Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America

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I. INTRODUCTION: REACTION TO THE TRAGEDY

On September 11, 2001, the American vision of the world changed forever. As two jumbo jets sliced into the twin towers of the World Trade Center and another slammed into the Pentagon, Americans wept and were swept by fear. The president declared war and the country was, as it has been in the past, thrown into crisis. Prior external threats against the United States, dating back to the early days of our nation’s history, have previously pushed Americans to agree to limits on their constitutional freedoms in pursuit of a larger goal—internal security. But such limitations have always been granted grudgingly, with Americans mindful of the fact that the attacks from without must not defeat the freedoms within.

The very point of terrorism, the brand of warfare we face now as a nation, is to shatter our political will:

By killing and wounding people, damaging and destroying their homes and communities, disrupting their jobs and economic livelihoods and undermining their confidence and sense of security, an enemy can inflict pain to the point that the people demand a change in the government’s policies. Used at the right time and place... an attack could destroy the people’s faith in their government, in their military, and in themselves. It could be a decisive attack against the political will of an entire populace.1

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The tragic events of September 11 have quickly generated proposals for greater security measures and increased police powers that will, if implemented, constrict the scope of current free speech and expression. Americans—including well-known public figures—speaking publicly in newspapers, magazines, and on television have been severely rebuked and punished for voicing unpopular opinions. Within weeks of the terrorist attacks on the World Trade Center and the Pentagon:

- Dan Guthrie, a newspaper columnist at The Daily Courier in Grants Pass, Oregon, was fired from his job by the publisher after calling President Bush an “embarrassment” for “hiding in a Nebraska hole” instead of flying straight back to Washington, D.C., on September 11.

- Tom Guting, a newspaper columnist at The Texas City Sun, was fired from his job by the publisher after writing that President Bush was “flying around the country like a scared child, seeking refuge in his mother’s bed after having a nightmare.”

- Bill Maher, a comedian and the host of the network television show “Politically Incorrect,” faced the withdrawal of two major sponsors and the cancellation of the show by some ABC affiliates, including one in Washington, D.C., after he said on the air that: “We have been the cowards, lobbing cruise missiles from 2,000 miles away. That’s cowardly. Staying in the airplane when it hits the building, say what you want about it, it’s not cowardly.”

- Susan Sontag came under sharp attack for a short piece that she wrote in The New Yorker magazine that criticized the “self-righteous drivel and outright deceptions” being broadcast about the terrorist incident on U.S. television.

- University of Texas Professor Robert Jensen was the recipient of hostile e-mails and telephone calls, and was called a “fountain of undiluted foolishness” by University President Larry Faulkner, after authoring an editorial suggesting that the September 11 attacks were “no more despicable than the massive acts of terrorism” that have historically been committed by the United States.

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2 Bill Carter & Felicity Barringer, In Patriotic Time Dissent Is Muted, N.Y. TIMES, Sept. 28, 2001, at A1. Other retreatments in the area of civil liberties since September 11 include various groups dropping their opposition to measures like the 1993 Congressional Order to the Immigration and Naturalization Service to create a system for tracking 515,000 foreign students attending American institutions of higher learning. This system, scheduled to be in place by 2003, would give law enforcement officials electronic access to information about those students. See Diana Jean Schemo, Access to U.S. Courses Is Under Scrutiny in Aftermath of Attacks, N.Y. TIMES, Sept. 21, 2001, at B7; see also uniting and strengthening America by providing appropriate tools required to intercept and obstruct terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 416, 115 Stat. 272 (2001). Legal experts also say racial profiling may be authorized by courts much more frequently than before. See William Glaberson, Racial Profiling May Get Wider Approval by Courts, N.Y. TIMES, Sept. 21, 2001, at A16.

3 Note also that some columnists have been sanctioned for voicing popular opinions in an arguably extreme manner as well. For example, The National Review Online dropped the syndicated column of conservative Ann Coulter. After the terrorist attacks she wrote, “We should invade their countries, kill their leaders and convert them to Christianity.” Talk of the Nation: American Reception of Journalistic Dissent About the Administration’s Agenda for War on Terrorism (National Public Radio, Oct. 3, 2001), transcript available at 2001 WL 4190139.


7 Id.

8 Susan Sontag, The Talk of the Town, NEW YORKER, Sept. 24, 2001, at 32.

“With extraordinary speed,” both houses of Congress passed and the President signed legislation that made it easier for the government to obtain information about people suspected of having a link to terrorist activity or other crimes, raising Fourth Amendment privacy concerns.\(^\text{10}\) In addition, the legislation made aliens who donate to a group certified by the government as a terrorist organization subject to deportation, raising First Amendment questions and the specter of McCarthy-era laws criminalizing association with Communist organizations.\(^\text{11}\)

Signals of sympathy for speech suppression have come from the very top of the federal government. On September 20, 2001 during a formal press briefing, White House spokesman Ari Fleischer, referring to the controversy surrounding Bill Maher, said, “There are reminders to all Americans that they need to watch what they say, watch what they do, and this is not a time for remarks like that. There never is.”\(^\text{12}\)

In contrast, other prominent government figures and leading academics have expressed concern about the possibility of speech restriction. Just eight days after Fleischer’s comment, Justice Sandra Day O’Connor told a law school audience that “we’re likely to experience more restrictions on our personal freedom than has ever been the case in our country.”\(^\text{13}\)

Michael Walzer, a professor of social science at the Institute for Advanced Study at Princeton, has observed, “I think the burden of proof has shifted in a significant way. Before September 11, a police agency that wanted to expand its powers had to make its case. After September 11, if a police agency

\(^{10}\) See USA Patriot Act, supra note 2.
\(^{11}\) Jess Bravin, *House, Senate Move Closer on Counterterrorism Measures*, WALL ST. J., Oct. 15, 2001, at A26; see USA Patriot Act, supra note 2. Senator Russ Feingold expressed his concerns on the floor of the Senate as follows:

Another provision in the bill that deeply troubles me allows the detention and deportation of people engaging in innocent associational activity. It would allow for the detention and deportation of individuals who provide lawful assistance to groups that are not even designated by the Secretary of State as terrorist organizations, but instead have engaged in vaguely defined "terrorist activity" sometime in the past. To avoid deportation, the immigrant is required to prove a negative: that he or she did not know, and should not have known, that the assistance would further terrorist activity... This language creates a very real risk that truly innocent individuals could be deported for innocent associations with humanitarian or political groups that the government later chooses to regard as terrorist organizations. Groups that might fit this definition could include Operation Rescue, Greenpeace, and even the Northern Alliance fighting the Taliban in northern Afghanistan. So this provision really amounts to a "guilt by association," which I think violates the First Amendment. Speaking of the First Amendment, under this bill, a lawful permanent resident who makes a controversial speech that the Government deems to be supportive of terrorism might be barred from returning to his or her family after taking a trip abroad. Despite assurances from the administration at various points in this process that these provisions that implicate associational activity would be improved, there have been no changes in the bill on these points since it passed the Senate. 147 CONG. REC. S10990, S11022 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold).

