

TURNER BROADCASTING:
CONTENT-BASED REGULATION OF
PERSONS AND PRESSES

In response to the virtual gatekeeper control that cable systems exercise over access to local broadcasting, Congress in 1992 gave local commercial and public television broadcasters the right to demand that cable systems carry their over-the-air broadcast channels without charge. In largely rejecting the cable systems' First Amendment challenge to these must-carry rules, the Supreme Court in *Turner Broadcasting v FCC*¹ gave the government and local broadcasters a significant victory. Although the decision was not as sweeping as the district court's grant of summary judgment for the government, the Court's remand to determine whether the legislation meets *O'Brien's*² mid-level scrutiny requirements of being adequately designed to further important governmental purposes³ should not place a serious constitutional obstacle to approval of the must-carry rules.

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¹ 114 S Ct 2445 (1994).

² *United States v O'Brien*, 391 US 367 (1968).

³ I will not discuss the Court's conclusion that, under its legal framework, a more extensive factual record was needed nor discuss what factual findings will be relevant. Justice Blackmun's concurrence emphasized the significance to be given Congress's predictive judgments but agreed that a remand was appropriate because "the standard for summary judgment is high" and because the government had not yet even introduced the complete record developed by Congress. Justice Stevens indicated a preference for affirming without remand because under the majority's framework no current factual showing, only experience, could undermine the government's position. Unsurprisingly given the tremendous economic stakes, cable interests consistently assert that the government will not be able to meet its burden and the remand is producing extensive and expensive discovery.

I. THE DECISION

As analyzed by the Court, the case turned on two issues. First was determination of the constitutional standard to be applied to government regulation of cable. The leading press-access case has long been *Miami Herald v Tornillo*,⁴ a unanimous decision cited to say, roughly, that the government should keep its hands off the press (a more precise description becomes important later). The conventional wisdom is that broadcasting is the one communication medium in which the First Amendment permits government regulation. Indeed, in *Red Lion Broadcasting v FCC*,⁵ the Court unanimously upheld a right-to-reply requirement applied to broadcasting that was in relevant respects identical to the law directed at newspapers that was unanimously invalidated in *Tornillo*. Seemingly, the permissibility of regulation of cable would turn on whether cable is more like broadcasting or newspapers. Lower courts have long struggled with this issue, to which the Supreme Court has studiously avoided speaking.⁶

In *Turner*, the Court stated that whereas physical scarcity provided the rationale for regulatory intervention in broadcasting, no such scarcity exists in cable. Rather than then making the predicted move of following *Tornillo* and applying strict scrutiny,⁷ the Court said that the “analogy to *Tornillo* ignores an important technological difference between newspapers and cable television.”⁸ The “cable operator exercises far greater control over access to the relevant medium” because “the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control”⁹ Observing the “potential for abuse of [cable’s] private power over a central avenue of communication,”

⁴ 418 US 241 (1974).

⁵ 395 US 367 (1969).

⁶ See, e.g., *Los Angeles v Preferred Communications*, 476 US 488 (1986).

⁷ Commentators and lower courts have routinely assumed the two alternatives in First Amendment challenges to cable are to apply the broadcast model represented by *Red Lion* and apply a mid-level *O'Brien* scrutiny or to follow the print model represented by *Tornillo* and apply strict scrutiny. Interestingly, and, as I will suggest in Part IV, refreshingly, *Tornillo* did not adopt strict scrutiny and *Red Lion* did not adopt *O'Brien* or any explicit form of mid-level scrutiny. These characterizations came later. Both decisions were written without reference to tests or levels of scrutiny but rather directly evaluated the arguments.

⁸ 114 S Ct at 2466.

⁹ *Id* at 2466.

the Court relied on *Associated Press v United States*¹⁰ for the proposition that the First Amendment “does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas.”¹¹ That is, after rejecting the broadcasting analogy, the Court also rejected *Tornillo*'s government-hands-off philosophy by relying on a different newspaper case, *Associated Press*, to assert the legitimacy of broad governmental power over cable. Interestingly, the four dissenters did not dispute any of this.

The second issue treated, as apparently crucial by both the majority and dissent, was whether the must-carry rules are content-based. Of course, on their face the rules are speaker-based, not content-based—only “local” broadcasters get the benefit. But the majority and dissent agreed that a law can be content-based not only on its face but because of its purpose. Although the only clear holding that the Court cited for this proposition was the most recent flag-burning case,¹² where the law could easily have been interpreted as facially content-based, the Court's view seems unexceptional. A content-based purpose, at least if it relates to suppressing expression, places a law outside the ubiquitous *O'Brien* test. And since *O'Brien* now applies to content-neutral time, place, and manner regulations, those excluded from this category on the basis of the content-based purpose are presumably treated more severely—with the obvious alternative being to treat them like facially content-based laws. In any event, that alternative gathered unanimous approval in *Turner*.

The Court split 5–4 on whether the must-carry rules were content-based, a split that perfectly reflected the vote on whether to invalidate the law.¹³ According to the majority, the law was content-neutral. Its admirable, anti-trust type purpose was to provide a fair playing field for television in order to prevent cable from using its control over the communication bottleneck to undermine

¹⁰ 326 US 1, 20 (1945).

¹¹ 114 S Ct at 2466.

¹² *United States v Eichman*, 496 US 310 (1990) (punishing anyone who “mutilates, defaces, physically defiles, burns, maintains on the floor, or tramples upon” but not one who disposes of a worn or soiled flag).

¹³ The five consisted of Justices Kennedy, Souter, Stevens, Blackmun, and Chief Justice Rehnquist—although Stevens only concurred in the disposition, favoring an outright affirmation.

the economic viability of (or to injure in somewhat less serious ways) local broadcasting. The law also helped preserve free (over-the-air) television, a service that many people value and that may be especially valuable for those who cannot afford cable. The dissent argued that the majority "cannot be correct."¹⁴ It quoted findings, which Congress enacted as a section of the law, that consistently emphasized Congress's concern with content. The findings asserted that "local news and public affairs programming and other local broadcast services [are] critical to an informed electorate" and that "educational and informational programming" provided by public television serves "the Government's compelling interest in educating its citizens."¹⁵

The majority, in addition to emphasizing the content-neutral purposes, argued that the law does not fit the purpose the dissent identified. When forced to carry an over-the-air broadcast station, even if it has minimal local content, a cable station could drop a cable channel (if one exists) that emphasized local news. Nevertheless, quarrel with the majority is more than possible.¹⁶ It is difficult to imagine that Congress would justify the must-carry rules except in part on grounds that the content of local television is expected characteristically to differ from that on cable and that this different content has value.¹⁷ Certainly, Congress's concerns in structuring

¹⁴ 114 S Ct at 2478.

¹⁵ 114 S Ct at 2476 (quoting Cable Act of 1992, § 2(a)(11) and § 2(a)(8)(A)). The question of whether a law supported by a content-based purpose would be saved if it also had a content-neutral purpose becomes important here. The dissent said no such position has ever been approved, and that the Court has "often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral." Id at 2478. However, in support the dissent only cited cases with content lines on the face of the statute. In no case did a purpose unrelated to content explain the content discrimination. The proper analogy would seem to be whether a law that was content-neutral on its face would be invalidated if supported by both content and noncontent reasons. A careful reading of both *O'Brien* and *Eichman* indicates that a purpose entirely independent of the expressive act's communicative impact arguably would suffice to save the law—which is what *Arlington Heights v Metropolitan Housing Dev. Corp.*, 429 US 252, 271 n 21 (1977), suggests in the analogous equal protection context.

¹⁶ In one possibly important respect, however, must-carry is clearly content neutral. Cable companies complained primarily that they had limited carriage capacity and the must-carry rules would require them to exclude other material. And the sole complaint of cable programmers was that must-carry made it more difficult for them to get their productions on cable. The must-carry rules were entirely content-neutral in indicating what material would be displaced—that choice was left entirely to the cable operators. This point gains significance if First Amendment concerns distinguish between government suppression of content and its promotion of content.

¹⁷ Political and cultural participatory values might justify local people's involvement in programming decisions, maybe local people talking on local talk shows, even if the speech content, even if the words on the talk show, were the same as those carried on a national

the broadcast industry, which it was here attempting to preserve, have consistently related to content.¹⁸

In defined circumstances, the Cable Television Consumer Protection and Competition Act of 1992¹⁹ even gives the FCC authority to order a cable system to carry an otherwise ineligible station on the basis of the FCC's findings that the station would provide content which Congress specially valued—that is, programming that “would address local news and informational needs which are not being adequately served” or “news coverage of issues of concern to such community . . . or coverage of sporting and other events of interest to the community.”²⁰ Recognizing that these appear facially content-based, the majority in a footnote indicated that the District Court, which had not addressed these particular provisions in its original decision, “may do so on remand.”²¹ But even if technically severable, the point ignored by the majority is that these grants of authority provisions illustrate the most obvious justification for must-carry provisions as a whole—to promote local content by safeguarding local broadcasting. Congress believed that local broadcasters are more likely than their competitive alternatives, especially national cable channels, to provide content that the FCC and Congress have traditionally considered and continue to consider especially valuable—local content. Or, at least, that these stations provide a content element that should not be lost.

In this article, I will defend three points. Most centrally, Part IIC argues that, although the dissent probably got the best of the question of whether the must-carry rules are content-based, both the majority and dissent were wrong to assume that a content-motivation is objectionable here. Safeguarding local broadcast television because of a concern for local content is perfectly appropriate. This content aim should be applauded rather than being a basis for a more exacting scrutiny.

cable channel. Whether from this participatory perspective the same words said by different people should be viewed as the “same content” is unclear. In any event, those holding this participatory vision are likely to predict and hope that the textual content will be different as well as being local.

¹⁸ See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal L Rev 1101 (1993); Donald W. Hawthorne and Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 Cardozo Arts & Enter L J 499 (1994).

¹⁹ Pub L 102-385, 106 Stat 1460.

²⁰ 47 USC §§ 534(h)(2)(B), (h)(1)(C)(III).

²¹ 114 S Ct at 2460 n 6. Justice Stevens's preference for affirming without any reconsideration suggests that he may not have been troubled by this content-based element.

Leading up to this critique of the Court's treatment of content discrimination, Parts IIA and IIB argue that for First Amendment purposes there is a fundamental difference between individuals and various legally created collective entities including media entities. My claim is that law has little role in structuring individuals (except maybe in defining and protecting the borders between one individual and another), and any law censoring or directed at suppressing individual speech is presumptively objectionable. In contrast, Congressional conceptions of the public good ought to inform the inevitable choices in the manner of structuring legally created entities and, often, those conceptions will include content-oriented judgments about how the entities will best serve a democratic communications order. Part III will show that, historically, acceptance of content-based governmental involvement with the communications order has been a constant and that courts have routinely upheld the governmental involvement on the few occasions when the communications industries challenged it on First Amendment grounds. And, most importantly here, that this difference between individuals and legally created entities should affect the question of when content-based laws are objectionable.

Finally, Part IV sketchily suggests that problems with the Court's analysis in *Turner* reflect a generally undesirable but increasingly common preoccupation with mechanical "tests," "scrutinies," and rigid categories that are too disconnected from the normative commitments underlying constitutional law.

II. CRITIQUE

A. INDIVIDUALS AND ARTIFICIAL ENTITIES

With the dissent's approval,²² the Court began its substantive discussion with the statement: "There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."²³ Yes, maybe. But the question here is whether being cable operators rather than gossiping colleagues, anti-abortion demonstrators, or

²² *Id.* at 2475.

²³ *Id.* at 2456.

schoolchildren during a flag ceremony should matter for purposes of the form (or degree) of constitutional protection the "speaker" should receive against government imposition of "must-carry" tasks.

Nongovernmental cable operators are typically business enterprises that take a corporate form; they inevitably deduct the costs of their speech as business expenses. Speech is their business. In these ways, they differ from individuals who speak as an aspect of (or who listen in order to aid in) making personal choices for themselves. Even identification of the "speaker" differs in the context of cable (or other business enterprises) from the personal context. In the latter, the speaker is the person speaking. Of course, outside forces greatly influence people's speech choices. Nevertheless, the dominant conception of the person attributes speech to the speaker who is normally treated as having authority and responsibility to control her own speech content. In contrast, with artificial, legally created entities, determining who has authority to control speech decisions requires examination of laws (and often other customary presumptions). When the Court says the cable operator engages in speech, to whom does it refer? Does it mean the owner(s) (often thousands of stockholders), the board or chief executive officer, some subordinate who is not overruled when she actually makes a particular choice, or the entity itself?²⁴ Despite these differences, perhaps the nature of the speaker does or should make no difference. Certainly, the Court's "initial premise" disregards any distinction between individuals and these legally created entities. On closer examination, however, the Court's reasoning proceeds in two directions.

In discussing general First Amendment principles, especially issues concerning content-based laws, the Court relied indiscriminately on cases involving individual speakers and those involving collective entities. In contrast, the identity of the speaker seemed relevant when the Court argued that cable is not like broadcasting

²⁴ See Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 Cal L Rev 1229 (1991) (arguing that it makes sense to refer to the speech of the collective entity). Although sometimes emphasizing different points, for the most part, Dan-Cohen's overall argument is consistent with those developed in C. Edwin Baker, *Human Liberty and Freedom of Speech* 194-271 (Oxford, 1989), on which much of the discussion here is based, and with Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L J 235 (1981).

but also is not like newspapers because of a “technological difference”—the “bottleneck or gatekeeper control” that cable has over the television programming channeled into the subscriber’s home that results from “the physical connection between the television and the cable network.”²⁵ The Court followed precedent in explaining that “[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”²⁶ In addition to distinguishing among media, this directive seems very policy oriented, more like a point that is addressed to a legislature designing industrial policy than to a forum of principle.

