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Recommended Citation

David Skover and Ronald Collins, The First Amendment in an Age of Paratroopers, 68 *TEX. L. REV.* 1087 (1990).

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Texas Law Review

Volume 68, Number 6, May 1990

The First Amendment in an Age of Paratroopers†

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“We cannot hope simply to retain our old prerogatives. Our bridges are gone and the Rubicon is yet to cross? We have either to assume a large new role or to abdicate entirely. It is the age of paratroopers.”

— Marshall McLuhan¹

McLuhan’s metaphor is an invitation and, at the same time, a warning. It is a call to action and a question. In the context of the first amendment, the metaphor is particularly powerful: it challenges us to cross the Rubicon into a hostile territory of jurisprudence.

Today’s first-amendment theory is largely the province of a concep-

† Copyright © 1990 Ronald K.L. Collins & David M. Skover. This is the first installment of a much larger work in progress entitled *The Death of Discourse*. The next installments, *Electronic Texts* and *The Death of Discourse*, address various points raised in this Article.

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We are grateful to a number of our friends and colleagues who provided thoughtful, and sometimes even critical, comments: Suzanne Singer, John Scanlan, Pierre Schlag, Eric Chiappinelli, Steven Pressman, Daniel Barbiero, Linda Hirshman, Chris Rideout, Burt Wechsler, George Anastaplo, H. Jefferson Powell, Jill Ramsfield, Antonia Fondaras, Joe Goffman, and Charles Reich.

1. Forsdale, *Marshall McLuhan and the Rules of the Game*, in MARSHALL MCLUHAN: THE MAN AND HIS MESSAGE 169, 173 (G. Sanderson & F. MacDonald eds. 1989) (quoting M. McLuhan, *Educational Effects of the Mass Media of Communication* (1955) (seminar paper presented at Teacher’s College, Columbia University)). To “cross the Rubicon” means “to take an irrevocable step.” Historically, the Rubicon was a small river that separated ancient Italy from Cisalpine Gaul (the province allotted to Julius Caesar). When Caesar crossed this stream in 49 B.C., he passed beyond the limits of his province and became an invader in Italy, thus precipitating war with Pompey and the Senate. See BREWER’S DICTIONARY OF PHRASE AND FABLE 973 (1981).

In this Article, we appropriate McLuhan’s language and apply it in ways that he probably would not endorse. For a justification of such practices, see M. LERNER, *IDEAS ARE WEAPONS: THE HISTORY AND USES OF IDEAS* 6 (1939) (“For in the history of ideas even their distortions are a part of their meaning—the unfolding of a line of direction inherent in the ideas themselves.”).

tion of freedom of expression grounded in eighteenth-century fears of government's tyrannical censorship. This theory, we maintain, is ill-equipped to deal with a distinct tyranny in late twentieth-century America, a tyranny playing upon the public's insatiable appetite for amusement. Crossing the Rubicon requires understanding the differences between the old and new tyrannies, and appreciating the complexities of developing first-amendment principles to suit a new cultural environment. Those who attempt such a venture are the first-amendment paratroopers of our time, the ones who realize that we cannot retain our old constitutional prerogatives in a transformed world.

Today the forces of capitalism encourage exploitation of highly advanced electronic technology to accelerate the age-old human drive for self-gratification. The consumptive thrust of unchecked capitalism affects all public discourse. This phenomenon is most apparent in the culture of commercial television, a culture in which America's most beloved toy provides unceasing mass amusement. Essentially, "the predicament of American television is the predicament of American culture and politics as a whole."² Public discourse is increasingly taking a distinctive and aestheticized form consistent with the look and feel of commercial television. The aestheticization of public discourse is essential to the effective marketing of ideas and commercial goods in a highly consumptive economy: marketing is, after all, essentially a selling of image. The business of television trades in the economy of such images and has pulled other discourse into that economy. With entertainment as the paradigm for most public discourse, traditional first-amendment values—which stress civic restraint³ and serious dialogue—are overshadowed. Given these core values and the anticensorial direction of first-amendment theory, is there anything that could (or should) be done to thwart, rather than to feed, an amusement-centered culture?

In attempting to answer this question, we confront a paradox: by saving itself, the first amendment destroys itself. On the one hand, to preserve its anticensorial ideals, the first amendment must protect both the old and new media cultures. Accordingly, it must constrain most governmental controls over expression, including those over the commer-

2. T. GITLIN, *INSIDE PRIME TIME* 335 (1983).

3. Civic restraint is not, of course, incompatible with radical political expression, which takes politics most seriously in a way that an entertainment culture simply does not. *See, e.g.*, S. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* (forthcoming 1990) (characterizing the first amendment's "free speech idea" as "one of our foremost cultural symbols"). Professor Shiffrin maintains that "as a cultural symbol, the first amendment has enlivened, encouraged, and sponsored the rebellious instincts within us all. It affords a positive boost to the dissenters and the rebels." *Id.* Shiffrin contrasts this with the "hedonistic consumer" television culture. *Id.*

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cial use of electronic media. On the other hand, if the first amendment's protections do not differentiate between the old and new media cultures, the modern obsession with self-amusement will trivialize public discourse and undermine the traditional aim of the first amendment. Differentiation requires government "abridgment" of expression, particularly in the case of commercial television. In the case of government abridgment, first-amendment protection collapses into first-amendment tyranny; in the case of anticensorial ideals, first-amendment liberty collapses into first-amendment triviality.

Throughout this Article, our analysis of contemporary public discourse focuses mainly on the ecology of commercial television. We chose this focus because television enjoys a dominant and almost unchallenged status in our society. In assessing the function of first-amendment jurisprudence, we simply cannot ignore that Americans own some 150 million televisions,⁴ that sixty-five percent of American households are equipped with VCRs,⁵ that our people are tuned into a television set on the average of forty-seven hours weekly,⁶ that our young consume one hundred commercials daily,⁷ that advertisers spend nearly twenty-three billion dollars annually on television commercials,⁸ and that the television culture is first and foremost one of amusement.

Part I of this Article examines what we consider to be the "new pleasure principle" and its relationship to the first amendment. We explain this relationship with reference to the cautionary tales of George Orwell and Aldous Huxley. Part II reflects on the attributes and commercial use of television as they relate to the Huxleyan pleasure principle. Part III describes three prototypical responses to the first-amendment dilemmas posed in Part I. Each of these responses attempts

4. See Cutler, *Meet Jane Doe*, AM. DEMOGRAPHICS MAG., June 1989, at 25, 26.

5. See Stack, *New Uses for Video—It's Everywhere*, S.F. Chronicle, June 30, 1989, at E1, col. 5 (describing how ubiquitous video technology is now being used to tape weddings, instruct police officers, and create video magazines, among other things).

6. See J. MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR 79-80 (1985) (noting past studies revealing that households with incomes under \$10,000 watch an average of 47 hours and 3 minutes of television a week; households with incomes over \$30,000 watch television 47 hours and 50 minutes a week). According to the Nielson 1988 Report on Television, even the lowest viewing group—single-person households—had their sets on 37 1/2 hours a week. See NIELSON MEDIA RESEARCH, 1988 REPORT ON TELEVISION 7 (1988).

7. See Verhovek, *New York Bans Sponsored TV From Its Schools*, N.Y. Times, June 17, 1989, at 1, col. 6 (reporting attempt of Whittle Communications to gain access to New York classrooms through sponsored television); Whittle, *Commercials, Plus Education*, N.Y. Times, Mar. 1, 1989, at A25, col. 1.

8. See Nader & Riley, *Oh, Say Can You See: A Broadcast Network for the Audience*, 5 J.L. & POL. 1, 53 n.274 (1988) (noting figures for 1987 advertising); see also Gerard, *Advertisers Rush Back to the Networks*, N.Y. Times, July 3, 1989, at 29, col. 3 (national ed.) (noting \$4 billion annual advertising expenditures for prime-time hours alone).

to preserve some realm of vital sociopolitical discourse, which either may be segregated from entertainment media or reconciled with them. Finally, Part IV demonstrates how each of these responses fails to appreciate the paradox of the first amendment in an age of paratroopers.

To avoid false expectations and to further the worthy mission of first-amendment debate in this area,⁹ we close this Article on something of an unresolved note. Having revealed the paradoxical nature of our contemporary first-amendment situation, and having identified and criticized the major responses to that predicament, we leave to others (would-be paratroopers) and to a future essay¹⁰ any further struggle with the paradox.

I. The "New" Pleasure Principle: Revisiting *Brave New World*

The high purpose of the first amendment's free speech and press guarantees is characteristically, although not exclusively, associated with protecting dissenters from government oppression. Contests between the activist or critic and the established order are the stuff of which the first amendment is made. Names such as John Peter Zenger,¹¹ Jacob Abrams,¹² Irving Feiner,¹³ and Paul Robert Cohen¹⁴ resonate with the Madisonian principle of free expression. First-amendment theories such as the traditional "marketplace of ideas,"¹⁵ the modern "antifoundationalist marketplace of ideas,"¹⁶ the "checking" function,¹⁷ the "self-govern-

9. See Appendix A.

10. In another essay in progress, *The Death of Discourse*, we grapple with several of the deeper points latent in this article. Importantly, here we consider the influences of an amusement-oriented media culture on the sociopolitical values of the first amendment, and not on its rationality principle. We realize that a fundamental relationship exists between the political and rationality values. On this occasion, however, we attempt to isolate the entertainment problem from the antirationality problem in order to enhance clarity.

11. See *Rex v. Zenger*, 17 St. Trials, 675, 723 (N.Y. Province 1735) (affirming a jury finding that acquitted John Peter Zenger when the jury was to decide only whether the libelous words were printed); L. LEVY, *EMERGENCE OF A FREE PRESS* 119-43 (1985) (relating the story of John Peter Zenger).

12. See *Abrams v. United States*, 250 U.S. 616, 622-24 (1919) (rejecting a first-amendment challenge to a conspiracy conviction for opposing the United States "capitalist invasion of Russia"); R. POLENBERG, *FIGHTING FAITHS* 197-242 (1987) (analyzing the Supreme Court's rejection of first-amendment challenge to espionage conviction in *Abrams*).

13. See *Feiner v. New York*, 340 U.S. 315, 321-22 (1951) (rejecting a first-amendment challenge to a conviction for incitement of breach of the peace by a street corner protestor).

14. See *Cohen v. California*, 403 U.S. 15, 18-19 (1971) (upholding a draft protestor's first-amendment claim).

15. See, e.g., Greenwalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130-41 (1989) (analyzing the premises of classical marketplace theory); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 nn.1-2 (arguing, through numerous examples, that jurists and scholars often use the marketplace-of-ideas image to legitimize first amendment freedoms).

16. An excellent attack on the premises underlying the traditional marketplace-of-ideas theory and a reconstruction of the marketplace metaphor in light of "antifoundational" criticism is provided in Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarr-*

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ance”¹⁸ and “autonomy and self-realization” rationales,¹⁹ and “romantic eclecticism”²⁰ enshrine, in essential part, the spirit of civic pride in socio-political engagement and civic disdain for governmental suppression of political viewpoints. In essence, all first-amendment cases and theories establish the necessity of preserving an environment in which robust sociopolitical discourse and action may be tested. Without this environment for experimentation, the first amendment, as we know it, cannot survive.

This lofty experiment is hailed as the antithesis of the Orwellian regime,²¹ in which the hand of an omnipresent government squelches dissent, bans books, denies information, and conceals truth. Triumphantly, America has survived *1984*, and is less fearful of Orwell’s dark determinism. But our Orwellian perspective has prevented us from focusing on an equally menacing, and more realistic, threat—the evil first identified in Aldous Huxley’s antiutopian *Brave New World*²² and later developed in his *Brave New World Revisited*.²³ As Huxley himself contended²⁴ and as Professor Neil Postman echoed,²⁵ it is this threat that looms largest to-

ran-Walter Act, 66 TEXAS L. REV. 1481, 1523-30, 1539-44 (1988). See also Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 632-33 (1990) (analyzing the first amendment’s commitment to neutrality with respect to the normative values of specific communities—a “marketplace of community” rationale, as it were).

17. See, e.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527-42 (arguing that the power of public opinion exposes and deters abuses of power by public officials).

18. See, e.g., A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 9-28 (1960) (asserting the hierarchy of first-amendment speech values justifying dual-level protections); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971) (arguing that the first amendment protects only “explicitly and predominantly political” speech).

19. See, e.g., C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-69 (1989) (advocating the protection of speech not because free speech is an instrumental means to a collective good but because of the normative value of the speech conduct to the individual); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (arguing that free speech promotes the realization of human character and potentialities); M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 20-30 (1984) (arguing that free speech enables the formation of life-affecting decisions); Scanlan, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-15 (1972) (defending the principle that certain ills must be accepted in order to maintain freedom of expression).

Our characterization of this rationale assumes that, at an important level, these theorists would distinguish between self-realization and self-gratification. In other words, the individual who is self-realized is significantly more than a glutton for pleasure and amusement.

20. See, e.g., S. SHIFFRIN, *supra* note 3.

21. See G. ORWELL, *1984* (1949).

22. A. HUXLEY, *BRAVE NEW WORLD* (1946).

23. A. HUXLEY, *BRAVE NEW WORLD REVISITED* (1958).

24. See 2 S. BEDFORD, ALDOUS HUXLEY: A BIOGRAPHY 490-91 (1973) (Huxley, in a letter to George Orwell, maintained: “I feel that the nightmare of *Nineteen Eighty-Four* is destined to modulate into the nightmare of a world having more resemblance to that which I imagined in *Brave New World*.”).

25. See N. POSTMAN, *AMUSING OURSELVES TO DEATH* at vii (1985) [hereinafter N. POST-

day. We maintain that the Huxleyan evil particularly endangers our historic and idealistic commitment to freedom of expression.

