

HECKLER'S VETO CASE LAW AS A RESOURCE FOR DEMOCRATIC DISCOURSE

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I. INTRODUCTION

Almost forty years ago, Jerome Barron proposed a listener-centered First Amendment right.¹ He argued that the central concern of the First Amendment should be with the listeners—that difficult questions of competing First Amendment rights should be resolved with the goal of increasing the viewpoints to which listeners are exposed.² While that approach remains an important part of the existing Supreme Court jurisprudence with respect to First Amendment analysis of broadcasting, the Court rejected its application to newspapers, and has not expanded the approach beyond broadcasting.³ Many legal scholars and policy-makers nonetheless remain concerned about the current law as it applies to the mass media, raising concerns that it grants too much power to the owners of media, and pays insufficient attention to the public, to the listeners and viewers that media serves.⁴

While a listener-oriented First Amendment interest is one way to promote more democratic discourse in media regulation, unfortunately, advocates have not successfully persuaded the courts to adopt this approach. Another alternative to improve democratic discourse would be to look to theories in existing case law that could be extended to media regulation, rather than creating a new First Amendment interest. An opportunity to do this arises from existing case law regarding a “heckler’s veto.” Heckler’s veto cases typically consider the appropriate behavior of local law enforcement when a crowd or individual threatens hostile action in response to a demonstration or speaker.⁵ In these cases, the First Amendment grants a positive right to the speaker: the local government must take action to protect the speaker against a hostile

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1. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967).

2. *Id.* at 1678.

3. See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986).

4. See *id.* at 1418.

5. See *id.* at 1416-17.

crowd.⁶ The courts do not allow local law enforcement to accede to a heckler's veto.⁷

The possibility that the legal tradition surrounding a heckler's veto might be applicable in this area was raised—but rejected—by Professor Owen Fiss in his 1986 article *Free Speech and Social Structure*.⁸ In his article, he rejected the heckler's veto approach as insufficient when compared with a listener's right to receive information.⁹ Although Professor Fiss is correct that a First Amendment interpretation focused on listeners would be more likely to produce enhanced democratic discourse, the failure of the Court to adopt such a test, or to even profess interest in it, means that other legal theories must be considered. In contrast to Fiss' and Barron's approach, the current validity of the heckler's veto cases is unquestioned.

As described in detail below, heckler's veto cases are helpful because they illustrate the fundamental conflict between two members of the public with competing speech goals and the role of the state in promoting the dissemination of messages. Heckler's veto cases justify compelling (and prohibiting) state action to promote the First Amendment goal of disseminating unpopular views. Heckler's veto cases recognize that it is important for conflicting speakers to have access to the same audience or crowd. Heckler's veto cases do not permit the state to hide behind the unpleasant reaction of some portions of the public in order to silence a speaker.

All these elements are missing from present mass media jurisprudence. Currently, the government has no obligation to act to promote speech. Except in rare cases, speakers do not have a right to access the same audience as an electronic speaker with whom they disagree.¹⁰ And media outlets are free to reject advertising on the grounds that the public will have an adverse reaction. The values underlying heckler's veto cases would render a dramatic change in mass media First Amendment jurisprudence.

On the other hand, it may not be easy to draw a simple and direct parallel between heckler's veto cases and the mass media context. Most importantly, all heckler's veto cases occur on publicly owned land and thus draw on public forum analysis. The private ownership of a speaking location has long been problematic for First Amendment analysis when

6. *See id.* at 1417.

7. *Id.*

8. *Id.* at 1416-18.

9. *Id.* at 1417.

10. *See* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 18 (1993).

the government is not the entity interfering with speech.¹¹ Also limiting is the focus in this line of cases on avoiding violence. The heckler's veto cases are an outgrowth of the fighting words doctrine, which creates a narrow exception to the First Amendment for words that are so vile as to "incite an immediate breach of the peace."¹² Outside of the small exception for fighting words, the heckler's veto doctrine holds.¹³ Thus, the obligation of the state to protect a speaker is engendered by the state's police power to prevent and regulate violence. Violence is never an issue in modern mass media cases; thus it may be more difficult to demand action by the government.

