently, the right to use the interschool mail delivery system. So much for laws against “unfair labor practice[s]”.

Thus, this case points out a potentially dangerous “loophole” in the Fourteenth Amendment. The Constitution explicitly gives to Congress the exclusive power to make Federal legislation; at the State level, however, the only Constitutional provision that could be seen to prevent a State from delegating its legislative authority is Article IV, Section IV, which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government”. While it ought to be clear that legislation by an unelected body is anti-Republican in character (since the essence of a Republic is that legislation is made by elected [and thus *accountable*] officials), some will argue against this viewpoint — and who’s going to stop them?

This would mean that the “protection” of the Fourteenth Amendment could be nullified by allowing the delegation of State legislative power to an unelected body — since this contract is not “State action”, *any Fourteenth Amendment prohibitions on State legislative action could be evaded*.

Luckily, the Court seems to want to come to our rescue, and not allow this subterfuge to happen:

We initially address the issue of our appellate jurisdiction over this case. PEA submits that its appeal is proper under 28 U.S.C. § 1254 (2) (1976), which grants us appellate jurisdiction over cases in the federal courts of appeals in which a state statute has been held repugnant to the Constitution, treaties, or laws of the United States. We disagree. No state statute or other legislative action has been invalidated by the Court of Appeals.¹³⁰

Oops — sorry, I was wrong. Since the Court rejects the idea that a contract is “State action”, it simultaneously rejects the idea that the Fourteenth Amendment will apply — or does it?

PEA suggests . . . that because a collective bargaining contract has ‘continuing force and [is] intended to be observed and applied in the future,’ it is in essence a legislative act, and, therefore a state statute within the meaning of § 1254 (2). . . . In support of its

¹²⁸ *Perry*, p. 41.

¹²⁹ *Perry*, p. 41.

¹³⁰ *Perry*, p. 42.

position, PEA points to our decisions treating local ordinances and school board orders as state statutes for § 1254 (2) purposes, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 . . . ; *Illinois ex rel. McCollum v. Bd. of Education*, 333 U.S. 203 . . . ; *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245. . . . In these cases, however, legislative action was involved — the unilateral promulgation of a rule with continuing legal effect. Unlike a local ordinance or even a school board rule, a collective bargaining agreement is not unilaterally adopted by a lawmaking body; it emerges from negotiation and requires the approval of both parties to the agreement. **Not every government action which has the effect of law is legislative action.**¹³¹

What does this new language mean? It means it is paving the way for a future “about-face” time. It means that *some* “government action[s] which [have] the effect of law” will be seen as violating Constitutional prohibitions; others won’t. In this manner, the Court can allow those laws to proceed which it wants to proceed, by framing certain “legislative action” as mere “government action” to which the Fourteenth Amendment does not apply. But the Court won’t see it that way at this time.

Well, if the “collective bargaining agreement” is not “legislative action”, then you would think at this point the case would be over, since the Fourteenth Amendment is now irrelevant. But surprise, surprise, the Court *does* grant jurisdiction after all, through a *writ of certiorari*, the usual way cases get to the Courts.¹³²

Why *this* about-face? Because if the Court didn’t have jurisdiction, it couldn’t reverse the Court of Appeals decision which gave the rival union access to the mail delivery system — and they want to do that. But they don’t want to saddle themselves with the consequences that would result from declaring that a “contract” is legislative action. They want to have their cake and eat it too, and, since that’s one of the prerogatives of sitting on the Supreme Court, we’re going to get their unjust desserts.

Now, you might think that they would overturn the Court of Appeals decision on the grounds that, since no legislative action was involved here, *there was no Constitutional question presented, and the Court of Appeals misapplied the Fourteenth Amendment*. They don’t do that!

Better grab another cup of coffee. You’re about to find out why the First Amendment got sucked into this case:

The primary question presented is whether the First Amendment, applicable to the states by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. ‘It can hardly be argued that either students or teachers shed

¹³¹ *Perry*, pp. 42-3.

¹³² *Perry*, p. 44.

their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ *Tinker v. Des Moines School District*, 393 U.S. 503, 506 . . . *The First Amendment’s guarantee of free speech applies to teacher’s mailboxes as surely as it does elsewhere within the school*, *Tinker v. Des Moines School District*, supra, and on sidewalks outside, *Police Department of Chicago v. Mosely*, 408 U.S. 92 But this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. ‘Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes.’ *Grayned v. City of Rockford*, 408 U.S. 104, 117-118 . . . (1972). The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.¹³³

But how can “constitutional interests [be] implicated” if there is no “legislative action”? Remember, the Court previously rejected the idea that the contract was “legislative action”, so the Fourteenth Amendment did not apply. Now they want to do yet another about-face, and say that the Fourteenth Amendment does apply *after all*.

This is bad enough, but now the Court now wants to go a step further, and continue its policy of re-defining the First Amendment to say what it does not. Once again, if the First Amendment is “applicable to the states by virtue of the Fourteenth Amendment”, and if the Fourteenth Amendment is relevant here, that *should* settle the matter. If the “State” passes a “law” violating a “right”, the right must be upheld.

But *which* First Amendment right was incorporated? According to the Court, we can’t say the “First Amendment requires equivalent access” *because* “nowhere” has the Court “suggested” that people have an “absolute constitutional right” to forums where speech takes place! Note that this contradicts the text of their own *new-and-improved version* of the First Amendment (cribbed from the web of public mythology). According to the Court, “[t]he First Amendment’s guarantee of free speech applies to teacher’s mailboxes as surely as it does elsewhere within the school”. In the same breath, however, the Court says that *this* “guarantee”, unlike the guarantee you imagined would flow from this new version, does not require “equivalent access”! *Caveat emptor*.

This recasting of the idea of a “guarantee” (and loss of protection from real First Amendment text) could only come about if the First Amendment has been re-defined from “the First Amendment to the Constitution” to the “suggestions” of the Supreme Court (“nowhere [have we] suggested”).

Here in 1983, we’re not supposed to look to the Constitution anymore; rather, to the opinions of Supreme Court Judges. And if the Brethren don’t “suggest” the right exists, then it doesn’t, regardless of language to the contrary which (in the same breath) they claim to want to uphold. It’s called “paying homage” to our ancestors — or is that

¹³³ *Perry*, p. 44.

“lip-service” to our ancestors?

The Court then tells us that a State *can* regulate a “content-based exclusion”, (but does not tell us why this would be relevant, since there is supposedly no State legislative action here):

[T]he rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks . . . In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455 The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Council of Greenburgh*, 453 U.S. 114 . . . ; *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530. . . . *Cantwell v. Connecticut*, 310 U.S. 296 . . . ; *Schneider v. State of New Jersey*, 308 U.S. 147¹³⁴

Now we can see why the First Amendment got sucked into this case: it’s an opportunity to add to the nodes of the new-and-improved version! Here we have more changes to the First Amendment flow chart: anti-speech laws are constitutional if they serve a “compelling state interest” and are “narrowly drawn”. Does this language appear in the Constitution? No, but it does appear in the Court’s prior cases, which they cite. This is what some people refer to as “bootstrapping”; if a Court can create law simply by citing its own cases, all it needs to do to author a new law is cite old cases which may or may not apply, and then use those cases as the basis for the new “law”. Of course, this isn’t “law” — it’s power.

In a dissent, Judge Brennan tacitly assumes that a need to reach a correct decision in this case gives him a license to lapse into wish fulfillment:

We have **never** held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. . . . Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’ . . . In short, the exclusive access policy discriminates against the respondents based on their viewpoint. The board has agreed to amplify the speech of the petitioner, while repressing the speech of the respondents based on the respondents’ point of view. This sort of discrimination amounts to censorship and infringes the First Amendment rights of the respondents.¹³⁵

¹³⁴ *Perry*, p. 45.

¹³⁵ *Perry*, pp. 61-2, 65.

Better make that “almost” never.

CITY COUNCIL OF LOS ANGELES V. VINCENT, 466 U.S. 789 (1984)

Here we go again! In this case, the Court holds that a municipal ordinance prohibiting the posting of signs on public property was not unconstitutional (reversing a Court of Appeals decision which had in turn reversed a District Court decision upholding the ordinance). Consequently, yet another political candidate, like Harry Lehman, does not have the right to advertise his candidacy in a particular manner, quite without regard to the clear directive of the Tenth Amendment that a power not exercised by the State flows to the “people” (and not a city). Judge Stevens delivers the opinion of the Court:

Section 28.04 of the Los Angeles Municipal Code prohibits the posting of signs on public property. The question presented is whether that prohibition abridges appellees’ freedom of speech within the meaning of the First Amendment.¹³⁶

By now you should know that this is *not* the question presented. The Court, in a footnote, tells us why they think this is an issue for the city:

The First Amendment provides: ‘Congress shall make no law . . . abridging the freedom of speech, or of the press . . .’ Under the Fourteenth Amendment, city ordinances are within the scope of this limitation on governmental authority. *Lovell v. Griffin*, 303 U.S. 444

Note, the “Fourteenth” Amendment, not the Tenth. But let’s not waste time arguing over small details like what Amendment covers this issue. Let’s see what the ordinance says:

Sec. 28.04. Hand-bill, signs-public places and objects: (a) No person shall paint, mark or write on, or post or otherwise affix, any hand-bill or sign to or upon any sidewalk, crosswalk, curb, curbstone, street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign . . . (c) Any hand-bill or sign found posted, or otherwise affixed upon any public property contrary to the provisions of this section may be removed by the Police Department or the Department of Public Works. The person responsible for any such illegal posting shall be liable for the cost incurred in the removal thereof and the Department of Public Works is authorized to effect the collection of said cost. (d) Nothing in this section shall apply to the installation

¹³⁶ *Vincent*, pp. 791-2.

of a metal plaque or plate or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality for which the Board of Public Works, with the approval of the Council, has granted a written permit.¹³⁷

Now let's look at the facts as reported by the Court:

In March 1979, Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters known as Taxpayers for Vincent ('Taxpayers') entered into a contract with a political sign service company known as Candidates Outdoor Graphics Service ('COGS') to fabricate and post signs with Vincent's name on them. COGS produced 15 x 44 inch cardboard signs and attached them to utility poles at various locations by draping them over cross-arms which support the poles and stapling the cardboard together at the bottom. The signs' message was: 'Roland Vincent — City Council.'

Acting under the authority of § 28.04 of the Municipal Code, employees of the City's Bureau of Street Maintenance routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the COGS signs.¹³⁸

Three reasons were given to uphold this ordinance: traffic safety, safety to workmen who had to remove signs, and finally, to preserve the "beauty" of Los Angeles:

[T]he District Court found that the large number of illegally posted signs 'constitute a clutter and visual blight.' With specific reference to the posting of the COGS signs on utility pole crosswires, the District Court found that such posting 'would add somewhat to the blight and inevitably would encourage greatly increased posting in other unauthorized and unsightly places. . . .' In its conclusions of law the District Court characterized the esthetic and economic interests in improving the beauty of the City 'by eliminating clutter and visual blight' as 'legitimate and compelling.'¹³⁹

The Court of Appeals disagreed that these reasons were legitimate, but the Supreme Court reversed the decision of the Court of Appeals, with this reasoning:

The ordinance prohibits appellees [Vincent] from communicating with the public in a certain manner, and presumably diminishes the total quantity of their communication in the City. The application of the ordinance to appellees' expressive activities surely raises the question whether the ordinance abridges their 'freedom of speech' within the meaning of the First Amendment . . . 'But to say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.' *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 561 It has been clear since this Court's earliest

¹³⁷ *Vincent*, p. 792.

¹³⁸ *Vincent*, p. 792-3.

¹³⁹ *Vincent*, p. 794-5.

decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. *Schenck v. United States*, 249 U.S. 47

[W]e shall assume that the ordinance diminishes the total quantity of their speech.

In *United States v. O'Brien*, 391 U.S. 367. . . , the Court set forth the appropriate framework for reviewing a viewpoint neutral regulation of this kind: ‘[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’ *Id.*, at 377

It is well settled that the state may legitimately exercise its police powers to advance esthetic values. . . .

[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

[A] city has the power to regulate visual clutter in much the same manner that it can regulate any other feature of its environment: ‘Pollution is not limited to the air we breathe and the water we drink; it can equally offend the eye and ear.’ [*Metromedia*, 453 U.S.] at 561

We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance — the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property — constitutes a significant substantive evil within the City’s power to prohibit. ‘[T]he city’s interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.’ *Young v. American Mini Theatres*, 427 U.S. 50, 71¹⁴⁰

Like any good court, the Court paves the way for its predecessors to regulate speech in the future by creating a new node in the flow chart: yesterday, “available alternative avenues of communication”, today, a “captive audience”, tomorrow, “commercial speech” — and there’s always the grab-bag of the “compelling state interest”, if it can’t find a more apt tool in its toolchest.

In this decision, the Court ratifies the existence of yet another node, and strikes a blow for *environmentalism*, by declaring its disgust with the notion of a “visual assault on the citizens of Los Angeles presented by an accumulation of signs”.

One day, presumably, they may conclude that the presence of “would-be” pamphleteers on our street sidewalks would likewise constitute a “visual assault” on city citizens. So far, the Court’s environmental consciousness has not extended quite so far. But who knows? This is, after all, a “conservative” Court.

Maybe one day the Court will have more “liberals” with a heightened sense of beauty.

¹⁴⁰ *Vincent*, pp. 803-7 (emphasis supplied).

U.S. v. STANLEY, 483 U.S. 669 (1987)

This case, a Bicentennial decision, was decided on June 25, 1987. 200 years earlier to the day, on June 25, 1787, Charles Pinkney uttered these words to his fellow Framers at the Constitutional Convention in Philadelphia:

Our true situation appears to me to be this. — a new extensive Country containing within itself the materials for forming a Government capable of extending to its citizens all the blessings of civil & religious liberty — capable of making them happy at home. This is the great end of Republican establishments.¹⁴¹

Let's see how the Supreme Court celebrated this Bicentennial moment. Technically speaking, this really isn't a "First Amendment" case — at least, it wasn't pled as such. But you ought to hear about it anyway, as an indication of which way the wind is blowing.

In February 1958, James B. Stanley, a master sergeant in the Army stationed in Kentucky, volunteered to participate in a program ostensibly designed to test the effectiveness of protective clothing against chemical warfare. Stanley was sent to Aberdeen proving grounds in Maryland, where he was secretly administered doses of lysergic acid diethylamide (LSD).

Subsequent to this exposure, Stanley suffered from hallucinations and periods of incoherence and memory loss, and would on occasion "awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident".¹⁴² He was discharged from the Army in 1969. One year later, his marriage dissolved because of personality changes wrought by the LSD.

What happened to Stanley was no mere aberration. As Judge Brennan noted in a footnote to this decision, "[b]etween 1945 and 1963, an estimated 250,000 military personnel were exposed to large doses of radiation while engaged in maneuvers designed to determine the effectiveness of combat troops in nuclear battlefield conditions."¹⁴³

Believe it or not, Stanley was "privileged" to find out about this dosage. In a 1959 Staff Study, the United States Army Intelligence Corps discussed its policy of covert administration of LSD to soldiers, and indicated that the way to avoid legal liability was to cover up these experiments:

It was always a tenet of Army Intelligence that the basic American principle of dignity and welfare of the individual will not be violated. . . . In intelligence, the stakes involved and the interests of national security may permit a more tolerant interpretation of moral-

¹⁴¹ 1 *Records of the Federal Convention* 402, ed. by M. Farrand.

¹⁴² *Stanley*, p. 671.