The question of whether differing constitutional standards do or should apply to differing media entities is left until Part III. I first examine the Court’s other major analytic turn. In considering the applicability of more general doctrines like those concerning content discrimination, are, as the majority and dissent both seemed to think, all speakers analogous?

Reasons for flattening First Amendment precedent into a single matrix applied to all cases of speech are not hard to find. First, any other approach might appear to abandon the claim that the constitutional order involves fundamental principles and to admit instead that constitutional law merely involves unprincipled judicial social engineering. For some audiences, the force of constitutional argument relates directly to the generality of its crucial principles. (Of course, the opposite view—that justifiability relates directly to the sensitivity of the analysis to context—also has devotees.²⁷) Second, the source of speech should not matter from the perspective of the marketplace of ideas. “The inherent worth of

²⁵ 114 S Ct at 2466. This reliance on a “technology-based” bottleneck may be unfortunate and doctrinally destabilizing. Already the technological basis for removing this bottleneck exists and already the FCC has approved phone company “video dialtone,” which allows delivery of video programs and possibly of multiple competing cable systems over telephone lines utilizing video dialtone. *In the Matter of Telephone Company—Cable Television Cross-Ownership Rules*, 7 FCC Rcd 5781 (1992). Economic and policy reasons, mostly related to the desirability of creating a more open and diverse communications order, will continue to support regulating cable differently from newspapers. See C. Edwin Baker, *Merging Phone and Cable*, 17 *Hastings Comm/Ent L J* 97 (1994). But the Court’s rationale creates an easy target for opponents of useful media policies in the same way that the scarcity doctrine has in the broadcast context.

²⁶ 114 S Ct at 2466 (quoting *Southeastern Promotions v Conrad*, 420 US 546, 557 (1975)).

²⁷ C. Steven Shiffrin, *The First Amendment, Democracy, and Romance* (Harvard, 1990) (advocating that courts accept and engage in social engineering in favor of dissenting speech).

the speech in terms of its capacity for informing the public does not depend on the identity of the source”²⁸ Of course, sometimes the Court rejects this premise. Many listeners find that the identity of the source affects the worth or at least their evaluation of the speech. Not surprisingly, a major policy reason for laws requiring sources to identify themselves is the belief that the source does matter. In the interest of listeners, the Court has upheld these laws, striking them only when it could reasonably conclude that the law will restrict speakers’ expressive freedom.²⁹ In any event, the Court’s episodic doctrinal indifference to the source, especially in its examination of content-based laws, can be criticized both analytically and normatively.

The dominant Enlightenment conception of personal identity would treat any law that gives someone other than the speaker herself an original power to dictate her self-expressive speech as an overt interference with her autonomy or liberty. Whatever insights are involved in the postmodernist portrayal of the disappearance of the subject, virtually everyone in her personal interactions treats what the other says and does as central to how she should judge, value, relate to, or feel about the other. Except under special institutionally bounded circumstances, few people will fail to object if explicitly denied the right to make their own expressive choices. Ascribing speech to the speaker is implicit in the pragmatics of everyday communicative action. This ascription probably provides the best explanation for “the principle” that lies “at the heart of the First Amendment . . . that *each person* should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”³⁰

Groups into which a person is born plus those with whom the person becomes associated largely determine the person’s beliefs. Associational relations likewise greatly influence a person’s speech. Nevertheless, “[o]ur political system and cultural life rest upon

²⁸ *First Natl. Bank v Bellotti*, 435 US 765, 777 (1978).

²⁹ Compare *Brown v Socialist Workers*, 459 US 87 (1982) and *Talley v California*, 362 US 60 (1960) with *Buckley v Valeo*, 424 US 1 (1976) and *Lewis v Morgan Publishing*, 229 US 283 (1913). See Geoffrey R. Stone and William P. Marshall, *Brown v Socialist Workers: Inequality as a Command of the First Amendment*, 1983 Supreme Court Review 583, 626 (arguing that even content-based exemptions from otherwise justified disclosure laws are justified “when the commitment to neutrality conflicts with the commitment to preservation of ideas in the political marketplace”).

³⁰ *Turner*, 114 S Ct at 2458 (emphasis added, cites omitted).

[the] ideal”³¹ that the speaker is the natural or appropriate locus of choice for a speaker’s expressive acts. Even when a person is expected to repeat another person’s words, as in a marriage ceremony where the person “repeat[s] after me,” in a legal proceeding where a person takes an oath, or in a ceremonial pledge of allegiance, the premise is that the repeated words manifest the speaker’s own commitments. Surely, this was the constitutional basis for objecting to the mandatory flag salute in *West Virginia Board of Education v Barnette*.³²

In contrast, a corporate entity is a person only within some legal fictions. Analytically, the law does not impinge personal identity or autonomy but rather helps structure and maintain power relationships when it recognizes one rather than another person’s authority to determine the content of some communication from a particular division of Time-Warner, a company owned by thousands and an employer of thousands more. Law provides the framework within which people create corporate structures that then relate various people to various corporate choices, including expressive choices. Within these legally structured entities, law inevitably either provides for one person’s (or role’s or office’s) authority rather than another’s or prohibits particular exercises of authority of one over another, but this does not compromise anyone’s autonomy in any obvious sense. As long as autonomy—or at least the constitutionally protected form of autonomy—does not imply any inherent right to exercise power over another, the law does not abridge autonomy if it fails to give one person or group within the corporation the power to order an actual “speaker,” for example, a writer or programmer or actor, either to say or not say particular things or to be fired for refusal.

Often the locus of authority within these collective entities is structured by generally applicable instrumentally justified corporate, contract, or other regulatory laws—as opposed to speech or media specific laws. The policy bases of these general laws seldom focus on the communications order. Nevertheless, any legitimate societal objective can presumably provide their justification. Once the quality of the communications order is recognized as a proper subject of government attention, reasons related to furthering a

³¹ *Id.*

³² 319 US 624, 638, 640–42 (1943).

better or more inclusive “public debate” should justify adoption of “structural” rules that determine whose speech prevails. Certainly, this concern would explain requiring shopping centers to allow for expressive opportunities.³³ Government ought to be praised rather than condemned if its reason for opening up shopping centers was not merely pro-speech but was content-based—namely, if its reason was that opening up this arena provides needed opportunities especially for dissident speech or for those espousing unpopular views.

Thus, my claim is that our most fundamental, deeply rooted practices treat the mind/body integration and moral agent conception of an individual as basic—a natural default position.³⁴ Even though countless influences operate on the person, the person typically claims control over and others hold her responsible for her speech. From this perspective, law that mandates a person’s speech on a basis other than the person’s choice impinges on individual autonomy. (Autonomy, however, may be consistent with speech-related conditions on grants or benefits, like conditions of employment—a point to which I will return below.)

On the other hand, legal frameworks that determine whose speech choices prevail within collective entities are inevitable. Whatever framework is adopted necessarily favors some and disfavors other speakers and content. In a sense, here there are no non-politically or non-socially created, natural default positions. As the Court explained in *West Coast Hotel v Parrish*,³⁵ given this lack of a default position, a structural choice merely sets the framework in which people exercise their autonomy. “The liberty safeguarded is liberty within a social organization”³⁶ Thus, a social structure that requires businesses to pay minimum wages

³³ *Pruneyard Shopping Center v Robins*, 447 US 74 (1980).

³⁴ I do not claim that this view is nonideological—only that the ideology is so deeply rooted that consistent deviation is practically untenable. Wittgenstein famously argued that although giving grounds comes to an end, “the end is not an ungrounded presupposition: it is an ungrounded way of acting.” Ludwig Wittgenstein, *On Certainty* § 110. Possibly Wittgenstein’s best image for how some of our presuppositions are less subject to change is: “And the bank of that river consists partly of hard rock, subject to no alteration or only to an imperceptible one, partly of sand, which now in one place now in another gets washed away, or deposited.” *Id.* at § 99. Jurgen Habermas, for example, could argue that the communicative action aimed at agreement is not a practice we could easily give up—it is like the hard rock of the river bank.

³⁵ 300 US 379 (1937).

³⁶ *Id.* at 391.

need not be understood as suppressing the employers' freedom. Rather, the absence of a minimum wage requirement can be understood as a subsidy for profiteering employers.³⁷ Likewise, the inevitable regulation of collective entities will disfavor some speakers or some content; however, these regulations need not be interpreted as suppressing their speech or limiting their autonomy. They merely set a favorable baseline for other speakers or content.

Even though the autonomy ascribed to individuals does not normally apply to legally created collective entities, distinctions among regulations of collective entities' speech will sometimes be relevant to free speech concerns. Many of these regulations—for example, a law providing a candidate a right to purchase “reasonable amounts of time for use of a broadcasting station . . . in behalf of his candidacy,”³⁸ or a law giving various nonprofits reduced-rate postage—can be understood to establish baselines or to provide subsidies for favored speakers or content. Likewise, law necessarily determines whether (or the extent and the circumstances in which) the stockholders, the board of directors, the CEO, a lower-level employee, the union, or some other person or group has the right to determine the company's advertising strategy. These unproblematic baseline or subsidy laws (hereafter called “structural” rules) differ in two respects from a second category—laws that prohibit various collective entities from communicating certain content or that purposively burden such communications (hereafter called “prohibitory” laws). First, these prohibitory laws suppress speech; they limit the expressive role of the restricted collective entities. Second, unlike structural rules whose allocative function is to determine whose private expressive decision will prevail, the existence of prohibitory laws is not inevitable. Bans on the publication or broadcast of a rape victim's name, restrictions on casinos' truthful advertising, limits on corporate participation in political campaigns, or prohibitions on or channeling of indecent expression within the media illustrate such prohibitions. These two differences provide a basis of constitutional challenge to these prohibitory laws, although I will suggest below that the success of the

³⁷ “The exploitation of a class of workers . . . casts a direct burden for their support upon the community. . . . What these workers lose in wages the taxpayers are called upon to pay. . . . [The community] is not bound to provide what is in effect a subsidy for unconscionable employers.” *Id.* at 399.

³⁸ 47 USC § 312(a)(7) (1988), upheld against First Amendment challenge in *CBS v FCC*, 453 US 367 (1981).

challenge should and usually does depend on the category of collective entities to which prohibition applies.

The inevitability of structural rules helps explain why this first category poses few constitutional problems. In *Turner*, the dissent asserted that “the government may subsidize speakers that it thinks provide novel points of view, [but] it may not restrict other speakers on the theory that what they say is more conventional.”³⁹ Subsidizing governmentally identified “novel points of view” is surely content-based.⁴⁰ Thus, the dissent apparently accepts content-based laws in the context of subsidies. The difficult analytic problem becomes distinguishing “subsidies” from “restrictions.”

The dissent in *Turner* did not argue, but apparently merely assumed, that must-carry rules restrict rather than subsidize.⁴¹ Here, its blindness to distinctions between individuals and collective entities became important. Clearly, the “must-carry” flag salute in *Barnette* counts as a restriction—but the “must-carry” rule for the shopping center in *Pruneyard* is, following the logic of *West Coast Hotel* and given California’s interpretation of its property law, a baseline allocation of property rights. First Amendment analysis generally should treat allocations of rights relating to institutional entities as establishing baselines or creating subsidies and as creating little constitutional problem, as in *Pruneyard*, unless the government’s purpose was to suppress speech. Even when suppression of a collective entity’s speech is the government’s goal, whether this suppression raises a constitutional issue depends on the normative theory of the First Amendment. I will suggest below that the suppression is a problem only for certain categories of collective entities, that is, for media enterprises and “solidarity” or expressive associations—the first because of the special, instrumental role of the press in a democratic society and the second because of their derivative status as embodiments of individual liberty.

In contrast, structural regulation of individuals—giving anyone

³⁹ 114 S Ct at 2478.

⁴⁰ Even though content-based, maybe a subsidy does not count as content-based “regulation.” Often the Court’s language implies that regulations are restrictive while subsidies are enabling. Nevertheless, the majority in *Turner* found it necessary to defend must-carry rules as “unrelated to the suppression of free expression,” citing *O’Brien*, 391 US at 377, “or to the content of any speakers’ messages.” 114 S Ct at 2469 (emphasis added).

⁴¹ In their role as restrictions, the must-carry rules are indisputably content neutral because the cable operator, not the rule, determines what content is not delivered. The dissent’s argument that the rules are content-based only applies to the speech they benefit. See note 16.

other than the individual authority over her speech—is presumptively suppressive. For individuals, distinguishing subsidies from restrictions is usually easy except in the perplexing case of conditional grants of government benefits.⁴² Arguably, if the condition is reasonably understood as furthering a legitimate governmental purpose in providing the benefit, the benefit merely subsidizes that government project and the speech-restrictive condition should be upheld; but without this connection (or if the governmental project is itself impermissibly suppressive), the condition unconstitutionally suppresses speech.

The above distinctions between legally created collective entities and individuals and between structural and prohibitory regulation of entities were analytic. Given deeply entrenched conceptions of personhood, individual autonomy is normally at issue in regulation aimed at individual speech but not, or at least not in the same way, in regulation aimed at the speech of legally created collective entities. Still, the relevance of this analytic point depends on the normative concerns that animate First Amendment interpretation. If the marketplace of ideas or, maybe,⁴³ if “undistorted” public debate were the central normative premise, the source of the speech is irrelevant. Any law aimed at suppressing any (protected) speech, especially on a content basis, is presumptively unconstitutional censorship.

In contrast, the source of the suppressed expression is crucial if the central normative value is individual expressive liberty—the value emphasized by the dissent in *First National Bank v Bellotti*⁴⁴ but now said by the majority in *Turner* to be the “heart” of the First

⁴² “Copyright” also presents a curious case. This “structural” regulation gives copyright holders authority to restrict nonholding individuals’ speech; but copyright’s purpose is clearly to subsidize the original author and to do so as a means of improving the communications order, that is, “[t]o promote the progress of science and useful arts.” US Const, Art I, § 8, cl 8. Possibly a broad noncommercial “fair use” provision is constitutionally required in order to take the “autonomy,” as opposed to the commercial, sting out of the restriction.

