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Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory

by

LARRY A. ALEXANDER*

I. Introduction: Track One and Track Two First Amendment Analyses

Standard First Amendment free speech analysis divides cases into two major groups. One group consists of those cases that Laurence Tribe has labeled “track one” cases.¹ In track one cases, the government’s concern expressed in the challenged regulation is the communicative impact of speech, the messages that the audience for the speech will receive. Those messages may be objectionable from the government’s standpoint for many reasons, some legitimate, others not. First, the messages may induce the audience to violate the law. Second, the messages may create in the audience’s mind false and derogatory impressions of other people, reveal private and embarrassing facts about them, disclose confidential or classified information, or represent appropriations of others’ creative endeavors. Third, the government may be concerned that the audience, through the messages, will learn the truth about the government’s own misfeasance or nonfeasance. Finally, the government may be interested in preventing the audience from having false beliefs about certain subjects, not for the sake of some further harms to which those beliefs might lead, but because of a concern with truth for its own sake.²

Track one analysis, inquiring what governmental purposes are legitimate bases for interdicting the receipt of messages, and what means the government may employ to accomplish those purposes, is difficult, com-

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1. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 791 (2d ed. 1988).

2. This is less likely to be advanced as a reason for restricting speech in a secular era.

plex, and controversial. It divides both courts and commentators along many lines. Yet despite its difficulty, complexity, and controversiality, track one analysis is relatively stable doctrinally if not theoretically. While courts and commentators may disagree over the outcomes of many of those cases that because of their difficulty actually get litigated or over the theoretical bases for the decisions, the courts and commentators do agree on the outcomes in the vast majority of *possible* cases. Moreover, almost all observers would agree that track one analysis is extremely speech protective. The government is rarely successful in meeting track one's relatively settled tests for when it may legitimately interdict receipt of a message based upon a concern with the message's effect on the audience. Courts have protected speech that advocates crime, defames, discloses secrets or private matters, threatens fair trials, offends, threatens, or insults.³ Speech can be regulated on track one only when it falls within a few narrow categories.⁴ Indeed, most liberal commentary today concerning track one urges less rather than more free

3. See, e.g., *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (threatening speech); *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991) (speech threatening fair trial); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (speech threatening privacy); *Texas v. Johnson*, 491 U.S. 397 (1989) (offensive speech); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (insulting speech); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (confidential communications); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (speech threatening fair trial); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (speech threatening privacy); *Cohen v. California*, 403 U.S. 15 (1971) (offensive speech); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of illegal action); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation).

4. Cases in which the Supreme Court has allowed, or said it would allow, regulation of track one speech include those in which the speech constitutes: incitement, see *Brandenburg*, 395 U.S. 444, fighting words, see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), obscenity, see *Miller v. California*, 413 U.S. 15 (1973), confidential communications (in some instances), see *Landmark Communications*, 435 U.S. at 45, defamation (in some instances), see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), invasion of privacy (in some instances), see *Cox*, 420 U.S. at 491, *Florida Star*, 491 U.S. at 532-33; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982), revelation of secret information (in some instances), see *New York Times Co. v. United States*, 403 U.S. 713, 725-27 (1971), false or deceptive advertising, see *Friedman v. Rogers*, 440 U.S. 1 (1979), advertising of harmful or illegal products or transactions, see *Posadas de P.R. Assoc. v. Tourism Co.*, 478 U.S. 328 (1986); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), coercion (in some instances), see *International Longshoremen's Ass'n v. Allied Int'l*, 456 U.S. 212 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1975), and speech internal to the workplace (in some instances), see *N.L.R.B. v. Gissel*, 395 U.S. 575 (1969). The Court would undoubtedly affirm, in the face of free speech challenges, convictions for perjury, criminal solicitation, criminal conspiracy, and misrepresentation. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 132, 239-80, 315-21 (1989).

speech protection, particularly with respect to pornography, hate speech, harassing speech, defamation, invasion of privacy, and corporate speech.⁵

The other major group of First Amendment free speech cases consists of Tribe's "track two" cases.⁶ Here, government is concerned with the noncommunicative impact of speech, not the message that is being conveyed.⁷

Track two cases have traditionally been broken into two subcategories: the public forum cases and the symbolic speech cases. The former concern access of private speakers to governmental or quasi-governmental facilities, and in some cases to private facilities that the speaker seeks to have treated like governmental facilities.⁸ Current First Amendment jurisprudence distinguishes among traditional public fora, such as streets, sidewalks, and parks, public fora created by government designation, and nonpublic fora.⁹ The conventional doctrine in public forum cases is that the government may impose narrowly drawn regulations of the time, place, and manner of speech in traditional public fora and designated public fora in order to serve significant governmental objectives unrelated to the speaker's message. The government may not, however, bar speech

5. See, e.g., Kingsley R. Browne, *Title VII on Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (harassing speech); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (hate speech); Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657 (1987) (defamation); Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81 (1991) (hate speech); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (hate speech); Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991) (defamation and privacy); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (pornography).

6. TRIBE, *supra* note 1, § 12-2, at 792.

7. The Court has sometimes treated as track two cases those that, properly analyzed, belong on track one. For example, in the adult entertainment cases—*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1991), and *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976)—the harms the cities were attempting to prevent were traceable to the communicative impact of the adult entertainment, yet the Court treated the regulations as though they were dealing with noncommunicative impact. In the recently decided case of *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), the Court treated the regulation of public nudity as a track two regulation, though careful analysis would suggest that the harms about which the government was concerned depended upon the message conveyed by the nudity.

8. Compare *Marsh v. Alabama*, 326 U.S. 501 (1946) (proscribing regulation of speech in a company town) with *Hudgens v. NLRB*, 424 U.S. 507 (1976) (allowing ban on picketers at privately owned shopping center).

9. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 954. In *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), four Justices, Kennedy, Souter, Blackmun, and Stevens, would have held that airports, as well as other facilities, were public fora. *Id.* at 2715-20 (Kennedy, J., concurring in Judgment); *id.* at 2724 (Souter, J., concurring in judgment and dissenting).

entirely from such public fora and must leave adequate alternative channels of communication available.¹⁰ On the other hand, if a facility is a nonpublic forum, the government may bar speech entirely or selectively, so long as it does not discriminate according to viewpoint.¹¹

Public forum cases are more complicated, however, than the preceding account indicates. First, alternative channels of communication are never entirely adequate. Thus, all regulations of the public fora will entirely suppress speech with respect to some potential audience and with a particular cognitive and emotive impact. Second, the analysis leaves unresolved whether the government must make a certain quantum of traditional public fora available, whether it must construct such fora if few are available or be prevented from razing those that are available, or whether it need only maintain those available as of a certain date or those of a certain vintage.¹² Lastly, the Court has recognized that, with respect to designated public fora, the government may and often has opened fora to speech on a limited basis. The Court has found no First Amendment violation where the government creates fora for speech of all kinds but for only certain speakers.¹³ It has similarly found no violation where the government creates fora for speech on some subjects but not others.¹⁴ Lastly, it has upheld the government's creation of fora for only those viewpoints the government favors, as when it runs public schools.¹⁵ This offends the asserted doctrine that even in nonpublic fora, government may not engage in viewpoint discrimination.

The other subcategory of track two cases consists of the symbolic speech cases.¹⁶ Here, the government forbids certain conduct irrespec-

10. *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989); *Buchanan*, *supra* note 9, at 954. It need not, however, choose the least restrictive means available. *See Ward*, 491 U.S. at 796-802; *Buchanan*, *supra* note 9, at 954.

11. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

12. The Court in *Lee*, 112 S. Ct. 2701, suggests in dicta that the government may fail to construct public fora and may convert public fora into other facilities; the only restrictions track two analysis imposes upon the government in this regard concern public fora that are currently in existence. *Id.* at 2706-07; *see also supra* note 9 and accompanying text.

13. *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Buchanan*, *supra* note 9, at 959-60. *But see Widmar v. Vincent*, 454 U.S. 263 (1981) (university cannot bar religious speech from university facilities).

14. A public hospital's bulletin board can be limited to posting notices concerning hospital business; and a public school classroom discussion can be restricted to subjects in the curriculum. *See Stephen R. Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976) (public school newspaper is part of curriculum).

15. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Goldstein*, *supra* note 14.

16. Given that all speech employs symbols and is thus symbolic, the area should perhaps be redescribed.

tive of whether those who would otherwise engage in that conduct intend their engaging in it to symbolize and communicate some idea to others. The free speech issue arises when someone in fact wishes to engage in that conduct to symbolize and communicate an idea. The accepted doctrine is that government may regulate the symbol on the same grounds and with the same restrictions as it may regulate the time, place, and manner of speech in a public forum. That is, it may do so if it is advancing a significant interest unrelated to the communicative impact of the conduct, if its statute is narrowly tailored, and if adequate alternative means exist for the speaker to convey his message.¹⁷

Unlike track one analysis, track two analysis has not proven to be speech protective, at least not as we normally think of speech protective doctrines. The government has always won track two cases, with two clear and two less clear exceptions.¹⁸ The clear exceptions are the decisions in *Schneider v. State*,¹⁹ which struck down anti-littering ordinances as applied to the passing out of pamphlets,²⁰ and *International Society for Krishna Consciousness, Inc. v. Lee*,²¹ which upheld the right to distribute literature in an airport terminal.²² The less clear exceptions are the Court's decisions in *Hague v. CIO*,²³ which established the speech easement over public streets, sidewalks, and parks,²⁴ and *Schad v. Borough of Mount Ephraim*,²⁵ which overturned a complete ban of live entertainment.²⁶

17. See *United States v. O'Brien*, 391 U.S. 367 (1968); Buchanan, *supra* note 9, at 953.

18. In addition to the exceptions discussed in the text, the government has also lost those cases challenging licensing schemes, which have constitutional defects related to the track one fear of message censorship. See *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

19. 308 U.S. 147 (1939).

20. *Id.* at 162.

21. 112 S. Ct. 2701 (1992).

22. *Id.* at 2713-14.

23. 307 U.S. 496 (1939).

24. *Id.* at 514-15.

25. 452 U.S. 61 (1981).

26. *Id.* at 67-77. Arguably, *Schad* is a track one case, since the effects with which *Mount Ephraim* was concerned were not unrelated to the fact that messages were being conveyed. (Consider what "entertainment" is.) *Schad* is what *Schneider* would have been had the ordinances in the latter banned distributing pamphlets but not distributing blank sheets of paper, equally litterable but not message-bearing.

Lee could have struck down the airport authority's ban on the sale and distribution of literature on the ground that the sale and distribution of literature caused no more congestion than the sale and distribution of other items, rendering the ordinance underinclusive and hence discriminatory against communication as an activity. The Court's actual analysis implies, however, that a broader ban on all potentially congesting sales and distributions of items would have been unconstitutional as applied to the sale and distribution of literature, making *Lee* analogous in that regard to *Schneider*.

