THE POPULISM OF JUSTICE BYRON R. WHITE: MEDIA CASES AND BEYOND

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Justice Byron R. White's jurisprudence reflects a commitment to ensuring that government can effectively address societal needs, even in areas with constitutional implications. His body of opinions exhibits a commitment to robust government as well as a belief in courts as an avenue for redressing wrongs, particularly those that individuals suffer at the hands of powerful institutions.[1] Thus, in many ways White sought to protect the individual citizen against powerful forces in society.[2] As the title of this article suggests, White's solicitous ap-

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1. *See* Jonathan D. Varat, *Justice White and the Breadth of Allocation of Federal Authority*, 58 U. COLO. L. REV. 371, 402 (1987). Dean Varat observed:

> Justice White has frequently recurred to the first principle of *Marbury* that the 'very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.' The judicially-formulated rule need not—and often will not—impose stringent standards or extensive limits on contested behavior, especially governmental behavior, but it remains essential that the Judiciary be available to provide protection from the gross abuse in a wide range of cases.

Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163).

2. Granted, the ordinary citizen most empowered by White's jurisprudence may well be the self-reliant individual in need of little government aid. White's deference to the political branches of government certainly led him away from viewing the Constitution as mandating that individuals receive a certain level of help from the Government. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("We do not denigrate the importance of decent, safe and sanitary housing. But the constitution does not provide judicial remedies for every social and economic ill."); Dandridge v. Williams, 397 U.S. 471 (1970) (Stewart, J.). Moreover, White's deferential constitutional approach often led him to rule against claims by poor people who needed exemption from generally-applicable government regulations. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (White, J., dissenting) (upholding zoning ordinance); *but see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). White was also willing to uphold legislation reflecting public morality, most controversially in his career-long objection to *Roe v. Wade*, 410 U.S. 113 (1970), and its progeny and in his opinion for the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986). (Indeed, in *Carey v. Population Services International*, 431 U.S. 678 (1977), White opined that laws regulating heterosexual relations between unmarried persons might withstand constitutional scrutiny. *Id.* at

proach toward ordinary individuals facing powerful private forces might be characterized, albeit only very loosely, as a type of populism.

The Populist Movement, a largely agrarian-based mass movement, lasted roughly from 1888 to 1896.[3] The Movement largely focused on monetary issues, but the Movement's various manifestoes contained somewhat more wide-ranging demands, including, for example, calls for regulation or public ownership of critical elements of the nation's transportation and communication infrastructure.[4] As renowned historian Richard Hofstadter observed, the Populist Movement's dualistic vision divided the world into elites and the common man, with the elites oppressing the masses.[5] For example, Kansas populist Mary E. Lease asserted: "Wall Street owns the country. It is no longer a government of the people, by the people, and for the people, but a government of Wall Street, by Wall Street and for Wall Street. The great common people of this country are slaves, and monopoly is the master."[6] Or as William Jennings Bryan, the Great Commoner, railed: "On the one side stand the corporate interests of the United States, the moneyed interests, aggregated wealth and capital, imperious, arrogant, compassionless.... On the other side stand the

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702–03 (White, J., concurring).) Upholding such legislative restrictions on abortion and homosexual relationships could mean that some ordinary citizens would face great hardship.

3. For a brief description of the Populist Movement and some of its colorful leaders, see H. W. BRANDS, THE RECKLESS DECADE: AMERICA IN THE 1890'S, at 183–214, 269–86 (1995); MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 27-46 (Cornell Paperbacks 1998) (1995).

4. The major manifestos were the St. Louis Demands (December 1889), The Platform of the Northern Alliance, The Ocala Demands (December 1890), the Omaha Resolutions (January 1891), the Cincinnati Platform (May 1891), the St. Louis Platform (February 1892), and the Omaha Platform (July 1892). These documents are reprinted in JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMER'S ALLIANCE AND THE PEOPLE'S PARTY (1931). *See* LAWRENCE GOODWYN, THE POPULIST MOVEMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA 55 (1978) (tracing the ideological course of the 1892 Omaha Platform from prior populist platforms). *See* WORTH ROBERT MILLER, OKLAHOMA POPULISM: A HISTORY OF THE PEOPLE'S PARTY IN THE OKLAHOMA TERRITORY 186–87 (1987) (describing Populist support of activist government).

5. RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 63–66 (1955); *accord* BRANDS, *supra* note 3, at 197. Populist "Sockless" Jerry Simpson put the matter simply: "It is a struggle between the robbers and the robbed." *Id.*

6. BRANDS, *supra* note 3, at 186.

numbered throng."[7] And the populists left no doubt as to role private interests' dominance of government played in facilitating the wealthy few's oppression of the multitudes. Not only did Mary Lease decry private domination of the government, but, for example, the Movement's 1892 St. Louis platform declared: "Corruption dominates the ballot box, the legislatures, the Congress, and touches even the ermine of the bench. . . . The fruits of the toil of millions are boldly stolen to build up colossal fortunes, unprecedented in the history of the world. . . . From the same prolific womb of governmental injustice we breed two great classes—paupers and millionaires."[8]

Justice White, then, was not a Populist, as that term is used to describe adherents of the Populist Movement. Populists focused on political agitation[9] and were largely outsiders looking at those who exercised power; White believed that law could vindicate the interests of the relatively powerless. Moreover, White was never really an outsider in his professional life. He thus, for example, understood the difficulties of exercising power and the need to accord leeway to those who had the responsibility to do so. Yet there is a sort of populism in Justice White's concern for the ordinary citizen at the mercy of more powerful forces and his insistence that government must possess the power to restrain powerful private forces.

White's "populist" tendencies are particularly evident in his Free Speech Clause jurisprudence, where the powerful interests that threatened to harm individuals or dominate government were often mass media entities, corporate interests,

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7. *Id.* at 197. *See also id.* at 188 (a number of man-eating tigers loosed on the streets to prey on men women and children "would not inflict a tenth of the misery that is caused by a like number of millionaires"); *id.* at 192 ("we hold [various societal maladies] are the legitimate result of vicious legislation in the interests of the favored classes, and adverse to the masses of American citizens") (quoting the Kansas People's Party Manifesto).

Accordingly, Populists were anti-elitists. MILLER, *supra* note 4, at 187 (discussing Populist opposition to legislation establishing professions as a reflection of Populists' anti-elitism); *see* WALTER T. K. NUGENT, THE TOLERANT POPULISTS: KANSAS POPULISM AND NATIVISM 11 (1963) (summarizing work of Peter Viereck).

8. St. Louis Platform, 1892 (Preamble), *supra* note 4. The Platform's Preamble went on to accuse the old political parties of "propos[ing] to sacrifice our homes and children upon the altar of Mammon; to destroy the hopes of the multitude to secure corruption funds from the great lords of plunder." *Id. See also* LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA 523 (speech of William Jennings Bryan); BRANDS, *supra* note 3 at 180–81.

9. GOODWYN, *supra* note 8, at 541–43.

and the wealthy. Moreover, White's Free Speech Clause jurisprudence provides a particularly important subject of study because his views were so central to the Courts resolution of many free speech issues. White's opinions for the Court played a major role in shaping constitutional doctrines applicable to the press, and even when White failed to persuade a majority of his colleagues and had to concur separately or dissent, his views often assumed a central role in the debate.

I. JUSTICE WHITE'S GENERAL APPROACH TO FREE SPEECH CLAUSE JURISPRUDENCE

To fully appreciate White's populist concern for the individual confronted with powerful institutions, one must first understand the constraints he placed himself under in his work as a judge. His rulings reflected not only his own philosophy, but also the deference he consistently accorded the political branches of government and his respect for precedent. White was one of the Justices who most consistently accorded deference to the judgments arrived at by the political branches of government. White's respect for the political processes makes his decisions upholding statutes somewhat ambiguous—they may reflect no more than a judgment that the particular issue should be left to the political branches of government, to resolve one way or the other. White's respect for precedent meant that his Free Speech Clause jurisprudence incorporated some well-established principles. White's analytical framework in free speech cases reflected at least three broad principles grounded in judicial precedent: (1) that "speech" must be distinguished from associated "conduct"; (2) that certain discrete categories of speech lay completely outside the protection offered by the Free Speech Clause; and (3) that the government possesses much greater powers to limit speech in its role as proprietor of government-owned resources than as regulator of private conduct.

A. Speech Versus Conduct

White carefully distinguished the communicative aspects of "speech" from the related non-communicative aspects sometimes closely associated with "speech." He considered "speech"

entitled to strong protection (for example upholding First Amendment claims in *New York Times, Co. v. Sullivan*,[10] *New York Times, Co. v. United States*,[11] *Nebraska Press v. Stuart*,[12] *Village of Schaumberg v. Citizens for a Better Environment*,[13] and *Hustler Magazine, Inc. v. Falwell*[14]),[15] but embraced a somewhat deferential balancing approach when addressing ancillary non-speech aspects of communication.[16] With regard to the latter he was committed to applying the framework Chief Justice Earl Warren laid out in *United States v. O'Brien*.[17]

Under the *O'Brien* test, a regulation of the non-speech elements of a communication can survive if: (1) the regulation lies "within the constitutional power of Government," (2) the regulation "furthers an important or substantial governmental interest," (3) the interest so furthered "is unrelated to the suppression of free expression," and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[18] Not only did White apply the *O'Brien* test in a particularly deferential manner that generally lead him to uphold the challenged regula-

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10. 376 U.S. 254 (1964) (extending First Amendment protection to defamatory speech).

11. 403 U.S. 713 (1971) (holding that the First Amendment precluded the Executive Branch from securing an injunction against the publication of documents damaging to national security).

12. 427 U.S. 539 (1976) (precluding courts from entering orders prohibiting the press from reporting aspects of criminal proceedings even when press reports might increase the difficulty of according a criminal defendant a fair trial).

13. 444 U.S. 620 (1980) (recognizing substantial First Amendment aspects of charitable solicitation and limiting governmental constraints on such activity).

14. 485 U.S. 46, 57 (1988) (imposing First Amendment limitations on suits alleging intentional infliction of emotional distress by virtue of speech).

15. *See also* Smith v. Goguen, 415 U.S. 566, 588–90 (1974) (White, J., concurring).

16. *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (White, J., dissenting); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981); Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 515 (1969) (White, J., concurring) ("the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinge on some valid state interest"); *see also* Smith v. Goguen, 415 U.S. 566, 586 (1974) (White, J., concurring) ("[the First] Amendment, of course, applies to speech and not to conduct without substantial communicative intent and impact. Even though particular conduct may be expressive and is understood to be of this nature, it may be prohibited if necessary to further a non-speech interest of the Government that is within the power of the Government to implement.").

17. 391 U.S. 367, 377 (1968).

18. *Id.* at 377.

tion,[19] he also seemed to have a strikingly expansive view of the non-speech elements of communication and, consequently, a relatively narrow definition of "speech." Thus, for example, he viewed campaign finance regulation and ordinances regulating newsracks primarily as restrictions upon non-speech aspects of communication.[20] Indeed, for White, speech largely seemed to consist of written or oral communication. Thus, even apart from his populist tendencies, White's narrow view of "speech" often led him to a relatively modest view of First Amendment requirements in many areas.

