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A Differing View on Viewpoint Discrimination

Danny J. Boggs†

When I was asked to appear on a panel addressing the question of a “Free and Responsible Press,” I immediately experienced a feeling of wariness. Whenever lawyers (or politicians), as opposed to moralists, journalists, or political scientists, start talking about “responsibility” in the same breath as freedom, you can usually be sure that freedom is about to come out the loser. I harked back at once to the 1950s, when several conservative groups promoted various “Bills of Rights and Responsibilities” that inevitably turned out to be ways to restrict the freedoms in the Bill of Rights. Similarly, today there are “Consumer Bills of Rights and Responsibilities” that invariably mean that consumers do not have as many rights as they would without the “responsibilities.”

I do not mean to disparage the idea of trying to be responsible. It may be nicer, more moral, or more efficacious to be “responsible.” It may even be true that as a matter of political science, a “responsible” press will win more close court cases or will be more successful in the political arena than a press that is less responsible. However, I maintain that the rights of the press embodied in the Constitution are not dependent on a judgment of “responsibility.” Those rights belong just as much to the *Daily Worker* and *Der Sturmer* as to the *Washington Post*. Further, if there are areas that First Amendment protection does not reach, then sanctions are as available against a “responsible” media as against an “irresponsible” one.

Professor Sunstein’s article¹ has not disappointed me in my wariness of doctrines put forward in the name of responsibility. I will address individually the four so-called “half-truths” that Professor Sunstein expounds. However, I would like to deal first with Professor Sunstein’s overall message for, as he says, these four half-truths are all closely related.

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¹ Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U Chi Legal F 25.

Although Professor Sunstein appears to praise current First Amendment doctrine, it is with faint damns, and his overall message is a very disturbing one. Though Professor Sunstein regularly states that conventional First Amendment theory has value, the main thrust of his article is that such doctrine is somehow not quite "nuanced enough" for today's circumstances. George Orwell referred in his essay "Politics and the English Language" to certain euphemisms as "a mass of Latin words fall[ing] upon the facts like soft snow, blurring the outlines and covering up all the details."² Cutting through that snow, I find two significant points in Professor Sunstein's article:

(1) The government may properly punish the expression of some viewpoints while permitting the expression of opposing viewpoints.³

(2) The government may be compelled by the courts to pay for the propagation of some ideas or expressions if it pays for the propagation of opposing ideas.⁴

These propositions are certainly closely related because they represent two ways for government, broadly speaking, under the tutelage of people like Professor Sunstein, to put its thumb on the scale of public debate. In the first case, the political branches of government, with the help of the courts, kick some speech out of the public arena. In the second case, the courts, overriding the political branches of government, force the collection and expenditure of monies to promote certain ideas of the courts' choosing.

I will first discuss the argument that viewpoint discrimination is already widely condoned in the law and that such discrimination should be permitted on the basis of some measurement of the harm posed by the speech. I will then address the argument that the government's "selective funding" of ideas is a significant danger to free speech, and that constitutional principles have much to tell us about how courts can force the government to fund additional speech. I will suggest and, I believe, demonstrate that Professor Sunstein's propositions are wrong as a matter of existing law and pernicious or simply impossible as a matter of doctrine and policy.

² George Orwell, *Politics and the English Language*, in Sonia Orwell and Ian Angus, eds, 4 *The Collected Essays, Journalism and Lectures of George Orwell* 127, 136-37 (Harcourt, Brace & World, 1968). The euphemisms to which Orwell referred included "elimination of unreliable element" for execution, and "rectification of frontiers" for invasion and extermination.

³ Sunstein, 1993 U Chi Legal F at 29 (cited in note 1) (Sunstein's first half-truth).

⁴ Id at 36 (Sunstein's third half-truth).

The first of Professor Sunstein's propositions, that government may properly punish the expression of some viewpoints while permitting the expression of opposing viewpoints, is the basis for the numerous attempts, especially by colleges and municipalities, to regulate and punish "hate speech." These efforts have fared very poorly in the courts thus far. Codes that directly regulate speech have been struck down in every case challenging them that I have seen.⁵ In addition, of course, *R.A.V. v City of St. Paul*,⁶ addressing the far more difficult issue of standards for punishing admittedly criminal conduct, was a ringing affirmation that freedom from viewpoint discrimination is a hallmark of the First Amendment's guarantee of free speech.