Given these aspects, there are two possible uses for the heckler's veto concept. First, it could be used as a tool to critique the failure of broadcasters to air controversial advertisements, and to possibly allow direct responses to controversial advertisements. While this is a more limited use than a broad-scale revision of our interpretation of the First Amendment, it could be extremely useful. As in the landmark case *Reno v. ACLU*,¹⁴ the concept of a heckler's veto can be persuasive because the idea is so firmly entrenched in legal thinking, even if a full legal analogy does not hold.¹⁵

Second, advocates might be able to circumvent the state action problem by attributing the whole communications regulatory and ownership structure to state action, rather than viewing state action narrowly as only when the state acts to directly suppress speech. Such an approach is advocated by Cass Sunstein.¹⁶ While this approach is theoretically sound and very appealing, it does suffer from some of the flaws of Barron's approach—which is that currently it is unlikely to be adopted by the courts.

II. HECKLER'S VETO CASE LAW

The relevance of heckler's veto case law lies in its strong commitment to fulfilling the First Amendment's ultimate goal of allowing viewpoints to be expressed, even when violence is in the

11. Since the Supreme Court concluded in *Arkansas Educational Television Commission v. Forbes* that a candidate debate sponsored by a state-owned public broadcaster is not a public forum, the application of the public forum doctrine to broadcasting is limited. 523 U.S. 666, 669 (1998).

12. See *Cohen v. California*, 402 U.S. 15 (1971); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); see also Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259 (1979) (tracing the connection between the fighting words doctrine and the heckler's veto doctrine).

13. See *supra* note 12 and accompanying text.

14. 521 U.S. 844 (1997).

15. See *infra* notes 55-56 and accompanying text.

16. See SUNSTEIN, *supra* note 10, at 36-38.

offing. As the cases below demonstrate, in heckler's veto cases the courts have required the state to ensure dissemination of clashing and unpopular views.¹⁷ Heckler's veto cases do not permit the state to hide behind the unpleasant reaction of some portions of the public in order to silence a speaker. Heckler's veto cases also recognize that it is important for competing speakers to have access to the same audience or crowd.

The heckler's veto doctrine grew out of the seminal doctrine of "clear and present danger." The credit for originating the concept of an impermissible "heckler's veto" is given to Justice Black in his dissent in *Feiner v. New York*,¹⁸ although the First Amendment scholar H.K. Kalven gave this doctrine its catchy name.¹⁹

Feiner v. New York contains all the elements of every classic heckler's veto case. In 1949 in Syracuse, New York, Mr. Irving Feiner was speaking to a crowd of black and white people.²⁰ Mr. Feiner was allegedly encouraging the African-Americans in the crowd to take up arms against whites to secure their civil rights and was hurling insults at a wide range of public figures, including the President and the mayor of Syracuse.²¹ The police determined that a fight was about to break out among the members of the crowd. Consequently, they asked Mr. Feiner to stop speaking and to ask the crowd to disperse.²² When he refused, the police arrested him.²³ He was convicted of breaching the peace and failing to obey a police officer.²⁴

As in many First Amendment cases, the original First Amendment speaker did not prevail. The Supreme Court upheld Feiner's conviction under the clear and present danger doctrine because, in the trial court's view, "a clear danger of disorder was threatened."²⁵ The lower court also concluded that there was no evidence "that the acts of the police were a cover for suppression of petitioner's views and opinions."²⁶ Over time, however, this case has been limited to the grounds found by the majority, that the speaker was indeed inciting the crowd to riot and inadequate means were available to keep the peace,²⁷ although the

17. See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 4-6 (1949).

18. 340 U.S. 315, 326-29 (1951) (Black, J., dissenting); see also Fiss, *supra* note 3, at 1416-17.

19. See Fiss, *supra* note 3, at 1416.

20. *Feiner*, 340 U.S. at 316.

21. *Id.* at 317.

22. *Id.* at 317-18.

23. *Id.* at 318.

24. *Id.* at 318-20.

