Hohfeld's First Amendment

Frederick Schauer*

The First Amendment guarantees "the freedom of speech [and] of the press,"[1] but what exactly *is* the freedom that the First Amendment guarantees and that the First Amendment prohibits Congress (and, now, the states[2]) from abridging? What kinds of rights, structurally and not just substantively, are First Amendment rights? Who or what does the First Amendment protect, and against whom or what are they protected? These are hoary questions which lawyers, judges, and scholars have been wrestling with for generations, and so I will not pretend to be able to say very much that is substantially novel about the topic. Nevertheless, it may still be useful to look at the First Amendment through the lens of some large issues in the theory of rights, which is, of course, also a huge topic. To make things more manageable, therefore, I propose to examine the First Amendment in a Hohfeldian[3] way, looking at who might have First Amendment rights, whom those rights are rights against, and what duties or obligations the existence of those rights imposes on others. In other words, I want to examine not what First Amendment rights are, but what *kind* of rights First Amendment rights are, and what kind of rights First Amendment rights might be.

I. The Standard Picture

Existing First Amendment doctrine takes a rather clear position with respect to the Hohfeldian structure: a First Amendment right is a right against the government and only against the government. How-

* Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University, and George Eastman Visiting Professor (2007–2008) and Fellow of Balliol College, University of Oxford. This paper was prepared for the symposium *Access to the Media—1967 to 2007 and Beyond*, held at The George Washington University Law School on October 11–12, 2007, in honor of the pioneering contributions of Jerome Barron in conceiving the First Amendment in terms of affirmative access rather than exclusively in terms of freedom from governmental restriction. Research for this paper was generously supported by the Harvard Law School, the University of Oxford, and the Joan Shorenstein Center on the Press, Politics and Public Policy, Harvard University.

1 U.S. CONST. amend. I.

2 Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931); Stromberg v. California, 283 U.S. 359, 368 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

3 *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

ever ubiquitous it is in public discourse to use "the First Amendment" as the designation for *any* restriction on some agent's freedom to speak, this usage is not even remotely in the vicinity of existing doctrine. Private universities may use disciplinary sanctions to restrict the speech of their students in ways that public universities may not,[4] private employers may dismiss employees who speak their mind even though public employers sometimes may not,[5] and the owners of private property may routinely impose content- and viewpoint-based restrictions on the use of the property that would be impermissible were those same restrictions imposed by the state.[6]

Even with respect to the citizen's or speaker's relationship to government and government alone, the prevailing doctrinal structure embodies a series of clear choices in favor of negative rights and against positive rights.[7] Although a right to freedom of speech might plausibly be understood as a positive right against the government to have the government provide some sort of opportunity to speak, or some

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4 *Compare, e.g.*, Phelps v. President of Colby Coll., 595 A.2d 403, 403 (Me. 1991) ("[T]he first amendment secures only the right to be free from governmental interference . . . ."), *with* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670 (1973) (restricting state university's power to curtail dissemination of ideas).

5 *Compare* George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) (finding that employee alleging infringement of First Amendment rights by private employer must make showing of state action), *with* Rankin v. McPherson, 483 U.S. 378, 383 (1987) (applying First Amendment to speech in a government workplace), Connick v. Myers, 461 U.S. 138, 140 (1983) (recognizing some free speech rights in government workplace), *and* Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968) (holding that public employee has some First Amendment rights against dismissal based on the content of a public speech).

6 *Cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (holding that states may impose access obligations on owners of private property, but not if those requirements would restrict the owners' own First Amendment rights). *Compare* Hudgens v. NLRB, 424 U.S. 507, 521 (1976), *and* Lloyd v. Tanner, 407 U.S. 551, 570 (1972) (both finding no constitutional guarantee to freedom of expression in a privately owned shopping center), *with* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (concluding that content-based denial of the use of a municipal auditorium constitutes a violation of the First Amendment). The significant exception to the statement in the text, although not especially germane here, is the so-called company town. *See* Marsh v. Alabama, 326 U.S. 501, 508–09 (1946) (holding that a resident of a company-owned town is afforded no less First Amendment protection than any other citizen). *See generally* Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMENDMENT L. REV. 201 (2007).

7 It is important to emphasize that these are *two* distinct choices. It is true that sometimes the grant of positive rights to one person may interfere with another's negative rights, as with the clash between Pat Tornillo's positive right to access and the corollary restriction on the *Miami Herald*'s negative right to control the content of its newspaper. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247–48, 258 (1974). In most cases, however, that linkage is absent, and the decision whether to allow claims by speakers of positive rights against the state for access or funding, for example, is analytically distinct from the questions about the extent to which government may restrict the speaking or writing of nongovernmental speakers or publishers.

form of support for speaking, the existing doctrine, with perhaps the one significant exception of the public forum doctrine,[8] refuses to understand the First Amendment right to freedom of speech in such a way. As the doctrine now stands, the right is a right *against* interference—a privilege or a liberty in Hohfeldian language—but it is not a right *to* have the actual opportunity to speak, nor is it a right to have a platform for speaking, nor is it the right to have an audience. The basic right to free speech is the right of a speaker to speak to whomever is willing to listen, but only with the speaker's own resources. It is not without significance that many of the sacred items in the First Amendment canon—*Brandenburg v. Ohio*,[9] *New York Times Co. v. Sullivan*,[10] *Cohen v. California*,[11] and *New York Times Co. v. United States*,[12] for example—involve speakers speaking on their own property,[13] or with their own resources,[14] or in public places where they otherwise have a right to be.[15]