¹⁴³ *Stanley*, p. 690.

ethical values, but not legal limits, through necessity. . . . Any claim against the US Government for alleged injury due to EA 1729 [LSD] must be legally shown to have been due to the material. Proper security and appropriate operational techniques can protect the fact of employment of EA 1729.¹⁴⁴

The “intelligence” “community” wanted to conceal these activities because public knowledge of the “unethical and illicit activities would have serious repercussions in political and diplomatic circles and would be detrimental to the accomplishment of its mission.”¹⁴⁵ Duh!

Alas, the worst-laid plans of mice and vipers often go astray.

In 1975, the Army notified Stanley for the first time that he had been given LSD. After an administrative claim for compensation was denied by the Army, Stanley filed suit under the Federal Tort Claims Act (FTCA), alleging negligence in the administration of the program.

The suit then began to wind its way through the system, and finally, 11 years later, on June 25, 1987, the Supreme Court reached its verdict: *Stanley was not entitled to sue the government for his injuries!* The Court made this decision even though the Constitution clearly states that a person has the right to federal protection from laws abridging speech (like Federal laws authorizing appropriations for programs that dose servicemen with the speech-abridging drug, LSD), a right to “just compensation” in the Fifth Amendment, a right to a jury trial in the Sixth Amendment, a right to be free from “cruel and unusual punishment” in the Eighth Amendment, and a right to “equal protection of the laws” and “due process of law” in the Fourteenth Amendment, as well as unenumerated, but very real rights, implied by the existence of the Ninth and Tenth Amendments. And it goes without saying that this decision goes against practically every conception of “natural rights” one might hold to.

How could the Court reach this decision in the light of so many compelling constitutional and humanistic arguments against it? Because the Supreme Court had earlier posited a doctrine that allowed this, in a case called *Feres v. United States*, 340 U.S. 135. In that case, the court held that there was no governmental FTCA liability for injuries to servicemen resulting from activity “incident to service”. *Stanley* extended the scope of this abstraction to a new degree. That is to say, not only was “getting shot” a harm incident to service, but so was “getting dosed with LSD in an experimental program” (Note: what was done to Stanley could not likewise be done to *prisoners*: U.S. servicemen have yet to attain this exalted status, according to the *Stanley* decision).

Since the Court “applied” *Feres* as they did, this means that the *Feres* decision operated as an *amendment* to the Constitution, which had formerly “guaranteed” “equal

¹⁴⁴ *Stanley*, pp. 688-9.

¹⁴⁵ *Stanley*, p. 688, quoting a CIA Inspector General’s Survey in 1957.

protection”, “due process”, etc., etc. — “liberty and justice for all”, as the Pledge of Allegiance goes. In a year when 225 million Americans were celebrating the 1787 Constitution, 5 of those Americans were seeking to undermine it. Unfortunately, those 5 happened to be sitting on the Supreme Court!

Judge Brennan (dissenting):

In experiments designed to test the effects of lysergic acid diethylamide (LSD), the Government of the United States treated thousands of its citizens as though they were laboratory animals, dosing them with this dangerous drug without their consent. One of the victims, James B. Stanley, seeks compensation from the Government officials who injured him. The Court holds that the Constitution provides him with no remedy, solely because his injuries were inflicted while he performed his duties in the Nation’s armed forces. If our Constitution required this result, the Court’s decision, though legally necessary, would expose a tragic flaw in that document.¹⁴⁶

Well put, though I hasten to add that *not even animals* should be treated “as though they were laboratory animals”! Indeed, the wholesale, factory-like use of sentient beings in experiments is one of this centuries’ most astonishing and horrifying violations of the human spirit (the same spirit of liberty that guides us when we seek to protect the speech of others), and the same attitude that puts *animals* in labs is the same attitude that ultimately will lead to the dosage of *people* like Stanley. There’s no need for me to quote the Biblical passage that applies here — you know it intuitively.

Judge O’Connor, in a partial dissent, said that “[n]o judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case.”¹⁴⁷ But why *would* judges craft a rule insulating government from the edicts of the Constitution? She doesn’t say, but ends with this, “[i]f this principle is violated the very least that society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution’s promise¹⁴⁸ of due process of law guarantees this much.”

Softie! See what happens when you put a woman on the Court?

LECHMERE, INC. V. N.L.R.B., 112 S. CT. 841 (1992)

The power to communicate information isn’t threatened only by government, but also by “private” interests who, after all, are regulated by government, and who make political contributions to that government, and upon whom governmental benefits are conferred from time to time.

If access to public property is problematic, access to private property is even more

¹⁴⁶ *Stanley*, p. 686.

¹⁴⁷ *Stanley*, pp. 709-10.

¹⁴⁸ This is not a misprint.

problematic, in contradiction to the mythological First Amendment which indicates that you have the power to distribute any message to any person at any place. That's a significant issue, because efficient communication depends on access to where the people are, and frequently the people are on "private" property (property that can be confiscated by government if the "owners" do not pay their taxes) .

Mythological First Amendment aside, there is no right of access to private property granted under the 1791 version. Here, the Court holds (correctly) that an employer could display a sign on its doors that prohibited access by private parties; however, the Court did *not* declare unconstitutional 29 U.S.C. § 158 (a) (1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [29 U.S.C. § 157]", a law which could conceivably abridge employer's speech by being used to bar the following (or similar) sign in some future case, which could be seen to "interfere" with employees' "rights":

On each door to the store Lechmere had posted a 6 in. by 8 in. sign reading: "TO THE PUBLIC. No Soliciting, Canvassing, Distribution of Literature or Trespassing by Non-Employees in or on Premises". . . . Lechmere consistently enforced this policy inside the store as well as on the parking lot (against, among others, the Salvation Army and the Girl Scouts).¹⁴⁹

Note that private property rules (constitutional) do what government anti-speech rules (sometimes unconstitutional) do: operate as a license to stop the dissemination of information. But sometimes the baby gets thrown out with the bathwater. Here, a sign really intended to stop union activity nails groups like the Salvation Army and the Girl Scouts. It could also stop members of the American Legion, or even members of the Libertarian Party looking for enough signatures to get their candidate on the ballot and break the Democratic/Republican dominance of politics, parties whose laws effect the operation and taxes of the store in question! Needless to say, these rules stop any other political communication as well, though nothing in the Constitution prevents this state of affairs. As the National Labor Relations Board saw it,

Concluding that traffic on the highway made it unsafe for the union organizers to distribute leaflets from the right-of-way, and that contacts through the mails, on the streets, at employees' homes, and over the telephone would be ineffective, the Board ordered the company to allow the organizers to distribute literature on its parking lot and exterior walkways.¹⁵⁰

The board also stated that "the union tried advertising in local newspapers; the

¹⁴⁹ *Lechmere* , p. 844.

¹⁵⁰ *Lechmere* , p. 845.

Board said that this was not reasonably effective because it was expensive and might not reach the employees.”¹⁵¹ The Court rejected this line of reasoning, ruling against the union.

Still, while the court ruled against the union and for the store, they did not make a blanket exception, and did not say that Congress could not have the power to abridge employer’s rights to put signs in their doors. Judge Thomas wrote the opinion:

As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property. As with many other rules, however, we recognized an exception. Where ‘the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them’ . . . employers’ property rights may be ‘required to yield to the extent needed to permit communication of information on the right to organize’ . . . ¹⁵²

Maybe in the future they’ll “recognize” other exceptions; maybe they won’t. While this seems to be a victory for employers and private property owners in the short term, the Court did not state that the statute was unconstitutional, even though it could effect the store’s ability to post signs in the future.

The net result is that, pragmatically, large groups of people can be prohibited by efficient access to the public by “private” parties, and that even those “private” parties themselves are susceptible to future regulation.

Int’l Society for Krishna Consciousness v. Lee, 91-1526 (1992)

All this analysis is giving me a headache. I’ll let you practice on this one, and I’ll just quote from the opinion here. See what you think.

In this case we consider whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment. . . .

The Port Authority has adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. The regulation states: ‘1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner: (a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing. (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material. (c) Solicitation and receipt of funds.’ . . .

The regulation governs only the terminals; the Port Authority permits solicitation and distribution on the sidewalks outside the terminal buildings. . . .

¹⁵¹ *Lechmere*, p. 850.

¹⁵² *Lechmere*, p. 846.

It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); . . . *Riley v. National Federation of Blind of N.C., Inc.*, 487 U. S. 781, 788-789 (1988). But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981); *Greer v. Spock*, 424 U. S. 828 (1976). Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. . . . Thus, we have upheld a ban on political advertisements in city operated transit vehicles, *Lehman v. City of Shaker Heights*, 418 U. S. 298 (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U. S. 37 (1983). . .

We have on many prior occasions noted the disruptive effect that solicitation may have on business. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. . . . Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. . . . This is especially so in an airport, where air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation. . . . Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.

In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. . . . The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. . . . Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly. . . .

The inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but viewed against the fact that pedestrian congestion is one of the greatest problems facing the three terminals. . . the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive. Moreover, the justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. . . . For if petitioner is given access, so too must other groups. Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely. . . . As a result, we

conclude that the solicitation ban is reasonable.

ALEXANDER V. UNITED STATES, 91-1526 (JUNE 28, 1993)

This is a “forfeiture of assets” case — but here, the assets are *books*:

Petitioner was in the so-called adult entertainment business for more than 30 years, selling pornographic magazines and sexual paraphernalia, showing sexually explicit movies, and eventually selling and renting videotapes of a similar nature. He received shipments of these materials at a warehouse in Minneapolis, Minnesota, where they were wrapped in plastic, priced, and boxed. He then sold his products through some 13 retail stores in several different Minnesota cities, generating millions of dollars in annual revenues. . . . As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three videotapes were obscene. . . . The court ultimately ordered petitioner to forfeit his wholesale and retail businesses (including all the assets of those businesses) [*including all the other books not judged obscene by the jury -- BK*] and almost \$9 million in moneys acquired through racketeering activity.

Judge Kennedy says it better than I could:

The Court today embraces a rule that would find no affront to the First Amendment in the Government’s destruction of a book and film business and its entire inventory of legitimate expression as punishment for a single past speech offense. Until now I had thought one could browse through any book or film store in the United States without fear that the proprietor had chosen each item to avoid risk to the whole inventory and indeed to the business itself. This ominous, onerous threat undermines free speech and press principles essential to our personal freedom. . . .

The admitted design and the overt purpose of the forfeiture in this case are to destroy an entire speech business and all its protected titles, thus depriving the public of access to lawful expression. This is restraint in more than theory. It is censorship all too real. . . .

What is happening here is simple: Books and films are condemned and destroyed not for their own content but for the content of their owner’s prior speech. . . . A defendant’s exposure to this massive penalty is grounded on the commission of just two or more related obscenity offenses committed within a 10-year period. Aptly described, RICO’s forfeiture provisions arm prosecutors not with scalpels to excise obscene portions of an adult bookstore’s inventory but with sickles to mow down the entire undesired use.

...

What is at work in this case is not the power to punish an individual for his past transgressions but the authority to suppress a particular class of disfavored speech. . . .

In a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state, public confidence in the institutions devoted to the dissemination of written matter and films is essential. That confidence erodes if it is perceived that speakers and the press are vulnerable for all of their expression based on some errant expression in the past. . . .

[T]he destruction of books and films that were not obscene and not adjudged to

be so is a remedy with no parallel in our cases. . . . Here the inventory forfeited consisted of hundreds of original titles and thousands of copies, all of which are presumed to be protected speech. In fact, some of the materials seized were the very ones the jury here determined not to be obscene. Even so, all of the inventory was seized and destroyed. . . .

[O]ne title does not become seizable or tainted because of its proximity on the shelf to another. And if that is the rule for interim seizures, it follows with even greater force that protected materials cannot be destroyed altogether for some alleged taint from an owner who committed a speech violation. . . .

The Court's failure to reverse this flagrant violation of the right of free speech and expression is a deplorable abandonment of fundamental First Amendment principles.

. . .

The case then has the following notice:

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

Okay, I'll take the bait:

Dear Mr. Court Reporter:

It seems there is an error in the *Alexander* case: the text of the majority opinion seems to have been inadvertently framed as the "dissent", and vice versa.

Please make the above correction. Thank you.

Sincerely,
Barry Krusch

DENVER ET AL. V. FCC ET AL., 95-124 (JUNE 28, 1996)

It's a rainy weekend, and you're looking for something to do. Polish the silverware? Nah, got used to it. Dust the CD player? Nope, sounds fine dusty. Guess that means it's time to go to the bench, and actually read that Supreme Court opinion lying in the drawer all these years.

You start plowing. By page 30, your eyes are getting s-l-e-e-p-y, s-l-e-e-p-y, while dreams of white tines and gleaming gloves clash in your head. But then, lo and behold, deep in the bowels of the aforesaid opinion, you come across the following astonishing paragraph:

We, the judges of the Supreme Court, have determined after long and deliberate analysis that the 1791 First Amendment no longer meets the needs of a changing world. We find its language too restrictive, in that it disallows Congress from responding to serious problems, fulfilling legitimate objectives, satisfying compelling interests, and acting in cases of extraordinary need. Now, we understand that there is no constitutional provision authorizing us to disregard constitutional text, as well as a constitutional provision in Article VI mandating us to take an oath of office to support the text, but these are serious times. We also understand that if defects in the Constitution are found the Constitution demands that amendments to remedy these defects go through the process outlined in Article V, but contemporary society does not move at the glacial pace contemplated by that Article. Accordingly, as loyal Americans dedicated to preserving and defending the United States, we have decided unanimously to disregard the text of the 1791 First Amendment when reaching our decisions. Instead, we will circumvent the Article V process and analyze the legitimacy of Congressional statutes with reference to the following text we have craftily — excuse us — carefully crafted:

Congress shall make no law abridging the freedom of speech or of the press except those laws which serve compelling interests, are narrowly or reasonably tailored utilizing the least restrictive means available, and have a reasonable fit with the objective legitimating the speech abridgment.

We understand this text isn't perfect. After all, we held no hearings, received no testimony or public comment, and no budget from Congress to explore the ramifications of this change. We are, in fact, poorly equipped as a legislative body, since we are in fact a judicial body. But it's the best we could do under the circumstances. Hope you like it!

Now, if you had a goat, wouldn't this paragraph get it? Tens of thousands of Americans have given their lives to defend the 1791 language in wars around the globe, but nine will chuck it on a whim. \$250 billion a year to defend against the spectres from without; but not one thin dime to fight the Gang of Nine, within! Something's up, and it's undoubtedly the jig.

Well, that's the Hollywood scenario, but we're not in Hollywood anymore, we're in Washington, D.C., where the predominant color is icy-white. The bad news: you won't get a blatant admission like the one above. The good news: you *will* get an admission if you begin fishing by making a hole through the ice.

The above not-quite-as-fantastic-as-you-might-think scenario is the "hot" version of what happens in this case, where the Court all but confesses to an impeachable offense: revising the text of the 1791 First Amendment and then reaching a decision based on this revision, acting as both legislative and judicial body. In *Denver*, the Court has to deal with three potentially unconstitutional statutory provisions. They can only find a majority to agree that one of the three is unconstitutional. Six (not nine) of the Court's judges will find the following statutory provision (47 U.S.C. 532(j))

unconstitutional with reference to a cobbled-together precedential construct they erroneously refer to as the First Amendment:

(j) Single channel access to indecent programming

(1) [T]he [FCC] shall promulgate regulations designed to limit the access of children to indecent programming . . . by - (A) requiring cable operators to place on a single channel all indecent programs . . . ; (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

However, this is not a victory for the exception-free First Amendment Classic, which reads in pertinent part

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

but rather for the aforementioned First Amendment Du Jour, dripping with qualifiers. Let's bring out the whippersnapper for an encore:

Congress shall make no law abridging the freedom of speech or of the press except those laws which serve compelling interests, are narrowly or reasonably tailored utilizing the least restrictive means available, and have a reasonable fit with the objective legitimating the speech abridgment.

