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The Logic of the First Amendment

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Abstract

We develop a framework that is applicable to all freedom of expression disputes. Our framework is based on the meaning of freedom which is based on the meaning of scarcity, and which, in turn, is based on the existence of physical incompatibilities. To maximize freedom, one must differentiate between scarce and non-scarce rights. Scarce rights can not be granted to everyone because of natural limitations caused by physical incompatibilities. If one person burns a tree for warmth, another cannot use the tree to build a house. Conflicts caused by such physical incompatibilities are resolved peacefully by giving exclusionary rights in the physical use of the tree to a single, private party. These are scarce rights because more than one person cannot use the tree when there are physical incompatibilities. Non-scarce rights, in contrast, can be granted to everyone. The contents of ones speech, for example, in no way limits what other people can say or do. To maximize freedom, each scarce right must be assigned to some individual person, and all non-scarce rights should be assigned to everyone. We use this framework to provide an integrated and consistent analysis of prominent Supreme Court rulings on free speech issues including public access to government and private property, symbolic speech (including flag burning), libel, and obscenity.

Keywords: Freedom, First Amendment, property rights, externality, physical incompatibility, scarce rights, non-scarce rights, constitutional law

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Unable to interpret the first Amendment in a consistent fashion, constitutional law scholars and the Supreme Court have segregated freedom of expression cases into a dozen or so categories with each category analyzed according to its own principles. Thus, obscenity is analyzed differently from, say, subversive speech; First Amendment claims of students demanding access to a private shopping center are analyzed differently from First Amendment claims by a flag burner.

The paucity of principles that apply across the many categories of First Amendment analysis, principles that apply to all cases involving human expression, is troubling because the founding fathers seemed to mandate a simple yet consistent treatment of all human expression:

Congress shall make no law ...
abridging the freedom of speech.

The paucity of First Amendment principles is also troubling because the compartmentalization of disputes leads to complicated and anomalous results. Consider the Court's decision this past term in *Greater New Orleans Broadcasting v. United States*, 1999 U.S. Lexis 4010 (1999). In this case the Court ruled that a federal ban on certain gambling

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*** Dean Emeritus, Simon School of Business, University of Rochester. Our good friend Bill Meckling passed away on May 15, 1998. Bill was a profound thinker who influenced many, including both of us. He is deeply missed, but his ideas will live as long as people are interested in economics and organizations. We dedicate this paper to his memory.

advertisements violated the First Amendment. The Court starts by placing the dispute into one of the many categories that it has established to decide freedom of speech cases, commercial speech. Next, it quotes a four-part test from an earlier commercial speech decision, *Central Hudson Gas & Electric Corp v. Public Serv. Comm'n of N.Y.* 447 U.S. 557 (1980). The test is not for the faint hearted: "The four parts of the *Central Hudson* test are not only entirely discrete. All are important and, to a certain extent, interrelated: Each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Id.* Finally, the Court applies this test and invalidates the restrictions on gambling advertising.¹

Yet, in an earlier case the Court had ruled that it was not a violation of the First Amendment for the government to require television and radio stations to provide free reply time to an individual who has been verbally attacked in a broadcast.² But in another earlier case, the Court held that it was a violation of the First Amendment for the government to require newspapers to provide free reply space to political candidates who were editorially attacked.³ Neither case was even cited by any of the justices in *Greater New Orleans*. Apparently, these earlier decisions fit into other First Amendment categories and thus had no relevance to the dispute at hand.

Such contradictions are not abnormalities in the First Amendment arena. They are the norm, both among the Court and among commentators. For example, Professor Archibald Cox in an influential article argues for treating classified ads under the First Amendment differently from editorial columns in the same newspaper.⁴ Meanwhile, the Supreme Court would grant First Amendment protection to a young man who walks on the public streets with a jacket that says "Fuck the Draft," yet at the same time allow the FCC to prohibit a radio monologue by a

¹ For an analysis of the Court's rulings in the area of commercial speech, including the *Central Hudson* case, see Henry N. Butler and Larry E. Ribstein, Corporate Governance Speech and the First Amendment, 43 Kansas Law Review 163 (1994).

² *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

³ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁴ Archibald Cox, The Supreme Court 1979 Term Forward: Freedom of Expression in the Burger Court, 94 Harvard Law Review 1 (1980).

prominent comedian that employs similar vulgarities. Advertisements appearing on television for soap must satisfy high standards for accuracy, yet advertisements for political candidates appearing on the same television show are immune from regulation, even when they contain blatant falsehoods.

In this paper we develop a framework that is applicable to all First Amendment disputes. Our framework is based on the meaning of freedom which, in turn, is based on the meaning of scarcity. This approach differs from the existing First Amendment literature in two fundamental respects.

First, we define freedom. One would think that definitions of freedom, which is generally recognized as the pivotal word in the First Amendment, would abound in the literature. One would think that the widely differing proposals in this area would emanate at least in part from different definitions of freedom. Such is not the case. In fact, in the enormous First Amendment literature it is difficult even to find a definition of freedom.

A case in point is Cass Sunstein's (1995) widely acclaimed book "Democracy and the Problem of Free Speech". In a 300 plus page book, Sunstein spends one paragraph (the first in the book) telling us that the phrase "freedom of speech is ambiguous." He then goes on to state (p. xv) that "insistence on the text [of the Amendment] is basically unhelpful, even fraudulent." If one does not use the text as a basis for interpretation, the one reasonable alternative would seem to be historical. What did the founding fathers mean by freedom of speech? Sunstein, however, like most constitutional scholars, rejects this originalism approach as well.⁵ Where is the anchor to reality? What prevents a First Amendment analysis from becoming a statement of the likes and dislikes of a particular author?

The second fundamental difference between our analysis and the existing literature is that we do not compartmentalize the First Amendment. We offer a logically consistent and coherent framework across the totality of First Amendment disputes. We caution, however, that although our framework applies to all First Amendment disputes, we are not proposing that our

⁵ Originalism is seldom dispositive with respect to the First Amendment. See Richard Posner, 1986, *Free Speech in an Economic Perspective*, 20 *Suffolk U. L. Rev.*

framework alone should decide all such disputes. Only if one views freedom as an absolute, and we think few people so view it, should our framework alone decide all First Amendment cases. We do maintain, however, that our framework should be a major consideration in all First Amendment cases because it is consistent with the wording and underlying logic of the First Amendment.

The paper is organized as follows. In Section I we define freedom of speech and discuss its relation to scarcity. Here we also discuss the distinctions between scarce and non-scarce rights and between physical effects and value effects, which are central to this paper. In Section II we analyze a series of Supreme Court cases in which the central question is whether freedom of speech requires that individuals be assigned rights to use specific resources which enhance their ability to express their views. Section III briefly analyzes symbolic speech. In Section IV we discuss freedom of speech and the right to use devices such as amplifiers to communicate with wider audiences. Section V addresses the issue of control over the content of expression by analyzing libel and obscenity. A brief conclusion follows.

I. Scarcity and Freedom

The contradictions and the compartmentalization that characterize First Amendment law seem largely to be a consequence of the Supreme Court's vacillation about the meaning of the word "freedom" in the phrase "freedom of speech," rather than about what constitutes speech. It is true that the Court has afforded different treatments to different forms of expression (for example, newspapers versus broadcasting), but that is usually not because one form of expression is deemed to be speech while the other is not. Over the years the word "speech" has come to encompass visual and oral expressions of virtually any sort, which seems a reasonable interpretation of the founding fathers' intention.