Similar legislation making a person liable for contributing to an organization deemed by the president to be involved in terrorism, even if the donations were for a nonterrorist activity, was fast-tracked in the aftermath of the Oklahoma City bombing in 1995. See *Quick Passage Urged for Anti-Terrorism Bill: Civil Liberties Group Troubled by Proposals*, DALLAS MORN. NEWS, Apr. 21, 1995, at 32A. Ironically, several weeks before the Oklahoma City Bombing similar state legislation was also the subject of criticism by Mary Dixon, Legislative Director of the American Civil Liberties Union of Illinois. See Mary Dixon, "Anti-Terrorism" Bill Impacts Freedom of Expression, CHI. TRIB., Apr. 7, 1995, at 22 (criticizing Illinois House Bill 667 "quietly passed" by Illinois House lawmakers that Dixon said "would criminalize a proud Irish-American's contribution to Sinn Fein leader Gerry Adams' travel fund for his historic visit to America [and] contributions to now-South African President Nelson Mandela's African National Congress to further the fight against apartheid").

comes forward and says we need these additional powers to prevent another terrorist attack, the burden of proof is on those who want to say ‘No.’”14

This is not the first time in the history of the United States that pressure has built for the suppression of unpopular opinion. The John Adams Administration, responding to external threats to the young nation, suppressed speech by passing the Alien and Sedition Acts of 1798. During World War I, the government enacted the Espionage Act of 1917 and the Sedition Act of 1918.

Traditionally, federal constitutional law, most particularly the First Amendment to the U.S. Constitution, has set limits on the degree to which broad political support for expressive suppression translates into actual legal sanctioning of speech by the government.15 In these very anxious and stressful times, one might expect the law to again serve this important function. As Justice O’Connor recently observed, “[t]he problem of how to maintain a fair and a just society with a strong rule of law at a time when many are more concerned with safety and a measure of vengeance.”16

In order to fulfill this critical societal role, free speech jurisprudence must be clear, coherent, and strong. To be an effective bulwark against rapidly shifting popular sentiment, First Amendment doctrine must be well-developed and predictable enough to deter unacceptable state action long before any formal determination of its unconstitutionality can be made in a court of law.

Unfortunately, almost no scholar who has seriously examined First Amendment jurisprudence has ultimately concluded that it is currently characterized by clarity, coherence or predictability. One scholar after another, in one article after another, decries the unruly nature of free speech doctrine. In the words of Jed Rubenfeld, Slaughter Professor of Law at Yale Law School, “[t]here is a problem in the basic structure of current free speech law.”17

Ironically, when one evaluates the rationales that underlie our free speech jurisprudence in light of the events of September 11, it may be that more government intervention—not less—is required to preserve freedom of expression. This counterintuitive conclusion comes in part from the realization that much of the criticism and suppression of speech in the wake of September 11 has been a private reaction to popular opinion. The above examples illustrate the type of actions being taken to chill speech by publishers and network executives in response to their perception that the majority of Americans believe that speech critical of the U.S. government should be suppressed. This response on the part of the institutional media, rather than the state itself, has been the focus of the free speech debate in this country since September 11 and raises the question of whether a greater level of governmental intervention is required to protect speech in post-World Trade Center America.

II. AN EVOLVING EXPRESSIVE ENVIRONMENT

Other relatively recent developments also raise the issue of governmental intervention and the proper balance between free expression and protection from external threats. For example, the analysis has been

14 Tim Rutten et al., When the Ayes Have It, Is There Room for Naysayers? The U.S. Climate Is Chilly These Days for Those Who Practice Political Dissent, L.A. TIMES, Sept. 28, 2001, at E1.

15 See, e.g., Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 449-50 (1985) (arguing First Amendment protection should be strongest in times when “intolerance of unorthodox ideas” is prevalent).

16 Greenhouse, supra note 13.

17 Jed Rubenfeld, The First Amendment’s Purpose, 53 STAN. L. REV. 767, 767 (2001) (arguing that First Amendment law has become a vehicle for constitutionalizing legislative policy questions).
significantly complicated by the explosive growth of the Internet, the first technology capable of permitting truly mass distribution of material at an extremely low cost. The availability of Internet publication to the great majority of the population calls into question deep assumptions underlying many long-standing First Amendment doctrines and may shift the balance in terms of free speech and national security.\(^\text{18}\)

The emergence of the Internet allows people with very modest resources to create messages that can potentially be received around the entire globe. While people of relatively ordinary means still cannot compete in any serious sense with asset-wealthy publishers (in terms of the technical design and complexity of the Web page or, more importantly, in terms of advertising), there now exists for the very first time in our history a physical mechanism by which such persons can publish material to vast numbers of receivers without the mediating influence of a publisher.

The Internet played an important role both before and after the events of September 11. Law enforcement authorities suspect that terrorist organizations, including Osama bin Laden’s network, regularly employ a technique known as steganography to transmit hidden messages and graphics inside otherwise innocent and seemingly unconnected Web pages.\(^\text{19}\) Extremist political groups routinely use the Internet to advance their propaganda and recruiting efforts, and some of these Web sites have been the object of speech suppression after September 11.\(^\text{20}\) Some news media executives fear acts of so-called cyberterrorism.\(^\text{21}\)

In the wake of September 11, some businesses have looked to computer-based networks enabling employees to connect to the office from their homes through the Internet as an important contingency in the event of the disruption of air travel or mail service, or even the physical destruction of their regular facilities.\(^\text{22}\) This potential use of the Internet has created increased pressure on government officials since September 11 to more quickly facilitate the provision of high-speed Web access to a wider range of businesses and individuals.\(^\text{23}\)

\(^{18}\) Senator Russ Feingold stated:

> The anti-terrorism bill that we consider in the Senate today highlights the march of technology, and how that march cuts both for and against personal liberty. Justice Brandeis foresaw some of the future in a 1928 dissent, when he wrote: ‘The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home…Can it be that the Constitution affords no protection against such invasions of individual security?’