In his first "half-truth," Professor Sunstein argues that we already allow a good deal of viewpoint discrimination, and that we should simply recognize this and look for the principles that allow it.⁷ According to Professor Sunstein, once we identify those principles, we should apply them to allow punishing other speech and publication that is "harmful". Professor Sunstein's analysis and examples, however, are very wide of the mark. The closest he comes to specifics is in the area of advertising and commercial speech, although the cases that he cites do not adequately support his view.

To support his view that the government may properly punish the expression of some viewpoints while permitting the expression of opposing viewpoints, Professor Sunstein first cites *Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico*,⁸ in which the Supreme Court permitted Puerto Rico to ban advertisements that specifically promote individual casinos. *Posadas*, however, does not condone viewpoint discrimination. There is nothing in *Posadas* that indicates that a hypothetical "Commission on the Virtues of Gambling" could not run advertisements, without promoting or mentioning any specific casino, that assert that gambling is wholesome entertainment, useful for relieving the stresses of everyday life. Likewise, nothing in *Posadas* indicates that a "Commission on the Vice of Gambling" could run opposing advertise-

⁵ See, for example, *Doe v University of Michigan*, 721 F Supp 852 (E D Mich 1989); *UMW Post, Inc. v Bd of Regents of University of Wisconsin*, 774 F Supp 1163 (E D Wis 1991). See also *Levin v Harleston*, 770 F Supp 895 (S D NY 1991), *aff'd* in relevant part, vacated in part, 966 F2d 85 (2d Cir 1992).

⁶ 112 S Ct 2538 (1992).

⁷ Sunstein, 1993 U Chi Legal F at 28-29 (cited in note 1).

⁸ 478 US 328 (1986) (upholding laws banning advertisements specifically targeted at the permanent residents of Puerto Rico that promoted individual casinos).

ments without fear of being contradicted through counterspeech.⁹ Finally, there is no evidence from *Posadas* to show that a commercially-oriented, anti-gambling advertisement (for example, "Play Miniature Golf, don't go to that den of iniquity, the Pink Pussycat Casino, at 1234 Del Rio Boulevard") would not come within the statute's prohibition on identifying individual casinos.

Similarly, Professor Sunstein's examples of bans on cigarette advertising and SEC regulations do not support his view.¹⁰ The cigarette law specifically refers to cigarette advertising,¹¹ saying nothing about, for example, a program analyzing scientific studies from the tobacco industry's point of view. Moreover, the SEC rules neither hold manufacturers of "evil" gasoline cars to one standard of disclosure while establishing a separate standard for manufacturers of "virtuous" electric cars, nor do they distinguish between the manufacturers of Granny's oil-soaked cookies and the producers of Ben and Jerry's sado-granola mix. Instead, the SEC's rules, while not "content-neutral" in that they place restrictions on the expression of financially-relevant information in the commercial context, are in fact viewpoint-neutral in that all actors, evil or virtuous, must disclose the same pertinent information. While the SEC's rules forbid misleading financial statements,¹² they do not prohibit the acts charged against Socrates, that he "made the worse appear the better cause,"¹³ which is what would be needed to support Professor Sunstein's picture of rampant, though little-recognized, viewpoint discrimination.

Finally, Professor Sunstein's example of the suppression of employer speech in the context of a union election is also misstated. Unions, like employers, are forbidden to use threats in representation elections.¹⁴ Contrary to Professor Sunstein's statement, employers are forbidden to make threats for, as well as against,

⁹ The Court's latest free speech case, *City of Cincinnati v Discovery Network, Inc.*, 113 S Ct 1505, 1512 (1993), quotes at some length from *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 761-62 (1976), on this subject ("No one would contend that our pharmacist [who is subject to controls on the content of advertising] may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden.").

¹⁰ Sunstein, 1993 U Chi Legal F at 28 (cited in note 1).

¹¹ Federal Cigarette Labelling and Advertising Act, 15 USC § 1335 (1991).

¹² Securities Acts Amendments, 15 USC § 78n(a) (1992); 17 CFR § 240.14a-9(a) (1992).

¹³ Plato, *Apology*, in Benjamin Jowett, ed, 1 *The Dialogues of Plato* 342 (Clarendon Press, 4th ed 1953).

