February 1983

Note, Content Regulation and the Dimensions of Free Expression

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NOTES

CONTENT REGULATION AND THE DIMENSIONS OF FREE EXPRESSION

For more than a decade, the Supreme Court has been engaged in controversy over an issue central to the interpretation of the first amendment — whether government may restrict speech on the basis of its "content."[1] In the 1972 decision of *Police Department v. Mosley*,[2] the Court declared that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[3] In *Mosley*, the Court applied this principle to invalidate a Chicago ordinance that banned picketing within 150 feet of a school but exempted peaceful labor picketing. The ordinance was impermissible, the Court held, because it discriminated among pickets on the basis of subject matter.

In several subsequent cases, the Court gave broad application to the doctrine of content neutrality by invoking it to strike down an ordinance that banned the outdoor showing of films containing nudity[4] and a city's denial of the use of a municipal auditorium to present the musical *Hair*.[5] In several other cases, however, the Court showed reluctance to apply the principle to its full extent.[6] Increasing opposition to a broad content neutrality doctrine culminated four years after *Mosley* in *Young v. American Mini Theatres*.[7]

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[1] "Content," in its most general sense, refers to the "communicative" aspects of expression, such as its viewpoint, subject matter, and general category. For discussions of the distinction between the "communicative" and the "noncommunicative" impacts of expression, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 to 12-3 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing*, 88 HARV. L. REV. 1482, 1496–1500 (1975).

[2] 408 U.S. 92 (1972).

[3] *Id.* at 95.

[4] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), *discussed at infra* note 99.

[5] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). For other cases following the *Mosley* principle, see *infra* note 11.

[6] *See* Greer v. Spock, 424 U.S. 828 (1976) (upholding ban on partisan political speech on military base); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion) (upholding municipal transit system's policy of accepting commercial but not political advertisements); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (upholding broadcast licensees' refusal to sell time for political advertisements). On the Court's inconsistency in applying the *Mosley* principle, see Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205 (1982).

[7] 427 U.S. 50 (1976) (plurality opinion).

In *Young*, the Court upheld a Detroit "anti-skid row" ordinance restricting the locations of "adult" movie theaters. Writing for a plurality, Justice Stevens contended that "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech."[8] He maintained that adult films, because of their adverse impact on neighborhoods, could be treated in a different manner from other films consistently with the "essence" of the *Mosley* rule — government's "paramount obligation of neutrality" with respect to "the *point of view* being expressed by the communicator."[9] Moreover, he asserted, "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."[10]

Since *Young*, the Court has remained deeply divided over the issue of content discrimination, and has issued a number of badly fragmented and inconsistent decisions. Although it has continued to rely on *Mosley* in many cases,[11] the Court has increasingly upheld content-based restrictions in the areas of commercial[12] and sexually explicit speech.[13] Last Term, a

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[8] *Id.* at 66–70.

[9] *Id.* at 67, 70–71 (emphasis added).

[10] *Id.* at 61, 70. In a sharp dissent, Justice Stewart accused the plurality of "rid[ing] roughshod over cardinal principles of First Amendment law." *Id.* at 85–86 (Stewart, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting). Justice Powell, concurring separately, also rejected the plurality's approach. *Id.* at 73 n.1 (Powell, J., concurring).

[11] The Court has followed *Mosley* most frequently in cases involving speech on public issues. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (invalidating ordinance allowing some commercial but no noncommercial billboard advertising); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating ban on inclusion in billing envelopes of utility's views on controversial issues of public policy), *discussed at infra* note 96; Carey v. Brown, 447 U.S. 455 (1980) (invalidating statute prohibiting residential picketing but exempting labor and some other forms of picketing), *discussed at infra* note 96; First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (invalidating statute banning corporate expression to influence referenda on issues unrelated to corporation's business), *discussed at infra* note 95. *But see* cases cited *supra* note 6.

Several other cases have applied the content neutrality principle. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (invalidating state university's policy of denying student religious groups the use of facilities permitted to other student groups); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (invalidating ordinance excluding all live entertainment from borough); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating statute prohibiting advertisement of contraceptives).

[12] *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (indicating that a narrow ban on advertising by electric utility would be upheld if necessary to promote energy conservation).

[13] *See, e.g.*, New York v. Ferber, 102 S. Ct. 3348 (1982) (upholding statute forbidding dissemination of child pornography); FCC v. Pacifica Found., 438 U.S.

majority of the Court for the first time endorsed Justice Stevens' view that the claim of particular forms of speech to protection under the first amendment often depends on their content.[14]

Although the Court appears to be moving toward a greater willingness to permit some regulation of speech on the basis of content,[15] it remains unable to achieve consensus on a proper approach. Part I of this Note argues that this failure is inherent in the way the basic problem has been conceived by modern first amendment thought. Part II offers a new perspective on free expression that may provide a coherent approach, outlined in Part III, to the issue of the legitimacy of content regulation under the first amendment.

I. Content Regulation and Modern First Amendment Theory

At the core of the controversy over content regulation is a basic problem in the theory of free expression. Modern first amendment thought regards expression as a protected "sphere" largely immune from government interference.[16] But it also

726 (1978) (plurality opinion) (upholding sanctions against radio station for early afternoon broadcast of George Carlin's "Filthy Words" monologue).

[14] New York v. Ferber, 102 S. Ct. 3348, 3358 (1982) (quoting with approval Young v. American Mini Theatres, 427 U.S. 50, 66 (1976) (plurality opinion)).