\(^{20}\) Azzam.com is a large jihad-related Internet site. Some of Azzam.com’s sites have been involuntarily terminated by the hosting company in response to complaints about its content. “At least one of Azzam’s sites was shut down by Texas-based CI Host following a request from the FBI, a company spokeswoman there said.” Stephanie Gruner & Gautam Naik, *Jihad on the World Wide Web: Muslim Extremists Find the Internet a Tool for Propaganda and Advice; Investigators into Sept. 11 Attacks Are Looking Closely at Online Activity*, WALL ST. J. EUR., Oct. 8, 2001, at 25. “Lycos Europe NV said a 20-person team is monitoring its Web sites for illegal activity and has been removing terrorist-related content.” *Id.*


\(^{23}\) *Id.*
Information from the Internet is being systematically collected by historians in an effort to document and archive the events of September 11 and its aftermath. The Library of Congress has recently unveiled a new Web site, http://september11.archive.org, that already contains more than 500,000 Web pages.\textsuperscript{24} Similar projects are being actively pursued by the Museum of the City of New York and the Smithsonian’s National Museum of American History.\textsuperscript{25}

Perhaps the most striking use of the Internet in the wake of September 11 was as a public forum for the dissemination of news and the expression of personal opinion. Nearly 99 million people went online in September of 2001,\textsuperscript{26} and, according to an analysis by Morgan Stanley, a record 36 percent of the U.S. population used the Internet during this period.\textsuperscript{27} According to Diane Kresh, the director of the Library of Congress’s public-service collections, “t]he Internet has become for many the public commons, a place where they can come together and talk.”\textsuperscript{28}

These examples illustrate that the Internet—a largely unregulated mechanism for speech—may well facilitate terrorism. Implementation of the plain meaning of the First Amendment would tend toward allowing such speech to flourish.\textsuperscript{29} This observation gives rise to the question of what the parameters of the First Amendment should be in the context of a post-September 11 environment as we balance two values Americans cherish: free speech and national security. What are the underlying rationales that should be considered in giving constitutional context to the words of the First Amendment?

### III. THE PRACTICAL IMPOSSIBILITY OF A SIMPLE SOLUTION

Clearly we, as a society, are not willing to give to the words of the First Amendment their obvious and plain meaning.\textsuperscript{30} We are unwilling to collectively say that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”\textsuperscript{31} One reason for such reluctance is our unwillingness to accept the political consequences of taking the language literally. A slightly fancier way of saying the same thing is that a literalist interpretation of the First Amendment has never been judicially embraced because it is thought to generate unacceptable societal consequences.\textsuperscript{32}


\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Surveys Find Record Number of People Rushed to Internet After Sept. 11 Attacks}, \textit{Nat’l Post}, Oct. 16, 2001, at A07.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{Internet Playing a Key Role in Sept. 11 Archival Efforts}, \textit{Hous. Chron.}, Oct. 16, 2001


\textsuperscript{30} See \textit{Dennis E. Everette et al., Justice Hugo Black and the First Amendment} 27 (1978) (noting that Justice Black was never able to get a majority of the Court to subscribe to his literalist interpretation of the First Amendment).

\textsuperscript{31} U.S. Const. amend. I; see \textit{Everette, supra} note 30.

\textsuperscript{32} See generally \textit{Joseph J. Hemmer, Jr., The Supreme Court and the First Amendment} (1986) (discussing various methods of interpretation and noting the infeasibility of granting absolute freedom of speech).
For example, a plain meaning reading of the First Amendment would require the courts to strike down as unconstitutional laws penalizing perjury, the bribery of government officials, and the passing of sensitive military secrets to foreign governments during times of war.33 Similarly, it would be highly questionable whether we could establish coercive civil remedies to enforce bargains; our current legal system attaches significant legal consequences to those who renege on statements such as "I accept your offer," or "I will take care of this piece of property of yours for a while," or "I do."

So it appears that we just cannot live with a simple, straightforward interpretation of the language of the First Amendment. Why then do we not amend it so that it says what we really mean? One explanation is that our society is composed of more than 250 million people with pluralistic values. In such a society the required legislative action—approval by 2/3 of the federal House and Senate and then passage by 3/4 of the state legislatures34—is more or less politically impossible.35 This has proven true for even seemingly uncontroversial proposed amendments.36

Another problem with moving by the amendment procedure to make the actual language of the Constitution conform to an agreed-upon meaning is that a First Amendment designed on such a basis might quickly look like the Internal Revenue Code. Our current understanding of constitutional free speech protection, even if confined to only those areas in which we have general agreement, is complex, subtle, and often heavily textured, and therefore is not susceptible to clear or easy codification.37

Thus we are left, unavoidably, with an enigmatic and highly symbolic text with which to work in the area of free speech jurisprudence. We are not willing to give the very few words that are actually in the Constitution their clear and plain meaning and we are not capable, politically or practically, of amending the language to say what we mean, assuming that could be determined. Instead, the First Amendment stands as a verbal monument, a kind of civic prayer, expressing what we believe to be our almost unique formal embrace of individual self-expression as a societal value. We use the sparse language of the First Amendment to symbolize our desire that freedom of individual expression be given more value than it historically has in the usual mix of factors that determine government action and systems of societal regulation.38

Once a literalist, or absolutist, interpretation of the First Amendment is deemed unacceptable, then the specifics of First Amendment doctrine must inevitably be based on a jurisprudence that, on an almost case-by-case basis, balances the societal cost of the behavior that the state action is seeking to deter against the societal benefits associated with free expression.39 While such a balancing is a very typical feature of common law jurisprudence, it usually only comes to the fore in exceptional circumstances—when a problem of statutory interpretation arises, when accepted black-letter doctrine is challenged, or when unusual factual circumstances are presented. In First Amendment jurisprudence such a policy-based balancing of costs and benefits constitutes the very essence, the substantive core, of the legal doctrine.

33 See Van Alstyne, supra note 29.
34 See id.
36 See Adam H. Kurland, Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation, 60 GEO. WASH. L. REV. 475, 505 n.38 (1992) ("Even under the best of circumstances, it is exceedingly difficult to amend the Constitution.").
37 TANNAHILL & BEDICHEK, supra note 35, at 50.
39 HEMMER, supra note 32, at 8-9 (discussing differences between balancing and absolutist views of the First Amendment).
Thus, in a very real sense, the only substance possessed by the First Amendment is the asserted societal benefit of unfettered individual expression. In other words, the only practical consequence of the First Amendment, jurisprudentially, is that it requires courts to consider the acceptability of challenged state action that may deter or suppress speech by balancing the likely societal benefits of such state action, against the cost of that action to the societal benefits generated by expansive freedom of individual expression.