B. Categorically Unprotected Speech

White embraced the well-established proposition that even some speech lay wholly outside the protection of the Free Speech Clause. Traditionally, the Supreme Court had viewed fighting words, obscenity, commercial speech, and defamation as unprotected.[21] Relatively early in White's judicial career, the Court, with White's concurrence, held defamatory speech and commercial speech entitled to some First Amendment protection.[22] Nevertheless, the Court continued its categorical approach with respect to fighting words and obscenity. White relied upon the categorical exclusion approach heavily in his opinions for the Court in cases involving sexually-explicit speech.[23]

This categorical approach came under attack in *R.A.V. v. City of St. Paul*,[24] where a narrow majority of the court invalidated an ordinance prohibiting cross-burning because it made

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19. *E.g.*, Regan v. Time, Inc., 468 U.S. 641 (1984).

20. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (White, J., dissenting) (licensing distribution of newspapers would have to meet strict First Amendment requirements because it covered expressive activity, but selling papers by affixing newsboxes to public sidewalks involved nonspeech); Clark v. Cmty for Creative Nonviolence, 468 U.S. 288 (1984); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (White, J., dissenting).

21. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); R.A.V. v. City of St. Paul, 505 U.S. 377, 382–85 (1992).

22. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

23. Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115 (1989) (White, J.); New York v. Ferber, 458 U.S. 747, 763 (1982) (White, J.) (child pornography); *see generally*, DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 394 (1998) (discussing *Ferber*).

24. 505 U.S. 377 (1992).

content distinctions in defining the fighting words prescribed by the statute. This prompted White's fullest defense of the traditional categorical denial of protection to certain limited categories of speech.[25] Not only did he note the doctrine's precedential pedigree, he also argued that the doctrine remained sound. He noted that the Court had categorically excluded certain classes of speech from First Amendment protection because those classes of speech were both "evil" and worthless in terms of the goals of the First Amendment. Given the worthless, and indeed pernicious, nature of such speech, it made little sense to strike down laws treating some speech falling in such a category differently from other speech within that same category. The categorical approach provided "a principled and narrowly focused means"[26] for distinguishing between speech that could be regulated freely on the basis of content (*i.e.*, categorically-unprotected speech) from speech subject to content regulation only upon a showing of a compelling state interest. White's faithful application of the court's well-established categorical approach to content regulation led him to reject some First Amendment challenges.

C. Government-Facilitated Speech

Often, White's rejection of free speech claims reflected the principle that the government should have great leeway in controlling its own resources, even when the exercise of that control adversely affects private speakers. Courts have long recognized that government can act in a proprietary capacity as well as a regulatory one, and that the government should have more power to control the use of its own resources than to regulate private citizens' use of their own resources. Thus, in rejecting a police officer's challenge to a regulation prohibiting officers from engaging in political activities even while off duty, Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, quipped "[A person] may have a constitutional right to talk politics, but he has no constitutional right to be a

25. This Term, having rejected the traditional categorical approach to "fighting words" cases in *R.A.V.*, the Court struggled to craft an alternative in *Virginia v. Black*, 123 S. Ct. 1536 (2003). The case, involving two convictions under a Virginia statute prohibiting cross-burning, fractured the Court.

26. *R.A.V.*, 505 U.S. at 400.

policeman."[27] The Supreme Court has long since abandoned the clarity of the approach exemplified by Holmes' quip, but has failed to fashion a coherent framework for analyzing government control of its own resources in ways that affect private citizens' speech.

Like the Court, White struggled with the conundrum of government-facilitated speech. White's decisions often exhibit his firm belief that the government has little obligation to apply its resources to facilitate speech, even when such decisions have implications for private parties' ability to speak.[28] Thus, in *City of Lakewood v. Plain Dealer Publishing Co.*,[29] White observed that although newspapers possessed First Amendment rights, they could not require the government to subsidize the exercise of those rights by dedicating public space to newsracks.[30]

White nevertheless maintained that the judiciary must police government use of public resources in ways that constrain private speech. For example, in *Perry Education Association v. Perry Local Educators' Association*[31] and *Connick v. Myers*,[32] White expanded government officials' powers to create fora for discussions available to limited groups of people and to control the speech of public employees. Nevertheless, in both opinions White noted that such government action remained subject to some, albeit relaxed, First Amendment constraint. White's po-

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27. McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (1892).

28. *See* Alexander v. United States, 509 U.S. 545 (1993) (Rehnquist, J.); Snepp v. United States, 444 U.S. 507 (1980); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (Blackmun, J.); United States v. Grace, 461 U.S. 171 (1983); Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, Co., 417 U.S. 843 (1974).

Indeed, somewhat surprisingly, White's position in flag desecration cases, where he consistently voted to uphold statutes banning such activities, hinged on his view that the government had a right to control public resources. He viewed the flag as a public resource, even when it took the form of a privately-owned flag. Smith v. Goguen, 415 U.S. 566, 587 (1974) (White, J., concurring) ("[t]he flag is national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it"); *see* Spence v. Washington; 418 U.S. 405, 421–22 (1974) (Rehnquist, J., dissenting) (quoting White's *Smith v. Goguen* concurrence); Texas v. Johnson, 491 U.S. 397, 429 (1989) (Rehnquist, J., dissenting) (same); United States v. Eichman, 496 U.S. 310, 319–24 (1990) (Stevens, J., dissenting).

29. 486 U.S. 750 (1988).

30. *Id.*

31. 460 U.S. 37 (1983).

32. 461 U.S. 138 (1983).

sition in *Board of Education v. Pico,*[33] a First Amendment challenge to a local school board's removal of certain books from school libraries, is particularly notable. He was unwilling to hold local school boards' decisions to remove books immune from First Amendment challenges and reluctant to deprive school authorities of broad discretion to make decisions concerning the contents of school libraries and curricula.[34] He thus wrote a cautious, narrow concurring opinion rather than joining Justice William J. Brennan's four-Justice plurality opinion or Chief Justice Warren E. Burger's opinion for the four dissenting Justices. Ultimately, White seemed willing to accord government officials acting in a proprietary capacity a wider range of discretion than Free Speech Clause liberals were typically willing to tolerate.[35]

In short, the three principles outlined above, namely the distinction between speech and conduct, the categorical exclusion of certain speech from constitutional protection, and the government's enhanced power to control its own resources, form the backdrop of White's free speech jurisprudence. These principles delineate a somewhat constrained approach to the Free Speech Clause.

II. JUSTICE WHITE'S APPROACH APPLIED TO MEDIA CASES

Within the confines of his generally non-expansive interpretation of the Free Speech Clause, however, Justice White's commitment to ensuring that powerful private forces not oppress ordinary citizens regularly manifested itself. That com-

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33. 457 U.S. 853 (1982) (White, J., concurring in the judgment).

34. *See* HUTCHINSON, *supra* note 23, at 390–93. In particular, White feared that Justice Brennan's proposed constitutional test for book removal decisions, whether the school board sought to impose a "political or ideological orthodoxy," was too ill-defined and might allow almost any removal decision to be challenged. In addition, he suspected that Brennan's test might easily be expanded by students or parents seeking judicial review of curriculum decisions. *Id.* at 392 (quoting Memorandum from Byron R. White to William J. Brennan, dated May 10, 1982).

35. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975) (White, J., dissenting); Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (White, J., concurring in the judgment); Lyng v. Int'l Union, 485 U.S. 360 (1988); Connick v. Meyers, 461 U.S.138 (1983).

However, as White's position in *Board of Education v. Pico* suggests, on occasion he refused to give the government operating in a proprietary capacity as much leeway as Free Speech Clause conservatives would have accorded.

mitment is evidenced in White's approach to First Amendment cases involving claims against news organizations, claims brought both by law enforcement officials seeking information pursuant to a criminal investigation and by individuals seeking recompense for some harm flowing from the news organization's published material. White had his most profound influence on the course of Free Speech Clause doctrine in such cases.

A. Media Obligations in a "Civilized and Humane Society"

White distinguished the mass media from individual speakers. Traditionally, speakers have been considered easily subject to intimidation.[36] Many of the First Amendment cases that occupied the Supreme Court from the 1930's through the early 1960's involved dissident or unconventional speakers often somewhat at the mercy of their fellow citizens or government officials.[37] White considered media organizations to be powerful institutions. Though certainly entitled to some Free Speech Clause protection, such powerful entities could not easily be intimidated, and, moreover, could severely harm individual citizens if left unchecked.

For example, in a critical defamation case, White observed:

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36. *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Freedman v. Maryland, 380 U.S. 51, 59 (1965); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (arguing that commercial speech is more hardy than the non-commercial speech generally protected by the First Amendment); NAACP v. Button, 371 U.S. 415, 433 (1963) ("These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); Speiser v. Randall, 357 U.S. 513, 525–26 (1958). Thus vagueness and overbreadth arguments have been allowed in Free Speech Clauses cases because of a concern that those who wish to engage in constitutionally protected speech prohibited by statute may remain silent to avoid the prospect of legal sanction.

37. *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Beauharnais v. Illinois, 343 U.S. 250 (1952); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Poulos v. New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951); Konigsburg v. State Bar of Cal., 368 U.S. 869 (1961); Cantwell v. Connecticut, 310 U.S. 296 (1940); Feiner v. New York, 340 U.S. 315 (1951); Wood v. Georgia, 370 U.S. 375 (1962); NAACP v. Button, 371 U.S. 415 (1963).

> The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses. . . . Neither the industry as a whole nor its individual components is easily intimidated. . . . Requiring them to pay for the occasional damage they do to a private reputation will play no substantial part in their future performance or existence.[38]

In another separate opinion issued that same day, White lambasted his colleagues for "[leaving] the people at the complete mercy of the press, at least in this stage in our history when the press . . . is steadily becoming more powerful and much less likely to be deterred by threats of libel suits."[39]

White wrote an impressive array of opinions in which he sought to ensure both that media organizations could not transgress bounds of proper conduct and that common law causes of action that protected certain basic elements of human dignity remained intact. In criticizing the Court's invalidation of a statute giving victims of sexual assault a privacy cause of action against media entities, he observed: "The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society."[40] As we shall see, in White's view such a civilized and humane society valued, and therefore protected, individual citizens' physical security, reputation, privacy, livelihood, and reasonable reliance on promises. Moreover, for White, the need to preclude political branches of government from using their legislative and regulatory powers to limit editorial discretion made all the more essential private rights of action allowing

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38. Gertz v. Robert Welch, Inc., 418 U.S. 323, 390–91 (1974) (White, J., dissenting). *See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767, 769, 771, 772, 774 (1985) (White, J., concurring); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 261–63 (1974) (White, J., concurring); *Gertz*, 418 U.S. at 392, 400, 402–03 (White, J., dissenting). White's discussion of the increased concentration of the media and the need for greater accountability echoed the concerns of some scholars. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 289–91 (1991).

39. *Tornillo*, 418 U.S. at 263 (White, J., concurring).

40. Florida Star v. B.J.F., 491 U.S. 524, 547 n.2 (1989) (White, J., dissenting); *Gertz*, 418 U.S. at 403 (White, J., dissenting) (defamation actions must remain viable even while constrained by the Free Speech Clause because "[f]reedom and human dignity and decency are not antithetical" and, indeed, "cannot survive without each other.").

individuals to seek redress for violations of such norms of a civilized and humane society.[41]

White's determination to ensure that the First Amendment not preclude press accountability for transgressing basic norms of a "civilized and humane society" is evident in several seminal, yet controversial, opinions White authored for the Court, including *Branzburg v. Hayes*,[42] *Zurcher v. Stanford Daily*,[43] *Zacchini v. Scripps-Howard Broadcasting Co.*,[44] *Herbert v. Lando*,[45] and *Cohen v. Cowles Media Co.*,[46] as well as in his dissent in *Florida Star v. B.J.F.*[47] and his ongoing criticism of the Court's defamation jurisprudence over much of his judicial career.