⁴³ “Maybe” because in some notions of undistorted public debate, the government must restrict sources that have already had their share of speech opportunities in order to prevent their dominance from “distorting” debate. More generally, the meaning of “distortion” is very much derivative of the nature of debate that the commentator favors for independent normative reasons.

⁴⁴ Corporate communications do not further “what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization and self-fulfillment.” 435 US 765, 804 (1978). The dissenting position has arguably prevailed given the questionable current validity of *Bellotti*. Compare *Austin v Michigan State Chamber of Commerce*, 494 US 652 (1990).

Amendment. On this view, the difference between individuals and collective entities is basic. Respect for individual autonomy requires respect for individuals' expressive choices. But in a secular age, the same does not follow for the choices of legally created entities like governments or business enterprises or most other artificial entities.

The important exception is that respect for individual autonomy requires protection for expressive or solidarity associations. People create and join expressive or solidarity associations in part to embody or further their values. These collectivities draw their normative significance from their role in people's lives and from the voluntary allegiance of its members.⁴⁵ This voluntary basis means that these associations could (even if they often do not) exist even independent of coercive power or of legal structuring. Unlike either governmental or market-oriented entities, functioning of these collective entities does not inherently depend on exercising legally based instrumental power over others—for example, their internal functioning does not necessarily depend on the purely instrumental use of property within exchange transactions.

Of course, often even these associations employ corporate forms and various other legally established options—for instance, in their tax treatment. Arguably, respect for autonomy requires that those institutional forms that society makes generally available must also be available for use by these autonomy-based associations—except where the associations are exercising instrumental power over others. Thus, regulations aimed at controlling their expression when they take a corporate form or restrictions imposed on other legal benefits received by these expressive or solidarity associations should normally be viewed as unconstitutional conditions restric-

⁴⁵ The Court, speaking through Justice Brennan, made this distinction in striking down regulations of voluntary, noncommercial associations' political speech, *FEC v Massachusetts' Citizens for Life*, 479 US 238 (1986), despite later upholding similar regulations of commerce-related entities. *Austin v Michigan State Chamber of Commerce*, 494 US 652 (1990). See also *FEC v Nat'l. Right to Work Comm.*, 459 US 197 (1982). The dissents in *Austin* can be read in part to object to the Court's unwillingness to adopt a marketplace-of-ideas understanding of the First Amendment. But in line with Brennan's distinction, the Court has never suggested that the constitutionally based freedom of association applies to the typical commercial entity.

Elsewhere, I defended a theoretical justification for this distinction—and also argued that autonomy is not at stake in most definitions or regulations of property rights, especially when the law restricts instrumental uses of property oriented toward market transactions. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U Pa L Rev 741 (1986).

tive of individuals' expressive freedom. Nevertheless, the normative differences between these collectivities and those entities addressed by this article and the borders of the category are complexities that are beyond the scope of this discussion.⁴⁶ I flag the category here only to emphasize that they are not covered by this article's discussion of legally created collective entities.

In its many, varied discussions of free speech, the Court invokes both the premise of individual liberty and of the marketplace of ideas. A plausible view is that the Court treats the two as overlapping, nonexclusive bases for constitutional protection of speech. If so, possibly the first premise could lead to basically absolute protection when it is truly at stake, while the second only justifies a weighing of values.⁴⁷ This is not the place to make an extensive defense of the liberty conception.⁴⁸ However, some recent judicial trends arguably reveal a willingness to allow the political process, itself ideally an embodiment of liberty, to prevail over challenges based only on the marketplace of ideas. This explains, for example, rejection of constitutional claims to access to governmentally controlled information and reduced protection of corporate speech both in the political arena⁴⁹ and the commercial realm.⁵⁰

The perspective of people's *autonomy as speakers* views regulation of individuals, for whom autonomy is directly at stake, differently than regulation of collective entities. But government can also disrespect *listeners' autonomy*, for example, by paternalistically concluding that people should not receive certain information. Many of the best First Amendment scholars who have treated autonomy

⁴⁶ Many of these issues are discussed in Baker, *Human Liberty* (cited in note 24); Baker, 134 U Pa L Rev 741 (cited in note 45); Dan-Cohen, 79 Cal L Rev 1229 (cited in note 24).

⁴⁷ When the dissent in *Bellotti* claimed that "[i]deas that are not a product of individual choice are entitled to less First Amendment protection," 435 US at 807, it significantly said "less," not "no," protection. This fairly accurately summarizes existing judicial precedent. Among recent members of the Court, Justice Brennan has been perhaps most explicit in defending this two-level approach. See, e.g., *Herbert v Lando*, 441 US 153, 183-87 (1979) (Brennan dissenting).

⁴⁸ See Baker, *Human Liberty* (cited in note 24).

⁴⁹ *Austin v Michigan State Chamber of Commerce*, 494 US 652 (1990); *FEC v Massachusetts' Citizens for Life*, 479 US 238 (1986).

⁵⁰ *Posadas de Puerto Rico Associates v Tourism Company*, 478 US 328 (1986), faithfully followed the dicta in *Central Hudson v Public Service Comm'n*, 447 US 557 (1980). There, the Court approved suppressing a corporation's truthful speech, i.e., about use of electrical power, if its promotional speech conflicted with the government's important interest in energy conservation. See also *United States v Edge Broadcasting*, 113 S Ct 2696 (1993).

as normatively central have had listener autonomy in mind—and this easily leads to the conclusion that the source of the speech is irrelevant.⁵¹ However, why these theorists focus on the listener's autonomy is not immediately clear. After all, speech is what *speakers* do. Often speakers and writers engage in verbal activities without any concern for an audience. Some diarists are even distressed to have an audience—especially if the audience turns out to be the FBI or a Congressional committee. And certainly without speakers, listeners' autonomy is irrelevant. Moreover, the listener's desire to hear something seldom gives her the right to hear it unless some speaker has both the right (or bureaucratically defined duty) and desire to talk.⁵²

Of course, the marketplace-of-ideas paradigm emphasizes the listener perspective. Sometimes an emphasis on listener autonomy may reflect an unthinking acceptance of the primacy of the marketplace paradigm of the value of speech. Alternatively, the emphasis on the listener could reflect an attempt to identify something special about speech. From the speaker's "actor" perspective, arguably speech is not especially different from other exercises of self-expressive liberty. But from the listener's second-party perspective, a communication has a relatively unique manner and type of impact. The listener is typically affected only through mental

⁵¹ The best example is T. M. Scanlon, Jr., *A Theory of Freedom of Expression*, 1 Phil & Pub Aff 204 (1972).

⁵² Some cases (of which I approve) may seem to hold the contrary. Most obviously, in *Board of Education v Pico*, 457 US 853 (1982), the Court, without a majority opinion, held that under some circumstances a school's removal of books from its library could violate the First Amendment. See also note 62. Elsewhere I have argued that *Pico* is better understood as based on the notion that school suppression of speech is impermissible than on any free-standing right to receive information, although both were suggested in Justice Brennan's plurality opinion. Baker, *Human Liberty* 171 (cited in note 24). But the principle asserted in the text generates a different issue: whether any "speaker" had a right not to have their speech suppressed. There are at least three constitutionally relevant ways to answer this question and to distinguish this suppression from, for example, the suppression of a casino's advertising. First, certainly the author (even if dead) had a right to speak and presumably, if she published her book, had a desire to reach any willing audience—that is, there is (or was) a willing speaker with a right to speak. Second, below, collective entities that are part of the press will be distinguished from other commercial entities such that suppression of speech of the former is impermissible—so that suppression of books would in any circumstances be presumptively unconstitutional. Finally, there may be entities created by the government for purposes related to expression or culture or education in which decisions as to what expression to favor or promote are and must be made but in which the purpose of suppression of ideas is sufficiently contrary to the function of the institution that it should be found impermissible in that context. Compare *FCC v League of Women Voters*, 468 US 364 (1984).

assimilation. And the listener receives something crucial for meaningful exercises of her own autonomy—information, arguments, and viewpoints. Intuitively, from the listener's perspective, these qualities distinguish the actor's speech from the actor's other activities and give listeners as a group a more general interest in the existence of freedom for communicative activity.

From the premise of listener autonomy, David Strauss derives the principle that it is presumptively impermissible for the government to suppress speech because of the bad consequences that may result if the speech persuades people.⁵³ The objection to suppressing persuasion is similar to the objection to lying.⁵⁴ Both attempt to manipulate listeners by denying them the information or argument that they presumably would want in order to decide how to act or what to believe. Both try to "control the audience's mental processes"—both "interfere with a person's control over her own reasoning processes."⁵⁵

Granting the significance of listener autonomy and, for its purpose, the relevance of the speakers' identity, the question remains whether the premise of listener autonomy or the principle Strauss derives from it can do adequate constitutional work without reliance on an even more basic commitment to speaker autonomy. My suggestion is that, by itself, the premise of listener autonomy leads to too little—or to too much.

First, honoring listener autonomy could impose too great a restriction on government if it means that the government must not base a decision not to disclose information on the ground that the disclosed information would inform or persuade various listeners.

⁵³ David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334 (1991). Since persuasion is something speakers do, it might not immediately be clear that Strauss's focus is on listener autonomy. However, Strauss argues that not allowing the listener to decide is the violation of autonomy involved in suppressing speech—the violation "is taking over [listeners'] thinking processes." Id at 356. He reports that his Kantian conception of autonomy "focuses on what is happening to the listener." Id at 356 n 62. Moreover, when considering a government suppression of speech, Strauss never considers whether the speaker has autonomy rights at stake.

⁵⁴ Moreover, Strauss's conception of autonomy only encompasses persuasion as a rational process. Thus, his principle not only does not protect speech involving a false statement of fact, but it also does not protect speech that uses nonrational means of influence, sometimes not protecting speech that precipitates ill-considered reactions.

⁵⁵ Strauss, 91 Colum L Rev at 354. Interestingly, many of the less controversial exceptions to constitutional protection of speech involve lying—for example, fraud, perjury, false or misleading advertising, defamation that is knowingly (or recklessly) false. See Baker, *Human Liberty* 34, 55–68 (cited in note 24).

Certainly, private individuals often do not tell another person various things because of a concern of how the person will act—the listener might reject the speaker's job application or romantic proposal. The listener might decide to act in a manner that the speaker believes is bad for the listener or for the speaker or a third person whom the speaker cares about. Private individuals often do not disclose merely because of a fear that hearers will take the information out of context or without full consideration of its relevance, or because of an expectation that their enemies will use the information against them.

The government likewise often does not divulge information for similar reasons—sometimes even acting almost as an agent of a private person whom the information describes and whom the government suspects would not want the information disclosed. But still a potential listener may want this governmentally held information—for example, information about other people's employment or medical records, police records containing the rape victim's name, current Federal Reserve Board minutes, secret military research, Cabinet meeting notes. Strauss accepts the propriety of governmental refusals to provide some of this information, for example, to protect someone's privacy.⁵⁶ But it is difficult to see this interest in privacy, whether it is the interest of the government or the private person on whose behalf the government does not divulge, as involving much other than a fear of the consequences (either attitudinal or behavioral) of the listener having the information. Strauss's acceptance of the privacy concern amounts, I think, to a wise rejection of complete allegiance to listener autonomy. But if properly rejected here, the question becomes when and why listener autonomy should be accepted. Specifically, if government is not constitutionally required to give up information, why can it not legislatively require nondisclosure by those entities that have no autonomy rights and over which government has legitimate power.

Strauss as well as others conclude that respect for listener autonomy requires protection of commercial speech—tobacco advertising, for example.⁵⁷ Assume, however, that a commercial speaker

⁵⁶ Strauss, 91 Colum L Rev at 358 (cited in note 53).

⁵⁷ Id at 343–45. This conclusion follows for anyone who treats listener autonomy as central to the rationale for free speech. When Scanlon explained backing away from full allegiance to the Millian principle, which had amounted to an interpretation of listener

or other collective entity has no autonomy rights as a speaker—Strauss does not argue otherwise and the Court has implicitly accepted the view that they do not.⁵⁸ Then, restrictions on the commercial entity's speech might be even easier to justify than restrictions on access to government-held employment or medical records. The government's rationale for restrictions could reflect objections to the tobacco company's participation in the persuasion process. Thus, unlike refusals to disclose government-held information, the prohibition of the corporate entity does not require a judgment that the listener should not be persuaded to smoke or to vote for corporate interests. This follows if the government's content restriction applies only to some speaker's, that is, to corporations' product advertising or political message. The government

autonomy, he gave as an example the benignness of regulation of tobacco and liquor advertising. T. M. Scanlon, Jr., *Content Regulation Reconsidered*, in Judith Lichtenberg, ed., *Democracy and the Mass Media* 331, 344–52 (Cambridge, 1990). Whether Scanlon would have found his retreat necessary if speech were protected as an aspect of speaker autonomy is less clear.

Richard Fallon suggests similar concerns. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *Stan L Rev* 875 (1994). First, Fallon distinguishes descriptive and ascriptive autonomy—with descriptive meaning, roughly, people's actual empirical autonomy and ascriptive as a capacity they are assumed to have for purposes of how they are to be treated. (The notion of autonomy that I have long argued provides that the foundational premise of free speech is, in Fallon's terms, "ascriptive," although I have also argued that respect for ascriptive autonomy, at least for adults, will in the long run turn out to contribute meaningfully to promotion of descriptive autonomy.) Then Fallon also argues that ascriptive autonomy (but not descriptive) favors protecting cigarette advertising or other forms of commercial speech. *Id.* at 878, 901. Unless he holds the surprising view that ascriptive autonomy is something that tobacco companies can claim, he too here apparently adopts a listener-based conception of autonomy. Without any notion of inconsistency, however, Fallon clearly identifies ascriptive autonomy with the speaker in other places. *Id.* at 897.