25. *Id.* at 319.

26. *Id.*

27. See, e.g., *Glasson v. City of Louisville*, 518 F.2d 899, 905 & n.3 (6th Cir. 1975) (holding that the plaintiff's right to express her views was entitled to constitutional protection, since unlike

minority disputed vehemently that characterization of the facts, and as a consequence would not have upheld *Feiner's* conviction.²⁸

Decisions upholding the state's obligation to protect controversial speakers fully embrace the goal of developing a rich marketplace of ideas. In *Terminiello v. City of Chicago*, a case that precedes *Feiner* but is quoted by many heckler's veto cases, Justice Douglas spoke for the majority in striking down an overly broad interpretation of a breach of the peace statute.²⁹ In that case, a speaker who incited great public response was convicted of creating a breach of the peace.³⁰ The law was interpreted to prohibit any action that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."³¹ Justice Douglas explained that "a *function* of free speech under our system of government is to invite dispute."³² "The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."³³ "[T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."³⁴

Similarly, in *Forsyth County v. Nationalist Movement*, the Supreme Court held that "[l]isteners' reaction to speech is not a content-neutral basis for regulation."³⁵ The Court explained that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."³⁶ In this case, the county had adopted an ordinance allowing an administrative official to set the fee for a parade or protest based on the likely cost of policing that event.³⁷ The Court found this would necessarily be regulating speech based on content.³⁸

the speech at issue in *Feiner*, the expression did not go beyond mere persuasion).

28. *Feiner*, 340 U.S. at 321-23 (Black, J., dissenting). All of the dissenting justices, including Douglas, agreed that the decision would allow "a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise . . . to the supervision and censorship of the local police." *Id.* at 323.

29. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

30. *Id.* at 2-3.

31. *Id.* at 3 (quoting the lower court's jury instructions).

32. *Id.* at 4 (emphasis added).

33. *Id.*

34. *Id.* at 4-5.

35. 505 U.S. 123, 134 (1992).

36. *Id.* at 134-35 (citation omitted).

37. *Id.* at 124.

38. *Id.* at 137; *see also id.* at 140-42 (Rehnquist, C.J., dissenting) (mentioning heckler's veto).

Even more on point are district court cases involving equitable relief, because those cases require that the city take action to promote free speech.³⁹ For example, *Dunlap v. City of Chicago* addressed an ongoing controversy over a pro-Martin Luther King, Jr. march that often faced a violent response every year that it was held.⁴⁰ The district court judge granted an injunction not only requiring the city to grant the protesters a right to march, but also ordered the city to “provide police in such numbers as in their professional judgment are required to afford adequate protection to plaintiffs.”⁴¹ After the march occurred, but with significant violence despite the court’s order granting police protection, the district court concluded that the plaintiff marchers were allowed to bring a Section 1983 claim against the police officers for failure to provide adequate protection.⁴²

A similar example is *Glasson v. City of Louisville*, in which a protestor observing President Nixon’s motorcade route held up a sign asking the President to “[l]ead us to hate and kill poverty, disease and ignorance, not each other.”⁴³ A police officer had earlier in the day been instructed to “destroy any sign or poster that was ‘detrimental’ or ‘injurious’ to the President. . . .”⁴⁴ The judge noted that this protestor was making her views known “in a manner often used by persons who do not have access to the print or broadcast media.”⁴⁵ “A police officer has the duty not to ratify and effectuate a heckler’s veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights.”⁴⁶ In this case, despite the presence of twenty-five to thirty hecklers, the court found that seven to twelve police officers could have called for reinforcements and that the destruction of the poster was not done in good faith.⁴⁷ The action of the police “exhibit[ed] shocking disregard of her right to have her person and property protected by the state from violence at the hands of persons in disagreement with

39. *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1301 (N.D. Ill. 1977); *Cottonreader v. Johnson*, 252 F. Supp. 492, 497 (M.D. Ala. 1966) (“[S]uppression by public officials or police of the rights of free speech and assembly cannot be made an easy substitute for the performance of their duty to maintain order by taking such steps as may be reasonably necessary and feasible to protect peaceable, orderly speakers, marchers or demonstrators in the exercise of their rights against violent or disorderly retaliation or attack at the hands of those who may disagree and object.”).