The challenge of the First Amendment thus centers on defining "freedom." This is why (as discussed earlier) it is surprising that so few First Amendment scholars have defined freedom. Scholars in other areas, however, have devoted considerable attention over the years to defining

freedom. Nevertheless, we propose to advance a definition of freedom that has not heretofore been carefully explicated, even though we believe it is what many people have in mind when they use that term and what economists have in mind when they talk about costs.⁶ Most importantly, our definition of freedom is the foundation for a logical framework for addressing all First Amendment disputes. Our definition of freedom is that developed in Michael C. Jensen's forthcoming book, *Freedom, Capitalism and Human Behavior*.⁷

The central problem faced in defining freedom is how to deal with the dilemma that arises because one individual's freedom is often another individual's constraint. If I have the right to say what I like, you must be denied the right to prevent me from saying what I like. Is freedom thus a zero-sum game? If granting freedom also means imposing constraints, how can we say what is more freedom and what is less freedom? Isn't it all simply a matter of robbing Peter to pay Paul? Some noted scholars take this position, but we emphatically disagree. For an example of a proponent of the zero-sum game definition of freedom, see Arthur M. Okun, *Equality and Efficiency: The Big Tradeoff* (The Brookings Institution, 1975). For a discussion of other definitions of freedom that we also believe to be erroneous, see Michael C. Jensen (forthcoming).

To answer such questions we begin by identifying two distinct classes of rights—*non-scarce* rights and *scarce* rights. The difference between non-scarce and scarce rights is central to this paper. We then specify two conditions that must be met in the assignment of rights in order for freedom of speech to be maximized. Rights, of course, are the essence of freedom. When we write that someone has the right to do something, we mean that the police powers of the state will be used to support the individual's opportunity to take the specified action

One class of rights is limitless and can be granted to all individuals—limitless in the sense

⁶ The academic literature on the First Amendment is voluminous. Articles by economists addressing the First Amendment include Ronald Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 *Am. Econ. Rev. Proc.* 384 (1974); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *Suffolk U. L. Rev.* 1 (1986); Richard Epstein, *Property, Speech, and the Politics of Distrust*, 59 *U. Chi. L. Rev.* 41 (1992); Matthew Spitzer, *The Economics of Freedom of Expression*, *New Palgrave Dictionary of Economics and the Law* (1998).

⁷ Michael C. Jensen, *Freedom, Capitalism and Human Behavior*, forthcoming, Free Press.

that granting a right to one person in no way precludes the opportunity to grant the same right to other people. We call these non-scarce rights. Examples include the right to adhere to whatever religious convictions one chooses (freedom of religion), and an individual's right to transfer his or her rights to others (freedom of exchange). Everyone can be granted the right to transfer rights which they have to others. Everyone can be granted the right to hold whatever religious (or other) beliefs he or she chooses. All these rights can be granted to everyone without affecting the freedom of exchange or religion of anyone. In other words, the assignment of these rights need not limit the opportunity set of other individuals.

The second class of rights available for assignment to individuals is inherently limited. We call these scarce rights. The limitations that make these rights scarce are imposed by physical facts. Some actions that individuals take have physical consequences that forestall other actions. Two individuals cannot eat the same slice of bread. The same piece of steel cannot be embodied in two different automobiles. Two individuals cannot simultaneously stand or sit on the same spot at the same time. Although two individuals can be given the right to say what they want, if they speak simultaneously in the same room at the same time the sound waves they create will interfere in the ear of a listener and the quality of the sound will decline. Nature, in short, imposes a set of constraints that simply can not be avoided.

It is this physical incompatibility among alternative actions that lies at the heart of the economists' notion of scarcity. Scarcity, in turn, lies at the heart of what economists mean by opportunity cost or simply cost.⁸ When a scarce right is exercised, alternative actions that might have been taken are physically eliminated from the opportunity set both for the person exercising the right and for all other individuals.⁹ In other words, when a scarce right is exercised there is a cost. When no choice has been eliminated, there is by definition no cost.

Physical incompatibility among actions creates a social problem. Some means must be

⁸ Armen Alchian, Cost, *International Encyclopedia of the Social Sciences* (1968).

⁹ As we learn more about physical relationships, these physical constraints are modified; the opportunity set is expanded by altering its boundaries. Nevertheless, at every point in time there is a boundary.

found for resolving the question of which among many incompatible actions will be taken. A central feature of what we call societies is the evolution of institutions for resolving the conflicts caused by physical incompatibilities. In the end, some social institution, which in modern societies is primarily the law, assigns the right to choose actions over specific objects to specific individuals or groups. Society sanctions the use of the police powers of the state to enable individuals to exercise the rights assigned to them. Doing so, of course, means limiting (if need be by the police powers of the state) the actions of other individuals. If I have the right to erect a house on Blackacre, everyone else must be denied the right to erect a house on the same property.

Some readers may ask, why not assign scarce rights to all individuals? Why allow some people but not others to use a given asset? If everyone is assigned the right to use a scarce resource, ultimately the resource will be destroyed. This is the tragedy of the commons.¹⁰ Such unrestricted access, of course, would eventually reduce society's opportunity set and thus, by our definition, diminish freedom. Therefore, some government restrictions are necessary if freedom is to be maximized. Freedom defined without regard to this physical reality would be a useless concept.

Using the distinction between scarce and non-scarce rights, and recognizing the inevitability of constraints in the case of scarce rights, we can define freedom so that it is not a zero-sum game. Freedom is maximized, in other words society's opportunity set will be as large as it can be given our limited resources, when:

1. *All non-scarce rights are assigned to everyone.*
2. *All scarce rights are assigned only to specific individuals or private entities.*

¹⁰ Scott Gordon, The Economics of a Common-Property Resource: The Fishery, 62 J. Pol. Econ. 124 (1954). Efficiency demands that an asset be used to the point where the marginal product of the variable input equals its opportunity cost. The problem with a common access resource is that a variable input will be used to the point where its average product equals its opportunity cost. If such unrestricted access is allowed to continue, eventually the entire value of the asset will be destroyed. For an excellent explanation of this classic common access problem, see Armen A. Alchian and William R. Allen, Exchange & Production: Competition, Coordination, & Control (1983) pp. 163-173.

This definition of freedom will peacefully resolve conflicts of interest among individuals that arises because of the physical incompatibility of actions. Furthermore, this definition is generally consistent with the lay person's understanding of freedom.¹¹ Moreover, our definition is not empty. It enables us to say whether a particular governmental action increases or decreases freedom of speech.

While the two-fold rule we propose for assigning rights will maximize freedom and resolve the conflicts generated by physical incompatibilities among individuals' desired actions, it will not resolve all conflicts among individuals. I can reduce your wealth not only by burning your factory (an obvious physical effect) but also by introducing a superior product at a lower price. The latter is an example of a pure value effect. Such actions that reduce the wealth of other individuals but involve no physical incompatibilities generate conflicts but do not reduce freedom. In addition, they must not be restricted if society is to realize the efficient use of resources—as would certainly be true if the law prevented a competitor from producing and selling a superior product at a lower price.