This traditional picture of a solely negative rather than a positive or positive *and* negative First Amendment rejects two different forms of positive rights. Under the form described in the previous paragraph, a positive right is one for which there is a claim on the state to provide just that which the right guarantees. A positive right to shelter, for example, would be a right to be housed, and a claim against the state for the state to provide housing,[16] and so too for other commonly discussed (in other countries, or in the theoretical literature) positive rights such as the right to health care[17] and the right to subsis-

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8 Although the public forum doctrine does, in effect, create mandatory access for purposes of speaking to streets, parks, and sidewalks, *see* Frisby v. Schultz, 487 U.S. 474, 481 (1988); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939), there is nothing in the cases that would require a municipality to provide streets, parks, or sidewalks if it had none. This is, of course, highly counterfactual, but it does underscore the way in which the doctrine, even here, requires the state to allow speakers to use some of the state's resources for speaking, but does not actually require the state to have such resources.

9 Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

10 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1963).

11 Cohen v. California, 403 U.S. 15, 16 (1971).

12 N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

13 *Brandenburg*, 395 U.S. at 445.

14 *N.Y. Times Co. v. United States*, 403 U.S. at 714; *Sullivan*, 376 U.S. at 256.

15 *Cohen*, 403 U.S. at 16.

16 *See Gov't of the Republic of S. Afr. v Grootboom & Others* 2000 (1) SA 46 (CC) at 14 (S. Afr.).

17 *See Minister of Health & Others v. Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) at 723 (S. Afr.); Colleen M. Flood, Lance Gable & Lawrence O. Gostin, *Legislating and Litigating Health Care Rights Around the World*, 33 J.L. MED. & ETHICS 636, 636, 639 (2005).

tence.[18] Under this view of positive rights, a positive right to freedom of speech would be a positive right *to* speak, and a corollary obligation on the state affirmatively to provide the opportunity and the resources to do so. And, as should be clear, under current (and any realistic future) constitutional doctrine, such a positive right to freedom of speech is, the traditional public forum doctrine aside, entirely absent from American constitutional law.

Not only is this relatively narrow form of a positive right to freedom of speech alien to American constitutional doctrine, so too is a somewhat broader version of a putative positive right to free speech. This broader version would understand positive rights not, or not only, as rights to specific opportunities to speak or publish, but also to those resources or conditions that are not themselves part of the right itself but whose possession would enable the possessor effectively to exercise the pertinent right. This argument was advanced in *San Antonio Independent School District v. Rodriguez*,[19] where parents seeking increased or equalized funding for education argued that the First Amendment should be interpreted not so much to guarantee a positive right to speak as to provide a positive right to the educational services that would make citizen speech (understood broadly) more effective.[20] But the fact that *San Antonio v. Rodriguez* stands as a landmark *against* a positive conception of American constitutional rights,[21] in whatever form, is an emphatic reminder that almost all of the traditional conception of First Amendment speech and press rights is a decidedly negative one.

II. Detaching the Constitution

Although my description of existing First Amendment doctrine and its underlying philosophy is greatly oversimplified, adding the complications would hardly change the basic picture of an almost entirely negative liberty. Yet even though this basic picture is settled, it is central to what I say here that we appreciate that much of this settlement has far less to do specifically with the First Amendment or with freedom of speech and press than it does with the philosophy of

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18 *See generally* Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673 (2007); Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 37–38, 48 (2006).

19 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

20 *Id.* at 35.

21 *See* Sotirios A. Barber, *Welfare and the Instrumental Constitution*, 42 AM. J. JURIS. 159, 161 (1997).

the U.S. Constitution generally, or at least with the Supreme Court's[22] longstanding view of that philosophy. It is true, as described above, that in *San Antonio Independent School District v. Rodriguez* the Supreme Court held that the First Amendment did not create a right to those conditions—in this case education—that would make the exercise of First Amendment rights more effective,[23] but hardly anywhere else in existing constitutional doctrine do we find a right to have the state or anyone else affirmatively provide the conditions necessary for the effective exercise of any constitutional right. There is a right to be free from protectionist-inspired (and sometimes other) restrictions on engaging in interstate commerce,[24] for example, but no right to the resources necessary to effectively *engage* in interstate commerce. There is (sort of) a right to vote,[25] but no right to the information or education that would make intelligent and informed voting effective. And although the First Amendment guarantees a right to the free exercise of religion,[26] no one has yet thought that the Constitution provides or ought to provide the mechanism by which people could decide, with maximum information and minimum parental influence, which religion, if any, they choose freely to exercise. Only, it seems, with respect to the Sixth Amendment right to counsel (and some associated rights to an effective defense) does the existing doctrine provide right-holders with the associated power to exercise the right effectively and to make a claim against the state for the resources necessary for the effective exercise of the right.[27] With respect to the exis-

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22 The Supreme Court's view appears to be shared by both the American people and the American political system. In a country with fewer guarantees to health care than exist in almost all other industrialized democracies, with a lower top marginal income tax rate than exists in most other industrialized countries, and with a higher education system in which private colleges and universities are very heavily represented, it would be hard to maintain that the Supreme Court's view of positive rights is out of step with longstanding, prevailing American views about the role of the state. *See* Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 45 (Michael Ignatieff ed., 2005).