Many practices further (or undermine) descriptive autonomy—good education, nurturing communities, availability of resources. Debates about most public policies could be styled as presenting contrasting views about which policy better contributes to descriptive autonomy. Thus, the concept is inevitably too contested and too comprehensive to serve usefully as a source of constitutional principle even if it is an appropriate aim of governmental policy. On the other hand, ascriptive autonomy refers to a type of respect the government must accord the individual as it adopts policies that pursue, among other things, descriptive autonomy. Respect for ascriptive autonomy would not be at stake in most governmental choices but, when it is, it could operate as a principled side constraint on democratic choice.

Of course, this does not imply that ascriptive and descriptive autonomy are entirely unrelated. Possibly, only a society of descriptively relatively autonomous people would want or be able to establish a society that respected ascriptive autonomy. Likewise, the appeal of ascriptive autonomy as a constraint on government action would lose considerable force as doubts arise about its long-term contribution to a form of social life in which descriptive autonomy flourishes.

⁵⁸ In cases where commercial speakers received constitutional protection, the Court eschewed any speaker autonomy justification and premised protection on a marketplace-of-ideas or a listener-oriented "public debate" rationale. See, e.g., *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976); *First Natl. Bank v Bellotti*, 435 US 765 (1978).

could explain that it did not want “that” self-interested entity to participate in the process of persuasion. This justification, however, must fail if applied to speakers (even if self-interested) whose autonomy, whose freedom of speech, the government must respect.

Unfortunately, this analysis of listener autonomy is tricky. The restrictions do reflect the government’s concern with consequences of persuasion. The government concludes that legitimate interests are furthered if the listener does not receive the information or advocacy. The government, however, argues that its attempt to influence “the audience’s mental process” is equivalent to an attempt improve the communications environment with which the audience engages. And, of course, sculpting the communications environment is something the government often does—by promoting education, by engaging in speech itself, by subsidizing both popular discourse and scholarly research, which also are intended to influence audience’s mental processes. All these activities (as well as government’s refusal to disclose certain information and its regulation of commercial speech) reflect the judgment that the set of communications people receive will influence their choices.

Since there is no natural set of communications to receive, the government will inevitably influence and ought to self-consciously and wisely influence the communications that people receive. Although both refused disclosure and restrictions on commercial speech deny the audience information out of concern for consequences, in neither case does the government prohibit the listener’s receipt of the information. Rather, the government judges that the likelihood of negative consequences justifies exercising control over itself and entities without their own basis to claim autonomy and restricting the participation of both in creating the information environment that contributes to these bad consequences. Nevertheless, if individuals (or media entities) have the information or maintain the viewpoint that the government or corporations do not supply, they still can speak. They can publish drug price information⁵⁹ or advocate smoking their favorite brand. Or they can disclose to any interested listener the name of the rape victim, the content of the Pentagon papers, or the content of nonadmissible confessions.

But if respect for listener autonomy allows government nondis-

⁵⁹ *Virginia Bd. of Pharmacy*, 425 US at 782–83 (Rehnquist dissenting).

closure and regulation of commercial speech because of concern with the consequences and allows the government to provide public education and support for culture out of hopes for consequences, what does respect for listener autonomy rule out? It could mean that the government cannot justify preventing a listener from receiving communications that the government, despite its structuring responsibilities, has no right to stop even if it fears bad consequences. But what would those communications be? The obvious answer would be communications that reflect speakers' autonomy (or media communications, which, I will argue below, receive special constitutional protection).

The above discussion does not disavow the necessity of respect for listener autonomy. Rather, it claims that if the premise of listener autonomy means that the government can never make choices on the basis of predictions of negative (or positive) consequences flowing from certain information or advocacy, then the premise leads to too much and too indeterminate protection of speech. That is, this broad conception of respect for listener autonomy would prevent the government from denying the listener information even if on balance it concludes that the speech does not contribute to the good and even if it is acting either as a speaker⁶⁰ or as a regulator of entities that have no autonomy rights.

Instead, in its more defensible, modest form, listener autonomy must be respected but doctrinally adds very little to speaker autonomy. It combines with speaker autonomy to require that government not block speech from an (ascriptively⁶¹) autonomous speaker to an (ascriptively) autonomous listener out of fear of the consequences of persuasion. In this account, however, listener autonomy offers very little protection without prior invocation of speaker autonomy.⁶² And speaker autonomy usually would require the pro-

⁶⁰ This does not mean that government secrecy is generally acceptable. Often governments refuse to provide information for "corrupt" or illegitimate reasons—such as fear that disclosures will reveal their misfeasance or malfeasance. More often, bureaucracies' almost instinctual attempts to maintain secrecy are practically unwarranted—not because bad on principle but because the secrecy reflects typical bureaucratic distortions in the calculation of the beneficial and harmful effects of disclosure. Laws like the Freedom of Information Act, 5 USC § 552, are appropriate responses to this problem.

⁶¹ See note 57.

⁶² If the speaker did not have protected rights, the notion of listener autonomy might require that the government regulate the speaker, not the listener. See, e.g., *Lamont v Postmaster General*, 381 US 301 (1965); cf. *Meese v Keene*, 481 US 465 (1987). Although the

tection on its own. Moreover, not only does the premise of listener autonomy add little, it also is surely inadequate by itself for First Amendment theory. It does not, for example, protect speakers from forced avowals such as mandatory flag salutes.⁶³

In sum, analytically, structural regulation of the individual, to the extent the notion is meaningful, is usually objectionable except in the sense of recognizing a person's authority over her self, her mind and body. In contrast, structural regulation of instrumentally created, collective entities in ways that affect their speech is unavoidable. When this regulation purposely influences speech, it should be seen as little different from establishing baselines or providing subsidies for favored communications or favored communicators. Its inevitability means that this regulatory structural intervention cannot be automatically problematic from a normative perspective. A marketplace-of-ideas perspective, however, might object to intervention that has the purpose of suppressing some expression (as opposed to regulation that has that effect in the context of promoting something else). In contrast, from a perspective that emphasizes either speaker autonomy or (more controversially) an appropriately limited listener autonomy, even regulatory suppression of communication by collective entities is usually unproblematic.

For example, neither a ban on corporate political speech nor a targeted restriction on casino advertising prevents autonomous individuals from speaking or autonomous individuals from hearing these speakers. Rather, these bans represent policy judgments concerning the appropriate role of these legally created corporate entities. The judgment is that, just as society sometimes benefits from government not providing certain information, society sometimes benefits from restricting these entities' informational and advocacy roles. At least since the demise of *Lochner*, the government can decide that a commercial entity serves society only on certain con-

area is unsettled, the Court in *Pearson v Dodd*, 410 F2d 701 (DC Cir 1969), in effect protected the listener when it denied liability for publication of information received from a speaker who had tortiously obtained the information. Also, whether the First Amendment permits regulation of the speech of an ascriptively autonomous speaker assumed not to have standing to object is a separate issue. See *Kleindienst v Mandel*, 408 US 753 (1972). Cf *Lamont v Woods*, 948 F2d 825 (2d Cir 1991).

⁶³ *West Virginia Bd. of Ed. v Barnette*, 319 US 624 (1943).

ditions. These policies embody structural judgments about the appropriate role in social life of collective entities created and given power under collectively established rules.

B. MEDIA ENTITIES

If the First Amendment only minimally restrains regulation of collective entities, what about media entities? The "press" is the only business to receive explicit constitutional protection.⁶⁴ Although some constitutional issues require a choice among theories of the constitutional role of the press, all these theories include the view that the press should provide the public with information and opinion uncensored by government. This distinguishes the press from other legally created collective entities.

In accord with an autonomy-focused interpretation of free speech, current doctrine allows the government to restrict the speech of most commercial entities in order to improve the wisdom of individual decision making or the quality or fairness of public debate. In contrast, the government cannot suppress press communications on this rationale.⁶⁵ Laws aimed at restricting either the press' expression or an individual's autonomously chosen expression should be, even if for different reasons, equally impermissible. In this respect, constitutional doctrine radically distinguishes the press from other collective entities.⁶⁶

In contrast, media entities are like other commercial entities and unlike individuals in being inevitably structured by law.⁶⁷ These structural choices often reflect policies unrelated to the communications order, such as efficiency in capital structures, fairness in employee relations, preservation of the environment, or maintenance

⁶⁴ See, e.g., Justice Potter Stewart, "Or of the Press," 26 *Hastings L J* 631 (1975).

⁶⁵ See, e.g., *Mills v Alabama*, 384 US 214 (1966).

⁶⁶ There is plenty of language, usually in dissents or concurrences, rejecting this dichotomy, but this rejection is uniformly made in support of greater protection for commercial entities rather than to favor reduced protection of the press. See, e.g., *Austin v Michigan Chamber of Commerce*, 494 US 652, 691-92 (1990) (Scalia dissenting); *First Natl. Bank v Bellotti*, 435 US 765, 795-802 (1978) (Burger concurring).

⁶⁷ Any suggestion that the choice of structures can be left entirely to private actors arranging their affairs on the basis of contract ignores that both the content of contract law and the availability of the option to enter obligatory or legally enforceable contracts reflect policy choices and that these choices cannot be justified on any neutral or abstract economic grounds. Compare Duncan Kennedy and Frank Michelman, *Are Property and Contract Efficient?* 8 *Hofstra L Rev* 711 (1979-1980).

of ethics. Nevertheless, the government has also always engaged in regulation to advance its conception of a desirable communications order—a conception that includes promotion of viewpoint diversity, quality of discourse, education, and ease of participation. A democracy concerned with promoting collective conceptions of the good arguably requires this form of regulation.

The question is whether it is proper to advance these policies with media-specific laws.⁶⁸ As I show in Part III, structural choices aimed specifically at the media, typically motivated and justified on the basis of content concerns, have been common in American history. On the rare occasions when these structural rules have been challenged, they have consistently been upheld by the Court. The legitimacy of a democracy's concern with the effective functioning of the communications order offers *prima facie* support for media-specific regulation. Moreover, two features that typically prompt objection to content regulation of individuals—first, that choices and speech of individuals can plausibly be thought to have intrinsic value and, second, that individuals are conceptualized as significant entities independent of legal structuring—are both absent in institutions that are valued only instrumentally in relation to how they contribute to human flourishing and that are inevitably subject to legal structuring.

Of course, attempts to undermine press performance are invalid under any regime of freedom of the press. Still, media-specific laws could support the press in performing its constitutional roles.⁶⁹ Since only instrumental arguments could be the basis of objecting to media-specific structural regulation, presumably the argument must be that an appropriate distrust of government's motives or wisdom in enacting structural regulation combined with a sufficient lack of confidence in courts' ability to identify cases where the law undermines rather than aids press performance outweigh the

⁶⁸ In response to the claim that the must-carry rules should be upheld as industry-specific antitrust regulations, the Court commented that the cases cited by the government involved laws of general application and "that laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse' . . . and so are always subject to at least some degree of heightened First Amendment scrutiny." 114 S Ct 2458 (citations omitted). But the Court also said: "As *Leathers* illustrates, the fact that a law singles out a certain medium, or even the press as a whole, 'is insufficient by itself to raise First Amendment concerns.'" *Id.* at 2468 (citation omitted).

⁶⁹ See C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 Const Comm 421 (1993).

potential gains to media performance from media-specific laws. Although such a conclusion is possible, neither American history nor prior judicial judgments supports such a negative view.

Before elaborating on these claims in Part III, I want to turn to the principle that both the majority and dissent believed could be determinative in *Turner*—that must-carry rules would be substantially discredited if content-based.

C. CONTENT QUESTIONS

The Court in *Turner* began its account of the normative basis of the content-based/content-neutral doctrine by asserting: “At the heart of the First Amendment lies the principle that *each person should decide* for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”⁷⁰ Despite the Court’s assumption to the contrary, my claim is that the Court’s individual-choice notion of the “heart” of free speech does not support objections to content-motivated structural regulation of media enterprises.

The “heart” is fundamental. Apparently, both the First Amendment and the special objection to content-based laws somehow embody or support the principle of each person deciding for herself about matters of expression, reflection, and commitment. They might do so in either or both of two ways: directly by empowering speakers or indirectly by empowering listeners. The constitutional guarantee protects the speaker’s choice to speak and may aid listeners in obtaining the information that will make their subsequent expression and commitments meaningful.

First, if the government mandates or prohibits speech, it violates speaker’s free choice. The Court’s citation to *Barnette* and *Coben* as support for personal choice being at the heart of the First Amendment was apt.⁷¹ Personal choice is central to why a person cannot be forced to swear allegiance to the flag. And as the Court said in relation to the person wearing a jacket emblazoned with “Fuck the Draft”: “[the constitutional right of free expression] put[s] the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport

⁷⁰ 114 S Ct at 2458 (emphasis added, citing *Barnette* and *Leathers* citing *Coben*).

⁷¹ *Id.*

with the premise of individual dignity and choice upon which our political system rests.”⁷²

Analytically, the individual choice central to *speaker* autonomy could not be offended by content-based or any other structural regulation of legally created collective entities. The Court’s theoretical introduction to its First Amendment discussion even used some language that might suggest that it recognized that this concern for speaker choice does not automatically extend to media entities. It began with “each person” deciding. After elaborating for three sentences, the Court started the next paragraph with: “For these reasons, the First Amendment . . . does not countenance governmental control over the content of messages expressed by private *individuals*.”⁷³

The Court, however, added to this emphasis on individual speaker choice another concern that might relate more to listeners’ decision making. It referred to the “risk that the Government seeks . . . [to] manipulate public debate through coercion rather than persuasion;” to “the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace;” and to the “risk of excising certain ideas or viewpoints from the public dialogue.”⁷⁴ These references might explain objections to content-based laws that are directed at collective entities, especially media entities.

