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# THE SEDITION OF FREE SPEECH

*Lee C. Bollinger**

WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA. By *Mark G. Yudof.* Berkeley: University of California Press. 1982. Pp. xvi, 306. $32.50.

Several years ago, a story appeared in *The New York Times* which provided a graphic illustration of how the Soviet government manipulates the news about itself. Each year on May Day, the *Times* reported, the Soviet leadership poses for a photograph while standing atop the Lenin tomb in Red Square. In the year of the *Times* story, however, the photograph had undergone a number of noticeable alterations as it appeared in the various government-run media outlets. One official had been removed altogether, another had been positioned a bit closer to Brezhnev, some who had not in fact been present were included, and there was a general retouching in order to make all present appear younger and of comparable height. Western interest, of course, centered around the political significance of this cutting and pasting: who was on the way out of favor and who was coming in. Other questions, however, might have occurred to a first amendment scholar. Assuming this was a calculated political move by the government, and not a mere matter of whimsy, and assuming this had occurred in the United States, would the first amendment have anything to say about it? Government manipulation of reality, at least as to that reality conveyed to us through the press, has particularly sinister implications for a democratic society, and some of the reported machinations of the Nixon Administration give the question a more than hypothetical character.

At the time I read this *New York Times* story, I felt that something like this might eventually become a subject of our first amendment jurisprudence. It was with considerable interest therefore that I read Professor Yudof's book *When Government Speaks*, which has as its central concerns issues such as these. It is a readable, intelligent and reasonable treatment of the problems of government participation in the political process — a most serious theme for the first amendment and we should be thankful to him for drawing our attention to it. By way of prelude, I will note that Yudof's considered judgment on the case of the Lenin Square photograph appears to be that the first amendment would not, and should not, afford a right of action, a matter I shall return to in due course.

## I

*When Government Speaks* advises us that we have been insensitive to the potential of government expression for undermining the democratic

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process, or more particularly what Yudof calls the "self-controlled" citizen. Conventional free speech theory, he tells us, has a myopic view of democracy as the simple absence of government restraints on citizens' political activity. The seditious-libel model of the first amendment, which *New York Times v. Sullivan*[1] (with Harry Kalven's assistance) introduced in 1964, has lulled us into thinking that merely protecting citizen criticism of government assures a democratic society. Such a view, however, ignores the great power of government to achieve the objectives of a seditious libel regime through a variety of indirect means — through the complete or selective nondisclosure of facts, through propaganda techniques for control of the minds of citizens or, more simply, through the use of an overwhelming, partisan voice to dominate public debate. The magnitude of this risk that governments might circumvent a maginot line constructed only against seditious libel is Yudof's motivating theme.

But, assuming one finds plausible, as I do, Yudof's vision of the threat posed by government participation in public debate (and he discusses at some length the evidence that government speech really *is* capable of manipulating a population), there arises the critical question of what, if anything, should be done about it. On the central matter of government speech which has the purpose or effect of undermining, rather than fostering, self-government, Yudof concludes that the courts should, with some exceptions, decline to offer any remedies (injunctions, damages and so on) to citizens who sue under the first amendment. The principal reason for his general negative response is the difficulty of drawing lines; additionally, he contends that, since the courts — and particularly the Supreme Court — rely themselves on communication to enhance their political position, they are likely to be either "insensitive" to manipulation through communication by other branches, or, alternatively, excessively concerned with reducing the communicative reach of other branches so as to enhance their own relative power.

Yudoff's line-drawing difficulty results from his ambivalence about the legitimacy of government's participation in political dialogue. Having identified the dangers, he also acknowledges the importance of the government's role in educating its citizens. He is then left facing difficult, perhaps intractable, issues of what is permissible "education" or "leadership," and what is "propaganda" and "impermissible manipulation of opinion." For Yudof, these are not the kinds of questions which the courts are equipped to answer: they are neither properly sensitive to the considerations relevant to the resolution of particular disputes, nor able to devise workable principles for adjudicating such disputes, assuming they *are* properly sensitive.