23 *Rodriguez*, 411 U.S. at 35–37.

24 *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 580–81 (1997); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 678 (1981); Hughes v. Oklahoma, 441 U.S. 322, 337–38 (1979).

25 *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

26 U.S. CONST. amend. I.

27 *See* Alabama v. Shelton, 535 U.S. 654, 679 (2002) (providing an affirmative right to counsel for *any* defendant); Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (noting an affirmative right to a psychiatrist where a criminal defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial); Argesinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); Gideon v. Wainwright, 372 U.S. 335,

tence of positive rights against the state, therefore, existing First Amendment doctrine is properly understood not as a conclusion about the First Amendment or about the freedoms of speech and press, but instead as simply an instantiation of a pervasive characteristic of the American constitutional approach generally, and a pervasive characteristic of the American constitutional view about the scope of judicial power.[28]

Pretty much the same thing can be said about the relationship between the First Amendment and various nongovernmental restrictors of speech. In *Hudgens v. NLRB*,[29] the Court, reversing its short detour to the contrary,[30] held that the First Amendment does not generally restrict nongovernmental abridgers of speech or impose obligations of noninterference on the owners of forums for speech. A similarly chary understanding of the state action principle also removes from constitutional concern most nongovernmental searches and seizures,[31] most nongovernmental denials of equality,[32] most nongovernmental restrictions on religious belief and practice,[33] and most nongovernmental denials of procedural fairness.[34] That the First Amendment does not apply to private restrictions on speech is a well-accepted truth. This truth, however, turns out to have virtually nothing to do with the First Amendment and almost everything to do with the long-standing, pervasive, and transdoctrinal state action principle.

Related to the lack of a right to the background conditions necessary for the effective exercise of constitutionally guaranteed rights, the absence in the existing doctrine of direct positive First Amendment

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343–44 (1963) (recognizing an affirmative right to assistance of counsel in all criminal prosecutions).

28 Judicial caution about taking on potentially unbounded issues involved in recognizing and enforcing positive rights is of a piece with the same caution about judicial involvement with effects as opposed to intent. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), might be thought of as a First Amendment case, but it might also be understood as the First Amendment instantiation of larger concerns about judicial intrusiveness in too wide a range of governmental decisions, a concern exemplified by, for example, *Washington v. Davis*, 426 U.S. 229 (1976).

29 Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976); *see also* Lloyd Corp. v. Tanner, 407 U.S. 531, 570 (1972) (holding that a privately owned shopping center not dedicated to public use was not under First Amendment obligation to allow protest on its premises).

30 *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968).

31 *See* Dist. Attorney for the Plymouth Dist. v. Coffey, 434 N.E.2d 1276, 1279 (Mass. 1982).

32 *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972).

33 *See* Lockwood v. Killian, 375 A.2d 998, 1004 (Conn. 1977).

34 *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 358–59 (1974).

rights to the opportunity to speak or publish is of a piece with the lack of such rights throughout constitutional doctrine, and it is consequently best seen as simply an instantiation of a larger principle having virtually nothing specifically to do with the First Amendment. The American constitutional system thus stands in stark contrast with the constitutional regimes of, for example, South Africa, Hungary, Poland, and India, where courts recognize and enforce positive entitlements against government with some frequency.[35] And, despite the persistent calls for American courts to adopt a similar approach,[36] the existing American constitutional framework is one that prohibits government action rather than one that allows citizens to demand it. Our freedoms are freedoms from, and not entitlements to, governmental action, and our Constitution is, in numerous respects, a negative and not a positive one. Government may not deny equality, but it is not required to ensure that equality actually exists. The state may not restrict (some forms of) personal privacy, but it has no obligations to affirmatively provide that privacy. And as cases like *DeShaney v. Winnebago County Department of Social Services*[37] have made clear at least for decades, the ability to use the Constitution to make calls *on* government affirmatively to take action is essentially nonexistent. Although it is true that the First Amendment does not require government to provide opportunities for citizens to speak, much less to speak effectively, it is also true that the Constitution as a whole, as currently understood and interpreted, does not require government to do much of anything at all.

There is a point to this little exercise, and that point is to detach questions about freedom of speech (and, yes, of the press) from questions about American constitutional doctrine generally. Because the First Amendment is of course legally and constitutionally part of the American constitutional scheme, it is difficult to disentangle just how much of the character of the First Amendment is a function of the nature of freedom of speech and freedom of the press and just how much is a function of the constitutional environment in which the First Amendment is situated. Accordingly, a large part of my goal here is to help foster an increased understanding of the First Amendment it-

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35 *See supra* notes 16–18 and accompanying text.