¹⁴ *NLRB v Gissel Packing Co.*, 395 US 575 (1969).

unions.¹⁶ The standard is not, as Professor Sunstein states, what “might be interpreted as a threat,” but rather the objective standard of what, in fact, is a threat.¹⁶ Again, the distinction is, at most, content-based, not viewpoint-based.

The Supreme Court has vacillated on the rubric for the regulation of commercial speech. In general, however, I read the cases that Professor Sunstein cites as resting far more on the government’s power to regulate “commercial” actions than on its power to regulate speech. As my above analysis of Professor Sunstein’s examples shows, it is not the obviousness of the harm, but rather the type of speech (content, not viewpoint) that explains even the few cases that Professor Sunstein can muster.

The oral presentation of these comments at the University of Chicago Legal Forum Symposium held in the fall of 1992 occurred about a month before the Supreme Court heard argument on *City of Cincinnati v. Discovery Network*.¹⁷ I authored the Sixth Circuit opinion¹⁸ in that case in which we affirmed the district court, holding unanimously that Cincinnati could not ban from street corners what it called “commercial” newsboxes (free publications: advertising educational courses, homes, cars, or “Christian Singles”), while permitting free use of street corners for “non-commercial” publications (such as the *New York Times*, which, of course, may contain paid advertisements for educational courses, homes, cars, or “Christian Singles”). We held that the lesser status now accorded to commercial speech must in some way be related to the peculiar commercial nature of that speech,¹⁹ and that the label of “commercial speech” could not be used to attack aspects of commercial speech that are identical to those of non-commercial speech. We further noted that the presence of paid advertising in “traditional” newspapers could make those newspapers subject to the ordinance that we declared to be unconstitutional.²⁰

I predicted at the time that it was quite unlikely that the Court would allow a city to ban certain types of speech because

¹⁶ *NLRB v. Exchange Parts Co.*, 375 US 405, 409 (1964) (“[The National Labor Relations Act] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization . . .”).

¹⁸ See, for example, *Frito-Lay, Inc. v. NLRB*, 585 F2d 62 (3d Cir 1978); *NLRB v. Riley-Beard, Inc.*, 681 F2d 1083 (5th Cir 1982).

¹⁷ 113 S Ct at 1505.

¹⁸ *Discovery Network, Inc. v. City of Cincinnati*, 946 F2d 464 (6th Cir 1991), cert granted, 112 S Ct 1290 (1992).

¹⁹ Id at 468-72.

²⁰ Id at 468 n 6.

they were "commercial" while permitting other types of speech, with identical externalities, simply because they were "non-commercial." I also noted that in order to support Professor Sunstein's notion of the permissibility of rampant viewpoint discrimination, the Court would have to opine broadly enough to permit the selective banning of commercial and, therefore, unprotected speech. For example, if a city could permit newsboxes for the Klan that offered memberships or trinkets for sale, but could ban those for the Spartacists, or vice-versa, this would indicate court approval of viewpoint discrimination within a supposedly "low-value" area, which would validate Professor Sunstein's view that a good bit of viewpoint discrimination is already allowed.

The Court's decision came down on March 24, 1993, and it did not disappoint me. The Court held that, under its opinion in *Board of Trustees of the State University of New York v Fox*,²¹ there was no "reasonable fit" between the commercial-newsbox ban and any legitimate state interest in safety or aesthetics affected by the existence of all newsboxes.²² While the Court did not go so far as to adopt the Sixth Circuit's principle of explicit content-neutrality between commercial and other speech, neither did it undercut that principle.²³ Moreover, Justice Blackmun, in a concurring opinion, expressly supported that principle.²⁴

It may be that Professor Sunstein's argument can be interpreted as simply pointing out that the government can take regulatory action that weakens, or makes more difficult or less effective, the speech of certain groups or the advocacy of certain points of view. If that is all there is to his argument, then it is indeed commonplace. Regulatory actions that affect speech and viewpoints are called politics or public policy.

Professor Sunstein makes the unusual argument that "[a]lmost no one" thinks there is a problem with his favored "viewpoint-based" restrictions because the harms are so "obvious . . . that the notion that [they are] 'viewpoint-based' does not even have time to register."²⁵ Aside from musing on the different reaction times of professors of constitutional law and ordinary citizens, I can certainly conjure up hosts of people for whom the "obvious

²¹ 492 US 469 (1989).

²² *Discovery Network*, 113 S Ct at 1510.