Moreover, recent case developments have perhaps eviscerated whatever little speech-protective force track two might have had. *United States v. Kokinda*,²⁷ upholding the Postal Service's banning of petition signature gatherers from sidewalks on postal service property,²⁸ coupled with the Court's prior approval of noise restrictions on city streets,²⁹ trespass laws' application to speakers on shopping center property,³⁰ and bans on residential picketing,³¹ leaves almost nothing to *Hague's* speech easement over streets, sidewalks, and parks. *O'Brien's*³² promise of a free speech exemption from regulations of conduct in circumstances where the conduct conveys a symbolic message may have been nipped in its latency by *Barnes v. Glen Theatres*.³³ And *Schneider's* future force was rendered doubtful by *City Council v. Taxpayers for Vincent*,³⁴ though revived to some extent by *Lee*.³⁵

Although Tribe does not describe it as such, there is actually a track three in free speech jurisprudence. On this track are the cases where government is using the mechanisms of the affirmative state, not to censor others' messages, but to communicate its own messages, either directly, as when it runs public schools,³⁶ libraries,³⁷ or theatres,³⁸ or by subsidizing private parties who agree to promote its messages.³⁹ Track Three cases, like other "unconstitutional conditions" cases,⁴⁰ involve the intersection of constitutionally optional benefits characteristic of the modern affirmative state—for example, public schools and libraries—and constitutional liberties established against the background of the very

27. 497 U.S. 720 (1990).

28. *Id.* at 731-37.

29. *See Kovacs v. Cooper*, 336 U.S. 77, 78-79 (1949).

30. *See Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).

31. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

32. *United States v. O'Brien*, 391 U.S. 367 (1968).

33. 111 S.Ct. 2456, 2457 (1991).

34. 466 U.S. 789 (1984) (upholding ordinance banning posters from utility poles).

35. In *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S.Ct. 2701 (1992), five justices, Blackmun, Kennedy, O'Connor, Souter, and Stevens, were willing to impose some inconveniences—congestion and potential littering—on the operators of airports and their customers so as to allow the Hare Krishnas and others to get their messages to whatever audience they could gather in the airports. *Id.* at 2715-16. The other justices, Rehnquist, White, Scalia, and Thomas, did not regard the airports as public fora like streets, sidewalks, and parks, and thus did not express an opinion on the current status of *Schneider* and restrictions on speech in public fora. *Id.* at 2710 (Rehnquist, C.J., dissenting).

36. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

37. *See Board of Educ. v. Pico*, 457 U.S. 853 (1982).

38. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

39. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1762-63 (1991).

40. *See Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989).

minimal state.⁴¹ Track three is perhaps more accurately described as track one and one-half, because it involves a blend of track one's concern with government's control of messages and track two's concern with government's allocation of resources.

My principal focus in this Essay will be on track two. In the next Part, I intend to show that track two is much more expansive than is realized, and is central to the quantity and quality of available information and to the quality of public debate and discourse.

In Part III, I intend to show that the failure of track two analysis to be speech protective was inevitable. Track two analysis must of necessity involve some kind of balancing. But speech interests cannot be balanced against those the government is attempting to foster through its track two regulations because balancing involves someone's prejudging the outcome that the First Amendment demands not be prejudged. In a sense, and somewhat counterintuitively, the First Amendment dictates that speech *not* be treated as important (or as unimportant).

Finally, in Part IV, I examine somewhat more speculatively the implications the track two analysis proposed in Part III carries for track one and track three cases, and for First Amendment theory generally.

II. The Entire Corpus Juris as Track Two

I will establish two propositions in this Part. The first, and easier to establish, is that the public forum cases and the symbolic speech cases have been, and should be, treated under the same standards. The second is that track two analysis potentially covers challenges to any law. In other words, the entire body of laws is subject to track two First Amendment analysis.

An examination of both the phrasing and application of the Supreme Court's time, place, and manner test for public forum speech and its test for regulation of symbolic speech reveals that they are essentially the same test. Both tests, as stated, require that the regulation in question be narrowly tailored but not that it be the least restrictive alternative.⁴² Moreover, in both tests the government's objectives must be significant, and the government must leave the speaker adequate alternative means to convey the message.⁴³

41. I address the general topic in a forthcoming piece on constitutionally optional benefits.

42. See *supra* notes 10, 17 and accompanying text.

43. *Id.* The Supreme Court itself has recently recognized the similarity of its time, place, and manner test and its symbolic speech test. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984).

Regardless of the test it employs, the Court is correct, from a theoretical standpoint, in employing the *same* test for both areas. Whenever government is regulating conduct that is being engaged in as a symbol, it is regulating the "time, place, and manner" of speech. It is easy enough to see that, for example, burning a draft card or dancing in the nude is employing a particular manner of expression to symbolize a message. However, the time of a speech or demonstration or the place in which it occurs may also be employed symbolically.

Susan Williams has recently noted the Supreme Court's erosion of any distinction between its time, place, and manner and symbolic speech tests.⁴⁴ She nonetheless urges that a distinction should be maintained between regulations that affect those aspects of time, place, and manner that are merely "facilitative" of speech—that affect the speaker's ability to convey his message to a particular audience—and regulations that affect those aspects of time, place, and manner that are themselves "expressive" (communicative)—that are part of the message itself.⁴⁵ She argues that there is never an adequate alternative available to the speaker when the regulation affects the communicative aspect of speech and thus what gets said.⁴⁶ Therefore, she would require regulations of that type to meet a higher standard of validity.⁴⁷

Nonetheless, it is both theoretically difficult and practically impossible to separate the uniqueness of a particular message from the uniqueness of a particular audience at a particular time and place.⁴⁸ The Supreme Court has recognized how the choice between words having the same denotative meaning can affect the emotive and ultimately the cognitive significance to the audience,⁴⁹ and how the choice between verbal and nonverbal symbols can do the same.⁵⁰ Surely, the choice between audiences and times affects not only the impact of a message, but also how that message will be translated and understood. To illustrate this, imagine delivering a talk on a given subject first to teenagers and then to senior citizens, or first at 5 a.m. and then at 8 p.m. The facilitative and the expressive, the media and the message, are ultimately inseparable.

44. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644-45, 653-54 (1991).

45. *Id.* at 659-63.

46. *Id.* at 706.

47. *Id.* at 707-19.

48. Williams herself comes close to recognizing this proposition. *Id.* at 715-16.

49. See *Cohen v. California*, 403 U.S. 15, 25-26 (1971) ("one man's vulgarity is another's lyric").

50. See *Texas v. Johnson*, 109 S.Ct. 2533, 2538-40 (1989) (burning a flag carries a message subtly different from verbal denunciation).

The second proposition I want to establish is that, just as there should be no distinction between track two regulations affecting the facilitative aspects of speech and those affecting the expressive aspects, so too should there be no distinction between track two laws directly regulating speech activities and all other laws. All track two laws regulate speech only indirectly in this sense: In a track two case, government's interest is not in what is being communicated but in the communication's effects on values unrelated to communication, such as noise, congestion, property, aesthetics, or privacy. Track two regulations are of First Amendment concern because they affect what gets said, by whom, to whom, and with what effect even though the regulations are not intended to affect such matters. Nevertheless, *all laws affect what gets said, by whom, to whom, and with what effect*. In short, all laws have information effects. Therefore, all laws, the entire corpus juris, should be subject to track two analysis.

Track two includes not only restrictions on obstructing traffic while speaking or demonstrating, using amplifying devices in residential neighborhoods, posting signs on utility poles, burning draft cards, or sleeping in parks, but also includes tort, contract, and property law, the tax code, and the multitude of criminal and regulatory laws and administrative regulations. For example, laws determining who owns what property under what restrictions or the price and availability of various resources will also determine what gets said, by whom, to whom, and with what effect—that is, the laws will have information effects. A change in the laws of any region of the corpus juris will have information effects. Laws equalizing income would surely have dramatic information effects. Elimination of the law against battery would produce a new form of symbolic speech as well as information—for example, what it is like to batter and be battered—and concerns that do not exist while the law against battery is on the books.

The ubiquity of potential track two cases has been noted.⁵¹ Susan Williams, for example, notes that “[t]here is . . . no clear dividing line between facilitative aspects of speech and other activities. Instead, there is a continuum”⁵² Yet she believes that a line must be drawn.

The task is required . . . because the alternatives are simply unacceptable. Some activities or resources that are not themselves a part of the act of speaking are, nonetheless, so closely related to speech that it would be absurd not to recognize that regulating them raises first amendment issues. Access to paper or typewriters might be a good

51. See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 273-77, 296 (1992); Williams, *supra* note 44, at 658-59, 722-25.

52. Williams, *supra* note 44, at 724.

example. On the other hand, without some limit, the free speech guarantee would be transformed into an invitation for all speakers to violate any generally applicable law if the violation contributes in any way, no matter how indirect, to their ability to speak. The constitutional solicitude for free speech demands that speakers receive special protection from regulations (even generally applicable ones) that affect either a communicative or a directly facilitative aspect of their speech activity. Nonetheless, at some point the connection to speech becomes so attenuated that the protection must disappear.⁵³

Although Williams's concern is well-founded, the "direct-indirect" imagery on which she relies misses the fundamental point that the most profound information effects are produced by laws she would place on the indirect side of the divide. Cass Sunstein, on the other hand, is quite anxious to exploit precisely this point:

[T]here may be no neutrality in use of the market status quo when the available opportunities are heavily dependent on wealth, on the common law framework of entitlements, and on the sorts of outlets for speech that are made available, and to whom. In other words, the very notions "content-neutral" and "content-based" seem to depend on taking the status quo as if it were preregulatory and unobjectionable.

At least two things follow. The first is that many content-neutral laws have content-differential effects. They do so because they operate against a backdrop that is not prepolitical or just. In light of an unjust status quo, rules that are content-neutral can have severe adverse effects on some forms of speech. Greater scrutiny of content-neutral restrictions is therefore appropriate. Above all, courts should attend to the possibility that seemingly neutral restrictions will have content-based effects.⁵⁴

As Williams recognizes, however, and Sunstein does not, the courts cannot apply the ordinary track two test to all laws, even though all laws are logically subject to track two analysis. For example, the setting of the marginal tax rate affects my income, which, if greater, I might devote to increased speaking. Under the current track two test, if the government's interest in the present rate is not significant, and the rate adversely affects my speech, the government would be required to abandon that rate in favor of another rate. But any other rate the government chooses will affect somebody's speech—it may result in lower transfer payments, adversely affecting the communication between poorer speakers and their audience—and, thus, *it* will have to serve a significant interest as well.⁵⁵ Therefore, the track two test cannot be applied universally,

53. *Id.*

54. Sunstein, *supra* note 51, at 296 (footnotes omitted).

55. Moreover, all laws curtail the symbolic expression of opposition to the laws themselves through violations, a point that by itself undermines the possibility of requiring a significant interest in order to restrict symbolic speech.

unless the requirement of a significant government interest is trivialized either by finding almost any interest to be significant or by being made synonymous with "the entire corpus juris is what it should be." (The latter trivializes because it tautologizes: track two laws are constitutional if they are constitutional.)

