

The Checking Value in First Amendment Theory

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SAMUEL POOL WEAVER CONSTITUTIONAL LAW ESSAY

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The author examines the sources and premises of the idea that free expression has value in part because of the function it performs in checking the abuse of official power (the "checking value") and explores how this checking value differs from those values that have dominated First Amendment analysis since 1919. In addition, the author traces in some detail the uneven influence the checking value has had recently in three areas of First Amendment adjudication: civil actions for defamation; disputes arising from efforts by journalists to protect or establish relationships with news sources; and claims by nonjournalists to a constitutional or statutory right to communicate directly to the public over major print or broadcast outlets. The author argues that the checking value must receive open, systematic consideration if it is to play a consistent part in adjudication and speculates on how such consideration of the checking value might help one think about a wide range of additional First Amendment questions.

I. THEME

The theory underlying a clause of the Constitution often depends more on the claims that have been pressed over the years in the name of the clause than on the grievances and value judgments that originally induced its adoption. For in Anglo-American law, theories are typically rationalizations for desired or decreed adjudicative results—rationalizations which come to have a life and integrity of their own and which do influence future perceptions and decisions, but rationalizations nonetheless. It is not surprising, therefore, that until fairly recently judges and commentators tended to view the speech, press, and assembly clauses of the First Amendment almost exclusively in terms of theories of fair play (really *noblesse oblige*) toward the ineffectual fringe elements of the society.

Our heritage of First Amendment theory was fashioned largely to explain judicial responses to the claims of anarchists and Socialists in the 1920s and 1930s,¹ Jehovah's Witnesses in the 1940s,² and closet

1. E.g., *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211

and apostate Communists in the 1950s³—litigants who for the most part pressed claims either to engage in various forms of advocacy or to keep their political beliefs private. The theories that were developed in response to these claims stressed three basic values: (1) a concept of individual autonomy concerning personal beliefs; (2) a commitment to diversity in a wide range of affairs, summed up in the metaphor of a “marketplace of ideas”; and (3) a theory of political community known as “self-government,” which holds that each member of the polity, no matter how eccentric or humble, occupies a vital role in the governing process and thus enjoys a right to hear and be heard on all matters relevant to governance.

In the 1960s and 1970s, however, a marked change occurred in the types of free-speech claims and claimants appearing before the Supreme Court. Two powerful movements—civil rights and antiwar—sought to influence the collective consciousness by means of sit-ins,⁴ mass demonstrations,⁵ symbolic burnings,⁶ the wearing of black armbands,⁷ paid newspaper and radio advertisements,⁸ the disclosure of classified documents,⁹ pamphleteering and picketing in residential and commercial areas,¹⁰ lengthy published interviews with reporters,¹¹ and a host of other tactics. The First Amendment issues raised by these practices could not be analyzed in terms of fair play for the dispossessed. These claims presented questions not of compassion or symbolic participation but of power—power to unleash latent social forces, to discredit persons and institutions, and to disrupt routines.

(1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927); *Fiske v. Kansas*, 274 U.S. 380 (1927).

2. *E.g.*, *Lovell v. Griffin*, 303 U.S. 444 (1938); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

3. *E.g.*, *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Speiser v. Randall*, 357 U.S. 513 (1958).

4. See, *e.g.*, *Garner v. Louisiana*, 368 U.S. 157 (1961); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Brown v. Louisiana*, 383 U.S. 131 (1966).

5. See, *e.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

6. See, *e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968); *Street v. New York*, 394 U.S. 576 (1969).

7. See, *e.g.*, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

8. See, *e.g.*, *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

9. See, *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

10. See, *e.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Gregory v. Chicago*, 394 U.S. 111 (1969).

11. See, *e.g.*, *United States v. Caldwell*, *rev'd sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972).

Partly as a result of the tensions generated by the civil rights movement and the Vietnam War, several large and well-established news organizations began, within the confines of their standards of professionalism, to challenge various manifestations of governmental and social orthodoxy. In the process, these organizations too became First Amendment claimants,¹² thereby adding another powerful constituency to the ranks of those regularly asserting free-speech and free-press claims. Again, the nature of the claims differed from those of the powerless petitioners of earlier years.

In the last decade the Supreme Court has sifted a large number of First Amendment claims raised by powerful movements and institutions and has begun to develop theories to rationalize the results it has decreed. The process is not far advanced, however, and the pattern of decisions is not easy to rationalize. The theories that were developed in response to the different claims of earlier decades have, of course, been invoked and adapted. But some basic values that were not implicated by the free-speech claims of the dispossessed—values relating to the concept of countervailing power in a democratic state—figure prominently in the First Amendment disputes of today. The challenge for the Court in this area is to develop a more comprehensive theory of the speech, assembly, and press clauses which gives adequate expression to these newly implicated values.

The need for fresh thinking at the theoretical level is all the more imperative because many of the First Amendment claims of powerful movements and institutions can be granted only at considerable cost to competing social and individual interests. The First Amendment claims of the powerful typically involve not advocacy or belief but control over information and access to limited channels of mass communication. The Court simply cannot resolve claims of this sort by determining that free speech is harmless or integral to some mysterious, unalterable evolutionary process. Instead, the Justices are now faced—indeed have been faced for some 15 years—with the difficult task of deciding just how high a price our constitutional commitment to open, meaningful discussion requires us to pay in terms of such competing concerns as individual reputation,¹³ adjudicative fairness,¹⁴ efficient public administration,¹⁵ and peace and quiet.¹⁶

12. See, e.g., *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

13. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

14. See, e.g., *Estes v. Texas*, 381 U.S. 532 (1965); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

To date, in cases involving efforts to gather information and to convey beliefs to mass audiences, the Court's opinions have suffered from the lack of a First Amendment theory that adequately reflects the values at issue. For example, virtually all of the cases that came to the Court in the 1960s as a result of the street campaigns of civil rights activists were resolved by finding the statutes at issue defective for vagueness or overbreadth.¹⁷ These numerous cases produced little in the way of First Amendment doctrine and nothing in the way of enlightening analysis of the basic values underlying the speech, press, and assembly clauses. Since the breakthrough decision in *New York Times v. Sullivan*,¹⁸ the Court's work in the libel area has been characterized by a series of unsuccessful efforts to adapt traditional free-speech theories that were originally developed in response to the First Amendment claims of powerless individuals to what is really a problem of corporate incentives and responsibilities.¹⁹ The result has been a pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices. The several Supreme Court opinions dealing with claims of access to air time or print space²⁰ have produced two ideas of potentially great theoretical importance: the notion that newspapers should be treated differently than broadcast outlets regarding the matter of access, and the concept of journalistic autonomy which implies that certain internal processes of news organizations should be exempt from government regulation and perhaps even scrutiny. No Justice has explained, however, how these ideas relate to the values underlying the First Amendment. More examples could be recited. The point is that our articulated understanding of First Amendment values is incomplete. And this, I believe, is the principal reason why the Court has performed below its normal standard in its effort to rationalize (in the good sense of the word) the results it has decreed and the ideas it has generated regarding First Amendment claims to acquire and disseminate information and to command mass audiences.

15. See, e.g., *Saxbe v. Washington Post*, 417 U.S. 843 (1974); *Parker v. Levy*, 417 U.S. 733 (1974); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

16. See, e.g., *Gregory v. Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965).

17. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966).

18. 376 U.S. 254 (1964).

19. The Court's performance in defamation cases is considered at length in section IV *infra*.

20. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). These cases are discussed in detail in section VI *infra*.

One basic value seems highly relevant to these newer claims, yet has not been accorded a central place in our articulated theory of the First Amendment. This is the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials. Consider the most important ways in which the First Amendment has made a difference in recent years. But for the peace marches and other protests, the Johnson administration might very well have escalated the war in Vietnam after the Tet offensive and the Nixon administration might have attempted to sustain a wider war after the Cambodian "incursion."²¹ But for the tradition of a free press, the crimes and abuses of Watergate might never have been uncovered.²² These incidents in our recent political experience are so familiar that it is easy to underestimate their importance. In the last decade, the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power as by protecting the dignity of the individual, maintaining a diverse society in the face of conformist pressures, promoting the quest for scientific and philosophic truth, or fostering a regime of "self-government" in which large numbers of ordinary citizens take an active part in political affairs.

Interestingly, the most influential free-speech theorists of the eighteenth century—those who drafted the First Amendment and their mentors—placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials.²³ Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate. Of course, the fact that many of the framers saw the free-expression guarantee primarily as a check on

21. One can only speculate about such matters. There is some evidence, however, which supports the judgment that the antiwar protests had an important effect on war policy in Washington. See, e.g., Townsend Hoopes, *The Limits of Intervention: An Inside Account of How the Johnson Policy of Escalation in Vietnam Was Reversed* 180, 215-17, 224 (New York: David McKay Co., 1969); Lyndon Baines Johnson, *The Vantage Point: Perspectives of the Presidency, 1963-1969* at 530 (New York: Holt, Rinehart & Winston, 1971); 4 Mike Gravel, ed., *The Pentagon Papers: The Defense Department History of United States Decision-making on Vietnam* 560 (Boston: Beacon Press, 1971); George Christian, *The President Steps Down* 159-60 (New York: Macmillan Co., 1970).

22. See Theodore H. White, *Breach of Faith: The Fall of Richard Nixon* 224, 227 (New York: Atheneum, 1975). One certainly gets the impression reading the account of reporters Bernstein and Woodward that the uncovering of the Watergate crimes was due to the courageous independence of the publisher and editors of the *Washington Post* in addition to a lot of hard work and luck. See, e.g., Carl Bernstein & Bob Woodward, *All The President's Men* 102-3, 165-66, 192, 260 (New York: Simon & Schuster, 1974).

23. The first part of section II *infra* is devoted to documenting this point.

government does not compel us to give that value a central place in contemporary analysis. But when a value that was important in the original process of adoption seems also to loom large in a clause's recent impact on the society, there is good reason to inquire whether that value should not figure prominently in the contemporary theory of the clause. This is particularly true when traditional theories emphasize other values and appear not to be serving the Court adequately in its efforts to process some of the more important claims currently being pressed in the name of the clause.

In this article, I examine the sources and premises of the idea that free expression is valuable in part because of the function it performs in checking the abuse of official power, an idea I shall hereafter refer to as "the checking value." I also explore how the checking value differs, both in premises and in implications, from the values that have dominated First Amendment analysis since 1919, the year the Supreme Court began to hear speech and press disputes on a fairly regular basis. In addition, I trace in some detail the uneven influence the checking value has had recently in three areas of First Amendment adjudication: civil actions for defamation, disputes arising from efforts by journalists to protect or establish relationships with news sources, and claims by nonjournalists that they have a constitutional or statutory right to communicate directly to the public over major print or broadcast outlets. These areas have been selected to illustrate both how the checking value has been implicated in several of the most important First Amendment claims that have been pressed in recent years and how it has not received the kind of open, systematic consideration that is necessary in order for a value to play a consistent part in adjudication. Finally, I speculate briefly about how a systematic consideration of the checking value might help one to think about a wide range of additional First Amendment questions.

Throughout the analysis, one must keep in mind that the checking value is to be viewed as a possible supplement to, not a substitute for, the values that have been at the center of twentieth-century thinking about the First Amendment. Although in this article I am more concerned with fundamental values than with details of doctrine or specific questions of application, I do not purport to offer a comprehensive ordering of First Amendment values or to suggest that the checking value should form the cornerstone of all First Amendment analysis. My only purpose is to further the understanding of one basic value which has been underemphasized in this century and which, I believe, should be a significant component in any general theory of the First Amendment.

II. THE CHECKING VALUE: SOURCES AND PREMISES

In order to understand a value and trace its impact, one must know something about the sources of the value, the premises on which it rests, and the ways in which it differs from other values. This section is devoted to the first two of these concerns; the next section discusses the third.

The tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present.²⁴ John Locke devoted much of his *Second Treatise on Civil Government*, first published in 1690, to this specific problem.²⁵ But although Locke set forth an influential theory that the general citizenry has a right to overthrow rulers who abuse the public trust, he did not emphasize the role of the press in the process of checking governmental authority.²⁶ In the decades immediately after Locke wrote, however, two institutions—the newspaper and the opposition party—developed into major forces in the politics of the times; partly as a result, the idea that free expression serves as a check on the behavior of incumbents assumed a prominent place in the political discourse of eighteenth-century England.²⁷

Among the English essayists of this period who were read by the colonists, four deserve special mention. The most important was "Cato," the pen name of coauthors John Trenchard and Thomas Gordon, who in the 1720s published a series of essays attacking the overbearing and manipulative administration of Sir Robert Walpole.²⁸ The essays were widely read

24. See, e.g., The Politics of Aristotle 101 (Ellis trans. London: Dent & Sons, 1952); Marsilius of Padua, *The Defender of Peace*, vol. 2, The Defensor Pacis 87-88 (Alan Gerwith trans. New York: Columbia University Press, 1956); Charles Louis Montesquieu, *The Spirit of Laws* 179 (Worcester: Isaiah Thomas, Jr., 1802); James Madison (?), *The Federalist No. 51*, in Jacob E. Cooke, ed., *The Federalist* 347-53 (Middletown, Conn.: Wesleyan University Press, 1961); John Stuart Mill, *Considerations on Representative Government* 243-45 (Oxford University Press, 1912); Karl Raimund Popper, *The Open Society and Its Enemies* 122-25 (5th ed. rev. Princeton, N.J.: Princeton University Press, 1966).

25. John Locke, *An Essay Concerning the True, Original, Extent, and End of Civil Government*, ch. 13-19 (Pearson ed. Indianapolis: Bobbs-Merrill, 1952).

26. The idea that free speech and a free press constitute a bulwark against the misuse of official power did receive some mention at the hands of the Levellers during the English Civil War. See, e.g., John Lilburne, *England's New Chains Discovered* (1649), in G. E. Aylmer, ed., *The Levellers in the English Revolution* 143-47 (Ithaca, N.Y.: Cornell University Press, 1975); Richard Overton (?), *The Humble Petition* (1648), in Don M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution* 326 (New York: T. Nelson & Sons, 1944). Milton's *Areopagitica* also came out of the English revolution. On the emergence of democratic and libertarian thought during this period, see generally Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (New York: Viking Press, 1972).

27. See Fredrick Seaton Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Controls* 289-302, 323-63 (Urbana: University of Illinois Press, 1952).

28. Bernard Bailyn, *The Ideological Origins of the American Revolution* 36 (Cambridge, Mass.: Harvard University Press, 1967). See also Leonard W. Levy, *Freedom of Speech and*

and discussed in both England and the colonies. "No one," notes Clinton Rossiter, "can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period."²⁹

Cato's discussion of the values underlying free expression is contained primarily in his Letter Number 15, entitled "Of Freedom of Speech."³⁰ The essay begins by distinguishing the freedoms of thought and speech: "Without Freedom of Thought, there can be no such Thing as Wisdom, and no such Thing as publick Liberty, without Freedom of Speech" In elaborating on his notion of public liberty, Cato's emphasis is on the need for popular recourse against evil officials:

Whoever would overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech; a Thing terrible to publick Traytors.

....

That Men ought to speak well of their Governours, is true, while their Governours deserve to be well spoken of, but to do publick Mischief without Hearing of it is only the Prerogative and Felicity of Tyranny³¹

The essay next proceeds to a didactic review of ancient Roman and English history to make the point that while free expression poses no threat to enlightened rulers, it helps to check abuses of official power by "Traytors and Oppressors." The concluding portion of the essay mentions in passing the value of free expression in nurturing "excellent Writers" and "Men of Genius" but rests its argument ultimately on the checking value: "Freedom of Speech is the great Bulwark of Liberty; they prosper and Die together Freedom of Speech therefore being of such infinite importance to the Preservation of Liberty; every one who loves Liberty ought to encourage Freedom of Speech."³²

While Cato probably was the English political writer most influential among the American colonists, the English political figure who most excited their admiration was the flamboyant John Wilkes.³³ In 1763

Press: *Legacy of Suppression in Early American History* 116 (New York: Harper Torchbooks, 1963).

29. Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 141 (New York: Harcourt, Brace & World, 1953).

30. Cato, Letter No. 15, reprinted in Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 11 (Indianapolis: Bobbs-Merrill Co., 1966). Cato's Letters No. 32, 100, and 101 also contain discussions of freedom of expression. The first two are printed in the Levy anthology at pp. 14-24. All three can be found in David Louis Jacobson, ed., *The English Libertarian Heritage* (Indianapolis: Bobbs-Merrill Co., 1965).

31. Cato, *Of Freedom of Speech*, in Levy, *supra* note 30, at 12.

32. *Id.* at 13-14.

33. An excellent study of Wilkes's escapades during the 1760s and 1770s is George Rudé, *Wilkes and Liberty* (New York: Oxford University Press, 1962). See also Levy, *supra* note 28, at 145-47.

Wilkes published the forty-fifth issue of his journal, the *North Briton*, which included a stinging attack on a speech given by George III. This prompted the king's ministers to file an information for seditious libel and to issue general warrants for the arrest and search of some 200 persons involved in the publication and dissemination of Number 45. Wilkes's private study was ransacked, his papers were seized, and Number 45 was ordered burned. A member of Parliament at the time, Wilkes was expelled from the House of Commons and prosecuted for seditious libel. He fled to France from whence he sent back to London numerous tracts and letters defending his cause and setting himself up as a martyr.³⁴ A shrewd propagandist, he built a large following in England and the colonies.

Wilkes was a politician and a polemicist, not an original political theorist. His only discussion of freedom of the press, contained in the first issue of the *North Briton*, follows Cato in emphasizing the checking value of free expression:

The liberty of the press is the birth-right of a Briton, and is justly esteemed the firmest bulwark of the liberties of this country. It has been the terror of all bad ministers; for their dark and dangerous designs, or their weakness, inability, and duplicity, have thus been detected and shewn to the public, generally in too strong and just colours for them long to bear up against the odium of mankind A wicked and corrupt administration must naturally dread this appeal to the world; and will be for keeping all the means of information equally from the prince, parliament and people.³⁵

The controversy over the prosecution and expulsion of Wilkes produced a lively debate among pamphleteers. Probably the two most important defenders of Wilkes's freedom of expression were "Father of Candor" and "Junius," anonymous writers whose identities have yet to be conclusively established. Father of Candor, whose essay *An Enquiry into the Doctrine Lately Propagated Concerning Libels, Warrants, and the Seizure of Papers* went through seven editions between 1764 and 1771,³⁶ presented a detailed criticism of the doctrine of seditious libel. He conceded that "libels on particular persons in their private capacities" should be punishable, but contended that "the case is totally different with respect to an administration; for the country in general is always the better or worse for its conduct, and therefore every man has a right to know, to consider and to reflect upon it."³⁷ He based his

34. See Levy, *supra* note 28, at 146-47; Siebert, *supra* note 27, at 377-80.

35. John Wilkes, *The North Briton*, No. 1, Sat. June 5, 1762, at 1-2 (London: W. Bingley, 1769).

36. Levy, *supra* note 28, at 149.

37. Father of Candor, *An Enquiry into the Doctrine Lately Propagated Concerning Libels, Warrants, and the Seizure of Papers* 30, 31 (New York: DaCapo Press, 1970).

argument directly on the checking value: "The liberty of exposing and opposing a bad administration by the pen is among the necessary privileges of a free people, and is perhaps the greatest benefit that can be derived from the liberty of the press."³⁸

The *Letters of Junius* are renowned not only for their contribution to political thought but also for the litigation that ensued over crown efforts to suppress them. To the chagrin of Lord Mansfield, the prosecutions of various publishers of the *Letters* were aborted by rebellious verdicts, which are now celebrated as leading examples of the practice of jury nullification.³⁹ Several parliamentary leaders, including Lord Camden, Edmund Burke, and John Glynn, emerged during the controversy as prominent critics of the traditional law of seditious libel.⁴⁰ The dispute was closely followed in the colonies. As Professor Chafee puts it, "The First Amendment was written by men to whom Wilkes and Junius were household words . . ."⁴¹

Like Wilkes's *North Briton*, the *Letters of Junius* were more concerned with immediate political issues than with abstract theories of government and liberty. But Junius did present one general discussion of liberty of press and in it he emphasized the checking value:

A considerable latitude must be allowed in the discussion of public affairs, or the liberty of the press will be of no benefit to society. As the indulgence of private malice and personal slander should be checked and resisted by every legal means, so a constant examination into the characters and conduct of ministers and magistrates should be equally promoted and encouraged. They, who conceive that our newspapers are no restraint upon bad men, or impediment to the execution of bad measures, know nothing of this country. In that state of abandoned servility and prostitution, to which the undue influence of the crown has reduced the other branches of the legislature, our ministers and magistrates have in reality little punishment to fear, and few difficulties to contend with, beyond the censure of the press, and the spirit of resistance which it excites among the people.⁴²

Cato and Wilkes and Father of Candor and Junius probably did not represent the thinking of most Englishmen. They were opposition figures. But according to Bernard Bailyn's luminous book *The Ideological Origins of the American Revolution*:

To say simply that this tradition of opposition thought was quickly transmitted to America and widely appreciated there is to underestimate the fact.

38. *Id.* at 32.

39. See Siebert, *supra* note 27, at 385-89.

40. Levy, *supra* note 28, at 161.

41. Zechariah Chafee, Jr., *Free Speech in the United States* 21 (New York: Atheneum, 1969).

42. C. W. Everett, ed., *The Letters of Junius* 8-9 (London: Faber & Gwyer, 1927).

Opposition thought, in the form it acquired at the turn of the seventeenth century and in the early eighteenth century, was devoured by the colonists. From the earliest years of the century it nourished their political thought and sensibilities. There seems never to have been a time after the Hanoverian succession when these writings were not central to American political expression or absent from polemical politics.⁴³

From his study of the pamphlets of the American revolution, Bailyn concludes that the colonists were preoccupied with the fragility of constitutional government. Thus, they frequently drew lessons from ancient history but "their detailed knowledge and engaged interest" was confined to the relatively narrow period when the Roman republic "was being fundamentally challenged or when its greatest days were already past and its moral and political virtues decayed."⁴⁴ Similarly, the colonists were fascinated by modern Venice, Sweden, and Denmark, "despotic states that had within living memory been free and whose enslavement, being recent, had been directly observed . . ."⁴⁵ The escape from Stuart tyranny represented by the Glorious Revolution of 1689 was viewed by the colonial pamphleteers as a close call, and anything but secure. Most important, Americans were appalled by the corruption of the Walpole ministry in England, particularly the way Walpole was able to manipulate Parliament.⁴⁶ In short, the allocation of political power was a central concern to the colonists, and "[m]ost commonly the discussion of power centered on its essential characteristic of aggressiveness: its endlessly propulsive tendency to expand itself beyond legitimate boundaries."⁴⁷

Thus, the colonial pamphleteers, like the opposition leaders in England whom they so admired, organized much of their political thought around the need they perceived to check the abuse of governmental power. The First Amendment was an outgrowth of this body of thought, as can be discerned from a brief examination of the most important eighteenth-century American writings on freedom of speech and freedom of the press.

The dispute over liberty of the press which most captured the imagination of the colonists was unquestionably the seditious libel prosecution in 1735 of the New York printer John Peter Zenger. A poorly educated tradesman, Zenger was printer for the *New York Weekly Journal*, a newspaper that served as the mouthpiece for the chief

43. Bailyn, *supra* note 28, at 43.

44. *Id.* at 25.

45. *Id.* at 64.

46. *Id.* at 48.

47. *Id.* at 56.

opposition faction in New York state politics. The paper's managing editor and chief contributor was James Alexander, a highly skillful lawyer whom Leonard Levy calls "the first American to develop a philosophy of freedom of the press."⁴⁸ Alexander frequently printed essays on freedom of the press in the pages of the *Journal*, including Cato's Letter Number 15. He also composed his own polemic on the subject, in which he lamented the "too many instances of powerful and wicked Ministers, some of whom by their Power have absolutely escaped Punishment."⁴⁹ The antidote that Alexander proposed was scrutiny of government by the press: "This advantage therefore of Exposing the exorbitant Crimes of wicked Ministers under a limited Monarchy makes the Liberty of the Press not only consistent with, but a necessary Part of, the Constitution itself."⁵⁰

When the *Journal* published a particularly stinging series of anonymous articles satirizing the incumbent administration, an indictment was returned charging Zenger with seditious libel.⁵¹ Alexander secured the services of the renowned Philadelphia lawyer Andrew Hamilton as counsel for the defense. In his brilliant closing argument to the jury, Hamilton defended the right of all freemen "publicly to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority . . ."⁵² The jurors, instructed to rule only on the indisputable question whether Zenger had published the offending issues, returned a verdict of not guilty. The jury's defiance was greeted by loud cheers in the courtroom and has ever since been celebrated as one of the great events in the history of freedom of the press.⁵³

When the Zenger verdict was ably criticized in the press by two West Indian lawyers, James Alexander responded with a four-part essay in defense of the acquittal. He began the essay with an invocation of the checking value: "Sir, the freedom of speech is a *principal pillar* in a free government: when this support is taken away the constitution is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a *popular examination*

48. Levy, *supra* note 30, at 26.

49. *Id.* at 28. The authorship of the anonymous essay has not been conclusively established, but Levy states it was "almost certainly" written by Alexander.

50. *Id.* at 29.

51. The events leading up to and surrounding the Zenger trial are described in Stanley Nider Katz's introduction to James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 1-35 (2d ed. Cambridge, Mass.: Harvard University Press, Belknap Press, 1972).

52. Alexander, *supra* note 51, at 81.

53. Katz, *supra* note 51, at 22.

into the actions of the magistrates.⁵⁴ Alexander also published a narrative of the Zenger trial, containing Hamilton's closing argument, which enjoyed great popularity on both sides of the Atlantic throughout the eighteenth century.⁵⁵

At the time of the Zenger trial, advocates of freedom of the press tended to base their arguments almost exclusively on the checking value. In the 1770s and 1780s, however, as the colonists consummated their revolution and set about the task of implementing their political principles, proponents of press freedom began to mention additional values such as general enlightenment and popular participation in decision making. Even so, the value of checking misconduct by public officials remained one of the central concerns in virtually every discussion of freedom of the press.

One of the most important of these discussions was contained in a letter of October 1774 from the First Continental Congress to the inhabitants of Quebec inviting them to join forces in resistance to the crown.⁵⁶ The letter enumerated several rights claimed to have been infringed by George III. One of the rights listed was freedom of the press, and one of the values mentioned was the checking value:

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.⁵⁷

The draftsman of the First Amendment was James Madison.⁵⁸ His most fully developed discussion of freedom of the press is contained in the Virginia Report of 1799-1800, a document he prepared for the Virginia House of Delegates in criticism of the federal Alien and Sedition Acts.⁵⁹ Elaborating on a theory he had sketched out ten years earlier in presenting his proposed draft of the Bill of Rights to the United States House of Representatives,⁶⁰ Madison argued that the

54. Alexander, *supra* note 51, at 181.

55. Levy, *supra* note 28, at 133.

56. Reprinted in 1 Bernard Schwartz, ed., *The Bill of Rights: Documentary History* 221 (New York: Chelsea House Publishers, 1971).

57. *Id.* at 223.

58. See Marvin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison* 211 (Indianapolis: Bobbs-Merrill Co., 1973).

59. Reprinted in *id.* at 299.

60. Madison's speech of June 8, 1789, presenting his proposed bill of rights to the House of Representatives, is reprinted in 5 Gaillard Hunt, ed., *The Writings of James Madison* 370-89

British legal doctrine of freedom of the press, which consisted mainly in the prohibition of prior restraints and permitted criminal punishment for seditious libel, represented a narrow conception of liberty inapplicable to the American system of government. For in England, he observed, “[t]he representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive.”⁶¹ In contrast, “[i]n the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible.”⁶² “Is it not natural and necessary,” asked Madison, “under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?”⁶³

Madison proceeded to explain why the federal Sedition Act claimed “a power which, more than any other, ought to produce universal alarm.”⁶⁴ His principal argument was that the freedom to criticize government officials is essential to the process by which the electorate turns out of office those who fail to discharge their trusts. When public officials fail in this respect, said Madison, “it is natural and proper, that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.”⁶⁵ Whether and to what extent the public trust has been breached “can only be determined by a free examination thereof, and a free communication among the people thereon.”⁶⁶ Madison placed more emphasis than earlier theorists on the role of the electorate in the checking process,⁶⁷ and also on the need to check errors of judgment

(New York: Putnam's Sons, 1904). In attempting to assess the original understanding of the First Amendment, it is important that Madison articulated as early as 1789 the theory of liberty on which he based his Virginia Report of 1799-1800. This fact casts some doubt on the thesis advanced by Professor Levy that a libertarian theory of freedom of speech was not accepted at the time the First Amendment was adopted and only emerged 10 years later as a result of the political jockeying over the Alien and Sedition Acts of 1798. See Levy, *supra* note 28, at 249. The debates in Congress on the Bill of Rights contain virtually nothing on the values thought to underlie the freedoms of speech, press, and assembly. The Senate journal reports no discussion of the First Amendment at all, although it does record a few votes. See 1 Annals of Congress 73, 80 (Washington, D.C.: Gales & Seaton, 1834). The House journal reports a lengthy discussion on August 15, 1789, but it covered only the religion clauses, the question whether the right to assemble was redundant in light of the right to petition, and a long debate on a proposed amendment, eventually rejected, which would have guaranteed the right of the people “to instruct their representatives.” See 1 Annals of Congress 757-78.

61. Meyers, *supra* note 58, at 330.

62. *Id.* at 331.

63. *Id.*

64. *Id.* at 315.

65. *Id.* at 338.

66. *Id.*

67. See his letter to Thomas Jefferson of Oct. 17, 1788, in Hunt, *supra* note 60, at 269.

as well as illegal or despotic actions by government officials.⁶⁸ Nonetheless, the Virginia Report constitutes a detailed argument by the author of the First Amendment that one of the principal purposes of freedom of the press is to permit intensive scrutiny of the behavior of public officials.⁶⁹

Thomas Jefferson also tended to view liberty of the press in terms of the checking value. In a 1790 letter to Noah Webster, Jefferson distinguished between rights that individuals retain because their enjoyment is not inconsistent with the purposes of government, and other rights that constitute "certain fences which experience has proved peculiarly efficacious against wrong." He then gave examples: "Of the first kind, for instance, is freedom of religion; of the second, trial by jury, habeas corpus laws, free presses."⁷⁰ Thirty-three years later, in a letter to Adamantios Coray, Jefferson once again stressed the checking value in explaining his commitment to freedom of the press: "This formidable censor of the public functionaries, by arraigning them at the tribunal of public opinion, produces reform peaceably, which must otherwise be done by revolution." He added, almost as an afterthought, "It is also the best instrument for enlightening the mind of man and improving him as a rational, moral, and social being . . ."⁷¹

Examples could be proliferated: the exchange of letters in 1789 between Chief Justice William Cushing of Massachusetts and John Adams,⁷² the commentary to a widely read 1803 edition of Blackstone by the respected judge and law professor St. George Tucker,⁷³ the comprehensive *Treatise Concerning Political Enquiry and the Liberty of the Press* by Tunis Wortman,⁷⁴ Alexander Hamilton's argument in 1804 before the New York Supreme Court in the case of *People v. Crosswell*.⁷⁵ These authorities, and those discussed above, do not establish

68. See Meyers, *supra* note 58, at 338.

69. Madison's appreciation of the checking value may also be inferred from the formulation he adopted in his original draft of what was to become the First Amendment: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Reprinted in Hunt, *supra* note 60, at 377.

70. Reprinted in Levy, *supra* note 30, at 341-42. Jefferson was in France when the Constitution and the Bill of Rights were drafted, but he took a deep interest in the subject of liberty and kept up an active correspondence with some of the persons, including Madison, who were involved in the drafting and passage of the First Amendment. See, e.g., the letters reprinted in Julian P. Boyd, ed., *The Papers of Thomas Jefferson* (Princeton, N.J.: Princeton University Press, 1955), vol. 12, at 439-42; *id.*, vol. 13, at 124-28, 440-43; *id.*, vol. 14, at 649-51, 659-61.

71. Levy, *supra* note 30, at 376.

72. *Id.* at 147-53.

73. *Id.* at 317, 319.

74. Wortman, *Treatise . . .* (New York: DaCapo Press, 1970). See esp. pp. 170, 174-77.

75. 3 Johns. 336 (New York, 1804). See Levy, *supra* note 30, at 377, 379, 380, 386.

that the generation of Americans which enacted the First Amendment built its whole philosophy of freedom of the press around the checking value. Then, as now, the commitment to free expression embodied a complex of values. There can be no doubt, however, that one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them. Insofar as the views prevalent at the time of adoption have relevance to contemporary interpretation, the checking value rests on a most impressive foundation.