In this case, the newborn First Amendment bares its newly-filed teeth. (Snar!!) Let the Court explain how Muzak upstaged Music:

The history of this Court's First Amendment jurisprudence . . . is one of continual development . . .

“Continual development” is from the stylebook of doublespeak all newly-sworn Supreme Court judges are required to read before writing a decision. Here's the translation: the text of the 1791 First Amendment has been, over the years, has-beened. The Court continues, using that peculiarly cool dialect no other mortals need employ (the velvet glove masking the filed teeth):

. . . as the Constitution's general command that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” has been applied to new circumstances requiring different adaptations of prior principles and precedents.

Brrr! But your Dishonor, how could we possibly discern the essence of the protection resulting from your differing “adaptations”, unless you were to inadvertently lapse into an uncool dialect and tell us point-blank?

The essence of that protection is that Congress may not regulate speech except . . .

Whoa, Trigger, hold the phones! To this “except” exception must be taken. There is NO language in the Constitution justifying this phrase. There are no exceptions in the First Amendment, since the word “no” in the First Amendment standing alone means “no exceptions”! Not one. Nada. Zip. Zilch. Zero. Nor is there the qualifying language like “but” or “unless” we find throughout the Constitution when the Framers want to declare the only allowable exceptions to absolute terms like “no” or “all”, for example, the word “except” found in Article II, Section I, Clause 5,

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . .

and “unless” in Article I, Section III, Clause 4:

The Vice President of the United States shall be President of the Senate, but shall have **no** Vote, unless they be equally divided.

Nope, no “unless”, “but”, or “except” in the 1791 First Amendment. The Judge is right on one account, though: it is the essence of their “protection”.

After listing their fantasy exception (the abysmally vague button-pusher “in cases of extraordinary need” that can be found nowhere in the 1791 First Amendment), the Constitutional Convention — err, Court — tells us that

[O]ur cases have not left Congress . . . powerless to address the most serious problems.

Note the fascinating (and telling) substitution here. The Court does not say “the First Amendment has not left Congress . . . powerless to address the most serious problems”, but rather “our cases”. That’s because the 1791 First Amendment once upon an antebellum time had left Congress powerless to address the most serious (speech-related) problems, leaving that responsibility up to the States. However, when you violate the Supreme Law of the Land by replacing the 1791 First Amendment with “our cases,” you can do pretty much what you want.

Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application.

More seemingly innocuous but actually noxious coolspeak to be penetrated. Here and above, the Supreme Court confesses that it has “restated and refined” (i.e. revised) the 1791 First Amendment principle that Congress can’t pass even one law abridging the freedom of speech or of the press. And the only where to go from “no” is “some”:

[T]he [1996] First Amendment embodies an overarching commitment to protect speech from Government regulation . . . but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems. This Court . . . has consistently held that the Government may directly regulate speech . . .

Could there be a clearer admission of an impeachable offense? Sure, but this is about the best we can hope for.

Well, now we know that they’ll be analyzing the law in question with reference to their “restated and refined” 1996 version of the First Amendment, and not the Classic edition, which wore out its welcome so, so many years ago. In striking down 47 U.S.C. 532(j), they give us a Cubist view of the text of the new kid on the block:

[O]nce one examines [47 U.S.C. 532(j)], it becomes apparent that, not only is it not a “least restrictive alternative,” and is not “narrowly tailored” to meet its legitimate objective, it also seems considerably “more extensive than necessary.” That is to say, it fails to satisfy this Court’s formulations of the First Amendment’s “strictest,” as well as its somewhat less “strict,” requirements. See, e.g., *Sable*, 492 U. S., at 126 (“compelling interest” and “least restrictive means” requirements applied to indecent telephone communications); *id.*, at 131 (requiring “narrowly tailored” law); *Turner*, 512 U. S., at ___ (slip op., at 16) (using “heightened scrutiny” to address content-neutral structural regulations of cable systems); *id.*, at ___ (slip op., at 38) (quoting “no greater than . . . essential” language from *United States v. O’Brien*, 391 U. S. 367, 377 (1968), as an example of “heightened,” less-than-strictest, First Amendment scrutiny); *Central Hudson*, 447 U. S., at 566 (restriction on commercial speech cannot be “more extensive than is necessary”); *Florida Bar v. Went For It, Inc.*, 515 U. S. ___, ___ (1995) (slip op., at 5) (restriction must be “narrowly drawn”); *id.*, at 14 (there must be a “reasonable” “fit” with the objective that legitimates speech restriction). The provision before us does not reveal the caution and care that the standards underlying these various verbal formulas impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions.

That’s a lot of words, but you paid for them.

Now, all the Yale boys and all the Harvard men couldn’t put the Farce Amendment they spun out of the thinnest ilk (and then ripped to shreds with their razor-sharp fingernails) back together again, so let’s see what we can do with a little chewing gum and chicken wire:

Congress shall make no law abridging the freedom of speech or of the press except those laws which serve compelling interests, are narrowly or reasonably tailored utilizing the least restrictive means available, and have a reasonable fit with the objective legitimating the speech abridgment.

Picasso's *Guernica*. Michelangelo's *Pieta*. The Supreme Court's 1996 *First Amendment*.

Munch's *Scream*?

The Court then ices off their bootstrapping routine by using the construct they invented to analyze the statute:

[We] cannot find that the "segregate and block" restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, "sacrific[ing]" important First Amendment interests for too "speculative a gain." . . . *For that reason they are not consistent with the [1996] First Amendment.*

"For that reason" is necessary just in case there were any lost souls out there who were under the erroneous impression that the Court was declaring this statute unconstitutional because it abridged speech, unaware that there really is a phantom clause. The bottom line is this: the statute fails not because it abridges speech, but because it is not a "narrowly, or reasonably, tailored effort" that abridges speech. Back to the drawing board!

Now, at this point one might ask, "Well, what difference does it make which version of the First Amendment the Court uses? After all, the Court does hold the statute unconstitutional. You get the same result anyway, so why complain?" Well, apart from the illegality of the Court's action, there are six other reasons why losing a war to win a battle is not an effective military strategy:

- 1) Confusion regarding the *content* of the new constitutional text;
- 2) Confusion regarding the *meaning* of the new constitutional text;
- 3) The increased cost of litigating First Amendment cases reduces the total number of challenges to speech-abridging laws that can and will be made;
- 4) A shift from *static* to *dynamic* constitutional text;
- 5) An increased ease in applying double standards;

6) The shift from *fact* to *opinion* moves the seat of authority from the *Constitution* to the *Court*.

Let's tackle the first one. We know what the text of the 1791 First Amendment (hereinafter "FA1791") says just by reading the Constitution. But how are we to derive the text of the 1996 First Amendment (hereinafter "FA1996")? We would have to do what the Court and attorneys do, and first find all the First Amendment cases, read all these cases (as well as locating and reading lower court rulings the Court declined to review, always aware that there was a case we could miss), figure out which decisions overruled which, "distinguish" the non-overruled but contradictory cases, analyze the decisions to separate the "holding" from "dicta", compile the holdings (understanding all the while that some holdings are generic while others are specific to the fact-pattern of that case), extract the buzz phrases and then (finally!) attempt to reconstruct the text. What should take one *minute* (opening up a copy of the Constitution) could take *months*. And so this text could only be available with those who had the formal training to understand the process by which precedential holdings are ascertained, and the time and money to implement the process. The text of the Constitution, formerly available to all, would now be available only to a select few.

Now let's move to the second reason. Assume that we are, in fact, able to correctly identify the text of FA1996. But that text will be riddled with vague terms such as "legitimate", "compelling", "reasonable", and so forth; consequently, even if we were able to actually correctly identify the text, we could not identify the *meaning* of that text. In point of fact, not even the judiciary itself can identify the meaning of FA1996, let alone the rest of us. Here's the Court's own description of the confusion below that results from the new-Constitutional-law-by-precedent approach:

A panel of that Circuit agreed with petitioners that the provisions [of the statute at issue] violated the [1996] First Amendment. *Alliance for Community Media v. FCC*, 10 F. 3d 812 (1993). The entire Court of Appeals, however, heard the case en banc and reached the opposite conclusion. It held all three statutory provisions (as implemented) were consistent with the [1996] First Amendment. *Alliance for Community Media v. FCC*, 56 F. 3d 105 (1995). Four of the eleven en banc appeals court judges dissented. Two of the dissenting judges concluded that all three provisions violated the [1996] First Amendment. Two others thought that either one, or two, but not all three of the provisions, violated the [1996] First Amendment.

And, in fact, this confusion extended all the way up to the Court, where three of the Courts' own Judges disagreed with the majority, holding that the 47 U.S.C. 532(j) did *not* violate the First Amendment (hmmm, maybe the law really *is* "narrowly tailored" after all). This confusion could only occur if the term "First Amendment" as used in the above excerpt now means "1996 First Amendment".

The third reason is that confusion costs. Hundreds of hours of attorney-time (billed at \$150 an hour and up) are required to brief these cases. The fewer people who can afford to challenge speech-abridging laws, the more of these laws that remain on the books. The Court, you see, does not rule prospectively on statutes. If a statute offends thee, you're going to have slog your way up just like everyone else (always risking, of course, that your case may be one of the few thousand that the Supreme Court will decline to review if you lose in the lower courts) to poke it out. Hey, you're only putting four years of your life and over \$40,000 on the line! Don't you believe in your case? Isn't it "solid"?

The fourth reason why the change from FA1791 to FA1996 makes a difference is the dramatic shift from *unchanging* to *ever-shifting* law. If FA1791 remained law, then everyone in society could rely on it. But as FA1791 mutates to FA1917 to FA1968 to FA1984 and so forth, legal speech becomes illegal, and vice versa. This uncertainty about what can and can't legally be said adds to the "chilling effect" already present from vague laws, since laws on the books formerly unenforceable may now be enforceable. This could be a violation of the "ex post facto" clause, if that clause actually had force.

The fifth reason FA1996 should be ridden out of town on a rail is the ease with which it allows the application of a double-standard: no umbrella shot through with holes can save U.S. when the storm comes. Consider these two statutes which slipped through the cracks of the body-snatcher:

47 U.S.C. §558. *Criminal and civil liability*

[C]able operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use . . . unless the program involves obscene material.

47 U.S.C. §559. *Obscene programming*

Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than \$10,000 or imprisoned not more than 2 years, or both.

The Court does not hold these speech-abridging Federal statutes unconstitutional. Now, we know the Court is aware of the existence of these statutes, since they explicitly refer to them in this passage from *Denver* where the Court explains why so-called "public access" on cable is a misnomer:

[U]nlike a park picketer, an access programmer cannot transmit its own message. Instead, it is the operator who must transmit, or "speak," the access programmer's message. That the speech may be considered the operator's is driven home by 47 U.S.C. Section 559, which authorizes a fine of up to \$10,000 and two years' imprisonment for any person

who “transmits over any cable system any matter which is obscene.” See also Section 558 (making operators immune for all public access programming, except that which is obscene).

Note: no ellipses!

Apparently these statutes are “narrowly tailored”, even though you can be imprisoned under 47 U.S.C. §559 for transmitting over a cable system any matter which is “unprotected by the Constitution”, not just obscene matter! (You’ll note how the Court somehow manages to omit this tiny detail in their quotation from the statute, using a period where there is none [instead of ellipses], creating the illusion that no “or” follows. That’s slick.) Does “unprotected by the Constitution” strike you as “narrowly tailored”? How could it be more *broadly* tailored? Yet it slips through, notwithstanding the supposed new node in the flow chart. Does the Court speak with forked tongue? Or is it just that the ACLU ran out of money? (They can’t fight everything, you know.)

An even more striking example of why the “narrowly tailored” language is so problematic is 47 U.S.C. §532(i), the provision immediately before 532(j). Consider this language:

(1) [A] cable operator required by this section to designate channel capacity for commercial use may use any such channel capacity for the provision of programming . . . from any qualified educational programming source. . . . (3) . . . the term “qualified educational programming source” means a programming source which devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding \$15,000,000. The annual expenditure on programming means all annual costs incurred by the programming source to produce or acquire programs . . . and specifically excludes marketing, promotion, satellite transmission and operational costs, and general administrative costs.

Note here that while one cannot be required to designate a channel for indecent speech, one can be so required for commercial speech! Where in FA1791 is *that* distinction? And then, of course, there’s the smoking-gun “some people are qualified to speak and others aren’t” language, where the dividing line between who speaks and who doesn’t is how much money they have access to! In blunter terms, if you tow the Establishment line enough to get 15 million in small ones (no counting those administrative costs!) from entities like the Rockefeller Foundation and the Lila Acheson Wallace Charitable Trust, then you and only you and the others in your class are qualified to educate the rest of us over the cable, regardless of the merits of your (and our) programs. No antiestablishment slackers need apply.

It is here we can really see the significance of allowing the Court to make Swiss cheese out of FA1791. Each phrase the Court adds to the flow chart, such as “compelling interest”, “least restrictive means”, “narrowly tailored”, and “reasonable fit”, etc., functions as just one more handle which the Judges can turn to allow certain statutes

functional entry into the United States Code, whereas under FA1791 all interlopers would have been bounced at the door. Under FA1996 all the Court has to do is say, “this speech-abridging statute is narrowly tailored, etc.” and *voila’* — it slips through! Even more significantly, the Court’s “narrowly tailored” claim doesn’t even have to be true; FA1791 made statutory constitutionality essentially an issue of *fact*, but FA1996 turns it essentially into an issue of *opinion*. And opinions, unlike facts, *cannot be challenged*. Thus, the Court can claim that a statute not narrowly tailored actually is, and who can prove them wrong? Not us. Since they are the “experts” (our opinions, uninformed as they are, can’t possibly be right), they win by default. The only basis for challenging them, the text of the Constitution, has been rendered null and void. How, then, can the Constitution defend us from the government when the government is free to redefine it at will?

Finally, as if the above reasons weren’t enough to reject FA1996, we move to the sixth reason: the Supreme Law of the Land is now Supreme Court cases! From “opinion” to “law”, with no messy intervening steps! And what’s the problem with that? Well, unfortunately, the Court is a political body, and they can indulge in all sorts of shenanigans. For example, they could play the game *Throw the Dog a Bone* (as described in *Games Judges Play* by noted scholar Ketcham Ifucan). Following the maxim “Every dog gets a bone” found in Fuldy Good’s *Wit or Wisdom of the Supreme Court* (itself derived from the aphorism “Why did they throw the dog a bone? Because the dog was *satisfied* with a bone!”), the Supreme Court makes sure that liberals and conservatives alike can have a decision or two a year that gives them that warm, fuzzy, feeling that says, “Hey, these judges are fair after all. They voted my way!” And so they did, at least on the surface. This preserves the illusion of fairness, that “justice is being done,” that the lady with the scale is still in business.

The game *Throw the Dog a Bone*, also known as *Faust’s Challenge* (or *Watch Out for that Bait!*) is played this way: the Court is perfectly willing to declare unconstitutional a statute or two — provided you’ll pay the devil his due and accept their underlying reasoning (which will nail you in the future) as valid. Every bone has its price!