This leaves the following problems. First, track two covers all laws since all laws have information effects—they affect what gets said, by whom, to whom, and with what effect. Second, a track two First Amendment challenge to a law or group of laws is a demand that the laws be changed; but every change in the laws will have information effects, so that track two First Amendment claims are always aligned against each other. Thus, testing challenged laws by the significant government interest test will entail testing all of their alternatives by that test. Finally, the universal application of track two analysis would result in the elimination of all sets of laws except those serving significant interests (as compared to all possible alternative sets). Because of this difficulty, the universal application of track two analysis would most likely result in complete abandonment of track two protection, with all asserted interests deemed "significant" so long as they are not concealing track one, message-related, governmental concerns.⁵⁶

III. The Inevitable Failure of Track Two Analysis

Track two laws have much greater information effects than track one laws (if the concept of greater effects is meaningful in this context). Yet, while track one analysis has been quite speech protective, at least superficially, track two analysis has been anything but speech protective.

The preceding Part demonstrated that track two covers all laws that incidentally affect speech—that is, *all* laws—and for that reason, the significant government interest test is unworkable. The significant government interest test treats all speakers, messages, and audiences as equally important, of a constant weight in the constitutional balance equal to that of significant government interests.

56. I treat the government's decision to ban conduct *because* it is message-bearing as a track one decision, even if the government is not concerned with the content of the message. In other words, government's concerns with paper-as-litter, book-as-merchandise, or newspaper-as-high-revenue-business are track two concerns when the government bans dispensing paper on the streets, bans sales in airports, or imposes sales taxes. The government crosses over to track one, however, when it singles out "pamphlets," "literature," or "newspapers." See Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 108 n.56 (1992) (discussing discrimination against speech as an activity and citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)).

What happens if instead of treating all speech interests as having a constant and significant weight, the particular value of the intended speech, given its intended audience, is weighed against the values the particular laws serve? This is the heart of my critique of track two analysis. In this Part, I propose that the value of speech cannot be balanced against the government's track two interests in any way that is principled and that respects the very freedom of thought that the First Amendment itself protects.

To make track two analysis work, we must assign a value to the audience's loss of information due to incidental restrictions on speech. That value in turn must be weighed against the values furthered by the incidental regulations at issue, values such as freedom from noise, litter, congestion, and taxes. Moreover, that value must also be weighed against the information lost to that and other audiences if the incidental regulations are struck down. (Each alternative set of regulations produces a different state of the world, which in turn makes available different information and/or different audiences for the same information. A trivial example: a world without an anti-litter law lacks the information "what a world with an anti-litter law is like." A less trivial example: a world in which extra police must be assigned to monitor and control street demonstrations and reroute traffic has less tax money available to hire teachers in public schools than a world in which street demonstrations are prohibited.⁵⁷)

In addition to the theoretical difficulties of the balancing process, the track two analysis also poses the theoretical problem of placing a value on the information at stake. On the one hand, if we evaluate the information at stake from the position of not knowing yet what it is, we face the theoretically impossible task of placing a specific value on unknown information. On the other hand, if we evaluate the information at stake from the position of knowing or imagining what it is, we risk imposing our evaluation on others through the striking down of the existing set of incidental regulations, and, thereby preempting the very freedom

57. It is bootless to attempt to tote up the information gained and lost under alternative sets of incidental restrictions. Information does not come in discrete units such that it would be meaningful to compare states of the world in terms of which state has more information. We can count up the number of television channels, the amount of time spent viewing television, the number of magazines and books purchased, or the number of words in each; but talking of the amount of information is meaningless. This point is frequently ignored. One student note speaks of "a concern for maximizing information" and "concern for a laws' effect on the net stock of information." *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 284-85 (1991). Maximizing the net stock of information in the global sense used by the note is quite meaningless. All laws have information effects, but that is all one can say.

of evaluation of others that is central to the First Amendment. In the name of the First Amendment we are imposing an evaluative framework on others and arguably violating the First Amendment. Put differently, the First Amendment is supposed to protect a realm of pure process, the substantive results of which are legitimate only because that process is pure; once substantive results begin guiding the construction of the process itself, the legitimacy of the results of that process is compromised.⁵⁸

The above argument is not one directed exclusively at courts. It applies to all coercive impositions of such valuations of information and thus suggests that legislative evaluation of information gains and losses is equally problematic. It suggests that legislatures should perhaps measure only the strength of the constituents' preferences in deciding, for instance, between open space suitable for speech and alternative land uses. And it suggests that taxing one group because of another group's preference for speech activities—for example, in building a town meeting hall—is illegitimate to the extent its justification depends upon public good derived from the speech. (Building a meeting hall, an auditorium, or a library is non-problematic to the extent it reflects the majority's private good preference for information of a certain type rather than, say, more tennis courts.) Finally, when government itself speaks with taxpayers' resources, it is evaluating specific information—the most problematic of all government activities from a First Amendment standpoint. Public schools and universities, public grants and subsidies for research, public broadcasting, public financing of election campaigns, and a variety of other activities, rather than being extensions of the animating spirit of the First Amendment, are in tension with it.

I will discuss each of these points at greater length.

A. Balancing Speech Interests Against Non-Speech Values Served by Incidental Regulations

The entire corpus juris, from the general common law of contracts, property, and torts to the most particular tax regulation, affects what gets said, by whom, to whom, and to what effect. Speech and listening

58. See Robert C. Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 ETHICS (forthcoming July 1993) [hereinafter Post, *Managing Deliberation*]; Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 282-83, 290, 293 (1990) [hereinafter Post, *Racist Speech*]; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 670 (1990) [hereinafter Post, *Public Discourse*] ("[T]he normative conception of public concern, insofar as it is used to exclude speech from public discourse, is . . . incompatible with the very democratic self-governance it seeks to facilitate.").

are costly activities. They use resources such as space, newsprint, radio frequencies, presses, and police protection, and impose other costs—noise, litter, and clutter. *Schneider*, for example, imposed the costs of litter or, alternatively, the costs in excess of the state's next best alternative for eliminating litter. (If a less restrictive alternative is on the order of a Pareto superior move—the alternative does all the good at no greater cost and without affecting speech—then less restrictive alternatives are unlikely to exist; all alternatives will have greater costs in some respects.)

Thus, the Court's decision in *Schneider* constitutionally mandated what can be viewed as a subsidy of pamphleteers. But why such a subsidy of pamphleteers?⁵⁹

Consider Jane, who complains about the high costs of *The New Republic*, cable television, books from Oxford Press, and a college education. Those costs result from laws—laws regarding property rights, laws conserving trees, laws affecting labor costs, laws regarding tax liability, and many other laws. Jane's receipt of speech—which is, after all, what the First Amendment is really about—is adversely affected by those laws. Why should her attempt to receive this speech not be subsidized? (Alternatively, if one resists the notion that listeners' rights are central to the First Amendment, why should *The New Republic* and Oxford Press, for example, not receive subsidies or relief from various laws in order to communicate with a wider audience?)

Next, consider John, who wishes to demonstrate on Main Street, which will tie up traffic and require police presence. If, against the city's wishes, a court mandates that he be allowed to demonstrate, then the decision can be viewed as a forced subsidy of John and correlatively a forced imposition of costs on others.

Next, consider Joan, who is denied several outlets for her message that, given her limited resources, would be the most effective: putting graffiti on the side of city hall, using a loudspeaker at night in a residential neighborhood, or putting up a pamphlet stand on land that, due to various zoning laws, is currently unaffordable for her. Why should *Schneider* but not Joan get a First Amendment subsidy here?

Finally, consider Jason, who wants the city to build an auditorium suitable for public lectures and rallies, but who is opposed by Jean, who would like the city to build more tennis courts because she and others prefer playing and discussing tennis to attending public lectures, and Jerry, who wants lower taxes so that he can afford to go to night school.

59. If one objects that the term "subsidy" is rhetorically loaded in favor of the existing set of entitlements, we can more neutrally ask why we should give the entitlement to the pamphleteer.

The *O'Brien* line of cases raises the same questions. If a medium is being regulated for non-censorial reasons, then striking down the regulation under the First Amendment imposes a costly First Amendment easement on others. If Jake wishes to protest inflation by burning an inexpensive work of art in the lobby of the Treasury Building, presumably a court will not protect him, even though he has cost each taxpayer an insignificant amount. Yet, how is Jake different from any other user of a tangible medium that the government wishes to regulate to avoid costs to a variety of values? This question is especially relevant since those values might always be translated into amounts of money that the taxpayers would pay to preserve them.

Track two also includes such obviously important-to-speech governmental decisions as what resources should be dedicated to the police and courts, and as a component of that decision, to protecting speakers from hostile audiences beyond those dedicated to protecting persons from assault and battery generally. Resources that go to protecting speakers are, of course, unavailable for other public projects, which include such things as public schools and libraries and the ideas they would otherwise communicate. Since track two includes *all* laws and governmental decisions, however, it includes these allocations of resources decisions.

Without a theory of proper information effects, non-content-related regulations cannot be evaluated under the First Amendment, except in an arbitrary manner. Schneider did win, of course, and so did the Hare Krishnas in *Lee*. But why they and not *O'Brien*, the sleep-in protesters in *Clark v. Community for Creative Non-Violence*,⁶⁰ or the many other actual losers? And if Schneider and the Krishnas, why not my hypothetical Jane, John, Joan, and Jason?

As discussed above, assigning the speech value a constant weight in the calculus—for instance, equal to a significant governmental interest—does not help. Without a theory regarding information effects—what gets said, by whom, to whom, and with what effect—assigning any weight will be arbitrary. More importantly, because speech interests are affected regardless of what set of track two laws are chosen, the speech “constant” appears on both sides of the equation and does not produce a winner.

An alternative that might be considered would be straightforward balancing rather than assigning speech an arbitrary constant value. Under this approach, all of the information at stake under all alternative

60. 468 U.S. 288 (1984).

sets of laws would be examined, as well as all the non-speech values, and a determination would be made as to which set of laws is superior.

There are obvious practical and institutional objections to such a balancing proposal. Given that this approach would involve nothing less than a comparison of all possible entire sets of laws, both for their information effects and for their effects on all the non-speech values, the proposal is a practical impossibility for a legislature and surely for a court.

This practical objection should by itself be sufficient to undermine all track two judicial decisions and to dictate complete judicial withdrawal from track two. There remains, however, a theoretical objection to the enterprise as well. In principle, we cannot evaluate the information effects of track two laws: Either we assume the viewpoint of one who does not know what the information at issue will be, in which case we cannot evaluate it at all, or we assume the viewpoint of one who does know what the information will turn out to be, in which case we can evaluate it, but only from a partisan perspective inconsistent with the First Amendment itself. These two points are discussed below.