The difference between physical effects and pure value effects is at the foundation of what economists mean by the difference between externalities and pecuniary externalities. Actions that cause pure value effects do not limit the physical opportunity set of other individuals. A central premise of this paper is that the First Amendment implicitly distinguishes between physical effects and pure value effects. Physical incompatibilities must be resolved if nature's opportunity set is to be passed on to private individuals. Value effects cannot be so limited if nature's full opportunity set is to be passed on.

The distinction between physical effects and value effects seems consistent with the lay person's understanding of freedom. For example, how is freedom increased if everyone is given the right to throw rocks through my windows? Most individuals, we believe, would agree that this is a clear physical incompatibility that must be resolved by assignment of rights and their

¹¹ We also note (although we do not pursue this line of inquiry) that our definition of freedom is generally consistent with some of the writings of the Founding Fathers. See, for example, James Madison, Property, National Gazette (March 27, 1792), reprinted in Robert A. Rutland, et al, editors, The Papers of James Madison 66-68 (University of Virginia Press, 1983).

enforcement by the police powers of the state. On the other hand giving me the right to produce widgets in no way physically affects your opportunity to also produce widgets, even though it may reduce your profits and therefore the value to you of so doing.

This definition of freedom and the definitions of and dichotomy between scarce and non-scarce rights can provide a logically consistent and coherent view of the entire range of First Amendment disputes through a two-part inquiry. First, determine if a physical incompatibility is present. If so, the incompatibility must be resolved by the assignment of the (alienable) right to one party.¹² Other individuals must be prohibited from using the resource. Second, if a physical incompatibility is not present (or it is present and has been resolved according to the above rule), there should be no government restrictions—in particular, there must be no restrictions designed to limit actions that have pure value effects on others. In other words, all citizens should have the right to do anything that creates no physical interferences with others or their property. Adherence to these two simple rules will maximize freedom of speech. Whether one in fact wants to maximize freedom of speech is a normative question which we turn to later in the paper.

II. Does Freedom of Speech Entitle the Speaker to a Forum?

In 1939 the Court began addressing the question of whether the First Amendment gives citizens a right of access to various types of property to express their views. Originally, the Court addressed whether certain types of government property that traditionally have been associated with public expression, notably parks, streets, and open spaces, must be made available to those wishing to express their opinions publicly. Later, the Court addressed whether the First Amendment provides a right of access to a variety of private properties, including shopping centers, television programs, and cable systems.

¹² More precisely, this means that the right must be assigned to a closed class of clearly identifiable individuals. A class is closed when the only way to enter it is to purchase the right from a current class member (owner). By necessity, this means that all other individuals are denied the opportunity to take the action without the permission of the holders of the rights. See Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 *J. Leg. Stud.* 321 (1985).

All of these decisions come down to the same question: Does freedom of speech entitle the speaker to a forum? The Court's decisions on this question have confounded the right of individuals to say *what* they want with the right to say what they want *where* they want to say it. The Court has, in a nutshell, confounded freedom with power.

A. Access to Government Property

In *Edwards v. South Carolina*, 372 U.S. 299 (1963) the Supreme Court reversed the breach-of-peace convictions of 187 civil rights protestors who demonstrated on the state capitol grounds against segregation policies. In addition to the demonstrators, a crowd of approximately 300 onlookers gathered, and 30 police officers were assigned to oversee the protest. In reversing the breach-of-peace convictions, the Court simply characterized the protestors' activities as an exercise of their First Amendment rights "in their most pristine and classic form."¹³ *Id.* at 235. The Court's majority opinion virtually ignored the physical impact of a crowd of approximately 500 persons milling about on the grounds of the state capitol and on surrounding sidewalks and streets.¹⁴

Justice Clark's dissent was more forthright in dealing with the physical impact of the protestors' activities and how the protestors physical presence prevented other citizens from using the public property for its normal and intended uses. He also distinguished government constraints based on the content of protests from government constraints based on the physical incompatibilities that protesting can create (in this case, the message against segregation versus blocking sidewalks and streets).

With respect to the physical incompatibilities caused by the 187 demonstrators, Justice Clark stressed that "South Carolina's courts expressly found [that the 187 demonstrators] had created 'an actual interference with traffic and an imminently threatened disturbance of the peace of the

¹³ The Court failed, however, to articulate what constitutes protected, expressive conduct under the First Amendment.

¹⁴ Justice Stewart's majority opinion notes that there had been some evidence that sidewalks had been blocked intermittently, 372 U.S. 232, nn. 5-6. But the testimony relied on by Justice Clark in his dissent pertaining to the blocking caused by the demonstrators is more persuasive.

community'." *Id.* at 239. In a similar vein he noted that the record below showed that police officers asked the demonstrators to disperse only after "vehicular and pedestrian traffic was materially impeded." *Id.* at 240. After documenting physical effects such as these, Justice Clark reiterated what the Court had held years earlier in *Cantwell v. Connecticut*: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threats to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." *Id.* at 243.

While arguing that the state should arrest persons who insist on blocking public streets and sidewalks, Justice Clark stressed that the First Amendment would prohibit arrests based upon the *content* of the protestants' message: "Certainly the city officials would be constitutionally prohibited from refusing petitioners access to the State House grounds merely because they disagreed with their views." *Id.* at 239.¹⁵

Although Justice Clark dissented in *Edwards*, his distinction between the content of a demonstration and the physical interference created by a demonstration has found favor with the Court in more recent years. The Court now typically applies a two-pronged test in public access cases with government property.¹⁶ First, a regulation must be "content neutral." Access may not be governed by what the speakers or demonstrators plan to say. Second, a regulation must be "narrowly tailored" to meet the government's interest.¹⁷ The regulation, in other words, must make for reasonable accommodations for access given the property's normal use. If these two conditions are satisfied, the regulation is upheld.

¹⁵ But as discussed earlier, Justice Clark cited persuasive evidence from the record below that the convictions were based not upon the content of the message but upon the physical incompatibilities created by such a large gathering in a busy, public place.

¹⁶ *United States v. Grace*, 103 S. Ct. 1702 (1983); *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984); *Frisby v. Schultz*, 108 S. Ct. 2495 (1988).

¹⁷ The Court also inquires if there are alternative means available for communicating the message. Of course, there are always such means available. The question is whether the alternative means are more costly than the contested means.

B. Access to Private Property

In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), ("*Logan Valley*") and *PruneYard Shopping Center v. Robins*, 100 S.Ct. 203 (1980) the Supreme Court extended the public forum concept to embrace privately owned property. In both cases individuals sought access to private shopping centers to protest. In *Logan Valley* they were protesting the decision of the shopping center owner to employ non-union help; in *PruneYard* they were protesting United Nations' policies. Both shopping centers had clearly announced policies prohibiting demonstrations of any type. In both cases, the Court ruled that the First Amendment required that the owners of the shopping centers accommodate the protesters, a clear reduction in freedom in our framework. (We delay our analysis of the access to private property cases to section C which follows immediately.)

In 1969 the Court addressed whether citizens had a First Amendment right of access to privately owned media. In *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) the Court upheld a FCC ruling requiring free reply time to an individual who had been "attacked" in a broadcast. The Court ruled that because of the limitation in the number of available frequencies, Congress and the FCC may impose "fiduciary" duties on the licensee "with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the air waves. ...Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 389-390. The Court further stated that the fiduciary obligations that may be constitutionally imposed are those that are consistent with the public's right "to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* Again, this is a clear reduction of freedom in our framework.