In this section, I will first discuss White's important opinions in two cases involving law enforcement officials' efforts to obtain information from journalists. I will then discuss a series of cases in which White considered the constitutionality of common law claims brought by aggrieved individuals against journalists. Thereafter I will focus more particularly on White's trenchant criticisms of the Court's defamation jurisprudence and the alternative vision he presented. The section will conclude with an examination of White's apparently anomalous effort to rein in the Court's overbreadth doctrine so as to limit citizens' right to bring lawsuits.

1. The State's Interest in Safeguarding Personal Security

Two of White's major opinions for the Court, *Branzburg v. Hayes*[48] and *Zurcher v. Stanford Daily*,[49] involved law enforcement efforts to obtain information from journalists. These cases quite clearly did not involve private claims by ordinary citizens seeking to redress violations of basic societal norms. But for White, the cases involved law enforcement officials' ability to secure what he viewed as a prime condition of a civi-

41. *Tornillo*, 418 U.S. at 262–63 (White, J., concurring).
42. 408 U.S. 665 (1972).
43. 436 U.S. 547 (1978).
44. 433 U.S. 562 (1977).
45. 441 U.S. 153 (1979).
46. 501 U.S. 663 (1991).
47. 491 U.S. 524 (1989).
48. 408 U.S. 665 (1972).
49. 436 U.S. 547 (1978).

lized and humane society—ordinary citizens' sense of personal security. As White wrote in his dissent from *Miranda v. Arizona*,[50] "[t]he most basic function of any government is to provide for the security of the individual and of his property."[51]

Branzburg and *Zurcher* establish the principle that media entities must comply with generally-applicable obligations and standards of conduct; in particular news organizations and journalists can claim no special immunity from law enforcement requests for information.[52] In *Branzburg*, White turned aside journalists' arguments that the Free Speech Clause immunized them from legal process compelling disclosure of their confidential sources.[53] In *Zurcher*, White, again writing for the Court, turned aside arguments that the First Amendment precluded law enforcement officials from searching a newsroom for evidence of criminal conduct by third parties.[54]

In both cases journalists presented an array of arguments suggesting that such law enforcement actions could seriously damage journalists' newsgathering capabilities, and each opinion drew dissents from four Justices who found the journalists'

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50. 384 U.S. 436 (1966).

51. *Id.* at 539 (White, J., dissenting). *Accord* Gregg v. Georgia, 428 U.S. 153, 226 (1976) (White, J., concurring) ("[O]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder."); Miranda v. Arizona, 384 U.S. at 542 (White, J., dissenting) ("The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help . . . .").

52. Thus, *Branzburg* stands as an emphatic rejection of Justice Potter Stewart's framework for analyzing media outlets' First Amendment claims, a framework grounded on the proposition that the Constitution sometimes requires government to treat journalists and news organizations especially favorably because the press has a structural role in our polity. Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 631 (1975); Branzburg v. Hayes, 408 U.S. 665 (1972) (Stewart, J., dissenting); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (Stewart, J., concurring).

53. *Branzburg*, 408 U.S. at 699–707. In part, White rejected the proposed privilege because recognizing it would require the courts to define the category of journalists who could invoke it. *Id.* at 704. Such a definition would almost certainly exclude "lecturers, political pollsters, novelists, academic researchers, and dramatists," not to mention the "lonely pamphleteer who uses carbon paper or a mimeograph," all of whom also engaged in the informative function the First Amendment was designed to protect. *Id.* at 704–05. In short, White questioned the notion of giving the organized press a privileged position among those who engaged in the dissemination of ideas.

54. Zurcher v. Standford Daily, 436 U.S. 547, 563–66 (1978).

concerns persuasive. Indeed, White himself acknowledged such concerns. Thus, in *Branzburg*, he wrote the oft-quoted line that "news gathering is not without its [constitutional] protections."[55] More precisely, he noted, law enforcement officials could not seek subpoenas solely to harass journalists.[56] In *Zurcher*, while White rejected journalists' claims for complete immunity from newsroom searches, he did direct the courts to apply the Fourth Amendment with "scrupulous exactitude"[57] when asked to issue warrants authorizing newsroom searches. Thus, again, White acknowledged the serious threat a law enforcement investigatory technique posed to press operations.[58] Nevertheless, the problems associated with subpoenas directed at journalists and newsroom searches could not justify conferring upon journalists any greater authority to resist legitimate law enforcement requests for information than that possessed by any other member of the public.[59]

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55. *Branzburg*, 408 U.S. at 707.

56. *Id.* at 707–08 ("Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.") (footnote omitted). With other Justices, these comments might be viewed as largely meaningless, but as discussed *infra*, White has often shown an unwillingness to abandon judicial scrutiny of the conduct of government officials, even law enforcement officials.

57. *Zurcher*, 436 U.S. at 564 (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965)).

58. White could have adopted the approach he took in *New York Times Co. v. United States*, 403 U.S. 713, (1971) (White, J., concurring) (the Pentagon Papers case). There he refused to entertain an Executive Branch request for an injunction prohibiting media entities' publication of classified documents that could damage American foreign policy, because Congress had not authorized such injunctive actions. *Id.* at 732–33 ("At least in the absence of legislation by Congress . . . I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press."). Thus, he could have held that legislatures must specifically authorize law enforcement to subpoena journalists and search newsrooms before the Court would uphold such law enforcement efforts. However, in *New York Times* the government's inherent authority to enjoin any speaker, journalist or non-journalist, was far from clear, whereas in both *Branzburg* and *Zurcher*, law enforcement officials were acting pursuant to powers generally conferred upon them and unquestionably available for use against other citizens and entities.

59. Ultimately, however, the press has enjoyed protection against both subpoenas and newsroom searches despite the Court's holdings in *Branzburg* and *Zurcher*. With regard to subpoenas, many states have shield laws protecting the press. RODNEY A. SMOLLA, LAW OF DEFAMATION § 12.06[2][a][ii], at 12–31 (1988).

2. Vindicating the Interests of Private Citizens

White's concern for the ordinary citizen's ability to vindicate basic interests in decency manifested itself in several cases involving common law causes of action, most particularly his opinions for the Court in *Zacchini v. Scripps-Howard Broadcasting Co.*,[60] *Herbert v. Lando*,[61] and *Cohen v. Cowles Media Co.*[62] These cases required reconciling the interests of private citizens with those of media organizations.

In *Zacchini*, White wrote an opinion for the Court addressing a common-law right of publicity claim against a local broadcaster. In particular, Hugo Zacchini, a carnival performer billed as the "Human Cannonball," sued a local television station for damages after it broadcast a tape of his flight at a local carnival on its news program.[63] The Justices largely seemed to agree on several aspects of the case: Zacchini's act was newsworthy, the broadcast was a part of a legitimate news program, and defendant broadcaster apparently had not sought to commercially exploit the tape of Zacchini's performance.[64]

White could have sought to address the conflict at the heart of the case, between rights of publicity (and, indeed, intellectual property rights more generally) and the First Amendment rights of news organizations to inform the public about newsworthy events, in broad philosophical terms. He certainly displayed an awareness of the implications that right of publicity claims like Zacchini's had for news organizations' ability to report news.[65] White acknowledged that courts would no doubt confront cases requiring them to distinguish the

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Indeed, in light of Powell's critical separate opinion in *Branzburg*, even the federal courts have adopted a balancing approach in evaluating subpoenas directed a journalists. *Id.* at § 12.06[2][b]. With regard to newsroom searches, both Congress and the states have conferred significantly more protection than that constitutionally required in *Zurcher*. Privacy Protection Act of 1980, Pub. L. No. 96–440, 94 Stat. 1879 (codified at 42 U.S.C. § 2000aa (1994); MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 665–66 (6th ed. 2000) (discussing state statutes limiting newsroom searches).

60. 433 U.S. 562 (1977).

61. 441 U.S. 153 (1979).

62. 501 U.S. 663 (1991).

63. *Zacchini*, 433 U.S. at 563–64.

64. The dissent noted these aspects of the case, *id.* at 580 (Powell, J., dissenting), and the majority did not explicitly contest the dissent's assertions. Indeed, various passages in the majority opinion also suggest that the majority did not question these aspects of the case before it. *Id.* at 564, 569, 578.

65. *Zacchini*, 433 U.S. at 574–75.

newsworthy elements of an entertainment act, which could be reported without fear of liability, from other elements of the act, whose non-consensual use would infringe upon a performer's intellectual property rights.[66] Indeed, years later, in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[67] when the Court faced a similar issue in the copyright context, White joined the dissenters who asserted that the "fair use" doctrine protected a news magazine's unauthorized publication of a passage from ex-President Gerald Ford's biography explaining his pardon of Richard Nixon.[68]

However, Justice White's opinion for the Court in *Zacchini* is anything but a broad philosophical discussion of the tension between intellectual property rights and free speech. Indeed, the opinion is somewhat cryptic, as the dissenting Justices themselves remarked. His opinion focused on two aspects of the case: the media entity's unjust enrichment should Zacchini lack a cause of action to vindicate his right of publicity, and the injury to Zacchini should the news organization prevail. First, even journalists could not appropriate an economically valuable asset without paying for its use.[69] Second, White explained, whatever the parameters of a media entity's ability to cover news, it could not deprive an entertainer of his livelihood.[70] White feared this would prove the case if an entertainer's "entire" act could be broadcast free to those who wished

66. *Id.* at 576–77.

67. 471 U.S. 539 (1985).

68. *Id.* at 590. Indeed, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), White joined a bare majority in concluding that television viewers' acts of taping entire shows to watch at times other than those the shows were broadcast constituted fair use and was thus permitted by federal copyright law.

69. *Zacchini*, 433 U.S. at 576. *See also* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 141–42 (1981) (White, J., concurring) (suggesting that the Court resolve the case on the principle that the Postal Service may reserve its facilities to paying customers).

70. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. at 576. Interestingly, in a case involving affirmative action in employment, White showed even more clearly his concern about the threat to individuals' livelihoods. In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 295 (1986), White wrote a cryptic concurrence expressing his support of the majority's argument that the affirmative action program in the case was unconstitutional. He wrote simply: "Whatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter." More informally, he said to a friend "You just can't take an innocent man's job away. You can't call that a remedy." HUTCHINSON, *supra* note 23, at 424.

to view it.[71] In short, White saw the broadcast as "go[ing] to the heart of petitioner's ability to earn a living as an entertainer."[72] In light of such concerns, he found questions of newsworthiness largely irrelevant.[73]

In *Herbert v. Lando*,[74] White wrote one of his rare opinions for the Court in a defamation case.[75] Clearly, as we will see when we examine White's defamation jurisprudence more closely, White considered personal reputation a significant dignitary interest of ordinary citizens that states must have power to protect. Defendant Lando, a producer for the CBS news magazine "60 Minutes," and a phalanx of media amici, claimed that the generally liberal discovery standards applicable in civil litigation could not constitutionally apply to discovery requests by defamation plaintiffs directed at news organizations.[76] In particular, discovery requests seeking information about the editorial process would chill the frank interchange of ideas and concerns that occur during editorial process.[77] Justice White would later acknowledge the persuasiveness of an analogous argument asserted by government officials who feared that their consultations would be chilled if discoverable in civil litigation arising out of their actions.[78]

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71. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. at 576.