[15] Several cases this Term provide further indication of the trend. *See* Regan v. Taxation with Representation, 51 U.S.L.W. 4583 (U.S. May 23, 1983) (upholding provision of Internal Revenue Code that exempts veterans' organizations from general restrictions on lobbying by tax-exempt charitable organizations); Connick v. Myers, 103 S. Ct. 1684 (1983) (holding that discharge of public employee for expression relating to internal office policies does not violate first amendment); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983) (upholding school board's practice of granting access to interschool mail system to official teachers' union but not to rival union); *see also* Kime v. United States, 103 S. Ct. 266 (refusing to review conviction for contemptuous burning of American flag), *denying cert. to* 673 F.2d 1318 (4th Cir. 1982).

[16] *See* L. Tribe, *supra* note 1, § 11-1, at 565. The classic modern statement of this view is West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), in which the Court held that the action of local school authorities in compelling students to salute the flag "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." *Id.* at 642. The view that expression constitutes a protected realm derives both from the tradition that regards freedom of thought and belief as an aspect of individual liberty, *see, e.g.*, J. Locke, *A Letter Concerning Toleration*, in Treatise of Civil Government and A Letter Concerning Toleration (C. Sherman ed. 1937); J.S. Mill, *On Liberty*, in The Philosophy of John Stuart Mill 185 (M. Cohen ed. 1961), and from the tradition that considers such freedom essential to self-government, *see, e.g.*, H. Arendt, On Revolution ch. 3 (rev. ed. 1965); G. Wood, The Creation of the American Republic, 1776–1787 ch. 2 (1969).

perceives free expression to be potentially in conflict with other important interests such as privacy or community. Thus, "[t]he crucial issues have revolved around the question of what limitations, if any, ought to be imposed upon freedom of expression in order to reconcile that interest with other individual and social interests sought by the good society."[17] During the 1950's and 1960's, this problem assumed the form of a debate over whether the first amendment's protection is "absolute" or whether instead it must be "balanced" against competing interests.[18] During the past decade, the problem has been recast in terms of a controversy over regulation based on "content." *Mosley* and *Young* represent the conflict in modern first amendment jurisprudence between granting full protection to expression and preserving the values with which expression appears to clash.

The central concern of the *Mosley* view is to protect autonomy of expression[19] from government restriction. "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual," wrote Justice Marshall, "our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control."[20] In the *Mosley* view, "[a]ny restriction on expressive activity because of its content"[21] constitutes government intrusion into the protected sphere of expression. Hence restrictions may be justified neither by government disapproval of a given type of expression[22]

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[17] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 887 (1963); *see, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 31–35 (1941).

[18] *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961) (Harlan, J.); *id.* at 56–80 (Black, J., dissenting); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962). On the relation between the absolutes/balancing debate and the present controversy over content discrimination, see L. TRIBE, *supra* note 1, § 12-2, at 582–84; Ely, *supra* note 1, at 1500–02.

[19] This Note uses the term "autonomy" to refer to the capacity for self-determination without outside interference. In this sense, groups and communities as well as individuals may be autonomous.

[20] Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972). *Mosley* thus derives the principle of content neutrality from the value of free expression both to democratic self-government and to individual self-realization. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970). Other commentators have argued for content neutrality on the basis of either one or the other of these values. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960) (deriving content neutrality from the requirements of self-government); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594–95 (1982) ("Any external determination that certain expression fosters self-realization more than any other is itself a violation of the individual's free will . . . .").

[21] 408 U.S. at 96.

[22] *See id.*

nor by concerns about public reaction to that expression.[23] Government must treat all expression as of equal worth[24] and "must afford all points of view an equal opportunity to be heard."[25] *Mosley* permits government to restrict speech in order to protect other interests, such as privacy, but only through time, place, and manner restrictions or other regulations "applicable to all speech irrespective of content."[26]

While the *Mosley* view captures much of our commitment to freedom of expression,[27] it does not adequately reconcile free speech and other values. First, the principle of content neutrality is too broad and inflexible to achieve sensitive accommodations among these competing interests. It fails to recognize that some sorts of expression have adverse impacts on other interests precisely because of their content. Hence the principle, if taken literally, would preclude legal restriction of defamation, incitement, invasion of privacy, false advertising, and other types of expression that are currently subject to content-based regulation.[28] Similarly, the interests that

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[23] *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791–92 (1978); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 96–97 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–11 (1975); L. TRIBE, *supra* note 1, § 12-2, at 581; *id.* § 15-19, at 981–82.

[24] *See* FCC v. Pacifica Found., 438 U.S. 726, 761 (1978) (Powell, J., concurring in part and in the judgment); *id.* at 762–63 (Brennan, J., dissenting).

[25] *Mosley*, 408 U.S. at 96; *see* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

[26] Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

[27] For commentary endorsing the view that content-based regulation is generally unconstitutional, see, for example, L. TRIBE, *supra* note 1, § 12-2; Ely, *supra* note 1; Karst, *supra* note 25, at 29–35 (1975); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). Among the few arguments for a contrary view are Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 955 (1978); Stephan, *supra* note 6.