40. *Dunlap*, 435 F. Supp. at 1296-97.

41. *Id.* at 1297.

42. *Id.* at 1298.

43. *Glasson v. City of Louisville*, 518 F.2d 899, 901 (6th Cir. 1975).

44. *Id.*

45. *Id.* at 905.

46. *Id.* at 906.

47. *Id.* at 902.

her ideas.”⁴⁸

In case after case, Courts of Appeals and the Supreme Court emphasize that the role of the state is to promote speech despite hostile circumstances.⁴⁹ Although these cases forcefully protect speech, they do not hold that the state's obligation to promote speech is boundless. In all the cases, the courts take pains to make clear that the duty to protect a speaker faced with a hostile mob will fail once the situation becomes truly dangerous. “[T]he law does not expect or require them to defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury.”⁵⁰

The cases described above hold that the state has a serious, but not boundless, obligation to protect and promote unpopular speech in the traditional heckler's veto case. However, perhaps more powerful is the concept of a heckler's veto in the mind of many jurists. For example, an extremely helpful use of the term heckler's veto occurs in the Supreme Court's opinion in *Reno v. ACLU*, the case in which the Supreme Court definitively granted full First Amendment protection to the Internet.⁵¹ In this case, the Court used an analogy with a heckler's veto, without requiring that the case before it include all the elements of a classic heckler's veto case. In this case, the Court considered and rejected a number of the government's arguments in support of the Communications Decency Act (“CDA”).⁵² One portion of the CDA outlawed transmission of proscribed content if the sender had knowledge that a “specific person” was under 18 years of age.⁵³ The Court found this portion of the statute unacceptable, in part because “[i]t would confer broad powers of censorship, in the form of a ‘heckler's veto,’ upon any opponent of indecent speech who might simply log on [to a chat room or other Internet forum] and inform the would-be discourses that his 17-year-old child—a ‘specific person . . . under 18 years of age,’

48. *Id.* at 911.

49. *See, e.g.,* *Ovadal v. City of Madison*, 416 F.3d 531, 537 (7th Cir. 2005) (“[D]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.” (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993))); *Smith v. Ross*, 482 F.2d 33, 37 (6th Cir. 1973) (“[S]tate officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights.”); *see also* *Grider v. Abramson*, 994 F. Supp. 840, 845-46 (W.D. Ky. 1998) (“The police were not at liberty to do nothing; authorities had to develop some way of allowing the rallies to proceed . . .”).

50. *Glasson*, 518 F.2d at 909.

51. 521 U.S. 844 (1997).

52. *Id.* at 864-68.

53. *See* 47 U.S.C. § 223 (1996), *invalidated by* *Reno v. ACLU*, 521 U.S. 844 (1997).

would be present.”⁵⁴

This use of the concept of a heckler’s veto in this case shows the power of the idea in the mass media context. In this case, the Court did not require any specific state action to see an analogy with a heckler’s veto. Instead, the Court found that by merely enacting a law proscribing certain types of private conduct, Congress could empower a private party to stop constitutionally-protected speech.

III. APPLICATION OF HECKLER’S VETO TO CONTROVERSIAL SPEECH

In contrast to other areas of First Amendment law, the Supreme Court has permitted the federal government to take action to ensure that all speakers are heard on the broadcast spectrum.⁵⁵ Despite this proactive role for the government to protect First Amendment rights in broadcasting, the current state of affairs for broadcasting is nonetheless inadequate to promote a truly dynamic marketplace of ideas. Most important, there is no obligation on the part of the government to protect the digital “heckler.” There is no obligation that a controversial speaker be allowed to speak on the broadcast spectrum. At most, the government is permitted to take action to promote speech, but is not obligated to do so. The analogy in a heckler’s veto case would be a situation where police officers were *permitted* to protect a controversial speaker, but were not obligated to do so. As illustrated above, this is clearly not the law.⁵⁶

In contrast, a critical element of the heckler’s veto is the obligation of the state not to allow public opposition to shut down a speaker. But today broadcasters frequently act in exactly this manner—they refuse to sell advertising time to a member of the public because of the controversial nature of the advertisement. While broadcasters are not permitted to deny political candidates advertising time because the advertisement is controversial, no other speaker has received such

54. *Reno*, 521 U.S. at 880 (internal citation omitted).