36 *E.g.*, Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Jessica Schultz, *Economic and Social Rights in the United States: An Overview of the Domestic Legal Framework*, HUM. RTS. BRIEF, Fall 2003, at 1, 1–4 (vol. 11, no. 1).

37 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

self by detaching it from its constitutional moorings. In doing so, I uncouple the First Amendment from the numerous issues of institutional competence, allocation of resources, judicial review, democratic theory, and much else that pervade American constitutional decision-making. These issues are undoubtedly important, but they are rarely, if ever, specific to the First Amendment. As a result, these larger questions of institutional competence and other systemic concerns are more of a distraction than a guide when our aim is to understand freedom of speech and freedom of the press rather than to understand the American constitutional tradition, the American approach to judicial review, and the American perspective on judicial power.

This exercise of detaching the First Amendment from the broader themes of American constitutionalism takes on special meaning in light of the cultural pervasiveness of the First Amendment, a pervasiveness that far transcends the existing contours of First Amendment doctrine. Journalists couch not only their claims for access, but also much of their entire mission, in First Amendment terms.[38] Academics even at private universities frame their pleas for academic freedom in the language of the First Amendment, just as students at those universities who feel their speech has been restricted make explicit recourse to the First Amendment in articulating their complaints. Librarians see the First Amendment as informing pretty much their complete *raison d'etre*, and artists and writers commonly use the First Amendment to frame their complaints against publishers, galleries, and even private museums. In these and countless other domains, a wide range of demands and platforms take on a First Amendment coloring, and not in any way very much connected at all with existing constitutional doctrine. Given the pervasiveness of this phenomenon, therefore, it seems especially valuable to examine the very ideas of the First Amendment, the freedom of speech and the freedom of the press, and to examine those ideas without the numerous constitutional considerations and constraints that, contingently, shape the judicially enforceable First Amendment.

III. The First Amendment as Policy

Having detached the First Amendment from the panoply of issues of institutional competence and democratic theory that surround the judicially cognizable and enforceable First Amendment, we can, I hope, begin to think in a different way about the First Amendment.

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[38] Frequently to the annoyance of the rest of us.

To put it starkly, we can begin to think not, or not only, about the First Amendment as a right, but also about the First Amendment as policy.[39] And a useful place to begin this enterprise might be to examine the First Amendment as policy in light of some of the traditional underlying justifications for the First Amendment in particular, and freedom of speech and press more generally.

Consider first the traditional "marketplace of ideas" justification for freedom of speech. Although traceable as far back as Milton's *Areopagitica*,[40] and with subsequent landmarks in Holmes's dissent in *Abrams v. United States*,[41] as well as in several other noteworthy Supreme Court cases,[42] the marketplace of ideas/search for truth justification for a distinct free speech principle is most commonly associated with John Stuart Mill's *On Liberty*,[43] in which Mill offers a possibly utilitarian justification[44] for allowing what he calls the "liberty of thought and discussion." For Mill, as for his predecessors and follow-

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39 Ronald Dworkin, in his analysis some years ago of the contretemps arising out of the refusal of the journalist Myron Farber to disclose confidential sources, Ronald Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 34, properly drew a distinction between those aspects of the First Amendment that could be said to reflect or embody deeper moral and political rights, such as the right to express one's political or religious views, and those aspects that are based on more contingent and more empirical considerations, such as the contingent empirical and instrumental relationship between certain forms of press rights and the effective operation of government, *id.* *See also* RONALD DWORKIN, A MATTER OF PRINCIPLE 373–80 (1985). Dworkin's concern, however, is not the same as mine, for his interest was primarily in the source of judicially enforceable rights, *see id*., and mine is in the nonjudicially enforceable policy dimensions of the First Amendment.

40 JOHN MILTON, AREOPAGITICA (J.C. Suffolk ed., Univ. Tutorial Press 1968) (1644).

41 Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

42 *E.g.*, Dennis v. United States, 341 U.S. 494, 546–53 (1951) (Frankfurter, J., concurring); Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); Int'l Bhd. of Elec. Workers v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950) (Hand, C.J.).

43 JOHN STUART MILL, ON LIBERTY (D. Spitz ed., W.W. Norton & Co. Inc. 1975) (1859).

44 There is an interesting debate in the political philosophy literature about whether Mill's defense of the liberty of thought and expression, or his defense of liberty in general, is in reality a utilitarian one, or whether it is ultimately based on deontological considerations that Mill may have failed to recognize or acknowledge. *See generally* FRED BERGER, HAPPINESS, JUSTICE, AND FREEDOM 41, 50, 199, 231–32 (1984) (discussing Mill's references to ethical considerations in relation to utility); C.L. TEN, MILL ON LIBERTY 126–28 (1980) (providing a critique of Mill's dedication to utilitarianism based on his advocacy of freedom of expression); James Bogen & Daniel M. Farrell, *Freedom and Happiness in Mill's Defense of Liberty*, 28 PHIL. Q. 325 (1978) (providing a critique of Mill's dedication to utilitarianism based on Mill's harm principle); David O. Brink, *Mill's Liberal Principles and Freedom of Expression*, *in* MILL'S ON LIBERTY: A CRITICAL GUIDE (C.L. Ten ed., forthcoming); David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 LEGAL THEORY 119 (2001); Daniel Jacobsen, *Mill on Liberty, Speech, and the Free Society*, 29 PHIL. & PUB. AFF. 276 (2000) (situating Mill's views on freedom of speech within larger Millian perspectives).

ers, the absence of governmental (and, for Mill, social)[45] restrictions on communication of ideas would facilitate the growth of knowledge, aid in the identification of truth, and, perhaps most importantly, be invaluable in helping to expose widespread but erroneous belief.