If you don’t like this game, there’s always *Split ‘Em*, where the Court will pick issues like flag-burning statutes that split apart political coalitions and divide the country, giving people a bad taste for the concept of rights in the process (“It’s only those fringe groups who get the rights!”). They seem to get some help from the ACLU here, which apparently specializes in litigating these “hot” issues. In the meanwhile, statutes like 18 U.S.C. §2709 and 47 U.S.C. §606 labor in obscurity, doing far dirtier work than their more prominent cousins, with nary a peep from the ACLU and the media.

Last but not least, there’s always *Social Architect*, the instantiation of double-standard theory, where the Court can use their Janus-faced constitutional clauses as both shield and sword, protecting legislation they like, and harpooning legislation they don’t. For example, if the Court wants to uphold laws that preserve the strength of the

established political parties, like laws that disqualify signatures on petitions because they're signed in blue instead of black ink, it need only refer to these laws as "ballot access" laws, and not "qualifications for office", which would violate their interpretation of Article I, Section II, Clause 2. On the other hand, if they want to torpedo laws which go against the Establishment party line, like term limits, they can quickly shift and refer to these "ballot access" laws as "evasions", as they did here in *U.S. Term Limits v. Thornton*, 93-1456 (May 22, 1995):

[T]here is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election. In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded. More importantly, allowing States to evade the Qualifications Clauses by "dress[ing] eligibility to stand for Congress in ballot access clothing" trivializes the basic principles of our democracy [sic] that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Gomillion v. Lightfoot*, 364 U. S. 339, 345 (1960), quoting *Frost & Frost Trucking Co. v. Railroad Comm'n of California*, 271 U. S. 583, 594 (1926).

Quite a game. But it doesn't take a genius to figure out who loses.

Are there Any Pro-First Amendment Cases?

My citation of the previous Supreme Court cases was designed to show (conclusively, I think) that the text of the First Amendment has basically been made irrelevant by the decisions of the Supreme Court.

However, critics will make the following argument: “Sure, the Supreme Court has made some bad decisions. All courts do. But out of over 15,000 decisions by the Court, you have picked only a relative handful that make the Court ‘look bad’. Well, anyone can do that, and anyone can do the contrary: we could have picked another set of cases that make the Court ‘look good’, so what have you proved? You have painted a distorted picture of the Court, and you have unfairly disparaged what is actually, though not without some minor flaws, a great institution.”

Wow! Sounds like a powerful argument. Did I really unfairly disparage the Court? Did I “stack the deck” against the judges of the Court, when, in fact, these judges are just “human” after all, prone to make mistakes just like the rest of us?

After all, no one’s perfect! Anyone can reach a bad decision now and then. By placing these cases one after the other, and by omitting the many, many cases in which the Court has let individuals go free on one charge or another, it could be plausibly maintained that I have unfairly and unconscionably distorted reality. That would make my view of the Court’s policies not only erroneous, but it would make me a *hypocrite*.

Well, there is some truth to these arguments. In my citation of the cases, you will find none of the classic “pro-free-speech” decisions of the Court, the decisions our social studies teachers (the ones who blithely walk by the ABA posters on hallway bulletin boards) cite when they want to show how the Court is out there in the trenches battling for our rights.

In my defense, I could argue that I have only scratched the surface, and left out a great many Supreme Court decisions that further demonstrate the point I’m seeking to assert.¹⁵³ I could also argue that I have not cited any of the many, many anti-rights cases

¹⁵³ e.g., *A.C.A. v. Douds*, 339 U.S. 382 (1950), *Meese v. Keene*, 481 US 465 (1987), *Snepp v. U.S.*, 444 U.S. 507 (1980), *Mills v. Alabama*, 384 U.S. 214 (1966), *Konigsberg*, 366 U.S. 36, *In Re Anastaplo* 366 U.S. 82 (1961), *Debs v. U.S.*, 249 U.S. 211 (1919), *Beuharnais v. Illinois*, 343 U.S. 250 (1952), *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957), *Adderley v. Florida*, 385 U.S. 39 (1966), *Pittsburgh Press*, 413 U.S. 376 (1973), *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640 (1981), *Connick v. Myers*, 461 U.S. 138 (1983), *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985), *United States v. Albertini*, 472 U.S. 675 (1985), *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305 (1985), *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), *Hazelwood School District v. Kullmeir*, 484 U.S. 260 (1988), *Ward v. Rock Against Racism*, 109 S.Ct. 2746 (1989), *Frisby v. Schultz*, 108 S.Ct. 2495 (1989).

involving *other* amendments, such as the Fifth, Sixth, Eighth, etc. which would add some pretty compelling confirmation of my central argument from different domains. And, I could also argue that I have confined my analysis to only *Supreme Court* cases, and omitted discussing the hundreds of other Federal Court cases which are “anti-First-Amendment”, and which the Court has declined to review, thus preserving their precedential value.

I could also argue that the presence of *any* pro-First-Amendment decision is *irrelevant*, given the manner in which courts operate. If there is a “line” of cases which is opposed to speech, then the Court has all the tools it needs to control speech in those circumstances when it wants to. Any cases to the contrary will be “distinguished”, ignored, or simply *overruled*, when necessary. So, in a sense, these “pro-Speech” decisions can function as facades, providing a smokescreen for the real, everyday work of the Court.

Or, a more powerful argument I could make is that *many of these supposedly “pro-First-Amendment” cases are actually not First Amendment cases at all: and therefore, to the extent that they re-define the First Amendment, they are actually anti-First Amendment cases!*

For example, *Tinker v. Des Moines* and *Cohen v. California*, widely considered to be solidly behind the First Amendment. Super decisions, for the individuals involved. Unfortunately, no Federal question was presented in those cases, so they’re not First Amendment cases.

The bottom line is, it’s not “me” who’s making the Court “look bad”, it’s the Court itself. If my reporting of their conduct makes them “look bad”, then maybe they need to look in the mirror and apply some sorely needed “make-up”.

However, in the spirit of fairness, I will cite every known candidate for a “pro-First-Amendment” case, courtesy of a compilation contained in Ms. Witt’s epic tome. These are cases where the Supreme Court has held Federal laws unconstitutional with reference to the First Amendment. I say “candidates”, because there is more to these cases than meets the eye (but you knew that already, didn’t you?). Anyway, here they are:

POTENTIAL PRO-FIRST AMENDMENT CASES ¹⁵⁴				
Case	Citation	Year	Statute Held Unconstitutional	Subject Matter
<i>Lamont v. Postmaster General</i>	318 U.S. 301	1965	76 Stat. 840, § 305	Post Office allowed to detain "communist political propaganda."
<i>United States v. Robel</i>	389 U.S. 258	1967	64 Stat. 992, § 5	Prohibition of Communist organization members from working in defense plant.
<i>Schact v. United States</i>	398 U.S. 58	1970	70A Stat. 35, § 772(f), 18 U.S.C. § 702	Allowing wearing of U.S. military apparel only in those theatrical productions which do not discredit the armed forces.
<i>Blount v. Rizzi</i>	400 U.S. 410	1971	64 Stat. 451, as amended	Mailing obscene materials.
<i>Tilton v. Richardson</i>	403 U.S. 672	1971	20 U.S.C. § 754	Removal of restriction against religious use of facilities constructed with federal funds.
<i>Chief of Capitol Police v. Jeannette Rankin Brigade</i>	409 U.S. 972	1972	60 Stat. 719, § 7	Prohibition of parades or assemblages on U.S. Capitol grounds
<i>Buckley v. Valeo</i>	424 U.S. 1	1976	Amendments to 18 U.S.C. §§ 608(a),(e), and 2 U.S.C. § 437(c)	Prohibitions against certain private campaign expenditures.
<i>United States v. Grace</i>	461 U.S. 171	1983	40 U.S.C. § 13k	Display of banners, etc. on public sidewalks surrounding Supreme Court building
<i>Bolger v. Youngs Drug Products Corp.</i>	463 U.S. 60	1983	39 U.S.C. § 3001(e)(2)	Mail regarding prophylactics and contraceptives.
<i>FCC v. League of Women Voters</i>	468 U.S. 364	1984	47 U.S.C. § 399	Prohibition against "editorializing" by noncommercial educational stations.
<i>Regan v. Time, Inc.</i>	468 U.S. 641	1984	18 U.S.C. § 504(1)	Exemptions from ban on photographic reproduction of currency "for philatelic, numismatic, educational, historical, or newsworthy purposes."
<i>FCC v. National Conservative Political Action Committee</i>	470 U.S. 480	1985	26 U.S.C. § 9012(f)	Limitation of campaign expenditures.
<i>FEC v. Massachusetts Citizens for Life, Inc.</i>	479 U.S. 238	1986	2 U.S.C. § 441(b)	Manner of financing corporate campaign expenditures.
<i>Boos v. Barry</i>	485 U.S. 312	1988	52 Stat. 30	Prohibition of certain signs within 500 feet of foreign embassies.
<i>Sable Comm. v. FCC</i>	109 S.Ct. 2829	1989	47 U.S.C. § 223(b)	Provision banning indecent as well as obscene commercial interstate telephone messages.
<i>U.S. v. Eichman</i>	496 U.S. 310	1990	18 U.S.C. § 700	Statute criminalizing defacement of flag.

A fairly nice-sized list, but remember, these are only candidates. When you

¹⁵⁴ Compiled from *Guide*, pp. 1001-9.

actually look to these cases, you find that there are problems: for example, in several instances, only portions of these statutes were overruled; e.g., in *United States v. Grace*, the Supreme Court only held unconstitutional the part of statute dealing with *sidewalks* — the other speech regulation provisions were allowed to stand.

Furthermore, you might think that when a law is ruled unconstitutional by the Court, as indicated by Witt's list, that law is stricken from the books. Zzzzzt! — you are wrong, *stare decisis* breath! In *Schact v. United States*, 398 U.S. 58 (1970), the Court supposedly held unconstitutional 18 U.S.C. § 702, which allowed the wearing of U.S. military apparel only in those theatrical productions which do not discredit the armed forces. But guess what? As of 1994, 10 U.S.C. § 772 (f) is *still* the law of the land, and it provides that: “While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.” So even if the Court rules a statute unconstitutional, that doesn't mean the statute was stricken from the books, or, if stricken, that an identical or substantively identical statute didn't take its place. (This is perhaps the *coup de grace* for Court apologists).¹⁵⁵

And in at least one other situation, which we'll get to, Congress repealed the law found unconstitutional, but an unconstitutional *regulation* took its place!¹⁵⁶

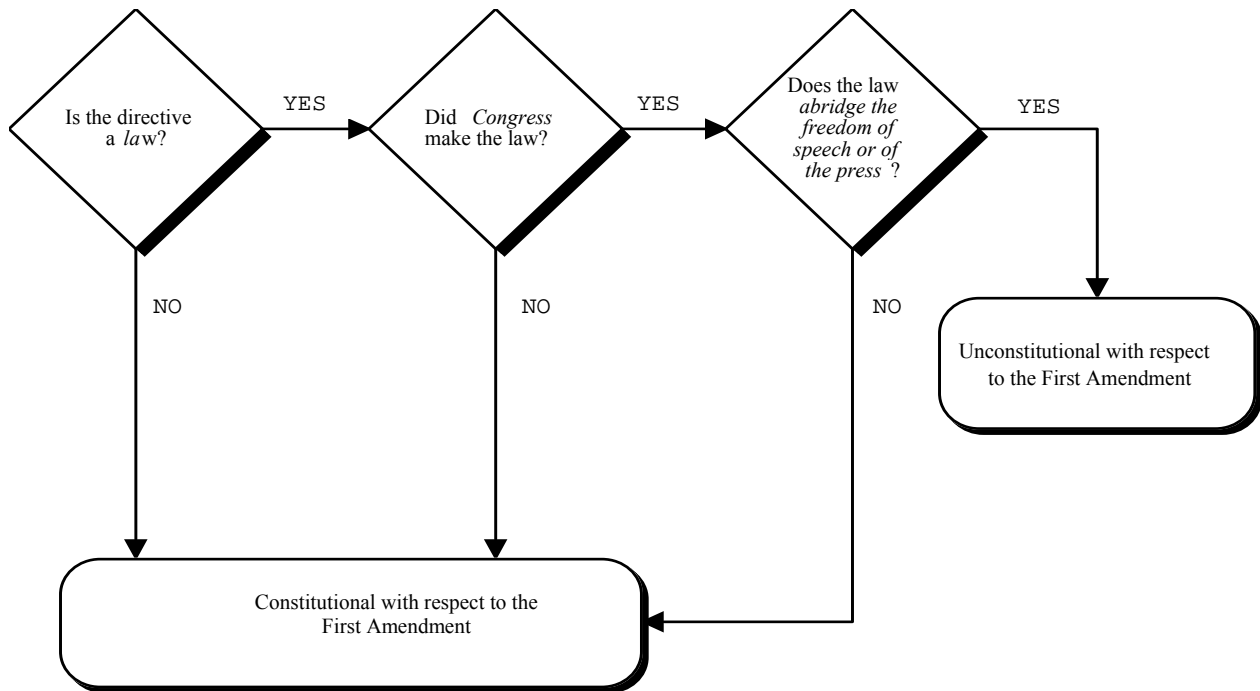
But these cases, even if correctly decided and followed-through, cannot undo the damage created by decades of First Amendment misrepresentation. The 1791 version is history. So what do we have in its place?

The New First Amendment Flow Chart

Hard to say. But recall the true First Amendment flow-chart we originally saw on page 9:

¹⁵⁵ See also *U.S. v. Eichman*, 496 U.S. 310 (1990), and 18 U.S.C. § 700, the same story.

¹⁵⁶ 47 CFR § 73.1920 (c), for the curious.



You'll note that this flow-chart only has 3 nodes. Wouldn't it be convenient if a law school professor took the time to draw the flow-chart for the Supreme Court's revised version? Then we could see the increase in nodes we *know* are there.

Luckily for proof's sake, a law school professor did take on this heroic task. In his 1987 article *Flowcharting the First Amendment*, 72 Cornell Law Review 936, Fred C. Zacharias (an Associate Professor at Cornell Law School) gamely attempted to reduce the Supreme Court's decisions over the years to a one-page flow-chart, reproduced on p. 1011. Naturally, such an attempt was bound to be inaccurate, given the inability to account for every case decided by the Court, and the judges' own waffling: Zacharias noted the Court's "cacophony" and "confusion" (p. 946), "inconsistent theoretical focus" (p. 947), "startling contrast in . . . approaches" (p. 949), and "overall judicial inconsistency" (P. 957). And the following flow-chart you'll see (Zacharias' attempt to impose some linearity on the disorder of the Court) attempts to deal with only *political speech*. Commercial speech, broadcast media, rights of teachers, copyright, etc., aren't even represented here. But hey — you have to start somewhere.

We saw 3 nodes in the 1791 version. And the 1987 version has — how many nodes? You count.