²³ *Id* at 1510 n 11.

²⁴ *Id* at 1517 (Blackmun concurring).

²⁵ Sunstein, 1993 U Chi Legal F at 28 (cited in note 1).

harms" of flag-burning, Communist speech, or anti-Semitism register much more rapidly than constitutional principles.

Before addressing Professor Sunstein's other half-truths, I want to say a word about the "fighting-words" doctrine, which is the major underpinning for some types of regulation of objectionable speech on racial or social topics. First, although the delineation of "fighting words" in *Chaplinsky v New Hampshire*²⁶ is still repeatedly cited as an area of speech that is not protected by the First Amendment, we have the following anomalies:

(1) The Supreme Court has never cited *Chaplinsky* to uphold any punishment for uttering a fighting word;²⁷

(2) Similarly, almost no federal court has cited *Chaplinsky* to uphold such a restriction;

(3) Most commentators, until very recently, explicitly stated that *Chaplinsky* is probably no longer good law;²⁸

(4) *Chaplinsky* explicitly authorized punishment for calling a policeman "a fascist" and "a racketeer," a principle that, if enforced consistently, would certainly have decimated the student left leadership of my day and today; and

(5) The only state cases that have actually applied *Chaplinsky* (for some reason, Georgia seems to be particularly prolific in such litigation)²⁹ have done so in the context of personal abuse of authority figures, usually in terms closely resembling the "Seven Dirty Words" of George Carlin's famous comic monologue.³⁰

Those who advance a stringent application of the "fighting words" doctrine as a solid basis for controlling speech generally should consider whether there is a degree of civility they would accept if applied to all political discourse. If we look solely to content and ignore accepted norms of tolerance, I believe that we are going to have to punish those who changed the note on my daugh-

²⁶ 315 US 568 (1942).

²⁷ Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Interment*, 106 Harv L Rev 1129 (1993).

²⁸ See, for example, David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 Brooklyn L Rev 1165, 1192 (1991); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L Rev 103, 111 n 35 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L J 484, 510.

²⁹ See, for example, *Evans v State*, 188 Ga App 347, 373 SE2d 52 (1988) ("god damn liar"); *Davenport v State*, 184 Ga App 214, 361 SE2d 219 (1987) ("Get out of my mother-fucking way"); *Brooks v State*, 166 Ga App 704, 305 SE2d 436 (1983) ("dogs"); *Bolden v State*, 148 Ga App 315, 251 SE2d 165 (1978) ("son of a bitch" and "mother-fucking pig"); *Johnson v State*, 143 Ga App 826, 240 SE2d 207 (1977) ("bitch").

³⁰ See *FCC v Pacifica Foundation*, 438 US 726, 751 (1978).

ter's door at college from "Young Republican Meeting" to "Fascist Baby-Killer Meeting," just as we would punish those who write other obnoxious signs on the doors of others. In the alternative, we can follow the content-neutral principle that people should keep their hands off the doors and property of others altogether. Rigid application of the fighting-words doctrine would result in chilling vital speech and thus actually undermining the First Amendment principles it is supposed to support.

The second and fourth "half-truths" are more statements of empirical fact than of principle, and as such, I have fewer grounds to object to them. Certainly, when the object of contemplation is something as nebulous as "the system of free expression," I cannot get too excited if Professor Sunstein considers Murphy Brown³¹ a greater threat than the punishment of Nina Wu.³²

Similarly, the fourth "half-truth," that content-based restrictions are worse than content-neutral ones, seems to merit the response that "it all depends." I can certainly conceive of extremely harmful content-neutral restrictions. For example, rules that there should be no newspapers, or no television, or no speeches by law professors whose names begin with "S," are all content-neutral but would all be awful. I can also conceive of content-based restrictions that are not too harmful in their own immediate effect—for example, no articles on kidnapping by UFOs or no advocacy of the Thugee religion and its belief in salvation by the murder of others. But where does that pragmatic judgment get us?

I would be much more willing to say that ostensibly content-neutral restrictions should be looked at carefully to see if they contravene the First Amendment. Simply repealing the First Amendment would, in one sense, be content-neutral—it would leave all opinions equally at the mercy of any "adequate justifications" for which the legislature could legitimize restricting speech. However, the very purpose of the First Amendment's rigidity is to discourage, to the greatest extent possible, the search for "adequate justifications" that so intrigues Professor Sunstein.³³ That very starkness, which he decries as "rigid and mechanical,"³⁴ is in fact a

³¹ Sunstein, 1993 U Chi Legal F at 34 (cited in note 1).