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court unanimously invalidated a Florida right to reply statute applicable to newspapers as a violation of the First Amendment guarantee of freedom of the press. The Florida statute in dispute required that any editorial attack upon a candidate for public office must entail free reply space to the editorial on

the part of the attacked candidate. The Court struck down the statute on three grounds. First, it noted that enforcement of a right to reply would impose costs on newspapers that they would not otherwise have to incur. These costs were identified as those involved in expanding the size of the newspaper or in omitting content that might be otherwise printed. Second, the Court noted that if a newspaper publisher is forced to provide free space to those opposing his published views, the increase in costs might lead the editor to avoid controversial issues.¹⁸ Finally, the Court saw the law as an impermissible intrusion into news editorializing. In this case, the Court increased freedom as we define it.

C. Access and Freedom

The public forum and must-carry cases illustrate how the Court has compartmentalized the First Amendment. Access to a park is seen to be fundamentally different from access to a newspaper. Access to a shopping center is seen to have little connection with access to a television station. In fact, all of these cases involve the same fundamental question: Does ensuring freedom of speech require that individuals be assigned rights to use physical objects—scarce rights—simply because such assignments would enrich their ability to express themselves?

Our definition of freedom implies that everyone should be given the right to say whatever they please. What individuals say, the content of a message, is a non-scarce right, and no one is to be denied a non-scarce right if freedom is to be maximized. What I may say, or what I actually say in no way limits what you can say. Accordingly, it would be a violation of freedom of speech to restrict access on the basis of *what* an individual intends to say, that is, on the content of her expression.

It is one thing to grant liberal rights with respect to what individuals say. It is an entirely different thing to liberally grant individuals' rights to use whatever medium or platform they happen to want for expressing their views. Rights in the kinds of physical objects at issue in

¹⁸ These costs in the newspaper case are simply a reflection of scarcity. Moreover, if increased costs, due to a free reply requirement will turn newspapers away from controversial issues, surely the same will be true of broadcasters.

these cases—broadcast facilities, printing presses, shopping plaza parking lots, government buildings, parks, and highways—are scarce. They can be granted only to some people, not to all people.

The urge to expand the notion of freedom of speech to include the assignment of scarce rights reflects the age-old confusion between the freedom to do something and the power to do it. Freedom as a concept makes little sense if the words "I *am free* to do X" (meaning the law does not deny me the opportunity to do X) are synonymous with the words "I *can* do X" (meaning I have scarce rights that enable me to do X). The contention that state trespass laws violate picketers' First Amendment rights does exactly that. It confuses the *power* to express oneself with the *freedom* to express oneself. And the First Amendment is concerned with freedom, not power. As Justice Black, a staunch supporter of the First Amendment, reasoned in *Logan*:

To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. ... These pickets do have a constitutional right to speak about [the shopping center owner's] refusal to hire union labor, but they do not have a constitutional right to compel [the shopping center owner] to furnish them a place to do so on its property. 391 U.S. 329-30, 332-33.

Access is inherently physical; it inherently involves the exercise of scarce rights. If one group occupies the lobby of a government office building, other citizens are physically precluded from doing likewise. If a local television channel uses a particular cable channel, others are physically unable to use that channel. The right to picket can be granted to certain individuals only by denying others ("owners" of the property) the right to allocate the space occupied by the pickets to patrons.

With any physical incompatibility, some means must be found for resolving the conflict, for deciding which of all possible uses will be realized. The Court can assign scarce rights to some individuals as an ingredient of freedom of speech only by denying scarce rights to other

individuals. The way that the law has traditionally resolved such physical incompatibilities is to assign the right of exclusion to a particular individual. With government property, it is typically a government agency. With private property, it is a private individual. These individuals then decide which among the myriad of technically possible uses for the property will be chosen. When the options of these individuals are not legally constrained, freedom is maximized.

When the government grants access rights to private property, it is doing two things. First, it is reducing freedom by effectively prohibiting a feasible use of the property. Second, it is taking property from the owner. Both points can be illustrated with the Court's cases on access to shopping centers.

The assignment of the right of access to a shopping center to a protestor is an assignment to an open class because anyone can become a protestor without purchasing a right. Although it is technically possible for a shopping center owner to purchase this right from any given protestor (in the form of a contract not to protest), it would be futile to do so because others would become protestors, if for no other reason than to extract a payment from the owner. This openness will, in turn, frustrate any exchange and lead to inalienable rights.¹⁹ Accordingly, even if it were more valuable to have a protest-free shopping center, it would not be possible given the Court's rulings in this area. Society's opportunity set is thus (legally) reduced. This is what we mean by a reduction in freedom.

Guaranteed access to private property also constitutes a taking of property without government compensation. In *Logan Valley* the Court apparently did not realize it was countenancing the taking of private property because the shopping center was "open" to the public. At the same time the Court appeared to recognize that the owner of the shopping center had opened his premises for certain purposes (primarily grocery shopping) while not for other purposes (for example, picketing), and that "[s]uch a power on the part of [the owner of the shopping center] would be, of course, part and parcel of the rights traditionally associated with ownership of private property." *Id.* at 319. Nowhere did the Court address why the owner of the

¹⁹ Holderness (1985, 1989).

shopping center in *Logan Valley* had to adopt an all or nothing posture. That is to say, why did the owner have to open his premises for all conceivable activities or close them to the public for all purposes? One of the key incidents of ownership (and one alluded to by the majority) is that an owner of property can invite people onto his property for some purposes while simultaneously excluding them for other purposes.

Although the Court in *PruneYard* recognized this in the context of guaranteed access to shopping centers, it has failed to recognize that guaranteed access to the media (the “must-carry doctrine”) likewise constitutes taking. Not all property is real property like the shopping centers in *Logan Valley* and *PruneYard*. Granting citizens access to a radio station takes rights away from the station’s owner just as granting citizens access to a shopping center takes rights away from the shopping center’s owner. If the Constitution requires government compensation in one instance, it should require compensation in the other instance.²⁰ Five minutes of broadcast time used for a rebuttal means the station owner cannot use the five minutes for anything else—there is a physical incompatibility.

In some of the must-carry cases, the court has relied on the supposed scarcity of the electromagnetic spectrum to justify guaranteed access. The Court apparently does not see the same scarcity with cable systems, so there is no guaranteed access. This distinction, which has been roundly criticized by scholars, makes little sense. Scarcity is everywhere. Scarcity *means* that actions have physical effects that limit or destroy the opportunity to take other actions. In the case of broadcasting, the emission of energy by one party in a given area at a given time eliminates alternative uses of that frequency at that time within that geographic area. But this in no way distinguishes broadcasting from any other productive activity. Use of a printing press for

²⁰ Whether this eventually turns out to be the case will depend on how the Court’s decisions on compensation for government taking of private property evolve over time. Some have argued that in *City of Monterey v. Del Monte Dunes at Monterey*, 119 S.Ct. 1624 (1999) the Court is beginning to require government compensation for regulations that significantly reduce a landowners options and thus the value of his property. For an analysis of this dispute (written before the Supreme Court issued its decision) and the taking issue, in general, see Philip Weinberg, *Del Monte Dunes v. City of Monterey: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?*, 26 B.C. Env’tl. Aff. L. Rev. 315 (1999).

one purpose eliminates its use for alternative purposes, and the same is true of land or any other physical object. Similarly, use of a cable channel for sports entertainment eliminates its use for a local television station. The "interference" in the broadcast case is precisely the kind of physical effect that we have earlier in this article labeled physical incompatibility

Guaranteed access to government property involves many of the same issues as guaranteed access to private property. Most importantly for our purposes, rights to use government property are as inherently scarce as are rights to use private property. Farm tractors travelling three abreast down Interstate 95 at five miles per hour physically interfere with motorists who wish to travel at higher speeds. Protestors on the grounds of a state capitol prevent other citizens from using the building for more mundane purposes.