These statements could be forced into the mold of a concern for speaker autonomy, for example, if the normatively relevant conception of public debate and dialogue were equated with the unconstrained dialogic participation of individuals in an attempt to reach agreement. Then, any regulation of speakers that risked “driving out” or “excising” *their* viewpoints from public dialogue would deny them their participation rights as well as undermine the legitimacy of conclusions reached through public dialogue. Still, these references, as well as the Court’s uncritical application of content-discrimination doctrine to the issue of must-carry rules, suggest a concern with the listener benefiting from an undistorted public debate. Moreover, as asserted in the last section, special

⁷² *Cohen v California*, 403 US 15, 24 (1971).

⁷³ 114 S Ct at 2458 (emphasis added).

⁷⁴ *Id* (the second statement quoting *Simon & Schuster v New York State Crime Victims Bd.*, 502 US 105 (1991)).

protection of press enterprises exists precisely to provide listeners with information and ideas. Thus, maybe the concern with content-based laws represents a First Amendment theory focused on the listener as well as (or rather than) the speaker. If so, maybe content-based laws directed at collective entities, or at least at media entities, should be treated the same as laws concerning individuals. Content discrimination would be equally objectionable in both cases.

In this listener perspective, the evil would be that content-based laws distort public debate. This view has substantial support. Geoffrey Stone, in the classic article on the content-based/content-neutral doctrine, defends the doctrine because, "properly defined and understood," it sufficiently serves several fundamental First Amendment values.⁷⁵ Stone credits three of the four considerations that he identifies as possible explanations of the constitutional problem with content- (or least viewpoint) based laws.⁷⁶ The third, distortion of public debate, might apply irrespective of the speaker to any content-based laws, and, thus, apply to the must-carry rules.⁷⁷

Stone repeatedly refers to distortion—for example, arguing that the First Amendment is concerned with distortion of "public debate" perhaps "more fundamentally" than with "the total quantity of communications."⁷⁸ Initially, this concern with distortion seems to offer little justification for special treatment of content-based

⁷⁵ Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 251 (1983).

⁷⁶ Despite the attention it had received, Stone observed that the notion of equality standing alone could not justify the content discrimination doctrine. *Id.* at 201–07. Roughly, the point is that laws always make distinctions. The issue must be what substantive equality norm does a law offend. See C. Edwin Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 Tex L Rev 1029 (1980). This means the objection to the content discrimination must lie in the offense to some substantive norm, which leads to Stone's other three concerns.

Other than distortion of public debate, discussed above, Stone's two other justifications for the content discrimination doctrine are that content discrimination often reflects paternalistic concerns with speech's communicative impact, which is usually an objectionable basis for a restriction, and that it often reflects an improper motive to restrict speech with which the government disagrees.

⁷⁷ Stone's category of content-based laws are those that are content-based on their face and, thus, does not immediately apply to must-carry rules. He describes content-neutral laws that have a content-based purpose as raising separate issues that result in their sometimes but not always generating serious first amendment concerns. Stone, *Content Regulation* at 234–39 (cited in note 75).

⁷⁸ *Id.* at 198. See also *id.* at 200, 212.

laws because content-neutral laws often have significant content-differential effects. Moreover, many content-based laws leave plenty of channels open for the disfavored content and, therefore, have only modest content-based effects. Stone suggests, however, that content-based laws pose a greater danger of being used improperly to distort. Eventually, he argues that this danger and the significant difficulty of identifying objectionable content-based laws provide support for the doctrine.⁷⁹ Nevertheless, he never explained, but merely assumed (as do the courts and many other commentators), that distortion of public debate is a “fundamental” First Amendment evil and that the concept has sufficient content to justify judicial intervention.

There is no “natural” version of public dialogue that the First Amendment could prohibit the government from distorting. The content and quality of public dialogue depend on many factors, including the overall legal order and legally established resource allocations. It reflects the societal resources devoted to education or to places of dialogue and the wealth legally placed into the hands of people who do or do not wish to engage in particular ways in public dialogue. The government even participates, massively and purposefully, in the debate itself.

A critic of content discrimination cannot reply that the government’s huge impact on public dialogue is unfortunate and should be avoided to the extent possible. Democratic theory requires a government role. Since all laws inevitably favor some conceptions of the good over others, rationality virtually requires that the choice of laws turn in part on collective notions of the good. Indeed, one purpose of democratic government is to provide for collective means to promote conceptions of the good in contexts where individual decision making would be inadequate for realizing the chosen conceptions. (Of course, the legitimacy of collective promotions of favored conceptions does not justify suppressing dissenting views and alternative conceptions.) In this regard, government ought to promote—that is, structure institutions in a manner that would promote—a collectively valued communications order. And

⁷⁹ *Id.* at 217–27. Arguably, Stone portrays avoidance of distortion as weaker than other supports for the doctrine. But he repeatedly refers to it both here and in other treatments of content discrimination. See, e.g., Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 42 *U Chi L Rev* 81, 101–03, 107 (1978).

it should participate in the communications order to noncoercively advance collective conceptions of the good.

Of course, the appropriate content and manner of government participation is always politically contested. After reflection, however, virtually no one argues that government participation should be entirely eliminated. The government selects what information to develop in government studies, to foster with government research grants, and to publicize in government publications. It also often promotes specific viewpoints. Public schools teach, or at least claim to teach, community values—and often carefully avoid teaching marxism or fascism.⁸⁰ Schools may even be constitutionally required to be partisan on the issue of racism. The Surgeon General advances the view that smoking is bad. The Defense Department promotes enlistment, while other government agencies sometimes advocate conservation.⁸¹ Sometimes the government simplistically participates on the side of “just say[ing] no.”

Government’s recognized role in structuring society in ways that affect public dialogue and its discretionary participation in that dialogue make it unclear why anything called “distortion” could be constitutionally objectionable. These facts also mean that there can be no standard with which to compare the effect of governmental policies in order to describe these effects as “distortions.” But if distortion cannot lie merely in the fact or the effect of government involvement, it is unclear how distortion of “public dialogue” can be identified.⁸² Certainly, if it is to be more than a constitutional

⁸⁰ All members of the Court apparently agree that it is proper for schools to teach community values. See, e.g., *Hazelwood School District v Kuhlmeier*, 484 US 260 (1988). I put aside here the question of the Constitutional basis of the principle of academic freedom as well as its content and the possible variable application depending on level of instruction or other contextual factors.

⁸¹ Surely all these examples involve the government is promoting particular viewpoints. Moreover, although a court held that during the Vietnam War enlistment was not a controversial issue, *Green v FCC*, 405 F2d 1082 (DC Cir 1971), other governmental viewpoints, like conservation, are quite controversial. See David Helvarg, *The War on Greens*, *The Nation* 646 (Nov 28, 1994).

⁸² In defending the view that distorting public debate is the prime evil the First Amendment should be interpreted to prevent (the Distortion model) and that the First Amendment requires “a rigidly enforced official government neutrality,” Lillian BeVier never explains how such distortion can be identified (or why it is bad). Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 *Supreme Court Review* 79, 102. She rules out most of the obvious, but as she recognizes, “naive” notions of neutrality. *Id.* at 103 n 96. Certainly, once the permissibility (and desirability) of government speech is recognized, the notion of improper distortion will either become vacuous or, as I argue below, turn on an independent normative basis (involving commitments BeVier seeks to avoid) for objecting to certain ways in which the government affects public debate.

of expression of most legally created collective entities is usually unproblematic—except that media entities are different because of their special constitutional role. Suppression of media entities' content is objectionable—as is structural regulation aimed at undermining their constitutional role[s]. However, structural regulation of the media is not only inevitable but it should be praised when wisely designed to enhance the quantity or quality of their participation. That is, content-motivated structural regulation of the media is generally permissible and will often be affirmatively desirable. Finally, any suppression of individuals' expression is clearly impermissible.

This emphasis on speakers' rights explains the constitutional objection in paradigm content discrimination cases. The Court early concluded that grants of discretionary power to officials to permit or license expressive activities in streets, parks, or public facilities create a danger of restricting individuals' speech choices on the basis of the officials' censorial preferences. Next, given a presumption that people ought to be able to use public spaces for their expressive activities, the Court suggested that only those narrowly designed restrictions on expression necessary to prevent direct interference with government programs or other private people's activities ought to be allowed.⁸³ Any permission given to people presenting some content but not another, such as labor picketing in *Masley*,⁸⁴ strongly suggests that expressive activity at that place and time does not seriously interfere with other uses of the space. And the government cannot persuasively argue that it is using its property to subsidize favored speech rather than to suppress people's expression, given that people have a right to be present at the location and to express themselves if doing so does not interfere with the location's dedicated use. Thus, permission for particular content generally means that the prohibition of other content violates the rights of those whose expression is suppressed. Hence this content discrimination is unconstitutional.

The general conceptual problem is to evaluate a government claim that it is not suppressing speech but rather that any content discrimination merely reflects some other legitimate undertaking. The government asserts that having flexibility allows it to make the

⁸³ See, e.g., *Grayned v Rockford*, 408 US 104 (1972).

⁸⁴ *Police Dept. of Chicago v Masley*, 408 US 92 (1972).

best use of public spaces; or that it is subsidizing labor picketing, maintaining the draft registration system or the park facilities in the nation's capital,⁸⁵ trying to ensure good job performance by its employees, restraining those with a demonstrated inclination for violence at abortion clinics, or using the school's mail system for its dedicated use. Sometimes the Court allows content-discriminatory conditions. Without unraveling the unconstitutional conditions doctrine, a possible interpretation is that if the condition relates to the government's legitimate reasons for its use of its resources, the condition should be acceptable. Likewise, announcements that some facilities are "nonpublic" fora have been most legitimately used as shorthand for the conclusion that the public's general expressive use of the facility would interfere with the purposes to which the government had dedicated the facility while the permitted expressive uses specifically relate to those purposes.

One puzzle in content-discrimination doctrine is why (and whether) a law that is facially content-neutral should be treated as content-based if it has a content-based purpose. *O'Brien* may help explain the move. Although the prohibition on burning draft cards facially did not relate to expression at all, the *O'Brien* test later became the standard test for content-neutral laws.⁸⁶ But *O'Brien* scrutiny applies only to laws that are not related to the "suppression of free expression."⁸⁷ When they purposefully suppress it will typically be a content-related suppression (as was the ban on burning draft cards, according to critics of *O'Brien's* application of its own test). And although *O'Brien* did not say explicitly what to do with such laws, presumably they normally should be struck down. In effect, they are treated just like facially content-based laws. Thus, *O'Brien* establishes the treatment for facially content neutral laws that have a content-based purpose.

The only missing step is that *O'Brien* treats the nonfacially content-based law as content-based only if it aims at *suppressing* expression. In contrast, existing doctrine, at least as described by both

⁸⁵ From an effects perspective and, more controversially, a speaker's rights perspective, *O'Brien* and *Clark v Community for Creative Non-Violence*, 468 US 288 (1984), involve content discrimination. See Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U Pa L Rev 615 (1991).

⁸⁶ Williams, 139 U Pa L Rev 615 (cited in note 85) (criticizing the logical slippage of conflating the tests for content-neutral laws with laws not directed at expression).

⁸⁷ 391 US at 377.

the majority and dissent in *Turner*, applies even when the law is directed at favoring particular content.⁸⁸ Nevertheless, the many cases that uphold content-related conditions on protected speech show that this claim cannot be quite right.⁸⁹ Possibly, the content-discrimination doctrine is properly used only when the government's claim to be merely "subsidizing" the favored expression seems implausible; then the laws are seen as really suppressing the unfavored speech.

⁸⁸ Both the majority and the dissent in *Turner* emphasized that the objection to content discrimination exists whether the distinction relates to hostility or favoritism toward the content. 114 S Ct at 2458–59, 2477. Between them, they cited nine cases for the proposition that government favoritism or agreement with a message would not support content discrimination. *Id.* Nevertheless, support for the proposition that government favoritism for a message is objectionable is quite weak. The two cases cited by the majority merely provided dicta. In the first, *Ward v Rock Against Racism*, 491 US 781 (1989), the cited language could only be dicta since the challenged law was treated as content neutral and upheld. In the second, *R.A.V. v St. Paul*, 112 S Ct 2538 (1992), despite the statement that "[t]he government may not regulate [speech] based on hostility—or favoritism—towards the underlying message," *id.* at 320, the challenged government practice can only be understood as suppression of a category of racist communications, not a benefit for preferred speech. In the one of the seven additional cases cited by the dissent, *Arkansas Writers' Project v Ragland*, 481 US 221, 231–32 (1987), the Court referred to pages where the Court rejected the states' purported explanation that the discriminatory tax was a subsidy for justifiably favored "fledgling publications" as so ill-fitting that the explanation was implausible. The implication was that the Court instead viewed the tax exemption as the baseline for the media and that the tax imposed a suppressive burden on a few; but it also implied that coherently structured content-based tax subsidy, for example, for "fledgling publications," might be upheld. Likewise, in the other six cases, the content discrimination should be viewed as suppression since the normal baseline ought to be free speech. Surely the normal assumption is the right to photograph, so the limitation on photographing currency was clearly suppressive. *Regan v Time*, 468 US 641, 648–49 (1984). As noted, the normal assumption is that people are free to use streets and parks (and arguably many other public facilities) for expressive purposes, so that when content-based limitations are imposed, they should be interpreted as suppressing what is not allowed rather than favoring that which is permitted. This point explains the other cited cases. *Metromedia v San Diego*, 453 US 490, 514–15 (1981) (plurality); *Carey v Brown*, 447 US 455, 466–68 (1980); *Police Dept. of Chicago v Mosley*, 408 US 92, 96 (1972); *Cox v Louisiana*, 379 US 536, 581 (1965) (Black concurring).