(1) Assume Ignorance of What Information Will Turn Out to Be

Information is in some respects a commodity just like toothbrushes, automobiles, and bananas. We buy it and sell it. When we buy it we place a value on it in the sense that we decide to pay a particular price for it. Nevertheless, information is unique as a commodity in this crucial respect: The value of information, and therefore the price we should pay for it, is generally unascertainable until it has been purchased and received.⁶¹

For example, the fifty-dollar medical book at the bookstore may contain information that will save my life or my loved ones' lives. Then again, it may not. Should I pay the fifty dollars and find out? Similarly, in deciding whether to buy a seventy-five-dollar electric razor, should I purchase the issue of *Consumer Reports* that evaluates it? The magazine

61. See KENNETH J. ARROW, *THE ECONOMICS OF INFORMATION* 137, 160, 171 (1984); KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 151-52 (1971); F. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* 348 (1921); J. Hirshleifer & John G. Riley, *The Analytics of Uncertainty and Information—An Expository Survey*, 17 J. ECON. LITERATURE 1375, 1395 (1979); see also James Boyle, *A Theory of Law and Information: Copyright, Spleens, Black-mail, and Insider Trading*, 80 CAL. L. REV. 1413, 1438, 1443-44, 1448-50 (1992) (pointing out the paradox resulting from regarding information both as a conceptual precondition for analyzing markets and as a commodity to be traded in markets); cf. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1212 (1991) (arguing that if transaction costs are taken seriously, including the costs of obtaining new information, we are always at a Pareto optimal point).

may save me some money, perhaps an amount greater than the magazine's cost. But I will not know that until I pay the price to get the magazine.

Interestingly, economic theory is mute here. It cannot tell me whether information is worth its price, except when I have good actuarial information about the information itself, such as that there is a one-in-three chance that *Consumer Reports* will save me ten dollars on a seventy-five-dollar purchase, which makes it worth a \$2.00 asking price. Economic theory itself normally assumes full or adequate information, or at least actuarial information about information,⁶² which makes economic theory largely irrelevant to purchases of information itself.

Economic theory does tell us, however, that the enterprise of producing information for sale—for example, what newspapers do—suffers from a public goods problem. Because information, once purchased, will be disseminated by the original purchaser for free⁶³ or at nominal charge, the producer cannot capture the full public benefit of the information in the price charged. As a result, if the cost of production is greater than the price purchasers will pay, though less than the total public benefit of the information, the information will not be produced even though it would have been socially beneficial to produce it.⁶⁴

In view of this inability of producers to recapture the full public value of the information in the price charged and the resulting underproduction of information, one might argue that we subsidize the production of information for distribution.⁶⁵ There are, however, several difficulties with this conclusion.

First, there are an indefinite number of activities that might produce—or might produce if subsidized—information of public benefit. Without knowing what information would be produced that is not produced now, how can we determine which information's production costs should be subsidized?⁶⁶

62. Cf. Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 SOC. PHIL. & POL'Y 62, 69-70 (1992) (arguing, based on knowledge of who is most likely to have the knowledge necessary for efficient allocations of resources, for a centralized structuring of a decentralized market).

63. Information is never consumed at no cost to the consumer; there are always at least the costs of time and attention. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 209-73 (1957). These costs, however, do not involve payment to the producer.

64. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-68 (1991).

65. *Id.* at 570-79.

66. Interestingly, in *Minneapolis Star & Tribune Co. v. Minnesota Commission of Revenue*, 460 U.S. 575 (1983), the Supreme Court held a special tax subsidy for the press to be unconstitutional because of the dangers of covert viewpoint discrimination inherent in the gov-

There are several layers to this problem. Because we cannot know what information will be produced by any information producer if we subsidize its production, we cannot know whether the information's total social value—the public's willingness to pay for the information if free-riding were precluded—will equal its social cost. In turn, this means we cannot determine which of the many producers to subsidize or at what level.⁶⁷ Moreover, there are other public goods that require protection or subsidization apart from information, some of them in direct opposition to information production. In addition, both the content of information and its production also produce *negative* externalities not reflected in the costs because of collective action problems. For example, those who don't like the noise and congestion of demonstrations, the scandal-mongering of the tabloids, or the eyesores of campaign posters might, but for collective action problems, pay off the information producers in question to eliminate the negative externalities.

The second general problem with this public goods argument for subsidizing information production is that its own logic renders it impotent as a track two tool. It highlights a problem information producers face—they cannot recapture in their price the public value of the information they produce. But defining who is a "producer of information" and what is a "subsidy" requires analytically privileging a certain set of entitlements and background laws; for it is only against that background that we identify who is producing information and what is a subsidy. A track two challenge, however, is a challenge to precisely that set of background entitlements and laws on First Amendment grounds. With a different set of background entitlements and laws, there would be different information producers producing—or potentially producing—different information, who would face the recapture (of costs of production) problem.⁶⁸ Paradoxically, the public goods argument works as a potential track two First Amendment argument only if we first decide on First Amendment grounds which set of entitlements and background laws to

ernment's singling out the press for special treatment. The Court, however, has been quite schizophrenic in this regard, hardly blinking at the subsidies of particular viewpoints inherent in such things as public education, publicly funded research, publicly funded arts, and public libraries. For example, in *Leathers v. Medlock*, 111 S. Ct. 1438, 1442-43 (1991), the Court upheld a subsidy for the press broader than the one in *Minneapolis Star*.

67. Indeed, because information is a byproduct of the production of other items, any producer may claim that he cannot recapture full social value of his product and therefore should be subsidized.

68. Consider whether we should subsidize those who already produce information for public distribution or those who would do so if they received a subsidy. Consider further those who would produce information for public distribution if they did not have to incur the costs of such subsidies to others?

privilege; but once that is decided, everything is decided, leaving nothing for the public goods argument to do. In short, the public goods argument has no force as a track two First Amendment argument because it provides no grounds for criticizing the background entitlements and laws that determine who the information producers will be.

(2) Assume Knowledge of What Information Will Turn Out to Be

The previous Part raised the difficulties that arise for any track two First Amendment enterprise if we do not know what information will be gained and what information will be lost under alternative sets of laws. The difficulties stem from two fundamental points. First, we cannot evaluate information and whether it is worth the costs required to obtain it until we actually have it; therefore, because different information will be gained and lost under every alternative set of track two laws, we have no way of assessing which of those sets of laws is preferable. Second, the fact that we will tend to underproduce information as a commodity because of the opportunity to free-ride is no grounds for making a track two attack, because each alternative set of track two laws produces its own distinct set of information that is underproduced.

If now we make the heroic assumption that we know what specific information will be gained and lost under each alternative set of entitlements and background laws, are we in a better position to evaluate the information effects of alternative sets of laws?

Yes and no. Yes in the obvious sense that we can and do evaluate information's importance once we have it. No, however, in the most crucial sense for First Amendment analysis. That is because the First Amendment expresses as its primary value that government not preempt individuals' evaluations of information.⁶⁹ Put differently, the First Amendment protects a process of citizens' evaluations of information and forbids governmental preemption of that process by privileging certain evaluations.

Al believes that knowing intimate facts about Bill Clinton's life is more important than knowing how Clinton's tax policy will affect the economy. Barbara believes the opposite. And Charles believes that knowing how many blades of grass there are in his lawn is more important than either Clinton's private life or tax policy. There may be a point of view from which it is possible to say whether Al or the others are

69. I am using information throughout this Essay in a broad sense, including not just items of data, but, for example, arguments, and ways of seeing and categorizing.

correct or incorrect in their evaluations, but whose point of view is it?⁷⁰ Each person—you, I, Al, Barbara, and Charles—will believe his or her point of view to be the correct one; that is why he or she holds that point of view.

The Krishnas in *Lee* no doubt believed the information about religion that they wished to distribute to airport patrons was more important than the information conveyed by an airport uncongested and uncluttered by solicitors and proselytizers and their litter or the information that would be produced by the resources used to police and clean up after the Krishnas. Is it? What if the religious teachings are false or sinister? What if an uncluttered environment heightens valuable aesthetic sensibility?

The point is not that an individual cannot have a point of view about the values of the competing types of information, or that one point of view cannot be correct. The point is, rather, that the First Amendment requires government to treat any point of view on these matters as just one point of view among many.⁷¹ The only point of view it privileges is its own—namely, that no particular point of view shall be privileged.⁷²

Of course, this view of the First Amendment's central value is contestable and contested. For example, some argue that the First Amendment requires only that no "political" position be privileged, and that only "political" speech and information are protected.⁷³ This position,

70. Of course, for much information, its value will be purely agent-relative. See Schauer, *supra* note 5, at 706-13.

71. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . ."); Susan M. Gilles, *All Truths Are Equal, But Are Some Truths More Equal Than Others?*, 41 CASE W. RES. L. REV. 725, 726, 740-41 (1991); cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 370 (1991).

Indeed, the liberal ideal observer construct I have described may not even be coherent. Real individuals have more than a bare desire to decide correctly what candidates they should vote for, or what views to hold about others in society, or what occupation they should pursue, or what products they should buy. They have concrete desires and views about products and candidates and occupations. It is possible that unless one knows what those concrete desires are, one cannot make sense of the question: what information would this person want in circulation? The bare desire to reach a correct decision may leave that question unanswerable in principle.

Id.

72. This is paradoxical. Indeed, the First Amendment has been held to protect anti-First Amendment views, which is also paradoxical. See Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956); see also Post, *Racist Speech*, *supra* note 58, at 303-04 (discussing the paradox of public discourse exemplified by tolerating the intolerant).

73. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech—An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300 (1978) (proposing that

however, is, for related reasons, both unhelpful for track two analysis and also wrong. Regardless of what alternative sets of laws we compare in assessing track two challenges, political information will be lost and gained under each.⁷⁴ Furthermore, the evaluation of the political information at stake surely will be political in the sense that requires governmental nonpartisanship. More fundamentally, the question of what information has political relevance is itself political.⁷⁵ If that is true, the position that the First Amendment protects only political speech devours itself.

Would track two analysis avoid the "point of view" problem if it sought "balance" or "representation" or "adequate airing" of points of view? This tack is equally unavailing. First, how many issues are there, and how many points of view are there on each? Second, whose position "represents" a point of view? Third, when has that position been "adequately aired"? The first question, if it is a meaningful one, is not a metaphysical one but one itself referable to points of view. Moreover, the number of points of view per issue is not determinable, since any answer depends on how the "issue" is described and what information and state of the argument is posited.⁷⁶ As for representation and adequacy of airing, no one can represent my point of view except me; and that point of view has not been adequately aired until it is universally accepted. To illustrate, if people disagree with me, they obviously have not listened or understood, or they are intellectually deficient. How else can I explain their disagreement if I still hold my point of view to be correct?

This discussion reveals a deep paradox in First Amendment theory. There are those, like Owen Fiss and Jürgen Habermas, who want the realm of speech to be a realm of pure process, the substantive results of which are correct because of the purity of the process from which they emerge.⁷⁷ Yet, to make the process "fair," they would build in substan-

in principle the First Amendment protects only "political" speech); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (proposing that the categories of protected speech should consist of speech concerned with governmental behavior, policy, or personnel).

74. Consider the effect of *Schneider v. State*, 308 U.S. 147 (1939), and *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S.Ct. 2701 (1992), on the political proposition that "streets and airports should be free of pamphleteers," a proposition communicated symbolically by the presence of the laws struck down in those cases.

75. Ninety-nine percent of us would agree that the *MacNeil/Lehrer News Hour* has more relevance to political choices than do re-runs of *Gilligan's Island*. Yet, how do we convince the remaining one percent while remaining politically "neutral"?