Given this situation, identification and analysis of the basic societal benefits of free speech reside at the very heart of First Amendment jurisprudence. And inevitably, it will be by reference to these basic free speech rationales that the parameters of our society’s legal regulation and control of speech in the post-September 11 world will be based.

IV. THE UNUSUAL NATURE OF FREE SPEECH RATIONALES

Another important reason to maintain a tight focus on the asserted benefits of a societal commitment to free speech is that such a commitment is very rare in the history of human communities. From a societal point of view, the idea of allowing individual members of that society to express themselves freely has almost always seemed much more disruptive than productive. Certainly no working rule such as “sure, say whatever you please” operates in most families, workplaces, or among competitive teams, the military, or circles of friends beyond the age of adolescence. Formal religions, historically powerful mechanisms for the regulation of human behavior, embrace the concept of blasphemy, in one form or another, and the consequent suppression of undesired individual expression.

In fact, as one thinks more about the idea of embracing unfettered individual expression as an important ideal, the more odd and problematic it appears from a purely societal perspective. It is very difficult to identify very many communities of humans who have decided, as a practical matter, to seriously adopt such a group value. Why not punish perjury? Why not punish the passing of state secrets to hostile foreign governments? Why not punish the denigration of another’s reputation? Why not punish disruptive criticism of the government and dangerous political ideas?

Moreover, as the various rationales for a societal free speech value are examined, they reveal themselves to be, perhaps appropriate to their mission, an unruly and uncoordinated bunch. Some rationales are strong in handling certain free speech issues while being weak and almost irrelevant with respect to others. More than a few of the rationales do not co-exist harmoniously with some of the others. Frequently, the specific legal doctrine suggested by one rationale will be significantly different from the rule prescribed by another, or by all of the others.

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42 Tedford, supra note 40, at 5-12, 121-28 (discussing the Church’s historical exemption from punishment for speech, the Roman Catholic Church’s suppression of heretical opinions, and the punishment of blasphemy after the American Revolution).
43 Smolla, supra note 41, at 4.
Given this difficulty, and its profound importance to the rational development of First Amendment jurisprudence, a clear-eyed, modern examination of the rationales for free speech becomes all the more important.

A. SELF-FULFILLMENT

Perhaps the most straightforward of the various rationales offered to support a societal free speech value is commonly known as the liberty theory, or the individual self-fulfillment rationale.\textsuperscript{45} This argument for a societal embrace of free speech begins with the belief stated in the Declaration of Independence that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.”\textsuperscript{46} It then follows, with the assertion that most people experience happiness in an environment in which they are most free to express themselves; that freedom of individual expression is an important component of a happy, fulfilled life. Thus, the argument concludes, if one of the fundamental goals of government, or society, is the creation of circumstances in which citizens are most able to pursue their individual self-fulfillment, then maximization of individual free speech should be an important goal of government.

One piece of obvious evidence for this is the degree and relative ease with which people self-censor their expression all the time, usually in pursuit of a more highly valued personal goal rather than in fearful response to possible legal sanctions. Certainly non-legal norms of acceptable personal behavior and etiquette apply every bit as much, and perhaps more, to social speech as to other forms of human activity. Would a community of individuals who depend so heavily upon unfettered expression for their happiness voluntarily enter into social arrangements that so clearly restrict that very freedom?

A second interesting feature of this rationale is the degree to which it fails to meaningfully distinguish speech from a number of other human activities that arguably contribute far more to individual satisfaction.\textsuperscript{47} Remember, one important task of the rationale is to explain why speech and expression are activities that should be given special federal constitutional protection by means of the First Amendment.\textsuperscript{48} If one’s answer to that question is because speech is critical to individual self-fulfillment, then it is hard to explain the absence of corresponding constitutional amendments protecting the freedom to eat and to drink, or to sleep, or to have access to decent clothing, decent shelter, and decent health care.\textsuperscript{49} Certainly these are all elements of human existence that contribute as much, or more, to basic individual satisfaction and happiness than does the opportunity to freely express oneself. Interestingly, these are also all human activities to which far fewer voluntary social constraints have been attached than to speech.\textsuperscript{50} If activities and opportunities other than speech are every bit as important, or more, to individual self-fulfillment, then how can one understand and interpret a special constitutional protection for speech alone on the basis of its role in the achievement of individual self-fulfillment?


\textsuperscript{46} \textit{The Declaration of Independence} para. 2 (U.S. 1776).


\textsuperscript{49} See generally Schauer, supra note 47.

\textsuperscript{50} See Thomas I. Emerson, \textit{The Systems of Free Expression} 6 (1970).
B. MARKETPLACE OF IDEAS

A second rationale for a societal commitment to individual freedom of expression is generally known as the marketplace of ideas rationale. More influential than the individual liberty rationale, the marketplace of ideas focuses on potential benefits to the whole of society rather than on asserted benefits to individuals in the society. Under this rationale, a legally protected freedom of expression creates a social climate in which accepted ideas and conventional orthodoxy can be vigorously challenged, and this constant competitive interplay of ideas moves society more quickly toward a truthful understanding of the world.

The marketplace of ideas notion is clearly consistent with a society enjoying the profound benefits of a scientific revolution. In the realm of natural sciences, the classic scientific method requires that hypotheses withstand severe challenges from both newly acquired evidence and alternative ways of explaining the existing evidence. Certainly, if current thinking is fossilized by means of a speech-suppressive regime, then progress toward greater understanding and more powerful technology is severely compromised. As Supreme Court Justice Oliver Wendell Holmes wrote in dissent more than eighty years ago:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

There are clear contrasts in the interests valued and promoted by the marketplace of ideas rationale and those embraced by the individual self-fulfillment rationale. The individual self-fulfillment rationale would support an expansive freedom of expression so long as some individuals were benefiting, even if it were clear that the result was detrimental to society as a whole. Conversely, the marketplace of ideas rationale would support a very vigorous freedom of expression so long as society advances, even if the conditions that created that advancement were acutely unpleasant to many of the individuals who live in that society.