An appreciation of the checking value requires not only some knowledge of its sources in the eighteenth century but also an understanding of the premises upon which the value rests. These can be discerned in part from the original sources, but contemporary analysis is also necessary.

The central premise of the checking value is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people. There are several reasons why misconduct by government officials may be regarded as different in kind from misconduct by private persons. First, and perhaps most important, the potential impact of government on the lives of individuals is unique because of its capacity to employ legitimized violence. This means not only that in most cases government can achieve a higher degree of compliance with its decisions than can private bodies, but also that public officials control the resources which, if misused, can do the maximum amount of harm. No private party—not Lockheed, not United Fruit, not the Mafia—could ever have done what our government did to the Vietnamese people and the Vietnamese land.⁷⁶ Private forces could never have exterminated such significant portions of the domestic population as did the Nazi and Soviet governments in the 1930s.⁷⁷ While the threat to humanity posed by the “corporate state” should not be lightly dismissed, the threat posed by the totalitarian state represents, to my mind, the overriding problem of twentieth-century politics.

The government's monopoly of legitimized violence means also that there is no concentrated force available to check the govern-

76. See Frances Fitzgerald, *The Fire in the Lake: The Vietnamese and the Americans in Vietnam* 369-78 (Boston: Little, Brown & Co., 1972).

77. See William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* 967-79 (New York: Simon & Schuster, 1960); Adam B. Ulam, *Stalin: The Man and His Era* 325-27, 420-21, 440-41 (New York: Viking Press, 1973); Isaac Deutscher, *Stalin: A Political Biography* 324-25 (New York: Viking Press, 1973).

ment in the way government is available to check even the most powerful private parties. The check on government must come from the power of public opinion, which in turn rests on the power of the populace to retire officials at the polls, to withdraw the minimal cooperation required for effective governance, and ultimately to make a revolution. This diffuse force is much less easily mobilized than are the regulatory resources of government. Also, the concentrated checking resources of government include significant investigative capabilities, ranging from the subpoena power to the personnel of the enforcement agencies to the vast accumulations of data that citizens must routinely submit to the government. No such investigative resources are available to serve the diffuse process by which government is checked by public opinion. Because no concentrated force is available to check it, government misconduct may properly be regarded as a more serious evil than misconduct by private parties who are subject to the checking power of government.

One consideration that may be thought to cut against this conclusion is the elaborate system of checks and balances embodied in the United States Constitution and the constitutions of all the states. Each branch of government may impose specific sanctions against members of the other branches, and also typically has at its disposal substantial investigative resources. But this system breaks down in certain political contexts, particularly at the local level where even the theoretical inter-branch checks may not amount to much. Also, although it could conceivably operate in a public opinion vacuum, the system of checks and balances usually functions only when an aroused populace demands that one segment of the government perform its checking function. In this respect, the system can be viewed as part of the larger process by which the electorate checks the misconduct of public officials, and hence a complement to the checking value of freedom of the press. Moreover, even with their own investigative resources, government officials engaged in the process of checking other public officials often benefit from the work of journalists and private citizens.⁷⁸ Thus, the existence of the system of checks and balances does not undercut the proposition that for purposes of First Amendment analysis misconduct by government officials should be regarded as a more important concern than misconduct by private parties.

78. See, e.g., Samuel Dash, *Chief Counsel: Inside the Ervin Committee—the Untold Story of Watergate* 24, 263 (New York: Random House, 1976); Vincent Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 253-54 (1971).

In addition to considerations of material capacities and checks, official power may be distinguished from private power on the basis of some important moral and symbolic differences. A person entrusted with public authority is morally obligated to serve the general welfare and to uphold the fundamental principles of the polity. It is a distinction to be called to even the lowliest public office. Most citizens feel they have a right to expect if not excellence at least conscientiousness from persons who have been so honored with the public trust. No such honor and reliance surrounds the acquisition of private power. There is moral significance in the symbolism of the consent of the governed as embodied in our elaborate and expensive election ritual.

The moral quality of official power has several implications that are relevant to the checking value. First, because the investiture of public power represents a form of moral approval, public servants are probably more likely than those who wield private power to lose their humility and acquire an inflated sense of self-importance, often a critical first step on the road to misconduct. Second, since public officials have been "chosen" by the people, either directly by election or indirectly via a chain of appointments anchored by an election, the public is probably less inherently skeptical of officials than of powerful private figures. I think this is true even after the disillusionments of the last 15 years. We *want* to believe in the trustworthiness of our officials. In the face of such strong evidence of wrongdoing, no private figure could ever have retained the confidence of a substantial segment of the public as long as did President Nixon—and this had little to do with Mr. Nixon's personal appeal or demagogic talents. Third, when trust is shown to have been abused, the cost to the society is greater if important expectations have been defeated. Watergate and the revelations about the FBI⁷⁹ have damaged American society⁸⁰ far more than the discoveries that General Electric and Westinghouse had engaged in massive price-fixing schemes,⁸¹ or that General Motors executives had left on the market automobiles known to be unsafe,⁸² or that Lockheed had bribed officials of foreign governments.⁸³ All of these factors—the

79. See David Wise, *The American Police State: The Government Against the People* 274-322 (New York: Random House, 1976).

80. By "damage to society" I mean such phenomena as the undermining of the sense of community that stems from the sharing of ideals and standards, and of the sense of security that stems from the perception that one is not totally at the mercy of alien forces.

81. See John G. Fuller, *The Gentlemen Conspirators: The Story of the Price-Fixers in the Electrical Industry* (New York: Grove Press, 1962).

82. See Ralph Nader, *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile* 53, 207 (New York: Grossman Publishers, 1965).

83. See Payoffs: The Growing Scandal, *Newsweek*, Feb. 23, 1976, at 26; Tad Szulc, *The Money Changers*, *New Republic*, Apr. 10, 1976, at 10.

greater likelihood that public power will be abused because of a loss of humility in those who hold it, the lesser likelihood that the actions of public officials will be greeted by the public with skepticism, the greater cost to society when public power is abused—suggest that there is much to be said for the notion, which constitutes the central premise of the checking value, that the exercise of power by public officials needs to be more intensively scrutinized and publicized than the activities of those who hold even vast accumulations of private power.

Another premise underlying the checking value is an essentially pessimistic view of human nature and human institutions. Human beings have an unmistakable tendency to hurt each other, so much so that the prevention of man-made evil can be viewed as the most important task of all political arrangements. In this regard, it matters little whether the human tendency to harm others is inherent in the nature of man or is due largely to the corrupting influences of civilization and technology. While a proponent of the checking value may regard free expression as important partly because of its contributions to progress, wisdom, community, and the realization of individual potential, he is likely to value free expression primarily for its modest capacity to mitigate the human suffering that other humans cause. Much of that suffering is caused by persons who hold public office.

This pessimistic assessment of human nature need not lead one to embrace premises often associated with anarchism or less extreme philosophies of limited government. On the contrary, in light of the interdependence that technology has wrought, the need to mitigate the effects of human predation may justify a great deal of social ordering, including much governmental intervention. It is largely because government today has to be so big that it has to be so closely scrutinized. To my mind, the checking value is more important in the world of post-New Deal politics than it was in the eighteenth century, when the fear of government misconduct loomed so large in political discourse.

The inevitable size and complexity of modern government is related to another premise that underlies my understanding of the contemporary significance of the checking value. This is the need for well-organized, well-financed, professional critics to serve as a counterforce to government—critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public. It may have been possible in the eighteenth century to arouse the populace against a particular official or policy by amateur, makeshift protest methods. Today, however, it is virtually impossible to do so, at least beyond the local level. The protests against the war in Vietnam

amounted to little until academic, journalistic, and eventually political elites took up the cause. Even protests that express deeply held "grass-roots" sentiments tend to have little impact until the protesters gain access to the channels of mass communication. In short, if modern government were ever to gain complete control of the channels of mass communication or to incapacitate its professional critics in some other way, there would be no effective check on official misconduct.

In addition to the belief that professional critics are necessary to check government misconduct, the checking value is based on the further premise that the general populace must be the ultimate judge of the behavior of public officials. In this regard, the checking value grows out of democratic theory, but it is the democratic theory of John Locke and Joseph Schumpeter, not that of Alexander Meiklejohn. Under the Locke or Schumpeter view of democracy, the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds.⁸⁴ One might, of course, be a direct democrat in the sense of favoring a significant participatory role for the ordinary citizen in day-to-day governance and also believe that the general populace must define and enforce norms relating to the abuse of official power. The point here is that one need not be a direct democrat to embrace the checking value, but that one must be at least a Lockean democrat. For if one does not approve a significant role for the ordinary citizen as the ultimate judge of official conduct, there is little reason to place as much emphasis on mass communication as does a proponent of the checking value.

The role of the general populace in defining norms for public officials relates also to a final premise of the checking value: the belief that the concept of "misconduct" has meaning in the context of governmental decision-making. Most of the considerations discussed above relating to extreme suffering and morality do not come into play when objections to government actions are based only on disagreements over questions of priority or efficacy. It is the violation by public officials of norms that transcend a wide spectrum of policy differences that most concerns the proponent of the checking value.

This is not to say that in interpreting the First Amendment courts must determine which controversial actions of public officials can be

84. Locke, *supra* note 25; Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* 269-83 (New York: Harper & Bros., 1942). Compare Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Oxford University Press, 1965), discussed in detail at pp. 554-65 *infra*.

considered "misconduct." Under the checking value, that determination must be made by each citizen in deciding when the actions of government so transcend the bounds of decency⁸⁵ that active opposition becomes a civic duty. However, unless there exists for each citizen a viable, distinctive concept of government misconduct, the citizen's claim to know about the actions of public officials amounts to nothing more than the desire to participate in political decision-making, a value that is already well embodied in traditional First Amendment theory. So while courts need not delineate the distinction between government misconduct and lesser forms of undesirable behavior by officials, the distinction must have meaning for the decisions of individual citizens if the checking value is to add a significant new element to First Amendment theory.

Is there a viable concept of official "misconduct" that does not simply collapse into "unwisdom" or "unpopularity"? Behavior in violation of the applicable criminal code such as embezzlement or the acceptance of a bribe might provide a starting point for such a concept. Behavior adjudicated to be unconstitutional could also be considered misconduct without collapsing the distinction, although those who believe that constitutional interpretation has become little more than an expression of contemporary policy will no doubt disagree. Some governmental actions such as the deliberate bombing of civilians during wartime, the assassination of foreign political figures, or less extreme examples of improper involvement in the domestic affairs of another nation might also be regarded as so in violation of shared standards of morality as to fall within a distinctive concept of misconduct. The category could also be extended to include serious misrepresentations made to other institutions of government or to the general public. In addition, employment of the powers of office to augment one's private wealth, even if not technically illegal, could be considered misconduct. In deciding whether to accept or reject the basic premises of the checking value, however, one ought not to be concerned with precisely how the concept of misconduct is defined by any particular citizen, only with whether the concept can retain coherence under any plausible definition.

These, then, are what I take to be the most important sources and premises of the checking value. In deciding what role, if any, the checking value should play in First Amendment analysis, one must pass judg-

85. This characterization might apply not only to heinous deeds but also to governmental actions in serious violation of procedures established by positive law or required by fundamental notions of fair process.

ment on the authoritative and hortatory significance of these sources and on the validity of these premises. Such an evaluation is only the beginning of inquiry, however. In addition, one must determine how the checking value differs, both in premises and in implications, from the fundamental values that have formed the basis of the twentieth-century understanding of the First Amendment. Furthermore, a detailed look at the ways in which an explicit recognition of the checking value would affect doctrinal analysis in selected areas of adjudication seems necessary before those of us accustomed to the modes of thought of Anglo-American lawyers can feel prepared to assess the value. The remainder of this article is devoted to these various explorations.

III. THE TWENTIETH-CENTURY UNDERSTANDING OF FIRST AMENDMENT VALUES: AN OVERVIEW AND COMPARISON

The twentieth-century understanding of First Amendment values is complex, but the various aspirations, empirical propositions, and other articles of faith that make up that understanding can be discussed under three general heads: (1) individual autonomy; (2) diversity; and (3) self-government. For the purpose of differentiating the value of checking the misuse of official power, the self-government value requires the most extensive treatment.

A. Individual Autonomy

In his classic opinion in *Whitney v. California*, Justice Brandeis commenced his discussion of the philosophy of the First Amendment with this observation: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness"⁸⁶ The basic idea here is not that speech leads to truth or a stable society or some other social value, but rather that certain speech activities are valuable because they are integral to the process by which persons consciously choose from among alternatives, a process which is regarded as valuable in and of itself because it figures prominently in our vague notions of what it means to be human.

Ironically, the idea that some speech activities should be immune from government regulation as a matter of individual right rather than social policy⁸⁷ may have roots in the seventeenth-century notion that

86. *Whitney v. California*, 274 U.S. 357, 375 (1927).

87. This distinction is addressed in Ronald Dworkin, *Taking Rights Seriously*, in Eugene V. Rostow, ed., *Is Law Dead?* 168 (New York: Simon & Schuster, 1971). See also Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

speech is special precisely because it is *not* a matter of conscious choice. Several early advocates of toleration—most significantly John Locke and the Leveller William Walwyn—argued that people have no real control over their beliefs and hence should not be held legally accountable for them.⁸⁸ Spinoza developed the idea a step further:

Not even the most experienced, to say nothing of the multitude, know how to keep silence. Men's common failing is to confide their plans to others, though there be need for secrecy, so that a government would be most harsh which deprived the individual of his freedom of saying and teaching what he thought; and would be moderate if such freedom were granted.⁸⁹

Through many vicissitudes of political thought in the last three centuries, the notion has persisted that the cognitive and communicative activities we associate with the concept of freedom of speech represent an unusually worthy form of endeavor, a variety of human behavior that has intrinsic, not just instrumental, value.⁹⁰ Why, however, apart from their social consequences, should these activities be valued or respected more than actions taken in response to other promptings of the human spirit, such as unconventional sex urges, entrepreneurial ambitions, or the desire to cease living? Perhaps cognition and conceptualistic communication are regarded as special because they are thought to differentiate the human species. But in light of what we have learned about irrational and subconscious forces in humans, not to mention discoveries regarding cognition and communication in other animals,⁹¹ one might question what is so distinctively human about the process of conscious choice informed by facts and reasons. In any event, the notion lives on, and undoubtedly influences our intuitive responses to concrete disputes, that there is something particularly dehumanizing—not simply antiutilitarian—about telling a person that he cannot communicate his beliefs to others or that he must communicate his beliefs to official inquisitors. And even if speech activities cannot persuasively be distinguished from many other claims of liberty on the ground of respect for the essence of the individual self, the fact remains that those aspects of liberty that involve speech receive the most explicit endorsement in the text of the Constitution and for that reason alone may properly be singled out for special judicial protection.

88. Levy, *supra* note 28, at 303-20.

89. Spinoza, *A Theologico-Political Treatise* (1670) at 258 (R. H. M. Elwes trans. New York: Dover Publications, 1951).

90. In a brilliant essay, Isaiah Berlin suggests that Mill's *On Liberty* is best appreciated not as a utilitarian argument for liberty of expression but as an affirmation of the intrinsic worth of cognitive and communicative endeavor. Isaiah Berlin, John Stuart Mill and the Ends of Life, in *Four Essays on Liberty* 173 (New York: Oxford University Press, 1970).

91. See, e.g., Eugene Linden, *Apes, Men, and Language* (New York: E. P. Dutton & Co., 1974).

The value of individual autonomy differs from the value of checking government misconduct in several respects relevant to constitutional adjudication. Perhaps most important, a proponent of the checking value views speech of a certain content as important because of its *consequences*: alerting the polity to the facts or implications of official behavior, presumably triggering responses that will mitigate the ill effects of such behavior. In contrast, a proponent of the individual-autonomy value is more concerned with the *process* of belief formation and communication; the value does not rest on any empirical propositions regarding the social effects of speech. In this respect, the autonomy value may be considered more enduring since it is less tied to the social dynamics of a particular time and place. On the other hand, the empirical propositions on which the checking value depends—that official power is sometimes abused, that the evil consequences of such abuse are often serious, and that exposure can be an important corrective—are so well grounded in millenia of political experience that the checking value also seems likely to endure, even if its empirical foundation is theoretically susceptible to disproof.

Actually, the autonomy value may in one respect be even less enduring than the checking value. For the autonomy value depends on a view of the human self that may not survive the scientific discoveries, technological advances, and demographic developments of the future. There are vital cultures in the world today which appear to attach little value to the psychological desires we lump under the concept of individualism.⁹² The Supreme Court's work in the last 40 years in defense of individual autonomy has at times had the appearance of a rearguard action, a striving to protect an endangered concept by symbolic gestures of limited material impact.⁹³ While I believe strongly in the value of individual autonomy and would give it more emphasis than has the Supreme Court, I feel more confident about the continuing significance of the speech and press guarantees when they are not viewed as resting exclusively on a concept of individualism which has held sway for only a few centuries in only a few parts of the globe.⁹⁴

92. See, e.g., Orville Schell, *In the People's Republic* 32, 43, 53, 169, 195, 238 (New York: Random House, 1977); *Fairbank, Mrs. M. and the Masses*, N.Y. Rev. Books, May 12, 1977, at 21; Frank Gibney, *Japan: The Fragile Superpower* 71-84 (New York: Norton, 1975); Edwin O. Reischauer, *The Japanese* 127-56 (Cambridge, Mass.: Harvard University Press, 1977).

93. E.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Wooley v. Maynard*, 45 U.S.L.W. 4379 (1977).

94. Cf. Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* 46-47 (Englewood Cliffs, N.J.: Prentice-Hall, 1966).

A further difference between the checking value and the autonomy value has important implications for the adjudication of speech claims that conflict with legitimate regulatory interests. The concept of human autonomy is largely irreducible. The libertarian argument from autonomy rests on the proposition that unless individuals retain a basic minimum of choice-making capability, they cease to be "individuals" at all. It is no accident, therefore, that claims based on the value of individual autonomy tend to be absolute in nature; they concern not interests to be promoted against competing regulatory interests but rather constitutive elements the integrity of which must be respected if the whole edifice of constitutional limitations is to remain coherent.

In contrast, the checking value is not based on the proposition that a threshold level of scrutiny and discussion of government behavior is constitutive of the system of constitutional limitations. The checking value *can* be viewed as something to be promoted on a conditional basis, to be "balanced" against competing regulatory interests. This is not to say that a balancing analysis might not produce some unconditional legal standards; such absolutism may be desirable for reasons of adjudicative economy or as a prophylactic against bad faith or insensitive interpretation. However, since the process of formulating legal standards is one of accommodating competing interests rather than of deriving standards from constitutive premises, the checking value can be promoted incrementally in the face of substantial regulatory interests in a way that the autonomy value cannot.

Another important difference is that, unlike the autonomy value, the checking value supports doctrines that make constitutional protection a function of who is speaking and what is being said. Since the argument for protection based on the checking value rests on the social consequences of speech activities, the content of the speech and the speaker's credibility and resources for dissemination would appear to be highly relevant factors. Particularly does this seem to be the case when the relevant consequences consist of a more or less patterned scenario whereby official malefactions are discovered and publicized by professional critics, and then are corrected by democratic processes. This scenario, unlike that by which "truth" is determined in a marketplace of ideas,⁹⁵ has a format specific and stable enough that particular speech activities can be categorized according to whether or not they form an important part of the envisioned scenario. The checking value can thus be viewed as supporting a distinctive constitutional role for

95. See pp. 549-51 *infra*.

certain specialized countervailing forces in the society and certain specialized speech and press activities. Also, a proponent of the checking value places a premium on, and thus may accord extraordinary constitutional protection to, speech of a certain content—that concerning the behavior of public officials. In these respects, the checking value is at odds with traditional egalitarian elements of First Amendment theory, which eschew distinctions based on the subject matter of the communication or the identity of the speaker.

Thus, there are important differences, having possible implications for First Amendment doctrine, between the autonomy value and the checking value. This is not to say that the two values are completely independent or that one is more important than the other. For example, one might regard the abuse of official power as an evil of an especially high order precisely because particular abuses often threaten individual autonomy. Indeed, one might even *define* the concept of government abuse primarily in terms of the unauthorized diminution of individual autonomy. Moreover, one reading of the checking value would emphasize the need to hold government to extraordinarily high standards of accountability on the theory that the ultimate goal of constitutional limitations is to forestall the advent of a totalitarian state, the quintessential negation of individual autonomy. Conversely, one can argue, as did Justice Brandeis, that the strongest check against government abuse is a citizenry that will not stand for it, a citizenry comprised of autonomous individuals who care deeply about their liberties and have the courage to defend them.⁹⁶ In short, the checking value could never replace the existing First Amendment value matrix but rather should be viewed as potentially a vital additional component in that constellation of interdependent values.

B. Diversity

In his dissent in *Abrams v. United States*, Justice Oliver Wendell Holmes offered this explanation of the value of free speech:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁹⁷

96. *Whitney v. California*, 274 U.S. 357, 375 (1927) ("the greatest menace to freedom is an inert people").

97. *Abrams v. United States* 250 U.S. 616, 630 (1919).

Holmes was a notorious skeptic. To him, "truth" apparently meant little more than an equilibrium of doubt, folly, and prejudice.⁹⁸ John Stuart Mill, on the other hand, presented an unskeptical argument for free trade in ideas in his celebrated essay *On Liberty*. He contended that a regime of unregulated discussion would maximize utility by exposing error, refining and fortifying people's understanding of true propositions, and providing a favorable climate to nurture the insights of genius upon which social progress depends. Holmes and Mill had remarkably little in common, but they shared a strong distaste for unitary systems of thought and unitary social institutions. For different reasons, each placed diversity near the top of his hierarchy of values. And both thought diversity to be important in virtually all walks of life, not just politics.⁹⁹

The marketplace-of-ideas concept is sometimes equated with a rigorous truth-determining process, and when this happens the concept is generally found wanting as a persuasive contemporary rationale for free speech.¹⁰⁰ Few would deny that there are such serious structural distortions in the ideological market that the economist's ideal of perfect competition is hardly approached.¹⁰¹ Indeed, if the forming of a consensus can ever be likened to the setting of a price—a dubious proposition in itself—the market in ideas is probably best described as one of monopolistic competition or oligopoly. Moreover, the market structure with regard to ideas is likely to prove every bit as resilient in the face of trust-busting efforts as have the entrenched market struc-

98. See, e.g., Mark De Wolfe Howe, ed., *Holmes-Pollock Letters* (2d ed. Cambridge, Mass.: Harvard University Press, Belknap Press, 1961), vol. 1, at 163 (letter of Apr. 3, 1913) ("I am so skeptical as to our knowledge about the goodness and badness of law that I have no practical criterion except what the crowd wants. Personally I bet that if the crowd knew more it wouldn't want what it does—but that is immaterial"); *id.*, vol. 2, at 13-14 (letter of May 26, 1919) ("I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn"); Harry C. Shriver, ed., *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 187 (New York: Central Book Co., 1936) (letter to Dr. Wu) ("Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough"). See also, *Holmes, Collected Legal Papers* 304-5, 311-12 (New York: Harcourt, Brace & Co., 1920).

99. See, e.g., John Stuart Mill, *On Liberty* 68, 78 (Indianapolis: Bobbs-Merrill Co., 1958); Max Lerner, ed., *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* 395-96 (Boston: Little, Brown & Co., 1943).

100. See, e.g., Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 Geo. Wash. L. Rev. 161, 188-94 (1972); Shapiro, *supra* note 94, at 52.

101. See, e.g., Benno C. Schmidt, Jr., *Freedom of the Press vs. Public Access* 37-46 (New York: Praeger Publishers, 1976). See generally, Jerome A. Barron, *Freedom of The Press for Whom? The Right of Access to Mass Media* (Bloomington: Indiana University Press, 1973); Bruce M. Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment* (Cambridge, Mass.: Ballinger Publishing Co., 1975).

tures in other industries. The case for freedom of expression is an uneasy one if it depends on the claim that the collective decisions that result from the existing or any reasonably foreseeable processes of opinion formation are likely to be wise, to ascertain some objectively verifiable reality, to reflect the most deeply rooted intuitions of the populace, or to be "true" in any other significant sense.

It might be argued, however, that although an open marketplace of ideas might not lead to truth, any governmental intervention in the market is likely to exacerbate rather than ameliorate the preexisting distortions, thereby adding still another hindrance to the quest for truth. Furthermore, a policy of nonregulation at least leaves open the theoretical possibility that error can be corrected by persistent and persuasive appeals to the public consciousness, whereas a fully implemented policy of selective suppression permits some orthodoxies to be perpetuated in the face of the most irrefutable evidence of their falsity.¹⁰² Thus, diversity of expression can be considered a primary value underlying the First Amendment even by persons who do not share Milton's faith that truth will always best falsehood in free and open encounter.

More important, the diversity value need not rest on the proposition that open discussion will facilitate the quest for truth. The essential argument of proponents of the diversity value is that the social consequences of unregulated discussion are likely to be better than the consequences of regulation. These consequences may include the enhancement of understanding, but they may also include benefits that have little to do with the search for truth. For example, a regime in which there is diversity of expression may be more stable because discontented citizens can register their grievances verbally without resorting to force, and persons in power can learn about and respond to grievances before citizens become irretrievably alienated. In addition, diversity of expression may contribute to a healthy pacing of social change by making the collective consciousness sufficiently aware of needs and developments to be able to countenance incremental change, yet sufficiently accustomed to controversy to be not easily captivated by impractical proposals for reform. Perhaps the most important beneficial consequence of unregulated expression is simply the stimulation individuals receive from a diverse reading and listening fare; this stimulation may contribute to human happiness directly, and hence be thought to have value quite apart from its relationship to the search for truth.¹⁰³

102. This is the key proposition around which Benjamin DuVal organizes his stimulating and comprehensive philosophy of the First Amendment. See DuVal, *supra* note 100.

103. In this respect, the diversity value may overlap the autonomy value. But not every

The consequentialist argument for diversity of expression may thus have considerable appeal even in an age characterized by confusion about the concept of truth and by serious distortions in the processes by which collective decisions are reached. Even the venerable metaphor of the marketplace of ideas may have continuing force if a marketplace is thought of not so much as a site where prices are determined and purchases made but rather as a place where people gather to browse, to taste, and to commingle aimlessly.

Just as the checking value draws on intuitions and has implications that are different from those associated with the autonomy value, the checking value differs in some important respects from the diversity value. It is true that the checking and diversity values are similar in that, unlike the autonomy value, they both support the protection of speech because of its social consequences rather than on the basis of the intrinsic moral worth of the activity or its constitutive status in the constitutional scheme. But the "consequences" that ensue from diversity are so many and so varied that one cannot convincingly ascribe to them any precise valuation such as that of maximizing utility. Those who accede to the consequences of a pluralistic approach to ideas do so primarily out of respect for the inherent limitations on human ordering—a form of fatalism. In some ages, this fatalism predominates; realizing that time has indeed upset many fighting faiths, people are willing to trust their destinies to a mysterious process of ideological evolution. But in other periods, and in some important subcultures in virtually all periods, the dangers of selective suppression of hateful creeds are not thought to be greater than the dangers of unchecked demagoguery.¹⁰⁴ In this respect, the diversity value rests on a proposition about the beneficial consequences of unregulated expression which may not command widespread acceptance over an extended period of time.

The checking value, on the other hand, rests on a proposition about consequences that is likely to appeal to most people in most ages,

communicative activity that contributes to human happiness can be considered such a constitutive element of individualism that a person's autonomy is impaired if he is denied the opportunity to engage in the activity. So even this aspect of the diversity value encompasses some instances of communication that fall outside the ambit of the autonomy value. For a most enlightening discussion of the interplay between the argument for free expression grounded on the notion of human autonomy and that based on an assessment of consequences, see Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972).

104. See, e.g., Herbert Marcuse, *Repressive Tolerance*, in Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* 81 (Boston: Beacon Press, 1965); Walter Berns, *Freedom, Virtue, and The First Amendment* 46-47, 223-27, 238-47, 252 (Baton Rouge: Louisiana State University Press, 1957); Peter Brett, *Free Speech, Supreme-Court Style: A View from Overseas*, 46 Tex. L. Rev. 668, 681-82 (1968); Alexander M. Bickel, *The Morality of Consent* 72 (New Haven, Conn.: Yale University Press, 1975).

at least in western political societies. Simply put, the proposition is that systematic scrutiny and exposure of the activities of public officials will produce more good in the form of prevention or containment of official misbehavior than harm of various forms such as diminution in the efficiency of the public service or weakening of the trust that ultimately holds any political society together. In all ages, no doubt, some thoughtful people will not concur in the judgment that the benefits of intensive scrutiny of official behavior necessarily exceed the costs; in the 1970s, for example, the American polity has paid a frightful price in citizen alienation for the exposures of government duplicity regarding Vietnam, Watergate, the CIA, and the FBI.¹⁰⁵ Nevertheless, the proposition about consequences which underlies the checking value at least is specific enough to win adherents; it is not beyond the speculative capabilities of most thoughtful people, as is any proposition about the consequences of diversity. In fact, distrust of officialdom is a theme that runs so deeply and so continuously in the history of American political thought¹⁰⁶ that it would seem to provide a substantial foundation for First Amendment doctrine, certainly more so than the more transient skepticism of a Holmes or zest for debate of a Mill. At a minimum, the checking value would appear to add an important element to traditional First Amendment theory by contributing a rationale based on social consequences which might appeal to persons who are troubled by the consequentialist argument on which the diversity value rests.

The fact that the checking value is concerned with a more specific pattern of consequences differentiates it from the diversity value in another respect—that of generating narrow, focused priorities for protection. A highly protective judicial doctrine is generally more acceptable and more manageable when it can be confined to a relatively narrow range of disputes. A commitment to diversity has implications for controversies over erotic and violent entertainment, commercial advertising, scandal sheet gossip, and all other subjects of communication. A commitment to checking governmental abuse need have no such implications. This is not to suggest that disputes regarding these other topics raise no First Amendment issues, but rather that speech activities which are instrumental to exposing government misbehavior might be accorded a level of constitutional protection higher than that accorded other

105. See, e.g., U.S. News & World Rep., Dec. 3, 1973, at 78; Low Marks for Politicians and Political Parties, Intellect, July/Aug. 1975, at 4-5.

106. See, e.g., the authorities collected in Alpheus Thomas Mason, ed., *Free Government in the Making: Readings in American Political Thought* 267, 402-3, 462, 557-58, 589, 733, 854-55 (3d ed. New York: Oxford University Press, 1965).

speech activities which have only the more general effect of enhancing diversity. In this regard, an acceptance of the checking value might lead to First Amendment doctrines of a more discriminating nature. In addition, the narrower priorities of the checking value would have special appeal to persons who believe that the noble eighteenth-century ideal of freedom of speech is somehow tarnished when it serves as the basis for resolving controversies over girlie magazines and gossip columns.

The diversity and checking values are similar, and once again stand in contrast to the autonomy value, in that they focus on the interests of listeners and readers rather than speakers and writers. The two values are different, however, in their relative emphasis on information as distinguished from argumentation. It is true that nothing about the diversity value or the marketplace metaphor compels the view that the activity of forming value judgments and attempting to persuade others to share them is more important than the activity of acquiring information and disseminating it to other people. Yet somehow we have come to think of the passionate, often uninformed, soapbox orator as the classic embodiment of our commitment to diversity. First Amendment claims that involve "hard" data rather than subjective beliefs are slightly unsettling; these claims seem not obviously implausible but neither do they impress us as being really at the core of our constitutional commitment. Yet a marketplace can trade in information as well as ideas, and in fact most of us probably seek new information more assiduously than we seek new points of view. Nevertheless, perhaps because the marketplace metaphor still evokes visions of a dialectical process, the ascendancy of the diversity value has resulted in a disproportionate emphasis on belief formation and advocacy of subjective points of view.

Although a proponent of the checking value does not deny the importance of argumentation, he emphasizes the need for information about what government officials are doing. The moral and political implications of official behavior will often be apparent without extended public debate. The most important stage in the checking process is typically that during which the public is first made aware of what is going on. Of course, the relative importance of argumentation will depend greatly on what the concept of official misconduct is thought to encompass. For example, some of the official actions revealed in the Pentagon Papers were unarguably an abuse of the public trust;¹⁰⁷ the

107. See Neil Sheehan *et al.*, eds., *The Pentagon Papers* 239-40, 260, 263, 265, 339, 416, 442-43 (New York: Bantam Books, 1971). See also Eugene G. Windchry, *On Reading the Pentagon Papers; The Prophetic Fiction of Graham Greene*, *New Republic*, Aug. 7 & 14, 1971, at 21.

most important speech activity concerning these actions was the publication of the fact that they had taken place. On the other hand, some of the United States government's actions in the Vietnamese War were to many people not obviously immoral, illegal, or otherwise improper. With regard to these actions, the most important speech activities were the countless exchanges of opinion, often generated by symbolic speech activities such as mass demonstrations and draft-card burnings, about what was right and wrong in the realm of international affairs. It would seem, however, that under any plausible interpretation of the concept of government misconduct, speech activities which relate to the dissemination of information divorced from advocacy would be more highly valued if the checking value were considered one of the primary values informing the First Amendment.