[28] Supporters of the doctrine of content neutrality, although they would not take it to such extremes, have been unable to provide principled exceptions to it. One proposed rationale would hold that speech is unprotected only if it is completely without social value. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957); *see also* L. TRIBE, *supra* note 1, § 12-8 (viewing speech as unprotected if it falls outside the first amendment's purposes). This "two-level theory" fails not only because it is difficult to identify any form of expression that is completely without value, but also because the theory itself violates the neutrality principle by considering the social value of speech. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Karst, *supra* note 25, at 30–31. Similarly, "definitional balancing," which would exclude from protection categories of expression whose social harm outweighs their value, *see* L. TRIBE, *supra* note 1, § 12-2, at 583; Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968), is inadequate because it requires weighing interests of different sorts and violates autonomy of expression by restricting speech

time, place, and manner regulations are intended to protect often are threatened only by particular sorts of expression.[29] *Mosley*'s requirement that such regulations apply to all speech regardless of content allows the court to evade the substantive issue whether a particular sort of expression is subject to restriction. Although *Mosley*'s equal protection rule ostensibly requires merely that the state regulate in an evenhanded fashion, it may effectively foreclose the state from regulating at all.[30] If, however, the state does choose to regulate the expression, *Mosley* requires it to do so by means that are more restrictive than is necessary to achieve its objectives.[31]

More fundamentally, the content neutrality principle, as a general approach to first amendment adjudication, is inherently contradictory and incoherent. The determination whether an aspect of expression is "communicative," and thus protected under the principle, itself requires a judgment about the meaning and value of expression. In order to apply the principle of content neutrality, a judge must decide, in light of his own understanding of expression, whether a particular aspect of expression has meaning.[32] Hence the attempt to define a protected realm of expression requires the very evaluations of content that *Mosley* forbids. Consideration of the content of expression is inescapable in first amendment adjudication. The real question, which is obscured by the rhetoric of content neutrality, is not whether, but for what purposes and in what ways, judges should consider content in determining whether speech is protected.

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on the basis of its consequences. *See* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 439 (1980).

[29] For example, community interests in the public environment may be threatened by outdoor showings of violent or sexually explicit films but not other sorts of films. *See infra* note 99.

[30] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 221–28 (1962).

[31] *See* Carey v. Brown, 447 U.S. 455, 475 (1980) (Rehnquist, J., dissenting).

[32] *Cf.* Farber, *supra* note 27, at 744 & n.93 (arguing that Ely's content neutrality theory, *see* Ely, *supra* note 1, "seems to rest on intuitions about what aspect of conduct is communicative"). For example, prohibiting display of the slogan "Fuck the Draft," *see* Cohen v. California, 403 U.S. 15 (1971), is considered a classic instance of a content-based restriction, while restricting the volume of sound trucks, *see* Kovacs v. Cooper, 336 U.S. 77 (1949), is deemed to be content-neutral. It is not clear, however, why one aspect of expression but not the other should be considered "communicative." As *Cohen* itself pointed out, the meaning and the form of expression are not sharply distinguishable. *Cohen*, 403 U.S. at 25–26; *see* L. TRIBE, *supra* note 1, § 12-8, at 606–07. The volume of expression as well as the words chosen may heighten the expression's effectiveness and "emotive" force. *Cohen*, 403 U.S. at 26. To decide that one aspect but not another is "communicative" requires a view of what constitutes meaning in expression.

The primary concern of the *Young* approach, in contrast to that of *Mosley*, is to allow government to protect the other interests threatened by particular types of expression. The fact that a type of expression is "within the zone protected by the First Amendment," Justice Stevens has argued, "does not require the conclusion that it is totally immune from regulation."[33] Instead, he has contended, the first amendment affords varying levels of protection to different forms of speech on the basis of their degrees of social value.[34] As long as government does not wholly suppress protected speech and is completely neutral with respect to the *viewpoint* expressed, Justice Stevens would permit content-based regulation of "marginal" speech in order to protect other interests.[35] He would allow regulation of the public display of sexually explicit materials, for example, in order to "protect the individual's right to select the kind of environment in which he wants to live."[36]

Justice Stevens' approach is sensitive to the need to protect such values as privacy and community, interests that are "of the highest order in a free and civilized society"[37] and that may be threatened by expression. Yet *Young*, like *Mosley*, fails to resolve the problem of reconciling such interests with freedom of expression. Although it acknowledges that expression is a "protected area" under the first amendment,[38] the *Young* approach would ultimately dissolve this protected sphere by allowing government to intrude whenever regulation is necessary to protect other legitimate interests and is not motivated merely by disagreement with the viewpoint expressed.

Moreover, *Young*, like *Mosley*, is ultimately incoherent. Although recognizing that "[i]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas,"[39] the *Young* view allows government to restrict speech on the basis of its social value. *Young* fails to articulate standards for making such judgments about the value of different types of expression.[40] More importantly, it

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[33] Carey v. Population Servs. Int'l, 431 U.S. 678, 716 (1977) (Stevens, J., concurring in part and in the judgment).

[34] New York v. Ferber, 102 S. Ct. 3348, 3367 & n.5 (1982) (Stevens, J., concurring in the judgment).

[35] Smith v. United States, 431 U.S. 291, 318–19 (1977) (Stevens, J., dissenting).

[36] *Id.* at 317.

[37] Carey v. Brown, 447 U.S. 455, 471 (1980) (Brennan, J.) (characterizing privacy).

[38] Smith v. United States, 431 U.S. 291, 317–18 (1977) (Stevens, J., dissenting).

[39] FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (plurality opinion); *see Smith*, 431 U.S. at 321 (Stevens, J., dissenting).

[40] *See, e.g., Smith,* 431 U.S. at 318 (Stevens, J., dissenting) (referring simply to

fails to give sufficient weight to the basic value, central to *Mosley*, of expressive autonomy — the freedom of individuals and groups to determine their own expression regardless of its content.[41] The *Young* view does hold that government may not restrict speech because of its viewpoint. But the attempt to distinguish viewpoint from other aspects of expression, like the attempt to identify the "communicative" aspect of expression, itself requires a judgment based on content and value[42] and therefore is unlikely to provide secure protection for unpopular expression. Furthermore, if the protection accorded viewpoint does more than merely prohibit restrictions based on the government's disagreement with speech, it seems to conflict with Justice Stevens' view that "[t]he question whether [speech] is protected by the First Amendment always requires some consideration of both its content and its context."[43]

Thus, *Mosley* and *Young* both fail to resolve the problem of reconciling free expression and other social values. This failure, however, is attributable not simply to the defects of the two views; rather, it appears to be inherent in the way the problem has been conceived in modern first amendment theory. Restricting speech because of its content seems to violate autonomy of expression; allowing speech regardless of its character or context endangers important interests in privacy and community. We are deeply committed to both sorts of values, yet they appear to be contradictory and incompatible. Reconciling these interests is possible only on the basis of a broader understanding of the nature and ends of expression.