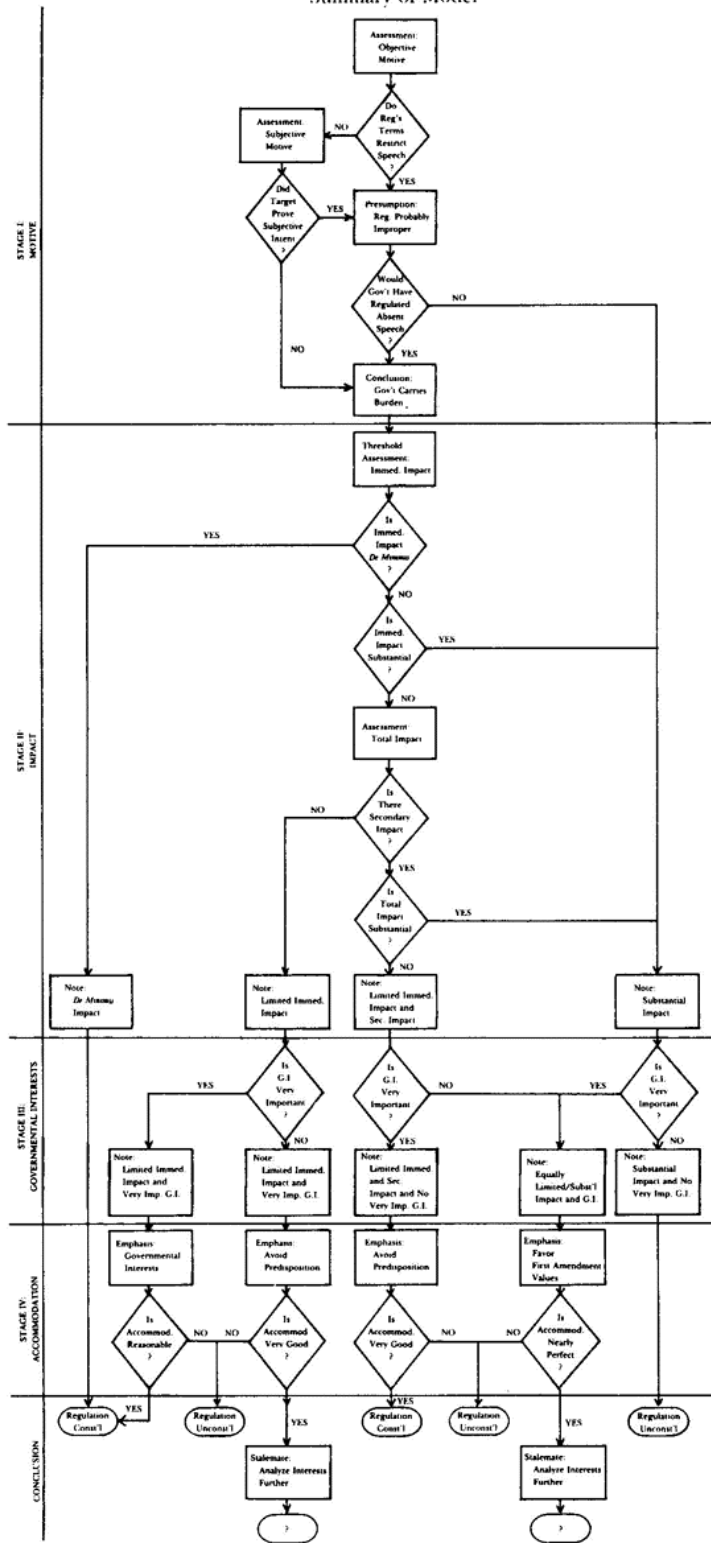
1987]

FIRST AMENDMENT

1011

FIGURE G

Summary of Model



Unconstitutional Federal Laws

Scary, huh? The presence of extra nodes in a flow-chart means that there are more “loopholes” for unconstitutional legislation to slip through. Perhaps that explains the next few pages, which consist of laws passed by Congress that abridge freedom of speech or of the press. They are, perhaps, the ultimate proof that the *real* First Amendment isn’t the one in the Constitution.

Incidentally, as you peruse these laws, you may find yourself in agreement with some of them from a policy standpoint — I know I do. But if the First Amendment is real, then these laws simply cannot exist at the *Federal* level; if they are to exist at all, they must be passed by *State* legislatures. Impractical? Yes. But impracticality is a price the 1791 First Amendment commands we pay.

10 U.S.C. § 772 WHEN WEARING . . . AUTHORIZED

(f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

17 U.S.C. § 108 LIMITATIONS ON EXCLUSIVE RIGHTS

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work . . .

17 U.S.C. § 111 LIMITATIONS ON EXCLUSIVE RIGHTS . . .

(e) *Nonsimultaneous Secondary Transmissions by Cable Systems.* —

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless —

(A) the program on the videotape is transmitted no more than one time to the cable system’s subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to clause (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within forty—five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to clause (2), to the erasure or destruction of all videotapes made or used during such quarter . . .

17 U.S.C. § 601 MANUFACTURE . . . OF CERTAIN COPIES

Prior to July 1, 1982 . . . the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title . . . is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada. [*exceptions and clarifications follow*]

17 U.S.C. § 1002 INCORPORATION OF COPYING CONTROLS

(a) *Prohibition on Importation, Manufacture, and Distribution.* — No person shall import, manufacture, or distribute any digital audio recording device or digital audio interface device that does not conform to —

- (1) the Serial Copy Management System;
- (2) a system that has the same functional characteristics as the Serial Copy Management System and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the Serial Copy Management System; or
- (3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying . . .

18 U.S.C. § 596 POLLING ARMED FORCES

Whoever, within or without the Armed Forces of the United States, polls any member of such forces . . . either before or after he executes any ballot under any Federal or State law, with reference to his choice of or his vote for any candidate, or states, publishes, or releases any result of any purported poll taken from or among the members of the Armed Forces of the United States or including within it the statement of choice for such candidate or of such votes cast by any member of the Armed Forces of the United States, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

18 U.S.C. § 605 DISCLOSURE OF NAMES OF PERSONS ON RELIEF

Whoever, for political purposes, furnishes or discloses any list or names of persons receiving compensation, employment or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager; and

Whoever receives any such list or names for political purposes —

Shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 709 FALSE ADVERTISING OR MISUSE OF NAMES

Whoever, except with the written permission of the Director of the Federal Bureau of Investigation, knowingly uses the words 'Federal Bureau of Investigation' or the initials 'F. B.I.', or any colorable imitation of such words or initials, in connection with any advertisement, circular, book, pamphlet or other publication, play, motion picture, broadcast, telecast, or other production, in a manner reasonably calculated to convey the impression that such advertisement, circular, book, pamphlet or other publication, play, motion picture, broadcast, telecast, or other production, is approved, endorsed, or authorized by the Federal Bureau of Investigation . . . [s]hall be punished as follows: a corporation, partnership, business trust, association, or other business entity, by a fine of not more than \$1,000; an officer or member thereof participating or knowingly acquiescing in such violation or any individual violating this section, by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

18 U.S.C. § 793 GATHERING, TRANSMITTING, OR LOSING DEFENSEINFORMATION

Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 794 GATHERING OR DELIVERING DEFENSE INFORMATION

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates . . . or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country . . . any document, writing, . . . or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

18 U.S.C. § 1302 MAILING LOTTERY TICKETS OR RELATED MATTER

Whoever knowingly . . . delivers by mail . . . [a]ny circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance . . . or [a]ny newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery . . . [s]hall be fined not more than \$1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

18 U.S.C. § 1304 BROADCASTING LOTTERY INFORMATION

Whoever broadcasts by means of any radio station for which a license is required . . . or . . . knowingly permits the broadcasting of, any advertisement of or information concerning any lottery . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

18 U.S.C. § 1381 ENTICING DESERTION . . .

Whoever . . . attempts . . . to entice . . . any person in the Armed Forces of the United States, or who has been recruited for service therein, to desert therefrom . . . [s]hall be fined not more than \$2,000 or imprisoned not more than three years, or both.

18 U.S.C. § 1463 MAILING INDECENT MATTER . . .

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1464 BROADCASTING OBSCENE LANGUAGE

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1696 PRIVATE EXPRESS FOR LETTERS AND PACKETS

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than \$500 or imprisoned not more than six months, or both.

18 U.S.C. § 2386 REGISTRATION OF CERTAIN ORGANIZATIONS

The following organizations shall be required to register with the Attorney General:

Every organization, the purpose or aim of which, or one of the purposes or aims of which, is the establishment, control, conduct, seizure, or overthrow of a government or subdivision thereof by the use of force, violence, military measures, or threats of any one or more of the foregoing.

Every registration statement required to be filed by any organization shall contain the following information and documents . . . [a] copy of each book, pamphlet, leaflet, or other publication or item of written, printed, or graphic matter issued or distributed directly or indirectly by the organization, or by any chapter, branch, or affiliate of the organization, or by any of the members of the organization under its authority or within its knowledge, together with the name of its author or authors and the name and address of the publisher . . .

Whoever violates any of the provisions of this section shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2702 DISCLOSURE OF CONTENTS

(a) *Prohibitions.* — Except as provided in subsection (b) —

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service . . .

18 U.S.C. § 2709 COUNTERINTELLIGENCE ACCESS . . .

(a) *Duty to Provide.* — A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section. . . .

(c) *Prohibition of Certain Disclosure.* — No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.

22 U.S.C. § 614 FILING AND LABELING OF POLITICAL PROPAGANDA

(b) It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda . . .

23 U.S.C. § 131 CONTROL OF OUTDOOR ADVERTISING

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty. . . .

(c) Effective control means that such signs, displays . . . if located within six hundred and sixty feet of the right-of-way . . . located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, or historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term “free coffee” shall include coffee for which a donation may be made, but is not required.

36 U.S.C. § 172 PLEDGE OF ALLEGIANCE TO THE FLAG; MANNER OF DELIVERY

The Pledge of Allegiance to the Flag, “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”, should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

[Historical note: the war with Germany in 1942 (and the familiar salute rendered by the Germans to “Der Fuhrer” during that war) led to the following change from the original text of the statute: on December 22, 1942, the following words were deleted from the instructions about the way to show respect for the flag: “extending the right hand, palm upward, toward the flag and holding this position until the end, when the hand drops to the side”. See 36

U.S.C.S. § 172, pp. 141-2 (1982).]

36 U.S.C. § 176 RESPECT FOR FLAG

No disrespect should be shown to the flag of the United States of America; the flag should not be dipped to any person or thing . . .

(g) The flag should never have placed upon it, nor on any part of it, nor attached to it any mark, insignia, letter, word, figure, design, picture, or drawing of any nature. . . .

(i) The flag should never be used for advertising purposes in any manner whatsoever. It should not be embroidered on such articles as cushions or handkerchiefs and the like, printed or otherwise impressed on paper napkins or boxes or anything that is designed for temporary use and discard. Advertising signs should not be fastened to a staff or halyard from which the flag is flown.

(j) No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations. . . .

(k) The flag, when it is in such condition that it is no longer a fitting emblem for display, **should be destroyed in a dignified way, preferably by burning.**

Contrast this with the following statute:

18 U.S.C. § 700 DESEGRATION OF THE FLAG OF THE UNITED STATES;

PENALTIES

(a) (1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled. . . .

(d) (1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).

(2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

36 U.S.C. § 410 PROPAGANDA ACTIVITIES PROHIBITED

No part of the activities of the corporation shall consist of carrying on propaganda.

40 U.S.C. § 13K PARADES OR ASSEMBLAGES. . .

It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

47 U.S.C. § 227 FAX EQUIPMENT

(a) (2) The term “telephone facsimile machine” means equipment which has the capacity (A) to transcribe text or images; or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from electronic signal received over a regular telephone line onto paper.

(d) (1) *Prohibition.* It shall be unlawful for any person within the United States –

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using

any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) *Telephone facsimile machines.* The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

[This law prohibits anonymous transmission by fax. Supposedly, laws preventing anonymity are unconstitutional. At least, that's what the Court said in *Talley v. State of California*, 362 U.S. 60 (1960). In that incorporated Fourteenth Amendment case, Judge Black stated that:

The question presented here is whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills 'abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution.' The ordinance, § 28.06 of the Municipal Code of the City of Los Angeles, provides:

No person shall distribute any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of the following:

(a) The person who printed, wrote, compiled or manufactured the same.

(b) The person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said hand-bill shall also appear thereon.¹⁵⁷

As Black noted,

There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value'. *Lovell v. City of Griffin*, 303 U.S. at page 452 . . .

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The

¹⁵⁷ *Talley*, pp. 60-1.

obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.¹⁵⁸

It is ironic that a municipality is *prohibited* from abridging speech in this manner, in the *absence* of an express Constitutional prohibition, while Congress is *not prohibited*, in the *presence* of an express Constitutional prohibition.]

47 U.S.C. § 228 REG OF CARRIER OFFERING OF PAY-PER-CALL SERVICES

(a) *Purpose.* It is the purpose of this section—

- (1) to put into effect a system of national regulation and review that will oversee interstate pay-per-call services; and
- (2) to recognize the Commission's authority to prescribe regulations and enforcement procedures and conduct oversight to afford reasonable protection to consumers of pay-per-call services and to assure that violations of Federal law do not occur. . . .

47 U.S.C. § 303A STANDARDS FOR CHILDREN'S TELEVISION PROGRAMMING

(b) *Advertising duration limitations*

Except as provided in subsection (c) of this section, the standards prescribed under subsection (a) of this section shall include the requirement that each commercial television broadcast licensee shall limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays.

47 U.S.C. § 317 ANNOUNCEMENT OF PAYMENT FOR BROADCAST

- (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person . . .
- (2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or

¹⁵⁸ Talley, pp. 64-5 (footnote omitted).

service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

47 U.S.C. § 335 DIRECT BROADCAST SATELLITE SERVICE OBLIGATIONS

(b)(1) *Channel capacity required.* The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature. . . .

47 U.S.C. § 399 Editorializing . . . prohibited

(a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office. . . .

[This law was declared unconstitutional in *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). According to the Court, “§ 399’s broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of government. The regulation impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state, or local government.”¹⁵⁹

In that supposedly pro-First Amendment decision, the Court rejected the First Amendment’s clear directives, and substituted a fake First Amendment exclusion of speech which “take[s] a directly partisan stand”.

In any event, Congress took the Court’s advice, and four years later replaced the statute with the following:

No noncommercial educational broadcasting station may support or oppose any candidate for political office.

(As amended Nov. 7, 1988, P.L. 100-626, § 10, 102 Stat. 3211)

Progress? Perhaps from a policy standpoint, but the new version *still* unconstitutionally abridges the freedom of speech. When it rains, it pours.

Even worse, the F.C.C. regulation reflecting this law was *not* changed. What does this mean? Apparently, it means that there are two sets of laws of the books. Instead of one law regulating speech, now we have two. Not only is “editorializing” still prohibited, but so is support or opposition of political candidates.

47 U.S.C. § 605 UNAUTHORIZED PUBLICATION . . .

Except as authorized by chapter 119, title 18, United States Code [18 U.S.C. §§ 2510 *et seq.*] . . . No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public . . .

¹⁵⁹ *FCC*, p. 395.

47 U.S.C. § 606 WAR POWERS OF PRESIDENT

(c) *Suspension or amendment of rules and regulations applicable to certain emission stations or devices.* Upon proclamation by the President that there exists . . . a state of public peril [note: no war required, contrary to the title of this statute -- BK] or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and/or its apparatus and equipment, by any department of the Government . . .

Unconstitutional Federal Regulations

Well, that was an enjoyable survey of Federal legislation. Of course, the previous list is not exhaustive. Interested readers are urged to go to the library and take a look at the United States Code themselves.

Now we move to a different set of “laws”, called “regulations”.

These “laws” have two strikes against them (if only two strikes made an out!). They’re not only opposed to the First Amendment (if passed by Congress), but also to Article I, Section I. According to that section,

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Regulations, alas, are not created by Congress, but by administrative bodies such as the FCC and IRS. Illegal, of course. Remember, in *Perry*, the Court saw legislative action as “the unilateral promulgation of a rule with continuing legal effect.”¹⁶⁰ The long and short of it is that Congress has, for many years, unconstitutionally delegated its legislative power to unauthorized branches.¹⁶¹

Strictly speaking then, the following regulations are not “laws”, but just words on a page. However you want to characterize them, they’re real — and they’re doubly unconstitutional.