55. *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396-401 (1968).

56. *See* *Gregory v. City of Chicago*, 394 U.S. 111, 111-12 (1968); *Glasson v. City of Louisville*, 518 F.2d 899, 905-06, 907-10 (6th Cir. 1975); *Dunlap v. City of Chicago*, 435 F. Supp. 1295, 1298, 1301 (N.D. Ill. 1977). The great flaw of many attempts to reform FCC policy is their necessary reliance on the FCC’s power to regulate. But if political winds change, and the FCC concludes that a particular policy promoting the diversity of voices is no longer appropriate, nothing in current jurisprudence can stop the FCC from making such a decision. *See* *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656, 667, 669 (D.C. Cir. 1989); *Syracuse Peace Council*, 2 F.C.C.R. 5047-48 (1987); *see also* Cheryl Leanza & Harold Feld, *How Can Government Constitutionally Compel Mass Media to Provide News, and How Can Citizens Make It Happen?*, in *NEWS INCORPORATED* 185, 185-212 (Elliot D. Cohen ed., 2005) (promoting a law that would obligate the FCC’s action in these cases).

protection from Congress and the courts. A classic example of the refusal to sell advertising time was the inability of the United Church of Christ (“UCC”) to buy time to air its message in 2004.⁵⁷ The UCC is a mainline Protestant denomination with over 1.3 million members nationwide that was engaged in a national identity campaign to draw individuals to its congregations.⁵⁸

In its campaign, UCC sought to spread a message of “extravagant welcome” to a wide array of members of the public—specifically demographic segments that might traditionally be considered unwelcome in church. To this end, UCC developed an allegorical advertisement called “Night Club.” In Night Club, two muscular, black-clad bouncers guard velvet ropes at the doors of a church, admitting more socially acceptable worshippers but turning away worshippers from more marginalized groups.⁵⁹ The screen goes black, and then the text conveys a simple message about the UCC: “Jesus didn’t turn people away. Neither do we.”⁶⁰ Music begins, the screen turns to shots of a happy, unified, diverse group, and an unseen speaker announces: “The United Church of Christ—no matter who you are, or where you are on life’s journey, you are welcome here.”⁶¹

UCC sought to buy advertising time on several broadcast networks, as opposed to buying from each local affiliate, as it is far more cost-effective to buy network time. NBC refused to air the advertisement on its network, claiming it was “too controversial.”⁶² CBS refused for a slightly different reason, claiming the advertisement addressed “one side of a current controversial issue of public importance . . . this commercial touches on the exclusion of gay couples and other minority groups.”⁶³

Thus, in this case, the networks were able to shut down speech specifically because it was controversial. The result of this decision-making, enabled by the current regulatory structure of broadcast regulation, was to ensure that some viewpoints will not be disseminated in this country. And this instance is but one application of typical broadcaster policies prohibiting ads on controversial topics. Viewed in

57. See *In re* NBC Telemundo License Co., Petition to Deny Renewal (petition date Dec. 9, 2004) (file no. BRCT – 20041001ABM) at 1, 5-7; *In re* CBS Television Stations, Inc., Petition to Deny Renewal (petition date Dec. 9, 2004) (file no. BRCT – 20041001AJQ) at 4-7.

58. *In re* CBS Stations, Inc., Petition to Deny Renewal (petition date Dec. 9, 2004) (file no. BRCT – 20041001AJQ) at 2.

59. Advertisement: Bouncers, <http://www.stillspeaking.com/media> (follow “Download The Ads” hyperlink; then follow “Bouncers” hyperlink under “View Television Commercials”).