The Huxleyan nightmare is one in which government has no need to censor dissent, no cause to hide truth, and no ground to ban serious discussion. It is a world of passivity, pleasure, and trivialization, a world whose citizenry euphorically digests narcotic "soma tablets."²⁶ The brave new world offers a surfeit of entertainment, "non-stop distractions of the most fascinating nature (the feelies, orgy-porgy, centrifugal bumble-puppy)"²⁷ that ensure a state of perpetual amusement and happiness. The governing maxim is: "Everybody's happy now."²⁸

The purpose of all this "happiness" is to numb. The "non-stop distractions . . . are deliberately used as instruments of policy, for the purpose of preventing people from paying too much attention to the realities of the social and political situation."²⁹ The problem with all this "happiness" is the servitude that it spawns, and the tyranny that a love of servitude makes possible. The rulers of Huxley's antiutopia have learned that soma tablets more effectively suppress the critical spirit that the iron fist of Orwell's world oppresses.³⁰

In the brave new world, the antiquated first amendment is eclipsed. Its fear of the tyranny of terror—demonstrated, for example, by the Alien and Sedition Acts of 1798, the Espionage Acts of 1917 and 1918, and the McCarthy era—is overshadowed by a tyranny of pleasure. The Orwellian constraints on physical liberty and ideological freedom constituted "hands-on" tyranny, but the Huxleyan conception is a "hands-off" governmental tyranny. Huxley understood tyranny as the product of

MAN, AMUSING]; N. POSTMAN, CONSCIENTIOUS OBJECTIONS 51, 168, 174 (1988) [hereinafter N. POSTMAN, CONSCIENTIOUS]. Professor Postman's provocative writings on public discourse do not address the first-amendment issues discussed in this article. Moreover, and as we point out later, the substance of Huxley's writings is more relevant to our first-amendment inquiry than Professor Postman has need to draw upon for his particular project. See *infra* note 94 and accompanying text.

26. A. HUXLEY, *supra* note 22, at 63-65, 71-72, 88-89; A. HUXLEY, *supra* note 23, at 85. In Huxley's works, soma was a mild drug dispensed by the government to sedate and gratify the populace. According to Huxley, "the soma habit was not a private vice; it was a political institution, it was the very essence of the Life, Liberty and Pursuit of Happiness guaranteed by the Bill of Rights." *Id.* at 85.

27. A. HUXLEY, *supra* note 23, at 45.

28. A. HUXLEY, *supra* note 22, at 88, 110.

29. A. HUXLEY, *supra* note 23, at 45.

30. See *id.* at 5. Huxley perceptively contrasts his world with Orwell's.

[C]ontrol through the punishment of undesirable behavior is less effective, in the long run, than control through the reinforcement of desirable behavior by rewards, and . . . government through terror works on the whole less well than government through the non-violent manipulation of the environment and of the thoughts and feelings of individual men, women and children.

Id.

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those “great impersonal forces now menacing freedom,”³¹ the “motivation analyst[s]”³² who held out the soma tablets.

In an insightful passage particularly applicable to the first amendment, Huxley questioned the outdated eighteenth-century constitutional ideal:

[T]he early advocates of . . . a free press envisaged only two possibilities: the propaganda might be true, or it might be false. They did not foresee what in fact has happened, above all in our Western capitalist democracies—the development of a vast mass communications industry, concerned in the main with neither the true nor the false, but with the unreal, the more or less totally irrelevant. In a word, they failed to take into account man’s almost infinite appetite for distractions.³³

Huxley’s depiction of a tyranny of pleasure accurately forecasts the contemporary American culture of commercial television. Huxley realized the connection between commercial television and his antiutopia: “That so many of the well-fed young television-watchers in the world’s most powerful democracy should be so completely indifferent to the idea of self-government, so blankly uninterested in freedom of thought and the right to dissent, is distressing, but not too surprising.”³⁴

America’s primary information medium is also its most popular source of entertainment, its favorite plaything. Metaphorically, television is the soma tablet of modern society.

II. The Soma Medium: Reflections on Its Attributes and Commercial Use

Because television is one of the primary media through which we conceptualize reality, its messages profoundly influence the nature of public awareness and discussion of important issues. As Professor Postman observed: “[T]here is no subject of public interest—politics, news, education, religion, science, sports—that does not find its way to television.”³⁵ Furthermore, television “has made entertainment itself the natural format for the representation of all experience. . . . To say it still another way: Entertainment is the supraideology of all discourse on television.”³⁶ The medium’s entertainment biases derive primarily from two

31. *Id.* at 136-37.

32. *Id.* at 64.

33. *Id.* at 44.

34. *Id.* at 145.

35. N. POSTMAN, *AMUSING*, *supra* note 25, at 78.

36. *Id.* at 87; accord Hendrix, *Is the Sky Really Falling?*, *L.A. Times*, Sept. 25, 1989, § 5, at 1, col. 2 (stating that television “has become the command center of our culture”); see also I. MITROFF & W. BENNIS, *THE UNREALITY INDUSTRY* 176-86 (1989) (arguing that entertainment has blurred

combined forces: first, the attributes of television's technology;³⁷ and second, the commercialization of television as a profit-oriented enterprise. These two forces create a communicative environment that favors trivial and entertaining programming. Both television's technological nature and commercial use disfavor sustained concentration, as attention is grabbed by a dynamic, fast-moving, and ever-changing series of images.³⁸ Television, as we have come to know it,³⁹ loses a key ingredient of its mass appeal when divorced from the visually⁴⁰ dramatic pleasure programs—for example, rock videos, sports events, "action" news. Where sustained concentration is the concern, neither Thomas Paine's *Common Sense*⁴¹ nor *The Federalist Papers*⁴² would play well on network television. The same holds true, in television vernacular, for "talking heads" programs.⁴³

reality and unreality and has thereby debased public discourse); N. POSTMAN, *CONSCIENTIOUS*, *supra* note 25, at 168 (arguing that Americans look to television to define their culture even though television trivializes everything it transmits).

37. Various communications theorists have investigated the operation and effect of different modes of communication, including the electronic media. Of course, any complete study of the subject would require the presentation and analysis of the views of individuals such as James Carey, Florian Coulmas, Daniel Czitrom, Elizabeth Eisenstein, Jacques Ellul, Franco Ferrarotti, Todd Gitlin, Eric Havelock, Hal Himmelstein, Ivan Illich, Harold Innis, Robert Logan, Jerry Mander, Marshall McLuhan, Joshua Meyrowitz, Mark Miller, Walter Ong, Barry Sanders, Tony Schwartz, and Raymond Williams. Also worthy of consideration is the scholarship of cultural theorists concerned with the social and economic effects of mass technological culture, including among many others the critical works of C. Wright Mills, Lewis Mumford, and Stuart and Elizabeth Ewen. Although our Article relies on certain insights from this rich body of literature, a more extended discussion of the relevance of these works to law is reserved for our forthcoming essay, *The Death of Discourse*.

38. Professor Postman explains that "[t]he average length of a shot on network television is only 3.5 seconds, so that the eye never rests, always has something to see." N. POSTMAN, *AMUSING*, *supra* note 25, at 86. Postman also remarks that "[t]he learning modules of the TV curriculum are extremely short and compact—commercials run anywhere from ten to sixty seconds; what are called 'programs' run from thirty to sixty minutes but are always sequenced in eight- to ten-minute modules." N. POSTMAN, *TEACHING AS A CONSERVING ACTIVITY* 60-61 (1979); *see also* Goldberg, *TV: Up-Links and Hi-Jinks at the Summit*, *Wall St. J.*, Dec. 4, 1989, at A12, col. 1 (noting the extravaganza created on Malta by the media covering the summit); Goodman, *For TV Networks at Malta, Big Stars, Great Scenery, but "Anchors Adrift"*, *N.Y. Times*, Dec. 4, 1989, at A9, col. 1 ("Television has taught us that there is a scant relationship between the significance of an event and the power of the picture. . . . [W]hether it is a Presidential election or a superpower summit, the substance is not readily captured by the camera.").

39. But may we come to know it in the future in new, multidimensional and more pervasive ways—ways that merge modes of communication and further accentuate their entertainment function. *See, e.g.*, Schlender, *Couch Potatoes! Now It's Smart TV*, *FORTUNE*, Nov. 20, 1989, at 111, 111 (explaining "Frox's home entertainment system" which combines television, VCR, stereo, computer, phone, and fax capacities); Markoff, *Personal Computers May Combine Brain with Beauty of TV*, *N.Y. Times*, Sept. 12, 1989, at 1, col. 6 (relating various methods by which television and computers may interact).

40. For a discussion of the audio influence of television, see R. ALTMAN, *Television/Sound*, in *STUDIES IN ENTERTAINMENT* 39, 44-46 (1986); Foltz, *Sound Becomes the New Frontier for TV Ads*, *N.Y. Times*, Feb. 5, 1990, at C10, col. 3.

41. T. PAINE, *COMMON SENSE* (I. Kramnick ed. 1776).

42. *THE FEDERALIST* Nos. 1-84.

43. In the last three decades, the only "talking heads" program to achieve a top twenty-five

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A. *The Attributes of Television's Technology*

The imagistic character of television produces a flow of information that is largely framed, context-free, and context-compressed.⁴⁴ A masterful exploitation of these properties occurred in the 1988 presidential campaign. With notable expertise, political media strategists situated then-presidential candidate George Bush in front of a colorful New Jersey flag factory.⁴⁵ This framed bit of television "reality" instantaneously communicated patriotism and leadership without the heavy baggage of commentary on the issues of the day.⁴⁶ In addition, television conveys information in a discontinuous and nonsequential manner.⁴⁷ For example, television programming catalogues a variety of disassociated subjects,⁴⁸ placing the national news next to a game show, and situ-

ranking in network television ratings was *60 Minutes*. See T. BROOKS & E. MARSH, *THE COMPLETE DIRECTORY TO PRIME TIME NETWORK TV SHOWS: 1946-PRESENT 1966-75* (4th ed. 1988). Although one may quibble, it is questionable whether the "action-packed" *60 Minutes* can be characterized as a "talking heads" program. Bill Moyers' Public Broadcasting Service series, *A World of Ideas*, is a finer example of "talking heads" programming, but it is viewed on a much smaller scale. See B. MOYERS, *A WORLD OF IDEAS* (1989) (edited versions of 41 interviews taken by Moyers of experts in a variety of fields about the ideas shaping our future).

44. See T. GITLIN, *THE WHOLE WORLD IS WATCHING* 5-13 (1980) ("What makes the world beyond direct experience look natural is a media frame. . . . Media frames are persistent patterns of cognition, interpretation, and presentation, of selection, emphasis, and exclusion, by which symbol-handlers routinely organize discourse, whether verbal or visual."). Admittedly, other forms of communication, such as print, "frame" reality. See, e.g., M. McLuhan, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 229-30 (1962) (positing the logic of printing as a centralized and homogenizing force which regulates language, the paint brush of reality); see also Collins, *Writing on Writing* (forthcoming essay) (copy on file with *Texas Law Review*) (arguing that any medium is too confining to adequately express the ideas it reflects. Even McLuhan, the critic of "the medium is the message" concept, was limited to expressing his ideas through the medium of print). But television "frames" differ in essential ways: they are more imagistically dramatic; they can instantaneously capture more unprocessed information; and they can divorce information from its natural and larger context in a more visually sensational manner.

45. See Farrell, *The Electronic Election: Campaign By Image*, Boston Globe, Nov. 13, 1988, § B (Special Report), at 6-7.

46. Similarly, we are told by one of "The Great Communicator's" top aides that President Ronald Reagan sallied forth to address the important subject of housing construction "wearing a hard hat and standing in front of homes under construction. . . . Naturally, the story played big on the evening news." Deaver, *Sound-Bite Campaigning: TV Made Us Do It*, Wash. Post, Oct. 30, 1988, at C7, col. 2.

National Republican Party Chairman and manager of the 1988 Bush presidential campaign, Lee Atwater, sums up the function of the modern political campaign consultant as "'spend[ing] an hour and a half [every morning] figuring out what you're going to do to get on the news that night—to get in the news hole. What stunt you can pull that will give you 14 seconds of news hole.'" Oreskes, *America's Politics Loses Way as Its Vision Changes World*, N.Y. Times, March 18, 1990, at A16, col. 4.

47. See, e.g., J. MEYROWITZ, *supra* note 6, at 79 ("The logical linking of pieces of information into large, complex, and connected treatises and theories is a feature of writing and print. . . . [Television, by contrast,] favors discrete clumps of information rather than long connected arguments and analyses." (footnote omitted)).

48. Of course, the disassociation of ideas is not a property unique to electronic media communication. Something of the same phenomenon surfaces in oral communication. Typographic communication, by contrast, places a premium on the analytically linear. Whatever the degree of

ating an endless number of disjointed scenes within a single rock video. These attributes of television's technology maximize its potential as an entertainment medium.

All of this, of course, serves to erode a continuous and critical social perspective. Picture stories⁴⁹ that capitalize on aesthetics and emotion do not really promote synthesis, analysis, or criticism; they likewise do little to enhance any desire to take a longer and harder second look at our culture and its directions. Although a "live news story" about a lone Montana gunman squaring off with a SWAT team may be "hot" national news, it trades an informed treatment of the problems of crime and justice in our society for "action" pictures. "Television teaches you to know through what you see and feel. Its epistemology begins and largely ends in the viscera."⁵⁰ The aesthetic and emotional experience is unquestionably television's standard fare and *modus operandi*.⁵¹ In short, as veteran reporter Daniel Schorr has put it: "Television allows people to experience more and understand less. It appeals more to the senses than to the intellect."⁵²

Out of this picture-centered environment emerges the prototype of the public leader: Ronald Reagan. The former President and "former Hollywood movie actor, rarely [spoke] accurately and never precisely, [yet he was] known as the Great Communicator; his telegemic charm [appeared] to be his major asset."⁵³ Professor James Barber, a leading presidential scholar, captured the essence of the Reagan television image:

disassociation in oral communication, television has institutionalized the phenomenon and made it a significant aspect of mass communication. As we emphasize repeatedly in this text, commercial television does not so much create a mindset hostile to traditional first-amendment values; rather, commercial television greatly *compounds* the problems associated with the trivialization of discourse. Cf. Gitlin, *Blips, Bites & Savvy Talk*, *DISSENT*, Winter 1990, at 18, 25-26.

49. See N. POSTMAN, *supra* note 38, at 55-56.

50. *Id.* at 58-59.

51. See N. POSTMAN, *CONSCIENTIOUS*, *supra* note 25, at 76-77. Postman notes:

Because time is so precious on television, because the nature of the medium favors dynamic visual images, and because the pressures of a commercial structure require the news to hold its audience above all else, there is rarely any attempt to explain issues in depth or place events in their proper context.