II. The Dimensions of Free Expression

A fuller understanding of free expression suggests that the premise on which both the *Mosley* and *Young* views rest is misconceived. The basic problem in content regulation cases is not, as modern first amendment theory assumes, that of

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"obvious differences of subject matter" that justify regulation, without identifying the nature of such differences).

[41] *See* FCC v. Pacifica Found., 438 U.S. 726, 761 (1978) (Powell, J., concurring in part and in the judgment).

[42] *See supra* p. 1859 & note 32.

[43] New York v. Ferber, 102 S. Ct. 3348, 3366 (1982) (Stevens, J., concurring in the judgment). For Justice Holmes, on whom Justice Stevens relies for the "classic statement" of this proposition, even the viewpoint of expression could be the basis for restriction if it resulted in a clear and present danger. *See* Schenck v. United States, 249 U.S. 47, 52 (1917), *quoted in Pacifica*, 438 U.S. at 744–45 (plurality opinion). For a powerful criticism of the Holmes position, see A. Meiklejohn, *supra* note 20, ch. 2.

reconciling free expression with other interests. Instead, the problem is better understood as one of reconciling competing interests in expression. This perspective opens the way for a resolution of the controversy by suggesting that content regulation cases involve conflicts *within* the realm of expression that may be resolved by reference to the values of expression itself.

The first amendment should be interpreted in accord with a theory of its underlying values and its relation to the human good.[44] Such a vision was eloquently expressed by Justice Brandeis:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.[45]

The end of the first amendment is to promote the realization of "man's spiritual nature." Man's identity or spirit is formed through the activities of thought, belief, will, and emotion, which are expressed both inwardly and through outward communication.[46] These activities shape man's identity in two complementary ways. On one hand, by a process of self-definition, people determine their particular identities as individuals and communities; on the other, they transcend these particular identities by uniting through shared discourse in the development of the human spirit.[47] Thus, man has both an individual and a social nature, which are created and transcended through the activities of thought, belief, and emotion. These inward activities are the essence of the "speech" protected by the first amendment, for speech has meaning and value only insofar as it reflects these activities. To fulfill the

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[44] *See, e.g.*, A. BICKEL, *supra* note 30; M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS ch. 4 (1982); L. TRIBE, *supra* note 1, § 11-4.

[45] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Although written in defense of the privacy of thoughts and beliefs, this passage also expresses Justice Brandeis' views on intellectual freedom in general. It closely resembles his account of the value of free speech set forth the preceding Term in Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[46] *See, e.g.*, ARISTOTLE, NICHOMACHEAN ETHICS X.7 (W. Ross trans. 1926) (the activity of reason realizes man's nature); AUGUSTINE, CONFESSIONS XIII.xi.12 (J. Ryan trans. 1960) (man's being, knowledge, and will are identical).

[47] *Cf.* G. HEGEL, PHILOSOPHY OF RIGHT §§ 5–7 (T. Knox trans. 1942) (1st ed. 1821) (viewing the self as a unity of self-determination and universalization).

end of free expression — the fullest development of the human spirit — the first amendment's protection should not be confined to outward speech, but should extend to *all* activity of the spirit, intellect, and emotions.[48]

Expression, in this view, embraces a wide range of activities essential to man's spiritual life. In addition to individual speech, it includes interests in thought and belief, in the receipt of ideas, in the privacy of personal life and the integrity of one's relation with the community, and in the formation of a public life and a sense of community. Such interests are integrally related both to speech and to one another, as unique elements in the process through which human identity is developed. Recognizing their expressive character leads to a better understanding not only of these values, but also of expression itself. Moreover, this recognition suggests a way out of the dilemma of content regulation by revealing the problem to be one of reconciling competing interests in expression.

Freedom of thought and belief, for example, although not literally freedom of "speech," is recognized as an interest lying "at the heart of the First Amendment."[49] Thought and belief should receive first amendment protection not merely as "the first stage in the process of expression,"[50] but as forms of intellectual and spiritual activity in their own right, indeed as the essence of such activity. The interests in thought and belief, although often regarded as interests of the individual rather than of society, in fact cut across this distinction, for thought and belief are formed, held, and transmitted as much through social discourse as through individual expression.[51]

Similarly, expression includes the interest in receiving ideas and images.[52] Receiving and communicating are reciprocal

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[48] This Note henceforth uses the term "expression" to include thought, belief, communication, and all other activity of the mind and spirit.

Such a view of expression is valuable, among other reasons, because it accounts for the primacy or "preferred position" of free expression in our constitutional order. Expression, in the sense used here, is the essense of all other activity, for thought, will, and desire are what give direction and meaning to all human activity. Expression is thus the highest human activity, *see* sources cited *supra* note 46, and is entitled to the highest degree of protection in a free society.

[49] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977).

[50] T. EMERSON, *supra* note 20, at 21.