Because of this scarcity and because individuals compete for the opportunity to use government property (just as they do with private property), rules have to be established to determine how government property will be used and by whom. For the vast majority of government property, the access rules are indistinguishable from those applicable to private property—there is no right of access.²¹ Thus, citizens have no right of access to the Oval Office or to a military base or to the inner chambers of the Supreme Court. Government officials decide who will have access to such properties.

The one exception that the Court has established over the years is that the public has a right of reasonable access to government property that has historically been available for public protest, such as parks and sidewalks.²² Even with this type of government property, however,

²¹ This does not mean private property and government property are the same thing, but merely that the distinction between the two does not revolve about limitations on use. Owners have alienable claims on the value of private property, and other parties cannot acquire claims unless they are transferred from existing holders. Neither of these conditions hold for government property. For a discussion of the differences between private property and government property, see Clifford G. Holderness, *Joint Ownership and Alienability*, unpublished working paper, Boston College (2000).

²² Justice Roberts mentions only such property in his famous dictum that marks the beginning of the public-forum doctrine: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515-56 (1939).

access is never unrestricted.²³ To do so, would create a common access resource which itself would be a diminution of freedom as it would constrict society's opportunity set.

The principle of content-free regulation of access to government property should not be confused with the belief that the First Amendment requires the government to subsidize expression by making property available for that purpose. Doing so would confuse freedom and power. And there is no obvious reason to conclude that the First Amendment requires government to supply podiums, simply because facilities such as parks and buildings which they operate are in some respects open to the public.

III. Symbolic Speech

Individuals often express their opinions through symbolic behavior rather than through "pure" (verbal) speech, for instance by burning a draft card or by mutilating an American flag. Those involved in symbolic speech are quick to argue that such acts are immune from government regulation because the expressions, albeit partly non-verbal, are constitutionally protected speech. These persons further note that symbolic speech is often used precisely because its communicative impact is more powerful than pure speech. Others argue that the First Amendment has little relevance to and thus cannot shield acts, as opposed to pure speech. For example, how can the Constitution condone a political assassination, a radical bank robbery, or the failure to pay income taxes, even if in each instance the actor is expressing strong personal beliefs. As Justice Fortas asked of counsel during oral argument in a symbolic speech case, "Does the First Amendment permit a person to throw a rock through a window in the White House?"

Symbolic "speech" provides another example of the confusion generated by extending the First Amendment to include rights to use physical objects in the course of expressing oneself. If

²³ As the Court has noted: "We seriously doubt that the First Amendment requires the park service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people." *Clark v. Community for Creative Non-Violence*, 468 U.S. 295 (1984).

one accepts the view that freedom of speech extends only to *what* individuals say, symbolic speech reduces to a question of the assignment of scarce rights in the objects used during the course of the symbolic speech.

A. Draft Card Burning

On the morning of March 31, 1966, to protest the war in Vietnam and the draft, Paul David O'Brien burned his selective service registration certificate on the steps of the South Boston courthouse. For this act Mr. O'Brien was indicted, tried, convicted, and sentenced in U.S. District Court of violating 50 U.S.C. § 462(b), a part of the Universal Military and Service Act, which imposes sanctions against any person "who forges, alters, knowingly destroys, knowingly mutilates, or any manner changes such certificates...." O'Brien argued that this law was unconstitutional because it was enacted to abridge freedom of speech and because it served no legitimate governmental purpose.

The Supreme Court upheld O'Brien's conviction and ruled that the Selective Service provisions against destroying draft cards did not abridge First Amendment protected speech.²⁴ The Court noted "that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." 391 U.S. 376-77 (footnotes omitted). The Court proceeded to balance O'Brien's First Amendment interest against the government's interest and concluded that his conviction for draft card burning did not violate the First Amendment.²⁵

Neither the Court (nor for that matter, any of the dissenting Justices) explicitly analyzed the property interest involved in Mr. O'Brien's "symbolic speech." In particular, was the burned draft card the property of Mr. O'Brien or was it the property of the United States Government? If the card was property of the United States Government, then the decision would appear to be

²⁴ *United States v. O'Brien* 391 U.S. 367 (1968).

²⁵ The authors cannot resist pointing out the resort to teleological language. There is, of course, no such thing as a governmental interest. Only individuals can have interests.

straightforward and consistent with basic civil law: One may not destroy the property of another absent permission or proper compensation for any reason, even if the destroyer wishes to convey a message.

Sometimes private citizens clearly have possession of government property. Perhaps the most obvious and widespread example, and one that is analogous to a draft card, is a passport. An American passport states (in bold printing with all capital letters, no less) that: “This passport is the property of the United States Government.” Ownership of a draft card is not so clear. The Court's description in *O'Brien* of various laws and regulations, however, suggest that it may be government property. Specifically, a 1948 statute limits the transfer, possession, alteration, copying, and counterfeiting of draft cards. Because these restrictions cover many of the incidents of property, a strong argument can be made that Mr. O'Brien's card was in fact the property of the government. If the Court had viewed the case in this manner and had explicitly determined that the card was not Mr. O'Brien's but the government's, then its decision upholding the conviction would be logical and straightforward: One cannot destroy another's property without first acquiring the rights to that property through voluntary exchange. There would have been no need to engage in slippery balancing.

B. Flag Burning

One of the most contentious issues that the Supreme Court has addressed over the past thirty years involves the mutilation, typically burning, of the American flag. In a series of landmark cases, the Supreme Court has invalidated both state and federal laws that prohibit the mutilation of the American flag. These decisions included *Street v. New York*, 394 U.S. 576 (1969), *Spence v. Washington*, 418 U.S. 405 (1974), *Texas v. Johnson*, 491 U.S. 397 (1989), and *U.S. v. Eichman*, 426 U.S. 310 (1990). All of these cases involve essentially the same fact situation. An individual who is upset with a particular government policy protests by publicly stating his opposition to the policy and to reiterate that opposition burns an American flag. Most of these acts have taken place in public places, often on a sidewalk.

The flag mutilation cases, like the draft card burning of *O'Brien*, come down to two simple issues, both of which involve scarce rights.²⁶ First, does the act of mutilation physically affect the property or persons of other citizens? Second, who owns the flag?

When any object is burned on a public sidewalk, be it an American flag or a shirt, the burning object will have physical effects on the public sidewalk and perhaps on nearby buildings and persons. Those issues have already been discussed in this paper with reference to the public access cases. In the flag mutilation cases, the Court found that the protests and the burnings caused no disruption and threatened no violence. What exactly this means, however, is not clear.²⁷ If it means that there were no physical effects to the persons or property of other people, then the cases should have come down to ownership of the flag itself. These are the only scarce rights that were used.