It bears repeating that the checking value should be viewed as a supplement to, not a replacement for, the diversity value. Although they are different in some important respects, the two values are similar in other equally important ways. Both values rest on assessments of social consequences rather than notions of inherent right. Both avoid being linked too closely with eighteenth-century rationalism or with other optimistic philosophies concerning the nature of truth or the inevitability of progress. Both emphasize the value of speech to the recipients of messages rather than the senders. Finally, both values affirm the significance of free expression even in a society in which the processes of communication are seriously distorted by concentrations of resources and techniques of manipulation. What is important, however, is not whether the similarities between the checking and diversity values overshadow the differences, but rather whether there are enough differences to suggest that the checking value has the potential to add new support and new dimensions to the existing edifice of free-speech theory. The answer to that question seems clearly "Yes."

C. Self-Government

The most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn's *Free Speech and Its Relation to Self-Government*.¹⁰⁸ In that volume of lectures and in subsequent law review articles, the distinguished philosopher and educator sets forth a vision of political community which he finds ordained by the "basic agreement" or "compact" entered into by the framers of the United States Constitution.¹⁰⁹

108. Originally published in 1948, the lectures are reprinted in Meiklejohn, Political Freedom, *supra* note 84.

109. Meiklejohn, *supra* note 84, at 14.

Meiklejohn regards the freedom of expression guaranteed by the First Amendment to be derivative from the fundamental constitutional principle that "We, the people" are sovereign and hence must assume the responsibilities of governing.¹¹⁰ Accordingly, he argues that only speech that constitutes a part of the process of self-governance is entitled to the protection of the First Amendment. Communications which have no political significance, or which are not motivated by a public-spirited search for the general welfare, fall outside the ambit of First Amendment concern.¹¹¹ Such "private speech" may be protected on a conditional basis under the general concept of due process, just as other private interests such as the enjoyment of property are safeguarded.¹¹² But the First Amendment, in Meiklejohn's view, plays a strikingly different role in the constitutional scheme. It is concerned not with *rights* but with *powers*—the powers we as citizens need in order to govern ourselves. Persons who hold office in any of the three branches of the federal government, and by extension in state government, are "officials" only in a formal sense; in actuality, they are merely the agents of the true "officials" who constitute the fourth and most important branch of government, the electorate.

Under this view, while private rights may sometimes have to be subordinated to the general welfare, the powers established by the First Amendment must be fully—that is to say, "absolutely"—guaranteed before the concept of the general welfare can have any meaning. The agents of the electorate have no authority to decide what serves the general welfare; that determination, according to Meiklejohn, can be made only by a continuing process of informed, disinterested reflection and discussion by the citizenry as a whole. Thus, the unqualified phraseology of the First Amendment—"Congress shall make no law . . ."—is not problematical but rather is perfectly consistent with the constitutional design. While "private" speech such as defamation of private persons,¹¹³ contempt of court,¹¹⁴ professional lobbying,¹¹⁵ and incitement to riot¹¹⁶ may be abridged in the face of competing regulatory interests, speech directed to helping "We, the people" determine the

110. He specifically disclaims any reliance on the concept of natural rights. *Id.* at 57, 79.

111. "The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare." *Id.* at 37.

112. *Id.* at 36-37.

113. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 259.

114. See Alexander Meiklejohn, *What Does the First Amendment Mean?* 20 U. Chi. L. Rev. 461, 473 (1952-53).

115. See note 111 *supra*.

116. Meiklejohn, *supra* note 84, at 40. See also Meiklejohn, *supra* note 114, at 473.

general welfare for the purpose of political action can never be abridged, not even in the name of "national security" or "self-preservation."

Meiklejohn does not regard the First Amendment as an isolated provision to be interpreted solely in its own terms. He views it, rather, as an integral part of the entire Constitution, linked especially with four other provisions: (1) the preamble's reference to "We, the people"; (2) the provision in article 1, section 2, that elected representatives shall be chosen by "the people of the several States"; (3) the Tenth Amendment, which "speaks of powers that are reserved 'to the people' in addition to powers 'reserved to the States'"; and (4) the clause in article 1, section 6, that guarantees "absolute" protection for the public speech of elected representatives: "for any speech or debate in either House, they shall not be questioned in any other place."¹¹⁷

In keeping with this broader emphasis, Meiklejohn views the First Amendment as much more than a negative prohibition. To him, the plan of self-government obligates the government to take affirmative steps to enrich the public debate, such as providing gathering places for the exchange of views and, most important, an educational system that will "attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen."¹¹⁸ Indeed, Meiklejohn regards the education component of political freedom to be "far deeper and more significant" than the liberty component.¹¹⁹

A key feature of Meiklejohn's thought is his rejection of the "excessive individualism" that he sees as underlying the First Amendment theories of Justice Holmes:

Mr. Holmes sees a human society as a multitude of individuals, each struggling for his own existence, each living his own life, each saving his own soul, if he has a soul to save, in the social forms of a competitive independence. Always, therefore, he tends to interpret the constitutional cooperation of one hundred and more millions of Americans, together with the past and future generations who belong to the same community, as if they had no fundamental community of purpose at all. The theory of strife he can understand—but not the

117. Meiklejohn, *supra* note 113, at 253. In later writings Meiklejohn expressed regret that he entitled his Walgreen lectures "Free Speech and Its Relation to Self-Government" because "[m]any activities of belief and communication, whose freedom the Amendment protects, are not 'forms of speech.'" Meiklejohn, *supra* note 114, at 464. He finally settled on the phrase "political freedom" to express the range of concerns embodied by the several clauses of the First Amendment and the other constitutional provisions to which he finds those clauses inextricably linked.

118. Meiklejohn, *supra* note 113, at 257.

119. Meiklejohn, *supra* note 84, at 86.

theory of cooperation. A nation tends to be, for his mind, a huge collocation of externally related human atoms.¹²⁰

This individualistic view of life has, in Meiklejohn's opinion, corrupted our attitude toward public discussion:

We Americans, when thinking in that vein, have taken the "competition of the market" principle to mean that as separate thinkers, we have no obligation to test our thinking, to make sure that it is worthy of a citizen who is one of "the rulers of the nation." That testing is to be done, we believe, not by us, but by "the competition of the market." Each one of us, therefore, feels free to think as he pleases, to believe whatever will serve his own private interests.¹²¹

In place of the Holmesian vision of self-interested competition, a vision that lay behind the Justice's famous "bad man" theory of law,¹²² Meiklejohn offers his own "good man" theory of the Constitution:

As against the dogma of Mr. Holmes I would venture to assert the counter-dogma that one cannot understand the basic purposes of our Constitution as a judge or a citizen should understand them, unless one sees them as a good man, a man who, in his political activities, is not merely fighting for what, under the law, he can get, but is eagerly and generously serving the common welfare.¹²³

This theme is central to his thought: "whatever else it may mean, the First Amendment is an expression of human goodness."¹²⁴

It should be emphasized that Meiklejohn's vision of political community does not purport to be descriptive of the American political system as it actually operates. His writings resound with disappointment and frustration at the failure of the American people to become truly self-governing.¹²⁵ For Meiklejohn, political freedom is an unrealized ideal that should guide judicial interpretation of the Constitution because the Supreme Court "is and must be one of our most effective teachers."¹²⁶

The checking value has much in common with Professor Meiklejohn's self-government value. Both are exclusively concerned with the

120. *Id.* at 62.

121. *Id.* at 73.

122. *Id.* at 74.

123. *Id.* at 66.

124. *Id.* at 68. His view of human nature as it relates to political arrangements seems strongly influenced by the idealist philosophies of Plato, Kant, and Rousseau. Malcolm Sharp remarks in his foreword to *Political Freedom*: "First at Amherst and later at Wisconsin, I found Mr. Meiklejohn going back most often to Plato and to Kant." *Id.* at xii. Meiklejohn's employment of social contract analysis and his frequent invocation of a concept of "the general welfare" suggest a heavy debt to Rousseau.

125. *Id.* at 88. See also *id.* at 162-63.

126. *Id.* at 51.

political consequences of speech and thus both support First Amendment doctrines that give special protection to communications that relate to the political system in certain specified ways. Both values emphasize the importance of communications for readers and listeners; neither is especially concerned with the benefits writers and speakers may derive from engaging in the act of self-expression.¹²⁷ In addition, both the checking value and the self-government value stem from democratic concepts of sovereignty. There are, however, some major differences between the two values. A detailed explanation of those differences is in order because, in light of the eloquence with which the self-government value has been spelled out by Dr. Meiklejohn and the considerable attention it has received from the legal community,¹²⁸ the checking value has the potential to influence First Amendment doctrine only insofar as it can be shown to have premises and implications significantly different from those of the self-government value.

The difference most immediately apparent is that the self-government value is concerned with, and thus supports special protection for, a much broader range of communication. The checking value focuses on the particular problem of misconduct by government officials. A proponent of the checking value does not deny that myriad harms to the body politic may be forestalled by speech activities or that many goals of a democratic system of government may be served by, may indeed depend upon, certain forms of communication. The proponent of the checking value is willing to accord several of these speech activities a high valuation for purposes of First Amendment analysis. But he maintains that the particular evil of official misconduct is of a special order. That evil is so antithetical to the entire political arrangement, is so harmful to individual people, and also is so likely to occur, that its prevention and containment is a goal that takes precedence over all other goals of the political system.¹²⁹ Communication which serves that goal to a sufficient degree should, by this line of reasoning, be accorded a level of constitutional protection higher than that given any other type of communication.

In contrast, Dr. Meiklejohn's theory makes no such narrow order-

127. Meiklejohn is quite explicit on this point: "[T]he point of ultimate interest is not the words of the speakers, but the minds of the hearers." *Id.* at 26. Also, "What is essential is not that everyone shall speak, but that everything worth saying shall be said." *Id.*

128. See, e.g., William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965). Sections IV-VI *infra* trace the impact of the Meiklejohn theory on the Supreme Court's analysis of libel, newsgathering, and access issues.

129. See pp. 538-41 *supra*.

ing. In his view, all speech relevant to the process by which citizens decide how to vote is entitled to the same level of First Amendment protection: "absolute" protection. His enumeration of the types of speech relevant to self-government and hence absolutely protected includes not only "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues," but also "[e]ducation, in all its phases," "[t]he achievements of philosophy and the sciences," and "[l]iterature and the arts."¹³⁰ Thus, a judge or scholar who believes that some of these categories of speech are more important (in the constitutional sense) than others might be drawn to the checking value but could never be attracted, on this score, to the self-government value. Moreover, the checking value is likely to be more appealing than the self-government value to persons who cannot accept the cost to legitimate regulatory interests of granting an extraordinarily high level of protection to a wide range of speech activities but who might countenance the lower cost of granting such extraordinary protection to a narrower category of communication.

Another significant difference between the checking and self-government values is that the latter not only calls for extraordinary protection for a wide variety of communicative activities but also is based upon premises which dictate that that protection be unqualified. Professor Meiklejohn does not base his support of absolute protection for self-governing speech on a calculation of costs and benefits or on a conviction that such speech must be "overprotected" in order to guard against unsympathetic application of a more finely tuned standard. To him, any limitation imposed by the agents of the people on the self-governing speech of citizens is simply an impossible notion under our political compact; the slightest restriction of such speech violates the "agreement" upon which the legitimacy of governmental power depends. The checking value, on the other hand, derives from a consequentialist ethics. Judicial protection of speech is warranted under this line of reasoning only if the good consequences of the speech outweigh the bad, taking into account the problem of unsympathetic application and hence the occasional need for an unqualified prophylactic standard. Thus, although the checking value might generate some absolute standards, it would not do so as a matter of inexorable logic, and certainly would not do so for as wide a range of speech disputes as would the self-government value.

The fact that the Meiklejohn analysis is based upon social contract

130. Meiklejohn, *supra* note 114, at 257.

theory has implications not only for the types of legal standards likely to be generated by the self-government value but also for the acceptability of its underlying premises. It is true that social contract theory figures prominently in the thought of John Locke,¹³¹ who was widely read and respected by the framers of the Constitution, and also may be on the ascendancy today as a result of the work of the contemporary philosopher John Rawls.¹³² But Professor Meiklejohn's explanation of the American agreement to be self-governed does not surmount the major difficulties with social contract analysis—most importantly, the problem of how people living today can be bound by an arrangement made by their forebears.¹³³ Moreover, since Meiklejohn's "compact" is not some unstated accord that evolved from a state of nature but the written agreement that is the United States Constitution, the fact that the original framers had a fairly narrow view about who should be entitled to vote¹³⁴ casts serious doubt on the claim that even our forebears "agreed" to be self-governed.

There may be answers to these criticisms. It does seem significant, for example, that the one consistent theme of the amending process over the years has been expansion of the franchise. One might say that the American people agreed to be self-governed at the point when they passed the Fifteenth Amendment, or the Seventeenth, Nineteenth, Twenty-fourth, or Twenty-sixth. Moreover, even if the electorate constitutes only a small percentage of the total population, a proponent of the self-government value might argue that in order to cultivate the ability to govern wisely, this limited group of people needs to live in a society characterized by open discussion. But Meiklejohn does not offer responses along these lines, and his theory is in fact based on a concept of consent which seems linked with the notion of universal suffrage and with a view of the original Constitution as a cognate document. I do not claim that the Meiklejohn analysis ultimately fails; a much more detailed critique must precede any such conclusion. But the analysis

131. See John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill Co., 1952).

132. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, Belknap Press, 1971).

133. The classic refutation of social contract theory is David Hume, *Of the Original Contract* (1748), reprinted in Ernest Barker, ed., *Social Contract: Essays by Locke, Hume, and Rousseau* 209-36 (London: Oxford University Press, 1947).

134. I refer here more to the exclusion of women and slaves than to property qualifications for voting. At the time of the Constitutional Convention, several states had extended the right to vote beyond freeholders, and in any event those who spoke at the convention seemed to think that a high percentage of the adult male population could meet a freeholder requirement. See 2 Max Farrand, ed., *The Records of the Federal Convention of 1787*, at 193-212 (rev. ed. New Haven, Conn.: Yale University Press, 1966).

does have some serious problems, as do all social contract theories of which I am aware.¹³⁵ These problems are avoided by the consequentialist analysis underlying the checking value.

Apart from difficulties presented by the analytical construct of the social contract, the self-government ideal may not embody widely shared intuitions because of the high level of political participation it demands. To Meiklejohn, the good society is one that is highly politicized:

Men are politically free if, and only if, with adequate intelligence, with unremitting zeal for the nation's welfare, and by Constitutional authorization, they actively govern themselves. To be free does not mean to be well governed. It does not mean to be justly governed. It means to be self-governed.¹³⁶

He carries over this theme of full participation to his reading of the First Amendment:

The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.¹³⁷

My point is not that self-government presupposes a commitment by the electorate which seems unrealistic in our age of low voter turnouts and impoverished political discourse. I subscribe fully to Meiklejohn's view that constitutional interpretation should be based on shared ideals, not shared shortcomings. But I question whether the highly politicized society extolled by Meiklejohn is, or ever was, a shared ideal of the American people. There is little to indicate that the framers of the Constitution thought a large percentage of the population ought to take an active, day-to-day interest in the affairs of state.¹³⁸ Moreover, the

135. Traditional social contract theories are summarized and discussed in Barker, *supra* note 133, at vii-xliv; Stanley I. Benn & R. S. Peters, *The Principles of Political Thought* 376-91 (New York: Free Press, 1959); Christian Bay, *The Structure of Freedom* 47-58 (Stanford, Cal.: Stanford University Press, 1958). Critiques of Rawls include Brian Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal Doctrines in A Theory of Justice* by John Rawls (Oxford: Clarendon Press, 1973); Robert Nozick, *Anarchy, State and Utopia* 183-231 (New York: Basic Books, 1974); Thomas C. Grey, *The First Virtue*, 25 Stan. L. Rev. 286 (1973); and Symposium: John Rawls's *A Theory of Justice*, 40 U. Chi. L. Rev. 486 (1973).

136. Meiklejohn, *supra* note 84, at 98.

137. *Id.* at 75.

138. In Federalist No. 10, Madison argues in favor of a republic in preference to a pure democracy. The effect of a republican form of government, he contends, may be "to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives

political apathy of our own age may bespeak more than simply a failure to live up to acknowledged standards of behavior. I choose to spend little of my time thinking about the general welfare writ large or even about discrete political issues. I would rather think about Mozart, or Jane Austen, or the White Mountains, or the Michigan football team.¹³⁹ I do not think I am unusual in this respect, nor do I think I am unworthy of the title "citizen." When totalitarian forces loom on the horizon, as they have in my lifetime, I feel obligated to do what I can to stop them. But such occasions for involvement in public affairs are a cause of sadness; they do not describe for me the good society.

If the Meiklejohn vision of active, continual involvement by citizens fails to describe not only the reality but also the shared ideal of American politics, that vision does not provide a secure basis for interpreting the First Amendment. The checking value is premised upon a different vision—one in which the government is structured in such a way that built-in counterforces make it possible for citizens in most, but not all, periods to have the luxury to concern themselves almost exclusively with private pursuits. This vision does not deny that the survival of humanist values depends in the final instance on the continuing capability of the populace to mobilize politically in order to forestall the advent of irreversible totalitarianism or to undo damage caused by petty tyrants. But the level of political involvement and awareness necessary to maintain that capability is considerably lower than that required by the vision of self-government.

In another important respect the Meiklejohn theory of the First Amendment may rest upon premises less widely shared than those at the root of the checking value. For Meiklejohn is hostile to many of the most prominent manifestations of individualism. He decries voting on the basis of private interest.¹⁴⁰ He has nothing but unkind words for the free-enterprise system.¹⁴¹ He believes that academic freedom "is

of the people, will be more consonant to the public good, than if pronounced by the people themselves convened for the purpose." Cooke, *supra* note 24, at 62. See also James Madison, Note to Speech on the Right of Suffrage (ca. 1821), in Saul Kussiel Padover, ed., *The Complete Madison* 36 (New York: Harper & Bros., 1953). Hamilton's oft-expressed views against mass political participation are perhaps best summed up by a statement, paraphrasing Demosthenes, which he made to the Constitutional Convention on June 22, 1787: "As a general marches at the head of his troops, so ought wise politicians, if I dare to use the expression, to march at the head of affairs; . . . the measures which they have taken ought to produce the *event*." 1 Harold C. Syrett, ed., *The Papers of Alexander Hamilton* 373, 390 (New York: Columbia University Press, 1961).

139. See generally Will Perry, *The Wolverines* (Huntsville, Ala.: Strode Publishers, 1974); Joe Falls, *Bo Schembechler: Man in Motion* (Ann Arbor, Mich.: School-Tech Press, 1973).

140. Meiklejohn, *supra* note 84, at 73-74.

141. *Id.* at xv-xvi, 87.

granted not because we want it or enjoy it, but because those by whom we are commissioned need intellectual leadership in the thinking which a free society must do."¹⁴² The checking value, on the other hand, does not depend on a view of the individual which subordinates the pursuit of private satisfaction to disinterested participation in the political community; the value is perfectly consistent with a private- or group-interest theory of politics. The checking value may even be considered an outgrowth of such a theory, for the phenomenon of misuse of official power may result in part from a political system's failure fully to separate notions of private gain from notions of legitimate political behavior. In any event, although the checking value would seem to have meaning also in a relatively cooperative society (unless one believes that a true political community would be free of even occasional official malefactions), the value is especially important in a society characterized to a large degree by competition and the pursuit of private satisfaction. If one agrees with Justice Holmes that the United States is such a society, by design as well as in practice, then the checking value can be an important component in one's theory of the First Amendment, whereas the self-government value cannot be.

These are the most important differences of principle between the checking value and the self-government value. In addition, there are a few differences of emphasis that are worth noting. The self-government value appears to place slightly more emphasis on argumentation (as contrasted with information) than does the checking value. This is not a sharp differentiation, however. One of the major contributions of the Meiklejohn theory is its repeated insistence that political discourse is not a game to be enjoyed for its own sake but rather a serious quest for right answers—a quest which demands that participants be informed as well as concerned. Nevertheless, the fact that the self-government value is implicated in all communications relevant to any facet of the political process means that Meiklejohn cannot place the same emphasis on information as does a proponent of the checking value, who is concerned about a specific problem of politics for which the shortage of information is the most serious difficulty.

A second difference of emphasis concerns the political role to be played by elite segments of the society. Meiklejohn is reluctant to assign a special role in the governmental system to any group of people; he even regards public officials as merely agents of the collective political will. In contrast, a proponent of the checking value sees political decision-making more as a product of contending forces and counterforces,

142. *Id.* at 128.

with some groups continually pitted against other groups. Respect for the checking value leads a citizen to look upon public officials as his potential oppressors rather than as his agents. In this view, public officials are qualitatively different from ordinary voters: officials have more political power and they have attitudes and skills more attuned to the acquisition and retention of such power. Because of this difference, one might conclude that officials can be effectively checked only by other elite groups with similarly specialized powers, skills, and attitudes. One such group is made up of minority-party officeholders in political contexts where an organized opposition exists. This group typically has the power to make officials give a public accounting of their behavior and often has special access to government records. Another elite counter-force under the checking value would almost certainly be the professional press. A theory based on the checking value might therefore envision a special role for the professional press, and thus in some instances treat journalists differently than ordinary citizens in determining what rights are guaranteed by the First Amendment. Professor Meiklejohn may have in mind a special constitutional role for some elite groups—his discussion of academic freedom suggests as much¹⁴³—but he never emphasizes the role of elites and says nothing about a special role for the professional press in the American plan of self-government.

In sum, the checking value and the self-government value turn out on close examination to be based on significantly different premises and also to have doctrinal implications that diverge in some important respects. Judges and commentators accustomed to thinking about First Amendment disputes exclusively in terms of Dr. Meiklejohn's scheme would undoubtedly bring some new questions, reasoning patterns, and conclusions to their work were they to base their analysis in part on the checking value.

That the checking value differs significantly from the self-government value does not necessarily mean that the one value can supplement the other. The self-government value is the central element of a distinctive, comprehensive theory of the First Amendment. That theory is inconsistent with some implications of the checking value—for example, the notion that speech about the behavior of government officials is more highly valued in the constitutional system than other political speech. Of course, one can regard political participation by ordinary citizens as a primary First Amendment value without subscribing to Meiklejohn's views regarding why the phenomenon of political participation should be accorded such status. In that event, one could view

143. *Id.* at 125-47.

self-government, as several Justices have,¹⁴⁴ as one of a small number of basic values to be promoted rather than as the central principle around which all interpretation of the First Amendment must be organized. The self-government value would then be perfectly consistent with the checking value, as well as with the autonomy and diversity values.

Such a view of the self-government value raises the possibility of a First Amendment theory based on a combination of the values that have dominated twentieth-century thinking about freedom of expression. In light of the differences delineated throughout this section, an explicit and systematic consideration of the checking value would add some unique elements to such a theory.

The preceding discussion posits a sharper separation between values than is likely to exist in the minds of persons, such as judges and advocates, who deal with values in the context of concrete disputes. Although I have pointed out some of the logical interrelationships between the checking value and the autonomy, diversity, and self-government values, I have not considered how the values interact at the level of practical intuition. For example, the intuitive responses to the seemingly gratuitous persecution of ineffectual leftists during World War I¹⁴⁵ may have generated a compassionate concern for human autonomy as well as a tolerance of diversity and eccentricity. Similarly, although they differ in many important ways, the self-government and checking values can both serve to rationalize some of the same intuitive fears people experience when their lives are controlled by alien political forces. It is the task of legal analysis, however, to sort out parallel and overlapping intuitions and to organize them into value systems that can generate specific judicial doctrines. For it is this process that permits judges and commentators to refine and test their intuitions, and thereby to bridge the gap between impulse and judgment.

I do not suggest that the basic intuitions underlying the checking value have not been felt until recently, or that they have never been given expression in judicial opinions.¹⁴⁶ I have little doubt that these

144. Justices Brennan, Powell, and Stewart have on various occasions laid considerable stress on the value of self-government without building their entire analyses around it. See *infra* pp. 571, 574, 595, 598, 617.

145. See generally Chafee, *supra* note 41, at 36-140, 285-305.

146. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *New York Times Co. v. United States*, 403 U.S. 713, 716-17 (1971) (Black, J.); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 165-69 (1973) (Douglas, J.). In a brief speech delivered at the Yale Law School, Justice Stewart expressed the view that "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." Potter Stewart, "Or of the Press," 26 Hastings

intuitions have influenced our understanding of First Amendment values from the outset. My thesis is that some of our basic intuitive responses to concrete disputes can be understood fully only when organized around the value of checking the misuse of government power—that judicial and academic efforts to channel these intuitions into other value schemes have been only partially successful. The result, in my view, has been an interpretation of the First Amendment at the level of theory and doctrine which is in some important respects out of touch with most people's (including judges') understanding of the First Amendment at the level of untutored intuition. This has produced a tension, a tentativeness, at times a confusion, when those First Amendment claims that most implicate the checking value have been pressed. I believe that if the checking value were to be employed as one of the basic building blocks in the formulation of free-speech theory and doctrine, greater conceptual clarity and decisiveness would result, particularly in the processing of First Amendment claims dealing with control over information and with efforts to reach mass audiences. It is to test this proposition that one needs to appreciate the differences between the various primary values that inform First Amendment interpretation.

Also important in evaluating my thesis that the inexplicit and uneven treatment of the checking value has had a distorting effect on the formulation of doctrine is an understanding of exactly how the intuitions that underlie the checking value have influenced First Amendment adjudication. In the next three sections I present detailed discussions of doctrinal developments in three areas of First Amendment adjudication: (1) civil actions for defamation; (2) disputes arising from efforts by journalists to maintain confidential relationships with news sources and to gain access to sources under government control; and (3) controversies over the power of government to require news organiza-

L.J. 631, 634 (1975). The thrust of Justice Stewart's remarks, however, was not that the checking value should be a major component in a cognate theory of the First Amendment encompassing the speech, press, and assembly clauses, but rather that the free-press clause embodies different concerns than the other clauses because it is grounded in a view about the institutional checking function of the organized press. Another allusion to the checking value can be found in Professor Bickel's rambling, thought-provoking essay, *Domesticated Civil Disobedience: The First Amendment*, from *Sullivan* to the *Pentagon Papers*, in Alexander M. Bickel, *The Morality of Consent* (New Haven, Conn.: Yale University Press, 1975). In places, Bickel speaks of the press as part of the system of checks and balances and of free speech as a form of "domesticated" opposition to government. *Id.* at 57, 86-87. More often, however, he invokes the self-government and diversity values to explain his view that the essence of the First Amendment lies in the maintenance of a creative tension between social forces. *Id.* at 62, 65-66, 77-78, 80-82. In his careful formulation of a general theory of free expression, Benjamin DuVal refers in passing to the argument that freedom of expression can serve as a safeguard against bad rulers. DuVal, *supra* note 100, at 198. DuVal does not develop this theme, however, because his general theory is based on a variant of the diversity value.

tions to grant nonjournalists access to print space or air time to present their views directly to the public. For each area, I first describe the general course of doctrinal development in the Supreme Court, with emphasis on what the Justices have said about the fundamental values that underlie and justify their specific holdings and distinctions. Next, I identify the doctrines, dicta, and holdings that seem explicable largely in terms of the direct or indirect impact of the checking value and specify which Court responses in the area seem inconsistent with a full commitment to the checking value. Then I point out what I regard as fundamental weaknesses in the existing edifice of doctrine which are traceable not necessarily to a rejection or underemphasis of the checking value but to the Court's haphazard and inconsistent approach to the value. Finally, for each area of adjudication I sketch in broad outline what doctrines might follow from a First Amendment theory based in significant part, although by no means exclusively, on the checking value.

IV. DEFAMATION

Until 1964 the Supreme Court regarded statements that were actionable under the traditional law of libel as one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."¹⁴⁷ Then, in *New York Times v. Sullivan*,¹⁴⁸ the Court was presented with a case in which a Montgomery, Alabama, jury had returned a verdict awarding the local police commissioner half a million dollars in damages against the *New York Times* for some factual misstatements in a paid political advertisement run in the newspaper by a group of nationally prominent civil rights advocates. The advertisement recounted, at times inaccurately, several instances of misconduct by "Southern violators," some of whom by clear implication had to be public officials. But the advertisement never referred to the plaintiff by name or by position. The Alabama Supreme Court affirmed the verdict and, as one student of the law of defamation observed, did not have to distort the traditional principles of libel law to do so.¹⁴⁹

The United States Supreme Court reversed, holding the damage award to be in violation of the First Amendment. Justice Brennan's majority opinion acknowledged the traditional view that libelous utterance falls outside the ambit of First Amendment concern, but observed

147. *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952).

148. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

149. Harry Kalven, Jr., "The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'" 1964 Sup. Ct. Rev. 191, 196-97.

that none of the Court's previous cases had "sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials."¹⁵⁰ Drawing heavily from the brief for the *Times* written by Professor Herbert Wechsler, the opinion analogized the Alabama common-law libel judgment to the criminal prosecutions under the infamous federal Sedition Act of 1798, and concluded that the historical repudiation of the Sedition Act provides a cornerstone for contemporary First Amendment analysis.¹⁵¹ In particular, the Court invoked, with extensive quotation, the theory of free expression set out by James Madison in his Report on the Virginia Resolutions of 1798.¹⁵² Justice Brennan derived from Madison's analysis the view that a "fundamental principle of the American form of government" is the "right of free public discussion of the stewardship of public officials."¹⁵³ The Court concluded that this public discussion would be deterred to an unacceptable degree unless critics of official conduct were granted a constitutional immunity from defamation damage awards absent a finding that the defendant acted with knowledge of the falsity of his statements or with reckless disregard for the truth. Three concurring Justices¹⁵⁴ thought even this limited exception to be inconsistent with the First Amendment.

In an engaging article written shortly after the decision, Professor Harry Kalven hailed the *Times* decision as a great constitutional event.¹⁵⁵ In his judgment, "[t]he theory of the freedom of speech clause was put right side up for the first time" because "[t]he touchstone of the First Amendment has become the abolition of seditious libel and what that implies about the function of free speech on public issues in American democracy."¹⁵⁶ As a result of the *Times* precedent, observed Kalven, "analysis of free-speech issues should hereafter begin with the significant issue of seditious libel and defamation of government by its critics rather than with the sterile example of a man falsely yelling fire in a crowded theatre."¹⁵⁷

Kalven did not speculate about the implications for other areas of free-speech adjudication were the Court to "take seriously the new idiom and work a general revolution in the thinking about the First

150. 376 U.S. 254, 269 (1964).

151. *Id.* at 273-77. See Brief for Petitioner, at 10-13.

152. See text accompanying notes 59-66 *supra*.

153. 376 U.S. at 275.

154. Justices Black, Douglas, and Goldberg.

155. Kalven, *supra* note 149.

156. *Id.* at 208-9.

157. *Id.* at 205.

Amendment."¹⁵⁸ But in the realm of libel, he suggested, the seditious libel analogy could not be limited to suits brought by public officials: "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming." This development, said Kalven, would permit the Court gradually to "work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now."¹⁵⁹

During the first decade after the *Times* decision, the Court followed the "dialectic progression" suggested by Professor Kalven, albeit with several plurality opinions and only occasional invocation of the Meiklejohn theory of self-government. For example, in *Time, Inc. v. Hill*,¹⁶⁰ the *New York Times* privilege was held applicable to a "false-light" privacy action¹⁶¹ brought by a plaintiff who was neither a public official nor a powerful or prominent person. Justice Brennan's majority opinion made no effort to characterize the communication in question, a magazine article on a play about escaped convicts, as analogous to criticism of public officials, relevant to self-government, or distinctive in any other way. Instead Brennan observed that the "guarantees for speech and press are not the preserve of political expression or comment upon public affairs," and he quoted several passages from earlier decisions stressing the function that free speech plays in promoting private well-being.¹⁶²

Five Justices concluded in *Curtis Publishing Co. v. Butts*¹⁶³ that the *Times* privilege should control libel actions brought by "public figures."¹⁶⁴ Three of these Justices¹⁶⁵ invoked the Meiklejohn theory but also stressed the point, reminiscent of a marketplace-of-ideas approach, that prominent private persons have as ready access to the

158. Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup. Ct. Rev. 267.