76. See Strauss, *supra* note 71, at 349.

77. See JÜRGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (1979); JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy trans., 1973); Owen

tive constraints. Fiss wants more diversity, more balance. Habermas wants to build in the various conditions that define his "ideal speech situation." Any conception of diversity and balance, however, will be the product of, and will privilege, particular points of view. Balance and diversity can only be ascertained relative to an opinion of what points of view are plausible or sound.⁷⁸ Fiss's version of a fair process will be partisan, and the partisanship deprives any outcome of pure procedural legitimacy.⁷⁹ Similarly, Habermas's conditions for the ideal speech situation build partisan positions on all the major substantive issues into his

M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

78. See Post, *Managing Deliberation*, *supra* note 58; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975); cf. Michelman, *supra* note 56, at 103-04 n.47.

There are other arguable cases of unfair impairment by some people's speech of the value of other people's speech that a committedly liberal constitutional-legal order may have little choice but to disregard. It may happen that less meritorious arguments backed by an individual speaker's superior personal endowment of wit, chutzpah, eloquence, or charisma gain undue advantage in the speech market over more meritorious insights that a slower-witted, duller-spoken person has trouble articulating. However, personal handicapping in such circumstances seems not a liberally entertainable possibility. Again, it may happen that what an audience experiences as comparative cogency and soundness of argument is just a reflex of the comparative familiarity or conventionality of the ideas being urged. If this is at all a frequent occurrence, then public-forum doctrines of content-neutral order-maintenance and equal access may be a recipe for ensuring that currently prevalent views and perspectives will continue to prevail regardless of their responsiveness to the interests and values of the audience. But by what standard can liberals deal out 'deviance' or 'dissidence' subsidies?

Id. (citations omitted).

79. See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 251 (1992).

To be sure, if government controlled all the resources, then very little would be left of the value of free speech. There are two responses, however, to this concern. First, as classic liberals have always known but socialists have forgotten, a limited government and a vigorous private sector firmly beyond government's reach are crucial to freedom of the spirit as well as to economic liberty. This is the basis of the old saying that liberty is indivisible. Since community control over resources is the light that beckons on the left, the left—to the extent it cares about freedom of the spirit—must seek out devices that will discipline the government's monopoly in the realm of ideas. But any such device must consist of an official arbiter (that is, a government arbiter) to attempt to distribute access to the public forum. And that device cannot be content-neutral. It must decide which views have been heard too much, which not enough, and which should not be heard at all. The only content-neutral device turns out to be a society in which a significant portion of the resources are in private hands and beyond the reach of government altogether.

Id.

procedural conditions. What comes out of the process will be predetermined by what went into setting it up.⁸⁰

In short, a pure free speech process is a vacuous concept. There are just different background conditions for speech, each of which will lead to different substantive outcomes.

Post understands the legitimacy difficulty faced by those who, like Fiss and Habermas, seek to manage free speech. On the other hand, Post fully appreciates the other side of this paradoxical predicament.⁸¹ For Fiss, Habermas, and others with similar views are correct that the set of background entitlements and laws will affect the outcomes of the free speech process.⁸² Yet, one such set must always be in place. If we cannot evaluate that set and compare it with other possible sets in terms of information effects, we cannot evaluate the most important determinants of outcomes of free speech, at least not on free speech grounds.

This is the paradox. Track two laws are extremely important in determining the quality of public debate. Indeed, track two laws have a much greater effect on speech than track one laws, if relative effects can be meaningfully measured. Nevertheless, the core First Amendment value that no partisan point of view be privileged precludes government from evaluating information gains and losses, which, in turn, means that track two analysis is precluded by the First Amendment itself.

Again, the point is not just an institutional one about the limits of courts. It applies to any governmental institution. Legislative evaluations of information, though democratic (unlike judicial evaluations), are themselves antithetical to the core First Amendment value.⁸³

Finally, one might argue that adopting a comprehensive normative theory—such as Rawlsianism, utilitarianism, or libertarianism—as the vantage point for First Amendment analysis provides a basis for evaluating information gains and losses and thus for evaluating track two laws. The rejoinder to this position is that although comprehensive normative theories are in one sense the proper bases for evaluating track two laws,

80. See Strauss, *supra* note 71, at 352-53; Michael Walzer, *Moral Minimalism*, in FROM THE TWILIGHT OF PROBABILITY 3, 3-14 (William R. Shea & Antonio Spadafora eds., 1992).

81. See Post, *Managing Deliberation*, *supra* note 58, at 37-38; Post, *Racist Speech*, *supra* note 58, at 287-88; Post, *Public Discourse*, *supra* note 58, at 683-85.

82. See Sunstein, *supra* note 51, at 262, 271-77, 294-97; see also Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 111-16.

83. Thus, a decision that there shall be public libraries, not public tennis courts, if it is a decision about the relative values of the information provided by libraries and tennis (and not just a weighing up of constituents' preferences qua preferences), represents government's endorsement of a partisan political view inconsistent with the First Amendment. See *supra* text accompanying notes 57-58.

they are the proper bases only insofar as they are not distinctly related to free speech. Rawlsianism, utilitarianism, and libertarianism are frameworks for assessing the entire corpus juris—to see if it maximizes liberties and wealth, maximizes aggregate or average welfare, or reflects libertarian rights—and in that sense they are important to track two analysis. In that same sense, however, they have nothing to do with speech or relative information value as distinct issues apart from liberties, welfare, and libertarian rights. Usually a comprehensive normative theory assumes full information of whatever type the theory makes relevant and then directs that that information be deployed to produce the results the theory dictates. Nevertheless, even if we assume the lack of full information, information effects can only be relevant to the choice of track two laws in a very restricted way. We would have to assume that the choice among track two laws was entirely neutral with regard to all values made relevant by the theory in question, and that relative information effects was the only ground for choice. The theory would then dictate that we choose that set of laws most likely to lead to the information upon which the theory itself places the higher value.

Yet, even in this extremely restricted way in which comprehensive normative theories would be relevant to track two analysis, such laws pose a First Amendment problem. Presumably the First Amendment, even if its ultimate justification rests on a comprehensive normative theory, forbids imposing such a comprehensive normative theory on citizens' evaluative decisions. Further, since imposition of a single comprehensive normative theory is the strongest of all governmental intrusions on the citizens' evaluative processes, it is the most antithetical to the First Amendment.

(3) Summary

If we assume the position of ignorance regarding information effects—what would get said, to whom, by whom, and to what effect—under alternative sets of track two laws, then we can make no evaluation of those sets in terms of information gains and losses. At most we can assume that under each such set, the deliberate production of information will face a recapture problem, a point that is normatively impotent because it applies to all alternative sets of laws.

On the other hand, if we assume the position of knowing the information effects under each alternative set of track two laws, we then face the problem that all evaluations of such information are positional and partisan and may not be endorsed by government. Even a comprehensive normative theory underlying the First Amendment will be too

strong to be a track two tool, since it will usually endorse a set of track two laws on grounds independent of information gain and loss. Moreover, comprehensive theories are nothing more than partisan positions that the government may not endorse in attempting to structure public debate, even if, paradoxically, they themselves provide the justification for the First Amendment and its proscription of their own endorsement.

B. The Implication of the Failure of Balancing

Track two First Amendment analysis requires that we balance information gains and losses and all other values furthered by the entire set of laws in question against the information gains and losses and all other values furthered by all the alternative entire sets of laws. We cannot do this as a practical matter. Perhaps more importantly, we cannot do this as a theoretical matter. Even if we knew what information each alternative set of laws would generate, the First Amendment itself forbids government to act on an evaluation of that information. Track two analysis is not an extension of the First Amendment but a violation of it. Track Two laws can be evaluated on many grounds—but not on First Amendment ones.

There are two major implications for the First Amendment to be drawn from this conclusion. Most obviously, the courts should no longer hear track two challenges to laws. This would not have a great impact because track two challenges, as discussed earlier, almost never succeed.

The second implication, however, is directed at legislation, not adjudication, and is quite far-reaching. For if my analysis is correct, the legislature violates the First Amendment if it adopts and imposes through law any partisan evaluation of information, which is any evaluation. Essentially, while the government may enact laws based on a variety of values, it may not constitutionally rely on the value of information gained or lost in choosing which laws to enact or repeal.

This, in turn, suggests that the government's decisions whether to build an auditorium to provide a forum for public debates, to fund election campaigns, to expand public education, to fund research, and a multitude of other track two and track three decisions resting wholly or in part on government's evaluation of information rather than its aggregation of private preferences, are constitutionally problematic.

This implication, however, appears to offend common sense. Do we not need more fora for public debate, more public funding of elections, more broadcasting options, more education, and more research? Should

government not support such endeavors?⁸⁴ Yet, how can I answer those who disagree without presupposing what information such endeavors would produce and without evaluating that information and its opportunity costs by reference to a controverted, partisan point of view?

Ultimately, track two analysis reveals not only its own First Amendment illicitness, but also the illicitness of all information-conscious legislative decisions regarding the quality and quantity of public discourse. Consider a legislative debate, such as might have occurred within the New York City Port Authority prior to *Lee*, over whether to allow the sale and distribution of literature inside the airport terminals and thereby incur the costs of congestion, annoyance, extra policing, clean-up, and so forth. The legislative body will be aware that if sale and distribution are not allowed, some passengers will not receive some messages, usually religious or political, and usually not mainstream. On the other hand, a clean, uncongested airport, aside from being valuable in itself, also communicates various messages to its patrons. Furthermore, the money saved on clean-up can be used to provide other services—including perhaps schools and libraries—or can be put in the pockets of taxpayers who might spend it on information. How is the choice to be made? The legislative body might disregard remote, uncertain, or amorphous information effects and focus only on the most direct, certain, and specific effects, such as the effects on the Hare Krishnas or the LaRoucheites. Even so, what should it do? Should it count these effects as outweighing the non-speech costs? Why? Because it sympathizes with the Hare Krishnas and LaRoucheites and believes others should hear their messages at the cost of other values and messages? Alternatively, should it count these effects as outweighed by the costs? Again, why? Legislative evaluation of the Hare Krishnas' and LaRoucheites' messages seems inevitable if speech effects are to be taken into account, but such evaluation on closer examination appears quite illicit.

Alternatively, consider a debate within Congress or the FCC over whether the broadcast media are sufficiently "diverse" or "balanced" in the array of information they provide the listeners and viewers in their markets. This debate can be meaningful only if there are criteria for identifying degrees of importance of information,⁸⁵ criteria for diver-

84. See BENJAMIN BARBER, *STRONG DEMOCRACY* 267-68, 305-07 (1984); Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 646-47 (1991).

85. For example, diversity of political information is more important than diversity of music formats.

sity,⁸⁶ and criteria for balance.⁸⁷ The choice of such criteria is deeply evaluative and partisan.