72. *Id.*

73. *Id.* at 574. Thus, he distinguished *Time, Inc. v. Hill*, 385 U.S. 374 (1967), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

74. 441 U.S. 153 (1979).

75. White's other major defamation opinions for the Court were *St. Amant v. Thompson*, 390 U.S. 727 (1968) (White, J.), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1985) (White, J.).

76. Herbert v. Lando, 441 U.S. at 155, 169–70, 175–77 & n.25.

77. *Id.* at 173.

78. Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (White, J.); Harlow v. Fitzgerald, 457 U.S. 800, 816–18 (1982) (Powell, J.) ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.") (footnote omitted). Executive Branch officials claimed that discovery in suits for money damages resulting from government officials' alleged violations of an individual's constitutional rights (known as *Bivens* cases because of the first case recognizing such a cause of action, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)), would inhibit internal governmental discussions. White concluded that such concerns justified limiting *Bivens* liability and making dismissals of summary judgment motions in *Bivens* actions immediately appealable. *Mitchell*, 472 U.S. at 530.

Nevertheless, White, writing for the Court, declared that journalists must respond to discovery requests in the same manner as other citizens.[79] He also expressed concern for individuals who rely on defamation actions to vindicate their reputations. In particular, he explained, given the media-protective substantive constitutional standards governing defamation actions, allowing liberal discovery, including discovery directed at illuminating the editorial process, was necessary to ensure that defamation plaintiffs could prevail on meritorious claims.[80]

In *Cohen v. Cowles Media Co.*,[81] the Court addressed journalists' liability for breaching their promises of confidentiality to sources. The *St. Paul Pioneer Press Dispatch* and the *Minneapolis Star and Tribune* published damaging information about a Democratic candidate obtained from Dan Cohen, a campaign staffer for the opposing candidate.[82] Cohen provided the information only after reporters for the two papers had promised him confidentiality.[83] Both papers' editorial staffs ultimately concluded that the source of the information constituted an important element of the story.[84] Accordingly, both papers identified Cohen as the source, indicated his connection to the Republican candidate's campaign, and included campaign officials' denials of any role in divulging the information.[85] The campaign immediately fired Cohen for disclosing the information, and Cohen brought an action for promissory estoppel against the *Press Dispatch* and the *Tribune*.[86]

Justice White again wrote for a majority of the Court, upholding the claim against the First Amendment challenge, even though he acknowledged the newsworthiness of the source's identity.[87] Despite the information's newsworthiness, he ex-

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79. Herbert v. Lando, 441 U.S. at 165.

80. *Id.* at 160 ("Nor did these cases suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. . . . Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination"); *see id.* at 155, 172, 174.

81. 501 U.S. 663 (1991).

82. *Id.* at 665.

83. *Id.*

84. *Id.* at 666.

85. *Id.*

86. *Id.*

87. *Id.* at 670–71.

plained, media entities must adhere to basic obligations imposed upon all citizens, in this case the obligation to keep promises upon which others rely.[88]

White's dissents and separate concurrences also reflect his commitment to ensuring that media entities could not infringe upon basic dignitary interests of individuals without affording them some compensation. Thus, in *Florida Star v. B.J.F.*, White berated the Court for holding that a Florida statute allowing a rape victim to obtain damages from a media entity who published her name violated the First Amendment.[89] For White, an individual had a dignitary interest in keeping her victimization private, and the media should have no constitutional right to violate that dignitary interest.[90]

White began his dissent by emphasizing the severity of the harm B.J.F. had suffered as a result of the violation of her privacy. He noted that "[s]hort of homicide, [rape] is the 'ultimate violation of self,'" but that B.J.F.'s rape was merely the beginning of her ordeal.[91] After the *Florida Star* published her identity, B.J.F. received harassing phone calls, including one in which the caller threatened to rape her again.[92] As a consequence, she had to change residences and seek mental health counseling.[93]

White viewed withholding a rape victim's name when publishing an account of the crime as a simple matter of decency.[94] He presented a vigorous defense of the right of privacy, and accused the Court of effectively rendering the press unanswerable for the unwarranted exposure of the private personal information.[95] If a rape victim's identity was not sufficiently "private" to provide a basis for a "publication of private facts"

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88. *Id.* at 671–72.

89. 491 U.S. 524, 542–43, 546, 548–49, 552–53 (1989) (White, J., dissenting). Though the cause of action was statutory, White viewed it as derivative of the common law "right of privacy" courts had developed, a common law right he described as "one of the most noteworthy legal inventions of the 20th century." *Id.* at 550. *See also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (White, J.) (press freedom and privacy rights are "both . . . plainly rooted in the traditions and significant concerns of our society").

90. *E.g.*, Florida Star v. B.J.F., 491 U.S. at 551–53.

91. *Id.* at 542 (White, J., dissenting) (second alteration in original) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (White, J.)).

92. *Id.* at 542–543.

93. *Id.*

94. *Id.* at 547.

95. *Id.* at 550–51

claim, White could conceive of few pieces of information that could support such a claim.[96] White could surely be accused of overstating the majority's holding, which rested heavily on the fact that the rape victim's identity had been divulged to the journalist by government officials, albeit inadvertently.[97]

White also remarked upon the relevance of the power of news organizations. The Florida statute upon which B.J.F. relied provided a cause of action if the victim's identity appeared in an "instrument of mass communication."[98] Thus, only media entities were subject to liability for divulging rape victims' identities; other individuals or entities could divulge such information without fear of statutory liability. The majority held, consistent with solid precedent, that such a distinction between speakers was, by itself, sufficient to invalidate the Florida statute.[99] White vigorously disagreed, arguing that states could impose upon news organizations greater liability for violations of a crime victim's privacy than they imposed upon the

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96. *Id.* White's concern about privacy can also be seen in his opinion for the Court in *New York v. Ferber*, 458 U.S. 747 (1982) (White, J.). In particular, White prominently noted that the exhibition of child pornography would constitute an additional injury to children who had been improperly pressed into service in making the films. *Id.* at 759. Such children had a privacy interest in limiting dissemination of a record of their victimization at the hands of child pornographers. In particular, distribution of the material violates "the individual interest in avoiding disclosure of personal matters." *Id.* at 759 n.10 (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)).

97. Florida Star v. B.J.F., 491 U.S. at 532–37. The majority had read previous cases to establish that ordinarily the government could not divulge information and then prohibit the press from publishing it. *Id.* at 534 ("Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.") (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978), Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311 (1977), and Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (White, J.)). Indeed, one of the key precedents, *Cox Broadcasting Corp. v. Cohn.*, written by White himself, had also involved publication of the identity of a rape victim. 420 U.S. at 471.

However, for White, the government's inadvertent disclosure of B.J.F.'s identity did not preclude the state from awarding damages against a media outlet that published such information. In reaching this conclusion, White once again exhibited his belief in allowing government the flexibility it needed to accomplish legitimate government objectives. White noted that the government had "taken virtually every step imaginable" to prevent the disclosure of the information, including forbidding state officials from disclosing such information. Florida Star v. B.J.F., 491 U.S. at 547. In White's view, "mistakes happen," and thus inadvertent disclosures should not defeat government efforts to keep information confidential. *Id.*

98. FLA. STAT. ANN. § 794.03 (West 2000).

99. Florida Star v. B.J.F., 491 U.S. at 540–41.

neighborhood gossip or other private citizens.[100] White surmised that Florida had limited the statute to disclosure through instruments of mass communications because publishers and broadcasters enjoyed a broader audience than that reached by ordinary citizens who might disclose the information, and therefore could do more damage by publishing such private facts.[101] White was quite willing to uphold a state's decision to impose greater obligations on mass media entities in this context because of their greater power.[102]

In each of these cases, involving First Amendment challenges to a variety of common law tort causes of action, White wrote powerful "populist" opinions expressing the importance of ensuring that the First Amendment did not stymie ordinary citizens' efforts to seek judicial redress for harm they had suffered at the hands of the powerful institutional press.

3. Vindicating Citizens' Interest in Their Reputations

White's view of the press as unduly powerful vis-à-vis the individual was particularly evident in his defamation jurisprudence. White recognized the need to provide the media with some protection against defamation actions. Indeed, he joined

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100. *Id.* at 549.

101. *Id.*

102. *Id.* Interestingly, White seemed to have a very narrow view of privacy when it came to freedom from intrusion. *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (White, J.). He fully supported the Court's crabbed vision of expectations of privacy, which held that citizens had no reasonable expectation of privacy that precluded others from obtaining their bank or telephone records, United States v. Miller, 425 U.S. 435, 440–45 (1976); Smith v. Maryland, 442 U.S. 735, 743–45 (1979), hovering low over their fenced-in backyards, *e.g.*, Florida v. Riley, 488 U.S. 445, 451–52 (1989), or rummaging though their garbage, California v. Greenwood, 486 U.S. at 40. As I have remarked elsewhere, this conception was far more limited than that of the public or the political branches of government. Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 793–96 (1999). White's different reactions to privacy arguments in the disclosure and intrusion cases might be attributed to his deference to the political branches of government—in "'publication of private facts" cases he was upholding privacy recognized by government against First Amendment challenges, whereas in intrusion cases he was upholding government infringements upon privacy against Fourth Amendment challenges. An equally plausible hypothesis, however, would focus upon the criminal context in which most privacy intrusion cases arose. In intrusion cases, privacy claims were raised by malefactors hoping to suppress evidence of their guilt.

Justice Brennan's opinion for the Court in *New York Times Co. v. Sullivan*.[103] However, after *New York Times Co. v. Sullivan*, White often found himself dissenting or concurring separately.[104] White's position can be traced to his view that reputation was another dignitary interest that should be protected from harm caused by media entities.[105]

Most notable, in terms of showing White's view of reputation as an essential dignitary interest, was White's concurrence in Justice Brennan's *Paul v. Davis*[106] dissent. That dissent categorized reputation as a "liberty" interest protected by the Constitution's Due Process Clauses, and, thus, asserted that government could not besmirch an individual's reputation without according him due process of law.[107] In *Paul v. Davis*,

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103. 376 U.S. 254 (1964). Indeed, he appeared to join the opinion with alacrity, *see* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 534 (1983), though he later regretted having done so. HUTCHINSON, *supra* note 23, at 352.

104. Greenbelt Coop. Publ'g Ass'n v Bressler, 398 U.S. 6 (1970) (White, J., concurring); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (White, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (White, J., dissenting); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (White, J., dissenting); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1983) (White, J., dissenting); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (White, J., concurring); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) (White, J., concurring); Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) (White, J., dissenting).

He spoke about defamation law even when other issues were at stake. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 263 (1974) (White, J., concurring) (Court's decision that day in *Gertz* "[left] the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (White, J., concurring) ("As I see it, the decision in *New York Times Co. v. Sullivan* has little to do with this case, for here the jury found that the ad contained no assertion of fact.") (citation omitted).

105. Perhaps the most elegant assertion of this point was made by Justice Stewart, "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

106. 424 U.S. 693 (1976).

107. *Id.* at 723–24 (Brennan, J., dissenting). White was actually more speech-protective than Brennan in the case, refusing to join a footnote suggesting severe limitations on law enforcement officials' abilities to issue statements about crimes that included identification of suspected perpetrators. *Id.* at 735 n.18 (White, J., dissenting).

plaintiff asserted that local police officials had violated his due process rights by naming him as an "active shoplifter" in flyers distributed to local merchants.[108] Unlike the cases in which White questioned First Amendment defenses to common law defamation actions, *Paul v. Davis* required White to conclude, despite the presumption of constitutionality that is the hallmark of White's approach to constitutional questions, that the government had acted unconstitutionally in depriving a citizen of his reputation.