⁸⁹ *Hazelwood School District v Kuhlmeier*, 484 US 260 (1988) (principal censored content of paper written in connection with journalism class); *Meese v Keene*, 481 US 465 (1987) (government identification of some foreign films as "political propaganda"); *Bethel School District v Fraser*, 478 US 675 (1986) (student punished for content of his speech); *Connick v Myers*, 461 US 138 (1983) (content evaluation of employees' speech); *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 48 (1983) ("[i]mplicit in the concept of the nonpublic forum is the right to make distinctions . . . on the basis of subject matter"); *Lehman v Shaker Heights*, 418 US 298 (1974) (favoring commercial over political advertising on public bus). All these cases are controversial—I would argue with the result in each. My objection, however, would not be that they involved content discrimination, which I believe must be viewed as uncontroversial in the context of many government endeavors and many cases of government subsidy, but rather with the majority's characterization of what was occurring in each case. Generally, the strategy would be to show that, properly characterized, the government engaged in suppression rather than merely avoidance of support.

Thus, the real objection to laws properly invalidated as content-based should be that those laws were aimed at suppressing the expression of people who have a right of free speech or at restricting the communications of media enterprises. If this is right, the traditional doctrine needs revision. Specifically, properly interpreted, the First Amendment does not outlaw content-based subsidies of speech or content-based laws needed to make proper use of government resources or most content-based laws regulating the expression of legally created commercial entities. More relevantly here, the First Amendment allows content-*motivated* structural laws directed at the media unless the law is designed to undermine the media's functioning. It should also, although somewhat more controversially, allow even facially content-*based* laws imposed on the media as long as the law does not suppress expression or undermine the media's integrity but, rather, supports a desirable communications order. For example, the government could require broadcasters to include children-oriented programming or to cover controversial issues.

Although the above formulations summarize the analysis in this and the previous section, the scope of permitted content discrimination may seem troublingly broad. I want to note two possible modifications of the above formulations involving the arguably special category of viewpoint discrimination⁹⁰—and tentatively approve one modification and reject the other. First, permitted content regulation or even content subsidies should arguably be limited to subject matter discriminations. Second, in any event, the government arguably should not be permitted to engage in strictly political party partisanship. The first point validly observes that viewpoint discrimination is often much more objectionable than subject matter discrimination. The second point refers to the way commentators often drive home the first point—they argue that the government surely should not be permitted to explicitly subsidize Democrats and exclude Republicans.

Of course, many laws—franking privileges, for example—favor incumbents over challengers. In practice such a law subsidizes the “view” that incumbents are worthy, a view currently at odds with

⁹⁰ Of course, the distinction between viewpoint and subject matter is never precise given that by stepping back the choice to consider or exclude a particular subject matter can amount to a very partisan viewpoint. See Stone, 42 U Chi L Rev 81 (cited in note 79).

the tendency for electorates to impose term limitations. Likewise, a law that private employers must pay employees for time taken off on election day may be permissible even if Democrats supported the law (in part) because of a viewpoint-based belief that the benefited workers will tend to use the time to vote Democratic.⁹¹ And although many states do restrict local governments' support of particular positions in referendums, it is very doubtful that this is a requirement of the First Amendment as opposed to state policy choices. Should the First Amendment be understood to prohibit local school boards from promoting favorable votes in referendums on their proposed budget or local governments from lobbying their state legislature for benefits for the city? If allowed, however, the government will have purposively favored obviously controversial viewpoints. Moreover, even though it seems unacceptable for the government to require private employers to give out leaflets saying, "Vote Republican—Vote for Jones," it may be very appropriate to require that they pass out literature discussing fair employment practices or environmentally sound operating procedures, even though in both cases the literature may represent viewpoints, in fact, viewpoints with which the corporate managers or owners and some other members of the public strongly disagree.

These observations lead to the following suggestion. Just as many imaginable regulations are not only economically stupid but sometimes politically offensive without being unconstitutional, most viewpoint-oriented subsidies and viewpoint regulation of non-media entities that cannot claim autonomy rights as speakers should be constitutionally permissible.

As for media entities, the argument becomes somewhat more complicated. Arguably, none of the many content-motivated regulations and only some of the content-based regulations of the media (for example, a requirement that television include children-oriented programming), some of which I will discuss in the next section, have been overtly viewpoint-based. The requirement that structural or nonsuppressive content regulation of the media is proper only if it does not undermine the media's democratic functions permits regulations designed to improve the communications order, but, it could be persuasively argued, viewpoint regulation will never (or seldom) pass this test. Thus, for the media, content

⁹¹ Compare *Day-Brite Lighting v. Missouri*, 342 US 421 (1952).

regulation not only must not be aimed at suppression, but also must not be viewpoint-based.⁹²

Finally, the narrower objection to overt, narrowly partisan, candidate-oriented subsidies or regulation seems right. However, the difference between this objectionable viewpoint regulation and the regulations and subsidies that I have argued should be allowed seems solely that objectionable regulation relates to partisan candidate support within the electoral process, not to any general principle about speech or government's viewpoint favoritism. Thus, arguably the First Amendment is the wrong text from which to object. The most obvious problem with government providing partisan support for its own entrenchment is that this violates any plausible conception of republican government. Of course, the Guarantee Clause has been generally assumed to raise only nonjusticiable political questions.⁹³ If this doctrine continues, the partisanship may still be a denial of equal protection—it violates a fundamental right of electoral fairness.⁹⁴ However, even if the objection is located in First Amendment-based requirements on the electoral process,⁹⁵ it hardly represents a general objection to viewpoint discrimination.

III. THE GRAND TRADITION: CONTENT-MOTIVATED STRUCTURAL REGULATION OF THE COMMUNICATIONS ORDER

Often discussion of the constitutionality of media-specific structural regulation narrowly limits itself to invoking *Tornillo* (and occasionally the newspaper tax cases⁹⁶). It then concludes that structural regulation, especially content-based regulation, is unconstitutional. Finally, *Red Lion* (and sometimes a few other broadcast regulation cases⁹⁷) is cited for the proposition that, as long as physi-

⁹² Of course, the government can pay to have a viewpoint included in the media as an advertisement, but in that case it is clearly the government's speech that is being circulated.

⁹³ See *Pacific States Telephone & Telegraph v Oregon*, 223 US 118 (1912); *Luther v Borden*, 7 How 1 (1849).

⁹⁴ Compare *Williams v Rhodes*, 393 US 23 (1968).

⁹⁵ Compare *Anderson v Celebrezze*, 460 US 780 (1983).

⁹⁶ E.g., *Grosjean v Am. Press Co.*, 297 US 233 (1936); *Minneapolis Star and Tribune Co. v Minn. Comm'r Revenue*, 460 US 575 (1983).

⁹⁷ E.g., *NBC v United States*, 319 US 190 (1943) (upholding the chain broadcasting rules against constitutional attack). Since scarcity obviously cannot justify restricting what is broadcast, *FCC v Pacifica Foundation*, 438 US 726 (1978) (upholding regulation of indecency), is seldom cited in this context. *Pacifica*, whatever the merits of the decision, is best analogized to *Young v Am. Mini Theatres*, 427 US 50 (1976), rather than other broadcast cases.

cal scarcity is accepted as distinguishing broadcasting from other media, broadcasting will be treated as different. This approach is summarized as presenting a dominant newspaper model and a secondary broadcasting model.

In this section I develop three points in challenging this conventional view and argue that the United States has consistently and properly engaged in content-motivated structuring of the communications realm. First, the conventional view encompasses too narrow a conception of communications media; given a broader conception, the ubiquity of content-oriented regulation becomes apparent and, despite often especially benefiting politically powerful industrial interests, it has usually also benefited the nation. Second, broadcasting regulation is not unique, and the conventional view's interpretation of its constitutional basis is misleading. Third, the conventional view is also wrong to assert that structural regulation of newspapers is impermissible.

A. TELEPHONE AND MAIL

Even adding magazines, books, music productions, cable, and theater to the usual focus on newspapers and broadcasting leaves too narrow an image of the communications order. The telephone and postal systems, for example, are major communications industries. Their function is communication. Their usage creates culture, generates public opinion, and provides personally and politically salient communications. And unlike noncommercial, face-to-face speech between individuals, the telephone and mail systems are institutionally structured media that normally sell their services.

Of course, the telephone and postal systems are usually conceived as strictly conduits of others' speech—but it need not be this way. Both enterprises could assert "editorial" power to "censor" the speech they deliver. Historically, the postal system usually denies mail privileges for speech considered illegal—that is, obscene or treasonous material—but it has also claimed the right to restrict mailing privileges to other speech or material of which the government disapproves.⁹⁸ Likewise, the phone company recently as-

⁹⁸ Compare *Hannegan v Esquire*, 327 US 146, 150 (1946) (rejecting postmaster's claim to deny second-class mailing privileges to nonobscene material because it did not "contribute to the public good and the public welfare").

serted an interest in control of messages delivered over its lines. The Court of Appeals upheld the company's decision to exclude constitutionally protected "adult entertainment."⁹⁹ Of course, the most profitable use of their facilities will generally favor allowing anyone who will pay the charge to use the facility for their speech.¹⁰⁰

Whether any media will seek to exercise editorial control is a historically contingent matter. In the initial stages, AT&T expected broadcasting to develop without editorial control. As an operator of radio stations AT&T planned "to provide no programs" but rather to create a phone booth of the air. "Anyone who had a message for the world or wished to entertain was to come in and pay their money as they would upon coming into a telephone booth"¹⁰¹ Similarly, some accounts of eighteenth-century press ideology suggest that the press thought it had an essentially common carrier obligation under which it would be inconsistent with freedom of the press not to print all views.¹⁰² Essentially, these providers of a communication service gave a different answer to the question, "freedom for whom?" than do modern newspaper corporations.¹⁰³ Freedom of broadcasting or the press would be for anyone who had something to say (and would pay the charge) over the medium. Certainly, law as well as economic conditions that are themselves reflective of law will influence the form these historically contingent developments will take.

Thus, telephone companies, like newspapers, could argue that

⁹⁹ *Carlin Communications v Mountain States Telephone & Telegraph*, 827 F2d 1291, 1294 (9th Cir 1987). The Court allowed the telephone company to accede to the heckler's veto, concluding that the exclusion did not violate common carrier obligations because done for business reasons. See also *Carlin Communication v Southern Bell Telephone & Telegraph*, 802 F2d 1352 (11th Cir 1986).

¹⁰⁰ Although newspapers' acceptance of advertising resembles this pattern, newspapers as currently constituted also find it profitable to engage in reporting, story writing, and editing—and they use their editorial power to exclude some advertising, and these exclusions are often economically advantageous.

¹⁰¹ Erik Barnouw, *A Tower in Babel: A History of Broadcasting in the United States* 106 (Oxford, 1966) (quoting AT&T's Lloyd Espenschied). See also Robert W. McChesney, *Telecommunications, Mass Media, & Democracy* 12–15 (Oxford, 1993). McChesney noted that AT&T's success was undermined by other stations giving away time.

¹⁰² "Newspapers were to be open channels of public communication, and 'public printers' were to be just that: printers, not editors. This impartiality was itself one meaning of the term *liberty of the press*." John Nerone, *Violence Against the Press: Policing the Public Sphere in U.S. History* 22 (Oxford, 1994).

¹⁰³ Compare Jerome A. Barron, *Freedom of the Press for Whom?* (Indiana, 1973).

their business is communications and that they therefore should have full First Amendment rights.¹⁰⁴ Certainly some regulations of the telephone or mail systems can violate the First Amendment. The Court has indicated wariness of any ban of constitutionally protected expression in either.¹⁰⁵ Nevertheless, usually the constitutional objection, even the regulation of privately owned telephone systems, is that the restriction violates users' speech rights rather than the speech or editorial rights of the medium.

Once telephone and mail are seen as important communications media, it becomes apparent that government policy significantly and purposefully shapes the communications order. An examination of regulatory policies relating to these media can test any thesis concerning the propriety of content-based regulation. Here, I merely note a few aspects of government regulation, often reflecting implicit or explicit content concerns, that favor various categories of communications or communicators.

Both telephone and mail have complicated, governmentally imposed or approved rate structures. These structures purposefully promote (subsidize) some users' expression, usually by imposing higher than cost fees on other users' expression. Telephone has seen various rate preferences.¹⁰⁶ Historically, regulation promoted universal service.¹⁰⁷ At times, urban users have subsidized rural and, with less egalitarian justification, suburban users. Business and long distance users have subsidized residential local users. Non-poor users have subsidized life-line service for the poor. Telephone rate regulation may merely reflect government's choice to favor politically significant categories of users—just as Congress's

¹⁰⁴ Patrick O'Neill, *Editorial Rights of Telephone Carriers*, 71 *Journalism Q* 99 (1994). Telephone companies' increasing claims of First Amendment rights have begun to receive somewhat critical attention. See, e.g., Angela J. Campbell, *Publik or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 *NC L Rev* 1071 (1992); Daniel Brenner, *Telephone Company Entry into Video Services: A First Amendment Analysis*, 67 *Notre Dame L Rev* 97 (1991).

¹⁰⁵ See *Sable Communications v FCC*, 492 US 115 (1989); *Lamont v Postmaster General*, 381 US 301 (1965); *Hannegan v Esquire*, 327 US 146 (1946).