This generally negative position, however, does not leave Yudof without any proposals to offer on the subject he urges upon us. Basically he offers a two-pronged attack. First, he contends that, while the courts are generally ill-equipped to deal directly with the problem of improper government speech, the legislative branch *is*, in contrast, particularly well suited to the task. The legislature, too, has a mandate to honor constitutional values. And being diverse and disorganized, it is the branch least able to utilize communication to enhance its political power, and thus the most sensitive

1. 376 U.S. 255 (1964).

to abuses by the other branches, if for no reason other than institutional jealousy. Thus, it is to the Congress that we should turn for restraints on improper or excessive government speech, Yudof advises. He generally applauds the enactment over the years of various legislative restrictions on partisan government speech and political activities and of laws requiring wider information disclosure. He does not offer new proposals for legislative action, however, but leaves the legislature with the general mandate to curb all government speech which has the purpose or effect of defeating the capacities of the "self-controlled citizen."

Yudof's principal recommendations for action look to traditional first amendment jurisprudence, in which the courts attempt to protect private speech against direct governmental interference or censorship. It is here, he argues, that the judicial branch should continue to play its important role, but with a heightened consciousness of the dangers of government speech. Thus armed, courts are advised to attempt in diverse ways to create a pluralistic society — one which includes several centers of private communicative power able and inclined to countervail that possessed by the government.

In this vein, Yudof reaches the following conclusions with respect to various issues arising out of the public educational system: (1) that the school prayer cases were correctly decided, not only on grounds of the improper establishment of religion, but also because they stopped the state from "indoctrinating" children; (2) that the concept of academic freedom for teachers can best be rationalized by the need for "pluralism" in a setting where the dangers of indoctrination are especially acute, rather than by an inherent right to individual freedom; (3) similarly, that extending free speech and press rights to editors of school newspapers and journals can be justified as necessary to limit the indoctrinating power of the state; (4) that aliens should have been held, in *Ambach v. Norwick,*[2] to be constitutionally entitled to become public school teachers because this would reduce the state's power to create a "homogeneous corps of teachers" facilitating the indoctrination process; (5) that public schools should be treated as limited public forums, where "outsiders should be entitled to distribute pamphlets, give speeches in the school yard, participate in assemblies, and so forth, even if we all agree that they may not push the English teacher aside in order to teach social anthropology" (p. 227), again as a means of counteracting the risk of government control of the educational process; (6) that providing constitutional shelter to private schools, as was done in *Pierce v. Society of Sisters,*[3] is proper as a check on government domination of the educational process; and (7) that, because the objective of countering the state's powers of indoctrination can be adequately satisfied by the existence of private schools, there is no need to take the drastic step of overturning compulsory attendance laws, except in exceptional cases as "in *Yoder*, where infringement on religious beliefs can be shown . . ." (p. 233).

Yudof is also prepared to permit the government to delegate editorial responsibility over some state-owned communication enterprises, such as journals and libraries, without being hampered by the equal treatment dic-

2. 441 U.S. 68 (1979).
3. 268 U.S. 510 (1925).

tates of the public forum doctrine. Such willingness to accommodate government speech arises from Yudof's ambivalence, noted earlier, toward government participation, in which he sees the potential not only for evil propaganda, but also for social instruction and advantage. To treat every area of government communication as a "public forum" would deprive the government of its legitimate role in public dialogue. But where should the line be drawn in deciding when the public forum doctrine is applicable and when not? Why is a state forbidden to use its "editorial judgment" to bar a particular play from its auditorium,[4] but not to exclude an article from one of its professional journals? Yudof proposes that "where the government's mission is to communicate and the scarcity of resources and the nature of the enterprise make editorial selectivity inevitable, the state need not tolerate or acquiesce in use of the forum that substantially destroys the communication and editorial processes" (p. 241). The principle appears to be that the state need not permit equal access whenever it has deliberately set out to communicate with the public in a way that requires editorial judgment. You cannot have a law journal dedicated to publishing what in the judgment of its editors are the most professionally worthwhile articles if you demand that they allocate the pages on a first-come, first-served basis. The two aims are completely incompatible with each other. On the other hand, with respect to the constitutional power of the state to reclaim for itself the editorial authority it has delegated, Yudof proposes as a working principle that "government agencies should be held to their own institutional arrangements . . ." (p. 243). He explains:

> For example, there is nothing constitutionally amiss about a university placing the editorial functions of a college newspaper entirely in the hands of the faculty or the central administration. The university could reserve editorial control over the editorial page but not over the news columns. Or it might delegate all editorial functions — over news, advertising, and the editorial page itself — to a student board of editors. Having made the decision to delegate, however, the university should not be permitted to revoke the delegation merely because it objects to the content of a single piece clearly within the established editorial authority of the board. [P. 243.]