³² Nina Wu was the student at the University of Connecticut who was ejected from her dorm for posting on her door a commercial "head shop" type poster that allegedly contained, in tiny type, among some 93 categories of favored and disfavored people, the words "Benneton bitches" and "Homos." She was later reinstated after the ACLU brought suit. See Nick Ravo, *Campus Slur Alters a Code Against Bias*, NY Times B1 (Dec 11, 1989).

³³ Sunstein, 1993 U Chi Legal F at 43 (cited in note 1).

³⁴ *Id.* at 42.

considered judgment that we do not want clever people to be permitted to search for justifications for suppressing speech. For if the standard implies that speech is only protected so long as no justification can be imagined under which speech can be suppressed, we can be sure that such justifications can be found. When the rule is that no law shall abridge freedom of speech, it is no answer to say that there are frequently, in the author's opinion, justifications for abridging speech. That is the inquiry that the First Amendment is intended to prevent, not because the First Amendment's authors did not grasp the subtleties and complexities of unabridged speech, but because they correctly believed that permitting legislators to consider abridging certain speech would be less compatible with the free society they hoped to create than clearly prohibiting the abridgement of free speech.

I want to turn now to the third half-truth and the question of subsidizing a diversity of opinions. It seems to me that Professor Sunstein tiptoes around this one, at times denying that "funding decisions affecting speech should be treated 'the same' as other sorts of government decisions that affect speech,"³⁵ but at other times analyzing the effects of "selective funding on the system of free expression, and of the legitimacy of the government justifications for selectivity."³⁶ While this argument is somewhat vague, it clearly contemplates that courts may scrutinize government speech, and apparently either ban that speech or compel subsidization of its opposite if the justification is inadequate. As a matter of coherent principle, this is simply nonsense. It may well be satisfying, as a matter of raw power, to say that a government that commissions a biography of President Johnson must also pay the author of "MacBird," a play that accuses Johnson of the Kennedy assassination.³⁷ But it is simply impossible to make any coherent judgment of what constitutes the diversity of opinion that must be subsidized.

There is no useful theory of the spacing or dimension of political opinion. At best, Professor Sunstein must view the political spectrum as exactly N inches long with N evenly spaced positions. But we know that is nonsense. Harry Kalven said the law is "analytically dense."³⁸ Any number of points can be put into every space and onto every spectrum line. Besides, we do not have a neat

³⁵ Id at 40.

³⁶ Id at 41.

³⁷ Barbara Garson, *MacBird* (Grassy Knoll Press, 1966).

³⁸ See Danny Boggs, *Comment on Donahue*, 54 L & Contemp Probs 223 (1991).

line, because the spectrum of opinion is a line of infinite length, not a line segment. We do not know where the line begins and where it ends. We do not know where we are on the line. To some, a specific current opinion is at one extreme of the line, while to others, it is near the opposite end. Many observers of the government's role in speaking decry its consistent leftward slant, referring to National Public Radio ("NPR") as National People's Radio and the Public Broadcasting System ("PBS") as the Proletarian Broadcasting System. Some commentators can produce studies showing, to their satisfaction, that there is an appalling lack of fair representation for the views of the right.³⁹ At the very same time, a group called FAIR (Fairness and Accuracy in Reporting) shows that public broadcasting leans to the right,⁴⁰ and listeners who write to NPR frequently chastise it for not being far enough to the left.

If that were not bad enough, we know that there exists not just one dimension but many dimensions along which we could measure diversity of opinion. Those measurements, moreover, do not even lie in the same plane, where there would have to be some point of intersection. Instead those lines are in three—or even more—dimensional spaces, and there need never be any communication or connection between them. In short, the enterprise is hopeless as a matter of principle and imaginable only as a matter of raw power: My court would force the subsidy of speech I like, and your court would try to do the same for speech you like.

In fact, however, the supposed problem of a paucity of voices to which the government has somehow contributed is a wild falsehood. Listen to Richard Reeves, a noted liberal writer, on his discovery on the radio dial:

There were 38 different stations broadcasting on the AM band of the car radio. . . . Revolution was being preached—political, social, and religious—quite openly. A convicted criminal was being interviewed—quite respectfully—about how he judged the performance of the current President of the United States. Men were speaking in . . . Portuguese. . . . A Protestant evangelist . . .