[51] *See, e.g.*, P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

[52] For the recognition that the first amendment protects a "right to receive information and ideas," see, for example, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2808 (1982) (plurality opinion); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965);

aspects of expression.[53] Moreover, "suitable access to social, political, esthetic, moral, and other ideas and experiences"[54] is crucial to the development of man's spiritual nature.[55] The right to receive information is essential not only to individual self-realization and the exercise of practical choice,[56] but also to cultural and intellectual development and the exercise of self-government by the public as a whole.[57]

The interest in privacy, too, intersects with expression.[58] Privacy may be viewed as the interest of an individual or group[59] in forming an inner life. It involves the channelling of thought, belief, and sensation as the expression of autonomous personality. Privacy has two complementary dimensions: freedom to determine one's own thoughts and beliefs and the other elements of one's inner life — in particular, to determine what personal information one will share with others;[60] and

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Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring). *See generally* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1 (discussing first amendment's protection of a right to receive information).

[53] Emerson, *supra* note 52, at 2; Green, *The Right to Communicate*, 35 N.Y.U. L. REV. 903, 903 (1960).

[54] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[55] *See, e.g.*, Cox, *The Supreme Court, 1979 Term — Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 1–2 (1980); *see also* H. CLOR, OBSCENITY AND PUBLIC MORALITY 251–52 (1969) (discussing role of literature in promoting intellectual and moral development).

[56] Redish, *supra* note 20, at 620–21; Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); *see, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763–64 (1976).

[57] *See, e.g.*, A. MEIKLEJOHN, *supra* note 20 (freedom of speech necessary to informed self-government); J.S. MILL, *supra* note 16, ch. 2, at 245 (freedom of thought and discussion necessary to "the mental well-being of mankind").

To some extent, the interest in determining what information to receive also involves an interest in not receiving unwanted communication. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Rowan v. United States Post Office Dep't, 397 U.S. 728, 735–38 (1970); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467–69 (1951) (Douglas, J., dissenting); Emerson, *supra* note 52, at 22–23.

[58] Privacy, or the "right of the individual to be let alone," Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890), includes a variety of interests, not all of which are expressive in the sense used here. But the aspects of privacy that relate to "man's spiritual nature," especially the "privacy [of] thoughts, emotions, and sensations," *id.* at 193–95, 205–06, may also be viewed as aspects of the spiritual and intellectual freedom protected by the first amendment. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564–65 (1969) (holding that the first amendment protects "the right to satisfy [one's] intellectual and emotional needs in the privacy of his own home"); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion."); T. EMERSON, *supra* note 20, at 547; L. TRIBE, *supra* note 1, §§ 15-5 to 15-8.

[59] For a recognition of group interests in privacy, see NAACP v. Alabama, 357 U.S. 449, 462 (1958).

[60] *See, e.g.*, L. TRIBE, *supra* note 1, § 15-17, at 966 (individual control over personal information constitutes "a basic part of the right to shape the 'self' that one

freedom from intrusion into one's inner life, whether by physical invasion, observation, or unwanted communication.[61] Privacy is crucial to the formation of individual personality; conversely, privacy also serves to create a public realm by defining its limits. In shaping man's spiritual life in a distinctive way, privacy is an integral element in the system of expression.

While privacy protects an individual's inner life, the individual's interest in reputation is concerned with his standing in the community. Reputation — which protects the relationships that a person gradually forms through interaction with others — may be viewed as a relational interest in expression; it is a product both of the image a person projects of himself[62] and of the way others view him. Recognition of the individual as a person and a full member of the community is basic to the development of his identity and self-respect.[63] Moreover, belief in a person's integrity and credibility constitutes an essential background element in his ability to communicate with others.

Expression is as basic to the creation of community as to the formation of individuality.[64] It is through expression that people come to view themselves as a community with a common identity and a shared conception of the good.[65] In ad-

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presents to the world"); Karst, *Individuality, Community, and Law*, in LAW AND THE AMERICAN FUTURE 68, 82 (M. Schwartz ed. 1976). The Supreme Court has recognized that the 14th amendment protects an "individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977).

[61] On freedom from unwanted communication, see *supra* note 57.

[62] *See* L. TRIBE, *supra* note 1, § 15-17, at 966.

[63] *See, e.g.*, I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 154–57 (1969); J. RAWLS, A THEORY OF JUSTICE § 67 (1971); M. WALZER, SPHERES OF JUSTICE 276–80 (1983); Karst, *supra* note 60, at 78.

[64] On the inseparable relation between the development of individuality and of community, see Karst, *supra* note 60, at 72–83.

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> [L]anguage serves to declare what is advantageous and what is the reverse, . . . what is just and what is unjust . . . . [Man] alone possesses a perception of good and evil, of the just and the unjust, and other similar qualities; and it is an association in these things which makes a family and a polis.

ARISTOTLE, POLITICS I.2.1253a (E. Barker trans. 1946); *see* R. WOLFF, THE POVERTY OF LIBERALISM ch. 5 (1968); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 149–52 (1977–1978).

The creation of community takes place within groups as well as formal political entities. *See, e.g.*, 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (pt. 2) ch. 4 (Paris 1835); 2 *id.* (pt. 2) ch. 7 (Paris 1840). On rights of expression by and within voluntary associations, see T. EMERSON, *supra* note 20, ch. 18. The importance of groups for the development of shared values is discussed in M. WALZER, *The Obligation to Disobey*, in OBLIGATIONS ch. 1 (1970); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067–73 (1980).

dition to the interests they have in common with individuals, communities have several distinctive interests in expression.[66] One of the most fundamental is the interest in expression relating to self-government.[67] Just as privacy enables the individual to form an inner life, public speech allows the community to generate a public life.[68] The community also has expressive interests in maintaining the respect for law and for others that forms the bond among members of society.[69] Finally, the community has an interest in promoting education.