Id.

52. Yaukey, *Newsman Schorr Blasts Politics Warped by TV*, Ithaca J., Nov. 15, 1988, at 3A, col. 1 (quoting from a lecture delivered at Cornell University (Nov. 14, 1988)).

53. N. POSTMAN, *CONSCIENTIOUS*, *supra* note 25, at 169. Apparently, the Reagan campaign model has been adopted abroad. See, e.g., Brooke, *TV Making Obscure Brazilian the Candidate to Beat at 39*, N.Y. Times, July 31, 1989, at A1, col. 5. Speaking of the television appeal of presidential candidate Fernando Collor de Mello, a Brazilian editorial writer observed: "He does not have a program—he has an image. He does not have a party—he has a vehicle for his personality cult. He does not say anything—only what people imagine that he is saying." *Id.* at A6, cols. 2-3. Mr. Collor de Mello's strongest opponent was a popular television talent show host, Silvio Santos, who leapt into the political fray 15 days before the election. See Margolis, *TV Host Upstages Brazil's Politicos*, Wash. Post, Nov. 4, 1989, at A17, col. 1.

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“He personifies his rhetoric, speaks with filmic grammar, pretends spontaneity, rolls through narrative and translates every blunder and tragedy into an upbeat lesson.”⁵⁴ Prophetically, in 1958, the British-born Huxley anticipated the Reagan political persona and its vital role in the brave new world:

In one way or another, as vigorous he-man or kindly father, the candidate must be glamorous. He must also be an entertainer who never bores his audience. Inured to television . . . , that audience is accustomed to being distracted and does not like to be asked to concentrate or make a prolonged intellectual effort. All speeches by the entertainer candidate must therefore be short and snappy. The great issues of the day must be dealt with in five minutes at the most—and preferably . . . in sixty seconds flat.⁵⁵

B. *The Commercialization of Television*

Obviously, amusement is not the unique product of contemporary television technology. Entertainment existed before television and expressed itself in oral and print cultures, as the jester’s antics and tabloids’ sensationalism so patently evidence. But today, television’s phenomenal appeal has placed a markedly new premium on the pursuit of pleasure⁵⁶—recall that people spend as much time with their television sets as they do at their jobs. In addition to the technological attributes of television, the commercial use to which it is put significantly determines its entertainment direction.⁵⁷ The commerciality of television thus plays a critical role in determining the directions of its programming. A direct correlation exists between the popularity of a program and the generation of commercial advertising revenues. Popularity, of course, is generally an appeal to mass appetites—typically a minimum of a thirty percent share of all viewers at a given time.⁵⁸ The desire for popularity, and in turn, profits, gives rise to television’s “predictable entrepreneurial problem”: “How do [producers and advertisers] get maximum audience for maximum return?”⁵⁹ Generally, in attempting to maximize profits, com-

54. Barber, *And Now, Mr. Lincoln, You Have 15 Seconds*, N.Y. Times, Oct. 30, 1988, § 7 (Book Review), at 36. For post-Reagan advice to national public leaders on the techniques of “com[ing] across well on television,” see Marchand, *Designing a Video Mask of Many Faces*, N.Y. Times, Aug. 13, 1989, at H31, col. 1 (offering media advice to Vice-President Dan Quayle).

55. A. HUXLEY, *supra* note 23, at 71.

56. See, e.g., Goldberg, *Did the Medium Become the Message?*, Wall St. J., Jan. 2, 1990, at A9, col. 1 (arguing that television’s entertainment format is the most significant factor in shaping the American world view).

57. Television has even changed our perception of pleasure itself, allowing the aestheticized surface—the abstract image—to dominate. Television has thus replaced pleasure with the image of pleasure.

58. See Nader & Riley, *supra* note 8, at 54.

59. T. GITLIN, *supra* note 2, at 328-29.

mercial television networks reach for the lowest common denominator in discourse.⁶⁰ With profit-maximization as the governing norm, television distorts traditional first-amendment values by "associating the lowest passions with the highest ideals."⁶¹ In this environment, it is not surprising that, when the CBS flagship television station in New York had to choose between a game show, *Win, Lose or Draw*, and Dan Rather's evening news for the desirable seven p.m. time slot, the game show won.⁶²

By necessity, commercial television favors noncontroversial and uncomplicated programming.⁶³ From an advertiser's standpoint, serious public affairs programming may prove so volatile or complex as to discourage commercial support. A mass medium heavily dependent on such support will inevitably program with a bias to avoiding viewer controversy or perplexity.⁶⁴ With broad-based popularity as its key stan-

60. See, e.g., F. GRAHAM, *HAPPY TALK: CONFESSIONS OF A TV NEWSMAN* 232 (1990) (noting that the tendency of CBS network news producers was to assume "that the average television viewer was rather dense and that the way to reach the largest number was to aim low and talk down").

61. A. HUXLEY, *supra* note 23, at 41 (referring to propaganda).

62. See Boyer, *The Shift of Rather*, N.Y. Times, Aug. 6, 1988, at 50, col. 6. The story continued:

The move is intended to improve the ratings and, as a result, the advertising revenues for Channel 2 in the highly competitive 7 to 8 P.M. time period, called "prime-time access" in the television industry because it comes just before prime time, when viewership is high.

Many network-affiliated stations around the country have long since moved their network newscasts into earlier time slots. The aim is twofold: not only can these stations often get higher ratings with a game show than with network news, but they can also, by keeping the entire "access" hour to themselves, retain all of the revenues earned in that period.

Id.; see also Boyer, *When News Must Pay Its Way, Expect Trivia*, N.Y. Times, Oct. 2, 1989, at A19, col. 2 (warning that "journalists are becoming entertainers").

As a former news cameraman has observed: "Why pretend television news is anything but entertainment? . . . Television is money-driven and viewer-numbers critical, and television news is the circus of bread and circuses." Sturken, *Letter to the Editor*, N.Y. Times, Nov. 12, 1989, § 4, at 22, col. 3.

63. Today's commercial television producers and advertisers are the modern-day equivalent of the ancient sophists who, in Plato's *Republic*, mastered the art of pleasing the "great strong beast." PLATO, *THE REPUBLIC OF PLATO* 172-73 (A. Bloom trans. 1968). This point is entirely in keeping with the Huxleyan message.

64. For a superb illustration of this point, consider the difficulties encountered by electronic broadcasters in airing programs pertaining to the abortion issue. See, e.g., Gay, *'Roe vs. Wade' Sells Out, but Did the Advertisers Sell Out to Boycott Threat?*, *Variety*, May 17, 1989, at 1, col. 3 (noting a substantial loss of advertising revenue after drastic rate reductions by NBC, even though the program was presented in a balanced and noncontroversial manner); Lipman, *Barbara Walters Radio Special on Abortion Shunned by Sponsors*, *Wall St. J.*, June 16, 1989, at B1, col. 5 (observing that the network was unable to "sign up a single advertiser" because of the program's subject). Many of the same problems confront public television. See, e.g., Goodman, *Public TV Juggles a Hot Potato*, N.Y. Times, Sept. 3, 1989, § 2, at 1, col. 2 ("How can [public television] serve as a forum for all manner of opinions, including those that are bound to irritate many viewers, yet retain its financial support?"). Indeed, corporations and advertisers employ television screening agencies to monitor the content of network shows and to ensure that advertising dollars dictate standards for controversial programming. See Carter, *Screeners Help Advertisers Avoid Prime-Time Trouble*, N.Y. Times, Jan. 29, 1990, at C1, col. 1.

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ard, and the avoidance of controversy as its watch phrase, commercial television inhibits the important first-amendment value of diversity of subject and opinion.⁶⁵ Indeed, the touted promise of cable television to diversify content may well not be realized. In all likelihood, the economics of the commercial broadcast medium will foreclose any other result. As commercial networks increase their holdings in the cable industry,⁶⁶ the entrepreneurial chase for advertising revenues⁶⁷ and maximum achievable market shares⁶⁸ indicates that more and more cable programming will mirror network entertainment shows.⁶⁹

Twenty-three billion dollars of annual commercial television adver-

65. Ralph Nader and Claire Riley have observed that

[d]emographic appeal is narrowed to exclude the elderly, [very] young, ethnic groups and the underclass, and programs reflect this exclusion. Certain program formats are even diminished or eliminated. There are, for example, no fine arts programs on commercial television. Program-length documentaries have been drastically cut back, replaced by short subject highlights on the national news.

Nader & Riley, *supra* note 8, at 54 (footnotes omitted). Even documentaries have fallen victim to commercial television's penchant for dramatic mass appeal. See, e.g., O'Connor, *Blurring the Line Between Fact and Fiction*, N.Y. Times, May 21, 1989, at H27, col. 1 (noting the rise in based-on-fact network movies that tend to use a reality label to perpetuate comfortable myths).

For thoughtful discussions of the transformation of the "public" into a commercial "mass," see W. LEISS, S. KLINE & S. JHALLY, *SOCIAL COMMUNICATION IN ADVERTISING* 307 (1986) ("With media output controlled by the audience logic of advertising, there is no real marketplace for ideas, that is, no public forum where widely different types of social actors can buy and sell information, opinion, and images that express their interests."); C. MILLS, *THE POWER ELITE* 298-324 (1956).

66. See, e.g., I. DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 49-52 (1983) (noting that the recent lifting of FCC restrictions on network ownership of cable systems has opened the door for large publishing and broadcasting organizations to further extend their cross-ownership of media concerns); T. GITLIN, *supra* note 2, at 331-32 (noting that "the networks are diversifying into pay cable and other new technologies so that, like the giant oil companies, they may end up controlling a considerable share of their competition"); see also Bagdikian, *The Lords of the Global Village*, *THE NATION*, June 12, 1989, at 805, 807-10 (describing the "big five" media corporations that control the world's mass media); Nader & Riley, *supra* note 8, at 61 (noting that the networks still command a majority share of the viewing audience and that the advent of cable has not decreased the dominance of the networks because local cable systems merely retransmit television broadcasts without altering their form or content).

67. The Cable Television Advertising Bureau established that advertisers spent \$2 billion on commercial cable services in 1989, an increase of 30% over the total spent on cable commercials in 1988. In planning their purchases of commercial time-slots for new television seasons, major advertising agencies now view cable services as they do network television. Reportedly, advertisers "are finding that in terms of programming cable is more like regular television, and that makes them comfortable. . . . Indeed, advertisers spending on cable [in 1989] mirrored exactly what happened in network television." Fabrikant, *Cable TV Is No Longer a Stepchild*, N.Y. Times, Jan. 10, 1990, at D17, col. 1.

68. See, e.g., T. GITLIN, *supra* note 2, at 328 (noting that capital demands of the new networks are identical to those of the old networks: maximum achievable market shares).

69. According to Ralph Nader and Claire Riley: "Although fifty-one percent of cable systems have over thirty channels . . . , the majority of the programming does not differ substantially from what is offered on network television. In fact, cable operators spend most of their programming dollars to acquire movies." Nader & Riley, *supra* note 8, at 62 (footnotes omitted). Similarly, Professor Todd Gitlin observes:

[Cable operators] have quickly learned that the surest way to carve out a big national market is to take some existing segment of the network schedule and to stretch it throughout a longer broadcast day. Thus sports, old movies, news, and syndicated series are the

tising has a monumental pressure and product effect: money influences programming while commercial advertising strives to create a market for products. Commercials exploit the very entertainment format that constitutes today's television programming. Indeed, media ads are the paragon of the commercial television aesthetic, the ultimate in transmission of fantasy via the pleasure medium. Professor Postman captures the essence of commercial advertising when he states:

[C]ommercials stress the values of youth, . . . consumption, the immediate gratification of desires, the love of the new, a contempt for what is old. Television screens saturated with commercials promote the Utopian and childish idea that all problems have fast, simple, and technological solutions. You must banish from your mind the naive but commonplace notion that commercials are about products. . . . They are about values and myths and fantasies.⁷⁰

The typical television viewer partakes of the culture of the commercial⁷¹ in astonishing proportions: "[T]he average American will have seen approximately 1 million television commercials, at the rate of a thousand per week, by the age of twenty. By the age of sixty-five, the average American will have seen more than 2 million television commercials."⁷² It is an incredible comment on the seductive power of television advertising over consumers that the more successful commercials have remained on the air for over a quarter-century.⁷³

The aesthetics of commercial television have influence far beyond the realm of advertising. As politicians master the strategies of advertising, the line between important political discourse and pure entertainment becomes increasingly blurred. Advertising agency professionals serve as "media consultants" to the candidates and orchestrate campaigns as if they were prime-time commercials. Forklifts, flag factories, tanks, harbor rides, and convict turnstiles were only a few of the backdrops for the staged 1988 presidential media events.⁷⁴ The commercial media exploited the deceptive practices of the past—the 1988 presidential

staples of the new cable networks and are likely to remain so. What they offer is not so much different as more of the same.

T. GITLIN, *supra* note 2, at 328. These arguments hold equally true for "direct-broadcast" television. For a description of this "direct-to-home satellite TV programming service," see Landro, *Direct-Broadcast TV May Be Getting off the Ground*, Wall St. J., Feb. 21, 1990, at B1, col. 3.

70. N. POSTMAN, *CONSCIENTIOUS*, *supra* note 25, at 113.

71. The culture of the commercial undergoes a remarkable evolution, as the newly developed "info-mercial"—a 30-minute to 3-hour commercial presented as a talk show—evidences. See Brush, *Heeeeere's The Commercial!*, Wash. Post, Feb. 11, 1990, at F1, col. 1.

72. N. POSTMAN, *CONSCIENTIOUS*, *supra* note 25, at 113.

73. See *And Now a Word About Our Sponsors*, PEOPLE WEEKLY, Summer 1989 Extra, at 120, 120-23 (noting longevity of Timex, Charmin, and Rice Krispies commercials).

74. See Farrell, *supra* note 45, at 7.

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backdrops were primed to “communicate” more than “babes in arms” ever could.⁷⁵

True to the entertainment-commercial format, “sound-bite” discourse increasingly replaces reflective deliberations over complex socio-political problems.⁷⁶ As Ms. Kiku Adatto’s analysis of more than 280 week-day network newscasts from 1968 to 1988 reveals:

The average “sound bite,” or bloc of uninterrupted speech, fell from 42.3 seconds in 1968 to only 9.8 seconds in 1988.