60. *Id.*

61. *Id.*

62. See *In re* NBC Telemundo License Co., *supra* note 57, at Attachment A, Exhibit 1.

63. *Id.* at Attachment A, Exhibit 2.

the context of heckler's veto cases, where only the threat of violence can shut down controversial—even vile—speech, broadcasting law seems out of touch with First Amendment precepts. It is difficult to reconcile a decision to refuse advertisement *because* it is controversial with the words in *Terminiello*: “[A] function of free speech under our system of government is to invite dispute.”⁶⁴

While it would be appropriate to prohibit a broadcaster from refusing to air speech because it is controversial, this does not imply that broadcasters must accept all advertising. For example, such a prohibition would continue to recognize that broadcasters have an appropriate role in evaluating advertising for taste, and to channel some advertisements to appropriate time slots accordingly.⁶⁵ Rationales grounded on inappropriate terms and graphics would certainly be appropriate for advertising. But rationales grounded in the discomfort of the audience because of the *ideas* the advertising contains should not be permitted.

As the cases regarding heckler's vetoes hold, “hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker's message so long as the speaker does not go beyond mere persuasion and advocacy of ideas and attempts to incite to riot.”⁶⁶

In addition to heckler's veto cases centering on the value of controversial speech, in some instances, these cases show the importance of allowing two competing views to be presented at the same time to the same audience. Drawing on these cases could provide a counterpoint to those who argue that media diversity need not be pursued because of the significant number of outlets available in the modern mass media. These cases contain an inherent recognition that presentation of multiple points of view *at the same time and place* are in furtherance of the First Amendment.

For example, in *Grider v. Abramson*,⁶⁷ the Klu Klux Klan and a “Unity Rally” were scheduled at the same time and general location in downtown Louisville. The court clearly recognized that the opportunity to speak in the same vicinity was a core portion of the First Amendment right being protected. The court praised the city for making an extensive effort to allow the two competing protests to occur at the same time.⁶⁸ The court concluded that “[c]hanging the time or place of either rally

64. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

65. *Cf. Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996) (upholding a political candidate's right to broadcast graphic material that did not rise to the level of indecency at any time of day because candidates receive special protection under Sections 312(a)(7) and 315(a) of the Communications Act).

66. *Glasson v. City of Louisville*, 518 F.2d 899, 905 (6th Cir. 1975).

67. 994 F. Supp. 840 (W.D. Ky. 1998).

68. *Id.* at 845.

would have reduced the threat of violence but also would have been more restrictive and inconsistent with the goal of fostering public debate. . . . [A] debate is more vigorous when the opponent is within range”⁶⁹ Part of the complaint against the city took issue with the city’s decision to separate the two protests with fencing and buffer zones. Rather than criticize the separation, the court based its evaluation of the city’s behavior on its effectiveness in promoting debate: “[T]he separation would probably encourage the debate, rather than inhibit it [because the separation would quell violence].”⁷⁰

Interestingly, this court carefully considered a related claim—whether speakers not associated with either rally should be permitted to speak. The court concluded: “Plaintiffs had no constitutional right to talk over or shout down the rally speakers. Allowing individuals to drown out the message of lawful speakers would diminish, rather than affirm, the right of free speech.”⁷¹ This subtlety draws a contrast between private citizens stopping others from speaking and private citizens who choose to respond to one another. Speakers who obtain a permit and organize a rally can respond to another rally, while speakers who simply want to drown out others are not permitted. But under this well-reasoned ruling, neither a private actor nor a city may eliminate speech because it is controversial. The beauty of the court’s analysis in *Grider* is that the opinion focused on increasing the amount of thoughtful debate at each turn.

This right of direct response is recognized in at least one area of FCC rules. Under these rules, political candidates are given “equal opportunities.”⁷² If one candidate in a particular election receives advertising time, competing candidates are guaranteed the right to also obtain time.⁷³ In these circumstances, broadcasters are obligated to give political candidates access to a similar audience demographic.⁷⁴ They are not allowed to relegate the response to “broadcasting Siberia.”⁷⁵

In heckler’s veto cases, controversy is recognized as the defining characteristic of speech that must be protected. The ability to debate directly with one’s opponent is often enshrined as the most important element under consideration. In current mass media law, in contrast, controversy is an acceptable reason to silence a speaker. And large

69. *Id.*

70. *Id.*

71. *Id.* at 848.