159. Kalven, *supra* note 149, at 221.

160. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

161. The "false-light" privacy tort compensates for injuries suffered by persons who have been portrayed to the public in a false light even though the statements made about them were not defamatory. See William L. Prosser, *Handbook of the Law of Torts* 812-14 (4th ed. St. Paul: West Publishing Co., 1971).

162. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

163. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

164. The holding in *Hill* was not necessarily controlling on this point because the law of defamation might be thought to protect more significant interests than the false-light privacy tort, and hence to weigh more heavily in the constitutional balance. On the insubstantiality of the interests protected by the false-light privacy tort, see Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 Law & Contemp. Prob. 326 (1966).

165. Chief Justice Warren and Justices Brennan and White. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967).

mass media to counter criticism as do public officials, and hence do not need to rely on libel actions to clear their names. Justice Harlan contributed a thoughtful opinion contending that critics of "public figures" are entitled to a somewhat weaker privilege than critics of public officials on the ground that libel actions brought by persons who do not hold office cannot be analogized to prosecutions for seditious libel because recoveries by such persons cannot "be viewed as a vindication of government policy."¹⁶⁶

The self-government value was curiously ignored in *Greenbelt Cooperative Publishing Association v. Bresler*,¹⁶⁷ decided in 1970. The case involved a libel action brought by a public figure against a newspaper for accurately reporting statements made at a city council meeting accusing the plaintiff, a real estate developer, of "blackmail" in negotiating with the city over zoning variances and eminent domain compensation. One would think that an accurate report of what transpired at a city council meeting would be a paradigm case for protection under the Meiklejohn theory despite the common-law adage that "tale-bearers are as bad as tale-makers."¹⁶⁸ Yet the Court, ignoring Justice White's suggestion to this effect in his concurrence,¹⁶⁹ declined to establish such a constitutional privilege and instead reversed the award only on the ground that under the circumstances the use of the term "blackmail" could not be considered defamatory.

In contrast, the Meiklejohn theory received an implicit endorsement in *Monitor Patriot Co. v. Roy*,¹⁷⁰ although again there was no explicit mention of the self-government value. The Court, speaking through Mr. Justice Stewart, stated that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for public office" and proceeded to hold that "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of [the *Times* privilege]."

The Meiklejohn theory reached its high-water mark in the libel area in 1971 with the Court's decision in *Rosenbloom v. Metromedia, Inc.*¹⁷¹ The case involved a \$750,000 award against a radio station for characterizing the plaintiff as a "smut merchant" and stating that 3,000

166. *Id.* at 154. The Harlan opinion was joined by Justices Clark, Stewart, and Fortas.

167. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970).

168. See Charles O. Gregory and Harry Kalven, Jr., *Cases and Materials on Torts* 1024 (2d ed. Boston: Little, Brown & Co., 1969).

169. 398 U.S. 6, 23 (1970).

170. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

171. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

"obscene" books had been confiscated in a police raid on his home when in fact the obscenity *vel non* of his books was the issue in a pending prosecution. An unlikely plurality composed of Justices Brennan, Burger, and Blackmun held that the *Times* privilege governs all "discussion and communication involving matters of public or general concern," a category broad enough to include the news reports at issue in the case. Justice Brennan, the spokesman for the plurality, based his opinion on the central proposition that "[s]elf-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government." He emphasized the point that since the constitutionally protected institution of private property "places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation," the self-government value is implicated by *any* communication relevant to "[o]ur efforts to live and work together in a free society not completely dominated by governmental regulation."¹⁷² Professor Kalven's "dialectic progression" was completed.

Justice White concurred in the result, but he criticized the plurality's reliance on the Meiklejohn theory. In its place, he offered a justification based on a synthesis of the seditious libel analogy and the marketplace theory. In Justice White's view, the basic point of *New York Times v. Sullivan* was its recognition of the paramount importance of "free public discussion of the stewardship of public officials." This special constitutional concern embraces, he thought, "the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries."¹⁷³ Since the topic of the allegedly defamatory radio broadcasts was a police raid and the ensuing prosecution, the defendant's statements were, under this approach, entitled to the *New York Times* privilege.

The three dissenters in *Rosenbloom*, Justices Harlan, Marshall, and Stewart, did not believe that the *Times* privilege should govern the type of communication at issue in the case, but suggested that traditional libel doctrines permitting the award of presumed and punitive damages could not be squared with the First Amendment. Justices Marshall and Stewart justified the idea of a constitutional limit on damages by invoking a theory of the First Amendment which appears to regard the professional press as a constitutionally ordained institution: "Our notions of liberty require a free and vigorous press that presents what it believes to be information of interest or importance; not timorous,

172. *Id.* at 41.

173. *Id.* at 61.

afraid of an error that leaves it open to liability for hundreds of thousands of dollars."¹⁷⁴

Three years later, in *Gertz v. Robert Welch, Inc.*,¹⁷⁵ a majority of the Court was able to endorse a single doctrine, but only by virtue of the concurrence of Mr. Justice Blackmun, who, although he "sense[d] some illogic" in the Court's new approach, regarded it "of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity."¹⁷⁶ *Gertz* involved a libel action by a well-known lawyer who had been criticized in a magazine article for his participation in a civil lawsuit seeking damages for police brutality. Mr. Justice Powell's majority opinion interpreted the First Amendment to prohibit all presumed and punitive damages, at least in the absence of actual malice,¹⁷⁷ without regard to whether the plaintiff is a public person or whether the subject of the defamatory statement is of "general or public concern." In addition, the Court drew back from the *Rosenbloom* result by holding that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."¹⁷⁸ The majority concluded that the plaintiff was not a public figure and hence did not need to establish that the defendant acted with reckless disregard for the truth. The case was remanded for a new trial on the issues of negligence and actual damages.

One cannot be certain from a close reading of the Powell opinion whether the seditious libel analogy or the Meiklejohn theory played any part in the majority's thinking. Justice Powell characterized the First Amendment interest at issue as "[t]he need to avoid self-censorship by the news media," but he did not explain why self-censorship should be considered a paradigm evil. One possibility is because the speech suppressed by self-censorship may have utility. Another is because the general mentality engendered by self-censorship may be crippling to the institutional role of the press as a watchdog for society. These rationales derive from quite different theories of the First Amendment, yet the opinion offers no clue regarding which rationale, if either, lay behind

174. *Id.* at 82. Justice Harlan's reason for limiting the damages recoverable in defamation cases was different and unrelated to the checking value. See text preceding note 195 *infra*.

175. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

176. *Id.* at 353-54.

177. The majority opinion expressly reserved the question whether punitive or presumed damages might be awarded in a case in which the defendant was shown to have published with knowledge of the falsity of his statements or reckless disregard for the truth. *Id.* at 349.

178. *Id.* at 347.

the judgment in *Gertz*. Similarly, in concluding that private individuals have more equity as libel plaintiffs than do public officials or public figures, Justice Powell can be read to suggest either that public persons "invite attention and comment" because of society's need to scrutinize their activities or that public persons must be deemed to have assumed the risk of injury to reputation in return for the influence they have gained by involvement in public affairs. In fact, the lengthy, careful majority opinion in *Gertz* is most distinctive for its failure to make any contribution to First Amendment thinking; its lines are drawn almost exclusively in terms of perceived differences in the strengths of the various regulatory interests.¹⁷⁹

Justice White dissented vigorously in *Gertz*, taking issue not only with the majority's new restrictions on damages but also with its disallowance of strict liability in suits by private individuals. He reaffirmed his belief that the abolition of seditious libel is the central value of the First Amendment,¹⁸⁰ and suggested that the Court's excessive protection of libel defendants might even undercut that value: "It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems."¹⁸¹ One point Justice White did not address, however, was why an article claiming that a police officer had been framed as part of a "nation-wide conspiracy to discredit local law enforcement agencies" is not precisely the kind of speech in defense of public officials which he had argued in *Rosenbloom*¹⁸² deserves the special protection of the *Times* privilege.

The Court's most recent pronouncement in the defamation area, the decision two terms ago in *Time, Inc. v. Firestone*,¹⁸³ did little to fill the theoretical void left by *Gertz*. On the basis of an incorrect interpretation of a confusing divorce decree, the defendant inaccurately reported in its "Milestones" column that the plaintiff had been found guilty of adultery. The Supreme Court held that the *Times* privilege was unavailable to the defendant on two grounds. First, the plaintiff, a locally prominent socialite, was considered by the majority not to be a public figure. Second, and perhaps more important, the Court rejected the defendant's contention that a report on the contents of a public

179. Differences in the level of privilege available to defendants turn on the Court's assessment of the strength of the claims to compensation presented by the various categories of plaintiffs. Similarly, restrictions on damages are based primarily on the Court's judgment regarding which types of damages serve legitimate regulatory interests.

180. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 387 (1974).

181. *Id.* at 400.

182. See text accompanying note 173 *supra*.

183. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

document should be privileged unless the document was interpreted with reckless disregard for the truth. Justice Rehnquist's majority opinion explicitly denied that press reports which scrutinize government proceedings are entitled to special consideration: "[U]se of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area."¹⁸⁴ Unlike the practice in decisions before *Gertz*, no effort was made by the majority to explain its specific doctrinal conclusions in terms of a theory of the First Amendment.

Mr. Justice Brennan's dissent in *Firestone* revealed an important shift of emphasis on his part. He made his customary references to Professors Meiklejohn and Kalven, but this time Brennan stressed not the importance of debate on matters of interest to the general populace but rather the overriding importance of speech about public institutions. Moreover, his concern was with citizen control over the dangerous tendencies of government rather than with public debate as a means to direct democracy or personal fulfillment:

With the judiciary as with all other aspects of government, the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions that might in the alternative grow remote, insensitive, and finally acquisitive of those attributes of sovereignty not delegated by the Constitution.¹⁸⁵

The unsatisfactory pattern of doctrinal development and justification since the *New York Times* decision can be traced in large part, I believe, to the fact that the Court has tried to employ traditional theories of the First Amendment to rationalize intuitions and results that are best understood in terms of the checking value. It should be noted that the Court's opinion in *New York Times v. Sullivan* made no reference to Dr. Meiklejohn's writings or to the concept of self-government.¹⁸⁶ Neither did Professor Wechsler's brief, from which the opinion borrowed heavily.¹⁸⁷ The key concept of the *Times* decision

184. *Id.* at 456. In rejecting the petitioner's argument on this point, the Court interpreted narrowly its decision the previous term in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which held, in Justice Rehnquist's words, "that the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection." *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976).

185. 424 U.S. at 478.

186. Justice Black's concurring opinion contained one "cf." reference to Meiklejohn in a footnote. *New York Times v. Sullivan*, 376 U.S. 254, 297 n.6 (1964). Justice Brennan's opinion cited and quoted many other scholars: e.g., John Stuart Mill, John Milton, Zechariah Chafee, Thomas Cooley, and Leonard Levy.

187. The idea that the rejection of seditious libel should be a central principle of First Amendment interpretation was a key theme of the Wechsler brief. See Brief for Petitioner, at 10-13, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

was not self-government but the analogy to the crime of seditious libel. Professor Kalven saw in the no-seditious-libel principle the germ of the Meiklejohn theory,¹⁸⁸ but the intuitions that cause one to regard the abolition of seditious libel as a starting point for analysis do not inevitably stem from or lead to the Meiklejohn vision of political community. The checking value provides an alternative touchstone.

Indeed, I venture to guess that if at the time of the *New York Times* decision the checking value had been articulated and defended by a proponent as eloquent as Dr. Meiklejohn, and been blessed with a cheerleader as engaging as Professor Kalven, the checking value rather than the self-government value would have been adopted as the primary rationale for the proposition that seditious libel is an impossible notion in a free society. For the historical abhorrence of seditious libel stems largely from the fact that the concept was used by tyrants to silence potentially influential critics.¹⁸⁹ Moreover, the concept of seditious libel strikes fear in our hearts today not so much because prosecutions for seditious speech might discourage large numbers of citizens from participating actively in government, but because some form of systematic scrutiny of officials seems necessary in light of the tyrannical possibilities opened up by the pervasiveness and technological resources of modern government. In short, the intuitions that lead one to build a First Amendment theory around the rejection of seditious libel are intuitions more closely associated with the checking value than with the self-government value.

Further evidence on this point is the fact that the Court originally formulated the *Times* privilege to cover only libel actions brought by public officials against critics of their official conduct. Why define the protected category so narrowly and carefully if the value to be vindicated is Meiklejohn's expansive notion of self-government? Although none of the Justices who made up the majority in *Times* probably viewed the public official category as a fixed outer boundary for the new constitutional privilege, there are indications in subsequent cases that several of the *Times* Justices viewed the public official category as covering most of the situations in which the rejection-of-seditious-libel principle would be implicated. For example, the Court's attempt in

188. See text accompanying note 159 *supra*.

189. The uses to which the crime of seditious libel was put in England are described briefly in Siebert, *supra* note 27, at 269-75, 380-92. Fuller accounts can be found in 10 William Holdsworth, *A History of English Law* 673-96 (London: Methuen & Co., 1966), and 2 Thomas Erskine May, *Constitutional History of England: Since the Accession of George the Third* 1-123 (London: Longman's, Green & Co., 1912). The impact of this history on American libertarian thought can be seen in the several passages in opposition to the Sedition Act quoted in Levy, *supra* note 28, at 249-309.

*Rosenblatt v. Baer*¹⁹⁰ to delineate the boundaries of the "public official" category seems to have been based on the premise that the category would be the key to defining the ambit of the *Times* privilege. Also, in *Curtis Publishing v. Butts*, Justice Harlan, writing for himself and two other Justices who had joined the *New York Times* opinion, considered the seditious libel analogy applicable only to libel awards that could "be viewed as a vindication of government policy," and concluded that damage awards to persons who do not hold public office cannot be so viewed.¹⁹¹ The Harlan opinion did advocate a constitutional standard somewhat less protective than the *Times* privilege to govern defamation suits by public figures, but the rationale for this standard was based on a marketplace theory and had nothing to do with the seditious libel analogy. Similarly, Justice White, another member of the majority in *New York Times*, argued that the *Times* precedent could not support the Court's expansion of the ambit of protection in *Rosenblum v. Metromedia, Inc.* and *Gertz* because *Times* was based on a narrower principle: "the right of free public discussion of the stewardship of public officials."¹⁹² These subsequent opinions indicate that several members of the Court that decided *New York Times v. Sullivan* were responding at the time not to the vision of political community that underlies the self-government value but to more focused concerns regarding the need for systematic scrutiny of government institutions and the need to prevent government officials from employing illicit means to vindicate their actions.

The indirect influence of the checking value on the Court's defamation decisions can be seen not only in the original appeal of the seditious libel analogy but also in the Justices' recent emphasis on the danger of excessive damage awards.¹⁹³ Several rationales have been put forth to justify the unusual phenomenon of First Amendment limitations not on the fact of regulation but on the severity of sanctions. Justice Harlan argued, for example, that the institutional interest "in avoiding an inquiry into the mere truth or falsity of speech" dictates a constitutional rule that such an inquiry is not to be undertaken unless the plaintiff can demonstrate an interest in compensation for "actual, measurable" harm.¹⁹⁴ In addition, Harlan justified a limitation on puni-

190. *Rosenblatt v. Baer*, 383 U.S. 75, 84-87 (1966).

191. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154 (1967).

192. *Rosenblum v. Metromedia*, 403 U.S. 29, 61 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 387 (1974).

193. *Rosenblum v. Metromedia*, 403 U.S. 29, 66-68, 72-76, 82-87 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

194. 403 U.S. at 66.

tive damages on the ground that the only legitimate state interest supporting punitive damages is that of deterring false, harmful speech, and the deterrence interest is not sufficiently served when the amount of damages bears no "discernible relationship to the actual harm caused by the publication at issue."¹⁹⁵ On the other hand, Justices Marshall and Stewart based their argument for restriction of damage awards on the importance for the defense of liberty of "a free and vigorous press" uninhibited by the constant specter of "liability for hundreds of thousands of dollars." The majority opinion in *Gertz*, instituting a constitutional prohibition on presumed and punitive damages, mentioned all of the above rationales and added another: "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."¹⁹⁶ Thus, the belief that excessive damage awards for defamation must be controlled seems to have a strong pull on most of the Justices, but no consensus has yet emerged regarding what constitutional values justify that belief.

Here again, the checking value might provide a rationale that is both convincing and true to the basic intuitions that inform the Justices' responses on this issue. It will be recalled that Justices Marshall and Stewart justified a constitutional limitation on damage awards by pointing to society's need for a vigorous press free from financially induced self-censorship. This observation can be read as a rudimentary exposition of the checking value. Admittedly, there may be many reasons why "a free and vigorous press" is required by "our notions of liberty," but surely one of the most important is that a professional press whose priorities of inquiry are distorted by financial disincentives will be unable to provide a powerful check against the misuse of government power. Historically, our constitutional distrust of arrangements that place news organizations financially at the mercy of government derives from the eighteenth-century experience in England when the Walpole administration employed an intricate system of financial rewards and penalties to minimize press criticism of its own considerable malefactions.¹⁹⁷ The effort by the ministers of George III to deter colonial criticism of their policies by the imposition of a stamp tax belongs to the same tradition.¹⁹⁸ Of course, in terms of a theory for

195. *Id.* at 72-76.

196. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

197. See Siebert, *supra* note 27, at 305-45. The American revolutionaries were much influenced by the experience in England under Walpole. Bailyn, *supra* note 28, at 48-51.

198. See generally Edmund S. Morgan & Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (New York: Collier Books, 1953).

checking tyrannical government action, there is no small difference between a stamp tax imposed by an imperial power and a judgment for damages awarded by a civil jury. But the author of the First Amendment, James Madison, is best remembered as a political theorist for what he had to say about tyranny by popular majorities, particularly local majorities.¹⁹⁹ And it will be remembered that the *New York Times* case reached the Supreme Court because a jury in Montgomery, Alabama, assessed a newspaper that had been sharply critical of Southern segregation half a million dollars for publishing an advertisement that contained misstatements of fact which only by a rather dubious process of inference could be said to have harmed the reputation of the plaintiff.²⁰⁰ Thus, the checking value can indeed be implicated by the phenomenon of exorbitant damage awards in libel cases and may provide the most convincing rationale for the proposition that presumed and punitive damages for defamation cannot be squared with the First Amendment.

These are the ways in which the checking value appears to have influenced the Court's responses in the area of defamation. I do not suggest that the effect of the checking value has been consistent or continual or that the value can rationalize all the Court's doctrines relating to defamation. Precisely because it has not been a key feature of our articulated theory of the First Amendment, the checking value has had only a sporadic impact. For example, the checking value cannot explain the Court's doctrine, first adopted in *Curtis Publishing Co. v. Butts* and reaffirmed through all the subsequent doctrinal vicissitudes, that critics of public figures are entitled to the same level of constitutional privilege as that granted critics of the official conduct of public officials. For a key ingredient in any theory based on the checking value is the judgment that speech about the behavior of government officials is more important, and hence more protected, than speech on any other topic. Similarly, the majority's failure in *Time, Inc. v. Firestone* to extend the highest level of constitutional protection to news coverage of the contents of official documents would seem to be inconsistent with a full commitment to the checking value.²⁰¹ These doctrinal developments, which I regard as unfortunate, can be attributed in

199. His classic statement is Federalist No. 10.

200. See Kalven, *supra* note 149, at 197-200.

201. The *Firestone* holding can be reconciled with the checking value on the ground that a two-sentence item in a gossip column is not the kind of report of an official proceeding that plays any significant part in the checking function. But the majority opinion in *Firestone* did not invoke this argument and seemed to indicate that the *Times* privilege would not be available to a news organization sued by a private individual for statements made in a detailed story about the operations of a court system.

part to the tendency of the Court to analyze First Amendment claims relating to defamation exclusively in terms of the self-government and/or diversity values, which provide little basis for making differential valuations of the speech interest within the broad category of communications that can be considered to be "of public or general concern."

The Justices' overreliance on the diversity and self-government values has led not only to some undesirable results but also to shortcomings of craftsmanship. It has already been recited how the majority in *Gertz*, unable to countenance the full implications of the Meiklejohn theory yet no longer willing to base distinctions on artificial notions of opportunity for effective rebuttal in the marketplace, made no serious attempt to explain what view of First Amendment values lay behind the elaborate set of doctrines the Court was adopting.²⁰² In addition, the high incidence in the defamation area of plurality opinions²⁰³ and shifts of position by individual Justices²⁰⁴ can be attributed to the absence of sound theoretical grounding. Inattention to basic values may also explain why the idea of limiting damage awards in libel cases was conceived so late in the course of doctrinal development despite the fact that the size of the award in the *Times* case undoubtedly had much to do with the Court's initial perception that defamatory speech should no longer be considered outside the ambit of First Amendment protection.²⁰⁵

The ascendancy of the self-government and diversity values has also led to some serious definitional problems with regard to two important concepts that survived the reformulation of doctrine in *Gertz*. One of these concerns the standard of care required of libel defendants. The Meiklejohn theory dictates an unqualified constitutional protection for all speech, even defamatory speech, that is relevant to the process of self-government.²⁰⁶ Yet most of the Justices have not been able to accept the dramatic consequences of such a commitment. So instead we have a quasi-absolute standard under which all "good-faith" speakers are

202. See text preceding note 179 *supra*.

203. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); cf. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 353 (1974).

204. Chief Justice Burger joined the plurality opinion in *Rosenbloom* (see text following note 171 *supra*), then wrote a dissenting opinion in *Gertz* (418 U.S. at 354) that is flatly inconsistent with the plurality's doctrine in *Rosenbloom*. Justice White's dissent in *Gertz* is also hard to square with his opinion in *Rosenbloom*. See text at note 182 *supra*. In addition, Justices Harlan, Marshall, and Stewart took positions in *Rosenbloom* quite different from those they had adopted prior to that time.

205. See *Kalven*, *supra* note 149, at 200.

206. Meiklejohn believes that although not all utterance is protected by the First Amendment, all speech that is part of the process of self-government is absolutely protected. See Meiklejohn, *supra* note 113, at 259.

entitled to unconditional protection: plaintiffs can recover only upon proving that the defendant is guilty of "actual malice," defined as the publishing of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not,"²⁰⁷ the latter concept in turn defined variously as "a high degree of awareness of probable falsity"²⁰⁸ and as the existence in the mind of the defendant of "serious doubts as to the truth of his publication."²⁰⁹ Even in a world of individual defendants, the practical problems of proof under these standards would be imposing. When most defendants are corporations, however, any standard based on the subjective state of mind of the defendant is impossible to administer in anything but an artificial way.

Serious definitional problems have also appeared concerning the ambit of the *New York Times* privilege. For the concept of a "public figure" does not have the kind of objective referents that help one to define, for example, a "public official." Originally, the extension of the *Times* privilege to suits brought by public figures was justified in part on the ground that public figures "have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."²¹⁰ Yet the Court has never explicitly made the degree of access to the media possessed by a particular plaintiff a part of the test for determining whether he should be considered a public figure. Instead, the Justices have invoked such factors as whether the plaintiff "commanded a substantial amount of independent public interest at the time of the publications"²¹¹ and whether he was "intimately involved in the resolution of important public questions or, by reason of [his] fame, shape[s] events in areas of concern to society at large."²¹² At one point in the *Gertz* opinion, the Court defined "public figure" to mean persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."²¹³ Six pages later, the Court restated the test to include also a person who "is drawn into a particular public controversy."²¹⁴ The majority opinion in *Firestone*, refusing to extend the *Times* privilege to a news item about a person who claimed that she was in the public limelight against her will,

207. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

208. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

209. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

210. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967).

211. *Id.* at 154. This is not synonymous with rebuttal opportunities, for an otherwise obscure person would have excellent rebuttal opportunities if he were the subject of a story that for a time commanded the continuing attention of the media.

212. 388 U.S. 130, 164 (1967).

213. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

214. *Id.* at 351.

quoted only the former passage from *Gertz* and ignored the latter.²¹⁵ Furthermore, in *Gertz*, a well-known lawyer who had been active for years in civic affairs and who had written several books and articles was held not to be a public figure. In *Firestone*, the subject of a *cause célèbre* divorce suit was likewise placed outside the category. Yet earlier, in *Curtis Publishing Co. v. Butts*, a football coach was held to be a public figure, and in neither *Gertz* nor *Firestone* did the Court explain the difference.²¹⁶

In sum, many of the difficulties that have plagued the Supreme Court in its efforts to work out a coherent pattern of protection for defamatory speech can be traced to the fact that the checking value has had only a sporadic, and never an openly examined, influence on the course of doctrinal development. No thoughtful student of the complex process by which basic values are translated into judicial doctrines would contend that a conscious recognition of the checking value would directly clean up all of the doctrinal problems in this area. I believe, however, that such an explicit recognition would enable the Justices better to organize some of their primary intuitions, and in that respect would improve the process of doctrinal formulation.

It is not my purpose in this article to develop detailed responses to the basic constitutional issues posed by the law of defamation. I have said not a word, for example, about the legitimacy and strength of the various regulatory interests served by damage awards. But it seems incumbent on one who would propose a greater, or at least more consistent and more openly articulated, reliance on the checking value in First Amendment adjudication to indicate in broad outline what consequences might ensue from that course in specific areas of dispute. Here is what I think would follow in the area of defamation.

First, respect for the checking value leads one to regard speech about the official actions of public officials as more important than any other kind of communication. Thus, the Supreme Court's original decision in *New York Times v. Sullivan* to extend the extraordinary protection of the reckless-disregard standard only to this category of speech makes sense in terms of the checking value. However, the Court's subsequent holdings expanding the privilege to cover speech defamatory of public figures do not. In other words, although Professor Kalven's "dialectic progression" may be irresistible to one who bases his theory of the First Amendment solely on the self-government value, a propo-

215. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976).

216. On the problems inherent in the Court's concept of "public figure," see George C. Christie, *Injury to Reputation and the Constitution: Confusion amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 49-50 (1976).

ment of the checking value would have good reason to restrict the most protective privilege to a limited category of utterance similar to that originally marked out in *New York Times*.

This is not to say that speech about public figures should not be protected by some sort of constitutional privilege, nor even that speech of that description should not be more highly protected than speech defamatory of private individuals who are not public figures. A theory based on the checking value might, for example, provide absolute protection for communications critical of public officials, a qualified privilege defeasible upon proof of reckless disregard for the truth applicable to speech about public figures, and a negligence standard for all other defamatory utterance. Alternatively, the checking value could justify the gradations of privilege advocated by Justice Harlan in *Butts*:²¹⁷ the reckless-disregard standard for suits by public officials, a "gross negligence" standard for suits by public figures,²¹⁸ and a negligence standard for suits brought by private individuals. A proponent of the checking value could even wind up with a doctrine much like that adopted in *Gertz* if he scaled the various categories of utterance as has been done above, and then decided to lump together for identical treatment the two most favored categories, public official and public figure, not on the ground that their speech value is identical but because a multi-tiered scale of privileges would be too unwieldy as a practical matter. Alternatively, the desire to avoid constitutional standards keyed to the state of mind of the defendant might lead one to eschew all inquiry into culpability and instead to vary the level of constitutional protection on the basis of differential requirements of proof of harm, for example, or of reference to the plaintiff, depending on the subject matter of the allegedly defamatory story. The important point about analysis framed partly around the checking value is that one need not assume that all communications have a constant value or that gradations of protection can turn only on such factors as the plaintiff's rebuttal opportunities or assumption of risk. By invoking the checking value, one can argue forthrightly that speech on the subject of official

217. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Justice Harlan did not discuss in *Butts* what standard of care is appropriate for libel suits brought by private individuals, but in *Time, Inc. v. Hill*, 385 U.S. 374, 409, he argued that "a duty of making reasonable investigation of the underlying facts" should govern false-light privacy actions by private individuals.

218. The phrase Justice Harlan used in *Butts* to describe the standard he would apply in cases brought by "public figures" was: "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. 130, 155 (1967). Kalven thought this amounted to gross negligence. Kalven, *supra* note 158, at 298.

behavior deserves special immunity from liability for defamation precisely because such speech is more important than speech on other subjects.

When the value of a communication determines its level of protection, at least one important implication follows concerning the scope of the most protective defamation privilege. For whereas the Supreme Court in both *New York Times* and *Gertz* defined the level of privilege available to the defendant in terms of the identity of the plaintiff, a doctrine fashioned around assessments of speech value would focus on the content of the communication. Thus, an article about the conduct of a public official which contained a relevant passage defamatory of a private individual would be accorded the maximum privilege even though the libel suit would be brought by the private individual. This, it will be remembered, was exactly the situation in *Rosenbloom* and, under one interpretation,²¹⁹ in *Firestone*.

Probably the most difficult questions of application which would arise under the standards outlined above concern the determination of when a communication defamatory of a private person is on the subject of the abuse of official power. One particularly sticky issue likely to come up frequently is whether an exposé of regulated and/or unpunished private abuses of power should be considered to be on the subject of official dereliction even if the fact of inaction by officialdom is not emphasized. My inclination, although I regard the question as close, would be to exclude this kind of communication from the most protected category unless the government's failure to regulate was at least a minor theme of the communication. Also, I would not consider the two-sentence gossip-column squib on the Firestone divorce, in which no real attention was paid to the performance of the divorce court, to be a communication on the subject of official behavior. In general, however, I think the checking value supports extension of the most protective privilege to many communications which do not focus primarily on the job performances of public officials but which nonetheless help the reader in various ways to understand official behavior.

If the public official category were to assume importance in defamation suits, a number of issues would arise, the resolution of which would turn in part on what the checking value was thought to encompass. For example, should public employees who do not hold "policy-making" positions be considered "public officials"? School-teachers, busdrivers, and accountants for municipal departments might

219. This would depend on whether one considered the two-sentence gossip-column report of a divorce decree to be an article about the conduct of a public official. See note 201 *supra*.

all be said not to be engaged in the determination of public policy. Does the checking value nevertheless mean that society has a greater interest in knowing about the job performances of these people than about the behavior of individuals who are not on the public payroll? It can be argued persuasively that at some point down the organizational chart lower-level public employees possess neither the capacity to do great evil nor immunity from traditional regulatory checks, two of the traits that make outside scrutiny of government so essential. Yet in terms of the symbolic values associated with public service, a defalcation by even a low-level public employee can do considerable harm to the polity. For this reason, as well as the desire to avoid standards that will lead to unusually difficult questions of application, I believe that in defining the standard of care required of the defendant in a libel action no distinction should be drawn on the basis of the rank or importance of the particular public employee who has been defamed.

A related issue concerns the private activities of people who hold public office. A devotee of Professor Meiklejohn might say that any communication that offers a glimpse into the private activities or thoughts of a public official should receive the maximum protection because such information might provide an insight into the official's character which could be helpful to the intelligent voter at election time. However, the checking value is concerned not with the general process of selecting the best persons for office but with the narrower task of preventing abuses of the public trust. In many instances, no doubt, there is some link between a person's disreputable or eccentric private activity and his willingness to violate norms of official conduct. The fact that an officeholder is a philanderer or a heavy drinker probably makes it slightly more likely that he is an embezzler or recipient of bribes. But as a general matter, the link between general character and abuse of the public trust is too tenuous. I would accord the most protective defamation privilege only to reports of private activities that are analogous or closely linked to abuses of public power. For example, if not too far removed in time, serious lawbreaking would be sufficiently linked, as would cheating to acquire private power or opportunity. But an official's bizarre social practices or attitudes would not be. Again, this is not to say that communications regarding such nonofficial matters ought to fall outside the ambit of First Amendment concern; to the extent that they implicate basic speech values other than the checking value, these communications ought to be accorded constitutional protection. The addition of the checking value, however, provides a basis for treating most speech about the private activities of public

officials as less valuable, and thereby less protected, than speech about their official activities.

One might extend this reasoning to conclude that the inner circle of maximum protection should be reserved for only those communications that describe official activities which might colorably be considered breaches of the public trust. There is much to be said, however, for letting the public decide when its trust has been betrayed and for avoiding judicial standards that define the limits of proper official conduct.²²⁰ Also, one story often leads to another: a communication about official behavior which does not present evidence of misconduct may prepare readers or generate sources for subsequent communications that do provide such evidence. Thus, I believe the checking value is served by, and hence supports special protection for, all communications about the official activities of public officials.