Free expression, therefore, is not a single principle, but a complex of interrelated rights — of speech, listening, privacy, and reputation[70] — that embraces interests both of individuals and of communities.[71] It is through the interaction of these values, not through the pursuit of any one of them alone, that free expression promotes its ultimate end: the development of man's spirit, intellect, and feelings.

Although the various interests in expression are ultimately directed to the same end, they are frequently in tension with one another on a practical level. Conflict is a healthy aspect of an open society, but at some point it becomes destructive and undermines rather than furthers the ends of free expres-

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[66] In arguing that communities have expressive interests, this Note does not intend to suggest that communities are entities apart from the people who compose them. It suggests, instead, that people identify themselves for some purposes as members of communities and that they have interests in this capacity as well as in their capacity as individuals. The interests that people share in family life, common culture, or political community are distinctively social; they can be properly understood only as group interests, not reducible to the separate interests of the members. *See* R. WOLFF, *supra* note 65, ch. 5.

[67] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); A. MEIKLEJOHN, *supra* note 20.

[68] *See, e.g.*, H. ARENDT, *supra* note 16, ch. 3; J. POCOCK, THE MACHIAVELLIAN MOMENT ch. 3 (1975).

[69] On the expressive interest in law, see *infra* note 72; on mutual respect as an element of a good society, see, for example, J. RAWLS, *supra* note 63, § 67.

[70] A view of free expression as a system of interrelated rights is developed in T. EMERSON, *supra* note 20. For an analysis of expression in terms of the interests of speakers, listeners, and third parties, see Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

[71] The various participants in the system of expression — individuals, groups, and communities — are overlapping rather than separate from one another. Thus, a conflict between individual and community speech interests — for example, over the public display of sexually explicit materials — may represent not simply a clash between different people or groups, but rather an instance of the inevitable tensions among interests held by the same people. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1774–75 (1976) (discussing contradictory commitments to individualism and community). In such a context, the law promotes freedom not simply by allowing individuals to act as they choose, but by determining which interest in liberty is more important.

sion. In such cases, it is the role of law to harmonize conflicting interests in expression.

This broader view of the nature of freedom of expression allows an escape from the problem of modern first amendment thought, by providing a common standard — the values of expression itself — with which to resolve conflicts among these interests in particular cases. Rather than focus on the dilemma of absolutism and balancing, of whether and to what extent freedom of speech should yield to other values, the recognition that these values are all expressive allows us to focus on the real issue: which forms of activity we believe to be most important for the realization of the human spirit. The final Part of this Note sketches the implications of such a perspective for the controversy over content regulation and proposes a new framework for adjudicating first amendment issues.

III. An Approach to Content Regulation and the First Amendment

The perspective developed in this Note suggests that, contrary to the *Mosley* view, the government is legitimately concerned with the content of expression in two different ways — as spokesman for the community's own legitimate interests in expression, and as regulator or arbiter of competing expressive interests.[72]

A. Government as Representative of Community Interests in Expression

As a participant in the system of expression,[73] a community is properly concerned with determining the content of its *own* expression. When the community can engage in expression directly, as in debate on public issues,[74] government's role is limited to imposing content-neutral regulations on behalf of the community in order to maintain the basic conditions and enhance the opportunities for such expression.[75] But many

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[72] For an analogous discussion of law as both an authoritative formulation of the community's will and a reasoned process for judging among conflicting claims, see Clor, *On the Moral Authority and Value of Law: The Province of Jurisprudence Undetermined*, 58 Minn. L. Rev. 569, 582–601 (1974). In these two respects, law itself may be viewed as a form of expression.

[73] *See supra* pp. 1865–66.

[74] *See, e.g.*, Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring).

[75] *See* T. Emerson, *supra* note 20, ch. 9.

forms of community expression, like other sorts of common action, must be accomplished by means of representative institutions. For example, government may promote the community's expressive interests by providing public education,[76] by disseminating information,[77] and by promoting the aesthetic quality of the public environment.[78] More generally, the community may regulate the expression of its members insofar as they are members.[79] For example, it may seek to restrict defamatory and privacy-invading speech in order both to protect individuals and to promote community thought and aspiration.[80]

B. An Approach to First Amendment Adjudication

When different interests in expression conflict, the object of first amendment adjudication is to harmonize them to promote most fully the ends of free expression.[81] This function does require a sort of neutrality[82] — not an indifference to the "communicative impact" of varying types of speech, but an effort fairly to assess their value and importance in light of the ends of free expression. The ability to make such an assessment, far from being inconsistent with freedom of speech, is one of its ultimate fruits.

Under the view proposed here, expression may be restricted because of its content — that is, regulated in its distinctive character as expression — only to the extent necessary to promote free expression as a whole.[83] This approach would

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[76] *See, e.g.*, Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799, 2806 (1982) (plurality opinion).

[77] *See* Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 569 (1980).

[78] *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (recognizing that city has substantial interest in aesthetics of urban environment); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). For general discussions of "government speech," see M. YUDOF, WHEN GOVERNMENT SPEAKS (1983); Shiffrin, *supra* note 77.

[79] Rather than an intrusion upon the realm of individual autonomy, *see* Redish, *supra* note 20, at 594–95, a community's regulation of its own expression is an exercise of social liberty that acts on community members internally and furthers the development of their social nature and common action. *See* A. MEIKLEJOHN, *supra* note 20, at 9–14; J. ROUSSEAU, THE SOCIAL CONTRACT bk. 1, ch. 8 (1st ed. 1762).

[80] *See* Warren & Brandeis, *supra* note 58, at 196.