The most explicit discussion of the property rights in the flag came in *Spence v. Washington*, 418 U.S. 405 (1974). To protest the invasion of Cambodia and the killings of the Kent State students, a college student hung his American flag from the window of his apartment building. The flag was upside down and attached to the front and back of the flag was a peace symbol made of removable black tape. The flag and the peace symbol were clearly visible to passersby, but it sparked no disruptions or altercations. 418 U.S. 406. The Court's reversal of the student's conviction of mutilating the flag clearly relied upon the property interest of the student in the flag. As the Court wrote:

A number of factors are important in the instant case. First, this was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property. But this is a different case. *Id.* at 408-9.

²⁶ For an alternative economic analysis of flag burning, see Eric Rasmusen, *The Economics of Desecration: Flag Burning and Related Activities*, 27 *J. Legal Studies* 245 (1998).

²⁷ Typical is the following passage from the Court's decision in *Texas v. Johnson*; "No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning." 491 U.S. 400.

Simply stated, the Court found that the student owned the flag, so he could therefore do with it what he pleased.²⁸ But because he could destroy *his* flag does not mean that he may destroy flags belonging to others. The Court's reasoning and decision in *Spence* are fully consistent with the interpretation our definition of freedom would place on the First Amendment. It implies that individuals have the right to engage in symbolic speech so long as their actions do not violate the physical integrity or the property of others. In other words, people may do things that do not use scarce rights that belong to others. In its two most recent cases on flag mutilation, *Texas v. Johnson*, 491 U.S. 397 (1989), and *U.S. v. Eichman*, 426 U.S. 310 (1990), the Court has inexplicably ignored the ownership issue.

Because of the Court's recent rulings allowing flag burning, some people want to amend the Constitution to prohibit mutilation of the American flag. Such an amendment would do two things. First, it would convert an alienable right into an inalienable right. That is to say, it would deny everyone the right to acquire a scarce right in flags, the right to destroy them. This would reduce freedom because it would reduce citizens' options.

A Constitutional amendment would also create a unique type of property right. We can see this by comparing flag burning with passport burning. Both are symbols of the United States, but they have very different property rights. Given the wording on a passport that it remains the property of the United States government, the government is essentially leasing a passport to a citizen. Many leases prohibit leasees from materially damaging the leased property. Thus, laws prohibiting the mutilation of passports are not unusual from a property-rights perspective.

Flags, however, are inherently different from passports. People typically do not buy or lease flags from the government. Moreover, the government does not have a copyright or trademark on

²⁸ Although the Court never discussed whether the flag was "a special kind of personalty" (borrowing Justice Fortas' description in *Street v. New York*), there was an implicit decision that the flag was not "special" property. Accordingly, the property "right" of destruction rests with what the layman would view as the owner (in this case, the student).

the American flag.²⁹ Unlike the case with passports, anyone can legally make an American flag. Consider, thus, the case of a citizen who decides to make his own flag after the passage of a Constitutional amendment prohibiting flag mutilation. Certainly, if the citizen destroys plain fabric, there would be no law stopping him (assuming, of course, that his destruction does not physically impact the property or persons of others). What happens, however, if he sews or weaves the fabric into an American flag? Does the government automatically gain property rights in the fabric by this act? If the Constitution is amended to prohibit flag mutilation, this apparently would be the situation. Whether this is desirable is not for us to say. What we can say is that such a form of property rights is, to the best of our knowledge, unique in the Anglo-American legal tradition.

IV. Freedom of Speech and Freedom to Make Waves

In communicating with other individuals, it is obviously necessary to employ human sensors, visual, oral, olfactory, which are activated by physical stimuli. Thus, communication is inherently a physical phenomenon. With sound and light, the physical phenomena take the form of waves travelling through space. Cases in which the First Amendment has been invoked on behalf of those who want to generate such waves over a large geographic area provide another example of the urge to extend the notion of free speech to include the assignment of scarce rights.

In *Saia v. New York*, 334 U.S. 558 (1948), the Court invalidated an ordinance prohibiting the use of amplification devices in public parks without the prior permission of the police chief. Writing for the majority, Justice Douglas found the ordinance unconstitutional for a number of reasons, including the fact that sound trucks were an important means of communicating, the police chief was given almost unbridled discretion to regulate the trucks, and no standards were established for regulating the trucks. At times Justice Douglas appeared to recognize that the use

²⁹ *Parker v. Morgan*, 322 F. Supp. 585 (1971), holds that the American flag does not have trademark protection.

of loudspeakers and the resulting generation of amplified sound waves creates physical incompatibility problems, but he never explicitly dealt with the issue. The sound waves generated by loudspeakers, of course, will interfere with other sound waves reducing their quality to listeners. In the extreme, sound waves can impose painful physical injuries in much the same way, say, that the burning of a shirt on a public sidewalk could (to borrow Justice Fortas's example in *Street v. New York*).

Justice Jackson in dissent in *Saia* comes close to recognizing the difference between regulating a sound truck because of its physical impact and regulating a sound truck because of the contents of its broadcast:

To my mind this is not a free speech issue. ... But can it be that society has no control of apparatus which, when put to unregulated proselytizing, propaganda and commercial uses, can render life unbearable? It is intimated that the City can control the decibels; if so, why may it not prescribe zero decibels as appropriate to some places? It seems to me that society has the right to control, as to place, time and volume, the use of loud-speaking devices for any purpose, provided its regulations are not unduly arbitrary, capricious or discriminatory. 334 U.S. 568-69.

One year after *Saia*, the Court in *Kovacs v. Cooper*, 336 U.S. 77 (1949) reviewed a conviction based upon violation of a ban on "any device known as a sound truck, loud speaker or sound amplifier which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon [the] streets or public places..." The Court stated that an absolute prohibition of loudspeakers in public would probably be unconstitutional. *Id.* at 81-82. But that the ordinance in dispute did not violate the First Amendment because it applied only to loudspeakers emitting "loud and raucous noises." Writing for the Court, Justice Reed in several places appears to recognize the physical incompatibility often caused by sound trucks:

The avowed and obvious purpose of these ordinances [prohibiting sound trucks] is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social

activities in which they are engaged or the quiet that they would like to enjoy. ...There is no restriction [in this ordinance] upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the homes or business houses from the distracting noise of vehicles equipped with such sound amplifying devices justifies the ordinance. *Id.* at 81, 86-87, 89 (footnotes omitted).

Justice Jackson in a concurrence came close to embracing what our definition of freedom implies. Namely, that the First Amendment is violated only when the state purports to regulate content; physical incompatibilities may be regulated even when they stem from expressive conduct. “No violation ... of free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting. Freedom of speech ... does not ... include freedom to use sound amplifiers to drown out the natural speech of others.” *Id.* at 97.

V. Control of the Content of Speech

The Supreme Court is continually confronted with cases in which constraints on the content of speech are at issue. Such conflicts are compartmentalized into a number of areas, such as subversive speech and libel. But, as in other areas of First Amendment law, there is little unified treatment of the issue. Each area has its own set of often-complex principles.

The right to speak or write whatever one desires is not a scarce right. The content of my speech in no way limits what you can say or do. Therefore, if nature's opportunity set is to be passed on to individuals—if freedom is to be maximized—there must be no regulation of the *content* of speech. In a world of maximal freedom, there would be no patents, copyright laws, libel laws, or regulation of obscenity. There would be no regulation of the content of any expression, written or verbal.