72. 47 C.F.R. § 73.1941 (2006).

73. *Id.*

74. See 47 C.F.R. § 73.1941(e) (2006).

75. *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

corporations that own broadcast networks with the power to prohibit certain ideas from reaching the public are given as much protection under the First Amendment as small pamphleteers on the village green in the 1700s. The analysis of the First Amendment in modern mass media law cannot be reconciled with the robust public debate enshrined in *heckler's veto* cases.

IV. STATE ACTION PROBLEM

Exploration of this matter raises the question of private action rather than state action in First Amendment debates. The First Amendment prohibits only government intervention with free speech.⁷⁶ In *heckler's veto* cases, speech is occurring on public ground. In the mass media, in contrast, the law considers speech on broadcast frequencies or cable channels to be occurring on private property.⁷⁷

In his book, *Democracy and the Problem of Free Speech*, Cass Sunstein proposes a constitutional theory of the First Amendment which he calls a "New Deal" for speech, which can help resolve the state action problem.⁷⁸ He bases his theory on the change in constitutional understanding that occurred during the New Deal era.⁷⁹ Sunstein explains that in the 1930s, the Constitution was "understood as a constraint on government 'regulation,' just as it is now with respect to free speech."⁸⁰ At the time, the Supreme Court believed that the government must be "neutral" as between employers and employees. Under this theory, it would invalidate minimum wage laws, for example.⁸¹

However, as Sunstein points out, this conclusion hinged upon an understanding that the existing power distributions were somehow sacrosanct.⁸² The New Deal reformers persuaded the Supreme Court that, in Franklin Roosevelt's words, "'economic laws are not made by nature. They are made by human beings.'"⁸³ In other words, the distribution of power via the commercial market is not natural and deserving of protection from the government. Instead, it is a *direct*

76. See U.S. CONST. amend. I.

77. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). This conclusion is ironic given the broadcast spectrum is clearly owned by the United States government, not the individual FCC licensees.

78. See SUNSTEIN, *supra* note 10, at 34-38.

79. See *id.* at 34.

80. *Id.* at 29.

81. *Id.*

82. *Id.*

83. *Id.* at 30 (citation omitted).

product of the government through the enforcement of existing laws. Property rights and tort law gave employers certain rights *vis-a-vis* employees. So-called government “intervention” eventually was understood, not as intervention, but as a recalibration of a government-produced system of rights.⁸⁴ Ironically, exactly this contrast was noted by Jerome Barron himself in his article forty years ago.⁸⁵

Thus, under *Lochner*, the government was able to enact minimum wage laws and the change was not understood to be the government taking away power that employers were naturally entitled to, but instead was understood as the government recalibrating the rights it previously granted to employers. If the government is the source of employers’ power in the first place, its reallocation of power cannot be considered an impermissible tampering. The government, in this account, is part of the initial power allocation.

The analogy to free speech in this country is clear. The freedom and power currently granted to newspapers, broadcasters, cable companies and other speakers is a direct result of the government’s allocation of rights through FCC and Congressional decision-making and through Supreme Court jurisprudence. It is not a sacrosanct right that may never be violated. Instead, the government would merely be recalibrating power among one set of speakers—who were previously favored—and another set of speakers (predominately comprised of listeners) who would receive more rights. In Sunstein’s words, “[s]peaker autonomy, made possible as it is by law, may not promote constitutional purposes” in all circumstances.⁸⁶

Sunstein’s theory is a natural fit with the heckler’s veto cases. Sunstein notes that his theory has particular support in the heckler’s veto law because current law protects the positive right of receiving government protection in order to speak, as contrasted with the more traditional First Amendment right not to be censored or thwarted by the government.⁸⁷

In fact, the current public forum doctrine implies that the

84. See SUNSTEIN, *supra* note 10, at 31-43.

85. See Barron, *supra* note 1, at 1643 (noting that Holmes was a great advocate of the marketplace of ideas in free speech, but “reminded his brethren in *Lochner v. New York* that the Constitution was not ‘intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*,’ nevertheless rather uncritically accepted the view that constitutional status should be given to a free market theory in the realm of ideas”) (citing *Lochner v. New York*, 198 U.S. 45, 76 (1905)).