A state can retract the delegation entirely but it may not engage in *ad hoc* interventions for the purpose of "censoring." The justification he offers for this distinction, yet another reflection of Yudof's ambivalence about government speech, is suggested here by the somewhat circular statement, "The constitutional justification for the irrevocability of a delegation of editorial judgments rests on the belief that interference with such delegation should not be permitted where the purpose is no longer editorial but only to eliminate 'objectionable' ideas" (p. 243).

Yudof also argues for recognition of a wide right of access, for both the press and the public, to information controlled by the government: "Depending on the nature of the institution and the countervailing interest in avoiding violence, invasions of privacy, and violations of other interests, Mobil Oil, the press, Nader's Raiders, and private citizens should all, subject to reasonable traffic controls, have a presumptive right to enter public

4. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

institutions to gather information" (pp. 250-51). Yudof says that *Richmond Newspapers*[5] was correctly decided, and that the prison cases like *KQED*[6] were not, but he does not elaborate on how this emerging right of access should be judicially administered.

On the question of placing more direct first amendment controls on harmful government speech, it turns out that Yudof would provide for a judicial role in a number of situations. One he labels "government incitement of unconstitutional or unlawful behavior." Given the government's tremendous potential power of persuasion, he argues, the first amendment should be interpreted to forbid government speech that advocates unconstitutional or illegal action, even though there may be no imminent danger in the conventional sense:

> Whatever the power of an isolated individual to distort the judgment of an audience and to incite it to unlawful conduct, the potential power of government in this regard is far greater. It is one thing for a newspaper owned by an anti-Semitic publisher to lash out against Jews and call for violence against them, and quite another for official government agencies to make similar statements through their extended private and public media networks. Government *advocacy* of unconstitutional or unlawful behavior should itself be subject to restraint, even if there is not the close nexus between speech and action required in modern incitement cases involving private expression. [P. 260.]

That this will yield difficult problems of line drawing between advocacy of illegal behavior and of legal change Yudof concedes, but he proposes that the "test should be whether the primary purpose appears to be to encourage lawlessness, and whether other lawful, substantial purposes are being served by the government communications" (p. 261). For this type of action he finds a suggestion of support in two Supreme Court decisions in the race area, *Anderson v. Martin*,[7] and *Lombard v. Louisiana*.[8] In *Anderson* the Court struck down a Louisiana law requiring ballot sheets to designate each candidate's race. In *Lombard* the Court overturned criminal trespass convictions of blacks who had participated in a lunch counter sit-in at a New Orleans store, despite the fact that New Orleans had no segregation ordinance, because of the public and private statements of city officials and the police. Yudof cites *Anderson* for the proposition that "it is unconstitutional for the government to be in the business of advocating racial discrimination" (p. 262), and *Lombard* to show that "the advocacy of segregation by public officials was virtually as powerful a force in bringing about segregation as legal sanctions would have been" (p. 263).

Yudof also criticizes the recent cases limiting private actions for stigmatizing statements made by government officials. On the other hand, he believes that legislative investigations should only rarely be enjoined by the courts and, as to the issue raised by the Lenin Square photograph, he rejects the idea that official speech should ever be found unconstitutional for the reason that it is deceptive, misleading or propagandistic:

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5. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
6. Houchins v. KQED, Inc., 438 U.S. 1 (1978).
7. 375 U.S. 399 (1964).
8. 373 U.S. 267 (1963).

> In short, the preferred response to government "propaganda" is "counter-propaganda," and not the silencing of government officials. Drawing the line in terms of what is "good" or "bad" executive advocacy; of what distorts judgment and what is public leadership; and of government versus private speech by public officials is so difficult that it is preferable to rely upon the pluralistic character of the system of freedom of expression. [P. 292.]

In a rather brief, and puzzling, section, he dismisses the fairness doctrine and equal time concepts as largely irrelevant to his inquiry, saying of the fairness doctrine that experience with it "is such that only the hopelessly optimistic would argue for its extensions into other realms" (p. 294), and of both doctrines that they do "not directly deal with government speech" but rather with "prevent[ing] the exclusion of the candidates of one party or set of parties from the broadcast media" (p. 295).