In 1968, almost half of all sound bites were 40 seconds or more, compared with only one percent in 1988.

In 1968, [political] candidates spoke for a minute without interruption in 21 percent of all newscasts. In 1988, this never happened.⁷⁷

“Sound-bite” discourse was the fare of the last televised presidential debates, which columnist George Will aptly described as “tossed salads of brevity,” serving only to “test skills unrelated to the real tasks of governance. . . . [These] debates [were] primarily the regurgitation of market-tested paragraphs. Reflexes, not thinking, [were] crucial.”⁷⁸ Ronald Reagan once remarked: “Politics is just like show business.”⁷⁹ One need only witness the spectacle of United States Senators, governors, prominent mayors, and presidential aspirants who make cameo appearances on “Saturday Night Live”⁸⁰ to realize the truth of former-President Rea-

75. During the 1988 presidential and congressional campaigns, candidates and their political consultants exploited commercial television’s potential for deceptive political campaign practices by giving a new level of visibility to negative advertising. “Attacks ads” are part of the “unceasing quest for the image, the code word, the value, the picture that moves voters.” See Toner, “Wars” *Wound Candidates and the Process*, N.Y. Times, March 19, 1990, at A1, col. 2, A14, col. 3.

For an original look at the effect of the electronic media culture on poetry, see Barbiero, *Poetry in the Age of Hyperinformation, With Reflections on What*, 15 CENTRAL PARK 144, 144-50 (1989).

76. According to Michael Sheehan, advisor to four democratic presidential aspirants in 1988: “[Politicians] must understand that the [television] time frame is scrunched—[they] need to be able to express a complex idea in about 15 seconds.” *The Remaking of the Candidate*, CAMPAIGNS & ELECTIONS, May-June 1988, at 27, 28 (interview with Michael Sheehan). Some suggest that the trend in sound-bite discourse evident in the 1988 elections will continue. See, e.g., Perry, *White Middle Class May Still Tip Balance in Elections in the '90s: With Attention Spans Briefer than a TV 'Sound Bite' Don't Look for Substance*, Wall St. J., May 15, 1989, at A1, col. 1 (predicting that the battle between the Democrats and Republicans for political ascendancy in the immediate future “will be nasty and negative, waged in the clutter of shorter and shorter ‘sound-bites’ on more and more TV channels”); see also *Confessions of a Sound Bite*, Wash. Post, Oct. 22, 1989, at C5, col. 1 (“As TV news increasingly has no use for information that is not scheduled to fit into a package, it loses interest in anyone who it has determined in advance will not be a sound bite.”).

77. Adatto, *TV Tidbits Starve Democracy*, N.Y. Times, Dec. 10, 1989, at D23, col. 1; see also Buresh, *Stop the World! I Want to Think!*, L.A. Times, Dec. 30, 1989, at B6, col. 3 (“The tendency in commercial television is to speed up. . . . Television can give us so much, except the time to think.”).

78. Will, *The Uselessness of Debates*, Wash. Post, Sept. 11, 1988, at C7, cols. 1, 4.

79. E. DREW, *PORTRAIT OF AN ELECTION: THE 1980 PRESIDENTIAL CAMPAIGN* 263 (1981).

80. See Postman & Ashcroft, *TV Brings Distortions to Politics*, Atlanta Const., Jan. 24, 1988, at

gan's observation. Reflecting on this truth, broadcast journalist Bill Moyers forecasts a gloomy future for the American polity:

Running campaigns in a nation on the pleasure principle is wrecking the polity of America, destroying our ability as a cooperative society to face reality and solve our problems. . . . Behind the charm and smiles, behind the one-liners [and] the pretty pictures, . . . the government rots, its costs soar, its failures mount But, on the bridge of the ship of state, no one's on watch and below deck no one can see the iceberg but everyone's feeling good.⁸¹

Not only politics, but other forms of important public discourse are increasingly packaged as entertainment when touched by television. The old Edward R. Murrow news model⁸² is yielding ever more to attractive "anchors,"⁸³ staged visuals, lulling music, compressed context,⁸⁴ and commercially-oriented "video news releases."⁸⁵ "The presence of news

C5, col. 1 (noting the appearances of Paul Simon, Jesse Jackson, Bruce Babbitt, George McGovern and Ed Koch). In addition, Michael Dukakis appeared on *Cheers*. See *id.*

81. *The Public Mind: Leading Questions* (PBS television broadcast, Nov. 15, 1989) (transcript on file with *Texas Law Review*) (statement of Moyers); see also Hall, *Bill Moyers Holds a Mirror up to America*, L.A. Times, Nov. 12, 1989 (magazine supplement), at 4, col. 1 (statement of Moyers).

82. See IN SEARCH OF LIGHT: THE BROADCASTS OF EDWARD R. MURROW 1938-1961, at 9-13 (E. Bliss ed. 1967) (Murrow covered world events for CBS radio and television, starting with an eyewitness report on Hitler's seizure of Austria and ending with coverage of John F. Kennedy's inauguration).

83. Broadcast journalist Bill Moyers boldly characterizes the phenomenon of anchor "star power": "Tabloid TV shows are polluting journalistic standards by hiring celebrities as 'reporters.' What happens to the basic standards of journalism when they are abandoned for the 'celebrity' appeal of imposters?" Hall, *supra* note 81, at 84, col. 4 (statement of Moyers); see also Zoglin, *Star Power*, TIME, Aug. 7, 1989, at 46, 46-47, 49 (noting the negative influence of anchor stars on news, stressing excessive salaries of anchor stars and monetary costs to news divisions, and criticizing the immense power wielded behind the scenes by such anchors and the effects of that power on news broadcasting); Cohen, *Drifting Anchors*, Wash. Post, Feb. 16, 1990, at A23, col. 1 (explaining that the anchor's geographic presence, not the news value, determines the content of news programming); Goodman, *New Cohost on "Today" Eases Her Way into the Job*, N.Y. Times, Jan. 9, 1990, at C18, col. 5 ("Personality is the main commodity [for being a morning news show host]: a ready smile to welcome visitors to another day; a go-down-smooth manner, to help the digestion of breakfast; a talent for making prepared small talk seem off the cuff. . . .").

84. Criticizing the *USA Today* program, television critic Tom Shales quips: "'Snippet' is actually too grand a term for what the syndicated program dishes out. There are sound-bites, light bites, [and] news bites." Shales, *'USA Today,' Nibbles And Bits*, Wash. Post, Sept. 13, 1988, at C1, col. 1. "All journalism is condensation, but 'USA Today' takes this goal to a dizzying extreme. In pounding its informational nuggets into mush, it challenges viewers to find some reason to watch—other than to test their kinetic responsiveness." *Id.* at C8, col. 2.

85. Video news releases are "promotional materials that often mimic the techniques and conventions of television news programs." Rothenberg, *Promotional News Videos Gain Support*, N.Y. Times, Sept. 11, 1989, at D12, col. 3. As described by Professor Eugene Secunda of Baruch College, a video news release

is an approximately 90 second electronic version of the PR profession's basic print tool, the press release. It's designed to promote the interests of its sponsor more subtly than TV commercials, which are required to clearly identify the advertiser. Its targets are the 700 local television station news shows currently produced in the nearly 300 U.S. media centers.

E. Secunda, *Video News Releases: The Hidden Persuaders Revisited?* 1 (Oct. 8, 1989) (unpublished paper delivered at Annual Media Ecology Conference in Saugherties, New York) (copy on file with

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in prime time, competing against entertainment shows, creates . . . pressures to make news stories more visually compelling,'” maintains Mr. Ed Turner, the executive vice-president of Cable News Network.⁸⁶ Even the make-believe of simulated events⁸⁷ and docu-dramas⁸⁸ conform with the entertainment standards of today’s news world. TV critic Tom Shales correctly observes: “More and more in television, stories that should be treated in documentary fashion end up as TV movies, and stories that would make good TV movies end up as news productions. The line between news and entertainment hasn’t just been blurred; everything’s gone topsy-turvy.”⁸⁹ In such a world, as sacrosanct a prospect as Christ’s second coming would be packaged for commercial television with all its electronically graven images.⁹⁰

The confessions of the titans of our television culture, offered in a November 1988 broadcast exchange, help to validate the evidence tendered above:

George Will (syndicated columnist): [comment to James Baker] It’s November and the election is still this way. Isn’t there a danger now that you come to November 9th, . . . and you say that our mandate is not to have furloughs, to pledge allegiance to the flag, to stay out of the American Civil Liberties Union . . . then, how do you govern on the basis of that?

James A. Baker, III (Bush campaign chairman): Well, . . . I really respectfully disagree with you because the fact of the matter is that

Texas Law Review); see also Lipman, “News” Videos That Pitch Drugs Provoke Outcry for Regulations, Wall St. J., Feb. 8, 1990, at B5, col. 1 (noting some 2000 to 2500 releases offered annually to TV stations nationwide).

86. Carter, *ABC News Divided on Simulated Events*, N.Y. Times, July 27, 1989, at C20, cols. 4, 6 (quoting Ed Turner, executive vice-president of Cable News Network).

87. See *id.* at C20, col. 4 (discussing ABC News’s use of simulated scene depicting Felix S. Bloch, the subject of an espionage investigation, exchanging a briefcase with a Soviet diplomat); see also Goldman, *CBS News Stands by Re-Enactment as Used in Series*, Wall St. J., Jan. 15, 1990, at B5, col. 3 (stating that CBS will continue to use simulations although some adjustments will be made).

88. See Goodman, *The Basic Crookedness of Docu-dramas*, N.Y. Times, Nov. 2, 1989, at C24, col. 4 (docu-dramas turn “real life into entertainment”); Garment, “Final Days” for the First Amendment, N.Y. Times, Oct. 30, 1989, at A19, cols. 1, 4 (“If the courts diminish First Amendment protection . . . , it will come in the area of the docudrama. Here, the preponderant product . . . is so far removed from any respectable definition of journalism that it will be difficult to invoke the First Amendment with a straight face.”); Goldman, *TV Network News Is Making Re-Creation a Form of Recreation*, Wall St. J., Oct. 30, 1989, at 1, col. 1 (discussing “marriage of news and theatre”); O’Connor, *supra* note 65, at H27, cols. 3-4.

89. Shales, *Chung’s Glossy Magazine*, Wash. Post, Sept. 25, 1989, at B1, col. 4. As Bill Moyers powerfully puts it: “When you mix fiction and news, you diminish the distinction between truth and fiction, and you wear down the audience’s own discriminating power to judge if that was so or not so.” Hall, *supra* note 81, at 84, col. 3 (statement of Moyers).

90. To examine the current state of public relations art, Harper’s hired public relations consultants to develop a media strategy for winning over American opinion at the Second Coming of Jesus Christ. The resulting strategies included a staged appearance on “Saturday Night Live,” a media “sound-bite,” a national tour, and a battery of one-minute television commercials announcing the Second Coming. See *He’s Back!!!*, HARPER’S, Apr. 19, 1989, at 47, 47.

we have to deal in thirty-second sound-bites. That's not our fault, it's not your fault, it happens to be the fault of the fact that the majority of the American people get their news that way.

. . . My point about the thirty-second sound-bite . . . is that this is the way the American public get their news and therefore we in campaigns have to take that into account . . . and plan accordingly.

David Brinkley (moderator): James A. Baker, Bush Chairman, made an interesting point: It is difficult to get a program before the American people because he seems to think that the thirty-second commercial is the only vehicle available to them. I don't think that's true. Is it true?

George Will: . . . A study has been done and it is that ten years ago, the average sound-bite . . . was forty-five seconds. In 1984 it was down to fifteen-seconds. In the preliminary study this year, [it] says it is down to nine-seconds. Why?

Sam Donaldson (ABC news correspondent): I'll tell you, yes, it's true. I was doing some research for a book a couple of years ago and I went back and looked at some of the pieces I did on ABC in 1971. And you're right, I ran sound-bites of George Meany [that] went forty-three-seconds. Now it's something that's called, I call it the Tom Pettit rule. Tom Pettit is a very able NBC correspondent, but somehow he's gotten the sound-bite down to two seconds . . . There's something like . . . the dancing pig syndrome in which every four or five or six seconds there must be another pig dancing on the street.

Hodding Carter (PBS commentator; former spokesman for Carter State Dept.): The devil made me do it is what I heard Mr. Baker say about why they were doing it. We say in the television business, "well, that's the way it is" . . .

It's almost impossible to tell the difference today between a political ad and an evening news spot about the campaign. They are both impelled by the same ethos, the same standards, the same techniques. Make it punchy, make it sharp, make it impactful. And if it doesn't have anything to do with real issues, too bad, it's good television.⁹¹

Despite all that has been presented, it is important to appreciate sev-

91. *This Week with David Brinkley* (ABC television broadcast, Nov. 6, 1988) (emphasis added); see also F. GRAHAM, *supra* note 60, at 219-20 (noting the transition from 1975s sixteen-second news sound-bite to today's three-second news sound-bite, "too quick to be boring, or, frequently, intelligible").

Incredibly, CBS news correspondent Lesley Stahl admits with a mixture of embarrassment and pride:

"As a reporter, I like to be able to wallpaper, as we say in television . . . [That is, put] pretty pictures up while I'm talking behind it. Pretty, interesting pictures, pictures with movement. Pictures that will capture the audience eye. I shouldn't want that, because I know that it's deceptive and the audience won't really hear what I'm saying. But I still like it. I like my pieces to have energy."

The Public Mind: Illusions of News (PBS television broadcast, Nov. 22, 1989) (transcript on file with *Texas Law Review*) (statement of Lesley Stahl).