Should speech that is defamatory of candidates for election be accorded the maximum protection? Political candidates who are not incumbents cannot, literally speaking, be labeled public officials, and speech about their past activities is not really on the subject of the uses of official power. Nevertheless, an election campaign might properly be considered an "official" enterprise; certainly the public's expectation that elections will be fair is one of the linchpins of the political system. Moreover, an announced candidate for office is close enough to the reins of power that stories about his "private," that is to say preofficial, behavior may properly be treated like communications concerning the private activities of officeholders: within the ambit of maximum protection if the link to official behavior is close enough. Hence, I would extend the most protective defamation privilege to any discussion of the conduct of an election campaign and to any story about the nonofficial activities of a candidate which bear strongly on whether he is likely to abuse his official power if elected.

Before leaving this question of the categories of communication to which various levels of privilege ought to apply, one should take note of the interesting argument put forth by Professor David Anderson that speech about public officials (or, for that matter, public figures) ought not to be singled out for special protection because the media already devote too many of their resources to conventional coverage of prominent persons and institutions and not enough to significant events and trends affecting ordinary people.²²¹ This point has some force. To my

220. See pp. 542-43 *supra*.

221. David A. Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 453-56 (1975).

mind, however, the critical shortcoming of contemporary journalism concerns not the *subject matter* of reportage but the *manner*. Just as there is not enough in-depth reporting on social developments, there is too little probing, critical coverage of government. If anything, reporting of government is probably less probing and innovative than reporting on other subjects because news organizations are able to provide some coverage of official activities simply by transmitting the self-serving press releases that government institutions churn out on a regular basis. Thus, if one shares the view, so central to the checking value, that speech which helps to check the abuse of official power is more important than speech which serves other social purposes, the dynamics of resource allocation in the mass media should not deter one from adopting a defamation standard that provides greater protection to the former type of speech than to the latter.

Assuming, then, that an appreciation of the checking value can help one to delineate the category of communication to which the most protective privilege should apply, does the checking value suggest anything about how protective that privilege ought to be? To begin with, as explained above, a theory of the First Amendment based on the checking value does not require unqualified protection for every category of utterance; competing regulatory interests must always be taken into account.²²² Moreover, two considerations suggest that an absolute privilege to defame might ill serve the checking value. If too many persons eligible for public office are deterred from seeking it because they are unwilling to expose themselves to demonstrably unfounded and malicious criticism, the public service will suffer on virtually all counts, including that of attracting those persons who are least likely to abuse the public trust. Also, if the public knows that critics of official conduct are subject to absolutely no standards of accountability regarding the accuracy of their charges, these critics may not retain the credibility necessary to perform their checking function effectively.

Advocates of an absolute privilege in the defamation area typically rest their argument on the phenomenon of self-censorship. In one respect, the standard self-censorship arguments neither gain nor lose force when assessed in light of the checking value. Thus, it seems no more true for communications regarding official behavior than for many other types of reporting that journalistic judgments may be distorted by the desire to avoid the costs of defending even a suit that the plaintiff is highly unlikely to win, as well as by the unwillingness to run the risk that a capricious or hostile jury will find that a news organization failed

222. See p. 547 *supra*.

to live up to the requisite standard of care. On the other hand, self-censorship may be viewed as particularly serious when it relates to a category of communication which can be identified as uniquely important in the constitutional scheme; in that respect, the self-censorship arguments are bolstered by the checking value.

In addition, a different type of argument for an absolute privilege seems strengthened by an explicit recognition of the checking value—the argument based on the notion of journalistic autonomy. If the professional press is to serve as an effective counterforce to the tendency of officials to abuse their power, it is important that the journalism profession develop an internal ethos that emphasizes such qualities as independence, vigor, innovativeness, and public responsibility—qualities typically associated with the status of autonomy and not with the status of dependency. It is a difficult empirical question whether the accountability to government represented by liability for defamation under a less-than-absolute privilege undermines the requisite sense of autonomy. At a minimum, however, it is fair to say that a person who is concerned with the preservation of journalistic autonomy is more likely to favor an absolute defamation privilege than is a person who thinks about the issue of privilege solely in terms of the behavioral phenomenon of “self-censorship.”

On balance, I find persuasive the arguments in favor of an absolute privilege for communications about official behavior. The self-censorship danger seems to me particularly acute regarding investigative reporting of government because many editors consider such reporting unduly expensive, even apart from the litigation expenses it may generate. What matters most, however, is not how I resolve the conflict between the incommensurable considerations present in this area, but rather how a respect for the checking value can help one to discern and refine the considerations that ought to be taken into account in determining the appropriate level of privilege.

Since 1974, the Supreme Court has placed at least as much emphasis on the types and amounts of damages successful plaintiffs may recover as on the various ambits and levels of privilege available to defendants. The checking value can help one to think about damages in a couple of ways.²²³

First, probably the strongest argument for prohibiting presumed and punitive damages is that when the amount of damages recoverable

223. Of course, one who favors an unqualified privilege against defamation liability for a certain category of communication need worry about limitations on damages only as a fallback strategy of protection.

need not be based on specific, objective proof, extremely high awards may ensue, and it is primarily the fear of financially debilitating awards which makes many editors and publishers willing to engage in self-censorship. If certain categories of communication are treated as more important than others, self-censorship regarding those categories may properly be treated as a particularly serious matter. Thus, under the checking value, the restrictions adopted in *Gertz* regarding punitive and presumed damages could be confined to litigation over stories on the subject of official conduct. Alternatively, the *Gertz* restrictions could be applied across the board, and further restrictions could be devised which would protect only the most favored category of communication.²²⁴ The Supreme Court, by contrast, has made the limitations on defamation damages universally applicable—and inevitably not as restrictive as more narrowly applicable limitations could be—because it has treated all speech as equally valuable.

Even for universally applicable restrictions on damages, the checking value may provide a persuasive rationale to supplement the self-censorship rationale. The fear of huge damage awards can force news organizations to become beholden to outsiders, such as libel insurers and lawyers, who have nonjournalistic priorities. When this happens, the sense of journalistic autonomy described above may suffer. Also, the possibility of serious financial loss can induce a libel defendant to sacrifice journalistic values by settling a lawsuit (thus symbolically admitting fault and perhaps losing credibility), diverting journalistic resources into its defense, or revealing confidential sources,²²⁵ when the prospect of only a moderate damage award would produce a more principled response. When added to the self-censorship rationale, these considerations relating to journalistic autonomy provide sufficient justification for limitations on the types and amounts of damages recoverable for defamation. Had they developed these lines of argument in *Gertz*, the Justices might not have felt the need to rest their holding on the rather far-reaching and dubious proposition that presumed and

224. Special restrictions applicable only to the most favored category of communication might take the form of a disallowance of recovery for any injury other than harm to reputation, a requirement that pecuniary loss be shown, a prohibition on recovery for damages suffered by the plaintiff not as a unique object of scorn but as a member of a defamed group, a fixed ceiling on the amount that can be recovered for any single communication, and independent appellate review as a matter of "constitutional fact" regarding the propriety of the amount of damages awarded. Respect for the checking value might even lead one to prohibit any damage award for a defamatory communication about official behavior if the defendant retracts the story or submits to a declaratory-judgment proceeding in which the plaintiff can obtain formal vindication though not monetary compensation. But see text accompanying note 233 *infra*.

225. Sometimes a source whose testimony would establish that the journalist had a basis for his story will have demanded confidentiality as a condition for cooperating with the journalist.

punitive damages in defamation actions serve absolutely no legitimate state interests.²²⁶

A more systematic recognition of the checking value might have implications not only for the scope and level of privilege and the kinds of damages recoverable but also for a number of other issues. Some of these implications relate to the question of vicarious liability. One view of the checking process would emphasize the need for the mass media to disseminate unconventional, disturbing, even "irresponsible" ideas regarding government.²²⁷ Ideas of this sort seldom originate with professional journalists, who typically share the social backgrounds of their government sources and often have career ambitions linked with those of the officials whom they cover. Nor is it common for publishers, who tend to have orthodox views and intolerant advertisers, to encourage (or even tolerate) disturbing reportage, particularly regarding local political issues. One way in which outsiders can disseminate unconventional ideas to mass audiences is through paid political advertisements. Thus, a proponent of the checking value should want this form of communication to be encouraged. Mass-media outlets might be inclined to accept such advertisements more readily if news organizations were not legally responsible for the defamatory content of the political advertisements they publish. Under such a doctrine, *New York Times v. Sullivan* could have been resolved without the need for an inquiry into the appropriate standard of care to be demanded of the *Times*.²²⁸ The dissemination of unconventional ideas about government could also be promoted by holding unconstitutional the common-law doctrine that talebearers are as responsible for defamation as tale-makers.²²⁹ An interpretation of the First Amendment based on the checking value might provide instead that an accurate report of any communication about official behavior is always privileged, so that if such a communication is defamatory, an action will lie only against its originator. The Supreme Court has resolved by implication a few issues concerning vicarious liability²³⁰ but has never offered any analysis of

226. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

227. See pp. 623, 629 *infra*.

228. The defamation that led to *New York Times v. Sullivan* was contained in a political advertisement purchased by a number of civil rights organizations.

229. See note 168 *supra*.

230. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 (1974), holding a publisher liable for defamatory statements made in a Sunday magazine feature article by a reporter whose regular employment was for the daily newspaper put out by the publisher. Also, the Court in *Gertz* seems to have proceeded on the assumption that a magazine publisher is not vicariously liable for the state of mind of a free-lance writer who was a regular contributor to the magazine and who was commissioned by the publisher to write the article that gave rise to the litigation. The Court referred only to the state of mind of the magazine's managing editor. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 328 (1974).

the problem in terms of First Amendment values. An awareness of the checking value could help the Justices to address this important group of issues.

Some legal systems attempt to safeguard individual reputation by means other than the award of money damages.²³¹ A legal right of reply for the defamed person is the most common device. A declaratory-judgment proceeding to determine the validity of defamatory statements has also been suggested.²³² In addition, a government-sponsored press council could assess the accuracy of criticisms disseminated by the mass media. The checking value might help one to think about the First Amendment issues presented by these regulatory arrangements. For instance, viewed solely in terms of self-censorship, nonmonetary sanctions on press behavior might be unobjectionable. But if journalistic autonomy is a prime consideration, as it is likely to be for most proponents of the checking value, any procedure that provides for structured, authoritative government pronouncements regarding the performance of the press is highly problematical. Ironically but importantly, the good reputation of the press is simply too fragile, and under the checking value is too precious, to be exposed to formal official criticism.²³³ If, freed from the discipline of knowing that material consequences hinge on their decisions, judges or press-council members were to prescribe standards for the journalism profession, the delicate sense of autonomy upon which the checking function depends could well be undermined. On the other hand, the checking value seems less at odds with a right of reply, as I shall explain in a subsequent section devoted entirely to the problems of access regulation.²³⁴

Finally, the checking value bears on the question whether defen-

231. A discussion of the provisions in a number of European and South American countries is contained in Richard C. Donnelley, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L. Rev. 867, 884-91 (1948).

232. Joel D. Eaton, *The American Law of Defamation Through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1431-32 (1975).

233. See Harry Kalven, Jr., *If This Be Asymmetry, Make the Most of It!* Center Magazine, May/June 1973, at 36-37:

What emerges, then, from reflections about the underlying rationale for freedom of speech seems to me quite congenial to the idea of deliberate asymmetry. Free, robust criticism of government, its officers, and its policy is the essence of the democratic dialectic—of “the belief,” again to quote Brandeis, “in the power of reason as applied through public discussion.” The government cannot reciprocally criticize the performance of the press, its officers, and its policies without its criticism carrying implications of power and coercion. The government simply cannot be another discussant of the press’s performance. Whether it will it or not, it is a critic who carries the threat of the censor and more often than not it wills it. Nor is it at all clear that its voice will be needed; surely there will be others to champion its view of the performance of the press.

Id. at 37.

234. *Infra* pp. 611-31. See especially p. 628.

dants who play a regular role in the system of mass communications ought to receive greater First Amendment protection than so-called non-media defendants. The Supreme Court has not spoken to this issue directly, but the *Gertz* opinion reads as though the protections established in the decision apply only to suits brought against "a newspaper or broadcaster."²³⁵ A proponent of the checking value recognizes the utility of all speech, by outsiders as well as professional newsmen, on the subject of official behavior, but also attaches considerable importance to journalistic autonomy. One might therefore conclude that the added concern for journalistic autonomy should entitle media defendants to a higher degree of First Amendment protection than that appropriate for nonmedia speakers, whose only contribution to the checking function comes directly from the value of the communications they disseminate. However, the special need discussed above²³⁶ for nonprofessional scrutiny and criticism of government activities serves as a counterweight to the claim that media defendants deserve special consideration. Just as it requires an autonomous professional press, the checking function requires at least some nonprofessional observers to lend their own fresh perspectives to the task of scrutinizing and evaluating official behavior. Thus, in terms of the checking value, there is no good reason to distinguish between media and nonmedia defendants in defining the First Amendment limitations on the law of defamation.

V. NEWSGATHERING

The emphasis given various fundamental values dictates to a large degree how one responds to the category of First Amendment claims which can be grouped together under the heading "newsgathering." These claims, which for the most part have been pressed only recently,²³⁷ have in common the contention that the efforts of journalistic investigators to find facts must be given great weight in the constitutional calculus—weight comparable to that given such highly valued activities as public speaking, publishing, and maintaining associational bonds for the purpose of advocacy. This is not to say that countervailing regulatory interests can never prevail over newsgathering claims, only that the plausibility and importance of the regulatory interests

235. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974). The Court introduced its opinion as follows: "We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen." *Id.* at 325 (emphasis added).

236. See text at note 227 *supra*.

237. For example, the claim that news reporters have a constitutional privilege not to disclose confidential sources was apparently made for the first time in 1958. *Branzburg v. Hayes*, 408 U.S. 665, 685-86 (1972).

must be no weaker to justify governmental interference with newsgathering endeavors than would suffice to limit other core First Amendment activities.

The newsgathering claim was first presented to the Court in 1972 in three cases, decided together *sub nom. Branzburg v. Hayes*,²³⁸ which presented the issue whether the First Amendment places any limits on the power of a grand jury to subpoena news reporters and inquire about information they may have obtained from confidential sources. Mr. Justice White's majority opinion acknowledged that the act of newsgathering "is not without its First Amendment protections,"²³⁹ but the Court rejected all of the privilege claims presented by the three reporters, and appeared to accord no more than intermediate importance to the First Amendment interests at issue.

The Court's failure in *Branzburg* to give more weight to the newsgathering interest can be ascribed in part to skepticism over whether a testimonial privilege would have much effect on the newsgathering capabilities of journalists.²⁴⁰ It is noteworthy, however, that the Court imposed a higher burden of proof on this point than has been its practice in other areas of First Amendment adjudication in assessing whether speech interests are adversely affected by government actions.²⁴¹ In addition, Justice White saw fit to reject in a sweeping dictum many newsgathering claims that do not suffer even an arguable empirical infirmity:

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of

238. *Id.* at 665. In *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court rejected the claim of a nonjournalist who contended that he had a First Amendment right to a passport permitting travel to Cuba because visiting that country would help him to inform himself about United States foreign policy.

239. 408 U.S. at 707.

240. *Id.* at 682, 690, 693-95, 698-99, 702, 706-7.

241. *Id.* at 693-95. The record in the case contained many affidavits of newsmen describing their experiences and opinions regarding the deleterious effect subpoenas could have on sources. Appendix, at 22-61, *United States v. Caldwell*, No. 70-57, *rev. sub nom. Branzburg v. Hayes*, 408 U.S. 665 (1972). This almost surely represents the most elaborate documentation to date in a record of the "chilling-effect" phenomenon. Also, in my empirical study of over 1,000 journalists, I found that certain valuable reporting efforts are indeed adversely affected by the subpoena threat, even though the majority of journalistic endeavors are not. Blasi, *supra* note 78. Compare the Court's willingness in other cases on much less evidence to fashion doctrine around the fear of a chilling effect. E.g., *New York Times v. Sullivan*, 376 U.S. 254, 277-78 (1964); *NAACP v. Alabama*, 357 U.S. 449, 461-66 (1958); *Elfrbrandt v. Russell*, 384 U.S. 11, 16-19 (1966). In his dissent in *Branzburg*, Justice Stewart criticized the Court's double standard regarding proof of a chilling effect. 408 U.S. at 733-36.

crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.²⁴²

Thus, doubts about the impact of press subpoenas cannot fully explain the Court's rejection of the reporters' claims. Theoretical considerations also played a major part in the *Branzburg* decision.

It seems evident from a close reading of the White opinion that the newsgathering interest was not accorded special consideration in part because the majority rejected any theory of the First Amendment which assigns to the professional press a special watchdog function over public officials. Each of the three journalists before the Court had been subpoenaed to testify about sources whose activities were a subject of police concern and who wanted to give the reporter "their side" of the story. Two of the journalists were covering the Black Panther Party, an organization that claimed to be the victim of an official nationwide policy of persecution and extermination.²⁴³ Yet the White opinion made no reference to the speech value of news about possible official misbehavior obtained from persons against whom abuses of power may have been directed. Instead, Justice White spoke only of the criminal activities of the sources themselves and their peers, and denigrated the speech value at stake as that in "possible future news about crime from undisclosed, unverified sources."²⁴⁴ At no point in the opinion did Justice White allude to the seditious libel analogy or the Meiklejohn theory, nor did he indicate that the reporters' claims would have been stronger had their unnamed sources been government officials willing to inform on the wrongdoing of their colleagues.

Indeed, the majority opinion in *Branzburg* characterized the press as a private-interest group rather than an institution with a central function to perform in the constitutional system of checks and balances.²⁴⁵ Justice White labeled the source relationships that the reporters sought to maintain "a private system of informers operated by the press to report on criminal conduct," and cautioned that this system would be "unaccountable to the public" were a reporter's privilege to be recognized.²⁴⁶ He pointed, by way of contrast, to the

242. 408 U.S. at 684-85.

243. Caldwell and Pappas. Pappas was permitted to spend a night at a Black Panther headquarters only because his hosts feared a police raid and wanted a neutral observer present. Appendix, at 4, *In re Pappas*, No. 70-94, *aff'd sub nom.* *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Branzburg* wrote stories on drug use in the Louisville and Lexington areas.

244. 408 U.S. at 695.

245. *Id.* at 692, 695, 697-98.

246. *Id.* at 697.

system of undercover informers maintained by law enforcement officials, which is protected by a qualified testimonial privilege: "[T]his system is not impervious to control by the judiciary and the decision whether to unmask an informer or to continue to profit by his anonymity is in public, not private, hands."²⁴⁷ White concluded that even though the power of compulsory process is limited by several other constitutional and nonconstitutional privileges, the First Amendment interests at stake in the press-subpoena controversy are not sufficient to justify still another restriction on the grand jury's fact-finding processes. He did warn, however, that "grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."

One of the members of the five-Justice majority in *Branzburg*, Mr. Justice Powell, contributed a brief opinion to clarify his grounds for concurring in the result and joining the majority opinion.²⁴⁸ Justice Powell emphasized "the limited nature of the Court's holding." He stated that "no harassment of newsmen will be tolerated," and also that reporters are entitled to constitutional protection against having to "give information bearing only a remote and tenuous relationship to the subject of the investigation." Moreover, he even implied that a weighty First Amendment claim to protect a source relationship might prevail over a nontenuous compulsory-process interest: "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Justice Powell did not indicate, however, how the strength of the First Amendment claim is to be measured; he provided no hint regarding what values inform his responses in this area. Moreover, he made no effort to reconcile his balancing test with the seemingly more restrictive standard adopted by the majority opinion, to which his vote was essential. Thus, despite the widespread popular perception that the *Branzburg* decision closed the door on a First Amendment reporter's privilege, Justice Powell's curious concurrence leaves this area of doctrine in a highly indeterminate state, as several lower-court judges have realized.²⁴⁹

Justice Douglas based his dissenting opinion in *Branzburg* explicitly on the Meiklejohn theory, from which he deduced two principles: (1) "the people, the ultimate governors, must have absolute freedom of,

247. *Id.* at 698.

248. *Id.* at 709.

249. The interpretation of *Branzburg* in the lower courts is traced in Donna M. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 Tex. L. Rev. 829, 878-915 (1975).

and therefore privacy of, their individual opinions and beliefs" as well as "absolute privacy over whatever information [they] may generate in the course of testing [their] opinions and beliefs"; and (2) "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination."²⁵⁰ The first principle, said Justice Douglas, justifies an unqualified testimonial privilege for a reporter, not in his special capacity as such, but rather "as a student who affirmatively pursued empirical research to enlarge his own intellectual viewpoint."²⁵¹ The second principle also supports an absolute privilege, Justice Douglas thought, because of the adverse effect subpoenas could have on the special role of the press in the scheme of self-government. "There is no higher function performed under our constitutional regime," he stated, than the function of the press "to explore and investigate events, inform the people what is going on, and to expose the harmful as well as the good influences at work."²⁵² It should be noted, however, that Justice Douglas did not confine his concern to harmful influences at work within government; he attached apparently equal importance to information about "the cabals that threaten the regime."²⁵³

The strongly worded dissent by Justice Stewart, which Justices Brennan and Marshall joined, also endorsed the Meiklejohn theory. Justice Stewart seemed especially troubled by the fact that testimony about confidential sources would place reporters in a close, albeit involuntary, relationship with government, and in that respect undermine "the historic independence of the press," which he considered "an incontestable precondition of self-government." He did not elaborate, however, upon his notion of institutional independence for the press.

Stewart sharply criticized the White opinion for undervaluing the strength of the First Amendment interest presented by the reporters' claims. In particular, he objected to the burden of proof imposed by the majority regarding the extent to which the subpoena threat harms reporter-source relationships. "Common sense" and the affidavits of reporters in the records convinced him that "certain types of relationships involving sensitive and controversial matters" would be adversely affected by the subpoena possibility. "To require any greater burden of

250. 408 U.S. at 714-15.

251. *Id.*

252. *Id.* at 722.

253. *Id.*

proof," said Justice Stewart, "is to shirk our duty to protect values securely embedded in the Constitution."²⁵⁴

His decision to treat the confidentiality of reporter-source relationships as a highly valued First Amendment interest led Justice Stewart to propose the following standard to govern efforts to compel grand-jury testimony from reporters:

[W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.²⁵⁵

Two years after *Branzburg*, in *Pell v. Procunier*²⁵⁶ and *Saxbe v. Washington Post*,²⁵⁷ the Court was called upon to respond to a somewhat different newsgathering claim when several journalists challenged state and federal prison regulations prohibiting prearranged press interviews with designated inmates. Mr. Justice Stewart, a forceful dissenter in *Branzburg*, this time wrote for the majority in rejecting the reporters' First Amendment claims, while Mr. Justice Powell, who had cast the deciding vote against the privilege claim in *Branzburg*, led the four dissenters.

Justice Stewart did not ascribe great weight to the newsgathering claim presented by the journalists. He drew a sharp distinction between the claim to freedom from government interference with source relationships that reporters have established on their own and the contention "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."²⁵⁸ Since this misfeasance-nonfeasance distinction would not seem to be of pivotal importance if the overriding consideration is the amount and quality of information available to the public, Justice Stewart's heavy reliance on the distinction suggests that his principal concern in *Branzburg* was the institutional autonomy of the press rather than the immediate effect subpoenas might have on the flow of information. But as in *Rosen-*

254. *Id.* at 736.

255. *Id.* at 743.

256. *Pell v. Procunier*, 417 U.S. 817 (1974).

257. *Saxbe v. Washington Post*, 417 U.S. 843 (1974).

258. 417 U.S. at 834.

bloom and *Branzburg*,²⁵⁹ Stewart did not make clear precisely what intrinsic or instrumental value he saw in this institutional autonomy or "independence."²⁶⁰

Mr. Justice Douglas, who on several occasions has shared Justice Stewart's concern for journalistic autonomy,²⁶¹ took sharp issue with the majority's conclusion that reporters have no greater right to information than that possessed by the public generally. Once again, Justice Douglas invoked as his touchstone "the right of the people, the true sovereign under our constitutional scheme, to govern in an informed manner."²⁶² But he found nothing in this approach inconsistent with the notion that journalists are entitled to some prerogatives not granted ordinary citizens. He viewed the average citizen's reliance on the media for information about public affairs to be a part of the constitutional design; in this respect, Justice Douglas read the First Amendment as envisioning a special investigative role for the professional press. In addition, he stressed the ultimate "responsibility of the populace" for the management of public institutions, perhaps implying that the constitutional role of the press is special when its reportage concerns such institutions.

Justice Powell also concluded that a complete prohibition on prearranged press interviews with designated inmates violates the constitutional rights of the reading public. He based his dissent on a view of First Amendment values that resembles in some respects that expressed in the Douglas dissent. Justice Powell observed that the First Amendment protects both "important values of individual expression and

259. Justice Stewart joined the Marshall opinion in *Rosenbloom*, which spoke of the need for a "free and vigorous press" but did not specify exactly why such a press is important. 403 U.S. at 82. On the failure of the Stewart opinion in *Branzburg* to make clear its philosophical underpinnings, see page 595 *supra*.

260. Another aspect of the Stewart opinions in the two prisoner-interview cases demonstrates how little value the majority accorded the newsgathering interest in this context. The records in the cases presented impressive testimony regarding the superiority of face-to-face interviews as a means of gaining a true picture of prison conditions. See Justice Powell's dissenting opinion in *Saxbe v. Washington Post*, 417 U.S. 850, 853-56, and authorities cited therein. Yet Justice Stewart devalued the journalists' claims on the ground that there exist other possible sources of information about prisons, such as letters from inmates, interviews with persons recently released from prison, and guided tours of correctional facilities. This argument based on alternative means is rather unconvincing in this particular context. More important, it is an argument that traditionally has been considered beside the point when fully valued First Amendment claims are at issue. See, e.g., *Schneider v. Irvington*, 308 U.S. 147, 163 (1939); *Cohen v. California*, 403 U.S. 15, 24 (1971). But see *Lloyd Corp. v. Tanner*, 407 U.S. 551, 566-67 (1972).

261. See, e.g., *Branzburg v. Hayes*, 408 U.S. at 721; *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. at 162.

262. 417 U.S. at 839-40.

personal self-fulfillment" and "the societal function . . . in preserving free public discussion of governmental affairs." He quoted Professor Meiklejohn for the proposition that the societal function is the "paramount value" of the First Amendment, and added his own judgment that "[n]o aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny."²⁶³

Justice Powell considered the individual values "not directly implicated" by restraints on newsgathering but found the "societal function" to be dependent on effective newsgathering by the professional press: "public debate must not only be unfettered; it must also be informed." And since "unrestrained public access" to observe government operations would be impractical, people must "depend on the press for information concerning public institutions." In this respect, Powell indicated, there is a "constitutionally established role of the news media."²⁶⁴

The Powell opinion in *Washington Post* provides a good point of departure for discussing the indirect and sporadic influence of the checking value on the Court's treatment of newsgathering claims. At one level, Justice Powell can be read as resting his analysis on a conventional understanding of the self-government value. He quoted Meiklejohn at length and alluded frequently to such concepts as "intelligent self-government," "popular self-determination," and "public debate." On the other hand, Justice Powell has never displayed a penchant for comprehensive theories of any sort, let alone those that generate unqualified legal standards.²⁶⁵ It is not surprising, therefore, that at times the Powell opinion adopts a more particularized view of the First Amendment values at issue than what one would expect from a confirmed devotee of the Meiklejohn theory. Repeatedly, the opinion invokes not the need for information on all matters of public interest but rather "the right of the people to a free flow of information and ideas on the conduct of their Government." Moreover, Justice Powell's explanation for this right, contained in a quotation from *Mills v. Alabama*, suggests the influence of the checking value more than the direct-democracy aspects of self-government:

263. *Id.* at 862.

264. *Id.* at 862-64.

265. See generally Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 Stan. L. Rev. 1001 (1972).

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.²⁶⁶

Significantly, the opinion gives no indication that Justice Powell would require extraordinary justification for restrictions on newsgathering about subjects "of legitimate societal interest and concern" that do not directly involve the administration of public institutions.

One must guard against reading too much into Justice Powell's opinion. His limited conception of the speech interest at issue in the prisoner-interview cases can be attributed entirely to the characteristic caution of a thoughtful judge taking a potentially significant first step. Nevertheless, the reasons and formulations adopted in the opinion suggest that Justice Powell experienced some of the intuitions that inform the checking value, and that he tried to express those intuitions through the imperfectly suited vehicle of the Meiklejohn theory.

In quite a different respect, Justice Stewart's opinions in *Branzburg*, *Pell*, and *Washington Post* reveal a set of intuitions that has yet to be rationalized successfully. The Stewart dissent in *Branzburg* did not rely on any quantitative effect press subpoenas might have on the flow of information; indeed, the opinion upbraided the majority for demanding such quantitative proof.²⁶⁷ Justice Stewart thought the First Amendment interest to be sufficiently established by the supposition, supported by many affidavits in the record, that "certain types of relationships involving sensitive and controversial matters" would be impaired if grand juries were permitted to subpoena reporters without making an extraordinary showing of need. The sole example he gave would be the paradigm case for a theory based on the checking value: "A public spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoings, because he will now know he can subsequently be identified by use of compulsory process."²⁶⁸

Further evidence that Justice Stewart was moved in *Branzburg* by the intuitions that underlie the checking value is that he emphasized the danger posed by press subpoenas to "the historic independence of the press." It is evident that even if the subpoena possibility could not have been shown to impair reporter-source relationships, Justice Stewart

266. *Mills v. Alabama*, 384 U.S. 214, 219 (1966), quoted at 417 U.S. 863-64.

267. See text at note 254 *supra*.

268. *Branzburg v. Hayes*, 408 U.S. at 731.

would have been deeply troubled by the phenomenon of news reporters regularly serving as government witnesses. He did not elaborate, however, on why this would be such an evil. One likely explanation is that any alignment of government with the press might undercut the adversary relationship between the two which is one of the key bulwarks against an overreaching and/or corrupt government. For even if tough-minded reporters can keep their psychological distance when compelled to turn state's evidence, it is important for the credibility of the press that journalists not be placed in the symbolically embarrassing position of being a partisan, even a conscripted partisan, for the government.²⁶⁹

This point of view also explains Justice Stewart's adoption in *Pell* and *Washington Post* of the seemingly tenuous distinction between government interference with independently established reporter-source relationships and government refusal to make available to reporters sources under its exclusive control. The key to this distinction appears to be either the fear that recognition of an "affirmative duty" on the part of government to furnish news sources under its control would jeopardize the privacy and efficiency of government decision-making processes, or else the belief that the adversary relationship between government and press would be undermined if, to invert Justice Stewart's phrasing in *Branzburg*,²⁷⁰ reporters were permitted "to annex [the government] as an investigative arm of [the journalism profession]." Justice Powell's dissent in *Washington Post* contains a rather convincing refutation of the argument that an affirmative governmental duty to permit press access to incarcerated news sources would imply "a right to force disclosure of confidential information or to invade in any way the decisionmaking processes of governmental officials."²⁷¹ Thus, especially in light of the concern he expressed in *Branzburg* for the independence of the press, Justice Stewart's distinction between government interference with privately established source relationships and failure to make available sources under its control seems best explained in terms of his vision of an arm's length relationship between government and the press.

Once again, however, as in *Branzburg* and *Rosenbloom*,²⁷² Justice Stewart did not make clear in *Pell* and *Washington Post* exactly what he means by the "independence of the press" and what First Amendment

269. This is a point on which a number of journalists whom I have interviewed feel quite strongly. See Blasi, *supra* note 78, at 241.

270. 408 U.S. at 725.

271. 417 U.S. at 861.

272. See note 259 *supra*.

values he finds underlying the concept. The fact that no meaningful "independence" appears to be jeopardized by a government obligation to furnish private sources under its control suggests either that Stewart has in mind a concept more subtle than his cryptic opinions on the subject permit one to appreciate, or that his lack of a more complete understanding of the values underlying his notion of independence led him in accepting the misfeasance-nonfeasance distinction to make a mistaken application of the concept of institutional independence. It is significant in this respect that in *Branzburg* Justice Stewart invoked the Meiklejohn theory but never explained how it is linked to the notion of journalistic independence, an understandable ellipsis since Meiklejohn himself had virtually nothing to say about the role of the press in the plan of self-government. In the prisoner-interview cases, moreover, Justice Stewart omitted all reference to the self-government value.

Hence, Justice Stewart, like Justice Powell, has registered some potentially important intuitions in response to newsgathering claims and, like his fellow Justice, has not been able to provide a satisfying explanation for his responses. Both Justices' efforts to invoke the self-government value to this end have been cryptic, sporadic, and ultimately unconvincing. I believe a theory of the First Amendment based in part on the checking value would better have served these Justices' efforts to sort out their intuitions in this area.