He concludes with an ambiguous discussion of an interesting case, *Bonner-Lyons v. School Committee of Boston*,[9] where the Court of Appeals for the First Circuit considered a first amendment claim against a school board which had sent home with the children a notice urging parents to attend an anti-busing rally to be held near the Massachusetts State House. The court's theory was that this distribution turned the school system into a public forum for purposes of the first amendment, thereby requiring it to distribute other, opposing viewpoints on the same issue. Yudof first observes that this "unprecedented" holding raises serious problems of line drawing:

> If some people think that the established school curriculum promotes representative democracy, do those who disagree have a right to reply through the same channels (in the classrooms)? Presumably nearly everything that is taught in public schools may occasion opposition, but to allow a right of reply in every instance would likely disable governments from carrying on important socialization and communications functions. [P. 298.]

And he concludes that "*Bonner-Lyons* may go too far in impeding important government activities, including communication activities" (p. 298). Yudof then seems to switch, or at least substantially modify, his position. Here was an expression of school board policy, sent to a "captive audience," and it was "not only blatantly partisan, but clearly fell outside the institutional mission of public school" (p. 299). "At a gut level," he continues, one feels that this is different from the usual socialization process undertaken in the school system. And so he concludes that "*Bonner-Lyons* may be one of those rare cases in which injunctive relief was appropriate," and then, finally, that "the case was properly decided" (p. 299).

In the succeeding and final chapter, Yudof advocates following the "legislative remand" approach to the *Bonner-Lyons* type of problem — that is, the court should require an explicit legislative delegation of power to engage in the challenged activity. He agrees with *Stanson v. Mott*,[10] where the California Supreme Court sustained an *ultra vires* challenge of a state Department of Parks and Recreation expenditure of $5,000 for rallying support for a bond referendum to raise money for parks, recreational areas and

9. 480 F.2d 442 (1st Cir. 1973).

10. 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

the like. Yudof recognizes that the line between "informing the public" and "propagandizing" is no brighter for the purposes of the legislative remand than for direct injunctions. He nevertheless finds this a workable compromise.

## II

The subject of *When Government Speaks* is serious, and this is a book that ought to be regarded seriously. Two general issues seem to me worth extended consideration. First, is the question whether the first amendment should limit certain government speech. A second and more subtle issue is how the first amendment might be administered to blunt the potential danger of that speech.

Before reaching those general questions, however, I would offer a few comments on some specific issues where I think Yudof's application of his central thesis creates difficulties. For example, I find myself troubled by the criteria that Yudof suggests for determining when the public forum doctrine should apply to state-run communicative activities, and when government may properly intrude on delegated speech activities. Government selection among communications is said to be permissible when "the scarcity of resources and the nature of the enterprise" make it "inevitable." But *all* of the media used by the government for communication are "scarce resources," and in this sense an auditorium is no different from a professional journal. Furthermore, the government's own characterization of its *purpose* cannot be determinative, for presumably we would not find it acceptable to let it escape the requirements of the public forum doctrine simply by declaring the auditorium a forum which would henceforth be administered by use of "editorial judgment." I would suggest that the basis of the collective intuition that allows for relatively greater government control over communications in something like this journal, then, is *not* that a law review, in contrast to an auditorium, involves "scarce resources" or that the government's "purpose" is determinative. I would suggest that it rests instead on the idea that *some* forums, probably those either traditionally made available, or especially well-suited in terms of audience accessibility, for a general political dialogue and for which a "professional" administration is generally absent, must be made available for public speech.

Similarly, it seems to me equally unworkable to decide whether government may intrude on properly delegated editorial functions by asking whether the intervention is *ad hoc* or inconsistent with the terms of the original delegation. Such a line will be easily circumvented simply by changing the original terms. Perhaps as a practical matter that will not occur, or perhaps that is a result which is not itself undesirable, but at least those matters ought to be considered.

There are other issues, too, which raise doubts. A first amendment prohibition of government "incitement" to illegal action is a daring and interesting idea. The cases on which Yudof relies *(Anderson* and *Lombard)*, however, seem most tenuous as precedents. They seem to me exclusively concerned with the peculiar problems of abolishing Southern segregation, which we all know has generated a number of unique judicial responses. Whether there should be a first amendment prohibition nevertheless, and

what form it should take, are of course still vital questions. One would want, at the very least, to consider whether an "incitement" test here would not suffer from the defects which have always been thought more or less to attend such a test since Learned Hand proposed it first in *The Masses* case years ago. Again, the principal problem is the ease of circumventing a strictly literal test. But when one looks to nuance and purpose, or to the probable understanding of the audience, then one must confront the line-drawing argument (with which Yudof himself has such problems), as well as questions about the capacities of courts to handle such inquiries.