Neither of these possibilities is farfetched. Human organizations designed primarily to achieve a critical task—armies for instance—have not historically included broad freedom of expression among their behavioral norms. Thus it is fair to presume that a society that embraces such freedom in an expansive

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52 See generally ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941) (discussing the various rationales for free speech and their application during various periods of the twentieth century).


way will pay a price in terms of its ability to effectively achieve some societal goals. On the other hand, while it may well be the case that an aggressive and combative communicative environment is most effective, and efficient, in terms of producing greater advancement in societal knowledge and technology, it is unlikely that such an environment would be a pleasant one in which to live.\textsuperscript{58} For example, we believe that our combative adversarial system of dispute resolution is most effective for discerning the truth of a matter and deciding between competing claims.\textsuperscript{59} However, no one seriously suggests that active, ongoing litigation is an attractive, or self-fulfilling, environment in which to exist, at least not as a party to the action.\textsuperscript{60}

In the immediate aftermath of September 11, Americans first wanted to know the facts of the event, and then they wanted to digest the tragedy, to understand the consequences, to grieve for the loss, to accommodate themselves to the necessary changes in their way of life, and to express their sadness and anger. Very few Americans were emotionally prepared to entertain ideas that were sympathetic to, or supportive of, the larger political convictions and goals of those thought to be responsible.\textsuperscript{61} Almost no one was willing to hear a serious and sober analysis of the views of the global role of the United States held by Al Qaeda or the Taliban. In the aftermath of September 11, the operation of an aggressive marketplace of ideas would most likely have been excruciating, if not intolerable, for most Americans. Individuals wanted a society that provided them comfort, support, and reassurance, not a vigorous questioning of their most deeply held beliefs.

Chip Heath, a psychologist on the faculty of the Stanford Graduate School of Business, has conducted empirical research questioning the ability of humans to create and live in a rational, dispassionate marketplace of ideas in which objective truth prevails.\textsuperscript{62} Heath has said, "[p]eople do care about the truth of an idea, but they also want to tell stories that produce strong emotion, and that second tendency sometimes gets in the way of the first."\textsuperscript{63} Speech is a social activity, an overt behavior engaged in by humans, and as such its display, as well as its reception, is heavily influenced by the emotional content that it carries.

The marketplace of ideas rationale possesses some interesting features as a generator of First Amendment doctrine. One is its far greater ability to handle legal issues involving statements that carry some capacity for being either true or false as compared to expressions that do not, by their own terms, attempt to make a factual claim.\textsuperscript{64} This limitation is important because a fair amount of expression that some segments of society may wish to suppress falls into the latter category.\textsuperscript{65} For instance, art, as a

\textsuperscript{61} See text accompanying notes 4-9.
\textsuperscript{63} Id.
\textsuperscript{64} See Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 DUKE L.J. 1, 25 (1984); see also Thomas I. Emerson, Colonial Intentions and Current Realities of the First Amendment, 125 U. PA. L. REV. 737, 741 (1977) (arguing the market is skewed towards the entrenched power structures and ideologies).
\textsuperscript{65} See GREENAWALT, supra note 44, at 21, 44 (arguing that acceptance of free speech is easier in the context of the discussion of scientific discoveries and that protection should be expanded to more subjective, value-based claims that are equally important in a society that encourages private and public discourse).
representative of the entire range of human expression, does not always even purport to be true or false. A First Amendment understood to exist primarily to support a marketplace of ideas is simply not a powerful tool with which to confront and resolve free speech problems of this nature.

Secondly, some expressive communities are better-suited in practice to the behavioral model implicitly assumed by the marketplace of ideas theory. That is, some communities of speakers and their audience operate in such a way that greater amounts of speech and communication in expression typically do result in the production of greater truth.\textsuperscript{66} For example, the community of Ph.D. physicists in this country probably conforms its speech conduct quite closely to the marketplace of ideas model.\textsuperscript{67} On the other hand, unfettered freedom and vigorous competition most likely does not promote greater truth and accuracy among the expressive community composed of supermarket tabloids, or Jerry Springer-like television talk shows. Some marketplaces of ideas simply do not reward truth and accuracy as much as others do.

If this rather simple empirical observation is accurate, then a First Amendment interpreted through a marketplace of ideas rationale would inevitably generate different levels of constitutional speech protection to different expressive communities and to different speakers. The logic of such a development is nearly inescapable. However, a free speech jurisprudence that protected the free speech of some members of society to a fundamentally different degree than others would run afoul of long-cherished constitutional notions of equal protection.\textsuperscript{68}

When we speak in ordinary language about the “freedom of speech,” we usually speak of a negative freedom of speech, an absence of coercive government constraints on our expressive activity.\textsuperscript{69} Thus much recent First Amendment jurisprudence consists of judicial restrictions on the ability of the government to suppress or punish speech.\textsuperscript{70}

The concept of positive freedom, however, provides a potentially different angle on this issue. If the First Amendment exists in order to sustain a marketplace of ideas in this country that will generate important societal benefits, why should it necessarily be true that the marketplace will most effectively generate those benefits in the relative absence of government regulation or control? The presence of strong federal and state antitrust law indicates our belief that commercial markets do not necessarily work

\textsuperscript{66} See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996) (discussing the manner in which scientific breakthroughs occur and noting that increased communication and speech generally make breakthroughs more frequent and more successful).

\textsuperscript{67} See GREENAWALT, supra note 44, at 21 (highlighting the scientific community’s agreement that freedom of expression leads to a greater understanding of the physical sciences).


best when left completely alone. If the metaphor of a marketplace of ideas is to be taken seriously, then perhaps the government should be allowed, or constitutionally required, to regulate the market in a way that discourages abuses, breaks up monopolies and oligopolies, and permits the widest possible diversity of voices and perspectives to compete fairly with one another. The third important rationale for free speech, self-governance, lends support to this argument.

C. SELF-GOVERNANCE

Like the self-fulfillment rationale, the self-governance rationale is rooted in the Declaration of Independence, which states, "[g]overnments are instituted among Men, deriving their just powers from the consent of the governed." If the legitimate authority of the government comes only from the consent of the governed, then it is important, in order for the government to possess legitimate authority, for those granting their consent to be reasonably well informed. A mere adherence to the formalities of granting consent in the absence of information about the functioning of the government and the society in which it operates would fail as a mechanism for conferring genuine authority on the government. Thus, our basic scheme of a democratic republic, as set forth in the Declaration of Independence and the Constitution, more or less requires a constitutional mechanism for freedom of speech and expression in order to create an environment in which citizens have the opportunity to grant to the government their informed consent.