Although as a philosopher (among many other things) Mill's arguments are properly seen as primarily philosophical, ultimately Mill's claim, as with all other versions of the marketplace of ideas principle, is a contingent empirical one rather than being a conceptual philosophical one. Mill's goal was to challenge the position, widely accepted at the time, that government can and should select official truth and suppress expressions of ideas contrary to that official truth. In response, Mill maintained that a decision procedure allowing individuals, without restriction, to communicate facts, ideas, and opinions that are officially taken to be false will in the long run produce more knowledge, more identification of truth, and less acceptance of falsity than would a decision procedure according to which government selects the truths and suppresses their negation. And when put this way, it becomes obvious that Mill's claim is empirical to the core.

Mill may or may not have been correct in his empirical and instrumental conclusion, but whether he was in fact correct is not something we can determine with philosophical speculation or analysis alone. Whether, for a given population,[46] that population will possess more knowledge in the long term with Mill's decision procedure than it will with his adversary's decision procedure is hardly self-evident in a world in which the marketplace of ideas has given us (or at least not eliminated beliefs in) astrology, Holocaust denial, and garlic rubs as a cure for AIDS. Of course, the procedure against which Mill was fighting has given us the execution of Joan of Arc, the suppression of Galileo, and the imprisonment of Eugene Debs. Ultimately, it is a testable and empirical question whether the "best test of truth," to use Holmes's famous, if ambiguous,[47] phrase from his *Abrams* dissent, is the power of an idea to get itself accepted in the competition of the market. The central question for so-called marketplace of ideas the-

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45 Indeed, Mill's extended attention to what he called "social intolerance" is a valuable caution against importing too much state action theory into a full appreciation of the idea of freedom of expression.

46 I use the term "population" in its social scientific sense, to encompass any group of people (or particulars), and not just the population of a city, state, or nation. Thus, we can ask the question both for the population consisting of a certain scientific community, for example, and for the population of Cleveland. It may well be that the answers in the two cases are not the same.

47 *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 19–22 (1982).

ory is a simple one: how much explanatory power does the truth of a proposition have in predicting whether that proposition will be accepted by some population, as compared to the explanatory power of the prior beliefs (and prejudices and biases) of the relevant target population, the authority and reputation and charisma and rhetorical power of the speaker, the frequency and volume with which a message is communicated, and the degree of fit between the belief at issue and the full network of beliefs otherwise or previously held by the relevant population?

Although the question of the soundness of the marketplace of ideas justification is an empirical and not a philosophical one, let us for present purposes assume that the empirical conclusion is supportive of Mill's basic claim—let us assume that the absence of governmental suppression of ideas believed by the government to be false will, in the long run and in the aggregate, produce more knowledge and less acceptance of error[48] than will a system in which government suppresses the expression of ideas it believes to be false. And let us assume as well that an increase in knowledge is a worthy goal, possibly worthier than any other.[49] Even with these assumptions, however, the virtually exclusive focus on governmental restriction seems in need of more justification. Even with knowledge as the end, and even with a practice of no government restriction acknowledged as causal of that end, the question remains as to what *else* might be causally related to the same end, and perhaps even more so. So consider, then, a group of other plausibly knowledge-increasing, truth-finding, and error-exposing policies: mandatory education until the age of eighteen; increased funding for colleges and universities; increased teacher

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48 It is also an interesting question, although here a normative rather than empirical one, how a society should balance the gains from increased knowledge against the losses from greater acceptance of error. Is a society that knows *n* true things and *x* false things better or worse off than a society that knows *n+1* true things and *x+1* false ones?

49 Mill comes close to treating the increase in knowledge and the identification of truth as having a lexical priority over all other values, but it is hardly self-evident that this is the case. Once we see that it is not always a good idea to circulate true but private facts about others, once we see that it may not be wise to provide terrorists with correct information on how to make explosive or chemical agents out of readily obtainable ingredients, *see* United States v. Progressive, Inc., 467 F. Supp. 990, 993, 995 (W.D. Wis. 1979), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979), *mandamus denied sub nom.* Morland v. Sprecher, 443 U.S. 709 (1979) (unpublished table decision); Thomas M. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 203, 204, 211–12 (1972), and once we see that it is not always the best course to tell our loved ones that their new dress or jacket makes them look fat, we can put truth and the possession of it in proper perspective. *See generally* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 704, 710–11 (1991) (arguing that not every increase in knowledge will be a social good).

salaries; more libraries; increased funding for university-based research; widely distributed and easily accessible government reports on a broad range of nonpolitical topics; high-quality nonelite public television; and many, many more. The instrumental value of any of these proposals in increasing the store of public knowledge is also of course an empirical question, and all of these proposals would undoubtedly have costs that might outweigh their benefits. That said, however, it is not self-evident that what we can over-simplistically call "non-censorship" would be causally more effective, even taking into account the inexpensive (to the government) nature of non-censorship, than any or all of these other possibilities. Even if non-censorship is effective, it is arguably a bit strange to pick out the approach of non-censorship over all of the others in considering the range of governmental policies that would most effectively aid in the increase in public knowledge and in the diminution of public acceptance of error.