¹⁰⁶ One critical review claims the current system's subsidies favor local over long distance, residential over business, heavy over light, and rural over urban users. David L. Kaserman and John W. Mayo, *Cross-Subsidies in Telecommunications: Roadblocks on the Road to More Intelligent Telephone Pricing*, 11 *Yale J Reg* 119, 131 (1994).

¹⁰⁷ This was one of various concerns that led government regulators to turn telephone into a monopoly business early in the century. See Warren G. Lavey, *The Public Policies That Changed the Telephone Industry Into Regulated Monopolies: Lessons from Around 1915*, 39 *Fed Comm Bar J* 171 (1987).

must-carry cable rules might realistically be described as Congress favoring politically powerful local broadcasters over others. But publicly defensible policies, including content preferences, also seem implicit. For example, government apparently considers local telephone usage to be especially important in people's lives. Similarly, the name of the heavily subsidized "life-line" service implicitly indicates a high value placed on reports of emergencies or calls for help.

Because the postal system is governmentally owned, it cannot make claims analogous to newspapers' asserted right to exclude on the basis of content. Indeed, the First Amendment might require the converse. Access to the postal system might be like access to a public forum.¹⁰⁸ Any content-based exclusion (of a protected category of speech) would be impermissible censorship.

Nevertheless, even without imposing exclusions, postal policy has continuously favored some users and some content. In a policy that existed from the beginning of the Republic until at least the 1970 Postal Reorganization Act, the postal service has charged some mail more than its share in order to subsidize favored mail. For the first time in 1970, Congress established the principle that each category of mail, with some notable exceptions, should pay its own way, and not more than its own way, phasing out the subsidies that newspapers and magazines had enjoyed throughout American history.¹⁰⁹ The remaining exceptions, however, show Congress's continued determination to favor some speakers, in part because of favorable judgments concerning content. For example, the most high-minded justification for the franking privilege is the content-based concern to promote knowledge of governmental affairs.¹¹⁰

¹⁰⁸ This view goes back to dissents by Holmes and Brandeis in *United States ex rel Milwaukee Social Democratic Publishing Co. v Burehan*, 255 US 407, 417, 436 (1921) that are now cited as authoritative. In *Blout v Rizzi*, 400 US 410, 416 (1971), the Court found the postal system procedures for excluding obscenity "violate the First Amendment unless they include built-in safeguards against curtailment of constitutionally protected expression." This contrasts with people's mailboxes, which are not public forums—at least, a person must use the postal system in order to gain access. *U.S. Postal Service v Greenburg Civic Assn*, 453 US 114 (1981).

¹⁰⁹ Richard B. Kielbowicz and Linda Lawson, *Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal*, 11 Harv J L & Pub Pol 347, 348, 367 (1988). The burden placed on users charged the higher rates is even more overt during the periods when the postal service operated without a deficit. In those times not only did those favored receive a subsidy but the subsidy was clearly being paid by the disfavored mail.

¹¹⁰ Content limitations are imposed on the use of the frank. Roughly, federal elected officials can use the frank for communications related to their representative role but not for personal or campaign purposes. 39 USC § 3210(a)(4), (5) (1988). Although categorization is difficult, in some circumstances courts have been willing to enforce these content exclu-

Likewise, the 1970 Act continued the policy of subsidizing the mail of certain broad, but limited, categories of nonprofit organizations.¹¹¹

Historically, newspapers were the largest beneficiaries of postal subsidies. In 1792, Congress's first major legislation on postal service charged rates for newspapers that, depending on the size of the paper and the distance sent, were from one-sixth to one-fiftieth the rate set for letters.¹¹² These beneficial rates continued throughout our history. In 1912, the government reported that first-class mail produced a \$70 million profit, while second-class postage entailed a \$70 million loss, with letter mail paying a rate eighty times that charged newspapers.¹¹³

These subsidies have been important for the print medium. The post office carried about 4 million of the roughly 22.5 million papers printed in 1810 and roughly 500 million of the 1.5 billion periodicals (newspapers plus magazines) published in 1870.¹¹⁴ Moreover, the subsidies have always reflected content concerns. When Congress in 1879 created the modern four-class system of mail, it for the first time gave magazines the same beneficial treatment as newspapers, apparently in part because magazines often had "the very best class" of content.¹¹⁵

This early cheap rate for newspapers, supported by the high rates for letters that were disproportionately sent by merchants,¹¹⁶ reflected the great value placed on newspaper content. Federalists believed in the nationalizing effects of newspapers, and Republicans thought that access to public information encouraged the type

sions. See, e.g., *Rising v Brown*, 313 F Supp 824 (CD Cal 1970). Interestingly, almost the opposite content restraints are imposed on its use by former presidents and their spouses—they can send only "non-political mail." 39 USC § 3214 (1988).

¹¹¹ See Kielbowicz and Lawson, 11 Harv J L & Pub Pol 347 (cited in note 109).

¹¹² Richard B. Kielbowicz, *News in the Mail: The Press, Post Office, and Public Information, 1700–1860s* 34 (Greenwood, 1989).

¹¹³ *Lewis Publishing v Morgan*, 229 US 288, 304 (1913).

¹¹⁴ Kielbowicz, *News in the Mail* at 43 (cited in note 112); Richard B. Kielbowicz, *Origins of the Second-Class Mail Category and the Business of Policymaking, 1863–1879*, 96 *Journalism Monographs* at 6 (1986).

¹¹⁵ *Id.* at 19–20. Newspapers were charged not by the item but by weight at 2 cents a pound. Congress adopted this extension despite Representative Joseph Cannon's objection that second-class mail already cost the Post Office \$18 million a year while producing only \$1 million in revenue. *Id.*

¹¹⁶ Kielbowicz, *News in the Mail* at 180 (cited in note 112). Of course, these postal subsidies also represent the political power of newspapers as compared to letter-mailers' lack of effective interest-group lobbying power.

of nation they favored—with the result that subsidies received bipartisan support.¹¹⁷ Some of the new nation's leaders argued that even these subsidies were insufficient. History has enshrined James Madison's view that a person should not be forced to pay even three pence to support any religion.¹¹⁸ But the press was different.¹¹⁹ Both Madison, a central author and sponsor of the First Amendment, and George Washington argued that the established low postage for newspapers was too high.¹²⁰ Their advocacy was related to content. Washington emphasized the value of "political intelligence and information."¹²¹ Madison argued that, given a government such as ours, the "easy and prompt circulation of public proceedings is peculiarly essential."¹²²

Thus, both telephone and postal policy illustrates a continual practice of subsidizing favored speech, often favored in part on content grounds, and a continual practice of burdening other constitutionally protected expression to help pay the cost of realizing the government's communications preferences.

B. RED LION: THE BROADCASTING ANOMALY

Both courts and commentators commonly view physical scarcity of broadcast frequencies as providing the original constitutional basis for upholding Congressional regulation of broadcasting. Both also seem largely unpersuaded by the justification, either because attribution of scarcity was always conceptually misguided or because it is now empirically inaccurate.

Conceptually, the only reason scarcity in broadcast properties differs from scarcity in newspaper properties is that broadcast licenses are given away for free, at least by the government.¹²³ Of course, there is a physical limit of frequency space—but there are also a limited number of trees in the world; scarcity of wood pulp

¹¹⁷ *Id.* at 179.

¹¹⁸ *Everson v Board of Education*, 330 US 1, 65–66 (1947) (appendix to Rutledge, dissenting) (quoting James Madison, Memorial and Remonstrance). The dissent continually referred to the three-pence language, *id.* at 40 n 29, 49 n 41, 57; the majority also adopted Jefferson's related metaphor of a "wall of separation between church and state." *Id.* at 16.

¹¹⁹ But see Randall P. Bezanson, *Taxes on Knowledge in America* (Penn, 1994).

¹²⁰ Kielbowicz, *News in the Mail* at 35 (cited in note 112).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Licenses are, however, less scarce but more expensive if sought from current holders.

would likely result if wood pulp (and other inputs into newspapers) were given away for free. Moreover, the two reasons that the "physically limited" frequency space does not presently accommodate many more broadcaster channels are FCC regulations and insufficient money-backed demand for more channels. Only greater demand would justify the added cost of the technological refinements needed to provide more broadcasting capacity. Thus, the only real limit is economic. Of course, the experienced physical scarcity is not surprising. Whenever a limited but valuable resource, whether a broadcast license, printing press, plot of land, or wood pulp, is offered for free, demand will exceed supply. But given a market, supply will just meet demand at the market-clearing price.

Empirically, scarcity also seems doubtful. The number of broadcasting licenses has continually expanded. Today, many more broadcast stations exist than at the time of *Red Lion*.¹²⁴ Likewise, many more exist than daily newspapers.¹²⁵ Moreover, the main constraint on greater expansion is economic, not physical or technological.

Without scarcity, the constitutionality of regulation appears to hang by a slender thread. Commentators argue that broadcast regulation "conflicts, starkly and gratuitously, with conventional [individualistic] free-speech philosophy."¹²⁶ In a superb article, Jonathan Weinberg observes in detail the collective-good or communitarian orientation of broadcast regulation, which responds situationally, recognizes the pervasive role of government in structuring the private order, and is consistently content-oriented. He shows that this regulatory regime is utterly inconsistent with standard free speech principles.¹²⁷ But Weinberg argues that deviation

¹²⁴ *Syracuse Peace Council v FCC*, 867 F2d 654, 661 (1990) (FCC found that between 1974 and 1985 the number of radio stations had increased by 30%, FM stations had increased by 60%, and the proportion of households receiving nine or more TV signals had increased from 21% to 64%).

¹²⁵ In 1989, there were 10,600 radio stations and 1,424 television stations on the air. In addition, there were 624 lower-power television stations operating, and construction permits had been issued for an additional 1,284 radio stations, 257 television stations, and 1,713 low-power television stations. Marc A. Franklin & David A. Anderson, *Mass Media Law* 761 (1990). In contrast, there were 1,586 daily newspapers operating in 1992. C. Edwin Baker, *Advertising and a Democratic Press* 16 (Princeton, 1994).

¹²⁶ Weinberg, 81 Cal L Rev at 1205 (cited in note 18).

¹²⁷ *Id.* See also, Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 NYU L Rev 990 (1989).

is justifiable.¹²⁸ He concludes that broadcast regulation and conventional free-speech philosophy embrace different, competing, probably irreconcilable worldviews, but that both contain an element of truth and we must live with both.¹²⁹

In contrast to conventional wisdom, I suggest that the foundational broadcast cases, especially *Red Lion*, embody an analysis that differs little from that which is appropriate and has historically prevailed in respect to other media. Moreover, in contrast to Weinberg's conclusions, both *Turner* and most¹³⁰ broadcast regulations are consistent with a coherent First Amendment analysis that explains the distinction between regulation of individuals and regulation of the structure of collective entities.

Various passages certainly invite reading *Red Lion* to be based on "scarcity."¹³¹ The penultimate sentence announcing the holding begins: "In view of the scarcity of broadcast frequencies. . . ." Even this sentence, however, continues with two additional elements: "[in view of] the Government's role in allocating those frequencies, and the legitimate claims [of possible users]."¹³² This list could be taken as a temporal progression—scarcity is a "state of nature," creating the necessity of the government adopting a method of allocation; then the government's chosen method of allocation created legitimate claims, for which the government finally provides. Seen as describing such a progression, the argument is coherent but not unique to broadcasting.

¹²⁸ Lee Bollinger has long argued for a similar conclusion on only slightly different grounds. See Lee C. Bollinger, *Images of a Free Press* (Chicago, 1991). But cf. Geoffrey R. Stone, *Imagining a Free Press*, 90 Mich L Rev 1246 (1992).

¹²⁹ This view illustrates Duncan Kennedy's notion of the "fundamental contradiction." Weinberg relies heavily on Critical Legal Studies literature, especially Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 (1976).

¹³⁰ Possibly the most troubling aspect of traditional broadcast regulation is not Congressional or FCC content-motivated rule-making but the broad discretion put into official hands, creating the danger that the Commission will suppress protected expression or that the existence of this discretion will stimulate self-censorship. This problem, however, is not limited to broadcasting. Discretion continually raises problems when postal officials must place items within categories for purposes of postal rates. Arguably the greatest constitutional evil of an unwise but still otherwise constitutionally defensible Newspaper Preservation Act is the authority it gives to the Attorney General, who decides with only the vaguest statutory restrictions whether to approve a proposed JOA. Lucas A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of Press in America* 219 (California, 1991); James D. Squires, *Read All About It! The Corporate Takeover of America's Newspapers* 123-24 (Times, 1993).

¹³¹ The analysis of *Red Lion* here and the analysis of cases involving newspaper structural regulation in the next section roughly parallel discussion in my article, *Merging Phone and Cable*, 17 Hastings Comm/Ent L J 97 (1994) (forthcoming).

¹³² *Red Lion*, 395 US at 400.

Certainly, the first point is right. Scarcity exists initially. Essentially, broadcast frequencies present the problem of the commons. In the paradigm commons, "scarcity" of pasture exists in the absence of cooperative or governmental structural regulation. Regulation solves the problem—whether regulation takes the form of defining property rights, creating rules of queuing, creating licenses, or some other response and whether regulation relies on custom or law. Broadcast frequencies merely present a commons where some government definition of rights is necessary.

Justice White's analysis in *Red Lion* began by recognizing this point. "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos."¹³³ He then correctly observed that under these circumstances frequencies were a scarce resource, and noted that "[w]ithout government control, the medium would be of little use because of the cacophony of competing votes, none of which could be clearly and predictably heard."¹³⁴ This is precisely the commons—the limited availability of a valuable resource (scarcity of land or broadcast frequencies), combined with the absence of some form of governmental (or social) allocation of usage rights, results in overuse, making the resource worthless to everyone.