One striking feature of this self-governance rationale is that it would, logically, only extend First Amendment protection to speech that can reasonably be said to contribute to the civic education of citizens—so-called "political speech." In this respect, the self-governance rationale is analogous to the marketplace of ideas rationale in that it extends constitutional protection only to certain special kinds of speech, and is limited in handling issues regarding important kinds of expression (art for example, including obscenity) that fall outside of these parameters.

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71 See Baker, supra note 48, at 965-66 (citing the failure of laissez-faire economics to achieve socially desirable results and drawing the analogy to the marketplace of ideas' similar failure to achieve optimal levels of free expression).

72 See id.; see also Garvey & Schauer, supra note 58, at 58 (addressing the idea that the marketplace of ideas might be subject to the same "market distortions based on wealth, class, power, race and gender" present in the economic marketplace); Greenawalt, supra note 44, at 19 (citing the inclination of people to believe an idea that is dominant socially, regardless of its merit).

73 The Declaration of Independence para. 2 (U.S. 1776).

74 See Thomas I. Emerson, Toward a General Theory of the First Amendment 10 (1966) (arguing that free speech is indispensable to a democratic form of government); see generally Alexander Meiklejohn, Political Freedom (1948) (documenting a series of lectures by the author on the importance of the American people's understanding of the First Amendment in preventing illegitimate government suppression of speech).

75 See IX The Writings of James Madison 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.").

76 See id.; see also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (citing Mills v. Alabama, 384 U.S. 214 (1966)) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

77 See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 88-89 (1948) (arguing that self-government is the most important rationale for free speech).

D. FOURTH ESTATE

The fourth estate is a relatively modern rationale for free speech that is primarily an extension of the self-governance rationale. This rationale holds that, as a practical matter, citizens do not have the time or resources necessary to inform themselves adequately about the actions of their government or the changes in the world around them. Therefore, there must be a group within society whose primary professional purpose is the gathering, organizing, and broad distribution of information about these actions and events. In our society, this group is, of course, the institutional media, sometimes referred to as the “fourth estate.” What is the source of their formal authority to operate in a quasi-constitutional role and to enjoy special constitutional protections on that basis?

More than the usual tribute to the societal importance of the press, this fourth estate rationale involves a serious claim that the institutional press performs a necessary constitutional function in our society and thus must enjoy a kind of special constitutional status. A First Amendment jurisprudence developed along these lines would, inevitably, confer a special constitutional protection to the speech of the institutional press, one not enjoyed by other speakers in society. Some areas of constitutional defamation law, most notably the holding in Philadelphia Newspapers v. Hepps, and the existence of state reporters’ privilege laws, already display this characteristic.

One serious problem with the fourth estate rationale is its granting of formal constitutional status to an institution that lacks any formal political authority. Members of the three recognized branches of government are all politically accountable in some form. Members of the fourth estate, in contrast, are neither directly elected by the people nor appointed by directly elected members of the government. They are simply private citizens employed by large corporations who frequently remain present and active on the political scene long after elected officials have come and gone.

The question then arises: if the institutional media is not directly elected or appointed, to whom, if anyone, do they answer for their actions? One possible answer is that they are held to answer to the people

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81 The Supreme Court has noted that the press performs this function. See Austin, 494 U.S. at 667-68.
83 See Garvey & Schauer, supra note 58.
84 See Austin, 494 U.S. at 668 (upholding the exemption of the media from limitations on expenditures incurred producing news stories, reasoning that ensuring the statute does not hinder or prevent the institutional press from reporting on and publishing newsworthy events is a compelling state interest).
87 See U.S. Const. art. I, § 2, cl. 1 (providing for election procedures for U.S. House of Representatives); U.S. Const. art. I, § 3, amended by U.S. Const. amend. XVII, § 1 (providing for election procedures for U.S. Senate); U.S. Const. art. II, § 1, cl. 2 (providing election procedures for the President and Vice President); U.S. Const. amend. XII § 2 (modifying election procedures for the President and Vice President); U.S. Const. art. III, § 1 (providing that judges be appointed by the political branches, who derive their power from the people).
through the commercial marketplace; media entities not perceived by the public as adequately fulfilling their social role will lose out to entities doing a better job.\textsuperscript{88} This response, however, depends upon an implicit notion of a mass media marketplace that rewards diligence in pursuit of the fourth estate function. A quick review of the top twenty-five Nielsen rated television programs or a glance at the list of highest circulation magazines in this country throws strong doubt upon such a model.

E. SAFETY-VALVE

The final rationale, sometimes referred to as the safety-valve function of the First Amendment, has historically been the least influential in the development of First Amendment jurisprudence of the rationales discussed here. It has nonetheless been mentioned more than once by courts and commentators.\textsuperscript{89} The theory is that free and open expression has a profoundly cathartic effect, diverting and releasing energies that would otherwise be repressed and potentially lead toward serious social unrest.\textsuperscript{90} From this perspective, the First Amendment is socially valuable because it makes the population more placid and manageable, and more easily governable.\textsuperscript{91}

The traditional view of the safety-valve function of the First Amendment is that it minimizes the risk of rebellion by the populace. However, in the post-September 11 environment, there may be another important safety-valve rationale for free speech. Some might argue that allowing citizens to express their anger and grief may act to release such emotions and may in fact minimize the rise of ethnic violence against those in society who are of the same ethnic origins as the terrorists who flew planes into the World Trade Center, the Pentagon and a Pennsylvania field. On the other hand, others might argue that such angry speech should be suppressed as hate speech because it will incite citizens to commit acts of violence against members of those ethnic groups associated with the terrorists. The two sides of this argument illustrate well the debate about hate speech codes that we have seen on university campuses in the last decade. The next section addresses how various First Amendment rationales may be used in a post-September 11 environment to grapple with the question of how much government regulation of speech is appropriate.

V. THE POST-SEPTEMBER 11 ENVIRONMENT AND ITS IMPLICATIONS

As noted above, a number of journalists and commentators have been condemned or sanctioned in some respect for being critical of the government after September 11.\textsuperscript{92} It is interesting that these incidents


\textsuperscript{89} See Emerson, supra note 74.

\textsuperscript{90} See Smolla, supra note 41, at 13; see also Emerson, supra note 74, at 12.

\textsuperscript{91} Justice Brandeis alludes to such a proposition in his concurring opinion in Whitney v. California:

Those who won our independence... recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also Richmond Newspapers v. Virginia, 448 U.S. 555, 571, 571-72 (1980) (noting that, by protecting the right of the people to observe and learn of criminal proceedings, the First Amendment can strengthen the people's faith in the government).