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eral caveats inherent in our thesis. First, while television's biases alone do not create the Huxleyan nightmare, they are nevertheless a vital component. The human drive for pleasure, fueled by so many aspects of a highly capitalistic and technological society, is greatly accelerated by the amusement medium. Second, although studies linking commercial television to cognitive and behavioral effects are indeterminate,⁹² more than ample experiential evidence supports the obvious conclusion that a medium that is all-pervasive has a significant effect on the structure of individual and cultural discourse; that a society that dedicates more than a quarter of every day to television is less likely to embrace the Madisonian ideals of critical discourse and civic participation; and that billion-dollar commercial efforts to institutionalize the pleasure principle have more than a negligible effect on traditional first-amendment values. Third, the ascendancy of the television culture may not affect everyone in the same way. Nonetheless, just as its appeal is mass, so too its effects are mass, and increasingly global.⁹³ Fourth, television is not without its social benefits.⁹⁴ For example, it "can seem a blessing to old people, [and] to the

92. Having examined and synthesized over two hundred social science studies, University of Massachusetts at Amherst psychology professors Daniel Anderson and Patricia Collins contend: "There is, in fact, only a small relevant research literature [concerning the effects of television on cognition and behavior] and that literature yields only a few firm conclusions." D. ANDERSON & P. COLLINS, *THE IMPACT ON CHILDREN'S EDUCATION: TELEVISION'S INFLUENCE ON COGNITIVE DEVELOPMENT* 8 (U.S. Dep't of Education, Office of Educational Research and Improvement Working Paper No. 2, 1988). One such firm conclusion that the researchers did reach was that even the lowest scientific estimate on viewing "represents large amounts of discretionary time spent with TV such that the opportunity clearly exists for television to exert an influence on a large number of children." *Id.* at 13. Among their final observations, Professors Anderson and Collins concluded: "A true lack of influence is itself difficult to demonstrate, and there is not nearly enough research done to safely conclude that there are no important cognitive effects of television viewing." *Id.* at 65. For a more positive assertion of the causal relationship of television viewing to cognitive and behavioral effects, see generally S. IYENGAR & D. KINDER, *NEWS THAT MATTERS* 112-33 (1987) (arguing that television news influences the priority viewers place on issues and the criteria by which viewers judge events).

Two points merit emphasis: First, a real possibility always exists that studies in this area will be biased, particularly when the economic influence of special interest funding is substantial. See D. ANDERSON & P. COLLINS, *supra*, at 72. Second, if tested by empirical evidence, the enhancement of rationality by commercial mass communications may be equally difficult to establish. See *id.* at 76.

93. With the growth of multinational media corporations and the potential for the commercial media's invasion of a newly liberated Eastern Europe, among other places, world-wide programming is likely to be patterned after the American entertainment model. See, e.g., Harnetz, *Hollywood Starts an Invasion of Europe's Booming Market*, N.Y. Times, Jan. 11, 1990, at C19, col. 4 (quoting Gary Lucchesi, president of production at Paramount Pictures, on the opening of Eastern Europe: "The European market is expanding in leaps and bounds. When you combine the people in Eastern Europe with the Common Market countries, you have close to a billion people who will be longing for good [American] entertainment."); Ostry, *The Risks in Going Global*, N.Y. Times, Dec. 31, 1989, at H29, col. 1 (arguing that international broadcasters will destroy the values and cultures of individual nations).

94. Yet, Professor Postman interestingly maintains that "television is at its most trivial . . . when its aspirations are high, when it presents itself as a carrier of important cultural conversations. The irony here is that this is what intellectuals and critics are constantly urging television to do." N. POSTMAN, *AMUSING*, *supra* note 25, at 16. Postman argues that, when high-minded programming is

ill;”⁹⁵ it may produce the likes of a Bill Moyers,⁹⁶ Ted Koppel,⁹⁷ or William F. Buckley, Jr.;⁹⁸ and it may furnish information (albeit suitably packaged) at electrifying speeds.⁹⁹ But, the larger point remains that the cultural costs of commercial television far exceed its benefits:¹⁰⁰ a vacuum of serious public discourse has been filled by a television culture of spectacle and a “‘democracy of images.’”¹⁰¹

situated in an entertainment medium, “the seriousness, clarity and, above all, value of public discourse dangerously decline.” *Id.* at 29; see also Anastaplo, *Self-Government and the Mass Media*, in *THE MASS MEDIA AND MODERN DEMOCRACY*, 161, 198-218 (H. Clor ed. 1974) (arguing for the removal of serious programming from television).

95. Anastaplo, *supra* note 94, at 204. But see Fantel, *The Living Room Is Now the Stage*, N.Y. Times, Dec. 31, 1989, at H20, col. 5 (sociologists noting anticommunal effects of VCRs); Collins, *TV Subverts the First Amendment*, N.Y. Times, Sept. 19, 1987, at 31, col. 1 (noting how television interferes with associational values).

96. See, e.g., Burns, “Moyers: A Second Look”—*More Than Meets the Eye*, N.Y. Times, May 14, 1989, at H33, col. 1 (asserting that Moyers is “one of the most celebrated and at times controversial providers of documentary films”); see also B. MOYERS, *supra* note 43, at ix (a collection of 41 interviews by Bill Moyers regarding “changing American values and how these values affect our lives in an increasingly global culture”). Ironically, Moyers is acutely critical of his medium:

“The truth of the matter is, the networks are finished as enlightened forces in public opinion. The mass media in this country are like the band on the Titanic. They’re playing for the passengers to dance while the ship hits the iceberg. A lot of people are going to get rich before the collision, but they’re finished as players”

Hall, *supra* note 81, at 84, col. 5 (statement of Moyers).

97. ABC’s noted interviewer, when interviewed himself, commented on television’s entertainment function:

“Vanna [Vanna White of the *Wheel of Fortune* show] leaves an intellectual vacuum, which can be filled by whatever the predisposition of the viewer happens to be,” Koppel told me. “The viewer can make her whatever he wants.” . . .

Vannification is a fundamental principle in the understanding of political and media success—and failure. Koppel believes the Vanna Factor now exists in all aspects of American life. “Mike Dukakis is using it, George Bush is using it,” Koppel said. “And the more successful you are in leaving a certain uncertainty in the mind of the voter You would think that the voter would be frustrated by that, but on the contrary he has become acclimated to the notion that you just fill in the blank”

Blonsky, *Ted Koppel’s Edge*, N.Y. Times, Aug. 14, 1988, § 6 (Magazine), at 35.

For a worthwhile discussion among celebrated figures in electronic and print media about a number of the issues discussed in this article, see *The Other Side of the News: Entertainment News or Entertainment?* (New York’s WNET broadcast, Apr. 12, 1989) (transcript on file with *Texas Law Review*). Professor Fred Friendly moderated this public broadcasting event.

98. See generally W. BUCKLEY, *ON THE FIRING LINE: THE PUBLIC LIFE OF OUR PUBLIC FIGURES passim* (1989) (presenting a collection of transcripts for two decades of *Firing Line* representing Buckley’s interviews with various public figures).

99. Reportedly, the instantaneous televised transmission of political developments in Eastern Europe played a significant role in spawning revolutionary fervor. Of course, these salutary effects occurred in a commercial-free medium and in a social culture radically different than that of contemporary America. See, e.g., Tempest, *Romania Had Its Rebirth in a Television Studio*, L.A. Times, Dec. 30, 1989, at A18, col. 1 (describing the influence of television on the Romanian Revolution); Rosenblum, *Free Romania Television Fueled Nation’s Revolution*, L.A. Times, Dec. 27, 1989, at F3, col. 1 (describing the National Salvation Committee’s use of television to lead the Romanian Revolution).

100. See N. POSTMAN, *AMUSING*, *supra* note 25, at 27-29; see also N. POSTMAN, *CONSCIENTIOUS*, *supra* note 25, at 172-73 (remarking that the entertaining visual image has replaced the spoken or written word as the primary medium of public discourse).

101. Hall, *supra* note 81, at 4, col. 1 (quoting Professor Stewart Ewen).

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If our communicative culture is indeed tending toward Huxley's anti-utopia, what can or should be done? From a first-amendment vantage point, how do we deconstruct or reconstruct our television culture? Is it possible to draw first-amendment lines that will address the distinct harms posed by Orwellian censorship and Huxleyan triviality in our amusement world? Against the backdrop of the dancing-pig syndrome and two-second sound-bites, we proceed to examine these questions.

III. A Rear-View Mirror Look at the First Amendment

We return to McLuhan, and to his metaphor describing how most people approach the present or future by looking into the "rear-view mirror"¹⁰² of the past. The "rear-view mirror" perspective is commonplace in the law, particularly in first-amendment jurisprudence. Media-law scholars attempt to transpose the eighteenth-century ideal of freedom of speech and press¹⁰³ on our modern world as if no changes have taken place. First-amendment doctrine assumes that governmental censorship still poses a greater and more real threat to our self-governing ideal than self-gratification; it assumes that the law that constitutes our system of free expression, although forged in a revolutionary era, still has meaning even though the evils against which that law was directed no longer prevail. A first-amendment doctrine based on such assumptions fails to address the vulnerability of free expression in the modern, commercial context of trivialized speech.¹⁰⁴

Clearly, the potential for Orwellian governmental censorship can never be dismissed.¹⁰⁵ Practically speaking, however, that potential is far

102. M. McLuhan & Q. Fiore, *WAR AND PEACE IN THE GLOBAL VILLAGE* 18 (1968). According to McLuhan's biographer, he frequently employed the

"metaphor he had devised to express what Wyndham Lewis had once taught him: 'The present cannot be revealed to people until it has become yesterday.' McLuhan termed this the 'rearview mirror phenomenon.' People went through life looking into the rear-view mirror—seeing the present in terms of the past—instead of paying attention to the reality confronting them."

P. Marchand, *MARSHALL McLuhan: THE MEDIUM AND THE MESSENGER* 209 (1989) (footnote omitted) (quoting H. Kenner, *THE POUND ERA* 436 (1971) (quoting Wyndham Lewis)).

103. Here, we do not mean to refer to the narrow and historical conception of the dimensions of the 1791 guarantee. Rather, we refer to a more generative principle grounded solely in the concern to prevent an Orwellian type of government—protection against censorial suppression of speech and press. However elastic or expansive this principle may be, it still does not contemplate the Huxleyan evil to which we have drawn attention.

104. On a related and important front, Professor M. Ethan Katsh has perceived that "the development of new communications technologies places pressure on the law to clarify the purposes of free expression." Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 *GEO. WASH. L. REV.* 1459, 1479-80 (1989) (examining constitutional protections for electronic information systems, particularly the computer); see also *infra* note 159.

105. See, e.g., Emerson, *The State of the First Amendment as We Enter "1984"*, in *FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S* 31, 32 (R. Curry ed. 1988) [hereinafter *FREEDOM AT RISK*] (arguing that the most urgent problem facing the first amendment is the

less threatening than it has been in the past. This is not, of course, to deny the obvious: on a variety of fronts, first-amendment freedom-of-expression issues continue to surface in cases ranging from flag burning¹⁰⁶ to cable station access. But, comparatively, the Orwellian evil is not likely to pose a clear and present danger to traditional first-amendment values: in China¹⁰⁷ and elsewhere, the censorial hand of the oppressor mutes the dissenter who in this nation is increasingly silenced by an oblivious commercial and entertainment culture.

Must we—and can we—redefine the evil and the enemy of free speech in an effort to reconcile old-world Orwellian principles with new-world Huxleyan predicaments? In pursuing such an inquiry, an unfortunate and almost inevitable tendency surfaces toward ideological labeling. Much of this constitutional discourse is novel and perplexing, and the reader may be tempted to affix labels to our arguments and to make hasty conclusions. We urge the reader to avoid labels and to suspend judgment for several reasons. First, ideological labeling is likely to be misleading. The attempt to combat the evils of the Huxleyan nightmare may be stamped as a “conservative” agenda to salvage an elitist ideal in an otherwise egalitarian society. Yet certainly, “the stupefying effects of

need for secrecy in national security); Koffler, *The New Seditious Libel*, in FREEDOM AT RISK, *supra*, at 140, 146 (arguing that the federal government currently invokes the need for secrecy to hide its authoritarian measures); Randall, *When the Imagination of the Writer Is Confronted by the Imagination of the State*, in FREEDOM AT RISK, *supra*, at 169, 170 (discussing a writer excluded from entry to the United States on the basis of views expressed); Schapiro, *The Excludables*, in FREEDOM AT RISK, *supra*, at 162, 164 (citing the United States policy of excluding foreign citizens on the basis of ideology as limiting free debate); Shattuck, *Federal Restrictions on the Free Flow of Academic Information and Ideas*, in FREEDOM AT RISK, *supra*, at 45, 51 (describing secrecy regulations promulgated to stop publication of scientific research under guise of national security); Stone, *The Reagan Administration, The First Amendment, and FBI Domestic Security Investigations*, in FREEDOM AT RISK, *supra*, at 272, 273 (arguing that domestic security investigations may become investigation of dissenters and not subversives); Pell, *Kicking Out Palestinians*, THE NATION, Feb. 5, 1990, at 167, 167 (1986 National Security Directive “aimed at chilling dissent by foreigners living in the United States”).

106. Interestingly, because of television’s imagistic and commercial qualities, contemporary first-amendment doctrine must respond more frequently to claims of constitutionally protected symbolic and commercial speech. See, e.g., *Texas v. Johnson*, 109 S. Ct. 2533, 2536 (1989) (concerning the burning of an American flag as a form of political protest); *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3030 (1989) (concerning the State University of New York’s attempt to limit commercial speech—“Tupperware parties”—within the dormitories of the school).

Consider in relation to the flag-burning case the spectacle of people fighting over images: a presidential candidate stands in front of a flag factory to assert patriotic leadership; a dissenter burns a flag to denounce administration policies of nuclear armament; a President responds by proposing an anti-flag-burning constitutional amendment so that his image will overshadow all dissent. Regarding the “Tupperware parties” case, it seems inevitable that in a highly commercial culture, the marketing of china, crystal, and silverware will be equated with the marketplace of ideas.

107. The Orwellian danger is striking in today’s China. See, e.g., Ignatius, *Repeat After Me, Please: War Is Peace, Freedom Is Slavery*, Wall St. J., July 20, 1989, at A1, col. 4 (reporting on the creation of required history classes in China’s universities that present the official version of the democracy movement of 1989).

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consumer capitalism and its mass media”¹⁰⁸ cannot be a thing of joy to either the reformist or radical. Alternatively, the effort to transform the law to license affirmative government involvement in the system of free expression may be branded as “progressive” or “socialist” or, in any case, as antithetical to the tenets of American free enterprise. But no conservative of integrity and public conscience can extol a culture that condones self-induced pleasure at the expense of thoughtful self-governance. The ideological labeling of these arguments serves only to confuse their substance. Second, hasty verdicts about the validity of such arguments may prevent the reader from inquiring past the labels to determine whether, indeed, the Huxleyan dangers are a threat to serious discourse. Finally, the reader who reaches rashly for ideological categories may well be surprised with what follows in this Article and in our future essays.