Current Supreme Court track two jurisprudence seems most consistent with the following position: The legislative bodies may enact or modify track two laws explicitly in order to facilitate speech activities or to promote balance and diversity so long as the legislature is presumed to have had no clear impression of what information would be favored and disfavored, or no particular sympathy for the messages likely to be favored. Governmental decisions to allow demonstrations, to open facilities for pamphleteering, to build public auditoria and other communicative fora, to break-up media monopolies, and to subsidize broad categories of information media will uniformly be upheld, even if those decisions were premised on some estimate of the relative value of information lost and gained.⁸⁸ Because the content of the information gained in these cases cannot be known with any certainty when the decisions are made, the decisions are no more arbitrary than had they been made without regard to information gains and losses. So long as the legislative body is operating in the dark, the Court will not care that concern for information effects was what determined the outcome of the legislative balance.

This analysis explains as well why the Court often strikes down obviously content-based regulations of time, place, and manner. If, for example, the legislative body has taken a partisan position in favor of speech related to labor disputes and against all other speech,⁸⁹ or in favor of non-religious speech and against religious speech,⁹⁰ the Court will strike down the time, place, and manner regulation.

86. For example, how many positions are there on labor policy, is a novel free market position on world trade more or less diverse than a tired Marxist view, and is the latter more "diverse" relative to mainstream political programming than is religious programming or farm reports?

87. For example, does a strong speech by Cuomo balance three speeches by Quayle?

88. It is difficult to come up with unambiguous support for this statement because governmental decisions are almost always challenged on First Amendment grounds when they obviously restrict speech or obviously favor some subjects or viewpoints, and not when they subsidize speech in an apparently nonpartisan manner. Nonetheless, the Supreme Court has occasionally faced First Amendment challenges to governmental speech subsidies. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 92-108 (1976) (holding federal subsidy of election campaigns constitutional); *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367 (1969) (holding fairness doctrine in broadcasting constitutional); *cf. Metro Broadcasting Inc. v. FCC*, 110 S. Ct. 2997, 3025-26 (1990) (allowing preference for minority ownership in awarding broadcasting licenses).

89. *See Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 (1972).

90. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

Thus, when the government makes a track two decision based on information effects, the Court will sustain the decision if it believes that the legislature could not have evaluated information effects in a partisan manner. Where the legislative decision appears to be partisan, however, the Court will invalidate it.

Track two First Amendment jurisprudence is destined to fail because no track two theory is available that is consistent with the core value of the First Amendment—citizen autonomy regarding the evaluation of information. The courts can strike down and, as in *Schneider* and *Lee*, have struck down laws in track two cases. Nonetheless, track two judicial decisions can only be arbitrary or illicit.

IV. Implications for Track One and Track Three Jurisprudence

A. Track One

The foregoing analysis of track two jurisprudence has profound implications for track one and track three. Essentially, its lesson is that track one and track three decisions cannot be justified by reference to the value of information at stake.

The content of speech—its message—has enormous capacity to inflict harm on values that government may legitimately seek to protect.⁹¹ Yet the courts have consistently struck down attempts to interdict the receipt of such harmful messages unless the messages fall within a few unprotected categories.⁹² The courts frequently justify this protection by reference to the value of the message.

Consider the following examples of track one jurisprudence. Defendant publishes a false and defamatory statement about a public figure plaintiff or satirizes a public figure plaintiff in an offensive manner that causes emotional distress.⁹³ Alternatively, plaintiff public employee makes a public criticism of defendant public employer that might adversely affect office morale.⁹⁴ The Supreme Court protects the speaker against sanctions in these cases and justifies protection on the ground that not protecting the speech would deter speech, the value of which is

91. See Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS (forthcoming 1993); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992) [hereinafter Schauer, *Uncoupling Free Speech*].

92. See *supra* text accompanying notes 3-4.

93. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

94. See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

expected to outweigh the harm prevented by deterrence.⁹⁵ If the previous Part's argument is correct, however, the Court cannot make the judgment of relative value for two reasons: it cannot know what information will be lost or who will lose it through deterrence; and it cannot place a value on that information such that its value can be compared with the values the government is seeking to protect.⁹⁶

Consider the protection tort law provides against revelation of private and embarrassing information. Should that protection withstand a track one First Amendment challenge? If so, then certain information will be lost to certain audiences. We do not know, however, what that information will be. Moreover, although any one of us may place a value on that information if we discover it, we have only our plural individual vantage points from which to assign a value to it.

On the other hand, consider the multitude of other track one First Amendment doctrines that purport to protect speech because of its information value despite the real and tangible harms it causes. The First Amendment law regarding defamation, regarding speech that induces others to engage in harmful conduct, and regarding pornography can be viewed as resting on the fear of "chilling" the communication of valuable information.⁹⁷ Frederick Schauer convincingly makes the point that our decision not to chill defamatory, inciting, or (soft-core) pornographic speech does not require that we allow the harm from some speech to remain on its immediate victims.⁹⁸ For example, we can shift its costs to the public through some sort of social insurance mechanism so that those costs truly are the costs we bear as the price of freedom of speech. Both Schauer and the Supreme Court fail to address, however, the loss of in-

95. See, e.g., *id.* at 571-75 (holding that a teacher's exercise of his right to speak on issues of public importance many not be the basis for his dismissal from public employment); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-83 (1964) (holding that the public interest in having free and unhindered debate on matters of public importance precludes a public official from receiving damages for defamation unless the statements were made with reckless disregard for the truth or with knowledge of their falsity).

96. This last statement needs to be qualified in this respect: Sometimes the information that is suppressed by censorship bears on the same value that government is seeking to further through censorship and thus reveals the censorship's self-defeating nature. In such a case the valuation of the information is no less legitimate than the valuation on which its suppression is premised. For instance, if the suppression of speech in the name of copyright and patent laws is meant to produce a net increase in ideas that can be copyrighted or patented by giving authors and inventors the incentive of legal monopoly, then that justification for suppression would be undermined by a showing that copyright and patent laws lead to fewer ideas that can be copyrighted or patented than would exist in their absence.

97. Although these aspects of First Amendment law might rest on other grounds, such as some conception of the right to autonomy. See *infra* Part IV.C.

98. See Schauer, *Uncoupling Free Speech*, *supra* note 91.

formation that any method of allocating the costs of harms entails. Every possible legal regime—the law of defamation prior to *New York Times v. Sullivan*, the *Sullivan* regime itself,⁹⁹ or Schauer's social insurance system¹⁰⁰—will produce its own distinctive supply and type of information. An information effects approach to track one jurisprudence is unavailing.

Other track one maneuvers, such as denying value to certain speech, are equally unavailing. Consider, for example, the categories of hate speech and pornography. While they undoubtedly cause harm, are they valuable? Alon Harel argues that they are not.¹⁰¹ Harel places hate speech and pornography in a category called "abhorrent speech." Abhorrent speech lacks value, not because it communicates no ideas, and not because its ideas are not important or political in some sense, but because its ideas do not make up part of our political discourse, a discourse that extends only to those values and ideas capable of generating legitimate political obligations.¹⁰² In other words, because we cannot legitimately act on racist or sexist values, we cannot assign First Amendment value to speech supporting such values.

Harel's position can be viewed as an outright denial of my contention in the previous Part that the core First Amendment principle is preventing any institution from assigning values to messages. Harel asserts that "[t]here are some values and ideas that are so abhorrent that they are not part of political discourse. The test is the degree to which values and ideas that purport to shape the nature of our political obligations can succeed in doing so."¹⁰³

Harel recognizes that courts have consistently granted First Amendment protection to what he labels abhorrent speech, but argues that such protection is a mistake. He rejects, quite correctly, any notion that all political messages are equally valuable:

Any participant in political discourse believes that her or his idea is more valuable than others; indeed, the reason why the participant holds a particular political position is precisely because he or she believes that this political idea is more valuable than the alternatives. If no political idea were more valuable than any other, we could arbitrarily choose any political view and govern our lives in accordance with it. The claim that all political ideas are equally valuable is inconsistent with the basic assumptions of participants in political discourse. The

99. *Sullivan*, 376 U.S. at 282-84.

100. See Schauer, *Uncoupling Free Speech*, *supra* note 91, at 1338-55.

101. Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887 (1992).

102. *Id.* at 1889.

103. *Id.* at 1889-90.

equal protection principle applies not because all political ideas are equal but *in spite of* the unequal value of political statements.¹⁰⁴

He then goes on to consider various theories that might nonetheless support First Amendment protection for abhorrent speech and finds them all wanting.

Most significantly for my purposes, Harel rejects institutional justifications for protecting abhorrent speech.¹⁰⁵ He does so for two reasons. First, he says that institutional incompetence is inconsistent with actual First Amendment decisionmaking. For example, courts assess the value of particular instances of political discourse when they ask whether obscene speech meets the *Miller* test¹⁰⁶ for unprotected status.¹⁰⁷ The courts also assess its value when they declare it to be more valuable—and thus subject to greater protection—than commercial speech.¹⁰⁸ Second, the incompetence argument is circular in that courts can become good at assessing the value of speech if First Amendment doctrine is changed to allow them to do so.¹⁰⁹

Harel is responding here to an argument that all governmental institutions should be deemed incompetent to assess the value of speech. Yet his response is limited to courts. Moreover, his response misses the particular type of governmental incompetence at the core of the First Amendment. First Amendment concerns are not implicated if a court or a legislature assesses the value of arguments and information worse than you, I, or anyone else would. The concern is that a court's or legislature's assessment—like yours, mine, or anyone else's—will be in an important sense just another point of view that should not be privileged by government. You, I, and most other people believe—no, we know—that bigotry is wrong. We also know that the First Amendment is a good thing. Further, what we know the government is quite likely to know as well. Nevertheless, the government is forbidden by the First Amendment to interdict ideas it believes to be false, including, not just the idea that bigotry is good, but, paradoxically, the idea the First Amendment is bad.

Harel, in fact, believes that in arguing for nonprotection for abhorrent speech, he is arguing for a minor amendment of First Amendment jurisprudence. The ideas expressed by abhorrent speech are not just wrong, says Harel, they are ideas that cannot provide the basis for legiti-

104. *Id.* at 1914.

105. *Id.* at 1915-16.

106. *See Miller v. California*, 413 U.S. 15, 24 (1973).

107. Harel, *supra* note 101, at 1917.

108. *Id.*

109. *Id.*

mate political obligation. Harel contrasts abhorrent speech, such as hate speech and pornography, with pro-life and pro-choice speech regarding abortion. Pro-lifers regard the pro-choicers as advocating murder. The latter regard the former as advocating subordination of women. Neither murder nor subordination are acceptable political values, so it might seem that Harel would allow the silencing of one group by the other. Harel denies this consequence of his position. He says that the underlying values of the pro-life and pro-choice positions—protection of life and equality—are values that can sustain legitimate political obligations, even if, from the point of view of the other side, these values have been misapplied.¹¹⁰

This maneuver leads Harel into an impossible dilemma. All proponents of abhorrent speech are expressing, at some level of generality, perfectly legitimate political values. As Harel notes, Nazis can argue that their speech conveys ideals of patriotism.¹¹¹ Likewise, racists and sexists can talk about respecting a natural moral order. Harel's response is weak:

A judgment must be made in each case as to the prominence of the abhorrent values and that of the legitimate ones. Speech should be denied or granted protection only after careful examination of the complex of values the speech conveys and reinforces. *All* discourse conveys a variety of different and contradictory values. Identifying the primary values and ideas conveyed by a particular form of discourse requires more than the identification of the explicit agenda advocated by the participants.¹¹²

There is no way in principle for a court, or anyone else, to disentangle the question of whether a political position is wrong from the question of whether a political position expresses legitimate political values. At some level of generality, almost any political position, including "abhorrent" ones, expresses legitimate political values. Yet, at another level of generality, any political question expresses legitimate political values only if it is correct.