\textsuperscript{92} See supra notes 3-12 and accompanying text.
have been discussed in the media within the context of speech suppression and the First Amendment.\(^\text{93}\) Strictly speaking, examining the firing of the columnists in Oregon and Texas, the public criticism of freelance author Susan Sontag, or the reluctance of network executives to renew Bill Maher’s television show within this context is analytically incorrect. The First Amendment protections of speech are meant to apply to situations where the government has limited a citizen’s right to speak. It is not concerned, as a conceptual matter, with situations where private actors take or threaten action that might chill or limit speech. There must be state action for the First Amendment protections to be applied through the Fifth or the Fourteenth Amendment to protect the citizen whose speech has been curtailed.\(^\text{94}\)

In the cases of Dan Guthrie, the newspaper columnist fired from The Daily Courier in Oregon and Tom Gutting, the columnist fired from The Texas Sun,\(^\text{95}\) the publishers were private actors taking action that sanctioned speech. In the case of Bill Maher, host of a public affairs television show, these private actors were network executives whom Maher believes not to carry his show after his contract expires next year.\(^\text{96}\) While publishers and network executives are clearly an integral part of the institutional media in this country, their judgments and decisions do not constitute state action.

If one adopts the view that the predominant value of free expression in society is to further the marketplace of ideas,\(^\text{97}\) then one would not expect any real free expression concerns with speakers like the two columnists and Maher being punished for their unpopular opinions. In fact, the free market would actually be working as expected, especially if there is no governmental action that limits their speech. If private citizens are reacting to private speech, a view of free speech grounded in a marketplace of ideas rationale would be completely consistent with this type of citizen reaction. So the question arises, why has there been such concern expressed\(^\text{98}\) about free expression when unpopular speech is penalized by private actors and not by the state itself?

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\(^{93}\) See, e.g., Larry Atkins, Media Attacked for Doing Their Job, BALT. SUN, Nov. 6, 2001, at 15A (where author is a lawyer and member of the First Amendment Committee of the American Society of Journalists and Authors and cites the firing and censoring of newspaper columnists and cartoonists as a risk to a free press in the context of the First Amendment. He never raises the fact that there is no state action in these situations and thus the First Amendment technically does not apply.).

\(^{94}\) The incident of a public university professor being implicitly threatened with sanction by his administration noted above moves closer to state action. See supra note 9 (discussing case of University of Texas professor Robert Jensen). There have also been incidents of speech suppression arguably involving state action aimed in the opposite direction, at those who were implicitly critical of the terrorists themselves rather than the United States government. For example, the University Senate at Berkeley threatened to raise the rent on the student paper, the Daily Californian because they objected to an anti-terrorist cartoon that the paper published. The City of Berkeley ordered firefighters not to display the American flag—a move it later rescinded—because some felt people were being “manipulated into support of war.” See Debra J. Saunders, Courage is the Last Casualty, S.F. CHRON., Oct 16, 2001, at A17.

\(^{95}\) See supra notes 4-5 and accompanying text.

\(^{96}\) See Don Kaplan, Maher Expects to Be Axed, N.Y. POST, Nov. 8, 2001, at 82.

\(^{97}\) See supra text accompanying notes 51-72 for a discussion of the marketplace of ideas rationale for First Amendment protection of speech.

\(^{98}\) See Atkins, supra note 93; Editorial, Don’t Sacrifice the First Amendment to War, STAN. DAILY, Oct. 18, 2001, available at http://daily.stanford.edu/daily/servlet/Story?id=6572&section=Opinions&date=10-18-2001 [hereinafter Don’t Sacrifice]; but see Saunders, supra note 94. There have also been a number of television and radio shows on the topic of the danger to speech, including ABC’s Nightline and National Public Radio’s Talk of the Nation with Neal Conan. See, e.g., Nightline Profile: Watch What They Say as America Fights Back (ABC News television broadcast, Oct. 3, 2001), transcripts available at 2001 WL 21773013; Talk of the Nation Analysis: American Reception of Journalistic Dissent About the Administration’s Agenda for War on Terrorism (National Public Radio broadcast Oct. 3, 2001), transcripts available at 2001 WL 4190139.
One answer might be that those who are expressing such concerns are implicitly adopting a fourth estate rationale as the predominant measure of the value of expression in society.\(^{99}\) While such concern is not consistent if the primary rationale for free expression is a marketplace of ideas, it makes much more sense from a fourth estate perspective. Since Dan Guthrie, Tom Guttig, and Bill Maher are members of the institutional media, or "fourth estate," under that rationale as outlined above they should enjoy favored or elevated speaker status. The gravamen of this rationale is that citizens do not have the time or the resources necessary to inform themselves adequately as to the actions of government or many of the changes in the world around them. The logical consequence of this is that the institutional press fulfills that role and performs a necessary constitutional function in our society and thus must enjoy, as a result, a kind of special constitutional status.\(^{100}\) From this point of view, one can more clearly demonstrate an expressive loss when these speakers are removed from their positions and no longer hold the position of columnist or television talk-show host.

This observation also reveals an inherent tension or irony in the interplay between the fourth estate and both the marketplace of ideas and self-governance rationales.\(^{101}\) One of the curious features of the fourth estate rationale is the fact that while it supports the granting of a special status to the institutional media in the free speech paradigm, these speakers have not been elected or chosen in any way by the citizenry. The view that their special status is justified by their quasi-constitutional role in our democracy is arguably balanced by the fact that they do in some way answer to the people through the commercial marketplace. Media entities not perceived by the public as adequately fulfilling their social role will lose out to entities more pleasing to the public.

The two columnists at issue and Bill Maher were chosen by purely private actors, newspaper publishers and network executives, not by any democratic process. It is therefore somewhat odd when people wring their hands from a First Amendment perspective about special status speakers being relieved of this privilege by the private actions of publishers and network executives. It is especially puzzling because these individuals only held their special speaker status because it was granted to them by these very publishers and network in the first place.

Perhaps what is really going on is not a concern that these particular people have lost their positions but that such private action is a bellwether of governmental action. When White House Press Secretary Ari Fleischer states that "people have to watch what they say and watch what they do" while denouncing Bill Maher, there is an argument that the government has begun to impinge on speech in an informal, but powerful way.\(^{102}\) When the White House asks the networks "to use discretion when airing statements by Osama bin Laden ... argue[ing] that the tapes are propaganda that could be used to send coded messages"; the public may well be concerned.\(^{103}\) Some commentators have noted that "the Bush Administration is wielding its influence within media circles, a practice which undermines the fundamental principles of a free and independent press."\(^{104}\) This would at first seem to raise a concern since the institutional media in this country is a heavily regulated industry. The newspaper publishers who fired Dan Guthrie and Tom Guttig and the ABC network executives who may fail to renew Bill Maher’s contract might not be simply

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\(^{99}\) See supra text accompanying notes 79-88 for a discussion of the fourth estate rationale for free expression.