³⁹ See, for example, S. Robert Lichter, Stanley Rothman, and Linda S. Lichter, *The Media Elite* (Adler & Adler Publishers, 1986).

⁴⁰ See Walter Goodman, *Watchdog Group Criticizes 2 News Programs*, NY Times 1-40 (May 28, 1990); Notebook, 8 Communications Daily 10 (May 5, 1988) (article detailing FAIR's criticism of PBS); Susan Karlin, *Ad-hoc Bloc Knocks Pubcaster Practices*, Variety 25 (Nov 16, 1992).

who had been dead for three years, was on [a] tape that could play until eternity, vigorously attacking all recipients of government welfare. . . . Four stations were broadcasting nothing but news. . . . Five stations were broadcasting only religious programming. . . . An American in Newport during that day could choose among 79 radio stations—and eight television channels. Six newspapers printed that day were laid out in piles at Brooks Discount Drugstore. . . . There were 250 different magazines in dazzling display at Lalli's News on Broadway.⁴¹

Today, television viewers may choose not only from the three to four network television stations, but also from forty cable channels in the more impoverished cable areas to a hundred or more stations in the more amply supplied cable areas. The newsstands of even small convenience stores carry a hundred magazines, and virtually every city of any size has at least one store where perhaps a thousand magazines, from libertarian to proletarian, from bridge to boating, will be available to those who seek them.

The relative portion of this cacophony that is provided or subsidized or instigated by the government is quite small. It may be possible to imagine a society in which the government provides 80 or 90 percent of the speech, which might require the release of more resources that could be used for non-governmental speech, but our society is very far from that situation.

Choices by a group of wise judges hardly guarantee a result that any thoughtful person would accept as "diversity." Judges generally come from the same milieu as academics, and, as reported by one thoughtful observer of the First Amendment, "there's a much more narrow range of opinions [on a major college campus] than there is in the average bar."⁴²

So what would "Sunstein World," with its diversity of government-funded opinion enforced by courts, look like? In the first place, we should remember that by far the largest category of government-funded speech today is the public schools. Presumably, courts would be able to review every school and classroom to see if too much attention was being paid, for example, to algebra rather than to Afro-Centric arithmetic; to the virtues of the Founding Fa-

⁴¹ Richard Reeves, *American Journey: Traveling with Tocqueville in Search of Democracy in America* 20-22 (Simon and Schuster, 1982).

⁴² Nat Hentoff, *Forbidden Books at Connecticut College*, Wash Post A21 (Sept 26, 1992) (repeating comments by a college professor).

thers rather than to Sally Hemmings; to the Holocaust rather than to those who minimize or deny it; to Robert Reich rather than to Milton Friedman; or to classical physics rather than to Velikovsky. While these examples may seem far-fetched, they have each been a source of controversy with regard to the proper interpretation of truth; they are each the subject of voices dissenting from the preponderant orthodoxy; and they are each the subject of government-funded speech. Perhaps less hypothetically, because there has been litigation on the question, there has been great diversity of opinion regarding a school curriculum that contains forty-four stories about naturalistic or Native American religions but only three about Judaism or any version of Christianity, and none about Protestantism, the avowed religion of the plurality of Americans.⁴³ I do not believe that Professor Sunstein really urges that courts are competent to decide, or that they even have the tools to decide, the question of whether "the system of free expression" would be better served by some alteration of the school curriculum.

Apparently Madisonian, to Professor Sunstein,⁴⁴ means that we manipulate the First Amendment to reach results that are conducive to his version of an enlightened electorate. Professor Sunstein argues that this is based on the dual criteria of attention to public issues and diversity of views. But these ends can be served explicitly only by the type of viewpoint-sensitive consideration whose dangers, in his better moments, Professor Sunstein eloquently points out.⁴⁵ When the courts, no less than the legislature, operate without standards, they are prey to the temptation, nay, the necessity, to legislate in favor of ideas they like and against those they dislike. It is scarcely likely that many current judges are going to want to increase diversity by ordering the funding of more Nazi speech, more Thuggee research, or more astrological science. Yet those too are all sources of diversity.