Once more, it must be emphasized that the checking value cannot explain all the responses of the various Justices to these novel newsgathering claims. Justice White's opinion in *Branzburg*, for example, contains no hint that the checking value played any part in the majority's assessment of the journalists' claim to a testimonial privilege. The White opinion goes out of its way to reject the contention that the professional press has a special watchdog role to play in the constitutional system, and offers a patently unrealistic antidote to the problem of official corruption: whistle-blowers are encouraged to see their local prosecutor—who may, of course, be implicated in the wrongdoing or beholden to those who are. Furthermore, Justice White failed to invoke the one consideration that might have rationalized the *Branzburg* result in terms of the checking value. For in theory at least, and at times in practice, an independent grand jury can itself serve as a check on corruption in government by insisting upon vigorous investigations and prosecutions of public officials when government prosecutors drag their feet. It is this function, rather than the routine task of screening government-initiated prosecutions, that under the checking theory may justify an extensive power of compulsory process for grand juries. Yet the White opinion in *Branzburg* mentions only the screening function.

One can only be dissatisfied with the current state of Supreme Court doctrine regarding newsgathering. In effect, the Court has failed to accord the newsgathering interest the full measure of favorable procedures, presumptions, and substantive doctrines that normally follow from the determination that a particular interest is truly of First Amendment pedigree. Yet the majority opinions have failed to explain or defend the decision not to give the newsgathering interest full First Amendment status; instead, they have glossed over the problem with empty rhetorical testimonials to the importance of the interest.

It is possible, of course, that the gap between the Court's rhetoric regarding newsgathering and the level of protection actually accorded the interest can be attributed to a fundamental hypocrisy on the part of the majority Justices. A more plausible explanation, however, is that the Justices are in fact ambivalent about the newsgathering interest. They believe that it implicates some important values, but they are reluctant to grant it the full measure of First Amendment protection because (1) they cannot foresee the implications of such a step, and (2) they sense that, in some imperfectly understood way, newsgathering is different from such core First Amendment activities as public speaking, pamphleteering, and demonstrating. So the Justices have kept their options open and have groped for distinctions that permit selective responses to the wide variety of newsgathering claims that may be presented.²⁷³

Judicial caution and experimentation can well serve the growth of the law, but only when they contribute to a richer understanding of the values and goals that provide the impetus for doctrinal development. Chronic ambivalence about basic values is not a virtue. Neither is ambiguous or muddled doctrine. I believe that the Justices have failed to resolve some of their internal conflicts about the newsgathering interest because they have tried to evaluate the interest primarily in terms of the traditional First Amendment values of autonomy, diversity, and self-government. The following outline of possible doctrinal implications illustrates how an explicit consideration of the checking value might help to bring a measure of coherence to First Amendment adjudication in this area.

273. Even the aggressively argued majority opinion in *Branzburg* displays this tendency. At one point, Justice White described the Court's holding as highly dependent on the records in the individual cases: "On the records now before us, we perceive no basis [for establishing a news reporter's privilege]." 408 U.S. at 690. He also implied that the *Branzburg* holding should have few implications for press-subpoena disputes concerning civil and criminal trials and legislative investigations. *Id.* at 702.

With regard to press subpoenas, journalists may claim either a testimonial privilege applicable to all confidential relationships with sources or a privilege limited to special source relationships that are uniquely important or uniquely jeopardized by the subpoena threat. An appreciation of the checking value is likely to affect one's response to both types of privilege claim.

A proponent of the checking value may respond favorably to the claim for a universally applicable privilege because he places particular emphasis on the acquisition of information, and information relevant to the abuse of power is frequently available only from insiders who stand to lose a great deal should their roles in the dissemination process be discovered. In this regard, a proponent of the checking value is likely to place more of a premium on information "from undisclosed, unverified sources"²²⁷⁴ than would someone who builds a First Amendment theory exclusively around the values of autonomy, diversity, and self-government.

Moreover, the relevance of the checking value is not confined to the situation in which a confidential source relationship leads to a dramatic exposé of wrongdoing. Perceptive reporting of ordinary government operations is important under the checking value because the abuse of official power is most likely to be checked effectively when the public has a sophisticated sense of what government actually does and what realistically can be expected of public officials. When citizens relate to government as to a deity—through a shroud of myth, with ritualistic faith or undifferentiated cynicism, in either event with attitudes unencumbered by knowledge of what is really happening—standards against which to measure the performance of officials may cease to exist in the popular mind. In-depth reporting that goes behind the palaver that makes up so much of the public debate may thus serve the checking value most significantly simply by providing readers with enough information about government that only irresponsible citizens can forgo judgment on the ground that "it's all too complicated." However, reporting that seeks to place an event or personality in context often requires reliance on numerous sources, some of whom will not consent to be identified, even when they have no startling exposés to offer. Thus, a legal system that wishes to encourage the kind of coverage of government which best serves the checking value should regard as most serious the possibility that probing stories will not be undertaken or pursued because they could lead to expensive legal disputes over the protection of confidential sources.

274. See text at note 244 *supra*.

The foregoing concerns would be important even if all subpoenas to reporters were sought in the best of faith, motivated solely by legitimate desires for evidence. However, if it is easy to summon reporters to the witness stand, the power to make a call on a reporter's time and cast a pall over his sensitive source relationships may be employed by government officials for the illegitimate purpose of discouraging embarrassing stories. Moreover, limits on the subpoena power keyed to subjective motivation are not likely to be effective because the practical difficulty of proving "bad faith" is too great. Thus, if the power to subpoena reporters were limited only by a good-faith requirement, a government intent on forestalling press coverage of its abuses would have a dangerous weapon quite antithetical to the checking value.

The privilege claims of journalists gain support from the checking value in two additional respects. First, as Justice Stewart argued in *Branzburg*, journalistic autonomy may be undermined by press subpoenas. When a reporter appears on the witness stand, even in response to a subpoena, he runs the risk of being perceived as a partisan for whichever side benefits from his testimony.²⁷⁵ In addition, even if the subpoena threat does not lead to conscious decisions by editors and reporters to kill stories or refrain from pursuing certain leads, constant worry about being subpoenaed can distract journalists, making it extremely difficult for them to pursue their craft in a vigorous, innovative, truly autonomous fashion.²⁷⁶ Second, the use of confidentiality can sometimes enable reporters to inform the public about inexperienced, alien, unassimilated groups in the society whose activities would otherwise go either unreported or, perhaps worse, reported only in terms of stereotypes and slogans. The views and experiences of these groups, particularly their experiences as objects of governmental attention, might be valuable to all participants in the checking process, professional critics of government as well as ordinary citizens.

In several different ways, therefore, a respect for the checking value is likely to lead one to accord a high valuation to the kinds of stories that are potentially jeopardized by the practice of subpoenaing reporters. Such a high valuation does not inevitably mean, however, that a testimonial privilege is appropriate; competing First Amendment and/or regulatory interests may outweigh the considerations just discussed. For example, unless all participants in the public debate are to be granted a testimonial privilege, the legal system would have to define

275. See text at note 269 *supra*.

276. See Blasi, *supra* note 78, at 265-66.

the qualities that make one a "journalist." This process of definition, of authoritative inclusion and exclusion, might be a more serious incursion on journalistic autonomy than the subpoena threat itself. Also, if reporters are singled out for extraordinary immunity from the obligation to testify, the journalism profession may come to be resented as still another elite force in the society. Such resentment should be viewed with alarm by proponents of the checking value, because in mass society the checking of government misconduct depends on the existence of a counterforce that is capable of activating a popular reaction against miscreant officials, and the professional press is the institution best suited to perform this function. More directly, a reporter who need not identify his sources may have little credibility with the public. When to these speech-related considerations is added the point that grand juries in theory play a vital role in the checking process, and may thus deserve all possible fact-finding advantages, one who takes serious account of the checking value could conceivably decide that there should be no testimonial privilege for journalists, at least not in the context of grand-jury investigations.

I believe the balance should be struck in favor of a highly protective reporter's privilege. The central role played by confidential source relationships in uncovering misconduct by officials strikes me as a consideration that subordinates all others.²⁷⁷ Most important for present purposes, however, is not this judgment but rather my claim that without taking conscious and explicit account of the checking value one cannot fully understand the competing considerations at issue in press-subpoena disputes.

Thus far I have assumed that the checking value strengthens the argument for a testimonial privilege covering all confidential reporter-source relationships, not just those involving either government sources or information about official behavior. This is true because, unlike the situation in a defamation action where the content of the communication is known at the time the degree of First Amendment protection is to be determined, one can never be sure what kind of information will come out of any particular source relationship. Moreover, if reporters are put in a compromising position regarding their nongovernmental sources, sources inside government may become uncooperative on the theory that a reporter who has violated one relationship of trust could violate another. Suppose, however, that a decision-maker who takes

277. In addition, many considerations unrelated to the checking value inform my views on this issue. See generally Vincent Blasi, *Press Subpoenas: An Empirical and Legal Analysis* (Washington, D.C.: Reporters' Committee For Freedom of the Press, 1972).

account of the checking value decides that, on balance, no testimonial privilege, or only a severely qualified privilege, is appropriate for the full range of reporter-source relationships. Can a persuasive argument be made that respect for the checking value dictates a more protective privilege for a narrower class of press-subpoena disputes?

A reporter's privilege stronger than that governing other press-subpoena disputes seems appropriate when the source whose confidentiality the reporter seeks to protect is a public employee. These news sources play a unique role in the checking process because they sometimes have access to inside information relating to the misconduct of public officials—information of the highest possible significance under the checking value. Moreover, a public employee who informs on his associates is unusually vulnerable to reprisals should his complicity with reporters become known. Furthermore, the one kind of source relationship for which the specific provisions of a privilege are likely to be important is that involving fearful “whistle blowers” whose cooperation with the press is a subject of intense negotiation.²⁷⁸ Thus, if augmented protection of confidentiality is ever likely to yield a payoff in terms of valuable information for the public, this category of public-employee sources seems the best candidate for special treatment. I can understand how a proponent of the checking value might regard as needlessly complex any formulation of a reporter's privilege which accords different levels of protection to different source relationships, but when one is talking of only two levels and a manageable category such as “public employee,” the objection based on complexity does not seem convincing.

I would interpret the First Amendment to grant an unqualified privilege protecting the identity of all confidential government-employee sources²⁷⁹ as well as all confidential information these sources convey

278. Most news sources cooperate with reporters on the basis of unspoken feelings of trust, not specific promises regarding confidentiality. Public employee news sources, however, tend to desire more explicit understandings about the terms of an interview. See Blasi, *supra* note 78, at 243.

279. A larger category of relationships for which an unusually protective privilege might be appropriate would include all sources who actually generate published stories discussing, at least as a minor theme, the actions or derelictions of public officials; the relationships at issue in the *Caldwell* and *Branzburg* cases answer to this description. An even more expansive category would include all relationships that either have generated information about government behavior or were established by the reporter in the hope that they would produce such information. I believe any testimonial privilege should be formulated so as to minimize the amount of litigation over its applicability. Accordingly, I favor an uncomplicated formulation that employs “bright-line” standards wherever possible, and hence would draw the line at those source relationships that involve public employees, a category not likely to generate many difficult questions of application.

to reporters, and a minimally qualified privilege covering all other reporter-source relationships. My preference for highly protective privileges for both categories of sources derives to a large extent from my low assessment of the evidentiary interests that are served by press subpoenas,²⁸⁰ an assessment that may not be shared by others. Nonetheless, I think any proponent of the checking value should conclude that, whatever the appropriate general level of protection for news-source confidentiality, press subpoenas that probe the identities or off-the-record communications sources who are public employees should be severely restricted.

A special problem is whether any reporter's privilege should apply to source relationships maintained in violation of legitimate regulations that prohibit certain persons from communicating with journalists or from disclosing sensitive information such as classified material or evidence prejudicial to a fair trial. Classification systems and "gag" orders can undoubtedly have the effect of covering up government duplicity or incompetence, yet these restrictions on the flow of information can also serve legitimate interests of a high order. Because of the great weight he places on exposure of official misconduct, a proponent of the checking value is likely to strike this particular balance more on the side of the dissemination of information than would a person who thinks about the First Amendment exclusively in terms of autonomy, diversity, and self-government. Even so, a fairly wide range of resolutions to the difficult problems posed by classified and prejudicial information can be anticipated if the checking value were to figure prominently in our understanding of the First Amendment. The following standards impress me as the best accommodation of the conflicting interests in this area: The testimonial privilege should never be inapplicable simply because the information conveyed by the source was classified or subject to a gag order, nor should the fact that the reporter went ahead and published the prohibited information amount to a forfeit of the privilege. However, if a source conveys and a journalist publishes information that the court determines to have had the demonstrable, immediate, and irrevocable effect of causing extremely serious harm to a criminal defendant's opportunity to receive a fair trial or to important diplomatic or military endeavors, the privilege should be unavailable. Under this standard, from what we know about the Pentagon Papers controversy the *New York Times* probably would not have had to identify Daniel Ellsberg as its source if his identity had

280. See Blasi, *supra* note 277, pp. 39-41, 146-95.

remained confidential.²⁸¹ On the other hand, William Farr, the reporter who published a sensational secret confession in the Manson trial, probably would have lost the protection of the privilege had the jury not been sequestered at the time the confession story was run.²⁸²

These are some of the specific implications I foresee for the reporter's-privilege issue should the checking value assume a prominent place in our theory of the First Amendment. Not surprisingly, if the checking value were to wax in importance, the other side of the newsgathering coin, the question of when reporters are entitled to have access to sources under government control, would also be affected in the direction of more constitutional protection for reporter-source relationships.

When a source under government control desires to be interviewed by a reporter, a respect for the checking value would seem to require that the newsgathering claim thereby presented be accorded great weight in the constitutional calculus, considerably more weight than that ascribed by the majority to the claims in *Pell* and *Washington Post*. Any source under the effective control of government—a prisoner, a member of the armed forces, a government bureaucrat, a participant in a trial—is likely to have information about the behavior of public officials, if nothing more than their behavior toward him. When the source wants to cooperate with the press, the reporter-source relationship may produce the kind of in-depth coverage of government that is of the highest value to a proponent of the checking value.

This is not to say that all restrictions on communication between sources under government control and reporters are inconsistent with the First Amendment. Certainly, some restrictions relating to the timing, frequency, duration, and setting of interviews are unobjectionable. It is difficult, however, to imagine a sufficient justification for any order that would prohibit a source under government control from having contact with the press simply because of what the source might say. Thus, a government employee should be able to defy with impunity any rule that requires him to obtain departmental authorization before communicating with the press. If, however, reporter-source contact is forbidden because of what the reporter might tell the source, such as when future witnesses and jurors are isolated during a trial, no

281. In *New York Times Co. v. United States*, 403 U.S. 727, 730 (1971), Justice Stewart adopted for the prior-restraint issue presented by that case a standard that is similar to the one I think appropriate for this type of press-subpoena dispute. Stewart concluded that the standard had not been met by the government's proof in the case.

282. See *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), cert. denied, 409 U.S. 1011 (1972).

First Amendment violation should be found. Also, sanctions against persons who disclose sensitive information may be consistent with a proper respect for the checking value, but only if the disclosure can be shown to create a serious risk of harm to the implementation of government policy. In other words, penalties against "leakers" should be thought to raise serious First Amendment issues, and not to be available to public authorities as a matter of prerogative. While I can imagine a range of legitimate disagreement over doctrinal details, I do not see how anyone who regards the checking value as one of the primary values underlying the First Amendment can fail to accord great weight to the newsgathering claims presented when sources under government control desire to communicate with reporters.

A more difficult problem is whether the checking value implies that government officials are sometimes constitutionally obligated to be "sources" against their will. The problem encompasses a wide spectrum of concerns, ranging from the questions that are litigated under "freedom-of-information" statutes to the issues presented when government business is transacted behind closed doors to the question whether public officials can engage in discriminatory practices in making themselves available to different members of the media. Control over press access to scenes of crime or disaster and restrictions on the telecasting and recording of official proceedings can also be analyzed under the rubric of involuntary government sources.

Each of these issues deserves an article of its own, but a few general observations may be ventured regarding how the checking value helps one to think about the First Amendment issues presented when government officials fail to facilitate press coverage of their activities. First, since under the checking value the dissemination of information about the behavior of government officials is the paradigm First Amendment activity, policies and practices that reduce the amount and quality of information disseminated to the public should not be upheld simply because they serve the convenience, or embody traditional prerogatives, of the government. At a minimum, restrictions on press coverage of official activities should be upheld only if it can be shown that the restrictions substantially promote an important governmental objective that cannot be promoted sufficiently by alternative policies having a less restrictive impact on what interested outsiders can learn about official conduct. For example, under this standard all journalists could not be excluded from a police inspection of the scene of a recent crime if a single pool reporter and/or photographer could be admitted without disrupting the investigation.

Second, under the checking value, the interest of the press (and

ultimately the public) in learning certain information relevant to the abuse of official power would sometimes take precedence over perfectly legitimate and substantial government interests such as efficiency and confidentiality. Thus, the First Amendment may require that journalists have access as a general matter to some records, such as certain financial documents, which anyone investigating common abuses of the public trust would routinely want to inspect, even though the granting of such access would undoubtedly entail some costs and risks. Also, the balance might be tilted even more in the direction of access if a journalist could demonstrate that there are reasonable grounds to believe that certain records contain evidence of misconduct by public officials. Reporters who have already broken part of a story relating to the abuse of official power might be entitled to preferential access if the government could establish that there would be an unacceptable risk of diversion of public employee time or misuse of information were any member of the public, or even any journalist, granted access to the records in dispute. In short, a proponent of the checking value should treat requests by journalists to view government activities and inspect official records as embodying First Amendment interests of the highest order.

A third general observation concerns the distinction between press claims of access to official information that otherwise would be confidential and claims relating to more vivid coverage—televising, tape-recording, photographing—of events that are already open to descriptive reporting. Although vivid transmission can serve the checking value by capturing the attention of a public that might not respond to mere descriptions of abuse, the key stage of the checking process is the initial acquisition of information. When journalists actually secure evidence of serious official wrongdoing, they seldom lack for ways to dramatize what they have learned. Also, the checking process does not always depend on widespread public outrage, even though popular indignation can sometimes help to bolster the resolve of specialized actors in the checking process, such as prosecutors, judges, grand jurors, and legislative investigators. Thus, a proponent of the checking value should accord greater weight in First Amendment analysis to claims relating to initial access to otherwise unavailable information than to claims relating to the more vivid transmission of information. He should, nevertheless, accord at least intermediate weight to claims of the latter sort.

Finally, one should consider whether a First Amendment right of access to involuntary official sources might protect methods of news-gathering that are generally considered unethical. I have in mind such practices as undercover journalism (a reporter posing as someone he is not), the bribing of sources, burglary, wiretapping, and long-range

photography. Journalistic autonomy would no doubt be diminished if judges were to read into the First Amendment a code of ethics for journalists. However, the danger of isolating the press from the public by granting journalists an exemption from widely accepted standards of conduct strikes me as even more of a threat to the checking value. Thus, I think a proponent of the checking value should find no First Amendment violation in generally applicable prohibitions against unethical means of acquiring information (prohibitions that single out reporters would be another matter), even if these prohibitions limit the ability of journalists to learn about abuses of official power.

VI. ACCESS REGULATION

In this age of radio, television, and wire services, the basic reading and listening fare of most people emanates from a fairly limited number of sources—those persons who control or have access to the channels of mass communication.²⁸³ Consequently, one must question whether laissez faire principles still hold the key to preserving the fundamental values embodied in the First Amendment; perhaps these values would be better served by a “Keynesian” approach involving selective government intervention in the process by which ideas and information are disseminated.²⁸⁴ With regard to radio and television, the Federal Communications Commission (FCC) has insisted for years that “discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.”²⁸⁵ In addition, there has been no shortage of legislative proposals to require newspapers to print viewpoints or replies by outsiders.²⁸⁶ Some commentators have even argued that the First Amendment by its own force grants individuals and private groups a right of access to the channels of mass communication.²⁸⁷ Conversely, the persons who control those channels contend that, far from supporting a right of access, the First Amendment stands as a barrier against any legal doctrine that would require news organizations to disseminate material that their best editorial judgments lead them to consider unnewsworthy or inappropriate.

283. See Schmidt, *supra* note 101, at 38.

284. See Barron, *supra* note 101; Thomas I. Emerson, *The System of Freedom of Expression* 627-73 (New York: Random House, 1970).

285. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 369 (1969).

286. See, e.g., H.R. 18927, 91st Cong., 2d Sess. (1970); Reporters’ Committee for Freedom of the Press, *Press Censorship Newsletter* 10, Sept.-Oct. 1976, at 121; *id.*, *Press Censorship Newsletter* 8, Oct.-Nov. 1975, at 122-25.

287. See authorities collected in David L. Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. Rev. 1 (1973).

The Supreme Court has addressed the constitutional issues raised by access claims on three occasions. In *Red Lion Broadcasting Co. v. FCC*,²⁸⁸ two specific aspects of the FCC's general "fairness doctrine" were challenged by broadcasters. One was the "personal attack" rule, which requires that persons or groups whose "honesty, character, integrity, or like personal qualities" are attacked on the air during a presentation of views on an issue of public importance must be given a reasonable opportunity to respond. The other was the "political editorial" rule, which decrees a similar right to reply for a legally qualified political candidate who is either explicitly opposed in a broadcast editorial or whose opponent is explicitly endorsed. A unanimous Supreme Court upheld both access regulations. Remarkably, all the participating Justices²⁸⁹ joined Mr. Justice White's majority opinion, and none felt the need to add additional remarks.

The cornerstone of the *Red Lion* opinion was its rejection of the contention that broadcast licensees are entitled to the same measure of autonomy as that accorded most other persons who disseminate ideas and information to the general public. Justice White conceded that "[n]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents."²⁹⁰ White refused, however, to extend the principle to licensees, because he viewed them as proxies or fiduciaries for all the myriad voices and viewpoints in the community which are excluded from direct use of the airways only because there are not enough frequencies to go around.

Justice White did not assert or imply that the FCC could exercise plenary control over the airwaves based on some concept of government ownership. To the contrary, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."²⁹¹ He reasoned that since licensees are regarded as only fiduciaries for the general populace, the autonomy of licensees is not itself a First Amendment value: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."²⁹²

The opinion discussed the rights of viewers and listeners exclusively in terms of two basic values: diversity and self-government. The Court

288. 395 U.S. 367 (1969).

289. Mr. Justice Douglas did not participate in the decision of the case.

290. 395 U.S. at 386.

291. *Id.* at 390.

292. *Id.*

concluded, without much analysis, that these values would be served better by the fairness doctrine than by a regime of absolute licensee discretion regarding programming:

Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.²⁹³

A different variant of the access issue was presented to the Court four years later in *Columbia Broadcasting System v. Democratic National Committee*.²⁹⁴ A national political party and an organization of business executives attempting to rally public opinion against American involvement in the Vietnam War contended that the First Amendment prohibits licensees from refusing to sell air time for politically oriented spot advertisements. Seven of the nine Justices rejected the constitutional claims of the groups seeking access.²⁹⁵ Six Justices did so on the ground that the values of the First Amendment would not be served by a requirement of direct access for outsiders, although only five Justices joined Chief Justice Burger's majority opinion on this point.²⁹⁶ In addition, three Justices, including two who joined the majority opinion on the First Amendment issue,²⁹⁷ rejected the constitutional claim of access on the ground that a broadcaster's policy regarding the sale of air time is not "governmental action" subject to the limitations of the First Amendment. Altogether, the Court produced six separate opinions, totaling 110 pages in the *United States Reports*.

Chief Justice Burger's discussion of First Amendment values built to some extent on the *Red Lion* opinion but evinced a most important change of emphasis. For whereas Justice White based his argument in *Red Lion* on the premise that broadcasters are mere "proxies" or "fiduciaries" for the general public, the Chief Justice's opinion in *Democratic National Committee* invoked a concept of "journalistic independence" or "journalistic discretion," the essence of which is that broadcasters do indeed have special First Amendment interests which

293. *Id.* at 392.

294. 412 U.S. 94 (1973).

295. Only Justices Brennan and Marshall would have granted the petitioners' claims.

296. Justice Douglas concurred in the result on this point but did not join the Burger opinion.

297. Justices Burger and Rehnquist rejected the petitioners' First Amendment claims on the merits and also found the First Amendment inapplicable for lack of "governmental action." Justice Stewart joined the part of the Burger opinion which held there was no governmental action but declined to join the part of the opinion which addressed the merits of the First Amendment issue.

have to be considered in the constitutional calculus.²⁹⁸ Chief Justice Burger concluded that journalistic independence would be infringed to an impermissible degree if the Court were to recognize a constitutional right for outsiders to purchase air time that licensees would prefer to devote to other uses. He also concluded, joined in this aspect by only two of his colleagues,²⁹⁹ that in light of the importance of journalistic independence, the decisions of broadcast licensees regarding the allocation of air time should not be considered "governmental action" subject to First Amendment standards at all.

The Burger opinion did not say what First Amendment values lay behind the Court's new solicitude for broadcaster autonomy. It seems significant, however, that the Chief Justice quoted Justice White's statement in *Red Lion* that the interests of viewers and listeners are paramount.³⁰⁰ Thus, it is unlikely that the Court's notion of journalistic independence derives from an extension of the concept of individual autonomy to cover the desire of licensees to control what is said over "their" frequencies. Instead, the majority appears to have rested its decision on the judgment that the diversity and self-government values would best be served by programming initiated and edited by professional journalists subject only to the broad dictates of the fairness doctrine: "For better or worse, editing is what editors are for; and editing is selection and choice of materials."³⁰¹

Although his emphasis was on the ways in which a general right of access might disserve the public's interest in program diversity and quality, the Chief Justice also mentioned "another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of Government control over the content of broadcast

298. The Burger opinion did not declare explicitly that the concept of journalistic independence is rooted in the First Amendment. One could read the Chief Justice narrowly to mean only that journalistic independence is a congressional policy, subject to revision, which prevails over whatever values are implicated in the constitutional claims of outsiders to purchase direct access to broadcast audiences. At several points in the opinion, however, Burger spoke of "balancing the various First Amendment interests involved" and of "the historic aversion to censorship" that led Congress to favor "a substantial measure of independence for the broadcast licensee." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102, 116 (1973). Also, the opinion reserved judgment on the issue whether an FCC decision to require the sale of time for political advertisements would violate the First Amendment rights of broadcasters, thus suggesting that the concept of journalistic independence was regarded by the majority as an expression of constitutional values capable of prevailing over a congressional or administrative policy. On the whole, it seems likely that the Chief Justice and those who joined his opinion had in mind some notion of constitutional, rather than merely statutory, protection for the independence of licensees.

299. Justices Rehnquist and Stewart.

300. See text at note 292 *supra*.

301. 412 U.S. at 124.

discussion of public issues.”³⁰² He implied that even if the immediate impact on program content were considered salutary, the majority would have serious doubts about the constitutionality of a regulatory scheme that would give the FCC authority “to oversee far more of the day-to-day operations of broadcasters’ conduct” and “tend to draw it into a continuing case-by-case determination of who should be heard and when.”³⁰³

Mr. Justice Stewart agreed with the Chief Justice that the decisions of broadcast licensees should not be considered governmental action, but declined to join that part of the Burger opinion which rejected the access claims on substantive First Amendment grounds. Surprisingly, Stewart studiously avoided the phrase “journalistic independence” and its equivalents. His chief concern, however, just like the majority’s, was that journalists remain “free from the intrusive editorial thumb of Government.”³⁰⁴ He explained:

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that “fairness” was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.³⁰⁵

Stewart concluded that effective press freedom could best be realized if the policies of licensees were regarded as private decisions not subject to the substantive standards of the First Amendment.

So concerned was Justice Stewart with the dangerous potential of government regulation that he even expressed second thoughts about his concurrence in the unanimous *Red Lion* decision four years earlier: “I agreed with the Court in *Red Lion*, although with considerable doubt, because I thought that that much Government regulation of program content was within the outer limits of First Amendment tolerability.”³⁰⁶ Moreover, Stewart described the holding in *Red Lion* as based on “the then-existing state of the art” in broadcasting, implying that technological developments might consign the precedent to a short life-span.

The brief opinion by Justice White in *Democratic National Committee* was consistent with the views he expressed in *Red Lion*. While he concurred in the Burger opinion’s discussion of the merits of the First Amendment issue, Justice White ignored the Chief Justice’s

302. *Id.* at 126.

303. *Id.* at 126-27.

304. *Id.* at 145.

305. *Id.* at 145-46.

306. *Id.* at 138.

treatment of journalistic independence as a constitutionally rooted concept. Instead, White viewed the rejection of direct access for would-be purchasers of air time as an integral part of the regulatory scheme fashioned by Congress and the FCC, and concluded that "statutory and regulatory recognition of broadcaster freedom and discretion to make up their own programs and to choose their method of compliance with the Fairness Doctrine is consistent with the First Amendment."³⁰⁷

Justice Douglas concurred in the Court's result but, as had become his practice in his last years on the Court, declined to join any of the opinions of his colleagues and used the occasion to contribute a wide-ranging essay on the First Amendment.³⁰⁸ The most striking feature of the Douglas opinion is that it made no mention of the Meiklejohn thesis or the value of self-government. Instead, the opinion stressed what might be regarded as the negative, pessimistic aspects of the speech guarantee.

Justice Douglas contended that broadcast journalists as well as print journalists occupy a "protected position under the First Amendment." Although he, too, did not invoke the phrase "journalistic independence," he emphasized "the fear that Madison and Jefferson had of government intrusion" into the affairs of the press. He attributed this fear to twin specters prominent in the minds of the framers: "a lawless government," and a "government under the control of a faction that desired to foist its views of the common good on the people." Later in the opinion, Justice Douglas characterized the Bill of Rights as a part of the larger constitutional scheme, consisting also of the separation of powers and an independent judiciary, designed "to take Government off the backs of the people."³⁰⁹ In addition, he quoted approvingly Justice Black's admonition in *New York Times v. United States*: "Only a free and unrestrained press can effectively expose deception in government."³¹⁰

Justice Brennan's dissent, which was joined by Justice Marshall, contended that a licensee's policy regarding the sale of air time amounts to governmental action subject to constitutional limitations, and that a blanket refusal to sell time for political advertisements violates the First Amendment. Unlike some of his brethren,³¹¹ Justice Brennan did not

307. *Id.* at 147.

308. See also *Branzburg v. Hayes*, 408 U.S. 665, 711 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969); *Miller v. California*, 413 U.S. 15, 37 (1973).

309. 412 U.S. at 162.

310. 403 U.S. 713, 717 (1971), quoted at 412 U.S. 165.

311. See pp. 614-15 *supra*.

analyze the governmental action issue in terms of the interest in journalistic independence. Instead, he employed a conventional analysis focusing on "the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcasting, and the Commission's specific approval of the challenged broadcaster policy."³¹² Brennan concluded that government is sufficiently implicated in broadcasting that the decisions of licensees should be characterized as governmental action. In contrast, he thought that the interrelationship between government and newspapers does not permit such a characterization in the sphere of print journalism.

With regard to the substantive requirements of the First Amendment, Justice Brennan adopted as his starting point the "paramount" right of listeners to "a full spectrum of views—presented in a vigorous and uninhibited manner—on controversial issues of public importance."³¹³ He then concluded that this diversity value is not adequately served by the fairness doctrine in the absence of a right of direct access.³¹⁴ In addition, Justice Brennan found the self-government value undermined by the refusal of broadcasters to sell outsiders air time to disseminate political views. In his judgment, the concept of self-government embraces "not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view."³¹⁵

Having concluded that the diversity and self-government values would be advanced by the recognition of a constitutional right of access, Justice Brennan turned his attention to the majority's concept of journalistic independence. He did not reject the idea out of hand; indeed, he acknowledged that broadcasters have a "First Amendment interest in exercising journalistic supervision over the use of their facilities," and even stated that "it is an interest that must be weighed

312. 412 U.S. at 173.

313. *Id.* at 184.

314. Brennan gave several reasons for this conclusion. First, the economics of broadcasting makes it unlikely that extreme or immoderate views will be included in the "balanced" coverage produced by licensees: "Stated simply, angry customers are not good customers." Also, and here he quoted John Stuart Mill, listeners must have the opportunity to hear opposing arguments directly "from persons who actually believe them; who defend them in earnest, and do their very utmost for them." Brennan demurred from the suggestion that professional editing can serve this need sufficiently: "the relegation of an individual's views to such tightly controlled formats as the news, documentaries, edited interviews, or panel discussions may tend to minimize, rather than maximize the effectiveness of speech." Finally, he observed that "balanced" coverage controlled by licensees would be limited to "those views and issues which generally are recognized as 'newsworthy,' " a category which may exclude "new and generally unperceived ideas and opinions" that the public also needs to hear. 412 U.S. at 187, 189, 190.