Certainly, many have touched upon the application of first-amendment principles to the electronic media, but very few have offered proposals to mediate or eliminate differences in protection of speech based on the medium of communication. What is striking about the few studies is the failure to focus on the Orwellian-Huxleyan dichotomy and the absence of what could be a rich cross-fertilization between constitutional jurisprudence, on the one hand, and thoughts on the technological attributes and commercial uses of television on the other. Metaphorically, the few who have confronted aspects of these issues—like first-amendment theorists generally—have driven into the future with eyes focused on the rear-view mirror.

Presently, we can identify three prototypical first-amendment scenarios pertaining to the divergence between the old and new media. In shorthand, these schema may conveniently be titled the classical (abolitionist), modern (libertarian), and reformist (regulatory) scenarios. In various ways, each scenario is tied to a typographic mindset that biases its vision of the first-amendment’s role in our society. Ultimately, we find all scenarios to be myopic—though each contains fragments of great value, none fully gleans the paradox of the first amendment in the age of paratroopers. The presentation of these scenarios follows immediately. Part IV critiques these scenarios from the Orwellian-Huxleyan vantage point developed in Part I.

A. The Classical Scenario

The classical scenario celebrates the Enlightenment philosophy of

108. AMERICAN MEDIA & MASS CULTURE 407 (D. Lazere ed. 1987) [hereinafter AMERICAN MEDIA] (referring to statement by Alvin Gouldner).

the eighteenth century—the century in which the first amendment was born. Classicists hail an educated citizenry as the essential component of a free society and urge that serious learning requires emphasis on reading, writing, and face-to-face dialogue. The classical vision is collective, not egocentric. The traditional model of the American town meeting—citizens coming together, talking about, debating, and resolving issues—is the embodiment of this ideal. A classical regime champions moderation in all things: self-restraint is the *sine qua non* of self-governance and interest in the public good. Antithetical to this objective is the specter of self-indulgent and alienating consumption. Accordingly, the classical theorist views unchecked commercialism as a clear and present danger. The modern mass media, particularly as it filters culture through television, imperils the very existence of the classical scheme. As it evokes from the audience emotional responses to its stimuli, the commercial electronic media tyrannize the public mind. Thus, at the center of the classical scenario, rationality, collective decision making, and public discourse are united in the doctrine of the first amendment. Any obstacle to, or interference with, this union is inimical to the principles of the first amendment and is therefore subject to prohibition.

Professor Alexander Meiklejohn is the leading American actor in the classical scenario. More than four decades ago, he warned of the exploitative nature of the mass electronic media; rather than promoting important first-amendment values of collective decision making, it corrupts and suffocates them:

[T]he total effect [of commercial radio], as judged in terms of educational value, is one of terrible destruction. The radio . . . is not cultivating those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends. On the contrary, it is a mighty force for breaking them down.¹⁰⁹

Consequently, this electronic medium must be denied first-amendment protection in the very name of the first amendment:

The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage.¹¹⁰

Further developing his first-amendment thesis for the electronic media, Meiklejohn moved with even greater force against commercial television:

109. A. MEIKLEJOHN, *supra* note 18, at 87 (the passage quoted was originally written in 1948).

110. *Id.*

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On the whole, the “liberties” of what we call “Free Enterprise” are, I think, destructive of the “freedoms” of a self-governing society. The unregulated self-seeking of the profit-makers is much more dangerous in its effect upon the morality and intelligence of the citizen than that *participation in regulatory action* for the common good to which free enterprise has so often shown itself hostile. . . . [P]rivately sponsored television has proved to be even more deadly [than radio]. Those business controls of communication are, day by day, year by year, destroying and degrading our intelligence and our taste by the use of instruments which should be employed in educating and uplifting them.¹¹¹

Additionally, and as a corollary, Meiklejohn called for “affirmative” congressional measures to buttress the classical ideal of freedom of expression.¹¹² Such affirmative measures seemed particularly necessary because he believed that laissez-faire economy and technology stirred modern consumptive tendencies contrary to the classical model of self-restraint.

More recently, Meiklejohn’s thesis has been extended by one of his intellectual disciples, Professor George Anastaplo.¹¹³ In a little-noticed but challenging essay,¹¹⁴ Anastaplo criticized the effects of television on the viewing public: its addictive quality, its simplistic portrayal of reality, its threat to civic piety and associational values, its commercial drives for material consumption, and its detrimental impact on education. Meiklejohn’s thesis leads directly to the abolition of commercial television:

[I]t has long seemed obvious to me—that the television industry should be abolished completely in this country, that nothing short of this can remove its crippling influence from American life. If this is indeed a society open to experimentation, then let us deliberately experiment for at least a decade with the remedy of complete suppression of television.¹¹⁵

111. *Id.* at xv-xvi.

112. Meiklejohn argued that Congress is empowered to “enlarge and enrich” that “freedom of mind which befits the members of a self-governing society.” *Id.* at 19. Among his preferred proposals, he suggested that Congress enact laws that would bring the citizenry “together in activities of communication and mutual understanding.” *Id.*

113. See Sharp, Crosskey, Anastaplo, and Meiklejohn on the United States Constitution, 20 U. CHI. L. SCH. REC. 3, 7 (1973). See generally G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 275-77 (1971) (arguing that success of republican government depends on quality of leadership, which in turn depends on education, and criticizing the caliber of television’s contribution to mass education).

114. See Anastaplo, *supra* note 94, at 161-232. Despite our differences with his views, we acknowledge a debt to Professor Anastaplo whose provocative essay initially spawned our interest in the topics addressed in this and future essays.

115. *Id.* at 222. For a similar suggestion, see generally J. MANDER, FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION 46 (1977) (arguing that America cannot return to a “sane and democratic” process unless television is banned).

Anastaplo advocates governmental regulation of television precisely to further first-amendment values:

[T]here should be, in ordinary constitutional circumstances, both an absolute prohibition against previous legal restraints of the press and an absolute previous restraint (that is, total abolition) of the television industry. . . .

I see in the abolition of television no serious First Amendment problem. Rather than abridge the "freedom of speech" guaranteed by the First Amendment, the abolition of television (and hence a radical reform of the mass media) would enlarge freedom of speech among us. . . . Thus abolition of television would probably contribute *among us* to the preservation of self-government and hence genuine freedom.¹¹⁶

B. *The Modern Scenario*

In direct opposition to the classical scenario, the modern scenario¹¹⁷ rejects virtually any legal distinction based on the method of communication as contrary to first-amendment principles. Although it purports to acknowledge that the operation of new electronic technology has implications for first-amendment doctrine, the modern scenario does not recognize any dissimilarities in the effect of different media types, or any evils that may be special to commercial television. Espousing "libertarian" and "laissez-faire" notions, the modern program dictates a policy of "hands-off" government. Fixated upon Orwellian fears to the exclusion of all others, the modern scenario highlights the perils of any governmental control of the electronic media.

Perhaps the most highly regarded director of this scenario was the late political science professor, Ithiel de Sola Pool. For the modernist,

116. Anastaplo, *supra* note 94, at 223-24 (footnotes omitted). Failing complete abolition of commercial television, Anastaplo offers an alternative program. He introduces seven almost equally provocative suggestions for reform of the electronic medium: curtailment of the amount of daily television, reduction of commercial advertising influence, encouragement of local programming, limitation of television to strictly entertainment programming, airing of extended civic proceedings (if politics are to appear), content screening of nonpolitical programs, and encouragement of familial and communal self-restraint. *See id.* at 226-28.

117. We do not employ the phrase "modern scenario" to depict the status quo in government regulation of the electronic media. *See* T. CARTER, M. FRANKLIN & J. WRIGHT, *THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA* 1-478, 634-86, 704-48 (1989). The modernist response to the Orwellian-Huxleyan dilemma is largely representative of today's highly capitalistic and technologically advanced culture. The archetypal character of the modernist first-amendment response will become more evident in our critique of this scenario in Part IV. At this point, it is only necessary to appreciate the existing potential for a significant realization of the modern scenario. Consider, for example, the deregulatory governmental trends affecting the mass communications industry. *See, e.g.*, *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989) (upholding FCC termination of the "fairness doctrine"); I. DE SOLA POOL, *supra* note 66, at 3, 45, 159-60, 221-23, 242-43 (describing the FCC's failed attempts to regulate computer networks and cable television).

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the “degrading erosion of freedom that our system of communication faces today”¹¹⁸ is alarming:

It would be dire if the laws we make today governing the dominant mode of information handling in . . . an information society were subversive of its freedom. The onus is on us to determine whether free societies in the twenty-first century will conduct electronic communication under the conditions of freedom established for the domain of print through centuries of struggle, or whether that great achievement will become lost in a confusion about new technologies.¹¹⁹

The modernist¹²⁰ maintains that two phenomena require the extension of first-amendment protection to the electronic media:¹²¹ first, the increasing use of the same physical apparatuses (wires, cables, airwaves) and technological formats (telegraph, telephone, television) for electronic communication;¹²² and, second, the growing cross-ownership in communications industries.¹²³

These two developments have fostered a “convergence of modes” that undermines the long-honored rationales for special governmental control of electronic media.¹²⁴ Moreover, the modernist argues that “[t]he extension of electronic means to do better and faster what the

118. I. DE SOLA POOL, *supra* note 66, at 4.

119. *Id.* at 10.

120. Another advocate of nonregulation of the electronic media is Professor Lucas A. Powe, Jr., who offers an historical exposé of the political machinations of broadcast regulators. See L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 6-7 (1987).

121. Professor de Sola Pool’s discussion of electronic media, though directed to television, encompassed all modes of electronic communication facing the actuality or potentiality of governmental regulation. See I. DE SOLA POOL, *supra* note 66, at 1-10.

122. *Id.* at 23-42. Professor de Sola Pool summarizes this point as follows:

A single physical means—be it wires, cables, or airwaves—may carry services that in the past were provided in separate ways. Conversely, a service that was provided in the past by any one medium—be it broadcasting, the press, or telephony—can now be provided in several different physical ways. So the one-to-one relationship that used to exist between a medium and its use is eroding. That is what is meant by the convergence of modes.

Id. at 23. For an expression of a similar concern, see S. BRAND, *THE MEDIA LAB* 214-19 (1987). See also Gilder, *Forget HDTV, It’s Already Outmoded*, N.Y. Times, May 28, 1989, § 3, at 3, col. 2 (discussing the development of the “telecomputer, which couples digital and video technology and fiber optics”).

123. See I. DE SOLA POOL, *supra* note 66, at 42-54. Professor de Sola Pool concludes:

More often than not . . . the bars on cross-ownership have proved ineffective. Despite government attempts to prevent it, cross-ownership reinforces a convergence among modes that is drastically changing the structure and legal status of communications industries. Neither competition among modes nor convergence between them is new; what is new is the scope of the convergence.

Id. at 53; see also Fabrikant, *Time Inc. Takes Control of Warner Within Hours of Court Approval*, N.Y. Times, July 25, 1989, at 1, col. 1 (describing a merger that created one of the largest communications and entertainment companies in the world).

124. Consistent with the current trend in deregulation of the communications media, de Sola Pool’s modernist concerns are echoed in a special report of the Congressional Office of Technology Assessment. See OFFICE OF TECHNOLOGY ASSESSMENT, *SCIENCE, TECHNOLOGY, AND THE FIRST AMENDMENT* 65-68 (1988).

older modes of communication did with lead, ink, and paper” requires that the modern electronic format receive a “newer tradition” of protection from governmental control equal to that developed over the centuries for the press.¹²⁵ In the modern first-amendment society, any official campaign to combat Huxleyan evils through governmental regulation paves the way of tyranny.

C. *The Reformist Scenario*

The reformist scenario is situated almost midpoint between the classical and modernist extremes, essentially advocating limited regulation of television rather than its abolition. Like its classical counterpart, the reformist heralds certain governmental actions as essential to the preservation of core first-amendment norms. Without affirmative government involvement, the reformist predicts that corporate commercial interests will select programs based on advertising objectives alone, and that the unchecked laissez-faire market will produce a concentration of media ownership. Although the reformists are concerned with the enlightenment and communal values of the first amendment, they are more concerned with the amendment’s potential to redistribute political and economic power in the media context.

The reformist scenario contains a subtle understanding of commercial television and the Huxleyan dilemma, but reformists are loath to admit to the disquieting implications of that knowledge. Like their modernist counterparts, the reformists tolerate a realm of virtually deregulated commercial broadcasting, presumably to avoid charges of Orwellian government rule. Ultimately, this agenda places a guarded faith in the media’s ability to save itself, in democracy’s ability to patrol its self-indulgent behavior, in the public’s ability to understand its best interest, and in the nation’s ability to transform an altogether mass media into a more local one. What this faith also presupposes is the active and knowing participation of the citizenry in a reformist enterprise.

The reformist, nevertheless, rails against a powerful commercial broadcast industry that “continues to push for fewer obligations to the general public, while focusing programming efforts toward attracting an audience that maximizes its advertising revenue.”¹²⁶ Reformists regard the right of public access to the airwaves as a necessity, “not simply from a need to improve the ‘vast wasteland’ of television programming,”¹²⁷ but also “to foster the development of a vast array of programming op-

125. I. DE SOLA POOL, *supra* note 66, at 54.

126. Nader & Riley, *supra* note 8, at 6-7 (footnotes omitted).

127. *Id.* at 7 (footnote omitted).