Content of speech cases are fundamentally different from the cases we have discussed so far in this paper, all of which involve physical incompatibilities. When a court resolves a physical

incompatibility case by assigning a scarce right to a particular person, it is maximizing both freedom and welfare. This is not necessarily so with content of speech cases.

Some content of speech cases raise the possibility of a conflict between increasing freedom and increasing welfare. It is possible, for instance, that giving people the non-scarce right to speak or publish lies will result in substantial inefficient uses of resources and thereby reduce human welfare. When this is the situation, there is a tradeoff between expression and welfare. One would therefore adopt a rule of no regulation of the content of any speech only if freedom of speech were an absolute. Although some may argue that this is precisely what the Constitution demands (“Congress shall make no law ... abridging the freedom of speech”), it is not how most people live their lives. People constantly engage in tradeoffs on virtually everything. Why should speech be different? Most people, we suspect, would be willing to give up some amount of freedom of expression, say in the form of a patent, if that significantly increased the probability of a vaccine to cure cancer. See Jensen (forthcoming). Likewise, our guess is that most people would voluntarily tradeoff some freedom of expression, in the form of limitations on subversive speech, if it significantly increased our physical security. These tradeoffs are undoubtedly one reason why the Court has so much difficulty with First Amendment cases and why it so frequently resorts to balancing, the inflexible language of the Constitution notwithstanding.

Among the myriad of content of expression disputes, which would include commercial speech, subversive speech, “fighting words,” hate speech, internet regulation, libel, and obscenity, we limit our analysis to libel and obscenity in the interest of brevity. Cases from these two areas illustrate how the concepts of freedom and scarcity can be used to resolve any dispute involving the content of expression.³⁰

³⁰ Government regulation of internet content promises to be one of the most active First Amendment areas over the coming years. For a discussion of some of these issues, see Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U Chi Legal F 377.

A. Libel and Falsehoods

Libel is an area in which the Supreme Court has held individuals and the press liable for damages to the reputation of others from the publication of falsehoods. The Court generally weighs the individual's interest in being free from false exposure to public scandal against free speech. In a series of opinions, most notably *New York Times v. Sullivan*, 276 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court has established that "private" individuals receive more protection from libelous statements than do famous or "public" individuals.

Libel is but a particular facet of the false-statement problem. As Justice Holmes said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic."³¹ There is no dispute on either freedom or welfare grounds about the desirability for individuals to have the right to shout fire in a theatre that is actually burning. More complicated, however, are the issues associated with the effects of granting individuals the right to speak falsehood such as shouting fire in a crowded non-burning theatre or by publishing false and libelous statements about others.³²

The scarce and non-scarce rights framework implies no necessity to constrain the content of speech, including the speaking of falsehoods. If the falsehood has no effect, there is little reason to question this conclusion. Where the falsehood causes damages, such as death or injury in a crowded theatre or the ruination of an individual's reputation, however, the possibility of tradeoffs between freedom and welfare arises again. If speakers are held liable for all damages, they will have incentives to take the likelihood of such damages and their amount into account in deciding what they say. Under such a rule, fewer falsehoods will be spoken. This, however, does not necessarily mean that the expression of truth is enhanced. The reason has to do with the

³¹ *Schenck v. U.S.*, 249 U.S. 47 (1919).

³² There is an important difference between these two situations, however. A theatre is a scarce resource and exclusionary rights should be assigned in the property. If all rights are assigned to the owner, she can determine what may be said on the property. A reasonable interpretation of the implicit contract between a theater owner and a patron is that the patron does not have the (contractual) right to shout "fire" when there is no fire. If a patron so shouts fire, the owner could sue for breach of contract. In contrast, there is no contractual relationship in the typical libel setting.

classical statistical notion of Type I and Type II errors.

Making a speaker responsible for the damages caused by falsely labeling Party A "dishonest" (Type I error) will reduce the frequency of such false labelings. The additional care taken in avoiding making such "dishonest" labelings will mean, however, that more people who are actually dishonest will fail to be so labeled (Type II error). The problem is well known in the criminal system: reducing the probability of falsely convicting an innocent person of a crime implies raising the probability of failing to convict a guilty person. In addition, if everyone has the right to lie, more resources will be devoted to sorting out lies from truth than under an alternative rights system.

From the standpoint of social welfare, the general answer to the problem is to establish rights that provide incentives such that the reduction in costs associated with getting more truthful statements spoken or published are equal on the margin to the increased costs associated with the increase in falsehoods that inevitably result therefrom. The tradeoff arises not only because of a trial court's difficulty in determining truth, but because basic uncertainty in the world and limited knowledge cause everyone to be less than perfectly certain about the truth or falsity of most propositions.

In the end the welfare gains and losses available from various degrees of restrictions of individuals' rights to speak and write falsehoods, a clear reduction in freedom of speech, is an empirical question. This is a difficult inquiry because listener reactions to any given statement will depend on whether or not the law holds the speaker liable for falsehoods. Thus, the damages caused by a given lie will also depend on the legal situation.³³

B. Obscenity

Most First Amendment cases and problems involve some physical effects. An individual cannot complain to the government or to the courts about another's speech, words, or symbolic

³³ The current constitutional doctrine that grants liberal rights to speak and publish falsehoods about "public" figures is interesting. On the one hand it makes politicians and other "public figures" more subject to damage from lies, and on the other hand, it reduces the costs they and others bear from expressing falsehoods about their "public" competitors.

acts unless the complainer first sees or hears the other person. The light waves or sound waves created by those expressing their views physically impact the sight and sound sensors of the viewers or listeners. To maximize freedom in a world with no transaction costs, the government would assign either the right to express one's views or the right to be free of the physical impacts of expressions of other individuals. Given the constraints of nature, the government cannot allocate both of those rights simultaneously. Likewise, if my land borders your land, it is impossible for me to be free of viewing structures on your land while you simultaneously have the right to construct buildings. The light waves from your building travel to my property.

In most obscenity cases, physical incompatibilities associated with light and sound waves are present, but the Court typically focuses not on the physical incompatibility but on the content of the message. And the content of the message conveyed imposes not a physical effect but a pure value effect such as that discussed earlier in this paper. The state must grant rights to constrain actions to resolve physical incompatibilities in order to maximize freedom of expression, but it cannot constrain the content of speech without reducing freedom of expression. And, unlike the libel cases, the obscenity case seems not to be one where social welfare can be increased by reducing freedom of speech. Obscenity puts us squarely in the middle of attempting to compare and rank interpersonal utilities; as economists have long understood, such comparisons of cardinal utility are meaningless.

The obscenity issue is analogous to pure wealth redistribution; the welfare of those who dislike the content of certain speech, writing, broadcasts or movies is increased by restricting the rights of others to produce or consume such content. Such restrictions are consequently clear-cut abridgements of freedom of speech that benefit some individuals while harming others. Social welfare is not increased.

Three obscenity cases decided by the Supreme Court within the past twenty-five years illustrate the physical incompatibilities and pure value effects present in most obscenity cases. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) the Court invalidated a city ordinance prohibiting the exhibition of motion pictures displaying the "human male or female bare buttocks, human female bare breasts, or human bare pubic areas" upon a screen visible from any

public street or public place. *Id.* at 207. There was evidence in this case that the screen of the appellant's theatre was visible from two adjacent public streets and a near-by church parking lot (which was privately owned). *Id.* at 208. The Court struck down the ordinance on the grounds that it sought to regulate the *content* of the message on the screen: "A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of contents. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.* at 209 (citations omitted).