Of course, White recognized the tension between common law defamation actions and the freedom of speech guaranteed by the First Amendment. He believed that the press should be able to report matters of public importance.[109] Journalists' ability to do so could be protected by constitutionalizing the common law "fair report" privilege.[110] Such a move would allow news organizations to report on public proceedings without fearing that individuals defamed in those proceedings could assert defamation claims against them. White also argued for protecting news organizations by limiting damage awards in defamation cases.[111] At other times he suggested that the tension between the First Amendment interest in ensuring that

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Interestingly, this issue has arisen recently with regard to "perp walks." Unable to consider reputation as a liberty interest protected by the Due Process Clause, for which one can seek recompense under section 1983, the Second Circuit granted an arrestee subjected to a "perp walk" a cause of action based on the argument that the "perp walk" served little law enforcement purpose. Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000) (upholding arrestee's *Bivens* claim against law enforcement official who put him through a "perp walk" for the benefit of the photo-journalists).

108. Paul v. Davis, 424 U.S. at 695–96.

109. Thus, for instance, he believed that the press had a constitutional right of access to criminal trials. Estes v. Texas, 381 U.S. 532 (1965) (White, J., dissenting); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). They also had a right to report what they observed during judicial proceedings. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). However, he refused to expand the right of access to include correctional institutions. Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974). White was never called upon to reconcile the two positions in a written opinion.

110. Greenbelt Coop. Publ'g Ass'n v Bresler, 398 U.S. 6, 23 (1970) (White, J., concurring) ("If it is thought that the First Amendment requires more protection for the media in this respect in accurately reporting events and statements occurring at official meetings, it would be preferable directly to carve out a wider privilege for such reporting.")

111. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771 (1985) (White, J., concurring).

media entities could report on public events and individuals' interest in reputation could be resolved by allowing individuals to bring actions for declaratory judgment that merely required the court to adjudicate the truth or falsity of a publication.[112] He also suggested a form of "fair use" defense to defamation causes of action.[113]

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112. *Id.* at 767–71; Gertz v. Robert Welch, Inc., 418 U.S. 323, 393 (1974) (White, J., dissenting).

113. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 61–62 (1971) (White, J., concurring) ("I would accordingly hold that in defamation actions, absent actual malice as defined in *New York Times Co. v. Sullivan*, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.").

In her contribution to this symposium, Professor Allison Eid suggests that White's opposition to the Court's defamation jurisprudence stemmed from a desire to protect state sovereignty. She views *Gertz* as a federalism case, in which Justice White favored the states' interest in their common-law defamation regimes over the federal interest in enforcing the First Amendment. Allison Eid, *Justice White's Federalism: The (Sometimes) Conflicting Forces of Nationalism, Pragmatism and Judicial Restraint*, 74 U. COLO. L. REV. 1627, 1625 (2003). Professor Eid's interesting and novel argument finds some support in White's complaints about the Court's doctrinal innovations working a "severe invasion[]" of the "prerogatives of the States." *Gertz*, 418 U.S. at 376. Ultimately, however, the argument is deeply flawed.

In *Gertz*, White's argument that the Court should uphold state common law tort rules did not rest upon a conclusion that the states' interests were superior to the federal interest embodied in the First Amendment. Rather, White's criticism of the majority reflected his conclusion that the First Amendment, properly construed, simply did not include a right to damage an individual's reputations in the way the media defendant had in that case. *Id.* at 380–88. In other words, there was simply no clash between the state's interest in protecting citizens' reputations and any federal right granted media defendants by the First Amendment. Thus, even if the defamation standards at issue had been set forth by federal statute rather than state common law, White surely would not have held that the Constitution required its invalidation. Accordingly, the fact that defamation law was traditionally the province of state law rather than federal law was irrelevant. Indeed, had defamation law been embodied in federal statute rather than state common law, White would surely have been *more* disturbed by the *Gertz* majority's modification of the extant liability standards.

To White, the members of the *Gertz* majority were wrong because they had misconstrued the First Amendment in a way that both harmed individual citizens, by leaving them without sufficient means to vindicate their reputations, and allowed public discussion to be polluted with falsehoods, see *id.* at 392, not because they had subjugated state interests to what they believed to be a legitimate federal interest. *Id.* at 376–77 ("These are radical changes in the law and severe invasions of the prerogatives of the States. *They should at least be shown to be required by the First Amendment or necessitated by our present circumstances.*") (emphasis added).

Ultimately, White believed that the Court had made it far too difficult for plaintiffs whose reputations had been tarnished by media errors to recover damages for the injuries they suffered.[114] White's defamation jurisprudence showed a "populist" hostility to conferring upon a powerful press the privilege of avoiding responsibility for the harms their falsehoods inflicted on ordinary citizens' reputations.

Additionally, White's position in *Paul v. Davis* shows that he was perfectly willing to federalize common law actions (albeit common law actions covering a defined group of defendants) when necessary to protect a federal constitutional right. The majority held that an allegedly defamatory statement by a local law enforcement official could not give rise to a damages claim under section 1983 for a violation of the defamed citizen's Fifth Amendment Due Process Clause rights to liberty or property. Paul v. Davis, 424 U.S. at 708–12. Permitting such a claim, explained the majority, would federalize state tort law. *Id.* at 701. White joined Justice Brennan's dissent nonetheless. This suggests that White was willing to displace state defamation law as it pertained to claims against governmental officials to vindicate citizens' "liberty" interest in their reputation. Granted, *Paul v. Davis* is perhaps only suggestive, and not dispositive, because White might merely have viewed the majority's claims about the prospect of federalizing tort law as hyperbole.

114. However, White did not invariably accept common law causes of action as consistent with the Free Speech Clause. Thus, in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), White agreed with his brethren that Rev. Jerry Falwell could not bring a cause of action for intentional infliction of emotional distress as a result of a publication of an ad parody which offended Falwell's sensibilities. White succinctly observed: "I agree with the Court that the judgment below, which penalized the publication of the parody, cannot be squared with the First Amendment." *Id.* at 57.

White also joined Justice Brennan's opinion in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), with regard to false light privacy, subjecting such claims to the actual malice standard that governed defamation claims. (White was active in the case. *See* SCHWARTZ, *supra* note 103, at 642–48.) Indeed, White rejected a dissent that struck chords similar to those White would strike in later opinions, such as his dissent in *Florida Star v. B.J.F.* For example, Justice Abe Fortas, in dissent, wrote as follows: "The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law. . . ." Time, Inc. v. Hill, 385 U.S. at 420. Thirteen years later, in *Florida Star v. B.J.F.*, White would write:

> As I see it, it is not too much to ask the press, in instances such as this, to respect simple standards of decency. . . . The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter. . . . While I would not want to live in a society where freedom of the press was unduly limited, I also find regrettable an interpretation of the First Amendment that fosters such a degree of irresponsibility on the part of the news media.

Florida Star v. B.J.F., 491 U.S. at 547 & n.2 (White, J., dissenting) (quoting main text and footnote).

4. The Overbreadth Doctrine

White's protection of common law causes of action against First Amendment attack in particular, and his inclination to avoid judicial abdication more generally, might seem incongruous given White's persistent and largely successful efforts to cabin the Court's overbreadth doctrine. However, White's desire to ensure that individuals could assert claims to redress injuries inflicted upon them was counterbalanced by a different concern. In particular, White believed it essential to limit intrusive judicial oversight of the political branches of government.

The overbreadth doctrine allows a litigant to assert a Free Speech Clause challenge to a statute or regulation that prohibits constitutionally-protected speech, even though the statute or regulation's constraint on the speech the litigant himself wishes to engage in is entirely constitutional. The doctrine thus constitutes an exception to the general rule precluding litigants from raising the constitutional rights of others. The court entertains such overbreadth challenges in Free Speech cases, because of its concern that citizens who wish to engage in constitutionally-protected speech covered by the statute will easily be deterred from doing so.

White wrote a major opinion for the Court in *Broadrick v. Oklahoma*,[115] limiting the availability of the overbreadth doctrine. He declared, on behalf of the five-Justice majority, that a litigant could rely on the overbreadth doctrine only if the litigant could prove the statute's overbreadth was "substantial" when "judged in relation to [its] plainly legitimate sweep."[116] In explaining the need to limit the reach of the doctrine, White expressed concern that an expansive overbreadth doctrine could expand the court's role beyond the limited one judges should assume in a democratic polity.[117] He explained that justiciability doctrines, like that limiting litigants to pursuing their own constitutional claims, "rest on more than the fussiness of judges" and "reflect the conviction that under our constitutional system courts are not roving commissions assigned

115. 413 U.S. 601 (1973).

116. *Id.* at 615.

117. *See id.* at 610–11; *see generally* HUTCHINSON, *supra* note 23, at 374–76 (discussing *Broadrick* as the culmination of a nine-year effort to cabin the vagueness and overbreadth doctrines).

to pass judgment on the validity of the Nation's laws."[118] Moreover, by insisting on substantial overbreadth, White gave fallible legislative and executive branch officials some breathing room to draft statutes and regulations that could take effect before the constitutional implications of every aspect of the statute were resolved.[119]

After succeeding in *Broadrick*, White often vigorously argued that litigants had not succeeded in demonstrating that a challenged statute or regulation's alleged overbreadth was sufficiently "substantial."[120] Consistent with the concerns that drove him to view overbreadth claims suspiciously, White was demanding when litigants sought to invalidate statutes as unconstitutionally vague[121] and sometimes adopted a constrained view of standing (authoring at least two highly controversial standing decisions, *Los Angeles v. Lyons* and *O'Shea v. Littleton*).[122]

However, these seemingly contradictory tendencies, avoiding judicial abdication while embracing doctrines that limited justiciability, can be reconciled. White would ensure that courts remained available to individuals who suffered wrongs

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118. Broadrick v. Oklahoma, 413 U.S. at 610–11.

119. *See id.* at 613, 618. White noted the practical difficulties legislative drafters confronted, quoting his own language from a companion case: "'there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.'" *Id.* at 608 (quoting United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973) (White, J.)).

120. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); New York v. Ferber, 458 U.S. 747, 773 (1982); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 118–19 (1990) (White, J., concurring); Vill. of Huffman Estates v. Flipside, 455 U.S. 489 (1982) (White, J., concurring).

Moreover, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), White wrote an opinion for the Court holding that litigants who sought to engage only in constitutionally protected speech or who sought to engage in both protected and unprotected speech could not argue that a challenged statute should be invalidated on its face as overbroad. Rather, in such circumstances a court may invalidate the statute only to the extent the statute prohibits constitutionally-protected speech. Otherwise, the court must leave the statute intact. *Id.* at 504.

121. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352 (1983); Smith v. Goguen, 415 U.S. 566, 583–90 (1974) (White, J., concurring).

122. Los Angeles v. Lyons, 461 U.S. 95 (1983) (White, J.); O'Shea v. Littleton, 414 U.S. 488 (1974) (White, J.). Admittedly, these cases involved attempts to enjoin local law enforcement. Given White's deference to law enforcement efforts, he was likely to take a particularly jaundiced view of such claims.

and sought redress of their own grievances, but was much more cautious about allowing individuals to use lawsuits to secure judicial review of the policies adopted by the political branches of government.