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tions from the maximum number of *different* sources. . . . The public— not government or corporate broadcasters or networks—should be given the opportunity to choose programs directly and to define what is in its own interest.”¹²⁸

An innovative contemporary expression of the reformist agenda is found in a recent article¹²⁹ by Ralph Nader¹³⁰ and Claire Riley.¹³¹ The authors propose the federal statutory adoption of “Audience Network,”¹³² a national, nonprofit membership organization, funded by dues and voluntary private contributions. “Audience Network” would be allowed free prime-time access on all television and radio channels for public interest broadcasting:

Audience Network is a proposal designed to reestablish the first amendment rights of the public. It would provide systematic public access to and programming experience over the airwaves, as well as better public representation in the regulation of over-the-air broadcasting. . . . It would use [prime-time] to develop and air programs the membership wants on the airwaves and to educate the public about Audience Network’s operation and broadcast regulation issues. Audience Network would also represent viewers’ interests before the FCC, Congress and the courts.¹³³

The overarching objective of Audience Network is “to put daily, civic function behind the principle that information is the currency of democracy.”¹³⁴

The three approaches for reconciling the first amendment with today’s commercial television—what we label as classical, modern, and reformist scenarios—all fall victim to the rear-view mirror predicament in some way. We cannot move into the future by freezing the first amendment in its eighteenth-century enlightenment mindset, by applying the first amendment as if the biases and dangers of commercial television did not exist, or by styling the first amendment as if the public craving for entertainment will not affect reform efforts. Moving into the future requires an appreciation of a paradox not played out in any of the scenarios. Against the scenery of the classical, modern, and reformist programs, we now discuss the paradox of the first amendment in the age of paratroopers.

128. *Id.* at 7-9.

129. *See id.* at 1-86.

130. Founder and director of the Center for Study of Responsive Law.

131. Washington, D.C., public-interest lawyer.

132. In fact, Nader and Riley append a detailed model statute for the creation of Audience Network. *See Nader & Riley, supra* note 8, at 87-125.

133. *Id.* at 4. For a discussion of an earlier and similar proposal, see Cirino, *An Alternative American Communications System*, in *AMERICAN MEDIA, supra* note 108, at 568, 568-76.

134. Nader & Riley, *supra* note 8, at 86.

IV. The Paratroopers' Paradox

A paradox: An apparently contradictory proposition that may nevertheless be true. The paradox: The first amendment cannot save itself without destroying itself.

Our Orwellian-Huxleyan circumstance is the crucible in which the paratroopers' paradox is formed. The eighteenth-century first amendment, with its emphasis on serious public discourse and its adherence to an anticensorial maxim, can no longer coexist with the self-indulgent bent of a mass entertainment culture. In order to protect this traditional vision, the first amendment must be recast to distinguish between old and new forms of media.¹³⁵ But, once the government is empowered to regulate expression on commercial television, the old first-amendment specter of censorial oppression resurfaces. First-amendment protection collapses into first-amendment tyranny.

Yet, to preserve the conditions for self-defined liberty and to promote the corollary anticensorial idea, the modern first amendment must be recast to protect all forms of media without distinction. But unleashing the drives for self-amusement and for commercial corporate gains, the electronic first amendment debases the values of meaningful public discourse, effective dissent, and collective decision making, all in the service of a new mass culture. First-amendment liberty collapses into first-amendment triviality.

With an eye to avoiding the paradox, the natural desire is to navigate the first amendment between the Orwellian Scylla and Huxleyan Charybdis. Such compromise seeks to preserve the ideals of the traditional vision while averting censorship, and to concede the reign of the modern vision while stemming triviality. Yielding to two media masters may have unsettling consequences. To be effectual, elevated public discourse must survive and flourish on a leveling commercial medium wed to pleasure. First-amendment compromise collapses into first-amendment ineffectiveness.

As the careful reader may have already gleaned,¹³⁶ this summary of the paradox sets the stage for our critique of the three scenarios sketched in Part III. The classical scenario invites tyranny, the modern scenario embraces triviality, and the reformist scenario endures ineffectiveness—

135. To some extent, the first amendment already recognizes differences between modes of expression, as evidenced by the use of distinct terms for freedom of "speech" and of the "press." Some have argued that this difference should be determinative. See, e.g., Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 633-34 (1975) (excerpt of Address by Potter Stewart, Yale Law School Sesquicentennial Convocation (Nov. 2, 1974)).

136. We direct our less careful reader to Appendix B.

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to understand this is to cross the Rubicon.¹³⁷ We have, then, only to jump?

A. *Classicism Critiqued*

Classicists cannot suffer the idea: the world of Faneuil Hall is gone.¹³⁸ The classical scenario strives to return to this world. The classicists' love for the past infuses in them a romanticism that is at war with reality. They reach for the future by returning to the past. At this juncture, the classicists confront the paradox.

In focusing on the past, the classicists do not appreciate that the television culture that they abhor is part and parcel of a larger mass commercial culture; the ideal of the "marketplace of ideas" now operates within a vast commercial marketplace of which television is only a part. However appealing their polemical call for the abolition of television, it cannot possibly provide an answer to the first-amendment paradox. To indict commercial television is to indict our culture—perhaps even the entire American democratic regime.¹³⁹ The classicist argument, when removed from the particulars of the first amendment and applied to the generalities of culture and government in America, becomes hyperbole. Its agenda, then, is intended more for shock value than as a serious proposal for change. Of course, its shock value exposes its futility.

The classical crusade to return to the past invites government action

137. Again, crossing the Rubicon means understanding the differences between the Orwellian and Huxleyan forms of tyranny, and appreciating the difficulties of developing first-amendment principles to suit an electronic entertainment medium. Those who attempt this venture are the first-amendment paratroopers who cross the Rubicon—and then jump?

138. Popularly known as America's "Cradle of Liberty," Faneuil Hall was constructed in 1742 and served as a meeting place for debates in opposition to the Sugar Tax of 1764 and the Stamp Act of 1765. In the next century, Faneuil Hall provided a forum for speakers such as Frederick Douglass and Susan B. Anthony. See R. BEARSE, *MASSACHUSETTS: A GUIDE TO THE PILGRIM STATE* 198 (2d ed. 1971). Today, Faneuil Hall is the centerpiece of an urban shopping mall.

139. In this regard, is not Allan Bloom's attack on higher education really an indictment of the American democratic regime per se? See A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 25-43, 243-382 (1987). Not surprisingly, the classicist must register a dissent to Bloom's larger thesis. See, e.g., Anastaplo, *In re Allan Bloom: A Respectful Dissent*, in *ESSAYS ON The Closing of the American Mind* 267, 267, 272, 275, 284 n.5 (R. Stone ed. 1989) [hereinafter *American Mind*] (criticizing Bloom for shoddy research and factual errors); Colmo, *Allan Bloom and the American Premise*, in *American Mind*, *supra*, at 154, 154-57 (arguing that Bloom attacks the modern notion of self without substituting another definition); Drury, *Allan Bloom and the Charms of Culture*, in *American Mind*, *supra*, at 158, 158-65 (arguing that Bloom presents a choice between the extremes of a closed society or cultural anarchy); Jaffa, *Humanizing Certitudes and Impoverished Doubts: A Critique of The Closing of the American Mind*, in *American Mind*, *supra*, at 129, 129-53 (arguing that Bloom misapplies the lessons of the classics to American society); Kesler, *The Closing of Allan Bloom's Mind: An Instant Classic Reconsidered*, in *American Mind*, *supra*, at 174, 174-80 (arguing that Bloom places too much emphasis on the role of American universities in the development of American culture); West, *Allan Bloom and America*, in *American Mind*, *supra*, at 166, 166-74 (noting that Bloom concentrates solely on the American colleges which have little influence on overall American culture).

so abhorrent to the contemporary citizen as to be nothing less than despotic. The total abolition of television or even regulation approximating this goal¹⁴⁰ would be viewed as the segue to an aristocratic (and, therefore, un-American) displacement of egalitarian and mass tastes. As the polemical Professor Postman observed in his critique of the polemical classicist:

Americans will not shut down any part of their technological apparatus, and to suggest that they do so is to make no suggestion at all. It is almost equally unrealistic to expect that nontrivial modifications in the availability of media will ever be made. Many civilized nations limit by law the amount of hours television may operate and thereby mitigate the role television plays in public life. But I believe that this is not a possibility in America. Once having opened the Happy Medium to full public view, we are not likely to countenance even its partial closing.¹⁴¹

With a nation of Americans unwilling to budge from their television sets, the classical vision is doomed. Tersely put, we cannot get to their world from here.¹⁴²

For the classical scenario to achieve any real measure of success without resort to Orwellian tyranny, two concepts of traditional first-amendment jurisprudence would have to be redefined: first, the concept of censorship, and, second, the character of the perceived enemy to free expression. To empower the government with a high level of authority to regulate commercial television programming, certain forms of censorship must fall outside the first amendment. The speech and press clauses must be narrowed to justify governmental "suppression" of commercial television expression. Further, the classicists must elevate the Huxleyan tyranny over Orwellian tyranny as the greater enemy of free speech. Yet, armed with a redefined first amendment, the paratroopers' paradox opens a Pandora's box. The classicists are apt to invoke the first amendment as a sword against private commercialism which assaults their notion of freedom of expression.¹⁴³ Among other things, once the classical

140. See Anastaplo, *supra* note 94, at 223-28; see also *Programs Urge Viewers To Turn Off Their Sets*, N.Y. Times, Aug. 25, 1989, at D18, col. 3 (noting that one San Francisco public broadcasting station airs a children's program during the summer which encourages them to turn off the television and read so that they do not lose important academic gains during the summer months).

141. N. POSTMAN, *AMUSING*, *supra* note 25, at 158.

142. See generally Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919, 960 (asserting that "idealized visions lead to the you-can't-get-there-from-here problem").

143. From this perspective, the conservative classical agenda resembles that of its radical counterpart. Interestingly, both would empower government to contain the drives of corporate commercialism; of course, they would do so for distinct, perhaps contradictory, reasons. The combined force of the ideological right and left may well threaten the hegemony of conventional constitutional doctrine in this area.

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agenda places an entire communications industry outside the first amendment's boundaries, it must then allow for a hierarchy of protections based on the commercial or noncommercial character of expression or its technological medium.¹⁴⁴

Curiously, the classicists' indictment of the status quo overlooks an important cyclical principle of the past: the commercial television medium, which the classicists so abjure, merely replaced a commercial oral predecessor, the radio, which in turn replaced another commercial predecessor, typography. Of course, classicists do not appear to abhor the effects of the typographic medium, which replaced its scribal predecessor, or the scribal medium, which replaced its oral predecessor.¹⁴⁵ Yet, each of these transitions exacted its own toll from the fullness of the social and psychological experience that was represented by the preceding mode of communication.¹⁴⁶ From the vantage point of the critic of the typographic culture, for example, print artificially reduced and abstracted the world to the cold confines of the typed page.¹⁴⁷

144. What would the classicist do with commercial print ventures, like the newspaper *USA Today* or *People* magazine?

145. In antiquity, commercial oral speech was the province of sophists, whom the classicists likewise abhorred.

146. See, e.g., E. HAVELOCK, *THE MUSE LEARNS TO WRITE* 9 (1986) (noting that a wealth of detail and depth of psychological feeling of non-Greek culture was lost when orality was transformed into literacy); E. HAVELOCK, *ORIGINS OF WESTERN LITERACY* 6 (1976) (arguing that written language fails to fulfill the full potential of oral language); E. HAVELOCK, *PROLOGUE TO GREEK LITERACY* 4 (1971) (noting that the creative process of oral-historical embellishment by successive bards ended in Greece when the Greek alphabet was invented); M. MCLUHAN, *supra* note 44, at 48 (characterizing the alphabet as an aggressive absorber and transformer of cultures); W. ONG, *ORALITY AND LITERACY* 10-15 (1982) (noting that once writing took possession of the psyche of oral cultures, the production of highly artistic and beautiful verbal performance was no longer possible); W. ONG, *THE PRESENCE OF THE WORD* 18 (1967) (noting that it was impossible to understand the psychological and cultural significance of oral expression contrasted with writing and print, until we moved into the present age of telephonic and electronic communication); W. ONG, *RAMUS, METHOD, AND THE DECAY OF DIALOGUE* 307-14 (1958) (discussing the implications for modern cultures of letterpress printing and of Ramism, which views the elements of dialogue and all expression as letters rather than sounds).

147. We discuss these, and other points, in our forthcoming essays, *Electronic Texts* and *Death of Discourse*, and in Collins, *Writing on Writing*.

For the classicists to deny the proposition noted in the text, they would have to obscure the paradox latent in the union of the warring typographic and oral traditions. The advent of typography raised its own form of the paratroopers' paradox in its time: orality could not save itself without destroying itself, because the word, in order to be effective, had to "speak" its case in print.

On a somewhat related score, we find it curious that the new critics of legal studies devote such great attention to the interpretation of texts. Although purporting to represent the cause of "new voices" or "other voices," they seem deaf to the oral. Put differently, is not the real problem with the Langdellian method more one of its format than its content? Should not the new critics question the continued use of texts in classes? Would not the return to the oral be entirely consistent with the eradication of the traditional legal (typographical) mindset and the introduction of other voices?

B. *Modernism Critiqued*

The modern scenario is single-value-based. Liberty is championed for its own sake and is largely divorced from other traditional first-amendment values. Essentially, the modernist understands the first amendment as a vehicle for individualism, rather than as an instrument for any public good. The modern scenario favorably portrays society as a collection of atomistic beings—a society in which the first amendment preserves the conditions necessary for self-interested behavior.¹⁴⁸ In Plato's words, it is "the city full of freedom and free speech" where there is "license" for all modes of expression.¹⁴⁹ As a laissez-faire theory, the modern scenario is ideally suited to the consumptive desires of a highly capitalistic and technologically driven society.¹⁵⁰

Modernists flatly reject the notion that the "new pleasure principle" of the commercial television culture is problematic. If anything, they view it in a positive rather than a negative light. Modernists do not imagine the Huxleyan evil as a threat to the system of free expression—to them, acting as if it were a threat is the real threat.

The felt need of modernists to extend first-amendment protections unsparingly to commercial television reveals their hypersensitivity to the fears of Orwellian tyranny. Not surprisingly, the Orwellian fear makes the modernist acutely aware that the first amendment cannot remain static in the face of dynamic changes in modes of communication. Unfortunately, the modernist is unaware that the first amendment likewise cannot remain static when triviality and amusement threaten to become the criteria for public discourse.