315. *Id.* at 193.

heavily in any legitimate effort to balance the competing First Amendment interests involved in this case."³¹⁶ Justice Brennan did not believe, however, that the interest in "journalistic supervision" was strongly implicated in the litigation before the Court because "these cases deal *only* with the allocation of *advertising* time—air time that broadcasters regularly relinquish to others without the retention of significant editorial control."³¹⁷

The most recent of the Court's access decisions, *Miami Herald Publishing Co. v. Tornillo*,³¹⁸ involved a First Amendment challenge to a Florida law that required a newspaper to provide equal reply space free of charge whenever it "in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose."³¹⁹ The case thus presented the issue whether the principles of *Red Lion* apply outside the unique context of broadcast regulation. Amazingly, all nine Justices agreed that the Florida statute violated the First Amendment. Even more amazingly, not one of the three opinions in the case so much as mentioned the *Red Lion* precedent.

Chief Justice Burger once again wrote for the majority. He began his opinion by recounting at some length the argument for a right of access—in this instance a statutory right—based on trends toward concentration and uniformity in the mass media. He then rather abruptly asserted that "[h]owever much validity may be found in these arguments," a right of access enforced by government coercion "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."³²⁰ One aspect of that gloss, he declared, is the implication that government may not compel newspaper editors to publish that which "‘reason’ tells them should not be published."³²¹

The Chief Justice treated the principle against compulsion to print as though it were so basic as not to require documentation or justification. He made no effort to demonstrate that a right of reply would adversely affect the First Amendment interests of newspaper readers except to assert that a "[g]overnment-enforced right of access inescapably ‘dampens the vigor and limits the variety of public debate’" by

316. *Id.* at 199.

317. *Id.*

318. 418 U.S. 241 (1974).

319. *Id.* at 244-45, n.2.

320. *Id.* at 254.

321. *Id.*

making editors pay a price for printing critical stories about candidates and officeholders. His alternative rationale for holding the statute unconstitutional was stated in equally conclusory fashion:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.³²²

That was it. The opinion contained not a word on how newspapers were distinguishable from broadcast outlets; the *Red Lion* decision was not even acknowledged.

Justices Brennan and Rehnquist briefly noted their concurrence in the majority opinion on the assumption that it “addresses only ‘right of reply’ statutes and implies no view upon the constitutionality of ‘retraction’ statutes affording plaintiffs able to prove defamatory falsehood a statutory action to require publication of a retraction.”³²³

Mr. Justice White contributed a separate concurring opinion in which he elaborated on the interest in journalistic discretion vindicated by the Court’s decision.³²⁴ Echoing the Chief Justice’s opinion, White expressed the view that “the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned.”³²⁵ Unlike Chief Justice Burger, however, Justice White explained why such a barrier should be erected in the name of the First Amendment. The main reason he invoked, quoting from Justice Black’s majority opinion in *Mills v. Alabama*, was the institutional role the press must play “as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”³²⁶ Justice White offered no explanation why broadcast journalists have no part to play in this institutional role; he too totally ignored *Red Lion*. It is worth

322. *Id.* at 258.

323. *Id.*

324. Justice White complained, however, that the unavailability of a right of reply for persons criticized in the press underscored the unwisdom of the Court’s holding the same day in *Gertz*, which he viewed as unduly restricting the possibilities of recovery for libel plaintiffs. 418 U.S. 241, 262 (1974).

325. *Id.* at 259.

326. *Mills v. Alabama*, 384 U.S. 214, 219 (1966), quoted in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 260 (1974).

noting, however, that White was careful to speak only of "a virtually insurmountable barrier between government and the *print* media."³²⁷

The Supreme Court's handling of the access issue parallels in some important respects the pattern of its responses in the areas of defamation and newsgathering. Some of the strongest intuitions registered by the Justices seem best understood in terms of the checking value, yet that value has received only truncated and intermittent articulation. As a result, the Court's efforts to formulate specific doctrines regarding access have been marked by changes of direction and shortcomings of craftsmanship quite in excess of what we have come to expect, even from an institution subject to as many practical constraints as the Supreme Court.

The subtle pull of the checking value is evident in several of the opinions sketched above. For example, in *Democratic National Committee* Chief Justice Burger emphasized the undesirability of close and continual government involvement in the internal operations of broadcasters but did not develop a convincing argument why such involvement would be detrimental to First Amendment values.³²⁸ One explanation is that if broadcasters are not continually dependent on the favorable exercise of official discretion and are not in a position of day-to-day contact with and accommodation to the regulatory bureaucracy, they will be in a better position to serve as a check on official misconduct. There are overtones of this consideration in the Court's surmise in *Democratic National Committee* regarding why Congress originally opted for a system of broadcasting controlled by private licensees: "Congress appears to have concluded . . . that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided."³²⁹ It is perhaps also noteworthy that Chief Justice Burger referred to the risk of "an enlargement of Government control" as "another problem of critical importance" over and above the problem of the impact of a right of access on the diversity and self-government values, thus implying that some other

327. 418 U.S. at 259 (emphasis added).

328. The Chief Justice asserted that the values of diversity and self-government would be ill-served by a regime of programming dominated by "self-appointed editorial commentators." But if diversity and self-government are to be the sole criteria, Justice Brennan was almost surely correct that in light of the economics of broadcasting and the limitations of the professional perspective, a limited right of direct access would improve the fare of listeners. See note 314 *supra*. It is noteworthy in this regard that the Chief Justice did not even undertake to answer Justice Brennan on these points.

329. *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973).

fundamental value lay behind his aversion to government involvement in the editorial processes of broadcasters.

The Douglas opinion in *Democratic National Committee* represents the most explicit judicial recognition to date of the function free speech and a free press can perform in checking the abuse of power by government officials. It is particularly significant that a Justice who had analyzed the First Amendment for so many years primarily in terms of the autonomy and diversity values,³³⁰ and who had recently embraced the Meiklejohn theory,³³¹ should in the twilight of his tenure come to give so much emphasis to the checking value. It is almost as though it took Justice Douglas 35 years as a judicial student of the First Amendment to work his way through Holmes, Mill, and Meiklejohn, only to discover that James Madison remains the best teacher we have on the subject of freedom of expression.³³²

In addition to these stirrings in the *Democratic National Committee* case, I believe the Court's surprisingly strong response to the access statute in *Tornillo* can be attributed largely to the intuitions that inform the checking value. The unanimous judgment in *Tornillo* and the peremptory tone of the majority opinion indicate that the Court believed that a law attempting to influence the content of newspapers would strike at the heart of some important values implicit in the concept of freedom of the press. Yet the Justices were not able to specify what those values are, and were so unable to square the result they desired in *Tornillo* with the decision they had handed down just four years earlier in *Red Lion* that their only recourse was to ignore the *Red Lion* precedent entirely.

Why was the Court so averse in *Tornillo* to the limited right of access provided by the Florida statute? It will be recalled that the statute granted a right of reply only to a candidate for public office, and then only when his personal character or record in office had been assailed by a newspaper or by someone who had been given free space by the newspaper in order to make such an attack.³³³ One possible explanation consistent with the checking value is that such a narrow right of reply could have the effect of shifting newspaper coverage away

330. See, e.g., *Dennis v. United States*, 341 U.S. 494, 584-91 (1951); *Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952).

331. *Branzburg v. Hayes*, 408 U.S. 665, 713 (1972).

332. For a discussion emphasizing other aspects of the evolution of Mr. Justice Douglas's views on the First Amendment, see L. A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 Colum. L. Rev. 371 (1974).

333. See text at note 319 *supra*.

from topics that are central to the checking function—discussions of the fitness of candidates, particularly those with records in office—and toward less valued subjects for which the reply right would be inapplicable. A more likely reason is that the Justices perceived the print media as having historically enjoyed an adversary relationship with government which could only be compromised, symbolically as well as materially, if officials could dictate, for whatever reason, what the content of a particular publication must be. It is significant in this respect that the only Justice who elaborated on the concept of journalistic discretion as it relates to newspapers, Mr. Justice White, stressed the role of the press as a watchdog over government.³³⁴ It is even possible that the Court responded more favorably to the print journalists' claim to be free from access legislation than to the similar claim of broadcast journalists precisely because the Justices viewed the electronic media as fulfilling, historically as well as currently, a somewhat different and less significant role in the checking process. The Court may well have been influenced by the fact that the networks have never really had an I. F. Stone or a Seymour Hersh or a Woodward and Bernstein.

Admittedly, this type of speculation can be carried too far. Many considerations that have nothing to do with the checking value have no doubt figured in the Court's wavering pattern of responses to access claims. Moreover, some judicial statements and omissions in these cases seem positively at odds with the checking value. For instance, several of the opinions in *Red Lion* and *Democratic National Committee* argued that the judgments of the FCC regarding the rights and responsibilities of broadcasters are entitled to a large measure of deference.³³⁵ This position is unlikely to appeal to a proponent of the checking value in light of the possibility that the FCC might be corrupted to serve as an instrument of executive policy, a possibility underscored during the Nixon years when the chairman of the FCC resigned at a key point in the Watergate controversy to serve as a close political advisor to the President.³³⁶ Also, one reason invoked by Chief Justice Burger in *Democratic National Committee* for rejecting a constitutional right of access was that outsiders using the airwaves would not be subject to the governmental regulations that restrict licensees, a state of affairs that a proponent of the checking value should cheer.

334. 418 U.S. at 259-60. Compare Justice White's refusal in *Branzburg* to give much weight to this watchdog concept. 408 U.S. at 695, 697-98.

335. See, e.g., 412 U.S. at 103; 395 U.S. at 379.

336. See White, *supra* note 22, at 119, 291.

Perhaps the strongest indication that the checking value was not a dominant consideration in the access cases is the fact that none of the Justices made any reference to the checking value in determining the weight to be given the interests of those seeking a right of access. To my mind, one of the most convincing arguments for a right of access is that outsiders who do not share the biases of professional journalists about what is "out of bounds," and who are not employed by politically partisan publishers and station owners, may be able to stir up large numbers of ordinary citizens whose expectations regarding the conduct of public officials are not dulled by some sophisticated insider's understanding of "the way it's done." This point has particular force, I believe, at the local level.

I conclude that in the area of access regulation, as with defamation and newsgathering, the Justices have been influenced to some extent by the checking value, but only in a sporadic, inconsistent manner. As in the other two areas of First Amendment adjudication canvassed above, the uneven and frequently inexplicit impact of the checking value has hampered the Court's efforts to formulate and justify a coherent body of doctrine to govern access disputes. The Justices' deficiencies of craftsmanship in the access cases have already been touched on and need only be briefly recounted here: the Chief Justice's failure in *Democratic National Committee* and *Tornillo* to develop a rationale for the concept of journalistic discretion; his failure, and that of Justice White, to explain why journalistic independence was never mentioned in *Red Lion*; the failure of all Justices in *Tornillo* even to mention the *Red Lion* precedent or to defend the distinction between access regulations imposed on broadcast licensees and those imposed on the print media; the failure of all the opinions in *Democratic National Committee* except Justice Brennan's to discuss in any detail the First Amendment values implicated in the right-of-access claim; the dramatic shift of emphasis by all Justices after the *Red Lion* decision away from the characterization of broadcast licensees as "proxies" or "fiduciaries" for the general public; Justice Stewart's strained effort in *Democratic National Committee* to explain away his vote four years earlier in *Red Lion*. A more conscious and more fully articulated consideration of the checking value might not have eliminated all failures of craftsmanship, but such a consideration probably would have resulted in opinions that were at least more forthright, and in that vital respect more likely to be coherent and consistent. Here is how I think analysis of the access question might proceed if the checking value were given its due.

Perhaps the most important implication of the checking value concerns the concept of journalistic autonomy—a concept that has

figured prominently in the Court's responses to access claims but has yet to be accorded an adequate delineation and justification. If one considers journalistic autonomy as a means of serving the checking value rather than as derivative from the diversity and self-government values, a strong case can be made that news organizations should be constitutionally protected against governmental intervention in their internal operations. For the process of checking official misconduct sometimes requires the press to behave as a vigorous, unabashed partisan, campaigning with all available resources against a corrupt official or improper government practice. In most instances, a press campaign to discredit will have more credibility if the object of attack is given an opportunity to present a defense. But whether granting access to outsiders will serve the partisan campaign, and if so precisely what format of access will best do so, are tactical questions that are better left to be decided by the news organization itself on a discretionary basis rather than by means of a legislative or judicial generalization. There may be, after all, occasions when the attention of readers could be diverted by boring, confusing, or brilliantly demagogic responses of officials who are being criticized by the press. Also, in a particular campaign to expose official abuse, the morale of reporters and editors may depend on their having control over the presentation of material and on not being sidetracked by the need to respond to countercharges or other diversionary defenses. Thus, in some circumstances a right of access may interfere with the partisan efforts of news organizations to awaken the public conscience to the abuse of power by officials. Respect for the checking value makes one more likely to consider such partisan efforts a vital part of the First Amendment scheme.

In addition, the checking value may be served by journalistic autonomy in ways other than the fostering of partisan press campaigns against specific abuses in government. The overall emphasis and quality of news coverage may have a significant impact on how effectively the checking process works. For a citizenry accustomed to perceptive, thoughtful reporting of government is more likely to take an interest in public affairs and consequently to respond actively when abuses of official power are exposed. The recognition of journalistic autonomy could contribute to the general quality of reporting on government by encouraging news organizations to view themselves not simply as businesses subject to extensive regulation but as independent participants in the system of checks and balances, a self-image that should generate reportorial priorities that are determined more by a sense of public responsibility than by a fetish for profit maximization.

Finally, the checking value provides a justification for journalistic autonomy at the all-important level of symbolism. Many persons who react intuitively against a right of access are influenced by the specter of a government-controlled press, one of the hallmarks of the totalitarian state.³³⁷ The checking value likewise is based in considerable part on the fear of totalitarianism. In this respect, a proponent of the checking value is likely to believe that even regulations with limited material impact are objectionable if they tarnish any of the symbols that distinguish democratic forms of government from their totalitarian counterparts. One of these symbols may well be the total exclusion of officialdom from the final decision-making processes that determine what shall be disseminated over the channels of mass communication.

These are the ways in which the checking value gives support to the concept of journalistic autonomy, and in so doing strengthens the constitutional argument against access regulation. But journalistic autonomy is not the only consideration relevant to the access issue. Opponents of access regulation also rely in part on the contention that enforced access will cause self-censorship. Respect for the checking value would seem not to affect one way or the other how one views the empirical question that lies at the root of this contention. However, since under the checking value speech about official behavior is accorded special significance, any supposition or demonstration that a particular access regulation induces editors to suppress stories relating to official behavior would weigh heavily in the scales against the constitutionality of the regulation.

On the other hand, consideration of the checking value may in some respects cause one to look more favorably on certain forms of access regulation. The abuse of official power is more likely to go undetected or tolerated the more power officeholders have to shape the public's perception of events. And the more difficult it is for unconventional points of view to receive an attentive hearing from the general public, the more this dangerous power to shape public perceptions will reside in government officials. Thus, the checking value may be well served by an access regulation that enables unconventional critics of government to speak directly to the general public without having to communicate through the distorting filter of journalistic jargon and format, and without having to resort to credibility-reducing demonstrative antics in order to attract media coverage.

337. See, e.g., Oran J. Hale, *The Captive Press in the Third Reich* (Princeton, N.J.: Princeton University Press, 1964).

In addition, access regulation may further the checking value by giving ordinary citizens an incentive to participate in the discussion of public affairs, thereby raising the general level of political consciousness. The more a citizenry is generally attentive to the activities of its officials, the more likely it is to resist actively any abuses of office that are uncovered. In this respect, the phenomenon of maximum political participation by ordinary citizens, which is intrinsically valuable under the Meiklejohn theory of self-government, can be instrumentally valuable under a theory based on the checking value.

As can be seen, the checking value cuts both ways on the issue of access regulation. How then should one who accords the checking value a prominent place in his theory of the First Amendment respond to claims by nonjournalists to have access to the mass media? I think thoughtful proponents of the checking value could differ widely on this question. My own response varies with the type of access regulation at issue, for the checking value is more implicated by some schemes of enforced access than by others, and the other basic values that inform my view of the First Amendment are implicated to varying degrees by different forms of access regulation.

Obligations on the part of news organizations to grant access to outsiders can stem from constitutional doctrine, statute, or administrative regulation. The obligations can be unconditional, or they can be contingent on a prior dissemination over the media outlet to which access is sought. Analysis of the access issue may also vary depending on whether the media outlet in question is publicly financed and on whether it is a broadcast or a print outlet. I shall not discuss how the checking value bears on each of these variants but instead shall analyze only a few types of access regulation to illustrate how an appreciation of the checking value might help one to think about the First Amendment issues they raise.

First, the general fairness doctrine imposed on broadcasters by the FCC and upheld by implication in *Red Lion* should be considered a violation of the First Amendment. The requirement that the overall performance of a broadcast licensee "afford reasonable opportunity for the discussion of conflicting views on issues of public importance" undercuts the conception of journalistic autonomy that grows out of the checking value because such a requirement imposes an external standard on the overall performance of a news organization. The fact that the very severe, although seldom invoked,³³⁸ sanction of loss of

^{338.} See generally Louis L. Jaffe, WHDH: The FCC and Broadcasting License Renewals, 82 Harv. L. Rev. 1693 (1969).

license stands behind this standard makes it all the more likely to deprive broadcast journalists of the sense that they are primarily responsible unto themselves for the quality of their product. Also, the amorphous nature of the fairness standard combined with the severity of the sanction would surely make a licensee reluctant to mount an all-out campaign to discredit government officials believed to be abusing their power.

More narrowly defined access regulations designed to give persons who are criticized on the air a right to reply stand on a different footing. The FCC's personal attack and political editorial rules, which formed the basis of the *Red Lion* litigation, are examples of such a narrower form of access regulation. I do not believe the loss of editorial control represented by such narrowly defined rights of reply is likely to undercut journalistic autonomy to such a degree as to dissipate the ethos that makes news organizations view themselves as guardians of the public welfare. And if one's conception of journalistic autonomy derives from the checking value, the preservation of this ethos is the appropriate measure, not some notion of total control analogous to that which an individual must enjoy within a certain sphere if he is to be truly autonomous. Another consideration suggesting that certain contingent access requirements may be consistent with the checking value relates to the possibility that in some localities all the major media outlets will serve as apologists for the reigning oligarchy. In such a situation, if political insurgents do not have a legal right of access to reply to media efforts to discredit them, the normal electoral checks on official abuse may be ineffectual. On the other hand, as explained above, even narrowly drawn contingent access regulations can threaten journalistic autonomy in one important respect: a partisan press campaign against particular abuses of public power may be deprived of its momentum by diversionary rebuttals that are required by law to be published. Also, a contingent obligation to grant an opportunity to reply may deter some editors from running critical stories about government officials. The arguments based on the checking value thus point in conflicting directions on the question of contingent access.

I would resolve these difficult issues by holding that narrowly drawn rights of reply contingent on personal criticism of the person seeking access should not be held to violate the First Amendment when the person criticized is not a public official. On the other hand, because of the risk of self-censorship of stories about public officials as well as the need to foster partisan press campaigns against abuses of office, access regulations granting public officials the right to reply to criticism of their official conduct should be held unconstitutional. This position

would mean that the access statute struck down in *Tornillo* should have been considered unconstitutional only insofar as it required newspapers to give officeholders a right to reply to criticisms of their personal character or performance in office; a statute drafted more narrowly to grant a right of reply only to nonincumbent candidates like Mr. Tornillo should be upheld. Such a disparity in the treatment of candidates running for the same office may seem paradoxical, particularly since I would treat nonincumbent candidates as "public officials" for some purposes in the area of defamation.³³⁹ Nevertheless, the risk, especially at the local level, that a dominant news organization may actually form a part of an abusive ruling oligarchy, coupled with the fact that officeholders typically have ample opportunities to disseminate their views, seems to me to justify this much of a bias against incumbents in the matter of access regulation.

On the other hand, if a public official's right to reply is conditioned on his establishing in court (or perhaps in an administrative proceeding) that the statements disseminated about him were defamatory and false, the constitutional balance should tip back in favor of upholding the access regulation. A fortiori, a right of reply for private citizens contingent on proof of falsity and defamation should be upheld. As I have indicated, however, the checking value provides support on both sides of these questions, and the considerations are rather evenly balanced. Thus, I can well understand how a proponent of the checking value might reach conclusions contrary to mine. The burden of this discussion, one should remember, is not to resolve the constitutional issues posed by various forms of access regulation, but rather to illustrate what paths of analysis the checking value leads one down in considering those issues.

To a proponent of the checking value, the most important access claims may be those that seek to introduce new topics or allegations for public debate, as contrasted with claims to reply to previous communications. An example of such a right to introduce would be a claim, such as the one rejected by the Supreme Court in *CBS v. Democratic National Committee*,³⁴⁰ to purchase broadcast time or print space for the purpose of disseminating a political "advertisement." Another would be the claim that a mass-media outlet provides insufficient opportunity for outsiders to disseminate their views directly to the public, as might

339. See p. 585 *supra*.

340. See text at note 294 *supra*.

be the case if a newspaper printed no letters to the editor.³⁴¹ Recognition of a right of introduction in addition to a right of reply would serve the checking value by making it possible for victims of official misconduct to appeal directly to the public. In addition, a right of introduction might lead to the publication of down-to-earth expressions of indignation by ordinary citizens in response to reported evidence of official misbehavior. The contribution of enforced access in these circumstances would consist primarily in permitting critics of government to break through the mist of "newspeak" that tends to dull almost everyone's response to public events. In general, I think a proponent of the checking value should look with favor on access claims that seek to introduce new subjects of discussion, although once again the many variants of access regulation must be considered individually.

On the question whether media outlets that sell commercial advertising must accept political advertisements purchased at the going rate, I have little doubt that the checking value supports the conclusion that this form of enforced access is constitutionally compelled. Political advertisements can be an effective medium for the ventilation of unconventional viewpoints, and the incursion on journalistic autonomy represented by loss of control over the content of advertisements seems minimal. Thus, a proponent of the checking value should consider the *Democratic National Committee* case wrongly decided, unless he accepts the dubious proposition that the administrative problems of enforcing a system of purchased access would be so grave that First Amendment theory must give way to practical feasibility.³⁴² It follows, moreover,

341. Claims such as these are seldom grounded in statute or administrative regulation; they are typically based on contentions regarding the affirmative requirements of the First Amendment. Because this is so, these claims are complicated by the question whether a privately owned media outlet is subject at all to the requirements of the First Amendment, the so-called state-action issue. No doubt news organizations would enjoy more autonomy if their editorial decisions were in no wise subject to the constraints of the First Amendment. I do not believe, however, that such a complete immunity from First Amendment standards is necessary before news organizations can play an effective part in the checking process. Here again, the conception of journalistic autonomy that stems from the checking value is less absolute than that which is based on the analogy from individual autonomy. Moreover, as mentioned above, the checking value can be well served by access regulations that enable outsiders to disseminate unconventional, "extreme" criticisms of government. See p. 623 *supra*. If, therefore, as I believe to be the case, conventional analysis of the state-action question can support the conclusion that the editorial decisions of mass-media outlets are sufficiently analogous to, intertwined with, or supported by the exercise of power by the state to make them subject to First Amendment standards, respect for the concept of journalistic autonomy should not cause one to reject this conclusion. On this point, see Justice Brennan's opinion in *Democratic Nat'l Comm.*, 412 U.S. at 172-81.

342. The administrative problems presented by access regulation were emphasized by Justice Burger. 412 U.S. at 123-24. For a refutation of the argument that these problems are insuperable, see Justice Brennan's dissent and the authorities cited therein. 412 U.S. at 201-3.

that if there is a constitutional right for outsiders to purchase time or space for political advertisements, a statute or administrative regulation requiring mass-media outlets to accept paid political advertisements without regard to ideology should not be held violative of the First Amendment.

Free access presents a more difficult question. Suppose a statute were to require all daily newspapers to devote at least as much space to letters to the editor as to editorials and to select which letters to print in some ideologically unbiased way. Or suppose the FCC were to compel all local television stations to allocate at least 25 minutes per week (or per day) to presentations by outsiders selected by lottery or queuing. At some point, an access regulation could so alter the format of a publication or program that the checking value would be disserved by the consequent undermining of journalistic autonomy more than it would be served by the unconventional messages disseminated as a result of the regulation. The two examples presented above seem to me not to reach that point, however, so I would uphold them, recognizing that other proponents of the checking value might strike the balance the other way. On the other hand, concerns about administrative difficulties and the lack of a guiding principle to determine how much access should be required lead me to conclude that a free-access requirement should not be considered to flow from the First Amendment standing alone in the absence of a statute or administrative regulation.

A final point regarding the implications for access regulation of a commitment to the checking value concerns the possibility of a distinction between the print media and the broadcast media. My colleague Lee Bollinger has developed an intriguing argument in defense of the access decisions handed down by the Supreme Court, which in effect grant newspapers (and presumably other print media) a larger measure of constitutional immunity from regulation than is accorded broadcast outlets.³⁴³ His argument has a sophistication that cannot be captured in a brief summation, but his basic point is that access regulation of one segment of the media may not undermine First Amendment values so long as other segments remain unregulated and fully autonomous. For the unregulated segments can then serve as models against which to measure the effects of the right of access on the regulated segments, and also can serve as a source of critical scrutiny of the regulatory experiment. Professor Bollinger refers to this justification as a theory of partial regulation. Although Bollinger does not defend his thesis in

343. Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. 1 (1976).

terms of the checking value, a proponent of the checking value might be attracted to this theory of partial regulation. In striking the balance between the autonomy necessary to nurture a critical, lively coverage of government activities and the outside input necessary to avoid an ingrown complacency, one might decide to have one medium as autonomous as possible and another as accessible as possible. This solution would be in accord with the Supreme Court's holding in *Tornillo*, the broad scope of which would otherwise be difficult to justify under the checking value.³⁴⁴

Personally, I do not believe the print media should enjoy total immunity from access regulation. In my judgment, the checking value can be seriously undermined in one-newspaper towns and suburbs if challengers to the local political oligarchy can be shut out totally from the only effective medium of communication to the public at large. I do believe, however, that a proponent of the checking value might well embrace Professor Bollinger's theory of partial regulation, even though I would not.

VII. FURTHER IMPLICATIONS

My conclusions regarding the implications of the checking value for defamation, newsgathering, and access are highly debatable. I have presented these conclusions not because I think they are significant in and of themselves, but because I believe the checking value can be better understood if the doctrinal implications foreseen by one of its proponents are spelled out in some detail.

At this stage of the analysis, it may be helpful to step back from the consideration of specific issues and ask what general ideas of significance for First Amendment interpretation have emerged from our inquiry into the implications of the checking value. In addition, it seems appropriate to speculate, in a fashion even more brief and conclusory than that employed heretofore, about how those general ideas might affect a wide range of additional free-speech disputes.

One of the most important ideas to emerge from the preceding inquiry is that communications on the subject of official behavior ought to receive more constitutional protection than communications on other topics, and that there are ways in which such a subject-oriented preference might be implemented.³⁴⁵ Another idea of potential significance is that the professional press should be viewed as an institution deserving of constitutional recognition in its own right, so that particular claims

344. See pp. 627-28 *supra*.

345. See pp. 552-53, 558-59, 581-83, 603, 606, 608, 609-10, 625 *supra*.

of individuals who belong to the institution and considerations relating to the viability and vitality of the institution itself should be accorded special weight in the constitutional calculus.³⁴⁶ Our exploration of doctrinal implications of the checking value in the three areas considered also underscores the importance in the First Amendment scheme of information as contrasted with advocacy, and suggests that restraints on the acquisition and dissemination of information should be especially vulnerable to constitutional challenge.³⁴⁷ Traditional First Amendment analysis focuses almost exclusively on the constraints that interfere with rational deliberation, yet our analysis has also been concerned with counteracting apathy and anomie so that passions as well as rational cogitations might be activated;³⁴⁸ this seems an important shift of perspective attributable to the checking value. Another notion that grows out of the checking value is that on occasion First Amendment doctrines may properly be designed so as to give political challengers special opportunities for expression which are not available to incumbent candidates.³⁴⁹ Finally, the idea emerges from a careful look at defamation, newsgathering, and access that the system of mass communications is such a limited and important resource that it is a matter of constitutional concern how the resource is exploited—whether, for example, news organizations engage in investigative reporting, and whether facts and viewpoints are communicated to the public in a manner that accentuates their impact.³⁵⁰

These ideas hardly exhaust the general implications of the checking value. Even less does this list encompass the whole body of ideas that should have a bearing on one's response to any given First Amendment dispute. For the purpose of explicating the checking value, however, it is appropriate to simplify the analysis, as I have done for the three areas discussed above, and discuss only the limited question of how the course of doctrinal development might be affected by consideration of the checking value. In undertaking such a one-dimensional inquiry for a wide range of problems, the ideas just outlined constitute a good starting point for analysis.

The doctrine of prior restraint has loomed large throughout the history of the First Amendment.³⁵¹ Yet the Supreme Court has never

346. See pp. 541-42, 563-64, 577-78, 587, 604, 623-25 *supra*.

347. See pp. 553-54, 563, 603, 606, 608, 609 *supra*.

348. See pp. 603, 623-26, 629 *supra*.

349. See pp. 627-28 *supra*.

350. See pp. 587, 603, 624-25, 629 *supra*.

351. See the materials collected in William B. Lockhart, Yale Kamisar, & Jesse H. Choper, *Constitutional Rights and Liberties* 626-64 (Annual American Casebook Series) (4th ed. St. Paul: West Publishing Co., 1975). Recent cases in which the Supreme Court has reaffirmed the

specified precisely what elements make a regulation a "prior restraint." For that matter, the Justices have never explained satisfactorily why a prior restraint, which often can be more narrowly tailored and which in any event gives better notice than a subsequent punishment, should be treated as a particularly undesirable form of regulation.

Some of the most forceful reasons for disfavoring prior restraints assume special significance under the checking value. One objection to injunctions and licensing schemes, the two most common forms of prior restraint, is that they place lawmaking authority in the hands of a single official who may use that authority for illegitimate purposes. Another problem with prior restraints is that they are typically enforced by summary procedures, so that a jury of peers is not available to check the abuse of power by officials. In addition, under most prior-restraint schemes the speech that is regulated never sees the light of day; this means that the censorship decision itself is not subject to public scrutiny, always an important safeguard against abuse of the power to regulate speech.³⁵² (It is noteworthy that *Near v. Minnesota ex rel. Olson*³⁵³—the landmark Supreme Court precedent establishing that injunctions are to be considered prior restraints³⁵⁴ and that prior restraints are especially suspect under the First Amendment—involved an injunction restraining a newspaper from publishing vituperative charges of official corruption. The Court's opinion in *Near* referred several times to the importance under the First Amendment of speech critical of officeholders, particularly speech charging them with abuses of their public trust.³⁵⁵) Thus, if the checking value were to be considered more explicitly in First Amendment analysis, the theoretical uncertainty that has plagued the prior-restraint doctrine in the twentieth century might be alleviated. Such a development might even bring some coherence to the Court's decisions regarding whether a particular form of regulation

importance of the prior-restraint concept include *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

352. See also the argument made in Harry Kalven, Jr., *Foreword: Even When a Nation Is at War*, 85 Harv. L. Rev. 3, 34 (1971), that the disallowance of prior restraint facilitates civil disobedience. A proponent of the checking value might regard the facilitation of civil disobedience to be a major consideration. See, p. 648 *infra*.

353. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

354. This proposition is not self-evident. Milton's classic polemic against prior restraint, the *Areopagitica* (1644), reprinted in Douglas Bush, ed., *The Portable Milton* 151 (New York: Viking Press, 1949), was directed at licensing systems. Many of Milton's arguments do not apply to injunctions issued by judges at the instigation of the complaining party.