[81] It is sometimes possible, by resort to a range of auxiliary doctrines such as vagueness and overbreadth, to enhance the opportunities for expression in a particular context without making an ultimate judgment about competing expressive values. *See* A. BICKEL, *supra* note 30, ch. 4. When used for this purpose, the doctrines should be moderated so that the accommodation under review need only be a sensitive and reasonable one, not one as protective as possible of traditional interests in speech.

[82] *See* Clor, *supra* note 72, at 584.

[83] The principle proposed here would not preclude government from acting to

allow the accommodation of competing interests, but only in terms of the values of expression itself. It thus offers a way to resolve the controversy between absolutes and balancing, by incorporating the insights essential to each — the former's commitment to the primacy and autonomy of expression, and the latter's sensitivity to such values as privacy and community.

To achieve a reasonable balance between competing expressive interests, a court must determine their relative strength and importance.[84] The value of a particular sort of expression can be understood to have two closely related aspects, which correspond to the two ways in which the human spirit is formed through expression.[85] These two aspects, which may be referred to as the *autonomy* and the *substantive* values of expression, reflect both *Mosley*'s emphasis on expressive autonomy and *Young*'s evaluation of the content of expression. Inquiries into the autonomy and substantive values help to structure the fundamental problems in content regulation cases and allow the courts to address them openly and directly.

The autonomy value is the interest of individuals or communities in determining their own expression regardless of content.[86] This value corresponds to the role of expression in developing the spirit through the activity of individual or group self-expression. The strength of the autonomy interest depends on the importance that expression has in a particular

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protect nonexpressive interests, such as public order or national security, by regulating the noncommunicative aspects of expression. Allowing such interests to justify restrictions on content, however, would violate the primacy of expression. *See supra* note 48. It is possible to recast such interests as expressive ones — maintaining respect for law or promoting a sense of national unity, for example. When viewed as expressive, however, such interests should be assessed only in terms of their intrinsic value in promoting the human spirit, not in terms of their importance for material ends. While the interest in national unity might outweigh some other expressive interests, it would not prevail over more fundamental interests such as freedom of thought and belief. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[84] Justice White has convincingly applied this sort of balancing approach in several cases. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 802–22 (1978) (White, J., dissenting); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386–90 (1969). For another model opinion that balances competing first amendment interests, see Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 170–204 (1973) (Brennan, J., dissenting).

[85] *See supra* p. 1862.

[86] *See, e.g.*, West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (recognizing "a right of self-determination in matters that touch individual opinion and personal attitude"). Groups and communities may be said to have such rights of self-determination as well. *See supra* note 19.

context. In freedom of thought and belief, for example, the interest is at its strongest.[87]

From a second perspective, expression represents not the product of autonomous choice, but the goal toward which people strive in trying to realize their selves. Here it is the content of the expression, its particular value for upbuilding human identity and character, that is crucial. The substantive value of expression is thus the extent to which the expression promotes the basic end of free expression, the development "of man's spiritual nature, of his feelings and of his intellect."[88] Expression that is engaged in as a good in itself promotes this object more than does speech that is aimed instrumentally at the achievement of material ends. Hence freedom of thought and belief, the interests in privacy and reputation, political discourse, and "expression about philosophical, social, artistic, economic, literary, or ethical matters"[89] rank higher in "the hierarchy of First Amendment values"[90] than do more instrumental forms of expression such as commercial speech or "adult" expression.

There remains an important role for the principle of equality in the process of reconciling competing expressive interests to promote the aims of free expression. When persons or groups with similar autonomy interests engage in expression of the same general sort, disparate treatment of such persons or groups would unjustifiably interfere with the process of expression. To this extent, *Mosley*'s principle of nondiscrimination performs an indispensable function in first amendment analysis. But to use the principle in this way requires a prior, content-based judgment that the two forms of expression *are* similarly situated for purposes of regulation.[91]

Although the fairminded assessment of the relative values of competing interests in expression represents the goal toward which adjudication should strive, the pursuit of this ideal must be modified to take account of the practical context in which

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[87] *See supra* p. 1863.

[88] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[89] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

[90] Carey v. Brown, 447 U.S. 455, 467 (1980).

[91] *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 563 (1982); *cf.* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075–77 (1980) (arguing that application of equal protection norms is meaningful only in light of a substantive vision of fundamental rights). For example, a school board may not decide that a school library should contain books reflecting one ideological point of view but not another, for the two are considered to be similarly situated with respect to education. But the board may remove certain books on the basis of its bona fide judgment of their educational value, even though this constitutes a distinction based on content. *See* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982) (plurality opinion).

it takes place. Regard for the courts' role in checking majoritarian power and for what Professor Emerson calls "the dynamics of limitation"[92] counsels that judges should lean toward the protection of untraditional and minority interests. Ultimately, however, the exercise of reasoned judgment on the value of different forms of expression, rather than indifference to their content or value, is the only firm basis for the protection of freedom of mind.[93]

The implications of the view developed here for various content regulation problems can be sketched only briefly. Political speech, because of its relation to self-government, is primarily an interest of the community. Hence government, as the representative of the polity, has no authority to restrict citizens' political expression on grounds of content.[94] By the same token, to promote broader and more equal participation, the community should be able to impose reasonable regulations on the extent to which its members engage in electoral expression.[95] The view would also permit more sensitive accom-

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[92] Emerson, *supra* note 17, at 887–93.

[93] *Cf.* Schaefer v. United States, 251 U.S. 466, 482–83 (1920) (Brandeis, J., dissenting) (clear and present danger standard "is a rule of reason" that "like many other rules for human conduct . . . can be applied only by the exercise of good judgment").

[94] *See* A. MEIKLEJOHN, *supra* note 20.