With those preliminary comments made, let me now turn to the two general areas that appear to me to be particularly interesting or important subjects for discussion.

Yudof is certainly right in thinking that the problem of the existence and extent of first amendment limits on government expression is extraordinarily difficult. As we have seen, he ends up advocating a substantial role for the court, despite his professed disinclination to permit judical enforcement of first amendment limitations. The final picture that emerges from his discussion includes judicial remedies for cases where government speech stigmatizes an individual, or where it incites individuals to engage in illegal or unconstitutional action (with reduced attention to be paid to the factor of imminent consequences) or — though more rarely — where it becomes part of a partisan campaign to shape political attitudes. Judicial involvement is rejected, on the other hand, when the citizen's claim is that the government has deliberately falsified information or that the government is engaging in a program of propaganda, with, for example, powerful appeals to group prejudice. Is this a viable overall scheme for interpreting the first amendment?

One might properly wonder at the very outset how the first amendment can be thought to cover such state activities, without pushing it over a doctrinal precipice which will make virtually *any* government activity subject to first amendment examination as bearing on the capacity of citizens to govern themselves. Government speech endangers first amendment values principally by crippling *the effectiveness* of private advocacy; the propaganda campaign shouts down the critic, while the refusal to disclose information denies the potential critic even the knowledge needed to object to government policies. But government speech or nonspeech exerts these baleful influences without restraining private speech directly. How, then, are other government programs which retard *the effectiveness* of private speech but do not directly restrain the speaker, to be distinguished? The lack of income and education surely limits the effectiveness of political communication in much the same way as do government speech decisions.[11] May the judiciary therefore enforce private first amendment claims to income or education? That does, however, appear to be the implicit logic of the argument about government speech and the first amendment, and it is a logic that is at least supported by the steps many, now including the Supreme Court, have taken in recent years to incorporate into the first amendment doctrine a private right to some information controlled by gov-

11. Indeed, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court effectively equated money with political speech under certain circumstances.

ernment. Logic often takes a long time to have its effects (and it need not even then always be followed), and it may well be that the first amendment, in order to be truly effective, always must be expanding, however gradually, and that it will wither and die if it remains motionless for long. Then the only question is about the direction in which it should move. The neglect of this question, however, is what is most curious and interesting.

For, apart from questions of standing, which I shall leave aside in this discussion, the primary argument for preventing judges from holding that certain government speech is unconstitutional under the first amendment is that of the difficulty of drawing lines. I am puzzled by Yudof's other arguments, the claims that the courts are somehow, in this area, peculiarly lacking in the necessary knowledge or skill, or on the other hand, that they are too interested in protecting their own relative powers of propaganda, to be offered the opportunity to sit in judgment on the speech activities of the other branches. It is difficult to see why courts are thought less attuned to the legitimate interests of government here than they are in a host of areas where they regularly judge the actions of the other branches. Courts presently offer judgments in the most complex and esoteric areas of government behavior, on tax laws, rate-making, and antitrust. And, closer to the issue at hand, we expect courts to make very much the same kinds of judgments about the legitimate scope of government communicative activities in deciding when to apply the public forum doctrine. Similarly, the opposite claim that the courts, being themselves experienced practitioners in the art of persuasion and therefore in competition with the other branches, will be *too* willing to still government speech for purposes of self-aggrandizement, seems to me highly hypothetical and, again, a consideration equally present in other areas commonly the subjects of free speech adjudication. Finally, that the legislative branch may generally be *better* than the courts at sensing the proper line to draw does not prove by itself that the courts are ill-equipped or that the legislature should be given a virtually exclusive role in oversight.

The line-drawing problem, however, seems very serious indeed. How are courts to decide when the government has overstepped the bounds of proper political dialogue and entered into that vague realm of propaganda with an intent to distort the political process? One might well wonder whether anything other than the most *ad hoc* type of adjudication is possible; given the enormous amount of government speech, that approach would appear to lead to an unacceptable degree of judicial interference in the workings of the other branches, especially the executive branch. The seemingly exponential increase in the opportunity for litigation would present a frightful specter for the courts. Thus, considered in the abstract, Yudof's reluctance to recognize a new judicially enforced right to seek injunctive relief against any government speech seems proper, despite its acknowledged potential for undermining entirely the constitutionally guaranteed right of free speech. But this only makes it all the more peculiar that Yudof would go on not only to find the *Bonner-Lyons* result acceptable, but to suggest that it was an appropriate case for injunctive relief. Perhaps the issue is deeper than the line-drawing claim.