30 C.F.R § 2.7 IDENTIFICATION AND MARKINGS

The information security system requires that standard markings be applied to classified information. Except in extraordinary circumstances as provided in section 1.5(a) of the Order, or as indicated herein, the marking of paper and electronically created documents shall not deviate from the following prescribed formats. These markings shall also be affixed to material other than paper and electronically created documents, including file folders, film, tape, etc., or the originator shall provide holders or recipients of the information with written instructions for protecting the information.

(b) Unless the portion marking requirement has been waived as authorized, each portion of a document, including subjects and titles, shall be marked by placing a parenthetical designation either immediately preceding or following the text to which it applies. The symbols, ‘(TS)’ for Top Secret, ‘(S)’ for Secret, ‘(C)’ for Confidential, and ‘(U)’ for Unclassified shall be used for this purpose . . .

47 CFR § 73.1225 STATION INSPECTIONS BY FCC

(a) The licensee of a broadcast station shall make the station available for inspection by representatives of the

¹⁶⁰ *Perry*, pp. 42-3.

¹⁶¹ For more on this concept of delegation, see my chapter in this topic in *Why We Need A New Constitution*, extracted from my book *The 21st Century Constitution*, available through the Online Book Initiative.

FCC during the station's business hours, or at any time it is in operation. . . .

(c) The following records shall be made available by all broadcast stations upon request by representatives of the FCC. . . .

(5) Station logs

47 CFR § 73.1226 AVAILABILITY TO FCC OF STATION LOGS AND RECORDS

The following shall be made available to any authorized representative of the FCC upon request:

(a) Station records and logs shall be made available for inspection or duplication at the request of the FCC or its representative. Such logs or records may be removed from the licensee's possession by an FCC representative or, upon request, shall be mailed by the licensee to the FCC by either registered mail, return receipt requested, or certified mail, return receipt requested.

47 CFR § 73.1212 SPONSORSHIP IDENTIFICATION . . . RELATED

REQUIREMENTS

(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

(1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and

(2) By whom or on whose behalf such consideration was supplied. . .

(ii) In the case of any television political advertisement concerning candidatus for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.

(d) In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such station in connection with the transmission of such broadcast matter . . .

47 CFR § 73.1210 TV/FM DUAL-LANGUAGE BROADCASTING IN PUERTO RICO

(b) Television broadcast licensees in Puerto Rico may enter into dual-language time purchase agreements with FM broadcast licensees, subject to the following conditions:

(1) All such agreements shall be reduced to writing and retained by the licensee for possible Commission inspection . . .

(2) All such agreements shall specify that the FM licensee will monitor sound track material with a view to rejecting any material deemed to be inappropriate or objectionable for broadcast exposure.

(3) No television or FM broadcast station may devote more than 15 hours per week to dual-language broadcasting, nor may more than three (3) hours of such programming be presented on any given day.

47 CFR § 73.1920 PERSONAL ATTACKS

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the persons or group attacked:

- (1) Notification of the date, time and identification of the broadcast;
 - (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
 - (3) An offer of a reasonable opportunity to respond over the licensee's facilities.
- (b) The provisions of paragraph (a) of this section shall not apply to broadcast material which falls within one or more of the following categories:

- (1) Personal attacks on foreign groups or foreign public figures;
- (2) Personal attacks occurring during uses by legally qualified candidates,
- (3) Personal attacks made during broadcasts not included in paragraph (b) (2) of this section and made by legally qualified candidates, their authorized spokespersons, or those associated with them In the campaign, on other such candidates, their authorized spokespersons or persons associated with the candidates in the campaign; and
- (4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs.

(c) **The provisions of paragraph (a) of this section shall be applicable to editorials of the licensee, except in the case of noncommercial educational stations since they are precluded from editorializing (section 399 (a), Communications Act).**

An interesting sidenote here: In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court held 47 U.S.C. § 399 unconstitutional. That law mandated a prohibition against “editorializing” by noncommercial educational stations. So how come this FCC regulation is still on the books?

47 CFR § 73.1930 POLITICAL EDITORIALS

- (a) Where a licensee, in an editorial,
- (1) Endorses or,
 - (2) Opposes a legally qualified candidate or candidates, the licensee shall, with 24 hours after the editorial, transmit to, respectively,
 - (i) The other qualified candidate or candidates for the same office or,
 - (ii) The candidate opposed in the editorial,
- (A) Notification of the date and the time of the editorial,
- (B) A script or tape of the editorial and
- (C) An offer of reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities. Where such editorials are broadcast on the day of the election or within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

47 CFR § 73.1745 UNAUTHORIZED OPERATION

- (a) No broadcast station shall operate at times, or with modes or power, other than those specified and made a part of the license, unless otherwise provided in this part.
- (b) Any unauthorized departure from an operating schedule which is required to be filed with the FCC in Washington, D.C. will be considered as a violation of a material term of the licensee.

47 CFR 73.1800 GENERAL REQUIREMENTS RELATED TO THE STATION LOG

- (a) The licensee of each station must maintain a station log as required by § 73.1820. This log shall be kept by station employees competent to do so, having actual knowledge of the facts required. All entries, whether required or not by the provisions of this part, must accurately reflect the station operation. Any employee making a log entry shall sign the log, thereby attesting to the fact that the entry, or any correction or addition made thereto, is an accurate representation of what transpired.
- (b) The logs shall be kept in an orderly and legible manner, in suitable form and in such detail that the data required for the particular class of station concerned are readily available. Key letters or abbreviations may be used if the proper meaning or explanation is contained elsewhere in the log. Each sheet must be numbered and dated. . . .
- (c) Any necessary corrections of a manually kept log after it has been signed in accordance with paragraph (a) of this section shall be made only by striking out the erroneous portion and making a corrective explanation on the log or attachment to it. Such corrections shall be dated and signed by the person who kept the log or the station chief operator, the station manager or an officer of the licensee.
- (d) No automatically kept log shall be altered in any way after entries have been recorded. When automatic logging processes fail or malfunction, the log must be kept manually for that period and in accordance with the requirements of this section.
- (e) No log, or portion thereof, shall be erased, obliterated or willfully destroyed during the period in which it is required to be retained. . . .

47 CFR § 95.403 AM I ELIGIBLE TO OPERATE A CB STATION?

You are authorized to operate a CB station unless:

- (a) You are a foreign government, a representative of a foreign government, or a federal government agency; or
- (b) The FCC has issued a cease and desist order to you, and the order is still in effect.

47 CFR § 95.412 WHAT COMMUNICATIONS MAY BE TRANSMITTED?

- (a) You may use your CB station to transmit two-way plain language communications. Two-way plain language communications are communications without codes or coded messages. Operating signals such as “ten codes” are not considered codes or coded messages. You may transmit two-way plain language communications only to other CB stations, to units of your own CB station or to authorized government stations on CB frequencies about –
- (1) Your personal or business activities or those of members of your immediate family living in your household;
 - (2) Emergencies (see CB Rule 18, § 95.418);
 - (3) Traveler assistance (see CB Rule 18, §95.418); or
 - (4) Civil defense activities in connection with official tests or drills conducted by, or actual emergencies announced by, the civil defense agency with authority over the area in which your station is located.
- (b) You may use your CB station to transmit a tone signal only when the signal is used to make contact or to continue communications. (Examples of circuits using these signals are tone operated squelch and selective calling circuits.) If the signal is an audible tone, it must last no longer than 15 seconds at one time. If the signal is a subaudible tone, it may be transmitted continuously only as long as you are talking.
- (c) You may use your CB station to transmit one-way communications (messages which are not intended to establish communications between two or more particular CB stations) only for emergency communications, traveler assistance, brief tests (radio checks) or voice paging.

47 CFR § 95.413 WHAT COMMUNICATIONS ARE PROHIBITED?

- (a) You must not use a CB station –
 - (1) In connection with any activity which is against federal, state or local law; . . .
 - (5) To advertise or solicit the sale of any goods or services; . . .
 - (9) To communicate with, or attempt to communicate with, any CB station more than 250 kilometers (155.3 miles) away;
 - (10) To advertise a political candidate or political campaign; (you may use your CB radio for the business or organizational aspects of a campaign, if you follow all other applicable rules);
 - (11) To communicate with stations in other countries, except General Radio Service stations in Canada; . . .
- (b) You must not use a CB station to transmit communications for live or delayed rebroadcast on a radio or television broadcast station. You may use your CB station to gather news items or to prepare programs.

47 CFR § 95.416 DO I HAVE TO LIMIT THE LENGTH OF MY COMMUNICATIONS?

- (a) You must limit your CB communications to the minimum practical time.
- (b) If you are communicating with another CB station or stations, you, and the stations communicating with you, must limit each of your conversations to no more than five continuous minutes.
- (c) At the end of your conversation, you, and the stations communicating with you, must not transmit again for at least one minute.

47 CFR § 95.419 MAY I OPERATE MY CB STATION BY REMOTE CONTROL?

- (a) You may not operate a CB station transmitter by radio remote control.
- (b) You may operate a CB transmitter by wireline remote control if you obtain specific approval in writing from the FCC. To obtain FCC approval, you must show why you need to operate your station by wireline remote control. Send your request and Justification to FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. If you receive FCC approval, you must keep the approval as part of your station records. (See CB Rule 27, §95.427.)

47 CFR § 95.421 WHAT ARE THE PENALTIES FOR VIOLATING THESE RULES?

- (a) If the FCC finds that you have willfully or repeatedly violated the Communications Act or the FCC Rules, you may have to pay as much as \$10,000 for each violation, up to a total of \$75,000. (See section 503(b) of the Communications Act.)

47 CFR § 95.422 HOW DO I ANSWER CORRESPONDENCE FROM THE FCC?

- (a) If it appears to the FCC that you have violated the Communications Act or these rules, the FCC may send you a discrepancy notice.
- (b) Within the time Period stated in the notice, you must answer with:
 - (1) A complete written statement about the apparent discrepancy;
 - (2) A complete written statement about any action you have taken to correct the apparent violation and to prevent it from happening again; and
 - (3) The name of the person operating at the time of the apparent violation.
- (c) If the FCC sends you a letter asking you questions about your CB radio station or its operation, you must answer each of the questions with a complete written statement within the time period stated in the letter.
- (d) You must not shorten your answer by references to other communications or notices.
- (e) You must send your answer to the FCC office which sent you the notice.
- (f) You must keep a copy of your answer in your station records. (See CB Rule 27, §95.427.)

47 CFR § 97.5 STATION LICENSE REQUIRED.

(a) When a station is transmitting on any amateur service frequency . . . the person having physical control of the apparatus must hold an FCC-issued written authorization for an amateur station.

47 CFR § 97.113 PROHIBITED TRANSMISSIONS.

(a) No amateur station shall transmit:

(1) Communications specifically prohibited elsewhere in this part;

(2) Communications for hire or for material compensation, direct or indirect, paid or promised, except as otherwise provided in these rules; . . .

(4) . . . messages in codes or ciphers intended to obscure the meaning thereof, except as otherwise provided herein . . .

(5) Communications, on a regular basis, which could reasonably be furnished alternatively through other radio services.

(b) An amateur station shall not engage in any form of broadcasting, nor may an amateur station transmit one-way communications except as specifically provided in these rules; nor shall an amateur station engage in any activity related to program production or news gathering for broadcasting purposes, except that communications directly related to the immediate safety of human life or the protection of property may be provided by amateur stations to broadcasters for dissemination to the public where no other means of communication is reasonably available before or at the time of the event.

The First Amendment vs. Federal Copyright Law

His mind slid away into the labyrinthine world of doublethink . . . to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing both of them . . .¹⁶²

— George Orwell, *1984*

The reconciliation of the irreconcilable . . . the synthesis of opposites, these are the great problems of law.¹⁶³

— Benjamin Cardozo

The Congress shall have Power to . . . [secure] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .

— U.S. Const, Art. I, Sec. 8, Cl. 8

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

— U.S. Const, First Amendment

It ought to be apparent now that the First Amendment we imagined existed is only a dim memory, an historical blip. Before we go to Thomas Ladanyi's updated version of the real First Amendment, there is one final issue we must explore. Students of the Constitution may, at this point, be hip to an interesting implication that flows from an accurate understanding of the 1791 First Amendment. We'll begin by illustrating with an hypothetical:

The New York Times publishes an article attacking an animal-rights group, employing in the process all the tools that are standard issue in the media disinformation toolbox: *unreasonable omission, distortion, guilt by association, innuendo, unreasonable cropping, irrelevant spotlighting, mind-reading,* and outright *lying*, just to name a few of this less-than motley crew. The article is filled with loaded terms like “radical”, “dangerous”, “anarchy”, “militant”, and so forth, terms which operate to create a conceptual climate that does not properly represent the views of the group in question.

¹⁶² *1984*, p. 32.

¹⁶³ Benjamin N. Cardozo, *The Paradoxes of Legal Science* (1927). (Quoted in *Nimmer on Freedom of Speech*, §2.05[c], 2-55).

X, a member of this group, feels that this article is heavily biased. X publishes an analysis of this article in a competing publication, *Mediawatch*, quoting from the article verbatim, which he must do to show how the slanted and distorted *language* of the article — its *form*, not just its *content* — contributed to the overall bias picture. Merely rephrasing the article is not an option for X, because *the bias is in the choice of phrasing itself*.

The New York Times, in response, sues in Federal Court to get an injunction against distribution of *Mediawatch* on the newsstands and to its subscribers, on Federal statutory grounds. The Court grants the injunction, and all copies of *Mediawatch* are locked away in a warehouse. The author's message is never sent.¹⁶⁴

Now, the \$64,000 question: has X's right to publish his materials via the press been abridged by a Federal copyright statute? The answer is yes — and therefore, those Federal statutes (found in Titles 17 and 18 of the United States Code)¹⁶⁵ — are *unconstitutional*. If *The New York Times* wants to sue *Mediawatch*, it is going to have to do it on grounds of State copyright law, not Federal.

In case you think this is “stretching things”, you might want to hear what Professor Nimmer, a highly-respected First Amendment scholar whose writings are regularly quoted in Federal (and Supreme) Court cases, has to say on this issue. In his book *Nimmer on Freedom of Speech*, Nimmer begins by observing the contradiction between the two clauses of the Constitution, how they are opposed, and how people can be blinded from seeing this antagonism by putting their beliefs in separate, “logic-tight” compartments:

¹⁶⁴ Other hypotheticals reveal the speech-abridging nature of copyright: a) Can Jim copyright a three-word text string, and prevent any other person from using that string in his manuscript? b) Can *Time-Life*, which holds the copyright to the Zapruder film, prevent CNN from airing it in a documentary on the JFK assassination? c) Can a publisher buy all existing copies of a book, burn them, declare the book out of print, and prevent anyone else from publishing them? d) Can a criminal copyright his financial records and prevent the Government from entering those records into evidence at his trial?

And there's another issue. Assume that there are 200,000,000 Americans. With Federal government banning of publication Z, 0 people are allowed to publish Z, a clear unconstitutional abridgment. Under Federal copyright law, 1 person is allowed to publish Z, and 199,999,999 are banned from publishing Z! The difference between Federal sanctioning of copyright and outright banning is less than .00005 percent. Moreover, that one person can function as a “private censor” (with government permission), and prevent the other 199,999,999 from reading the book by putting it “out of print”, creating a 100% prohibition on speech with reference to that book.