\(^{100}\) Justice Potter Stewart wrote: "The primary purpose of the constitutional guarantee of a free press was ... to create a fourth institution outside the Government as an additional check on the three official branches." Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 634 (1975).

\(^{101}\) See supra text accompanying notes 73-78 for a discussion of the self-governance rationale for free expression.

\(^{102}\) See Don't Sacrifice, supra note 98.

\(^{103}\) Saunders, supra note 94.

\(^{104}\) Don’t Sacrifice, supra note 98.
responding to angry private citizens and their perception of the larger public’s reaction to unpopular speech. It may be that they are responding to a subtle form of government influence.

On the other hand, one might argue that the private publishers’ and network executives’ strong reaction to popular opinion against unpopular speech is an important indicator of the inability of the marketplace of ideas and its most expressive communities to sufficiently protect unpopular viewpoints without some governmental regulation or collective intervention. A First Amendment jurisprudence animated by a robust marketplace of ideas might actually require governmental intervention to preserve that diversity of ideas. The institutional media, commercial by nature, may be over-responsive to the popularity of speech and may not give sufficient exposure to unpopular opinions absent such governmental intervention to protect those ideas. There may be an irresolvable tension between the need for external regulation to ensure First Amendment goals and the fact that we are inherently suspect about the government’s intervention in speech issues because of the risk that it will be tempted to drive speech in a direction favorable to its interests.

One might frame the issue as follows: Why is an absence of legal regulation more likely to result in an institutional media that effectively fulfills its fourth estate function than a scheme of positive regulation? The idea that the commercial marketplace will act as an important discipline on an institutional press given special status in the free expression scheme is flawed. First, it assumes a vibrant and competitive commercial media environment, which does not exist. The modern media is much more like an oligopoly in structure. Second, it assumes that the citizenry will pressure the media to be more informative when it comes to governmental activities. In fact, popular opinion in the wake of September 11 has shown that the majority may demand that speech critical of the government should in fact be suppressed by the institutional media.

When we talk about a constitutionally guaranteed freedom of speech and of the press, we typically are talking about a freedom from legal regulation, an absence of coercive control. However, the institutional media may most effectively fulfill its function as a fourth estate only when affirmatively prodded and encouraged to do so. This contention gains support if one accepts the claim that the commercial marketplace rewards style and entertainment value over substance and seriousness of purpose. If the media in its natural state is not a responsible, serious and dependable watchdog of government, then adherence to a fourth estate rationale for a constitutional protection for free speech would likely lead to a mandate for more rather than less legal regulation of media activities.

Such governmental intervention must be carefully balanced not only because of its effects on private speech, but because we must also be concerned that the government’s speech itself is truthful and open. In the wake of September 11 there have been a number of developments that should lead us to be concerned about this alternative aspect of the First Amendment. For example, the Web site of OMB Watch, an organization that monitors the White House Office of Management and Budget (OMB), has a list of government agencies who are restricting the public’s access to information by, for example, taking pre-existing information off their Web sites or taking down their sites completely. Such actions are presumably justified by national security concerns but the movement to restrict access to governmental information must always be carefully monitored.

105 See OMB Watch, Access to Government Information Post September 11th, http://www.ombwatch.org/info/2001/article/article view/213/1/ (last visited March 12, 2002) (describing examples such as the U.S. Geological Survey removing a number of its reports on water resources, the International Nuclear Safety Center removing interactive maps showing the location of nuclear power plants from its site, the NASA Glenn Research Center limiting Web access to the public, and the site for the National Transportation of Radioactive Materials at U.S. Department of Energy being completely removed. The site also describes a memorandum from Attorney General John Ashcroft urging federal agencies to exercise greater caution in disclosing information requested under the Freedom of Information Act (FOIA) as well as a statement from the Internal Revenue Service detailing new restrictions on access to the Freedom of Information Reading Room.).
VI. CONCLUSION

As the various rationales for a societal free speech value are examined, they reveal themselves to be, as discussed above, an unruly and uncoordinated bunch. The rationales do not co-exist harmoniously in many situations. But taken together, they represent a resilient theoretical framework that our courts have used for more than 200 years to balance the country’s need for internal security with a healthy democracy’s need to protect personal expression.

Our nation has been confronted with this balance since its inception. There have been other times, including World War I with the Espionage Act of 1917 and the Sedition Act of 1918, when the government felt compelled to limit this most important freedom. Given this history of governmental efforts to limit speech in times of war and the movement to restrict liberties in the aftermath of September 11, we urge the American public and Congress to bear in mind the underlying rationales for the First Amendment and to proceed cautiously in balancing America’s security with its fundamental freedoms. As one commentator observed in the aftermath of September 11: “Benjamin Franklin’s warning of long ago resonates hauntingly: ‘They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.’”

\[\textsuperscript{106}\] See supra notes 3-12 and accompanying text citing events in the wake of the September 11 attacks which indicated a trend toward limiting speech. The anti-terrorism bill passed by Congress and signed by President Bush in the wake of the attacks “casts such a broad net that it will allow for the detention and deportation of people engaging in innocent associational activity and Constitutionally protected speech, and permit the indefinite detention of immigrants and non-citizens who are not terrorists.” The American Immigration Lawyers Association, Anti-Terrorism Legislation Passed New Law Sparks Civil Liberties Concerns, at http://www.aila.org/newsroom/43me1026.html. See also Guillermo Contreras, Questions Raised about Immigrants’ Rights, ALBUQUERQUE J., Nov. 4, 2001, at A3 (“In practical terms, any legal permanent resident that participates in protest activities or even speech that’s oppositional to the U.S. government could find themselves a target of this new law.”)(quoting Peter Simonson, executive director of the ACLU of New Mexico). Judy Golub, senior director of advocacy for the American Immigration Lawyers Association said ‘people who unknowingly donate money to a humanitarian organization linked to a terrorist cell could be snagged. They (investigators) will say you might have known, but really, you might not have,’ Golub said.”

\[\textsuperscript{107}\] Susan Goering, Anti-Terrorism Act Imperils Liberties, BALT. SUN, Oct. 30, 2001, at 15A.