The only operational way that I can conceive of such a system working with any principle would be to mandate that government speech be responsive to the citizenry individually, rather than by the majoritarian process that allows 51 percent of the people to

⁴³ See *Mozert v Hawkins County Bd of Education*, 827 F2d 1058, 1080-81 n 13 (6th Cir 1987) (Boggs concurring). See also Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 Harv L Rev 582 (1993).

⁴⁴ Sunstein, 1993 U Chi Legal F at 33 (cited in note 1).

⁴⁵ *Id.* at 26-27.

control 100 percent of government speech—in other words, a voucher or checkoff plan for government speech. But I would be hugely surprised if a public broadcasting station with time apportioned according to the proportion of people supporting each program and point of view would be any more to Professor Sunstein's liking than the current system.

In all of the discussion of possible government controls on expression, whether through the rubric of hate speech or other means of "viewpoint discrimination," one curious omission has troubled me. We as a society have very explicitly debated these issues for fifty to seventy-five years.⁴⁶ Most of the cases arose in the context of socialist, communist, or radical leftist ideas.⁴⁷ And in a series of principles that Professor Sunstein characterizes as half-truths, we have established a very firm basis of law (what Harry Kalven and Owen Fiss call the "Tradition").⁴⁸ It seems crystal clear to me that anyone who today wants to swing radically away from that tradition owes it to the audience to confront directly the contexts and specifics that led to that tradition. *Quod licet Jovi non licet bovi*⁴⁹ is not an acceptable principled basis for First Amendment analysis. Yet, it is almost unheard of for the many efforts at justifying the repression of speech on campuses and in society actually to address the cases of the past.

Free speech law did not arise full blown with the first racial controversy on a campus or the first dispute over the role of gays in society. Every argument made in favor of repression today is exactly mirrored by an argument for the suppression of radicals and communists made decades ago. The notion that there is something novel about speech being harmful today, that it is only now that First Amendment defenders "ignore" or "minimize" the effects of speech, is simply wrong. Those who want a different result today owe us an answer: would they want a different result in yesterday's cases as well? How much difference is there between the display of a Confederate flag, which has roiled campuses from Harvard to Alabama and which is specifically cited as a violation of

⁴⁶ Laurence H. Tribe, *American Constitutional Law* 841 (Foundation Press, 2d ed 1988).

⁴⁷ See *Schenck v United States*, 249 US 47 (1919); *Gitlow v New York*, 268 US 652 (1925); *Cohen v California*, 403 US 15 (1971).

⁴⁸ See Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405 (1986).

⁴⁹ *Proverbial*, compiled in Anthony Cree, *Cree's Dictionary of Latin Quotations* 180 (Newbury Books, 1978) ("What is lawful to Jupiter [or leftists] is not permitted to an ox [or rightists].").

the student code at some campuses,⁵⁰ and the display of a red or black flag of anarchy, which was banned in many states? A law banning the latter was struck down by the Supreme Court in *Whitney v California*,⁵¹ although it remained on the books in my home state of Kentucky as late as 1970.⁵² I think there is very little difference between the two.

I want to attack in particular the idea that there is something new about words being harmful, about ideas being dangerous, and about users of words being vicious. In the 1960s at the University of Chicago, as well as across the country, there were those who espoused a philosophy drenched in blood; a philosophy certainly a finalist, if not the grand champion, in this century for lives destroyed and graves filled; a philosophy that demeaned and denied the humanity of people both in the abstract and in the particular—the Marxist philosophy. Groups of what were called leftists or radicals, some philosophically based, some devoid of any coherent ideology or even thought, clearly and loudly hated everything that some of us believed. These groups hated us, our mothers and fathers, and the horse we rode in on. Some of us thought them cute or advanced thinkers—some gave them advanced degrees—but they appeared to many as the Strelnikovs⁵³ and Raskolnikovs⁵⁴ of the new day—as people who, if they believed what they said, would, at the first opportunity, loot and pillage, maim and kill. Many were simply muddled and had no connection between their brains, their tongues, and their hands. But a good number did exactly as I just said—as soon as they got the chance, they did pillage and kill—in riots, in bombings, in robberies.⁵⁵ And yet, their ideas, their speeches, their words of hate, were fully protected by the First Amendment and the university codes,⁵⁶ as I believed then, and I believe now, that they should have been.