The issue becomes more complex when non-censorship turns out to detract from the effectiveness of some of these other knowledge-increasing policies. At times, this complexity may just be a matter of political negotiation. If as a political necessity, not unlike the case of funding of the arts, increased funding for research could be obtained only at the cost of permitting censorship of certain politically unpalatable ideas, it is hardly axiomatic that the increase in knowledge produced by the former would be less than the decrease produced by the latter, even taking into account the phenomena of the dangerous precedent, the slippery slope, and path-dependence, as well as other forms of less immediate effects on public knowledge acquisition.[50] Moreover, and even putting aside the question of direct censorship, many of the ways in which knowledge might by hypothesis be increased might require some sacrifice of values of viewpoint neutrality that lie at the heart of the Millian model.[51]

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50 To expand on the suggestion in the text, consider more closely the case of arts funding. If (realistically and not just hypothetically) increased governmental funding for museums, exhibitions, art schools, and emerging talented artists can come as a practical but unfortunate political matter only by allowing funding authorities to refuse to fund so-called indecent art, *see* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 574, 585, 588–89 (1998), and even if granting that power will increase the amount of serious art that is restricted or simply not produced, it is not axiomatic that the benefits to art coming from the increased funding will be outweighed by the admitted impediments to art stemming from the power of a governmental agency to refuse to fund the art it deems indecent.

51 A plausible example is the issue of publication in learned journals, *see* ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 263–71 (1998), where the goals of increased knowledge and greater acceptance of truth may in fact be fostered by empowering journal edi-

My point here is emphatically *not* that proposals such as the ones just described should be adopted. It is only that if, by hypothesis, knowledge acquisition, truth identification, and error exposure are our goals, then barring the state from viewpoint-based censorship, even if that policy does serve those goals in a positive way, seems to be at best a relatively small component of a much more broad-based approach to serving what even Mill thought of as the primary goal.

A similar form of analysis can also be applied to some of the other traditional free speech goals and rationales as well. Consider, for example, the argument that a robust First Amendment allows speakers and the press to check potential abuses by those in power.[52] Again, the causal relationship between various traditional First Amendment legal devices (speaker-friendly laws about criticism of government,[53] press-friendly libel and privacy laws,[54] virtually total elimination of prior restraint,[55] prohibitions on punitive taxation of publishers,[56] etc.) and increased press and speaker attacks on and criticism of government is an instrumental and empirical question, as is the question of the relationship between increased criticism of government (as well as the criticism implicit in government-targeted investigative journalism) and a decrease in governmental abuse of power, corruption, and malfeasance of other varieties. But assuming that these causal relationships do exist, which seems more than plausible, similar questions to those posed above about the marketplace of ideas still remain. So even if what Professor Blasi calls the "checking value" is instrumentally served by a range of anti-censorship policies, it is nonetheless important to ask how the collective instrumental value of these anti-censorship policies stacks up against, for example, open-meeting ("sunshine") laws, freedom of access to governmental information laws, informal open-meeting policies, generous policies of informal access to governmental information, the publication of

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tors to distinguish between knowledge and ignorance, and to base their acceptance and rejection decisions on questions of truth and falsity.

52 The canonical locus for this argument is Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 523 (1977), although, as Blasi himself recounts, it has its roots in the eighteenth century, *id.* at 529–44. *See also* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 S. CT. REV. 1.

53 *E.g.*, Rankin v. McPherson, 483 U.S. 378 (1987); Pickering v. Bd. of Educ., 391 U.S. 563 (1978); Watts v. United States, 394 U.S. 705 (1969).

54 *E.g.*, Fla. Star v. B.J.F., 491 U.S. 524 (1989); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

55 *E.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

56 *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. Am. Press Co., 297 U.S. 233 (1936).

government documents, the willingness of an official to hold televised press conferences, and so forth. We cannot be confident of any answer to this question, but it is nevertheless far from self-evident that anti-censorship policies are more important than any or all of the others that have just been listed.

The obvious rejoinder to this, of course, is that in most cases there is no need to make a choice. And in most cases there is not. But although there is rarely a need to make a choice as a matter of (semi-) formal logic between anti-censorship policies and other abuse-checking policies, there may nevertheless be a need to make a choice with respect to the allocation of scarce political, economic, and, indeed, rhetorical resources. So if we shift from the checking value to the political participation and self-governance rationales for the First Amendment, rationales commonly associated with Alexander Meiklejohn[57] and developed more recently by, for example, Lillian BeVier,[58] Robert Post,[59] Cass Sunstein,[60] and the High Court of Australia,[61] we can see that there need not be a formal choice between a First Amendment understood as a prohibition on governmental restriction of citizen speech, especially speech critical of the government, and a First Amendment understood as a strategy seeking to maximize citizen participation in public debate and citizen involvement in fundamental governmental decisions. Each could, in theory, be fostered without loss to the other. In practice, however, choices may be necessary, as advocacy groups with limited resources decide where and how to use those resources, as scholars/advocates decide which outcomes to urge and which to leave to others, as legislators decide where to invest their efforts and what to leave to the courts, and as the shapers of public opinion decide what image of the First Amendment they will try to help create.