Harel's argument purports to be critical, and not descriptive, of track one jurisprudence. He is seeking to reform, not legitimize, the jurisprudential status quo. I am also critical of many First Amendment precedents. My argument against Harel is not that he is at odds with First Amendment jurisprudence, but that he is more fundamentally at odds with a central value underlying the First Amendment. Whether an idea can form the basis for political obligations cannot be disentangled

110. *Id.* at 1925-26.

111. *Id.* at 1926.

112. *Id.*

from the question of whether the idea is correct. Furthermore, if the correctness of an idea is the touchstone for its track one protectability, the First Amendment is not merely drained of its central meaning but is turned inside out.

Nonetheless, Harel and I agree on one thing: track one First Amendment jurisprudence protects more speech than it can justify protecting. Harel's point is that some speech that is currently protected is valueless. My point is that placing a positive value on speech—as track one jurisprudence currently does in dealing with contending values of privacy, confidentiality, property, and sensibility—is itself problematic.

B. Track Three

If my arguments are correct, they reveal a major problem with what I have called track three governmental decisions, decisions by the government to promote its own views. These would seem to be the most suspect according to the analysis I have applied to the other tracks, yet the Court treats them quite deferentially. There are, of course, a number of track three decisions that deal with speech appurtenant to government enterprises that are not principally information oriented. For example, when the government runs the military, the police, public hospitals, the welfare department, and other enterprises, it has a concern with what gets said that is no different from the concern a private enterprise would have. It wants its welfare workers to give clients advice about welfare, not politics or religion. It wants the police department's bulletin board to be used for notices of seminars, union meetings, and shift information. In short, the government wants to make sure that the information necessary for the success of its enterprises be conveyed, and that it not be drowned out by extraneous information.¹¹³ If government's enterprises

113. Several cases fall into this realm. *See, e.g.,* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (restrictions on who could participate in college governance institutions); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (restrictions on who could communicate through teachers' mail system). More problematic, because they disclose the lack of a clear boundary between government's legitimate concern for its own enterprises and its more suspect concern with public debate over its effectiveness, are cases in which employee speech is suppressed because of morale effects. *See* Rankin v. McPherson, 483 U.S. 378 (1987) (balancing potential value of speech by public employee against potential for undermining her effectiveness); Connick v. Myers, 461 U.S. 138 (1983) (upholding dismissal based upon speech by public employee affecting office morale and undermining employer's authority); Pickering v. Board of Educ., 391 U.S. 563 (1968) (holding employee's speech on matters of public importance cannot be a basis of dismissal); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1812-16 (1987). Ironically, the concern for morale is less problematic the broader the muzzling that occurs. *See, e.g.,* Greer v. Spock, 424 U.S. 828 (1976) (upholding

are legitimate, then so too is its concern with speech that interferes with those enterprises.

When government becomes an educator or patron of scholarship, research, and the arts, the tension with the First Amendment's central values is most acute. If the government may not establish an evaluative orthodoxy regarding citizens' exchanges of information, why may it do so when it speaks itself, as it does through public education, the funding of research, scholarship, the arts, public broadcasting, family planning counseling, and myriad other enterprises? Does the First Amendment speak differently to government's evaluation of information when it is using citizens' tax monies as opposed to censoring citizens' speech or manipulating time, place, and manner regulations in order to favor and disfavor certain subjects and viewpoints?

I cannot square the Court's general concern with content discrimination and its currently quite permissive attitude toward track three governmental speech. Why the government may monetarily subsidize speech that promotes life birth over abortion but may not subsidize labor speech by granting an exemption from a general ban on demonstrations near schools is a theoretical mystery. Perhaps the Court believes that partisan use of resources is more of a threat to the First Amendment when the resources are parks, streets, sidewalks, and perhaps airports than when the resources are tax monies. Nevertheless, current track three jurisprudence is surely in need of a theoretical reconciliation with the principle of governmental evaluative neutrality that underlies the First Amendment.¹¹⁴

regulation banning political speech from military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding regulation banning political advertisements from public transport).

114. For scholarly commentary on track three First Amendment jurisprudence, see generally MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983), Stanley Ingber, *Socialization, Indoctrination, and the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, Robert D. Kamen-shine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979), Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980), Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889 (1986), and Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partnership*, 20 B.C. L. REV. 578 (1980).

My fanatical conclusion regarding track three jurisprudence could be softened somewhat if the legislature were allowed to act on premises on which there were a broadbased consensus. Thus, the schools could teach that the earth is round, that America was discovered by Columbus in 1492, and that $2 \times 2 = 4$. The legislature could fund medical research and basic physics but not astrology. See *infra* text accompanying notes 122-124. It could also decide that public libraries and public theaters were more valuable than more shopping malls. Moreover, the courts could develop a track three jurisprudence that would focus on structural issues, such as how decisions about curricula, collections, or research, for example, are made within track three governmental entities, with a First Amendment preference for decentraliza-

C. Autonomy and First Amendment Jurisprudence

This Essay has asked the reader to accept the proposition that a central principle underlying the First Amendment is that the government is forbidden to impose on citizens a particular evaluation of information, ideas, and arguments. This proposition entails that any governmental decision, whether on track one, two, or three, is illegitimate if premised upon the government's evaluation of the decision's information effects, even if government's ultimate aim is to prevent some harm more tangible than ignorance or falsehood.¹¹⁵ Government must act for reasons that do not require citizens to believe, or be ignorant of, certain things.

While there are many theories of freedom of speech and the First Amendment, I will not attempt to canvass them, much less recite the problems internal to each.¹¹⁶ What is important is that those theories generally do not dispute the central principle upon which I have been relying, but rather, attempt to justify that principle by reference to a still broader aim, such as pursuit of truth, democratic self-governance, self-realization, or distrust of government.

The major competitor to consequentialist theories of freedom of speech, those that depend upon evaluating information differentially, are those deontological theories that are based upon some conception of individual autonomy.¹¹⁷ According to these theories, the paradigmatic violation of freedom of speech is an attempt to penalize or interdict the sending or receipt of a message because of the fear that the audience will, on account of the message, believe things to be true and good that are not and, as a result of that belief, act to its or others' detriment. If someone

tion and professionalism. The legislature, however, could not take sides on widely disputed issues. Moreover, this concession to legislative assessments of the value of information would not entail any judicial track two role (unless one took the position that the First Amendment was an *affirmative* command to produce a certain level of education and a certain kind of public discourse).

For a more permissive view of track three government action, see David A. Strauss, *The Liberal Virtues*, in VIRTUE 197, 202 (John W. Chapman & W. Galston eds., 1992) (arguing that the government should be able to teach "liberal virtues," presumably even if liberal virtues include the unwillingness to force others to accept those virtues).

115. Government must, of course, evaluate information and find facts for its own purposes. It must decide questions of adjudicative fact (Did Mary rob John?) and questions of legislative fact (Will clearcutting in national forests worsen erosion?). The question is not whether government may evaluate information for its purposes but whether its purposes may legitimately include concern that citizens receive information government deems valuable.

116. For a discussion of theories of freedom of speech and their problems, see Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319 (1983).

117. See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Strauss, *supra* note 71, at 356-57.

wishes to convince me that socialism is the best governmental program, then according to autonomy theories of freedom of speech, government cannot attempt to prevent me from hearing these arguments, even if government is convinced that the arguments are wrong and afraid that if I hear them, I will cast a misguided vote for a catastrophic socialism.

Autonomy theories lead to a First Amendment that is narrower than current doctrine in some respects, but broader in others. Most important for my purposes, autonomy theories eliminate track two from the First Amendment altogether.¹¹⁸ Autonomy theories also revise track one in several respects. They arguably expand protection for commercial, pornographic, and other forms of speech that receive no, or reduced, track one protection where the government's concern is that the audience will be persuaded of error in action or belief.¹¹⁹ On the other hand, First Amendment protection of speech invasive of privacy might not be granted to the same extent as at present, since limiting access to private information for the victim's sake does not, at least arguably, infringe on the audience's deliberative autonomy. The precise implications of autonomy theories for track one will, of course, depend upon the particular conception of autonomy they embrace, but there is no doubt that all of them will be revisionary to some extent.¹²⁰

118. This is not true when a content-neutral law is enacted *because* of its content effects, a case that has always been rightly considered to be on track one.

119. A classic example is *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), in which the Court upheld Puerto Rico's ban on casino advertising in Puerto Rico, a ban premised on a fear that the audience would be persuaded to gamble, to its and Puerto Rico's detriment.

120. Autonomy theories have difficulty dealing with false statements of facts upon which the audience might detrimentally rely. Scanlon believed his conception of autonomy prevented government from penalizing such statements, a result that led him to abandon his autonomy theory of freedom of expression. See T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532 (1979). Strauss believes that his autonomy theory can distinguish between false statements of fact, which government may regulate without violating the First Amendment, and actions of government which violate the First Amendment because they manipulate audience deliberation. See Strauss, *supra* note 71, at 357, 366-68. He also believes that his theory can maintain the distinction between private and governmental attempts to manipulate audiences, with the latter forbidden by the theory and the former protected against governmental restriction. *Id.* at 362-63. I believe both of Strauss's distinctions are problematic. Both depend upon the existence of a distinction between false or misleading statements of fact and false or misleading statements of some other kind. (The private manipulation Strauss *would* permit government to restrict is manipulation through false statements of fact.) But as Strauss himself acknowledges, the line between statements of fact and First-Amendment-protected political statements is difficult to maintain because the latter, to the extent one thinks they are wrong, usually are wrong in some factual aspect. *Id.* at 366 n.76. Whether lowering taxes will increase the deficit is a factual question. Government might believe that my position, that it will, is incorrect because my predictive models, my information, or my inferences are flawed *as a matter of fact*. The same criticism can be levelled at the

Autonomy theories of freedom of speech, as opposed to consequentialist theories, are quite consistent with the core First Amendment principle of governmental neutrality in evaluating ideas. Indeed, that core principle derives from and is an expression of the value of autonomy. Of course, the value of autonomy has implications far beyond speech and government neutrality regarding ideas. In that sense, autonomy theories do not specially justify freedom of speech.¹²¹

D. Categories of Speech and the First Amendment

One approach to free speech and the First Amendment limits the protection to certain categories of information, such as political and religious information. Any of the First Amendment theories discussed

distinction in the realm of professional ethics between misstating in one's brief the record or the courts' holdings in the area and making an argument that one believes will sound persuasive but that one also believes is logically fallacious. Cf. Fried, *supra* note 79, at 239-41 (asking whom could we trust to ferret out falsehood). In general, much more needs to be said about the ethics of conveying and withholding information, including when we must publicize the full bases of our actions, when we may withhold information in the hope others will be deceived, and when we can use bad arguments to corrupt others for good ends. See Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 325-29 (1985).