The line-drawing type of argument plays a complicated role in legal discourse. It often masks other, more strongly felt arguments, sometimes

because they are too dimly perceived and would suffer from premature exposure, other times because they are *too well* understood and full exposure would be embarrassing or inconvenient. It is a type of argument that closely resembles what we think of as legal fictions, serving many of the same functions, and deserving of (but not having received) the same serious probing which has attended that mode of thinking. Perhaps that inattention has been due to the fact that the line-drawing argument sometimes is not so evidently specious. Be that as it may, however, one must be careful in its presence.

One ought to know in particular just how courts do proceed in areas where the difficulty seems particularly acute. As noted earlier, we have right now before us an example which has special relevance to the problem of government speech, and which Yudof himself says should be handled by judicial intervention — namely, that of public and press access to information controlled by the government. Right from the beginning it was clear that one of the principal problems with recognizing a right of access would be the exceptional difficulty inherent in devising workable lines and of concomitantly opening up the courts to a flood of litigation. It was one thing to protect private speech against government suppression, where the lines are drawn at the outer perimeter and do not often require fresh demarcation; it is quite another to call for a general judicial examination of the reams of information within official control to determine what is important for public acquisition as of right and what not — or so it was commonly said. But, of course, that problem is now being gradually resolved. History is on the side of access, despite the daunting complexity of line-drawing problems, though the ultimate shape and nature of the right remains shrouded at this early stage.

That history is significant and instructive. First there was a near-outright rejection of the right, but with a confusing and suggestive hint that all that was being rejected was a claim by the press to a greater right of access than that of the public, and in a context in which alternative means of access were arguably present.[12] More cases followed, with more confusion and split decisions.[13] Then came a seemingly firm denial of access in a context where openness had a long tradition and was within the control of the judiciary itself — the pretrial stage of the criminal trial[14] — which led to a hasty reversal, or more accurately a retreat, and the first limited and tentative acknowledgment of an access right.[15] Here, then, is the evolutionary process of a new first amendment principle, in an area where line-drawing difficulties exist unrivalled. Through the use of doctrinal devices like "rebuttable presumptions," and through reliance on the traditional common law technique of case-by-case exploration of specific factual circumstances, there will eventually emerge a pattern of enforcement with a

12. *See* Pell v. Procunier, 417 U.S. 817 (1974).

13. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

14. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

15. *See* Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

meaningful language which time and context will have made sufficiently concrete.

Much the same thing could happen, and perhaps is already happening in the lower courts, in the area of judicial enforcement of first amendment limits on destructive government expression. Yudof's inability to resist the *Bonner-Lyons* result is indicative of this process. Nothing in *Bonner-Lyons* makes it so extraordinary a case as to lead one irresistibly to abandon clear general principles. It is a powerful case for judicial intervention, but one like many that could be conceived. What makes it powerful is that it is actual and specific, and it is this reality that exerts such a strong gravitational force against our prior conception of the entire area in the abstract. At some point such a case may present itself to the Supreme Court in a context of national politics, and a standing precedent will be created. A systematic campaign of deceit and lying, as in the case of the Lenin Square photograph, might be just such an event, especially since it would deal with outright misrepresentation, with which courts are more comfortably experienced and which they may, therefore, more easily separate from a more general doctrine. That of course is not to wish for such a case, but only to suggest that, assuming the idea makes sense as a matter of logic and social importance, it will be the compelling nature of the circumstances of a case, and not the potential line-drawing problem in the abstract, that will determine the outcome.

How seriously we take the line-drawing argument is directly related to the seriousness of the challenged activity. Prayer in the public schools may reasonably be regarded as so injurious to the rights of a minority of children, or so symbolically representative of the dangers of religion in the conduct of public affairs, as to overwhelm any concern over having to distinguish between religious activities and instructional activities related to religion. It is the press of real problems that helps us to actualize the injury in our minds, and that correspondingly diminishes the felt need for clear categories.