Even if not as a matter of logic, therefore, appreciating the extent to which most of the values thought to underpin the First Amendment

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57 Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government*, *in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 3, 27 (1965). Earlier traces of the argument can be found in the writings of Spinoza and Hume, and in Justice Brandeis's opinion in *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

58 *See* Lillian BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 CAL. L. REV. 1045, 1068 (1985); Lillian BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 502 (1980).

59 *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS 179–80 (1995).

60 *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

61 *See* Australian Capital Television v. Commonwealth (1992) 177 C.L.R. 106, 138–42 (concluding that there was an implied right to freedom of political expression situated in the Australian Constitution's guarantee of representative government).

would also generate a host of judicially unenforceable policies has important lessons. These are *not* lessons about the undesirability of judicial review of free speech questions.[62] Rather, they are questions about the contribution of non-censorship policies compared to various other speech-promoting policies in serving what are widely understood to be the values the First Amendment is supposed to serve. And these questions are therefore questions about the extent to which it is necessary or wise to understand the First Amendment only as it has been filtered through the numerous constraints of the traditions, norms, and complications of constitutionalism and judicial review.

IV. The Underinclusive First Amendment

There are two ways of understanding the previous section, and I have no particular preference for either one over the other. One way is by understanding the First Amendment as an admittedly important but nevertheless small part of a larger cluster of institutions and policies serving a more or less unified goal. If that unified goal, consistent with the epistemological "marketplace of ideas" justifications surrounding the First Amendment, is one focused on the fostering of public knowledge, or even on creating an environment for the discovery of less widely accessible but no less important truths, then the First Amendment is one component of an array of policy instruments that include education, research funding, publication outlets, forums for the exchange of ideas across national and disciplinary boundaries, public communication outlets, and genuine opportunities for a wide range of voices, especially skeptical or novel ones, to be heard. And if that unified goal, consistent with both "checking value" and democratic participation justifications, is one focused on the accountability of government and the ability of the people to govern themselves, then the First Amendment can be understood as one component of a different array of institutions that now would include elections, candidate debates, investigative journalism, transparent governmental processes and decisions, as well as inspectors general, special prosecutors, and departments of internal affairs, all, again, devices to guard against governmental abuse of power.

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62 And thus what I say here is different from the argument that strong judicial enforcement of the First Amendment may detract from other ways of promoting First Amendment values. *See* Robert Nagel, *How Useful Is Judicial Review in Free Speech Cases*, 69 CORNELL L. REV. 302, 318 (1984) (noting that the use of principle in judicial enforcement "requires courts to protect speech even in cases in which the immediate advantages are questionable and the social disadvantages are clear").

In talking about a "unified" goal, I do not mean to suggest that these goals are mutually exclusive. They are all valuable, as are some of the other goals of which the First Amendment might also be seen as a part, especially the goal of creating an environment for the appreciation and cultivation of art and literature. Rather, I mean "unified" to suggest that for some number of goals, the goal itself is the common aim of a number of different policies, of which the protection of First Amendment rights targeted at that goal might be among them, but is certainly not coextensive with them. From this perspective, the First Amendment is properly understood as underinclusive vis-à-vis the background justifications that the First Amendment was designed to serve.[63]

But although the perspective of underinclusion compared with a larger range of communication- and information- and expression-fostering policies is one way of understanding the First Amendment, another, and one which might be more compatible with larger Hohfeldian themes, is to understand the First Amendment itself as creating a larger array of rights than the courts alone can or should be expected to manage. Hohfeld's First Amendment might include rights against government interference with privately initiated speech which it is the job of the courts to enforce; rights to compel the government to provide opportunities to speak and opportunities to obtain information, which it might be the job of Congress and other governmental entities to provide; rights of access to communicative forums controlled by others, which it might be the job of legislatures to create and the courts to enforce; and perhaps rights against nongovernmental interference with privately initiated speech, which again it might be thought of as the job of legislatures to create and the courts to enforce.

Like the morning star and the evening star, the policy of underinclusion and the rights-underenforcement perspective on the First Amendment may be two different conceptions of the same thing. Under the former conception, the First Amendment is but one part of a larger collection of rights, duties, policies, and goals; and under the latter, the First Amendment itself is the source of and the appropriate label for a variety of rights, duties, policies, and goals, only some of which are the responsibility of the courts to operationalize, and only some of which are the responsibility of the courts to enforce. It may

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63 *See* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 7 (1989) (noting that freedom of speech is both underinclusive and overinclusive with respect to its background justification).

be that not a great deal turns on the difference between these two conceptions, although the ubiquity of doctrinally implausible First Amendment rhetoric suggests that the latter may already have carried the day, the opinions of legal insiders notwithstanding. The important point, however, is that the First Amendment as a directly and judicially enforceable constitutional prohibition on governmental interference with privately initiated communication may have a valuable role to play,[64] but there is no reason to think that *that* First Amendment is anything other than radically underinclusive vis-à-vis any of the justifications that even *that* First Amendment is properly thought to serve.