Strauss proposes the following test for when government may restrict private manipulative statements: Government may restrict private manipulative statements whenever a hypothetical individual with no desire other than reaching the best decision would want the speech restricted. Strauss, *supra* note 71, at 369. The problem with the test is that it depends on the level of generality at which the manipulation is described and thus yields no determinate answers. But see Fried, *supra* note 79, at 236-37 (arguing that audience has no right not to receive unwanted messages).

Interestingly, autonomy theories of freedom of speech do not appear to protect statements that the audience does not wish to hear, such as statements designed solely to insult the audience but not to persuade others. Indeed, autonomy theories may not even protect speech meant to persuade others if the government's purpose in forbidding the speech is not to prevent the persuasion but is instead to protect other values, such as privacy, confidentiality, property (in ideas), sensibility (from insult and offense), and equal opportunity (from harassment, assuming the sense of harassment is not merely concern about others' being persuaded). Perhaps we can say that the rightful sphere of autonomy of a speaker and his willing audience is infringed whenever government acts to interdict speech because the speech insults, offends, or distresses third parties or an unwilling audience if the harms to the third parties are caused by their beliefs about what others believe. See Larry Alexander, *Harm, Offense, and Morality*, in READING FEINBERG (Howard McGary ed., forthcoming) (manuscript at 34-37, on file with author); see also JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 253-57 (1990) (causing belief-mediated distress to another does not infringe that person's rights). But see *id.* at 354-56 (discussing legislative ability to prohibit behavior causing belief-mediated distress). It is not clear whether autonomy theories can be extended to invalidate governmental interdiction of insulting or offending speech, or extended even further to invalidate protections of privacy or reputation. If not, then perhaps very few governmental track one laws infringe the rightful sphere of speaker or audience autonomy. In other words, autonomy theories may lead to a much, much narrower track one First Amendment than we currently have.

121. See Alexander & Horton, *supra* note 116, at 1356-57.

above can be applied broadly so as to include all information or applied more narrowly so as to include only a subset of information. Likewise, the central principle upon which I have been relying can be limited to only certain categories of information.

A "categories" approach to free speech and its jurisprudence has powerful proponents in the literature,¹²² as well as considerable precedential support.¹²³ It also has a powerful appeal. Most of us believe that government should not make retail decisions—censorial or advocative—about the value of specific items of information, such as that the teachings of the Hare Krishnas are false or wicked, that socialism is not worthy of consideration, or that feminist legal theory is muddled. Moreover, most of us believe that government should not be authorized to censor "unreasonable" views or to advocate "reasonable" ones because we do not trust the government's ability to distinguish what it believes to be unreasonable from what it believes to be incorrect.¹²⁴ On the other hand, most of us think it reasonable to believe that political and religious information is, on average, more valuable than other kinds of information, for example, backyard gossip, the common fare of supermarket tabloids, or "trivia."

So long as the common consensus is that some categories of information are on average more valuable than others, we might believe that government may legitimately distinguish *among* the categories but not *within* them. Of course, we would also have to believe that government is capable of determining in most cases the category into which various information falls.¹²⁵ This does not mean that the line between, say, political speech and commercial speech must be bright and susceptible to formalistic application. It does mean, however, that the line cannot be so

122. The most powerful proponent is Frederick Schauer. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

123. The Supreme Court has treated adult movies and books and commercial speech as "low value" speech, and has treated pornography and other types of speech as having no value. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980) (commercial speech); *Young v. American Mini-Theatres, Inc.*, 424 U.S. 50, 70 (1976) (adult movies and books); *Miller v. California*, 413 U.S. 15 (1973) (pornography); see also Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989) (discussing the division of speech into categories according to value). Within the defamation area, the Court has distinguished speech about matters of "public concern" from purely private speech. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

124. All views that we believe to be incorrect we believe to be unreasonable given the information we possess.

125. To take an oft-cited example, does an advertisement urging lifting of restrictions on domestic oil production count as "political speech" or "commercial speech," and is the answer dependent on whether it is paid for by Common Cause or Mobil Oil? See David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359 (1990).

vague that the majority of cases are incapable of principled categorization. If the latter were true, then not only would the categories be manipulable, but the judgments of higher and lower average value would look insupportable.

This categorical approach helps to justify those aspects of track one and track three jurisprudence that I found troubling. Speech about public officials, public figures, or matters of public concern receives protection in the defamation and privacy contexts that purely private speech does not. The public schools' choice to teach American history, or certain topics within it, rather than to count blades of grass or memorize the phone book is justifiable, though teaching the superiority of Democrats over Republicans is not.

Nonetheless, a categorical approach does nothing to justify track two decisionmaking. No matter what track two laws the government adopts, information will be lost, and information in each category will be lost. Change the laws, and you change what gets said, by whom, to whom, and to what effect with respect to politics, religion, commerce, and every other possible category.¹²⁶

More importantly perhaps, a categorical approach relies on the reasonableness of imposing an evaluative ranking on everyone. You and I may agree that political speech is more valuable than the typical contents of the *National Enquirer*. Indeed, almost everyone would agree with us, including almost every reader of the *National Enquirer*. Yet, what makes our judgment reasonable, such that we may legitimately impose it on a solitary dissenter, that does not make my judgment that Bill Clinton is superior to George Bush, or that most multi-culturalist apologia are rubbish, "reasonable" as well? Controversiality surely does not determine reasonableness as a matter of legitimate governmental action. As an epistemic matter, we can be more confident of judgments with which most others would concur. Nevertheless, if that is what is at stake, freedom of speech looks less like a protection of the lonely dissenter and more like a crude and costly bulwark against entrenching error. Furthermore, a noncontroversiality approach to the relative value of categories of speech does not, in principle, prevent categorization *within* categories such as political or religious speech that would cordon from protection political or religious views that almost all of us believe are worthless.

Robert Post adopts something akin to a categorical approach in track one analysis. He asks whether particular speech is part of "public

126. See *supra* text accompanying notes 57 and 74.

discourse.”¹²⁷ If so, it receives First Amendment protection, though perhaps not absolute protection. The question whether speech is part of public discourse is, as Post admits, a deeply evaluative one regarding the relation of the speech to a proper conception of democratic decisionmaking.¹²⁸ The problem is that any conception of the autonomy required by democracy will be based on an evaluation regarding autonomy’s requisite knowledge, skill, and character that, from another angle, can be viewed as a heteronymous imposition. Post argues that this paradox of the heteronymous construction of autonomy is, like other antinomies such as that of free will and determinism, unavoidable, and should therefore be embraced. If Post is correct, something like a categorical approach is perhaps inevitable, with only judgment and not algorithms available for drawing lines.¹²⁹

V. Conclusion

One of the clearest expressions of the core principle of the First Amendment, an expression that reveals the value of autonomy underlying that principle, is Charles Fried’s:

127. See Robert Post, Personal Correspondence with Author, Nov. 23, 1992 (on file with the *Hastings Law Journal*) [hereinafter Post, Personal Correspondence]; Post, *Racist Speech*, *supra* note 58, at 279-85; see also Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 116-18, 151-52 (1992) (distinguishing public discourse, which government may not coerce, from utterances outside the scope of public discourse).

128. See Post, Personal Correspondence, *supra* note 127.

129. Post believes, contrary to my position, that there is a tenable track two jurisprudence. *Id.* Post would not conflate, as I have done, public forum analysis and symbolic speech analysis. His focus would be on the former, which he would recast as an analysis of the health of media of communication. The question of what is a medium of communication, like a newspaper, as opposed to an expressive act, like burning a draft card, would be a sociological one addressed to how we, as a society, understand such things. The First Amendment analysis would ask how a time, place, or manner regulation affects a medium of communication’s health.

I am generally less sanguine than Post about entrusting courts with deciding subtle questions of sociology such as whether and when “we” understand an activity to be a medium of communication. Even if I were perfectly happy with entrusting the courts with that question, however, I cannot imagine on what ground they would assess a regulation’s effect on a medium’s “health.” The latter assessment assumes a normative baseline regarding well-functioning media of communication, and no judgment about that baseline can be divorced from judgments of the baseline’s information effects. Are newspapers “healthy”? Is television? Has placing graffiti on others’ property become a medium of expression, and, if so, is it “healthy”? Post criticizes Owen Fiss’s and Cass Sunstein’s urge to manage democratic deliberation, but his approach to public forum analysis commits him to precisely the same evaluative judgments with which he saddles Fiss and Sunstein. See Post, *Managing Deliberation*, *supra* note 58, at 29-38.

There are famous difficulties in defining these spheres of liberty against encroachment by the actions of others—one man's liberty is another's constraint—and many have despaired of deriving any practical conclusions from this principle as it relates to laws bearing on conduct. But the way is much clearer with respect to thought, expression and persuasion. There the claim to liberty runs directly to the foundational. Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons. No conviction forced upon us can really be ours at all. Limits may be put on my actions insofar as my actions impinge on others, but my status as a rational sovereign requires that I be free to judge for myself what is good and how I shall arrange my life in the sphere of liberty that the similar spheres of others leave me. I cede authority to the state to draw the necessary concrete boundaries between our respective spheres of action. But no such necessity requires, indeed self-respect forbids, that I cede to the state the authority to limit my use of my rational powers. That is why lying, while not the most damaging offense to another's moral right, is one of the clearest. It is also why the state has no claim to dominion over our minds: what we believe, what we are persuaded to believe, and (derivatively) what others may try to persuade us to believe.¹³⁰

It should be obvious that if Fried is correct, there is no place for a track two jurisprudence in the First Amendment. However, track one and track three jurisprudence remain. The government actions that invoke track three are quite problematic; the shape of track one is difficult to discern, though autonomy theories would undoubtedly require some changes in current track one doctrine. In a true track two case, however, there is no toehold for finding government's actions or laws to violate the First Amendment.

This conclusion is, of course, deeply paradoxical. Track two laws have profound effects on what gets said, by whom, and to what effect, and they thus have a profound effect on what we believe and value. Yet because the First Amendment's core principle enjoins government—including the courts—from deciding what we should believe and value, the First Amendment disables government from dealing with the belief and value effects of its track two laws.

This paradox, of course, extends beyond track two. The absence of education surely undermines our autonomy, but government-run schools, which must decide what shall be taught and what shall not, raise a profound track three First Amendment problem.¹³¹ And track one

130. Fried, *supra* note 79, at 233 (footnotes omitted).

131. See Larry Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 853-58 (1981).

analysis paradoxically disables government from protecting our autonomy from private manipulative and deceptive speech.¹³²

That the First Amendment contains paradoxes should not be surprising. The First Amendment is a feature of liberalism, which gives pride of place to individual autonomy. Autonomy, however, is a paradoxical value. Enshrined in the First Amendment, it tells us that even when we are convinced we know what is correct and wish to keep others from falling into errors of belief and value, we may do so only with our own private resources and acting within our own private domain. We are forbidden to enlist the weapons of the state, even to save others' autonomy and the First Amendment itself.¹³³

132. See Strauss, *supra* note 71, at 362-65.

133. See Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. (forthcoming November 1993).