It is also true, however, that the opportunity for correcting the injury through means other than judicial remedies in the particular case, will usually itself tend to blunt the force of the actual harm arising out of the case. That leads to the questions whether and how the courts themselves can try to create the conditions which will diminish the injury caused by the excesses of government speech.

This is, as I have noted, where Yudof places his primary emphasis. He strongly criticizes first amendment theorists for building on an overly simplistic foundation, one which totally ignores the threat to self-government inherent in government's affirmative participation in political discussion. He advises courts to be particularly conscious of this danger in dealing with the usual run of first amendment problems, and to try to counteract it. Demonstrating how this should be done, he takes up a number of classic problems and either reaffirms the results reached as suitably sensitive to the dangers of government speech or rejects them as not appropriately sensitive. One of his guiding assumptions here is that only a private sector with groups equal in power to government can deflect the dangers he sees. Thus, press rights are given particularly strong support.

Yudof's discussions here display a careful sense of judgment. Of course one always has disagreements. Perhaps it is an unavoidable danger of focusing on a particular risk to speech that one tends to overemphasize its importance in solving specific problems, even though one has — in modern parlance — termed the relevant factor only a "value" of the first amendment. I wondered, for example, whether we don't just jump from the pan to the fire when we talk about augmenting the power of the press to counter that of government. That, of course, has been the ostensible justification for the imposition of public controls like the fairness doctrine and access rights, about which Yudof is so dismissive.

But, on the whole, I found myself seldom disagreeing with Yudof's analysis of old problems and more intrigued by an observation Yudof makes to the effect that the American goverment, with some notable exceptions, has been remarkably restrained in the use of its speaking powers for improper ends. That moved me to wonder whether the theory of free speech itself, the way in which we define and think about the idea, might have contributed to a state of mind which reduces the likelihood or impact of dangerous government speech, particularly of the propaganda variety. The doctrine of freedom of speech is itself a form of speech. It is like a national monument, symbolizing a way of thinking about a variety of issues, a set of values for people to hold or aspire to. And in its implementation it provides a forum from which one of the branches of government speaks to those ways of thinking and values. This is, of course, "government speech" too. Yudof recognizes this, but only to make his point about the need to inhibit the courts in controlling the speech of the other branches. He does not actually analyze how courts have, or could, employ that capacity in the context of first amendment adjudication.

Of course, courts might be thought able to do that very directly simply by saying that it is deciding this or that case because of the need to protect against the risks of excessive government speech. But, though this surely might be done, and I think sometimes is actually done, there are a variety of factors inhibiting its regular use. The rhetoric of the first amendment, for many reasons, does not naturally include discussions about the potential risks of successful propaganda in this country. To speak so is to imply that the population is subject to manipulation, whereas our inherited libertarian justifications of free speech say just the opposite, that people are rational and can be trusted to discern truth from falsehood. Whether this is good or bad is not my concern at the moment.

To say that we are uncomfortable with direct discussion of the threat of propaganda in the United States, however, does not exhaust the methods of addressing the problem. There are other ways of creating an inhospitable environment for government manipulation of public opinion, the most significant example of which is the way in which we refer to the government in our first amendment rhetoric. In first amendment discourse it is common practice to characterize issues in terms of the interests of the "individual" as against those of the "state." The government is portrayed as something apart, separate from the people, something to be watched and feared as always ready to usurp the rightful sovereignty of the populace. The crown continues to provide the central image against which free speech issues, and the state in particular, are depicted. Thus, *New York Times v. Sullivan* is

characterized as a case akin to seditious libel, not as a dispute between various private citizens or as one involving the contemporary validity of an historically derived body of common law. In all this, the Court portrays itself as standing as an intermediary, a nonconductor, between the government and the citizens. This is a most untrue and troublesome posture when the government is no longer a tyrant but a true product of the democratic process, although it is, to be sure, a convenient way for the courts to avoid facing up to questions of democratic legitimacy.

Free speech thus rests on a hostile, antagonistic vision of government, and in a sense it might be thought that part of its mission is to inculcate such an attitude, as a kind of guarantee against the evils to which Yudof wisely directs our attention. In communications theory, as Yudof tells us, one of the best defenses against intellectual or psychological manipulation is a natural, preexisting skepticism toward the messages of the speaker. If that is so, perhaps the principle of free speech serves society best not simply by standing guard against laws of sedition, but by encouraging sedition itself.