[95] In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Court struck down federal limitations on campaign expenditures by individuals, groups, and candidates on the ground that such limitations violated core first amendment rights of political speech. Although it emphasized the importance of political speech, the Court failed to address the critical question whether participation in electoral expression is primarily an interest of people in their capacity as individuals or as members of a political community. The problem was one of choosing among competing visions of the political community. *See* R. Parker, Political Vision in Constitutional Argument (Feb. 1979) (unpublished manuscript on file in Harvard Law School Library). As the Court's own rhetoric suggests, political expression is best viewed as collective discourse on matters of community self-determination. *See* 424 U.S. at 14–15, 48–49. The freedom of the community is enhanced rather than diminished by measures that ensure broader and more equal participation in public discussion.

For similar reasons, the Court in First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), erred in striking down a Massachusetts prohibition on corporate expenditures made to influence referenda on issues unrelated to the corporation's business. Justice Powell's majority opinion emphasized the importance of expression to democratic decisionmaking and argued that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source." *Id.* at 777. The aim of citizen involvement in public discussion, however, is not merely to make rational assessments of conflicting arguments, but to participate in forming a common judgment of the public good. Large-scale corporate political expression has the potential seriously to distort if not to dominate this process. Thus, as Justice White argued in dissent, the statute should have been upheld as a reasonable effort to balance "competing First Amendment interests." *Id.* at 803–04 (White, J., joined by Brennan and Marshall, JJ., dissenting).

modations between political speech and such interests as privacy.[96] In addition, the view offers a potentially fruitful approach to issues of speech in the public forum.[97] With respect to nonpolitical expression, the approach would permit, as the Court has, greater regulation of commercial expression on the basis of content.[98] Finally, it would allow communities reasonable latitude to shape the public environment through, for example, restrictions on the display of sexually explicit materials.[99]

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[96] For example, in Carey v. Brown, 447 U.S. 455 (1980), the Court relied on *Mosley* to invalidate, as an impermissible content discrimination between labor and public issue picketing, an Illinois statute that prohibited residential picketing but exempted the picketing of the picketer's own residence, of a place of employment involved in a labor dispute, and of a place where meetings on subjects of general public interest were held. If, however, the Court had viewed the statute from the perspective of reconciling competing expressive interests, it might have seen the statute as a reasonable attempt to "achiev[e] a delicate balance among rights to privacy, free expression, and equal protection" by allowing picketing only of buildings used for nonresidential purposes. *Id.* at 475, 481–82 (Rehnquist, J., dissenting).

Similarly, the Court erred in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980), in condemning as content discrimination a New York regulation prohibiting public utilities from including in their billing envelopes inserts discussing controversial issues of public policy. Several sorts of expressive interests combine to justify such a regulation. First, the privacy interests of individuals are infringed by unwilling exposure to advocacy within their own homes. *See, e.g.*, Rowan v. Post Office Dep't, 397 U.S. 728, 735–38 (1970). Second, the ratepayers have an interest in not being forced to subsidize the utility's political speech. *Consolidated Edison*, 447 U.S. at 551–55 (Blackmun, J., dissenting). Finally, the state has an interest in regulating the expression of the public utility as a state-created monopoly. *See id.* at 549–51 (Blackmun, J., dissenting).

[97] *Mosley* and its companion case, Grayned v. City of Rockford, 408 U.S. 104 (1972), established a broad right to nondiscriminatory use of public places for purposes of expression, as long as the manner of expression is compatible with the normal activity of the place. In recent years, however, the Court has cut back on such access by holding that particular facilities do not constitute public forums. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983); Greer v. Spock, 424 U.S. 828 (1976). Indeed, the Court has sometimes turned the *Mosley* principle against the existence of access by arguing that, if some speakers may be barred from the forum, all may be. *See* Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976).

A more balanced approach to the problem of access to nontraditional forums would view the problem as one of reconciling a variety of interests in expression — interests of speakers and audience, unwilling listeners, the governmental or private owner, and the public as a whole. Access need not be the same for all speakers; the degree granted may turn on such factors as the expression's substantive importance, its relation to the forum, the availability of alternative effective means of communication, and the nature of other expression that is permitted. For similar efforts to develop a more "flexible approach" to the problem, see *Greer*, 424 U.S. at 857–61 (Brennan, J., dissenting); *Hudgens*, 424 U.S. at 538–43 (Marshall, J., dissenting).

[98] *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[99] *See* Young v. American Mini Theatres, 427 U.S. 50 (1976) (plurality opinion). In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), the Court invalidated an

IV. CONCLUSION

Problems of content-based regulation are best viewed not as conflicts between expression and other interests, but as conflicts within the realm of expression itself. Such a view requires the courts to assess the value of competing interests in order to promote the values of expression. Ultimately, the issue between this view and that of content neutrality may turn on a choice between competing visions of liberty. Rather than viewing liberty as essentially a negative condition, consisting in protection against governmental interference, the view developed in this Note rests on a vision of liberty as the free development of man's spiritual nature. In this view, liberty is most fully realized when people are enabled to act freely in the greatest diversity of capacities, both social and individual, and thereby to develop all facets of human nature. It is by promoting all varieties of expression that we can attain the goal of the first amendment — the fullest development of man's intellect and spirit.

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ordinance that prohibited exhibition of movies containing nudity on outdoor screens visible from a public street or place. In addition to finding the ordinance overbroad, the Court stated that government could not undertake "selectively to shield the public from some kinds of speech on the ground that they are more offensive than others" except when "'substantial privacy interests are being invaded in an essentially intolerable manner.'" *Id.* at 209–11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). The principal interest supporting the ordinance, however, was not the individual interest in privacy, but the community's interest in the aesthetic quality of the public environment. The case thus required a more sensitive accommodation of the competing expressive interests of theater owners, viewers, passersby, and the community.