White made an eloquent statement about the central nature of private causes of action as a means to redress grievances in *Zauderer v. Office of Disciplinary Counsel*,[123] a case that had little to do with justiciability doctrines or the tension between the First Amendment and speech-related common-law causes of action. In *Zauderer*, White discussed the Ohio State Bar's application of its limits on lawyer advertising, which one sanctioned lawyer challenged on First Amendment grounds. White wrote:

> the traditional justification for restraints on solicitation—the fear that lawyers will "stir up litigation"—[does not] justify the restriction imposed in this case. . . .
>
> [W]e cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.[124]

During Justice White's tenure, the Court addressed basic questions regarding the institutionalized press's position in society. White consistently evidenced his belief that in a civilized and humane society all citizens were entitled to expect decent treatment. When the press transgressed those bounds, he would not hesitate in upholding common law causes of action designed to vindicate citizen's entitlement to decent treatment against Free Speech Clause attacks.

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123. 471 U.S. 626 (1985).
124. *Id.* at 642–43.

III. BROADCAST REGULATION, COMMERCIAL SPEECH, AND CAMPAIGN FINANCE REGULATIONS

Other aspects of White's Free Speech Clause jurisprudence showed his tendency to approve efforts to limit the powerful. First, White argued that the First Amendment did not require use of the broadcast spectrum, either by broadcasters or viewers, to turn on economic wealth. The government could ensure that everyone benefited from the broadcast medium, even if that meant compelling authorized speakers to "share" their facilities with other speakers. Second, White's measured and cautious approach to claims challenging government regulation of commercial speech and corporate political speech, challenges often asserted by established commercial interests, reflected White's view that institutions' free speech rights were somewhat less critical than those of natural persons. Finally, White's almost singular commitment to ensuring that governments could craft a viable system for controlling the financing of elections in the face of First Amendment challenges shows a dedication to ensuring that economic power did not dominate the political process.

A. *Broadcast Regulation:* Red Lion Broadcasting Co. v. FCC

In *Red Lion Broadcasting v. FCC*,[125] broadcasters challenged the federal government's conception of broadcasters as "public trustees" entitled to diminished First Amendment protection. The case involved the fairness doctrine, which required each broadcaster to air balanced views, on pain of having its license revoked.[126] Outside the context of broadcasting, of course, such content-based government constraints would be impermissible.[127] The Court nevertheless upheld the fairness doctrine.

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125. 395 U.S. 367 (1969).

126. *Id.* at 369–70. The doctrine has since been abandoned. Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142 (1985); Syracuse Peace Council, 2 F.C.C.R. 5043 (1987); Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

127. *See, e.g.*, N. Y. Times Co. v. United States, 403 U.S. 713 (1971) (White, J., concurring) (the "Pentagon Papers" case); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (White, J., concurring); Neb. Press v. Stuart, 427 U.S. 539

Justice White, writing for the Court, presented two justifications for doing so. The first derived from the scarcity of broadcast frequencies. Such scarcity meant that some who wanted to engage in mass communication by radio or television could not do so. Unlike newspaper publishers, then, broadcasters were properly viewed as trustees, because they held their broadcast license for a limited period of time to present matters the public needed to hear. Broadcasters' lawful dominion over a portion of the spectrum did not entitle them to silence others. The broadcasters' programming decisions must reflect the general public's needs and are reviewable by a government body responsible to the public. The public as a whole, and not just the broadcast license holder or its preferred audience, must benefit from the medium. Justice White's second rationale in *Red Lion* focuses upon the origins of the broadcasters' control over the spectrum. As the Justice noted, the government itself had accorded each broadcast license owner a monopoly by giving each the exclusive right to use a government-owned resource, namely portions of the electromagnetic spectrum. Therefore, he reasoned, the government could make each holder of a broadcast license share its frequency.[128]

Many have criticized the scarcity rationale.[129] They argue that we typically rely on market mechanisms to allocate scarce resources, and that markets perform this allocative function most efficiently. Ordinarily, the argument goes, citizens and business entities can acquire property rights in scarce resources, property rights that include the right to transfer ownership.[130] The right to transfer property allows markets to

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(1976) (White, J., concurring); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

128. In his biography of Justice White, Dennis Hutchinson reports that White's *Red Lion* opinion won rave reviews from the other Justices. HUTCHINSON, *supra* note 23, at 348.

129. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994). *See generally*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

130. Indeed, before the federal government began to license the spectrum, at least one court had tentatively begun to craft a property regime for the electromagnetic spectrum. *See* Tribune Co. v. Oak Leaves Broad. Station, Inc., 68 CONG. REC. 216 (1926); *see generally*, Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53, 56 (1999); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 924–25 (1997).

form, and consequently, scarce resources to flow toward their most productive uses.

However, such a property-based regime, relying on market allocations, would largely replicate society's resource inequities. In addition, where severe scarcity exists, such a property-based regime would certainly not ensure that the scarce resource benefited all segments of the population. Wealthy individuals could purchase broadcast frequencies to propagate their own idiosyncratic views or to hawk products.[131] Even profit-maximizing purchasers, who might seek to attract the broadest possible audience, might well cater to those segments of the public with the greatest purchasing power. Such purchasing power clearly corresponds to wealth and income, and may leave segments of the population that command few resources without programming suited to their tastes. In any event, White's acceptance of an administrative, rather than a market, approach to allocating the electromagnetic spectrum is consistent with his predisposition toward allowing government to regulate markets in the public interest.[132]

Of course, a few years after *Red Lion*, advocates sought to make an argument analogous to the one at the heart of White's *Red Lion* opinion in their defense of a Florida statute that guaranteed a person attacked in a newspaper editorial a right to compel the newspaper to publish his reply. In *Miami Herald Publishing Co. v. Tornillo*,[133] the State argued that the scarcity of local newspapers allowed it to require newspaper editors to share the space in the newspaper with others, particularly those the newspaper had attacked. Despite his authorship of

131. In the early days of radio broadcasting, the Federal Radio Commission withdrew the licenses of some broadcasters who were, in the Commission's view, using their frequencies as a "personal outlet" or a means to propagate a particular ideology. The Commission reasoned that given the scarcity of broadcast stations "there is no place for a station catering to any group[, and thus] [a]ll stations should cater to the general public and serve public interest against group or class interest." STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 20 (2001).

132. However, in a later case White showed he was not implacably opposed to regulators permitting market-based allocation of the electromagnetic spectrum. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) (White, J.). The FCC satisfied its statutory obligations of regulating in the public interest, convenience, and necessity, by concluding that market forces would effectively ensure programming diversity. Accordingly, the FCC could decide that it would no longer consider potential program format changes in reviewing requests to transfer a broadcast license in conjunction with a purchase of a radio station. *Id.* at 593, 595–96.

133. 418 U.S. 241 (1974).

Red Lion, White joined Chief Justice Burger's opinion rejecting the argument. Indeed, White began his separate concurring opinion by rhapsodizing about the importance of freedom of the press and decrying the threat to freedom of speech from statutes like the one before the Court.[134]

Commentators typically note the *Tornillo* Court's failure to cite, much less distinguish, *Red Lion*.[135] Indeed, many consider the cases irreconcilable, or at least mystifyingly inconsistent. White's jurisprudence suggests his answer to these critics' justifiable challenge: *Red Lion* involved use of a government resource while *Tornillo* did not.[136] The electromagnetic spectrum was a public resource that the government had decided to license. But in allowing private citizens to use a government resource, the government was free to impose modest obligations on the licensees to act as public trustees, particularly given the legitimate government concern that scarcity prevented everyone from speaking. By contrast, local general circulation newspapers, even though almost invariably enjoying a monopoly position, do not communicate by means of a public resource.

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134. *Tornillo*, 418 U.S. at 260–61 (White, J., concurring).

135. MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 111 (6th ed. 2000); STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 166 (2001); FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS & THE FIRST AMENDMENT 193, 195 (1975) (quoting Paul A. Freund, *The Legal Framework of the Tornillo Case, in THE MIAMI HERALD V. TORNILLO*: THE TRIAL OF THE FIRST AMENDMENT 27 (Freedom of Information Center, ed. 1975)); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: a Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 156–57 (1985).

136. *Accord* Jeffrey L. Harrison, *Public Utilities in the Marketplace of Ideas: A Fairness Solution for a Competitive Imbalance*, 1982 WIS. L. REV. 43, 52 (1982). White believed that government officials must have the means to ensure that a public resource was available to benefit all citizens. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 779 (1988) (White, J., dissenting) ("From the outset of its contemporary public forum cases, this Court has recognized that city streets and sidewalks 'have immemorially been held in trust for use of the public. . . .' This means *all* of the public, and does not create a First Amendment right in newspaper publishers to 'cordon' off a portion of the sidewalk in an effort to increase the circulation of their papers." (emphasis in original) (citation omitted)); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 567–69 (1975) (White, J., dissenting) ("Whether or not a production as described by the District Court is obscene and may be forbidden to adult audiences, it is apparent to me that the State of Tennessee could constitutionally forbid exhibition of the musical to children, . . . and that Chattanooga may reserve its auditorium for productions suitable for exhibition to *all* the citizens of the city, adults and children alike. 'Hair' does not qualify in this respect, and without holding otherwise, it is improvident for the Court to mandate the showing of 'Hair' in the Chattanooga auditorium." (emphasis added) (citation omitted)).

Because newspapers use no public resource, the government cannot use its control over public resources to impose upon them a "public trustee" obligation.

B. Commercial Speech

The constitutional protections for commercial speech are often invoked by substantial economic interests. Thus, plaintiffs in the major Supreme Court cases since 1980 have included a prominent manufacturer of athletic footwear, pharmacies, tobacco companies, gambling interests, alcoholic beverage sellers, and utility companies.[137] Based largely on intuition,[138] the Court has traditionally viewed commercial speech as warranting diminished protection. When it has sought to justify its intuition, the Court has noted commercial speech's unusual hardiness and verifiability. However, the traditional assessment of commercial speech has become increasingly controversial.[139] Indeed, at least one member of the Court, Justice Cla-

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137. Nike v. Kasky, 123 S. Ct. 2554 (2003) (global manufacturer of athletic shoes); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (tobacco company); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (gambling); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (beer company); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (liquor retailer); Posades de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) (casino operator); Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (electric utility).

Many cases also involve regulation of professions, which in some sense may be characterized as established economic interests. However, in many of these cases the litigant making the commercial speech claim is an upstart seeking to challenge the professional establishment. Indeed, White might have been particularly suspicious of such regulatory entities, in which private groups exercised public authority. *See* Hoover v. Ronwin, 466 U.S. 558 (1984) (Stevens, J., joined by White, J., dissenting); Rice v. Norman Williams Co., 458 U.S. 654 (1982) (Stevens, J., joined by White, J., concurring in the judgment); S. Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985) (Stevens, J., joined by White, J., dissenting).

138. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 634 (1990) (observing that "[m]any of the commercial speech cases refer to the 'commonsense differences' between commercial and noncommercial speech, as if further explication of these differences would be beneath the dignity of the Court"); *e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985) (White, J.); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981) (White, J.) (plurality opinion).