⁵⁰ Sarah Kock and Adrian Walker, *Display of Confederate Flags, Swastika Stir Harvard Campus*, Boston Globe 29 (Mar 7, 1991).

⁵¹ 274 US 357 (1927).

⁵² Ky Rev Stat Ann 1 § 2.070, repealed by Acts 1974, ch 406 § 336 (Baldwin 1992) (effective Jan 1, 1975).

⁵³ The murderous revolutionary in *Doctor Zhivago*. Boris Pasternak, *Doctor Zhivago* 250 (Pantheon Books, 1958).

⁵⁴ The philosophical murderer in *Crime and Punishment*. Fyodor Dostoevsky, *Crime and Punishment* (Random House, 1956).

⁵⁵ See Clarence Page, *The Next Anti-War Movement*, Chicago Trib 3 (Dec 2, 1990); Jonathan Mandell, *The Other Side of the Mountain*, Newsday 34 (Mar 8, 1992); Kathy Sawyer, *Kathy Boudin's Capture Evokes Memories of the 'Days of Rage'*, Wash Post A14 (Oct 22, 1981); *Wilkerson Surrender*, UPI AM Cycle (Dec 18, 1980).

⁵⁶ Compare University of Chicago Student Bill of Rights 4 (1967) ("right of every student to exercise his full rights . . . to publish and/or disseminate his views . . . on or off

This example highlights the fundamental flaw in Professor Sunstein's article: the troubling notion that someone or some group gets to decide what words bring down the hammer of the state. To a person with a hammer, everyone looks like a nail. The bedrock of First Amendment law is that such a power is highly dangerous, that the line of illegality should be drawn brightly, and that it should be placed as far from the likely uses of discourse as possible.⁵⁷ Note that "fascist" is considered a fighting word that could be banned in *Chaplinsky*, yet the term was used as a direct political attack in the 1992 Senate race in New York.⁵⁸ My fighting words are too easily your legitimate comment, and vice versa. When matters of judgment on the weight of words are so widely disparate, as we have seen regarding media bias, negative campaigning,⁵⁹ and the tension between insensitivity and robust debate, we see that this is a highly dangerous and easily abused power and doctrine.

Only Professor Mari Matsuda, in the *Michigan Law Review*, has come out and given us a forthright and at least objectively discussible answer to this dilemma: It is permissible to suppress racist speech because no country believes in it—communist speech is allowed because a lot of countries do!⁶⁰ At least we can grapple with that—we cannot grapple with Professor Sunstein's slippery standard, other than by giving all power to the deans and censors. But beyond the silliness of deciding First Amendment cases by votes in the United Nations, what becomes of this argument as the number of communist countries slides toward zero?

Finally, there is another approach that adequately addresses the most vivid manifestations of the hate problem: firm and even-handed enforcement of the criminal law and neutral disciplinary principles. I raised that notion in a discussion with a prominent proponent of hate-speech codes. She gave the game away, I thought, when she said that she would not favor that approach because "we wouldn't want to stifle legitimate political activity." It

campus") with same, section B(d) (1989) (" . . . provided that the exercise of those rights neither constitutes personal abuse . . . nor exceeds the boundaries of appropriate discourse and civil conduct").

⁵⁷ *Doe v University of Michigan*, 721 F Supp at 864, citing *NAACP v Button*, 371 US 415, 433 (1963).

⁵⁸ Alessandra Stanley, *The 1992 Elections: New York State—U.S. Senate Race*, NY Times A1 (Nov 5, 1992).

⁵⁹ See Danny Boggs, *Comment on the Paper by Professor O'Neil*, 21 Cap U L Rev 593, 594-95 (1992).

⁶⁰ Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich L Rev 2320, 2358-60 (1989).

was pretty clear that she meant activity in her favor using the tactics of force and violence, though she did want to stifle activity on the other side, whether using such tactics or not!

CONCLUSION

I conclude that Professor Sunstein's allegations of semi-truthfulness are themselves not even half true. The worthy free speech tradition of Harry Kalven has served us well over the last thirty or more years. Certainly, it has served us better than the alternatives that Professor Sunstein suggests.

While unabridged speech brings evils in its wake, that realization is not new or startling. An attempt to excise only the evils that disturb the author, while allowing the evils that disturb others is not compatible with either a free political order or the Bill of Rights whose words are the best definition of Madisonianism. That is the standard to which lovers of Liberty can repair whole- (not half-) heartedly.