Surely, the value of freedom of expression cannot be confined to an unchecked liberty interest. By attempting to safeguard the single anticensorial tenet of the traditional first amendment, the modernist allows other values to be destroyed,¹⁵¹ either by governmental indifference or by

148. See generally E. WOLGAST, *THE GRAMMAR OF JUSTICE* 1-76 (1987) (describing "social atomism" as the view that society is composed of a collection of independent, self-motivated entities); Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 221 (1988) (attributing to classical liberal legalism the philosophy that "the individual [was] a free, rational, and autonomous agent who was both the source of political authority and the ultimate justification for its exercise"); *id.* at 220-37 (discussing criticism of the contemporary liberal legal emphasis on individual-rights consciousness).

149. See PLATO, *supra* note 63, at 235.

150. See *supra* note 117.

151. As Professor Steven Shiffrin aptly notes, when expression is justified for atomistic self-gratification, it is "likely to promote individualist alienation and to discourage civic virtue. More directly to the point, it is likely to promote a privatized nonengaged citizenry. So while American educators encourage persons to participate in the body politic as 'citizen-critics,' American television teaches people to be hedonistic consumers." S. SHIFFRIN, *supra* note 3. On a related matter, Professor Todd Gitlin observes:

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corporate design. Professor Frederick Schauer, criticizing Pool's modernist theory, doubts "whether free speech interests are necessarily strengthened by the broadening of the first amendment. We cannot ignore the extent to which an extension may be conducive to dilution."¹⁵² His doubts are well-founded.

Once the "new pleasure principle" is unleashed, the cultural environment erodes all other important first-amendment values. For example, effective dissent requires a social climate in which its message can be appreciated and acted upon; worthwhile civic participation requires a citizenry that elects to do more than ingest television's soma tablets; an enlightened search for the common good requires more than atomistic desires for entertainment. Tracking Huxley's larger point, the modernist libertarian concept of first-amendment freedoms equates "the lowest passions with the highest ideals."¹⁵³

Finally, as Pool perceived, the increasing convergence among forms of communication creates an overlap among the technologies and uses of oral, typographic, and electronic media. Granting the point, convergence of past and present modes of expression does not dictate the extension of past forms of first-amendment protections to all present and future forms.¹⁵⁴ Carte-blanche application of the first amendment, without accounting for the different technological attributes and special commercial uses of television, would protect past, nonelectronic forms of communication as they are corrupted by the new medium. For example, the oral discourse which was the life force of eighteenth-century revolutionary and nineteenth-century radical protests at Boston's Faneuil Hall is fundamentally altered when communicated via a staged and "sound-bite" medium. Convergence notwithstanding, one should pause before equating the two forms of discourse for first-amendment purposes.

C. Reformism Critiqued

The reformist scenario is, at heart, a laudable one. After all, the reformists fight the good fight. Facing a mass culture obsessed with the

[I]f we are serious about living in a democracy, the fundamental responsibility of the media should be to help people better pursue their rights and obligations as citizens, not to sell goods, . . . or sprinkle flakes of celebrity and blips of disconnected fact upon the daily life of a society otherwise dedicated to private gain. Democracy requires an active, engaged citizenry committed to determining and seeking the public good. As it is, the bulk of commercial television . . . reminds us to think of ourselves as consumers first and foremost.

T. GITLIN, *supra* note 2, at 334.

152. Schauer, *Free Speech and the Demise of the Soapbox* (Book Review), 84 COLUM. L. REV. 558, 565 (1984).

153. A. HUXLEY, *supra* note 23, at 41.

154. See Schauer, *supra* note 152, at 569.

entertainment fare fed to it by the captains of corporate media, the reformists pin their faith on the good sense of the citizenry and the media's ability to rise above itself. They do not resort to the censor's heavy hand, thereby rejecting the most odious aspects of the modern and classical scenarios. In this sense, reformists appear to grasp the paratroopers' paradox.

Yet, their compromise position prompts us to reconsider the earnestness of their first-amendment objectives. Although it espouses a platform for media education, the reformist agenda appears more political than educational, more of fourteenth-amendment equality than of first-amendment rationality. What animates the reformist is the desire to reallocate media power, to wrestle prime time from the commercial "haves," and to place it in the hands of the public "have-nots." The power exchange, on closer examination, may achieve little else.¹⁵⁵

The public appetite for self-amusement that feeds on the status quo will inevitably corrupt or destroy the reformist educational agenda. For example, once the reformists have created their Audience Network to caution the public to the dangers of commercial broadcasting, the question will be: Who wants to watch it?¹⁵⁶ On the one hand, if its entertainment value cannot compete with the commercial marketplace, it most likely will fail for lack of mass interest. On the other hand, if its entertainment value is truly competitive, it will undermine its own endeavor to educate the public on media ecology.¹⁵⁷

If the town-meeting media fails to educate, is there any first-amend-

155. This is not to deny, apart from the first-amendment context, the importance of the relationship between media and power. See, e.g., H. INNIS, *THE BIAS OF COMMUNICATION* 3-32 (1951) (assessing the refinement of printing as hastening the rise of nationalism, savagery, and revolution in the twentieth century); C. MILLS, *POWER, POLITICS, AND PEOPLE* 577-98 (1963) (arguing that sudden advances in communication technology destabilize society); C. MILLS, *supra* note 65 (arguing that centralization of the expression of opinion and the difficulty of the individual to answer, combine to grant power to those who control the instruments of communication).

156. In McLuhanesque terms, perhaps this is a case of imposing a "hot" message on a "cool" medium—television. See M. McLuhan, *UNDERSTANDING MEDIA* 36-45 (1964); Marchand, *supra* note 102, at 140-42, 150, 168-69.

157. See N. Postman, *AMUSING*, *supra* note 25, at 159 (arguing that television is most dangerous when it "co-opts serious modes of discourse—news, politics, science, education, commerce, religion—and turns them into entertainment packages"). Postman calls for education in the schools regarding what information is and how it gives direction to our culture, presumably in a nonelectronic format. See *id.* at 160. Consistent with Postman's larger theme, there is the danger that electronic education will undermine the educational process. See Goodman, *Are Commercials in the Classroom Cause for Alarm?*, N.Y. Times, June 18, 1989, at H27, col. 1; Verhovek, *supra* note 7, at 1, col. 6; Innerst, *Turner Bids for Young Minds with Free TV News*, Wash. Times, Apr. 27, 1989, at A6, col. 1; cf. Rosen, *Classroom TV Can Become a Lesson in Media Criticism*, L.A. Times, Mar. 12, 1989, § 5, at 5, col. 1. For a descriptive account of the educational media efforts of Whittle Communications, see China, *Debut of Commercials on School TV Renews Debate Over Shows' Value*, N.Y. Times, Mar. 6, 1990, at A18, col. 1; Donohoe, *Whittle Carves Out a Niche in Media*, Wash. Times, July 19, 1989, at E1, col. 5.

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ment justification for grabbing a piece of the new media pie? If they were candid, the reformists would likely retort: “As long as we are on the screen, we are doing something.” Ironically, this response dismisses all that ever mattered in the classical scenario, which informed the reformist’s high educational mission, and blindly accepts the modern scenario’s operative principle—media for media’s sake. Essentially, the acquisition of media power has no meaningful first-amendment purpose. If the power exchange alone is meaningful, it is only in a formalistic sense.

This formalism renders the reformists powerless to mediate between the classical and the modern scenarios. Once the reformists are stripped of their serious educational objectives, they come dangerously close to the triviality that permeates the modern scenario. The reformists may have grasped the paratroopers’ paradox, but they have not escaped it.

The paratroopers’ paradox has survived the classical, modern, and reformist scenarios. Because the paradox remains, each scenario will continue to perplex its respective audience—and well it should. As long as each scenario fails to capture the larger play of forces among them all, its adherents will not understand the fullness of the dizzying paradox.

Understanding the paradox, we must admit, creates a profound conflict in our first-amendment jurisprudence. The fundamental tenets of the traditional first amendment—its anticensorial command and its public discourse rationale—suggest two different directions for governmental action. With regard to abridging speech, its operative principle is both hands-off and hands-on.

Indeed, Huxley understood the magnitude of the paradox and its constitutional significance:

The best of constitutions and preventive laws will be powerless against the steadily increasing pressures of . . . advancing technology. The constitutions will not be abrogated and the good laws will remain on the statute book; but these liberal forms will merely serve to mask and adorn a profoundly illiberal substance.¹⁵⁸

Huxley and the paradox challenge us to consider: How do we empower the first amendment? Must we—and can we—recast the first amendment to reconcile old-world Orwellian principles with new-world Huxleyan predicaments? Do we really wish to act upon the knowledge of the paradox?

Facing the paradox without resolving it, we offer the following (non-exhaustive) possibilities for future analysis:

158. A. HUXLEY, *supra* note 23, at 90-91. In the comment quoted above, Huxley confronted a similar and larger paradox, involving the dissipated power of constitutions and protective legislation in the face of pressures of propaganda, overpopulation, and over-bureaucratization.

- (1) Investigate the viability of either fortifying rationality, civic participation, and meaningful dissent rationales for the first amendment, or substituting some form of a self-gratification rationale, or attempting to draw lines between these two rationales.
- (2) Investigate the viability of a first-amendment doctrine that distinguishes protections on a combination of factors: the form of communication (oral, print, electronic);¹⁵⁹ the extent of commercial influence; the "mass" character of the expression (speaker-audience ratio); and the existence of alternative traditional, noncommercial forms of expression (remember: The "new pleasure principle" suffuses the American culture generally, and is only most blatantly manifest in commercial television).
- (3) Investigate the viability of empowering and requiring national and state governments to take affirmative steps to protect traditional forms of noncommercial expression: government-sponsored television; government-sponsored public fora for face-to-face debates, lectures, readings, recitals, and art exhibitions; government-sponsored media education programs.
- (4) Investigate how other countries, particularly socialist nations without a "first amendment," confront the Huxleyan dilemmas.

Should we choose to act on our knowledge of the paradox, and should we attempt to recast the first amendment to grapple with the paradox, there undoubtedly will be something lost and something gained. Whether the something lost or the something gained will render us better-off or worse-off cannot be resolved at this point. This uncertainty results in part because the Huxleyan factor has not yet become a variable in the constitutional calculus of the first amendment, and the full ramifications of grappling with the paradox remain wholly speculative.¹⁶⁰

For now, our paratroopers are assailed by a cloud of paradoxical bullets as they cross the Rubicon and prepare to leap into the new first-amendment terrain. And this all points to the *Death of Discourse*. But that, of course, is another battle, another call for hope, and another article.

159. Insightfully, Professor M. Ethan Katsh predicts the probability of format-specific first-amendment doctrines in an electronic age. See Katsh, *supra* note 104, at 1483-85. See generally M. KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 113-67 (1989) (noting that the advent of new technology demands clarification of the purpose of free expression).

160. "We're in unmapped territory," observed Bill Moyers, "where the image is the dominant grammar of our public conversation, and we're not even sure how to think about it." Hall, *supra* note 81, at 4, col. 1 (statement of Moyers).

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Appendix A Paratroopers' Reading List

To assist in furthering discourse on the Orwellian-Huxleyan paradox of the first amendment, we suggest the following foundational readings which, in our estimation, deserve some place in the curriculum of any course on the freedom of expression:

Anastaplo, *Self-Government and the Mass Media*, in *THE MASS MEDIA AND MODERN DEMOCRACY* 161 (H. Clor ed. 1974).

T. GITLIN, *INSIDE PRIME TIME* (1985).

A. HUXLEY, *BRAVE NEW WORLD* (1965).

A. HUXLEY, *BRAVE NEW WORLD REVISITED* (1958).

A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

C. MILLS, *THE POWER ELITE* (1956).

Nader & Riley, *Oh, Say Can You See: A Broadcast Network for the Audience*, 5 *J.L. & POL.* 1 (1988).

G. ORWELL, *1984* (1949).

N. POSTMAN, *AMUSING OURSELVES TO DEATH* (1985).

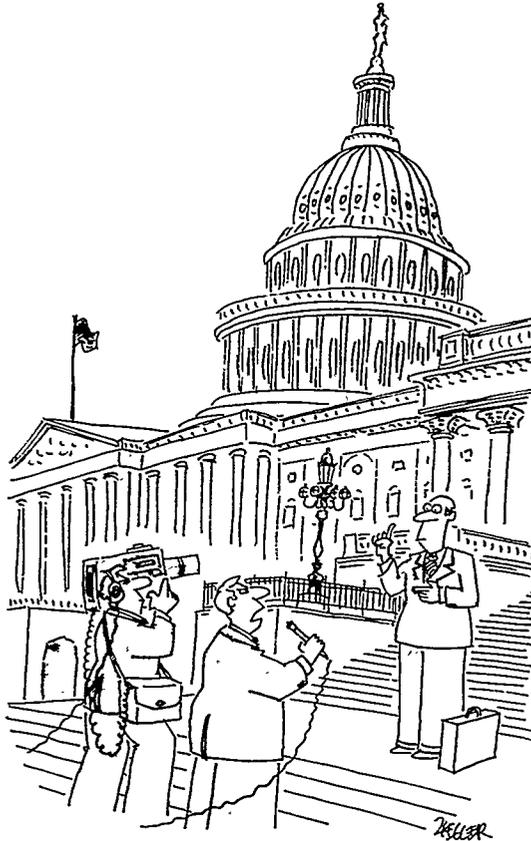
N. POSTMAN, *TEACHING AS A CONSERVING ACTIVITY* (1979).

Schauer, *Free Speech and the Demise of the Soap-Box*, 84 *COLUM. L. REV.* 558 (1984).

I. DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983).

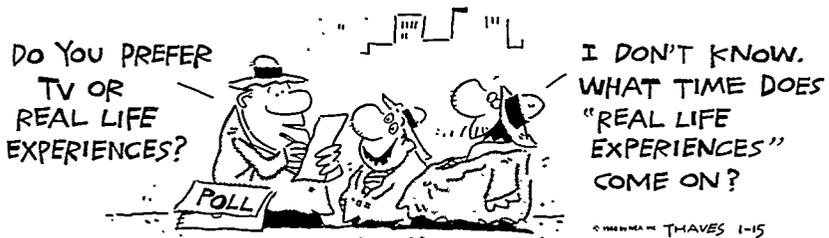
Appendix B

For our less careful reader who does not wish to be burdened by text:



"Hey, do you want to be on the news tonight or not? This is a sound bite, not the Gettysburg Address. Just say what you have to say, Senator, and get the hell off."

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