139. *44 Liquormart*, 517 U.S. at 518 (1996) (Thomas, J., concurring) (a government's desire to keep consumers "ignorant in order to manipulate their choices in the marketplace" is "*per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech"); *Lorillard Tobacco Co.*, 533 U.S. at 571-72 (Kennedy, J., concurring) (expressing concern that the traditional test governing restrictions on commercial speech "gives

rence Thomas, argues that commercial speech warrants full protection.[140]

Justice White solidly supported the proposition that commercial speech merited less protection than non-commercial speech. White intuitively viewed commercial speech as lying outside "the exchange of ideas" that the First Amendment was primarily designed to foster (though he, like other Justices, never offered a rigorous justification for his view).[141] For White, it appears, commercial speech had little intrinsic value. Rather, commercial speech merited protection largely because of the autonomy it allowed potential hearers to exercise in seeking the goods and services needed to negotiate the demands of everyday life. Indeed, the origins of the contemporary protective commercial speech doctrine lay largely in ordinary citizens' interests in receiving beneficial information rather than in commercial enterprises' interest in pecuniary gain.[142] The needs of ordinary citizens seeking professional assistance was a critical element of White's opinion for the Court in *Zauderer v. Office of Disciplinary Counsel*,[143] partially overturning the application of a regulation on attorney advertising.

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insufficient protection to truthful, nonmisleading commercial speech"); *see also* Kozinski & Banner, *supra* note 138, at 634–38.

140. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."); *accord Lorillard Tobacco Co.*, 533 U.S. at 572 (Kennedy, J., concurring) ("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'").

141. Most often, this intuitive judgment was attributed to "common sense." *See supra,* note 138.

142. The early cases involved prohibitions that kept consumers ignorant of the availability of important goods and services or deprived them of the most basic information. Bigelow v. Virginia, 421 U.S. 809 (1975) (advertising informing Virginia citizens of the availability of out-of-state abortions); Virginia State Bd. of Pharm. v. Virginia Consumer Council, 425 U.S. 748 (1976) (challenging rule precluding pharmacists from advertising the prices they offered on prescription drugs); Linmark Assocs. v. Willingboro Tp., 431 U.S. 85 (1977) (precluding homeowners from placing "for sale" signs on their property); Cary v. Population Servs., Int'l, 431 U.S. 678 (1977) (precluding advertising of abortion services). The Court often emphasized the harm to consumers. *Virginia State Bd.*, 425 U.S. at 763–65; *Linmark Assocs.*, 431 U.S. at 93, 96–97; *Carey*, 431 U.S. at 700–01; *see* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 567–68 (1980).

Granted, the Court also noted that speakers should not lose their first amendment right simply because they spoke for pecuniary gain. *Virginia State Bd.*, 425 U.S. at 761–62.

143. 471 U.S. 626 (1985).

In particular, he noted that the traditional justification for restraints on solicitation—that lawyers will "stir up litigation"—could not justify the challenged restrictions. White asserted, "[t]he State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights."[144]

White was particularly likely to uphold limitations on commercial speech, at least outside the context of challenges to regulations governing professional conduct. In several close commercial speech cases, *Posades de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, *Board of Trustees v. Fox*, and *United States v. Edge Broadcasting Co.*, White voted to uphold restrictions on commercial speech.[145] Indeed, he seemed particularly sympathetic to states' use of commercial speech restrictions to protect citizens from perceived vices.[146]

White's view of the subordinate nature of commercial speech, when compared to non-commercial speech, was particularly apparent in *Metromedia, Inc. v. City of San Diego*[147] and *City of Cincinnati v. Discovery Network, Inc.*[148] White's plurality opinion in *Metromedia* asserted that government could not prefer commercial speech to non-commercial speech. Thus, a San Diego ordinance permitting on-site commercial billboards also had to permit on-site non-commercial billboards.[149] In *City of Cincinnati v. Discovery Network*, he and Justice Rehnquist went further. Rehnquist's dissent argued that a government entity could treat commercial speech less favorably simply because it placed less value on such speech. Specifically, if city officials decided that they needed to reduce the number of newsboxes, they could ban only boxes used to distribute commercial circulars (primarily consisting of advertisements for various services), leaving boxes for non-commercial matter un-

144. *Id. at* 642.

145. Posades de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1980) (involving a statute prohibiting casinos from advertising their legal gambling); Bd. of Trs. v. Fox, 492 U.S. 469 (1989) (involving a state university's regulation restricting operation of commercial facilities on campus); United States v. Edge Broad., 509 U.S. 418 (involving a federal statute prohibiting broadcasters licensed in states that do not allow lotteries from airing lottery advertising, even if most of their audience lives in another state) .

146. *Posades*, 478 U.S. at 341–43, *Edge Broad.*, 509 U.S. at 434–35.

147. 453 U.S. 490 (1981).

148. 507 U.S. 410 (1993).

149. *Metromedia*, 453 U.S. at 513–14.

disturbed, because commercial speech was less valuable than non-commercial speech.[150]

In short, White's commercial speech jurisprudence suggests that he was sensitive to ordinary citizens' needs for information about the availability of important goods and services, but would not allow protection of commercial speech to undo the constitutional revolution of 1937, by undermining government's power to regulate the marketplace.[151]

C. Corporate Political Speech

Justice White's position on corporate political speech, outlined in his powerful dissent in *First National Bank of Boston v. Bellotti*,[152] provides another example of his commitment to ensuring that government possessed the power to check powerful economic forces.

The Massachusetts statute at issue in *Bellotti* prohibited corporations from contributing funds to support or oppose ballot propositions unrelated to their business. A bare majority of the Court invalidated the statute on First Amendment grounds, concluding that corporations possess no less right to speak on matters of public importance than natural persons.

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150. *Discovery Network*, 507 U.S. at 438 (Rehnquist, J., dissenting). In *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), a First Amendment challenge to an ordinance regulating door-to-door solicitation, White carefully distinguished commercial and non-commercial speech. He explained that regulation of efforts to solicit financial support must be undertaken "with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Id.* at 632. Without such solicitation, "the flow of such information and advocacy would likely cease." *Id.* He distinguished such efforts from commercial speech, which does no more than "inform private economic decisions" and primarily seeks to "provid[e] information about the characteristics and costs of goods and services. . . ." *Id.*

151. Recently, four Justices have expressed just such concern about the heightened scrutiny the Court has employed in commercial speech cases. In *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002), Justice Breyer ominously warned:

> [A]n overly rigid 'commercial speech' doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections. As history in respect to the Due Process Clause shows, any such transformation would involve a tragic constitutional misunderstanding.

Id. at 389.

152. 435 U.S. 765 (1978).

White wrote for the four dissenters who challenged that proposition. While White's position did not prevail in *Bellotti*, a narrow majority of the Court accepted elements of his position a few years later, upholding restrictions on corporate speech in support of candidates for public office.[153]

In his *Bellotti* dissent, White argued that government can impose greater restrictions upon corporate expression than upon individual expression. He argued that corporate expression less substantially furthers "First Amendment values" and, simultaneously, poses a greater "threat to the functioning of a free society."[154] White first sought to justify his assertion that corporate political speech has less value than that of natural persons. Unlike speech by individuals, speech by profit-making entities does not further the "self-expression, self-realization, or self-fulfillment" goals of the First Amendment.[155] Nor does corporate speech play a particularly critical role in the interchange of ideas. In particular, corporate speech communicates ideas that do not reflect individual choice, and, for that reason, warrants less protection.[156]

White acknowledged that corporate speech sometimes merited protection. Such speech furthers the interests of natural persons in two ways. First, it serves the interests of the shareholders on whose behalf the corporation presumably spoke—speech "integrally related to the operation of the corporation's business may be viewed as furthering the desires of individual shareholders."[157] Second, recipients of corporate communications, such as customers, potential customers, employees, and investors also benefit from such speech. It serves their need for

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153. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (Marshall, J., for a six-Justice majority); California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182 (1981) (Marshall, J., for a four-Justice plurality). The *Austin* majority did not allow a state to prohibit speech in support of political candidates, as White's position in *Bellotti* would have suggested, but the majority did hold that corporations could make contributions only from segregated funds contributed to the corporation for the purposes of supporting political candidates. *Austin*, 494 U.S. at 660–61.

154. *Bellotti*, 435 U.S. at 804.

155. *Id.* at 804 & n.6. He distinguished corporations formed for the express purpose of advancing ideological causes shared by all of its members (citing *NAACP v. Button*, 371 U.S. 415 (1963)), as well as those formed to disseminating information and ideas, like the corporate members of the institutional press. *Bellotti*, 435 U.S. at 805.

156. *Bellotti*, 435 U.S. at 805.

157. *Id.*

information regarding various aspects of the corporation's endeavors.

However, corporate political speech on matters other than corporate business lacks these benefits. Shareholders possess a "unanimity of purpose" that corporate communications seeking to advance the company's pecuniary interests presumably further. That "unanimity of purpose breaks down . . . when corporations make expenditures . . . designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property or assets."[158] Even worse, such corporate political expression could constitute a kind of compelled speech, as shareholders who disagree with the management's political views must support those views nevertheless as a price of owning shares. Given that the Court itself had constrained union expenditure of member funds to protect individual union members' First Amendment rights in *Abood v. Detroit Board of Education*,[159] surely a state could similarly restrain corporate use of funds to protect shareholders' analogous interest in not having to support objectionable corporate speech.[160]

Not only is corporate speech intrinsically less valuable, argued White, it poses special dangers to democracy. Corporations benefit from special rules that allow them to amass capital and function as potent economic forces.[161] White warned that such special privileges place corporations "in a position to control vast amounts of economic power" which could, left unregulated, produce corporate dominance of "the very heart of our democracy, the electoral process."[162] States possess a legitimate interest in "preventing institutions which have been permitted to amass wealth as a result of special privileges extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process."[163] Indeed, in starkly dramatic terms, White asserted: "The State need not permit its own creation to consume it."[164]

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158. *Id.* at 805–06.
159. 431 U.S. 209 (1977).
160. *Bellotti*, 435 U.S. at 813-15.
161. *Id.* at 809 ("[i]t has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power").
162. *Id.*
163. *Id.*
164. *Id.*

Moreover, White concluded, corporations' ability to amass wealth means that expenditures on corporate expression bear no relation to the fervency with which those views are held.[165]

As we shall see, White was generally sympathetic to campaign finance regulation, viewing such regulation as essential to ensuring that the electoral process reflects the will of the general public rather than the comparative wealth of competing candidates' and policies' proponents. However, as demonstrated by his *First National Bank of Boston v. Bellotti*[166] dissent and his later votes in cases involving regulation of corporate political speech, most notably *Austin v. Michigan Chamber of Commerce* and *California Medical Association v. Federal Election Commission*, White was particularly concerned about corporate dominance of the political process.[167]

D. Campaign Finance Regulations

Justice White's tendency to interpret the First Amendment flexibly when the powerful asserted their free speech rights to protect their dominance was also on display in the campaign finance cases.[168] White consistently wrote in this area and was the Court's most persistent advocate of broad, effective campaign finance regulation.

In general, the Court has imposed significant restrictions upon federal and state attempts to regulate the financing of campaigns. The Court has consistently rejected the view that legislatures can craft campaign finance restrictions to ensure that elections are contested by rivals who wield equal financial

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165. *Id.* at 810.

166. 435 U.S. 765, 803 (1978) (White, J., dissenting).

167. Interestingly, White was quite protective of some "political" activities pursued by industry associations. He viewed their role as an important and salutary one. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 511–16 (1988) (White, J., dissenting). White believed that such industry organizations possess expertise that resource-strapped legislatures should sometimes take into account. As he observed: "State and local governments necessarily, and as a matter of course, turn to . . . proposed codes [promulgated by private associations] in the process of legislating to further the health and safety of their citizens. . . . There is no doubt that the work of these private organizations contributes enormously to the public interest. . . ." *Id.* at 514.