The Court's opinion is consistent with freedom of expression as defined in this paper. There is no natural or physical constraint on the subject matter that can be shown on a motion picture; it can be an X-rated movie or it can be a child's cartoon. For the state to limit what may be shown over the screen would be a clear curtailment of freedom of expression.

Not all of the Court's opinions on obscenity, however, are consistent with a rights system that maximizes freedom of expression. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is an example of the Court's failure to distinguish physical effects from value effects, and an example of a decision which decreases freedom of expression. In this case a radio station had made an afternoon broadcast of a satiric monologue, entitled "Filthy Words," by a famous comedian which repeated a variety of colloquial uses of "words you couldn't say on the public airways." A father who was driving in his automobile with his son heard the broadcast and complained to the Federal Communications Commission about the indecent nature of the broadcast. The Commission determined that the language of the broadcast was indecent and was therefore prohibited by statute.

The Court upheld the Commission's decision on a number of grounds. First, the Court stressed the intrusion of the broadcast into the homes of an initially unconsenting audience, "the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." *Id.* at 759 (Powell, concurring in part and in the judgment.) On the other hand, some members of the Court recognized that "despite everyone's interest in not being

assaulted by offensive speech in the homes, the Commission's holding in this case is impermissible because it prevents willing adults from listening to [the monologue over the radio]." *Id.* at 460.

As with the motion picture in *Erznoznik*, there is a clear physical effect present: the radio waves emitted from the property of the radio station impact upon the property and persons of other individuals within the range of the broadcast. Because of nature's constraints there is no way that the owner of the radio station can have the right to broadcast radio waves while an individual in the vicinity simultaneously has the right to be free of radio waves. Congress has resolved this physical incompatibility by granting to organizations that hold radio licenses the right to emit the radio waves. Details of the FCC's licensing schemes aside, a disgruntled homeowner could, if she wished, stop the radio waves from entering her property by buying all of the radio licenses within the vicinity of her house and then halting broadcasts. The Court is correct in saying that the radio waves "invade" the privacy of the home. But the crucial fault of the Court's reasoning is that it neglects to note that all radio waves "invade" the home and that the content of the broadcast is irrelevant to the physical incompatibility. The content of the broadcast is a pure value effect.

A second reason why the Court upheld the FCC is that "[o]bscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards." *Id.* at 745 (citations omitted.) This is obviously a case where the Court imposed constraints to protect some individuals from a value effect. There is no natural constraint on what words can be said over the radio, just as there are no natural constraints on what motion pictures can be shown at outdoor theatres in Jacksonville, Florida. The banning of "obscene" words is inconsistent with the maximization of freedom of expression and is a case where the Court is exercising its own tastes and preferences regarding "offensive" versus "proper" content as justification for abridging freedom of speech. It is now impossible because of government constraints for individuals to receive certain broadcasts.

The Court re-visited the issue of whether nudity is protected by the First Amendment in *Barnes v. Glen Theatre, Inc.* 501 U.S. 560 (1991). At dispute in this case was an Indiana statute

which prohibited anyone from appearing “in a state of nudity” in any “public place.” The owners and dancers from two establishments that wished to engage in the prohibited action brought suit. The Court upheld the statute because criminal activity tends to “follow” such establishments. Any incidental effect upon constitutionally protected activity was outweighed by the state’s interest in preserving the peace.³⁴

Although the court and the individual justices who wrote concurring or dissenting opinions never made the connection, this case is fundamentally the same as the shopping center cases of *Logan Valley* and *PruneYard*. The nudity in *Barnes* was apparently confined to the inside of privately owned buildings. There were no reports, at least none were cited by the Supreme Court, that people outside of the clubs could see the nude dancers. Thus, to maximize freedom as defined in this paper, the Court should have enforced the scarce rights over the property which had been assigned to a specific person (the owner). That person could then decide what activity would occur within his property or could sell the right to decide to another. When the Court in *Barnes* prohibits a technically feasible activity, such as nude dancing, it is restricting freedom. The Court assigned the rights but made them inalienable because no one else got the rights who could sell them. Because alienability is a non-scarce right, alienable as opposed to inalienable rights must be assigned if freedom is to be maximized. In this case no one else was assigned rights which could be sold. Thus, the Court’s decision reduced society’s opportunity set because it denied not only the owner, but everyone, the rights and therefore made them inalienable. This is another illustration of how many First Amendment cases can be decided simply by assigning rights in scarce resources to specific private individuals (typically the owner).

VI. Conclusion

The wording of the First Amendment is simple and admits to no categorization. Yet the Supreme Court’s doctrine on the First Amendment is complex and categorized. This paper offers

³⁴ The majority opinion and the dissenters held that nude dancing was protected by the First Amendment; some justices who concurred with the majority opinion, however, argued that nude dancing was not protected by the First Amendment.

a simple framework that would put Supreme Court doctrine more in line with the wording of the First Amendment. Our framework derives from the meaning of freedom, which derives from the meaning of scarcity, which, in turn, derives from the existence of physical incompatibilities.

To maximize freedom, one must differentiate between scarce rights and non-scarce rights. Scarce rights cannot be granted to everyone because of natural limitations arising from physical incompatibilities. If one person occupies a given spot, for example, other people cannot occupy the same spot. The laws of nature—scarcity—do not allow it. Thus, to avoid conflicts, the right to occupy that spot cannot be given to more than one person or entity, and when that scarce right is exercised there is therefore an opportunity cost.

Non-scarce rights, in contrast, can be given to everyone. What one person says, or believes, for example, in no way limits what other people can say or believe. There is no natural limitation. There is no opportunity cost when a non-scarce right is exercised because no other person is limited by it. This definition of freedom seems to be generally consistent with the lay person's definition of freedom. This definition of freedom is also consistent with the notion of opportunity cost which lies at the heart of all economic analysis.

To maximize freedom of speech, the Court should assign rights in scarce resources to specific individuals only, and assign all non-scarce rights to all individuals. At times the Court seems to be unconsciously following this framework. In particular, it confirms the Court's uneasiness with restrictions on the content of expression. This is a non-scarce right, and restrictions here would reduce freedom. Thus, the Court's decision this past term in *Greater New Orleans Broadcasting v. United States*, 1999 U.S. Lexis 4010 (1999) invalidating restrictions on the content of advertisements is consistent with our framework. It increased freedom of speech.

Other First Amendment doctrines, however, violate the distinction between scarce and non-scarce rights. This is the case when the Court assigns rights in scarce resources to all citizens in an effort to enhance their powers of expression. In fact, this creates a common access resource which ultimately reduces its value to society and diminishes welfare and freedom. These cases, which include the categories of public access and must carry, also confound power and freedom.

The First Amendment is concerned with freedom, not power. Ownership of scarce resources goes to one's power to convey a message.

We do not propose that our framework of scarce versus non-scarce rights should alone decide all First Amendment cases. One would do so only if freedom of expression were an absolute, and few people, including the authors, act as if this is the case. Freedom of expression, however, appears to be a good for most people. Thus, the difference between scarce and non-scarce rights should be an important consideration in all freedom of expression disputes. The wording and the spirit of the First Amendment warrant it.

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