86. SUNSTEIN, *supra* note 10, at 34; see also *id.* at 34-38 (theorizing that government regulation should not always be dismissed as constitutionally impermissible, and in certain circumstances, may actually promote free speech).

87. See *id.* at 46-48.

government owes members of the public a right to speak. The government must offer a reasonable venue to engage in the desired speech, and it may not prohibit all speech on certain land.⁸⁸ The government may not withhold a parade permit or refuse to grant other permits unless there are “ample alternative channels of communication.”⁸⁹ The difference in this case is that the government owns the property where the speech occurs. But nevertheless, the courts require a proactive effort by the government in the face of would-be speakers.⁹⁰

Under Sunstein’s theory, the current regulation of mass media is sufficient to meet the state action requirement of the First Amendment. Congress and the FCC have granted to broadcasters, cablecasters and other media outlets the power to reach vast audiences and the power to exclude others.⁹¹ The affirmative government involvement in the modern mass media is much more direct and obvious than the common law of property and tort eventually acknowledged as government action in the New Deal era. The range of rights granted in media regulation is extensive. Beyond receiving licenses, virtually all media outlets are granted various protections in intellectual property, technology regulation, and government subsidy.⁹² Congress should be able to conclude that these protections ought to be balanced through additional rights granted to controversial (or any) speakers.

V. CONCLUSION

Ironically, this Article began in search of a legal theory that would be more palatable to the courts than a broadscale reinterpretation of the First Amendment along the lines proposed by Jerome Barron forty years ago. To some degree, this effort was successful. A parallel between broadcasters who refuse to air controversial advertisements is plausible and could be helpful in current litigation. The terse rejection by private

88. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

89. *Id.*

90. For an alternative solution to circumvent the state action problem, see Rory Lancman, *Protecting Speech from Private Abridgment: Introducing the Tort of Suppression*, 25 SW. U. L. REV. 223 (1996).

91. See *supra* Part III.

92. See *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 688 (1994) (upholding must-carry regulations); *Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 124 (D.C. Cir. 2002) (noting that the Cable Act “gives a broadcaster the option of cable carriage under a retransmission consent provision that permits the broadcaster and the cable operator to negotiate cable carriage arrangements” in exchange for compensation); *Satellite Broad. & Comm. Ass’n v. FCC*, 275 F.3d 337, 343 (4th Cir. 2001) (describing the “carry one, carry all” rule); *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1187 (D.C. Cir. 1983) (describing network non-duplication rules).

media owners of advertising that might be controversial is embarrassing in contrast with the efforts required of police departments to risk life and limb to promote debate in the face of violence. In the end, however, to reach beyond that scenario, the heckler's veto theory must turn to a different, but no less radical, rethinking of the fundamental concept upon which current First Amendment law is based. While Cass Sunstein's approach to the First Amendment is solid, it is unlikely to be taken up in the near term by the Supreme Court.

Thus, heckler's veto cases are useful, but hardly a silver bullet. Advocates can cite to the concept of a heckler's veto as an easily understood and accepted concept of First Amendment law. The language in these cases is a soaring testament to the importance of airing conflicting views, in situations much more dire than the typical mass media advertising buy. The analogy can help point out to courts, as it did in *Reno v. ACLU*, that one private actor is stopping the speech of another private actor with the state's assistance. However, the heckler's veto cases also come up against the core limitation of the First Amendment as it is currently interpreted. The Constitution says "Congress shall make no law . . . abridging the freedom of speech."⁹³ Until congressional action in this context is not limited to direct government action, the democratic discourse goals of the First Amendment are not likely to be fully realized.

93. U.S. CONST. amend. I.