168. Buckley v. Valeo, 424 U.S. 1 (1976); *Bellotti*, 435 U.S. at 765; Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985).

resources.[169] Limiting the ability or resources of some speakers to ensure that others have an equal ability or equal resources to speak transgresses the First Amendment.[170] The Court has allowed campaign finance regulations designed to ensure public disclosure of candidates' sources of financial support.[171]

The Court has also recognized that private contributions to political candidates can lead to the appearance or reality of corruption. For example, public officials might explicitly or tacitly agree to use their powers, once elected, to reward contributors.[172] Even if they did not intentionally seek to use their official powers to reward contributors, the public might reasonably suspect the existence of such a *quid pro quo*. Thus, the Court has upheld restrictions on contributions to candidates against First Amendment challenges.[173] But the Court has narrowly circumscribed the power to combat the reality or appearance of corruption. Thus, the Court has distinguished individuals' independent expenditures in support of candidates from their contributions to candidates, and struck down limits on individuals' independent expenditures in support of candidates.[174] The Court has invalidated *contribution* limits upon supporters or opponents of ballot initiatives and referenda, because such ballot propositions involve no election of an officeholder who could favor contributors, and thus pose no risk of actual or ap-

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169. For example, the *Buckley* majority summarily rejected the argument that the First Amendment permitted Congress to create a level playing field by setting expenditure limits on campaigns:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by . . . expenditure ceiling[s]. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

Buckley, 424 U.S. at 48–49.

170. *Id.*

171. *Id.* at 66–67.

172. *Id.* at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation.").

173. *Id.* at 26–27. Moreover, the Court has explained, merely funding another person's speech is less central to core free speech values than funding one's own speech. *Id.* at 20–22.

174. *Id.* at 39–50; Fed. Election Comm'n v. Nat'l Conservative Political Action Comm'n, 470 U.S. 480, 496–98 (1985).

parent corruption.[175] The Court has also invalidated limitations on the amounts candidates can contribute to their own campaigns. In short, beginning with *Buckley v. Valeo*, the Court has consistently precluded the political branches of government from limiting expenditures by candidates or by individuals who wish to speak independently.[176]

Justice White expressed disagreement with almost every limitation that the Court has placed on campaign finance regulation. Three major critiques emerge from White's opinions.[177] First, White objected to equating limitations upon funding speech with limitations upon speech itself. For him, funding speech, whether one's own or another's, was a form of "conduct," and thus susceptible to more extensive regulation than pure speech. This reflects White's approach of carefully distinguishing speech and non-speech elements of communications.[178] Thus, for White, limitations on contributions to political candidates and restrictions on expenditures either in favor of political candidates or relative to ballot propositions were all governed by the *O'Brien* analysis,[179] under which he found virtually every campaign finance regulation constitutional.

Second, he fundamentally disagreed with many members of the Court about the legitimacy of the government interests served by campaign finance regulation. For White, preventing the appearance or reality of corruption did not exhaust the legitimate justifications for regulating the financing of political campaigns.[180] Rather, unlike many of his brethren, White believed that legislatures may seek to equalize the resources available to electoral adversaries.[181] White also identified other legitimate governmental interests furthered by various campaign finance regulations, including "maintain[ing] public confidence in the integrity of federal elections" and "hold[ing] the

175. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 302 (1981).

176. *Nat'l Conservative Political Action Comm'n*, 470 U.S. at 496–98; *Bellotti*, 435 U.S. at 786–91; *Buckley*, 424 U.S. at 39–54.

177. By reducing White's critique to three major themes, of course, I risk ignoring many nuances of White's position.

178. *See supra* Part I.A.

179. *See supra* Part I.A.

180. *Berkeley*, 454 U.S. at 306–07 (White, J., dissenting).

181. Buckley v. Valeo, 424 U.S. 1, 265–66 (1976) (White, J., dissenting). As noted earlier, a majority of the Court had rejected that proposition in *Buckley v. Valeo*. *See supra* Part III.D.

overall amount of money devoted to political campaigning down to a reasonable level."[182] Moreover, he feared unfair dominance of the political processes by those who wielded economic power.[183] While many of his brethren remained skeptical, the events of the 1970's and 1980's convinced White of the existence of such domination (or at the very least of a sufficient basis for various legislatures to conclude that such dominance existed).[184]

In addition, he viewed the largely unregulated private financing of campaigns as an impediment to communication between public officials and the public they represent. He believed that the fundraising efforts needed to win and retain office were proving distracting to elected officials. Thus, in *Buckley v. Valeo*, White expressed his confidence that "limiting the total that can be spent will ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function."[185] In his view, the government could assert a weighty interest in "insulat[ing] the political expression of federal candidates from the influence inevitably ex-

182. Fed. Election Comm'n v. Nat'l Conservative Political Action Comm'n, 470 U.S. 480, 509 (1985) (White, J., dissenting). In *Berkeley*, White argued that the Court itself had long recognized the government's interest in "sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government." 454 U.S. at 306 (quoting U.S. v. Automobile Workers, 352 U.S. 567, 575 (1957)). Paraphrasing earlier cases, he said that the state pursued "interests of the highest importance" when it acted to "preserv[e] the integrity of the electoral process and the individual citizen's confidence in government." *Id.* at 306 (quoting U.S. v. Automobile Workers, 352 U.S. 567, 575 (1957) and *Bellotti*, 435 U.S. at 788–89).

183. Thus, in *Berkeley*, the majority found contribution limits less justifiable in elections involving initiatives and referenda than those involving contenders for elective office. 454 U.S. at 296–300. Contenders for elective office could provide a *quid pro quo* to contributors once elected, while advocates whose positions prevailed on ballot initiatives could not. *See id.* White found such a distinction utterly unpersuasive. *See id.* at 305–08. Instead, White showed solicitude for initiative and referenda processes as a means for "the people" to make their will known. *See id.* at 310. Thus, White observed that the court's ruling is particularly problematic because the initiative process in California was designed precisely to "circumvent the undue influence of large corporate interests on government decision making." According to White, both the initiative process, and the ancillary regulations designed to protect that process, "serve to maximize the exchange of political discourse." *Id.* at 310-11.

184. *Bellotti*, 435 U.S. at 810; *Berkeley*, 454 U.S. at 306–08 & nn. 2–4.

185. *Buckley*, 424 U.S. at 265.

erted by the endless job of raising increasingly large sums of money."[186]

Third, White was more willing to justify restrictions that have First Amendment implications in order to allow the government the necessary leeway to construct a sensible, comprehensive system of campaign finance regulation. Thus, he found expenditure limitations necessary in order to reinforce contribution limits, and to ensure that workable campaign finance regulation was possible.[187] Similarly, White complained about the Court's distinction between independent and coordinated expenditures.[188] White had little sympathy for the argument that the First Amendment protected independent expenditures,

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186. *Id.*

187. In *Buckley* and in *Berkeley*, White observed that it made little sense to limit contributions without also limiting expenditures. *Buckley*, 424 U.S. at 264–65; *Berkeley*, 454 U.S. at 303–04; *see generally Nat'l Conservative Political Action Comm'n*, 470 U.S. at 509, 511. Thus, in White's view, the First Amendment could not completely exclude some control on the level of expenditures given that such limits formed an essential element of any workable campaign finance regulation. *See Buckley*, 424 U.S. at 264–65; *Berkeley*, 454 U.S. at 303–04.

In *Buckley*, White explained the connection between expenditures and contributions, arguing that "expenditure ceilings reinforce the contribution limits and help eradicate the hazard of corruption." 424 U.S. at 264 (White, J., dissenting). If the cost of campaigns rises, candidates will increasingly find themselves tempted to seek out contributors who are willing to risk being "caught flouting . . . the contribution limits." *Id.* Moreover, candidates will be saved from large, overhanging campaign debts which must be paid off with money raised while holding public office and at a time when they are already preparing or thinking about the next campaign. The danger to the public interest in such situations is self-evident. Corrupt use of money by candidate is as much to be feared as corrosive influence of large contributions. Unlimited money tempts people to spend it on whatever money can buy to influence an election. *Id.* at 264–65.

188. White found the distinction untenable. *Nat'l Conservative Political Action Comm'n*, 470 U.S. at 510. Independent expenditures provide an alternative avenue for contributions, which the Federal Election Commission Act restricts. *Id.* White believed that a candidate would certainly know about the extensive efforts "independently" undertaken of his behalf. *Id.* Tacit understandings and implied agreements between a candidate and those making "independent" expenditures could result from such "independent" expenditures, and White was unwilling to disregard the congressional judgment that such independent expenditures must be carefully regulated. *See id.* at 511. White also noted practical connections between political action committees ("PACs") and candidates, with both communications and personnel flowing between candidates' committees and PACs. *Id.* White noted that "it is pointless to limit the amount that can be contributed to a candidate or spent with his approval without also limiting the amounts that can be spent on his behalf." *Id.* In other words, "[i]t is nonsensical to allow the purposes of this limitation to be entirely defeated by allowing the sort of 'independent' expenditures at issue here, and the First Amendment does not require us to do so." *Id.* at 512.

but he was particularly concerned because independent expenditures could take the place of campaign contributions and could pose many of the same risks.[189]

White expressed particular dismay at the Court's partial invalidation of the Presidential campaign finance system. He noted that the Presidential campaign finance system, unlike that established for financing congressional elections, reflected a legislative judgment that competing candidates' campaigns should be publicly, rather than privately, financed.[190] The government had an "all the more compelling" interest in ensuring that such "elections should be between equally well financed candidates and not turn on the amount of money spent for one or the other."[191] Moreover, in a publicly-financed system the danger of permitting private funding that reflected "underlying disparities" in wealth was more serious.[192] He lamented the majority's failure to recognize the government's perfectly legitimate interest in preventing private contributions from distorting a publicly funded system. But even worse, White observed, the majority had gravely erred "[b]y striking down one portion of an integrated and comprehensive statute," and thus "once again" "transform[ing] a coherent regulatory scheme into a nonsensical, loopholeridden patchwork."[193]

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189. *Id.* at 510–12.

190. *Id.* at 514–16 (White, J., dissenting). Even the proposition that Congress could constitutionally opt for public, rather than private, financing of election was contested. In *Buckley v. Valeo*, Chief Justice Burger, appointed for his judicial restraint, concluded that the First Amendment precluded the federal government from interfering with the electoral speech by funding the speech of candidates for elective office. 424 U.S. at 246–52 (Burger, J., dissenting).

191. *Nat'l Conservative Political Action Comm'n*, 470 U.S. at 518.

192. *Id.* at 516.

193. *Id.* at 518. White was also concerned about elected officials rigging the electoral system. Davis v. Bandemer, 478 U.S. 109 (1986). In *Davis v. Bandemer*, White, writing for the court, held that extreme political gerrymandering that would frustrate electoral majorities was constitutionally cognizable. *Id.* He also joined the reapportionment cases, which served to remedy inequities in political representation that again frustrated electoral majorities. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964). However, characteristically, he was a strong voice for ensuring that legislatures had some leeway in drawing up electoral districts. Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (reapportionment is a job for legislatures and their work "should not be invalidated . . . when only minor population variations among districts are proved."). Thus, he did not require that officials pursue the one-person-one-vote principle with mathematical precision as some of his colleagues required. *See* Karcher v. Daggett, 462 U.S. 725, 766 (1983) (White, J., dissenting) (accusing the majority of an "unreasonable insistence on an unattainable perfection in the equalizing of congressional districts."); Gaffney v.