355. 283 U.S. at 717-22.

is properly classified as a prior restraint, currently an important and troublesome area of dispute.³⁵⁶

Since under the checking value information about the conduct of government is accorded the highest possible valuation, speech critical of public officials by those persons in the best position to know what they are talking about—namely, government employees—would seem to deserve special protection.³⁵⁷ Thus, a proponent of the checking value should demand an extremely strong regulatory justification before permitting public employees to be disciplined for criticizing their colleagues. For this reason, the Supreme Court's 1968 decision in *Pickering v. Board of Education*,³⁵⁸ which established a high standard of protection for such speech, should be treated as one of the great seminal precedents of the Warren Court; its holding should be augmented and extended. Disappointingly, the Justices have done very little with the *Pickering* precedent,³⁵⁹ despite a plethora of cases testing it in the lower courts.³⁶⁰

If criticism of their colleagues by public employees should be considered one of the most highly valued of speech activities, what about active participation by public employees in political campaigns? Twice in the last 40 years the Supreme Court has held that the Hatch Act, the federal statute forbidding active political participation by federal civil service workers, does not violate the First Amendment.³⁶¹ I believe that only political activities on behalf of incumbents may be prohibited consistent with the Constitution, because only for such pro-incumbent activities is there the risk that government employees will be coerced to work for the reelection of their superiors. This fear of coercion is the only regulatory interest served by the Hatch Act that

356. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

357. See generally Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. Chi. L. Rev. 530 (1975).

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

359. But see *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 45 U.S.L.W. 4043 (1976).

360. See, e.g., *Abbott v. Thetford*, 529 F.2d 695 (5th Cir. 1976); *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1975); *Gilbertson v. McAlister*, 403 F. Supp. 1 (D. Conn. 1975); *Muir v. County Council*, 393 F. Supp. 915 (D. Del. 1975); *Roseman v. Indiana Univ. of Pa.*, 520 F.2d 1364 (3d Cir. 1975); *Los Angeles Teachers Union v. Los Angeles City Bd. of Educ.*, 71 Cal. 2d 551, 455 P.2d 827, 78 Cal Rptr. 723 (1969); *Watts v. Seward School Bd.*, 454 P.2d 732 (Alaska 1969); *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972); *Meehan v. Macy*, 425 F.2d 469 (D.C. Cir. 1968).

361. *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). See also *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), upholding a state statute restricting political involvement by state employees.

is weighty enough to override the substantial First Amendment claims of civil servants who wish to promote their political views through the election process, claims which under the checking value take on added constitutional significance when government employees seek to unseat an incumbent whom they believe to be unworthy of his office. I can understand, however, how a proponent of the checking value might be unwilling to countenance the asymmetry inherent in this result. Such a proponent should probably uphold the Hatch Act across the board, for the possibility that government bureaus will be mobilized to work for the reelection of incumbents is deeply antithetical to the checking value. I am not troubled by the asymmetry because I think it only partially offsets the many built-in advantages possessed by incumbent candidates.

The Supreme Court held in *Elrod v. Burns*³⁶² that the First Amendment is violated when low-level public employees are dismissed on the basis of political party affiliation to make room for patronage appointments.³⁶³ A newly elected insurgent's effort to clean out an entrenched bureaucracy may in some ways promote the checking value, but the mentality and leverage that results from the spoils system seems much more likely to engender abuses of office. Thus, I think a commitment to the checking value should lead one to favor the Court's holding in *Elrod*.

The need under the checking value for independent-minded government bureaucrats who are willing to expose the misbehavior of officials also supports the conclusion that most loyalty oaths and job disqualifications based on political beliefs are incompatible with the First Amendment.³⁶⁴ The only oath requirement a proponent of the checking value should uphold is the obligation to promise to execute faithfully the duties of one's office. There may be some belief-based disqualifications that should not be invalidated—perhaps when a Ku Klux Klan member applies to join the police force or an avowed criminal syndicalist seeks a top-security clearance³⁶⁵—but I think a proponent of the checking value should be more disposed to strike down belief-based disqualifications than a person whose interpretation of the First Amendment rests exclusively on the values of autonomy, diversity, and self-government.

362. 427 U.S. 347 (1976).

363. On this issue generally, see Comment, *Patronage Dismissals: Constitutional Limits and Political Justification*, 41 U. Chi. L. Rev. 297 (1974).

364. The best treatment of this subject of which I am aware is Jerold H. Israel, *Elfbrandt v. Russell: The Demise of the Oath?* 1966 Sup. Ct. Rev. 193.

365. Compare *United States v. Robel*, 389 U.S. 258 (1967).

Restrictions on trial reporting have generated a large number of First Amendment disputes in recent years.³⁶⁶ In *Nebraska Press Association v. Stuart*,³⁶⁷ the Supreme Court invalidated a court order that prohibited news organizations from publishing specified information in their possession, indicating that virtually no such "gag order" would ever be upheld. Apparently influenced by their understanding of the concept of journalistic autonomy, the majority Justices invoked a distinction between restrictions on reporters and restrictions on sources under the jurisdiction of the trial court such as attorneys, jurors, and parties: orders directed against reporters, the majority implied, are generally impermissible, but orders binding trial participants might not raise serious First Amendment questions.³⁶⁸

Although a proponent of the checking value should treat restrictions on trial reporting as highly suspect, I do not think an absolute ban on such restrictions is appropriate. The checking value is promoted by close and critical press coverage of the behavior of officials charged with the responsibility of investigating crime and adjudicating guilt. Particularly when the charges in question concern the abuse of official power, it is absolutely essential that the press be permitted to second guess the prosecuting authorities to prevent them from protecting or coddling their political associates. However, it is the high value of reportage concerning the prosecution of crime, not any notion that journalistic autonomy is infringed by preventing journalists from publishing information in their possession, which leads me to treat restrictions on trial coverage as suspect under the First Amendment. I do not give much credence to journalistic autonomy claims in the trial-reporting context, for I do not think the journalistic ethos of self-determination and responsibility to the public is likely to be undermined simply because news organizations are not free to publish immediately every item of information they get their hands on. Thus, I am not drawn to an absolute prohibition on gag orders or to the Court's distinction between restrictions on news organizations and restrictions on trial participants. I think the checking value would be sufficiently served by a highly protective prohibition on all gag orders—those directed at trial participants as well as those binding reporters—which could be overcome by a showing that the premature release of the information in question would almost certainly make it impossible for the defendant to be tried

366. See, e.g., Reporters' Committee for Freedom of the Press, Press Censorship Newsletter No. 10, Sept.-Oct. 1976, at 6-36; *id.*, Press Censorship Newsletter No. 9, Apr.-May 1976, at 6-34; *id.*, Press Censorship Newsletter No. 8, Oct.-Nov. 1975, at 42-60.

367. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

368. *Id.* at 563-65. See also *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

by a jury that is not strongly predisposed against him.³⁶⁹ I would, however, interpret the First Amendment to prohibit without qualification any gag order in a case in which a person currently holding public office is being investigated or prosecuted. In this situation, the public's need to learn as soon as possible everything there is to know about the behavior of the public official outweighs the risk that he will thereby be denied a fair trial, or even the risk that he will escape criminal punishment altogether on the ground that a fair trial could never be held.

In the last several years, a number of First Amendment disputes have concerned efforts to regulate communications in the context of election campaigns.³⁷⁰ The most important Supreme Court decision to result from these disputes is *Buckley v. Valeo*,³⁷¹ which upheld dollar limitations on "contributions" to political candidates but invalidated limitations on "expenditures" by private persons on behalf of political candidates as long as the expenditures are not funneled through or coordinated by the candidate's campaign organization.³⁷²

A large campaign contributor may expect and receive favors from the officeholders whom he has helped to elect, if nothing more than special access to plead his political claims on the merits. I regard the granting of such favors as an important abuse of office; in this respect, I think the checking value provides powerful support for the Court's holding in *Buckley* regarding contributions. On the other hand, abusive entrenched regimes can sometimes be challenged only by well-financed insurgent campaigns. This says more, however, about the possible unconstitutionality of restrictions on total expenditures by nonincumbent campaign organizations³⁷³ than about the need for large individual contributions. On the whole, I believe a proponent of the checking value should have little difficulty upholding a ceiling on individual campaign contributions.

369. See the related discussions of implications in this area at pp. 607-8 *supra*.

370. See, e.g., the cases collected in Lockhart, Kamisar, & Choper, *supra* note 351, at 1013-67.

371. *Buckley v. Valeo*, 424 U.S. 1 (1976).

372. See generally Daniel Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 Sup. Ct. Rev. 1; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?* 85 Yale L.J. 1001 (1976).

373. In *Buckley*, the Court invalidated the provision of the Federal Election Campaign Act of 1971 which placed dollar limitations on the overall campaign expenditures of candidates but held that the distribution of public funds to a candidate could be conditioned on the candidate's agreement to abide by overall expenditure limits. 424 U.S. 1, 54-59. A proponent of the checking value should certainly applaud the invalidation of expenditure limitations that bind nonincumbents. Whether expenditure limitations on incumbents should have been struck down, and whether the Court should have upheld the conditioning of public funding for nonincumbents on their acceptance of limitations are, it seems to me, close questions that might be decided either way under the checking value.

But what about the Court's holding in *Buckley* that independent "expenditures" on behalf of candidates cannot be restricted to \$1,000 per person?³⁷⁴ The individual interest of a plutocrat in being able to use his wealth to influence elections derives no support from the checking value. The important question is whether the recognition of an individual right to expend large sums on behalf of another person's candidacy would generate communications that are likely to serve the checking value. For example, large expenditures on behalf of insurgent candidates might help draw public attention to possible abuses of power by incumbents. The fact that such expenditures cannot be coordinated with the candidate's campaign organization may mean that they will be used to purchase political advertisements that are more issue oriented and diverse, and in these respects more likely to serve the checking value, than the advertisements that would result from contributions to the campaign itself. But the links here are tenuous. I conclude that under the checking value independent expenditures on behalf of candidates should be treated as relatively unimportant though not totally without speech value. On the other hand, the regulatory interests served by prohibiting large expenditures do not strike me as particularly weighty either, although no doubt some successful candidates grant special favors to persons who have independently expended large sums of their behalf. I would strike the balance in favor of upholding expenditure limitations, but I regard the issue as close.

*Mills v. Alabama*³⁷⁵ involved a constitutional challenge to a state statute prohibiting the publication on an election day of any newspaper editorial supporting or opposing a candidate. The rationale for the law was that charges made in such editorials cannot be answered before the voters go to the polls. The Court held the statute invalid under the First Amendment. The majority opinion, written by Mr. Justice Black, contains perhaps the most explicit invocation of the checking value to be found in the *United States Reports*.³⁷⁶ Disappointingly, however, the Court's treatment of the checking value was confined to a few rhetorical flourishes.

How should a proponent of the checking value respond to the issue posed in *Mills*? On the one hand, there is a symbolic cost in legitimating any kind of newspaper "blackout," even for one day when there would seem to be good, politically neutral reasons for restricting publication. Also, on occasion there will be late-breaking revelations indicating that a candidate is unfit for office, and the checking value would be ill served if these revelations could not be widely disseminated.

374. 424 U.S. at 39-51.

inated. On the other hand, when a monopoly newspaper is part of the local ruling oligarchy, the power to publish unanswerable election-day editorials could be abused to discredit political challengers. On balance, I think *Mills* was rightly decided, but I do not regard it as an easy or paradigm case under the checking value.

A final implication of the checking value in the area of elections concerns provisions designed to promote the two-party system by making it difficult for third parties or independent candidates to get on the ballot.³⁷⁷ In one sense, the two-party system increases the likelihood that there will be a large, well-organized political force opposed to the persons in power and alert to discover and publicize abuses of office; if the opposition is fragmented, incumbents may be able to get away with more. Nevertheless, as outlined above,³⁷⁸ unconventional criticisms of government are very important to the checking process, and presentation through the medium of a political party may be an effective way for unconventional viewpoints to gain a respectful hearing. Thus, I think a proponent of the checking value should be highly solicitous of the interests of third parties and independent candidacies, much more so than the Supreme Court has been.

The phenomenon of symbolic conduct raises constitutional questions of a high order of difficulty. Some forms of nonverbal communication—the wearing of a black armband, a hunger strike, a picket line—can have an impact more powerful than any that could be achieved by words. Yet precisely because they transcend the medium of language, symbolic communications cannot be answered in kind and often carry connotations of nonrational force, even latent violence. The Supreme Court's decisions regarding symbolic conduct have been spectacularly muddled,³⁷⁹ in part, I believe, because the Justices have not resolved

375. *Mills v. Alabama*, 384 U.S. 214 (1966).

376. See text at note 266 *supra*.

377. See *Williams v. Rhodes*, 393 U.S. 23 (1968); *Jenness v. Fortson*, 403 U.S. 431 (1971); *American Party of Tex. v. White*, 415 U.S. 767 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Lippitt v. Cipollone*, 404 U.S. 1032 (1972).

378. See pp. 625, 629 *supra*.

379. *United States v. O'Brien*, 391 U.S. 367 (1968); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Street v. New York*, 394 U.S. 576 (1969); *Smith v. Goguen*, 415 U.S. 566 (1974); *Spence v. Washington*, 418 U.S. 405 (1974). In his casebook, Gunther devotes a subsection to the questions of judicial competence and role raised by the Court's inept performance in this area. See *O'Brien-Tinker-Street as the Culmination of 50 Years of Free Speech Litigation: Some Anxious Thoughts about Unstable Doctrines and Uneven Results on the Warren Court*, in Gerald Gunther, *Cases and Materials in Constitutional Law* 1251-53 (9th ed. Mineola, N.Y.: Foundation Press, 1975). See also John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975).

their own deep ambivalences about the role of the nonrational appeal in our system of political decision-making.

I think the checking value gives much support to the claim that symbolic conduct deserves a high degree of constitutional protection—more support than is provided by any of the other primary First Amendment values. The checking process depends on the continuing capability of a populace generally inattentive of public affairs, engaged almost exclusively in the pursuit of private satisfaction, to be mobilized to resist government officials who are abusing their power. The kind of stimulus necessary to activate the political conscience of a privately oriented populace sometimes can be created only by transcending rationality and appealing to more primitive, more basic instincts. In this vein, the communication achieved by the wave of draft-card burnings at the height of the United States involvement in Vietnam represents a paradigm example of the "speech" with which the First Amendment is concerned. This is not to say that such speech must be absolutely protected, but the flimsy regulatory interests invoked in *United States v. O'Brien* certainly should not have been considered sufficient to justify the prohibition of draft-card burning.

The checking value does not help one much in deciding what forms of symbolic conduct should qualify for First Amendment protection—whether, for example, the conduct must be stylized, traditional, nondisruptive, associated in the public mind with a fairly specific message, or distinctive in other ways.³⁸⁰ I do believe, however, that a proponent of the checking value should be particularly solicitous of conduct that attacks the government's own symbols—for example, the burning or defacing of the American flag—because historically the manipulation of patriotic symbols has been one important way by which tyrannical and abusive governments have overwhelmed their critics.

One form of "symbolic conduct" which is seldom considered under that rubric is the mass demonstration. Without much analysis, the Supreme Court has come to treat the gathering of large numbers of people in a public place as a form of "speech plus" which is entitled to an intermediate level of First Amendment protection.³⁸¹ The Court has decided a few cases concerning what areas are appropriate for such

380. For a thoughtful consideration of these questions see Note, *Symbolic Conduct*, 68 Colum. L. Rev. 1091 (1968).

381. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 23-25.

gatherings and what kinds of prior arrangements must be made,³⁸² but its opinions give little indication whether the claim to hold a mass demonstration is weighty enough to prevail in the face of substantial regulatory concerns such as traffic congestion or the fear of violence from hostile onlookers.³⁸³

I think a proponent of the checking value should treat the mass demonstration as a preferred form of speech, important enough to justify the imposition on society of substantial costs in order to accommodate the activity. Just as with other forms of symbolic conduct, the mass demonstration can have an important emotional impact, on participants as well as observers. In addition, such gatherings often attract media coverage, and may in fact be the only way that new grievances can achieve a wide hearing. Under the checking value, this consideration is highly relevant in determining what speech value is to be ascribed to a particular form of communication. I do not suggest that demonstrators are constitutionally entitled to commandeer major thoroughfares at rush hour or impose other social costs of that order. I do think, however, that competing uses must sometimes be subordinated to the claims of persons who wish to congregate *en masse* for communicative purposes, and that, if necessary, substantial law-enforcement resources must be deployed to protect protesters from hostile onlookers.³⁸⁴

The checking value also has implications for the so-called captive-audience question, which can arise with relation to mass demonstrations as well as many other forms of speech. The key issue here is whether the First Amendment ever entitles a speaker to communicate in a place or manner that makes it difficult for uninterested persons to avoid the message. The Supreme Court has been extremely solicitous of the privacy of persons who wish not to be confronted with protest speech. The Justices have, for example, upheld the exclusion of political advertisements from municipal buses³⁸⁵ and the exclusion of protestors from privately owned shopping centers.³⁸⁶ In addition, one reason given by

382. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Adderley v. Florida*, 385 U.S. 39 (1966); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). See generally Vincent Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1482 (1970).

383. On the hostile-audience problem generally, see Note, *Hostile-Audience Confrontations: Police Conduct and First Amendment Rights*, 75 Mich. L. Rev. 180 (1976).

384. I have developed my views on this point in some detail. See Blasi, *supra* note 382, at 1485-1503, 1510-15.

385. *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). Compare *Cohen v. California*, 403 U.S. 15 (1971); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

386. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 96 S. Ct. 1029 (1976).

Chief Justice Burger for rejecting the access claims in *Democratic National Committee* was that viewers might be unexpectedly confronted with points of view distasteful to them.³⁸⁷

The checking value can help one to think about the captive-audience question, but proponents of the value might well take different positions on the question. On the one hand, the checking value is based in part on the premise that in the normal course of events people who do not derive private satisfaction from political involvement should not have to take much interest in political affairs; the privacy claims of the politically apathetic are to be respected. On the other hand, there are occasions when political involvement is a civic duty, when the public must be roused willy-nilly from its civic slumber. The "capturing" of audiences by protesters may be one way in which this awakening can be facilitated. I conclude that the checking value offers a small amount of support for the First Amendment claims of speakers who seek to reach uninterested listeners, but I can understand how a proponent of the checking value might disagree.

One of the great bulwarks against totalitarianism is an open educational system, substantially independent of state control and devoted to developing in future citizens a critical attitude toward government. A proponent of the checking value thus should pay special attention to regulations of speech that concern schools. Such regulations fall into several categories. Speech by students, whether it be wearing a black armband in class³⁸⁸ or publishing an uncensored student newspaper,³⁸⁹ should be accorded a high level of protection. Only specific and pressing regulatory interests should suffice to justify limitations on student speech; vague justifications based on notions of paternalism should be considered unacceptable. In addition, dissenting speech by individual teachers should receive considerable protection,³⁹⁰ and attempts by school boards to purge politically offensive books from school libraries and from assigned reading lists should be held unconstitutional without exception.³⁹¹

387. 412 U.S. at 127-28.

388. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

389. See, e.g., *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970).

390. See, e.g., *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972); *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973).

391. For a comprehensive analysis that reaches a different conclusion, see Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293 (1976).

The concept of academic freedom has had a checkered career in the Supreme Court.³⁹² If the checking value were to become a major element in First Amendment theory, academia might be accorded a special constitutional role much like that of the press. There would then be nothing paradoxical about claims of autonomy by universities which have rejected the monastery model and become deeply involved in public affairs. Such claims of autonomy might prevail over government efforts to prohibit or prescribe the teaching of certain subjects or the use of certain books,³⁹³ to force academic researchers to testify about information they acquired in confidence,³⁹⁴ to require loyalty oaths and conventional beliefs from professors,³⁹⁵ to ban unorthodox speakers from campus,³⁹⁶ and to prevent dissident groups from establishing local student chapters.³⁹⁷

A depoliticized military is a hallmark of free government, yet some of the most dangerous abuses of official power are perpetrated by the armed forces. The Supreme Court has looked favorably upon the efforts of military authorities to restrict political discourse within their midst, holding that leaflets and rallies can be banned from military bases³⁹⁸ and that a soldier can be disciplined for expressing antiwar views while addressing recruits in an official capacity.³⁹⁹

I think the checking value compels a rejection of all arguments for regulation of speech which are based on the need to instill in troops an unquestioning belief in current military goals, to avoid political antagonisms within fighting units, to keep servicemen free from ideological distractions, and the like. If abuses of power by the military are to be checked, it is extremely important that individual servicemen retain their moral compasses and stand ready to blow the whistle on atrocities such as those that took place at My Lai.⁴⁰⁰ Moreover, diverse and heretical speech may actually serve the goal of a depoliticized military. Members of the armed forces will never be totally apolitical; the most

392. See generally Emerson, *supra* note 284, at 593-626.

393. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Epperson v. Arkansas*, 393 U.S. 97 (1968). See also Harry Kalven, Jr., A Commemorative Case Note: *Scopes v. State*, 27 U. Chi. L. Rev. 505 (1960).

394. See Vincent Blasi, *The Newsman's Privilege and the Researcher's Privilege: Some Comparisons*, in Paul Nejelski, ed., *Social Research in Conflict with Law and Ethics* 155 (Cambridge, Mass.: Ballinger Publishing Co., 1976).

395. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

396. See *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969).

397. *Healy v. James*, 408 U.S. 169 (1972).

398. *Greer v. Spock*, 424 U.S. 828 (1976).

399. *Parker v. Levy*, 417 U.S. 733 (1974).

400. See Joseph Goldstein, Burke Marshall, & Jack Schwartz, *The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?* (New York: Free Press, 1976).

one can hope for is that service personnel will not be so politically united and motivated that they are tempted to employ military force to promote goals of their own choosing. The more open, well-informed, and sophisticated the political discourse within the military, the more truly "depoliticized" the armed forces are likely to be. I conclude, therefore, that efforts to immunize servicemen from criticism of national policy cannot be countenanced under an interpretation of the First Amendment which is based in significant part on the checking value. On the other hand, regulations of the time, manner, and place of speech which are well-grounded in the need to prevent interference with actual military operations, including training exercises, should pose no problem under the checking value. Viewed in light of these principles, the Supreme Court's recent decisions in *Parker v. Levy*⁴⁰¹ and *Greer v. Spock*⁴⁰² cannot be justified.

At present, the United States does not have an "official secrets" act imposing criminal punishment for the unauthorized publication of confidential government information.⁴⁰³ But a controversial provision of the proposed general revision of the federal criminal code that was introduced in the Ninety-fourth Congress would have instituted such criminal liability.⁴⁰⁴ Can an official secrets act be upheld under the First Amendment? The Supreme Court's decision in *New York Times Co. v. United States* did not resolve the issue, because the government's claim to suppress the *Pentagon Papers* was complicated by the fact that it sought a prior restraint (an injunction) and did so on the basis of implied executive power rather than statutory authorization.⁴⁰⁵

A complete prohibition on the publication of anything the government stamps "classified" should be considered unconstitutional under the checking value. The unauthorized dissemination of confidential material can be an important phenomenon in the process of discovering and checking abuses of power by governmental officials. Indeed, one wonders whether the concept of limited government would retain any meaning if news organizations invariably respected classification decisions. The speech value of unauthorized disclosures of classified

401. 417 U.S. 733 (1974).

402. 424 U.S. 828 (1976).

403. Although there is no *general* crime of unauthorized disclosure, there are several provisions of the federal criminal code that punish disclosures of certain kinds of specialized information made with the intent to injure the United States. For an exhaustive discussion of these provisions, see Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929 (1973).

404. S. 1, 94th Cong., 1st Sess., sec. 1124 (1975).

405. See generally Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311 (1974).

information is so high in terms of the checking value that any restraints on publication should have to be justified by regulatory interests of unusual clarity and magnitude. I do not think, however, that the checking value supports a conception of journalistic autonomy that would totally preclude government from punishing news organizations for publishing classified material. I would uphold an official secrets act which provided that classification decisions had to be made carefully in the first instance and had to be periodically reviewed, and that criminal sanctions could be imposed only upon detailed proof that the disclosure of classified information in fact caused serious harm to the government's ability to implement a legitimate and authorized policy. Undoubtedly, other proponents of the checking value would insist upon greater constitutional protection for persons who disclose classified information relating to the conduct of public officials.

Lately, there has been much concern about the concentration of power in the hands of a small number of media organizations.⁴⁰⁶ Reform proposals include the prohibition of ownership of a broadcast outlet by a newspaper serving the same area and stricter antitrust doctrines against the acquisition of local outlets by national media chains.⁴⁰⁷ These proposals do not conflict with the checking value so long as they are fashioned with specificity and implemented with a minimum of discretionary exceptions. It is true that in the short run economic concentration might alleviate some of the financial pressures that keep news organizations from undertaking expensive investigative reporting. One might also argue that journalistic autonomy is infringed when government seeks to control the economic structure of the mass-communications industry. On the other hand, as news organizations become mere cogs in the wheels of vast conglomerates, some of the spirit of autonomy, of devotion to the ideals of a craft, seems likely to suffer in the process. Moreover, the local oligarchy problem is particularly worrisome when an influential newspaper publisher also controls a major broadcast outlet. In addition, newspapers that own broadcast outlets are vulnerable to unfavorable exercises of FCC discretion⁴⁰⁸ in retaliation for stories critical of government. I conclude that policies

406. See generally Schmidt, *supra* note 283, at 37-54; Owen, *supra* note 101.

407. See, e.g., Reporters' Committee For Freedom of the Press, *Press Censorship Newsletter* No. 9, Apr.-May 1976, at 124-26, 129-31.

408. Note the discussions within the Nixon administration about such retaliation against the *Washington Post* for its Watergate coverage. The *Post* owns several broadcast stations. See J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* 273-74 (New York: Viking Press, 1976).

designed to promote a certain economic structure in the mass-communications industry are not unconstitutional so long as the regulations are as free as possible from the taint of vagueness. The worst of all worlds is the one we have: regulations of market structure are so amorphous that they invite discriminatory implementation, a situation guaranteed to make news organizations hesitant to incur the wrath of high government officials. The checking value adds considerable force to constitutional objections based on the uncertainty of the present regulatory standards regarding media concentration.

Alexander Meiklejohn regarded paid political lobbying as a form of expression outside the ambit of First Amendment protection.⁴⁰⁹ The Supreme Court has upheld provisions requiring lobbyists to register and disclose their expenditures and sources of income.⁴¹⁰ Recently, there has been talk in Congress of strengthening these proposals.⁴¹¹ How does the checking value affect the First Amendment claims of paid political lobbyists? On the one hand, lobbyists can serve as conveyors of bribes. More subtly, by perfectly legal importunings lobbyists can distort the governmental decision-making process to the advantage of those wealthy enough to afford such direct input at the seat of government. On the other hand, a lobbyist can also serve as a watchdog against any abuses of official power which disadvantage his clients. I conclude that the imposition of strict financial disclosure requirements on lobbyists is consistent with the checking value. Lobbyists play enough of a part in the checking process, however, that I would strike down a total prohibition on the payment of persons for services rendered in communicating directly to representatives and would also read the First Amendment to protect some of the propagandizing efforts of lobbyists, such as campaigns to stimulate constituent letters to congressmen.

One of the more troublesome lines of recent First Amendment precedent concerns the claim that freedom of speech includes the right to advise people on how they can secure effective legal representation.⁴¹² Traditional bar canons forbidding solicitation and advertising by lawyers severely restrict the flow of information regarding the

409. Meiklejohn, *supra* note 84, at 37.

410. *United States v. Harriss*, 347 U.S. 612 (1954).

411. See Time Ran out for Lobby Revision Bill, 32 Cong. Q. Almanac 477-86 (1976).

412. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transportation Union v. State Bar of Mich., 401 U.S. 576 (1971); Bates v. State Bar of Ariz., 45 U.S.L.W. 4895.

availability of legal services. The Supreme Court has been highly receptive to First Amendment challenges in this area, but has not produced much in the way of a rationale for its holdings. The Court seems to have gotten caught up in an uncontrollable logic of expansion, extending doctrines originally conceived to protect the plaintiff-recruitment activities of the NAACP in school-desegregation cases to cover lawyer-referral plans established by labor unions and commercial advertising by general practitioners.

Since recourse to the courts is one way that victims of official misconduct may put a halt to improper government practices, a proponent of the checking value should look favorably on the contention that the First Amendment protects communication designed to "stir up" litigation. But this argument applies only to litigation against the government or its officials. Lawsuits against private parties are not part of the checking process, even though the judicial branch of government is charged with the responsibility to resolve such disputes. Thus, I think the checking value might supply a rationale whereby the Court could protect solicitation to litigation of the sort engaged in by the NAACP without having to extend the mantle of constitutional protection to a wide range of promotional activities by lawyers seeking to represent private interests. Under this line of reasoning, the cases in which the Court struck down bar restrictions on lawyer-referral arrangements and commercial advertising could have been decided differently.

One of the important general implications of the checking value is a shift of emphasis toward the recognition of First Amendment claims that relate to the acquisition and dissemination of information as contrasted with claims to engage in advocacy. Nevertheless, judicial doctrines delineating the limits of subversive advocacy might also be affected if the checking value were to assume a prominent place in First Amendment thought. It seems appropriate to conclude this survey of possible implications with a brief consideration of how a commitment to the checking value might affect the regulation of subversive advocacy, traditionally the cornerstone issue in free-speech analysis.

A nagging paradox of First Amendment theory is that speech advocating crime or revolution is protected only so long as it is ineffective; this is what the clear-and-present-danger test is all about. The more eloquent the speaker, the more forceful his points, the better his sense of the audience, the less First Amendment protection he receives. Justice Brandeis tried to justify this paradox by arguing that speech that presents an "imminent" danger cannot be rebutted and hence can be suppressed consistent with a commitment to the marketplace of

ideas.⁴¹³ But it is not as though the idea that one should obey the law or refrain from taking up arms against the state can never have occurred to a subversive advocate's audience. In a real sense, the advocate's argument already will have been rebutted thousands of times in the lives of his listeners.

The checking value supports the protection of speech on the basis of the supposed effectiveness, not the supposed futility, of communication. Under this approach, the limits on permissible speech derive not from assessments of ineffectiveness but rather from notions, based on democratic theory, concerning what forms and degrees of opposition to itself a government must countenance in order to maintain its claim to authority. My thoughts on this central question of political philosophy are for the most part embryonic and untutored. I do believe, however, that critics of government should have a right to "incite" others to nonviolent, open civil disobedience. A society that abides by the principle of limited government need not abstain from punishing civil disobedients, but such a society must, I think, preserve a climate in which citizens can seriously consider the option to engage in civil disobedience as a means of combatting abuses of official power. Whether or not a proponent of the checking value agrees with this conclusion, the degree of protection he favors for subversive advocacy should turn on his views regarding what forms of opposition a free government must allow to incubate, even if not to flourish. Simply casting the issue in these terms represents a major change from the way the subversive-advocacy question has been considered under the autonomy, diversity, and self-government values.

VIII. CONCLUSION

To become a vital part of the living Constitution, a value must have more than a strong historical and analytical foundation. The value must also succeed at the level of rhetoric; it must have its great quote. The diversity value might never have loomed so large in First Amendment theory were it not for Holmes's stirring dictum in *Abrams v. United States* on the theme that "all life is an experiment."⁴¹⁴ Similarly, the self-government value owes its contemporary ascendancy in part to Professor Kalven's dramatization of the Court's allusion in

413. See *Whitney v. California*, 274 U.S. 357, 377 (1927).

414. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

New York Times v. Sullivan to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁴¹⁵

The checking value has been explicitly invoked by the Justices only infrequently, but one of those occasions deserves to be remembered. Appropriately, the last opinion Hugo Black ever wrote was on the subject of the First Amendment, and in that opinion he gave the checking value its finest expression. The acceptance of my thesis in this article may be measured by the degree to which these words from the Black opinion in *New York Times Co. v. United States* come to occupy a prominent position in our constitutional rhetoric:

The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.⁴¹⁶

415. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). See Harry Kalven, Jr., "Uninhibited, Robust, and Wide-Open": A Note on Free Speech and the Warren Court, 67 Mich. L. Rev. 289 (1968).

416. *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971). In this passage, I take Justice Black to be articulating a philosophy of the First Amendment which is applicable not only to the freedom of the press but also to the freedoms of speech and assembly. Although the checking value supports the contention that the professional press is entitled to some protections not available to lay speakers, many other considerations bear on the question whether the press clause of the First Amendment should be interpreted independently of the speech and assembly clauses. Thus, in their lively and illuminating exchange on this question, Professors Nimmer and Lange make virtually no reference to the checking value. See Melville B. Nimmer, Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech? 26 Hastings L.J. 639 (1975); David Lange, The Speech and Press Clauses, 23 U.C.L.A.L. Rev. 77 (1975); Melville B. Nimmer, Speech and Press: A Brief Reply, 23 U.C.L.A.L. Rev. 120 (1975). Conversely, the checking value has many implications for First Amendment interpretation which have nothing to do with the professional press or with the interrelationship among the three clauses that guarantee freedom of expression.