¹⁶⁵ You can find these statutes on the Web at <http://www.law.cornell.edu/uscode/>. An excellent resource, with the full United States Code.

Nowhere is this phenomenon better illustrated than in the ‘logic-tight compartments’ of those devoted to copyright who maintain, on the one hand, their attitude toward copyright, and on the other, their views on freedom of expression under the First Amendment. Not only is there generally a failure to relate the one to the other, but there is, moreover, a failure to perceive that views of copyright and the First Amendment, held ‘side by side’, may, in fact, be contradictory.¹⁶⁶

Well, there’s a slight problem here. Not “may” — *are*. Nimmer notes the contradiction between the two clauses of the Constitution, and how they are opposed. In 1787 Article I, Section VIII, Clause VIII of the Constitution gave authors (against the rights of other citizens) exclusive rights to publish, but in 1791 the First Amendment *obliterated* this clause:

[M]ost people who oppose censorship, including those concerned with copyright, base that opposition not merely on the narrow economic ground that a creator and his assigns should be able to exploit the creator’s works, but also, and more fundamentally, on **First Amendment principles of freedom of expression**. It is not just the artist’s right freely to express himself that is regarded as important. Freedom of speech for all men, whether or not they can qualify as artistic creators, is the basic principle that underlies the opposition to governmental censorship.¹⁶⁷

Whoops, *another* error slipped in here! It is not “First Amendment principles of freedom of expression” on which the unconstitutionality of Federal copyright law is based; rather, it is the express *language* of the First Amendment (and *not simply the principles* underlying the language) which fails to restrict speech and publication protection merely to the *originators* — author and/or publisher — of the speech. “Pass-along” speech is also covered under the First Amendment. Once Jim says, “let’s have a party!”, Bill can say, “Jim said ‘Let’s have a party!’”, and Congress has no power to stop Bill from passing along this information, nor any power to prohibit Bill from *also* saying “let’s have a party!” because Jim happened to utter it first.

Unfortunately, Nimmer implicitly rejects the idea that the text of the Constitution is the only legitimate basis for constitutional interpretation. But, to his credit, Nimmer keys in on a significant and formerly-unseen problem:

It is here, it may be suggested, there lies a largely ignored paradox, requiring

¹⁶⁶ Nimmer, § 205 [C], 2-55-6 (subsequent quotations from Nimmer are from § 205 [C]).

¹⁶⁷ Nimmer, 2-56 (italic emphasis supplied).

exploration. The First Amendment tells us that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press’. Does not the Copyright Act fly directly in the face of that command? Is it not precisely a ‘law’ made by Congress which abridges the ‘freedom of speech’ and ‘of the press’ in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright?¹⁶⁸

Bingo! Now Nimmer hits the issue squarely on the head. If I want to give Joe a photocopy of the book *Finnegans Wake*, even though its eminent author (James Joyce) has been dead over fifty years, and even though its eminent author would be flattered and gratified that one more person was reading what he had spent seventeen years writing, I could be fined under existing Federal copyright law. That not only abridges *my* freedom of speech, but also abridges *Joyce’s* speech by limiting Joyce’s power to transmit information beyond the grave via a “pass-along” medium (photocopy) for a period of years. The reader will note that the First Amendment makes no distinction between “legitimate” and “illegitimate” speech with reference to property rights:

But surely, many will conclude, the First Amendment does not apply to copyright infringers. Yet, is such a conclusion justified? The language of the First Amendment does not limit its protection to speech which is original with the speaker. It provides rather that Congress shall make ‘no law’ abridging freedom of speech; and Justice Black used to say that this reference to ‘no law’ means no law “without any ‘ifs’ or ‘buts’ or ‘whereases.’” If one adopts Justice Black’s absolutist approach to the First Amendment it is difficult to see how any copyright law can be regarded as constitutional.¹⁶⁹

Unfortunately, Nimmer once again peppers his generally sound legal reasoning with spurious, mythological premises. For starters, the suppressed premise that the pronouncement of a judge can *define* reality (and not simply describe it). Why should we care (other than for reality-checking purposes) whether Judge Black (or any other judge) believes that “no” means “no” or that “2” means “2?” The meaning of the word “no” is not an issue that is “on the table” — the meaning of the word “no” is not an issue on which “reasonable men (or women) may disagree”. It is not Judge Black’s *opinion* of what the word “no” means that gives it its content; rather, it is the term itself.

¹⁶⁸ Nimmer, 2-56.

¹⁶⁹ Nimmer, 2-56-7, quoting Cahn, “Justice Black and First Amendment ‘Absolutes’: A Public Interview,” 37 N.Y.U.L. Rev., 549, 553, 559 (1962). See also *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J, dissenting).

To accept the notion that the *opinion* of a Supreme Court judge (or anyone else) is dispositive on so unambiguous an issue as the meaning of the word “no” is to invite terminological disaster, since it implicitly endorses the idea that a contrary opinion may be legitimate; namely, that “no” does not mean “no”, and that “2” does not mean “2”! However, whatever power a Supreme Court judge has, we may be sure that it is *not* the power to say that the word “no” means something other than “no”. To reject this “view” is to flatly reject the Constitution, and, it may be added, to flatly reject the idea of *language itself*.

And there is yet another spurious, mythological premise operating in the background here; namely, that if you believe that “2 = 2” you have “adopted” an “absolutist” “approach”. The fallacy embedded here is that the meaning of the term “2” is purely a function of the “approach” used to “interpret” it; however, it is not the *approach* which is “absolute”, but the *term*. What other “approach” is possible that would turn the meaning of the number “2” to “3”, or the meaning of the word “no” to “some” or “all”? To accept any other “approach” is to kill the First Amendment and to introduce new, mythological text.

Nimmer leaves this issue to highlight, correctly, the nature of the First Amendment; namely, that it is an *amendment* — it *changes* the text of the Constitution:

[I]f a **completely literal** reading of the First Amendment is to be made, then we must likewise recognize that the First Amendment is an amendment, hence superseding anything inconsistent with it which may be found in the main body of the Constitution. This, of course, includes the Copyright Clause. . . . As illuminated in *Reid v. Covert* (per Justice Black, incidentally): ‘The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution’. Any other conclusion would, of course, render the First Amendment, as well as the remainder of the Bill of Rights, meaningless.¹⁷⁰

Well said, though, alas, Nimmer once again has to throw in the red-herring of the mildly pejorative phrase “completely literal”. Are we being “completely literal” when we state that the First Amendment is an “Amendment”, and that it is the “First” Amendment? Yes, but we wouldn’t use that language: rather, we’d say we’re being *accurate*. Nimmer then focuses on the obvious consequence that flows from a correct analysis of the Constitution:

¹⁷⁰ Nimmer, 2-57-8 (italic emphasis supplied).

Doesn't the First Amendment obliterate the Copyright Clause and any laws passed pursuant thereto? This returns us to Justice Black's absolutist approach. [Irrelevant -- BK] It cannot be denied that the copyright laws do in some degree abridge freedom of speech, and if the First Amendment were literally construed, copyright would be unconstitutional.¹⁷¹

Overall, a very sound paragraph, with one (stricken) irrelevancy and a whopping bug: it is not “copyright”, which would be unconstitutional under the First Amendment, but “Federal” copyright! State copyright is perfectly permissible under the First Amendment, and so a necessary protection for intellectual property rights is present at the State level, provided that we adopt the “strict construction” interpretation of the Fourteenth Amendment the Court applied in *The Slaughterhouse Cases* in the previous century (and reject the *Gitlow* and *Near* contrary interpretations in this century) to allow this intellectual property regulation to go forward. Considering the policy implications of failing to adopt strict construction of the Fourteenth Amendment (and thus failing to have *any* protection for intellectual property, Federal *or* State), this adoption is a virtual necessity, mandated by the absolute language of the First and Tenth Amendments.

As Nimmer essentially points out, the only way to allow Federal copyright law to stand is to construe the First Amendment “non-literally”; that is, to either *ignore* the words, or, more specifically, to *interpret them in a sense contrary to that to which they refer*. Once again, Nimmer’s use of the term “literally construed” implies that there is some other way of construing the terms “Congress” and “no” other than “literal” (i.e., what they mean). Instantiating Nimmer’s use of the phrase “literally construed”, and fixing the bug in his formulation of the issue, we can see the final phrase of his last sentence as this:

If the word ‘no’ means ‘no’, Federal copyright law would be unconstitutional.

Well, there you have it then. Since “no” means “no”, Federal copyright law is unconstitutional!

Of course, there’s a small problem here: this would not be “realistic”; after all, what would *The New York Times*, *The Washington Post*, *Random House*, and *ABC News* have to say if the Supreme Court told them Federal protection of their exclusive “rights” had been nullified by the First Amendment they are constantly defending in court? That would be absurd! Therefore, “no” *cannot* mean “no”, and so we *cannot* “literally construe” the First Amendment. Presto chango!

¹⁷¹ *Nimmer*, 2-58 (emphasis supplied).

But if we reject the idea that “no = no”, what is the alternative? *Metaphorical* interpretation? *Ad hoc* balancing? *Definitional* balancing? Interpretation by Ouija board? You be the judge!

But for reasons advanced elsewhere in this treatise, such an absolutist approach must be rejected. Instead of either an absolutist approach, or one based upon ad hoc balancing, it has been suggested that definitional balancing is to be preferred. If the definitional balancing approach is to be applied in the copyright sphere, **it is necessary to draw a line** between that speech which may be prohibited under the copyright law, and that speech which, despite its copyright status, may not be abridged under the command of the First Amendment.¹⁷²

Alas, while it may be “necessary to draw a line”, the First Amendment does not permit any such necessary “line-drawing”. And unfortunately for the Supreme Court judges and necessity, the judges violate their oath of office when they ignore the text of the Constitution.

As you might have guessed, this is not just an abstract issue suitable only for legal scholars. The issue actually came before the Court. In that case, *Smith v. California*, the attorneys for the State of California hit the nail almost on the head:

There appears to be only one case in which the issue was placed before the United States Supreme Court. In that case, *Smith v. California*, 375 U.S. 259 (1963), the defendant had been convicted under the state obscenity statute for selling the book *Tropic of Cancer*. In its brief before the U.S. Supreme Court the State of California argued that copyright and the right of free speech were fundamentally inconsistent, and that ‘[c]onsequently, *either all copyright law is invalid as an unconstitutional impingement on the rights of Free Speech and Press of those whose rights to publish and disseminate the copyrighted material are purportedly restricted by the copyright, or else any material that is copyrighted is thereby removed from the realm of Free Speech*’. Brief of Respondent at 8, *Smith v. California*, 375 U.S. 259 (1963). The State argued for the latter alternative, claiming that one who obtained a copyright for his work thereby elected to waive the application of the First Amendment to his work.¹⁷³

¹⁷² *Nimmer*, 2-58 -9.

¹⁷³ *Nimmer*, 2-59 (emphasis supplied): “Justice Douglas, in dissenting from the Supreme Court’s denial of certiorari in *Lee v. Runge*, 404 U.S. 887, 92 S. Ct. 197 (1971), observed: ‘Serious First Amendment questions would be raised if Congress’ power over copyrights were construed to include the power to grant monopolies over certain ideas.’” See also *Nimmer*, 2-63: ‘The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatise and thus obtain a monopoly on the ideas contained. We should not construe the copyright laws to conflict so

Once again, we must pull out the bug detector. It is not “all” copyright law which is invalid, only “Federal” copyright law. Still, the attorneys for the State of California perceptively noted the main issue, that publishers want to have their cake and eat it too. On the one hand, they want to claim that their copyrighted works *are* “speech” and therefore protected under the First Amendment; on the other, they want to simultaneously claim that their copyrighted works *are not* “speech”, since the First Amendment does not allow speech abridgments such as copyright.

But if their copyrighted works are *not* speech, then they can’t have First Amendment protection. And if they *are* speech, the First Amendment obliterates the legitimacy of the Federal law which is supposed to protect them.

Quod Erat Demonstrandum.

The Real First Amendment?

Well, we've finally come to the logical conclusion of the preceding; namely, that the text of the 1791 First Amendment has been superseded by an imposter. Thanks to Thomas Ladanyi, we can finally meet this imposter face-to-face. When people say, "The First Amendment protects us," it is proper to ask, "which First Amendment are you talking about?" In case they don't know what *you're* talking about, you might want to show them the new kid on the block.

THE REAL FIRST AMENDMENT?

*Original text proposed in the House of Representatives
by James Madison on June 8, 1789*

Modified by the United States Senate and Conference Committee in September, 1789

Passed by Congress on September 25, 1789

Ratified by 3/4 of the States on December 15, 1791

Modified by the United States Supreme Court, 1790-1987

*(as Extracted, Transcribed and Edited by Thomas Ladanyi¹⁷⁴ in 1987,
on occasion of the Bicentennial of the Constitution)*

No State legislature or the Congress of the United States shall make ~~no~~ any law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of ~~the press~~ all media of information¹⁷⁵; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. This general prohibition shall be subject to the following elaborations, extensions, restrictions, limitations, interpretations and conditions:

¹⁷⁴ The following text is contained in the book *The 1987 Constitution* by Thomas Ladanyi, published by Tribonian Press, now out of print. In that book, Ladanyi attempted to distill the decisions of the Supreme Court that operated to modify the Constitution into a coherent form. I have made minor corrections of spelling, punctuation, and emphasis to Ladanyi's version of the new First Amendment. This text © 1987 by Thomas A. Ladanyi.

¹⁷⁵ This broad interpretation has been widely accepted, and is more permissible, given that the term may be legitimately construed in a broad sense.

With respect to:

1. An establishment of religion:

- a. Generally, all legislation and executive action shall have a secular purpose and primary effect that does not advance, inhibit or cause excessive government entanglement with religion;
- b. Religious oaths for public office or employment shall not be administered, nor any religious qualifications required therefor;
- c. Traditional prayers in public bodies, such as legislative chambers, not amounting to religious endorsement or indoctrination, shall be tolerated;
- d. Public displays, official symbols and expressions and proclamations recognizing the historical origins, practices and observations of religions as part of the Nation's heritage, promoting religion merely in an indirect, remote and incidental manner, shall be allowed;
- e. Laws that coincide with religious doctrine or laws passed without undue religious influence, or excessive involvement, shall be valid;
- f. Sunday closing laws shall be recognized as having acquired a primarily secular purpose;
- g. Public fora and facilities for the exchange of ideas, available for public use, shall not be restricted to the propagation of either religious or secular views;
- h. The traditional grant of tax exemption to religious property shall be upheld;
- i. Parochial schools at the elementary and secondary levels engaging in substantial religious indoctrination shall not be granted direct governmental assistance in any form, or indirect assistance through grants to students, except where its purpose is clearly secular, separate, and easily segregable from any religious purpose, and the administration of which involves minimal governmental entanglement, or where assistance is provided under the general police power of a State extended to all persons and institutions. But universities and other post-secondary church-related educational institutions may be granted government benefits or assistance towards the construction of segregated facilities unreservedly guaranteed to be used for secular educational purposes only;
- j. Direct aid to primary and secondary level parochial school students not provided on the premises of their schools, except public health services which may be given therein, clearly aimed at improving secular education available to all students, including those attending public schools; and income tax deductions for tuition and other educational expenses available to all taxpayers, shall be permitted;

- k. Public school facilities shall not be utilized for any overtly or covertly religious or religion-inspired purpose, except that teaching about religion in a historical context in an academically objective manner shall not be proscribed; and school policies and practices shall accommodate, off-premises, the free exercise of religion, by individual students or groups thereof; and
- l. Persons directly affected by any claimed breaches of this section shall have standing to complain and request judicial remedies in any State or Federal court having the required jurisdiction.