V. Access Revisited

Forty years ago, Jerome Barron recognized the importance of access to the mass media as a component of a comprehensive free speech approach,[65] and he did so in a way that can now be seen as theoretically prescient and strategically misguided. He was theoretically prescient in recognizing that seeing the First Amendment in solely negative terms neglected not only the realities of modern communication, but also, and more importantly, the fact that some rights are centrally about *doing* things and not merely about not being prevented from doing things.[66] There is a large difference between what we can do and what we are not prevented from doing, and Barron insightfully capitalized on this difference.[67] It is true that there are indeed rights whose principal aim is to keep government from doing things, and whether citizens actually do something as long as government is kept away may not make a great deal of difference. It is important that government not force us to testify against ourselves, but perhaps little is lost when we choose to confess to our crimes. It is important that government not invade our privacy, but whether we exercise our privacy may be neither here nor there. And it is important that government not interfere with the free exercise of religion,

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64 Especially, it seems to me, in the protection of wildly unpopular speech, such as flag desecration, child pornography, racist speech, and the like. Apart from the question of how many of the foregoing categories of speech *should* be protected and, if so, how much, which is not our topic here, it may nevertheless be the case that protection of speech not taking place within the "forty-yard lines" of contemporary political and social discourse is best entrusted to countermajoritarian institutions such as the courts. *See* Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1057–58 (2004).

65 *See generally* Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

66 *See id.* at 1156.

67 *See id.*

but perhaps it is not so (constitutionally) important whether people have religion, and whether and how they choose to exercise it.

Speech, however, may be different. Mark Twain once quipped that "[i]t is by the goodness of God that in our country we have three unspeakably precious things: Freedom of Speech, Freedom of Conscience and the prudence never to practice either of these,"[68] but Twain's clever remark should not be taken too far. Speech, unlike privacy, the privilege against self-incrimination, and (maybe) religion, provides positive benefits. Ideally, the right to free speech aims at having people speak and not just at avoiding the costs of government interfering with their speech. And, if the goal of free speech is to have people speaking, then a full-blown right to free speech might recognize, prior to the question of enforceability,[69] that issues of access and opportunity are at the center of any healthy conception of why the right exists in the first place. Even under the often-ridiculed (and rightly so) marketplace of ideas rationale for freedom of speech and press, it would seem silly for the right to exist and then to wind up with a state of affairs in which few people actually challenged a society's accepted opinions. It was Jerry Barron's prescience to recognize that the reasons for *having* the right to free speech led to serious concerns about actual ability and opportunity, and that these concerns in turn led to the importance of access, including, even more controversially, access to the privately owned and controlled mass media.

In 1967, however, confidence in the courts was, in some circles, close to limitless. A short time later, Frank Michelman was writing about a constitutionally enforceable right to welfare,[70] and yet Larry Sager was some years away from writing about underenforced constitutional rights.[71] If some value or goal was good enough to be a right, then it was good enough for courts to create it, recognize it, and en-

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68 Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 121 (1961) (Douglas, J., dissenting).

69 And perhaps prior to the question of whether those against whom access rights are claimed have countervailing rights. When countervailing rights, especially countervailing First Amendment rights, do not exist, the question of access is far less constitutionally, doctrinally, and politically perilous. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83, 91 (1980). As a matter of strategy, it might have been wiser first to see the case for access to government established, as with freedom of information and open meeting laws, and then to see the case for access to non-ideological private property established, as in *Pruneyard*, and then, and only then, take on the question of access to a press whose own understanding of the First Amendment is a powerful force. As the old saw goes, "[n]ever argue with the fellow who buys ink by the barrel."

70 Michelman, *supra* note 36, at 9, 11.

71 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978).

force it, or so it now seems that many at the time believed. Jerry Barron's proposed judicially enforceable right of access to the mass media was a child of its era, but if that era had ever come, the Supreme Court made clear in *Miami Herald Publishing Co. v. Tornillo*[72] and *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*[73] that by the early 1970s it was over.

By yoking the right of access to the mass media to judicial power, however, Barron saddled his profoundly important idea with all of the baggage of the American constitutional tradition—the countermajoritarian difficulty, the passive virtues, nonjusticiability, and all the rest. As a result, it is perhaps slightly too easy to think now that Barron's idea was unsound, rather than just recognizing that it was hanging around with the wrong crowd. When we uncouple Barron's profound ideas about the importance of access from the difficulties with judicial enforcement of those ideas, we may begin to glimpse Hohfeld's First Amendment, a First Amendment of several rights, and a First Amendment of rights, policies, and values, the judicial nonenforceability of some of which makes all of the others no less important.

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72 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257–58 (1974) (holding a Florida statute, which required newspapers to devote equal space to allowing a political candidate to respond to attacks on their record, unconstitutional on First Amendment grounds).

73 Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 132 (1973) (holding that the First Amendment does not require broadcasters to accept paid editorial advertisements).