2. The free exercise of religion:

- a. The freedom to hold or reject, without any coercion, religious beliefs shall be absolute, and the free expression of such beliefs or rejections, and the free exercise of religious practices, shall only be curtailed to the extent that they contravene the free speech restrictions imposed in this article, and other proscribed conduct pursuant to legislation enacted for the protection of basic secular societal, or important or compelling governmental interests, not unduly burdening religion, and not in disharmony with this Constitution. Religious beliefs protected hereunder need not be founded on the claimed existence of God, but must reach beyond mere ideological convictions and political, economic, sociological and other doctrines, however strongly held, based on allegedly rational or scientifically demonstrable considerations;
- b. In any judicial proceeding where religious beliefs or practices are in issue, their veracity, logic or comprehensibility shall not be questioned, but the sincerity of a person's belief therein may be decided as a question of fact; and judicial review of intra-church non-secular, doctrinal or other disputes, resolved internally within a church, in good faith, shall not be available; but in cases concerning questions of property law, wherein the final determination depends on secular principles of such law, civil action in Federal and State courts may properly be resorted to;
- c. Compulsory formal education of all minor children in schools recognized by a State shall not override reasonable *free exercise of religion* based challenges offering acceptable alternative modes of education;
- d. The exclusive recognition of monogamous marriages by a State shall constitute a proper exercise of its police power, defeating any objections raised under this section;
- e. The uniform enforcement of tax laws, including the collection of income taxes on salaries of clergymen, shall not be subject to exemptions due to claims of interference with the free exercise of religion, except where a required religious activity would unreasonably be brought under some general taxing provision, but non-public schools practicing or propagating racial discrimination, even as a matter

of sincere religious belief, may be denied all benefits otherwise due under any tax laws;

- f. Mere financial loss suffered by adherents of non-Sunday-observing religions shall not be sustained as a discriminatory burden on the free exercise of religion; insubstantial economic loss incurred by a State shall not be sufficient to cause any infringement, however slight, concerning the religious observance of days other than Sundays;
- g. Members of the clergy shall not be deprived of their normal rights of citizenship, such as standing for elective office or being appointed to any other public post;
- h. Objectors to military service on religious grounds shall be given such full or partial exemption therefrom as the Congress may decide, keeping in mind the paramount interests of the defense and survival of the Nation;
- i. Prison inmates shall preserve and have their right to practice their religions respected to the extent that prison discipline and safety requirements are not seriously compromised thereby;
- j. Persons directly injured in their own religious beliefs shall have standing to complain and request judicial remedies in any State or Federal court having the required jurisdiction.

3. The freedom of speech:

- a. The absolute freedom of engaging in or refraining from speech and non-verbal communication, and receiving or refusing to receive information, without any coercion, shall be a rebuttable presumption in any administrative or judicial proceeding, concerning any attempts to abridge them. The onus of rebutting this presumption shall rest entirely on the party seeking such abridgment, by showing that the speech or non-verbal communication sought to be restrained, or the information to be withheld, do not, by virtue of some other conflicting and overriding considerations or necessities, fall within the categories of freedoms that this section is intended to protect;
- b. Any Congressional, State, or local legislation or regulation by any governmental authority, which is so imprecise, ambiguous, vague, overbroad, or excessively general in its terms that it provides a pretext for arbitrary or discriminatory law enforcement, uncertainty in the minds of persons of common intelligence as to the limits of protected communication, and creating a chilling effect on the unrestrained exercise of freedoms clearly not proscribed, shall be wholly void on its face; except that insubstantial defects may enable the courts to merely sever unenforceable parts or specific applications thereof;
- c. Prior restraint shall not be imposed on any communication by institutionalized or informal censorship or coercion, however subtle, unless, in each instance such restraint is sought, a fair judicial hearing, following proper notice, is held; except

where the required delay may cause irreparable harm, upon which a temporary restraining order, subject to a prompt subsequent hearing, may be issued;

- d. Maintaining the integrity of the judicial process may validly require in-court and out-of-court curtailments on communication and information to prevent the clear and present probability of serious interference therewith;
- e. The free and uninhibited conduct of any electoral process shall not be interfered with, unless the integrity of the process itself is, or appears to be, threatened, or where its integrity is protected or enhanced thereby;
- f. In order to maintain the reliability and preparedness of the armed services, restrictions on communications and information likely to reduce the effectiveness of response to command may be justified therein;
- g. Inmates of penal institutions and preconviction holding facilities shall retain the freedoms granted herein to the extent that their exercise does not endanger prison security and order, and any limitation imposed, however warranted, shall be in accordance with properly defined and administered procedural safeguards;
- h. Public employees or licensees may be required to take such oaths or affirmations as are necessary to obtain their commitment to the lawful performance of their functions, or to make disclosures about themselves, as a condition of their office or employment, that are crucially relevant, lawful, and not repugnant to the letter and spirit of this Constitution;
- i. Fighting words that tend to incite immediate violence, offensive speech to a hostile, potentially violent audience, false statements likely to cause panic, disorder and safety hazards, advocacy aimed at inciting or producing imminent lawless action and is likely to succeed shall not be protected under this section;
- j. Untrue defamatory speech (slander) or other communication (libel) is not protected herein; but the baseless defamation of public officials respecting their official conduct and of public figures respecting matters related to the causes or circumstances of their fame or notoriety, or a public controversy in which they willingly participate, shall, in the absence of malice (requiring communication knowingly false or recklessly disregarding of its truth or falsity), be protected;
- k. Sexual conduct described or depicted in a patently offensive manner, lacking serious literary, artistic, political or scientific value, and the dominant theme of which would appeal to the abnormal, prurient sexual interest of the average normal adult person, as determined by the application of contemporary standards of a given relevant geographically circumscribed community, shall be assumed to be harmful to society, and be outweighed by the need to protect the social interest in preserving, or not blatantly offending, recognized, generally approved norms of morality; and in the application of this clause, the corruption of minors, by exposure to obscenity, or their use in its description or depiction, shall be an aggravating factor supporting the denial of the freedoms herein granted. But the foregoing notwithstanding, no law

proscribing pornography in any form, except child pornography, shall be made, that invades the personal right of privacy exercised in non-public places;

- l. Public property open to the public shall be available for the exercise of freedoms herein granted, subject to reasonable, non-discriminatory, content-neutral regulations serving some significant government interest not otherwise attainable, concerning the orderliness, public safety and convenience, and personal right of privacy aspects. of any such exercise, by determining, on the basis of unambiguous, non-discretionary guidelines and procedural safeguards, the time, place and acceptable manner thereof. Private property open to the public, depending on the extent and exclusivity of its use, and its relevance in the public life of a community, may, subject to judicial determination, be required to partially accommodate the exercise of freedom of communication and information, or even be considered the equivalent of public property open to the public. But in either case, where a total ban on expression is lawfully applied in any public place, or by any medium, assurance of a satisfactory alternative place or medium shall be provided to ensure that such a ban does not result in suppression of the exercise of anyone's right of expression, or a community's right to receive information intended to be conveyed; and in any limitation of or ban on the exercise of such freedoms, the burden of showing just cause will rest entirely on the party seeking to impose it; and
- m. Commercial communication primarily concerned with promoting commercial transactions may, in order to serve a substantial government interest, be subjected to reasonable limitations on the grounds of confusing or deceiving the public, or to banning, if false, misleading or otherwise illegal, and the communicator may be required to carry the burden of showing cause why protection under this section should not be withheld.

4. The freedom of the press:

- a. All freedoms and limitations thereof described in the previous section shall apply to all media of information as well;
- b. The laws of defamation, especially those applying to private individuals, shall be construed and applied against information media defendants in such a way, that their special responsibility for fairness and the avoidance of malice, negligence, and damaging reporting due to incompetence, be given due weight;
- c. The communication of obscenity through the information media may be subject to special sanctions and restraints where it involves the invasion of privacy, or ready access to minors; but distributors, sellers and other facilitators of the conveyance of information media products in any form shall not be discouraged or chilled in their freedom to contribute to the maintenance of a free market of information and ideas by burdening them with an absolute presumption of knowledge of the contents of all information that they carry;

- d. The preservation of a fair criminal trial by a ban on media reporting shall require virtual certainty that such a ban is essential and would in fact safeguard the rights of the accused, and that there is no viable alternative way of affording such protection; but the right of privacy of jurors concerning non-relevant facts and circumstances may be afforded reasonable restraints on reporting; and there shall be no automatic or non-consensual right to interview the accused or a convicted prisoner in a penal institution as long as some alternative channel of requesting information from an incarcerated person remains open through which the prisoner may choose to respond;
- e. News-gatherers shall not be granted any privileges or immunities, or greater protection than any other person under the freedom of communications and information provisions herein, however, their need for continuous reliance on news sources requires special consideration on the part of public officials, in order not to disrupt the availability of such sources, or to harass or inhibit their activities in any unlawful or unreasonable manner;
- f. In grand jury proceedings news reporters shall be required to give evidence and reveal the sources thereof in the manner any other witness may be compelled to do, and their offices may be searched in accordance with the requirements of the Fourth Amendment herein, however, in authorizing and carrying out each such search, special care must be taken to preserve the confidentiality of information concerning persons and matters not targeted thereby;
- g. Information media conveying its information on publicly-owned property subject to physical limitations, such as the airwaves, shall be subject to governmental licensing and regulation on a fair and equitable basis, solely in the public interest. Any governmental, political or economic interest not in harmony therewith shall have access to judicial review;
- h. The acceptance of political or election campaign advertising in any medium of information shall not be compelled, but editorializing on political and other controversial public issues shall be subject to regulation prescribing fairness and balance in news media otherwise subject to licensing and regulation;
- i. Government regulation aimed at preventing the monopoly of available public sources of information in a given geographic area may properly be applied to any medium or combination of media of information;
- j. In the absence of a compelling State interest, any tax extractable exclusively from any one medium, or all media of information, shall be presumed to be a covert attempt to censor or penalize the press, and to interfere with the public's right of access to independently and freely provided information.

5. The freedom of association:

- a. As a general rule, the freedom to associate or refuse to associate, without coercion, and to petition, individually or associated with one's peers, the government of the United States or any State or local government, for a redress of grievances, shall not be abridged; and the freedoms and lawful curtailments thereof described in section 3 of this article shall apply to associations of various forms as well;
- b. Membership in, or collaboration with, associations the aims or activities of which are unprotected by this Constitution, shall not be considered prima facie evidence of identification with such aims or participation in such activities;
- c. Membership in or collaboration with associations engaging in illegal advocacy or activity may carry the presumption of sharing in the association's culpability where a member or collaborator possesses specific knowledge of such advocacy or activity and a clear intent that the aims be reached or the activities be carried out;
- d. Associations engaged in unlawful advocacy or activity may be compelled to disclose the names of their members if such disclosure is essential to serve a substantial governmental interest; and individuals may be required to disclose any such membership as a relevant and essential condition of their public office or employment or membership in validly licensed professional bodies;
- e. Absent a compelling governmental interest, political parties shall have absolute freedom from interference in their internal affairs;
- f. In order to promote harmonious labor relations, simple majorities of employees may designate or form a union as a sole bargaining agent, and compel non-members to pay dues, and abide by agreements reached on their behalf. However, their dues shall be used solely for collective bargaining activities, and their right to communicate independently with their employers shall not be denied;
- g. Non-coercive, peaceful picketing or boycotting intended to publicize economic or labor disputes, or the alleged denial of rights guaranteed by this Constitution, shall be protected;
- h. Inmates of penal institutions may be denied their right of association, including the formation of or participation in any prison unions;
- i. Political activity or party affiliation of public employees, unless specifically in conflict with the effective performance of their functions, shall not be regarded as a disqualification for public employment; and
- j. Demonstrations and meetings in public places shall be conducted within the framework of subsection 1 of section 3 of this article.

FURTHER READING

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“The Rise And Rise Of The Administrative State”, 107 Harvard Law Review 1231 (1994)

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World-Wide Web Resources

FEDERAL LAWS: <http://www.law.cornell.edu/uscode/>

CODE OF FEDERAL REGULATIONS: <http://www.pls.com:8001/his/cfr.html>

SUPREME COURT DECISIONS: <http://www.law.cornell.edu/supct/supct.table.html>

PROPOSED LEGISLATION: <http://thomas.loc.gov/>

Appendix: 10 Reasons Why the 14th Amendment Due Process Clause Does Not Incorporate The First Amendment

1. On Its Face, 14th Amendment Due Process Clause Only Extends Federal Due Process Clause To State

Due process clause (DPC) of 14th Amendment applies the DPC of the Fifth Amendment to State governments, it adds nothing substantive not already present in Fifth Amendment. In other words, the 14th Amendment DPC functions to reverse Barron v. Baltimore re: 5th amendment, nothing more.

2. Lack Of Explicit Declaration

If DPC was meant to incorporate either the entire Bill of Rights or else other individual rights in the Bill of Rights, it should have done so explicitly, as it was explicit in the case of the Fifth Amendment. A change of this magnitude would require the same degree of specificity.

3. First Amendment Does Not Confer Rights, Only Determines Jurisdiction

DPC could not possibly be applied to the First Amendment in any case, because by its express terms, the First Amendment does not confer any right, it merely assigns jurisdiction of its subject matter (in conjunction with the 10th amendment) to the States. In other words, due process as defined by Constitution plainly allows state action in the First Amendment subject areas.

4. Inconsistency With Other Supreme Court Reasoning

The notion that the 14th Amendment should incorporate the First Amendment through the DPC conflicts with the reasoning of the Slaughterhouse cases with reference to privileges and immunities clause, never overruled.

5. Displacement

If operative, the First Amendment incorporation doctrine would displace declarations regarding rights of speech & religion et al. in the constitutions of State governments; these State provisions could conceivably have greater protection and be framed in more contemporary terms, and so incorporated language could actually provide

less rights for the citizens of states. In addition, displacement such as this would create confusion as to which forum has legitimate jurisdiction.

6. Illegitimate Process

The process by which the First Amendment was supposedly “incorporated” into the 14th amendment was illegitimate, an expression of opinion subsequently operating as fact with a complete lack of justification provided in the “reasoning”, as well as the complete failure to provide any analysis of the public policy impact of the change.

7. Improper Forum For Change

A change of the magnitude of First Amendment incorporation would have to be decided by a constitutional convention which would consider the implications of this change, a change potentially altering the checks and balances of the Constitution, and so other changes would need to be made in the Constitution to address those new imbalances (e.g. term limits for Judiciary, etc.).

8. Absence Of Integrity

Even if incorporation of the First Amendment was legitimate, which flowchart would be incorporated? Supreme Court has never incorporated the First Amendment flowchart, invalidating their own thesis that the DPC of the 14th Amendment incorporates the First Amendment.

9. Internal Conflict

Supreme Court has not consistently incorporated the provisions of the Bill of Rights; their strategy of selective incorporation invalidates their thesis that the 14th Amendment incorporates all provisions of the Bill of Rights.

10. Reality And Public Policy Considerations Argue Against Incorporation Thesis

Proof that the First Amendment has not really been incorporated is the number of laws on the books of State governments which actually do abridge freedom of speech, press, etc.. Also, if the process of analysis mandated by the First Amendment indeed was

applicable to the state governments, there would be a potential destabilizing effect since society could not legislate intelligently in needed areas.