The government responded with a licensing regime. The Court would be mistaken if it thought this were the only possible government response. But the Court was not so naive. A major premise of White's opinion was that Congress was not so limited in its structural choice. For example, he noted that, rather than the licensing scheme actually adopted, "the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week."¹³⁵

Still, some commentators assert that the First Amendment requires that Congress create private property rights in broadcast frequencies much like the rights that exist in printing presses.¹³⁶ The Court, at least implicitly, noted this possibility but found that Congress had permissible reasons for rejecting it. Making broadcast

¹³³ *Id.* at 375.

¹³⁴ *Id.* at 376.

¹³⁵ *Id.* at 390–91.

¹³⁶ See Spitzer, 64 *NYU L Rev* 990 (cited in note 127).

frequencies into the equivalent of private property would have created a potential problem that the Court said Congress could choose to avoid. "Station owners and a few networks would have unfettered power to make time available only to the highest bidders."¹³⁷ Arguably, the market creates this problem in the world of print. Refusing to decide a question not before it, the Court expressed no view on whether, in general, the government could "multiply voices and views presented to the public through . . . devices which limit or dissipate the power of those who sit astride the power of the channels of communication with the general public."¹³⁸

Although private property rights were presumably a possibility, Justice White quoted a sponsor of the original legislation to prefer a different route. Congressman White argued that if the Radio Act of 1927 were enacted, "the broadcasting privilege will not be a right of selfishness," a fair characterization of what private property and commercial interests were understood to mean in the context of the broadcast debate.¹³⁹ Twice, the Court noted broadcasters' claim to have unlimited choice in respect to the use of their license, which would effectively treat the license like private property, and then responded by citing the portion of *Associated Press* which asserted that the "First Amendment does not sanction repression of that freedom by private interests."¹⁴⁰ That is, the Court recognized the possibility but rejected the necessity of creating traditional exclusionary private property rights in broadcasting.

¹³⁷ 365 US at 392.

¹³⁸ 395 US at 401 n 28 (citing *Citizen Publishing v United States*, 394 US 131 (1969)). An interesting feature of the Court's analysis here is its reliance on print media cases as precedent that might justify restrictions in broadcasting. Thus, in raising this possibility of dispersing the power of media entities, the Court referred to a decision that, itself relying on *Associated Press*, rejected a newspaper's claim that structural (antitrust) regulation by the government had violated its First Amendment rights.

¹³⁹ 395 US at 377 n 5. Joy Elmer Morgan, the Chairperson of the National Committee on Education by Radio, to which she was the National Education Association representative, repeatedly used the language of "selfishness" to characterize the commercial interests. Morgan talked of the "censorship maintained by powerful private interests who are responsible to no one but their own selfish interests" and, in the early 1930s, posed the legislative reform issue as "whether broadcasting be used as a tool of education or as an instrument of selfish greed." See McChesney, *Telecommunications* 48, 94 (cited note 101). Despite the public interest rhetoric coming from Congress, which misleadingly suggested that Congress had resisted the interests of commercial broadcasters, the licensing regime adopted was a victory for the private commercial broadcasters, at least as long as they could control the regulatory agency. Thus, they blocked the public interest lobby at almost every step with the adoption of the Communications Act of 1934. See generally, *id.*

¹⁴⁰ 395 US at 386-87, 392.

Congress's choice to give out licenses for free inevitably created a second scarcity. When any valuable good is given away for free, there are, as the Court said of broadcast licenses, always "substantially more individuals who want [the good] than there are [goods] to allocate."¹⁴¹ But the legitimate reason for choosing a free license scheme rather than a private property regime was that Congress wanted allocations to reflect considerations of the public good rather than mere purchasing power. That is, as the Court seemed to realize, this second form of scarcity does not justify regulation—it results from regulation. Then, given Congress's rationale for "creating" scarcity, the FCC acted properly when it took account of "legitimate claims" of those who otherwise would not get access.¹⁴²

In this reading of *Red Lion*, the Court recognized the government's need to respond to the natural scarcity that exists without legal definition of rights, recognized that the government had discretion in how to respond, and implicitly concluded that Congress was not bound to adopt a private property regime, which would allow economic power and commercial market forces to prevail. Finally, given the scarcity created by Congress's chosen structural form, the Court concluded that the government acts properly in making structural decisions that address the legitimate expressive claims of otherwise excluded portions of the public.

Rather than relying on an assertedly unique but ultimately incoherent notion of scarcity, the Court in *Red Lion* is better understood to have developed a more tenable general principle. Relying most heavily on a case coming from the print realm (*Associated Press*), the Court essentially held that the government has the power to structure the media in a manner that the government thinks will promote the best communications environment. Of course, this general principle does not mean that the First Amendment imposes no limits. As the Court explained, "[t]here is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views . . . [or] of government censorship of a particular program contrary to § 326."¹⁴³ And a different First Amendment issue would be presented if the chal-

¹⁴¹ *Id.* at 388.

¹⁴² *Id.* at 400.

¹⁴³ *Id.* at 396.

lenged regulation had “the net effect of reducing rather than enhancing the volume and quality of coverage. . . .”¹⁴⁴ The Court approved content-oriented structural regulation while clearly treating suppression as a different issue.

C. NEWSPAPERS: STRUCTURAL AND CONTENT INTERVENTIONS

Above I considered how the postal system favored some generic categories of speech, especially newspapers. This section examines how the government has used the postal system to favor particular categories of newspapers and newspaper content and disfavor others. Then I will consider some more direct governmental regulation of the structure of the newspaper industry.

The politics of postal rates in the eighteenth and nineteenth centuries was animated by the conflict between the interests of local “country” and potentially national “city” papers.¹⁴⁵ Presumably in response to transportation costs, Congress in 1792 created nine distance gradations for letters ranging from 6 cents per sheet for delivery within 30 miles to 25 cents for distances over 450 miles. Zoned rates for newspapers, however, were more controversial. Those who favored a heavily subsidized flat rate for newspapers argued that everyone ought to have equal access to the information—this equality protected liberty. However, low flat rates were seen especially to benefit city, often mid-Atlantic papers. These rates helped these papers invade other regions, especially the territory of local “country” papers. Congressional supporters of zoned rates maintained that postage for greater distances should reflect the greater expense. But even more vigorously, they asserted that low flat rates would unfairly advantage city newspapers in their competition with their small rural counterparts. The claim of these supporters of zoned rates—that “country papers are important on many accounts, and ought to be encouraged”—virtually duplicates the content-based concerns of those who today favor must-carry cable rules in order to help preserve the strength of local television stations. But in 1792, those favoring nationalizing content arguably got the best of a compromise—newspapers, typically three sheets, paid 1 cent for the first 100 miles and 1.5 cents if sent farther.

¹⁴⁴ *Id.* at 393.

¹⁴⁵ This paragraph is based on Kielbowicz, *News in the Mail* at 33–34 (cited in note 112).

Debate about how low postal rates should be for newspapers might pragmatically be seen as turning on competing financial interests. Nevertheless, the question was surely also influenced and certainly fought on the ground of competing content-inspired principle. During the Jackson period, Jackson's opponents argued that democratization of information and dissemination of knowledge among all classes required eliminating postage for newspapers. Senator George Gibb even invoked the First Amendment as affirmatively requiring postal subsidies.¹⁴⁶ But others feared that rates that were too low would cause the small-town press to succumb to eastern urban papers. For example, Senator Isaac Hill, a former publisher, argued that lower postage would "annihilate at least one-half of our village newspapers."¹⁴⁷ When in 1832 Jackson's opponents attempted to abolish all postal charges for newspapers, the proposal failed in the Senate vote, 23 to 22, with no Jackson supporter voting for free postage.¹⁴⁸

Another policy innovation favored local knowledge. Legislation in 1845 provided free postage for newspapers within thirty miles of where they were published. This was changed to free delivery for weekly papers in their home county in 1851, a privilege briefly withdrawn in 1873 but quickly restored for all in-county newspapers in 1874.¹⁴⁹ The entirely subsidized, free in-county postage that benefited local content partly balanced the heavily subsidized, virtually flat rate that benefited nationalizing content. Richard Kielbowicz observes, however, that the flat rate also may have unintentionally promoted local reporting because many rural or country editors, who otherwise primarily printed nonlocal information "stripped" from outside papers, responded to the competitive challenge by printing more local content, which distinguished their papers from the city press.¹⁵⁰

Since before the Revolution, the government also provided free postage for "exchange" papers. Benjamin Franklin and William Hunter, deputy postmasters for the colonies, issued a formal direc-

¹⁴⁶ *Id.* at 59–60.

¹⁴⁷ *Id.* at 61.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 84, 86–87; Kielbowicz, *Origins* (cited in note 114) at 9, 11. Free in-county postage for weekly newspapers was finally ended in 1962, although other in-county preferences remained.

¹⁵⁰ Kielbowicz, *News in the Mail* at 63 (cited in note 112).

tive in 1758 (itself continuing earlier practice) that newspapers could send a copy of each issue for free to any other paper, a policy Congress reaffirmed in its 1792 law. This practice had both clear content effects and, presumably, a broad content-based purpose of spreading nonlocal news and opinion. At least until the dominance of the telegraph—and even then for more wordy reporting—papers depended heavily on other papers for their nonlocal news. Newspapers merely copied and reprinted news or commentary from elsewhere.

These “free exchanges” were a significant economic benefit as well as a major stimulus for carrying nonlocal content.¹⁵¹ For example, during one month in 1843, 16.5% of all papers mailed were free exchanges; each publisher, mostly of weekly papers, received an average of 364 exchanges.¹⁵² Of the 40,000 papers coming into New York during a week in 1850, 35,000 were postage-free exchanges—while 28% of those arriving in New Orleans fell into this category.¹⁵³ Free exchanges directly increased the circulation and local republication of nonlocal news and opinion. They also may have indirectly supported local news by adding to local papers’ financial viability. Of course, these huge subsidies are hardly comprehensible outside the great value Congress or the postal authorities placed on nonlocal “intelligence”—a clear content concern.

The subsidies described above furthered implicit content-based goals. Congress also has used explicitly content-based postal rate provisions to advance its conception of a good communications order. The content-based purpose of second-class postal rates was to encourage “the dissemination of current intelligence.”¹⁵⁴ Thus, when Congress created the second-class postage in 1879, it granted the rate only to newspapers “published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry.”¹⁵⁵ It also carefully attempted

¹⁵¹ *Id.* at 17–18, 142.

¹⁵² *Id.* at 149.

¹⁵³ *Id.* at 151.

¹⁵⁴ *Lewis Publishing v Morgan*, 229 US 288, 302 (1913) (quoting the Commission on Second-Class Mail Matter).

¹⁵⁵ Post Office Act of March 3, 1879, 20 Stat 355. The Court rejected an attempt by the post office to give this categorization real evaluative content. *Hannegan v Esquire*, 327 US 178 (1946).

The parallels between the legitimate purposes and the content limitations of second-class postage provided for the “fourth estate” provocatively resemble the announced purposes

to avoid support of advertising. Congress specifically denied the second-class rate to “regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.” To further distinguish journals with reader-valued news content from advertising sheets that might have some news attached, Congress required that to qualify for the subsidized rates a publication must have “a legitimate list of subscribers”—a requirement recently upheld against First Amendment attack.¹⁵⁶

A major Progressive era reform required that newspapers using second-class postage, other than “religious, fraternal, temperance, [or] scientific, or other similar publications,” publish twice a year information chosen by the government, not the editor—specifically, the names and addresses of the editors, publishers, and owners.¹⁵⁷ The law exhibited a substantive concern with content. Supporters of the requirements wanted to aid the public in learning, for example, whether powerful and self-interested commercial and industrial interests controlled the news they received.¹⁵⁸

An additional provision of the Act had the same “evil” that the Court found in the right-to-reply law invalidated in *Tornillo*. The Act restricted second-class mail to publications that meet a requirement that only comes into play given an initial publication decision. A relatively common industry practice had been to print paid advertisements disguised as news stories or editorials. In response, the Act required that material published for “money or other valuable consideration . . . be plainly marked ‘advertisement.’” The required “speech” would either deter the publication decision (the paper would not publish the “advertorial”) or would give the public access to arguably relevant information.¹⁵⁹ Again, Congress attempted to shape the content of newspapers to reflect Congress’s preferences.

Partly in pursuit of broadly defined content-based concerns,

and content limitations on the frank provided for government communications. See note 110.

¹⁵⁶ *Enterprises v United States*, 833 F2d 1216 (6th Cir 1987).

¹⁵⁷ *Lewis Publishing v Morgan*, 229 US 288 (1913) (upholding § 2 of Post Office Appropriation Act, 37 Stat 539, 554 (1912)). This statute also required daily newspapers to publish their average circulation for the past six months. The Court reasoned that these publication requirements were acceptable conditions on the grant of a privilege.

¹⁵⁸ The best account of this legislation is Linda Lawson, *Truth in Publishing: Federal Regulation of the Press's Business Practices, 1880-1920* (So Ill, 1993).

¹⁵⁹ Later regulation imposed similar requirements on broadcasting.

Congress also has directly regulated newspapers in ways that advantage some papers and disadvantage others. In *Associated Press v United States*,¹⁶⁰ the Court required the Associated Press to speak regularly to those to whom it would prefer not to speak. That is, it approved the lower court's remedy for Associated Press' monopolistic limitation on membership and access to its news. As interpreted by the Court, the decree meant "that AP news is to be furnished to competitors of old members without discrimination."¹⁶¹

Of course, *Associated Press* applied generally applicable antitrust laws. Therefore, its precedential value for media-specific regulations can be reasonably disputed. Nevertheless, courts have invoked it to uphold such structural regulation. For example, *Red Lion* relied heavily on *Associated Press* at three crucial points in its First Amendment analysis.¹⁶² This reliance is understandable. The Court in *Associated Press* explained itself with media-specific language. Most dramatically, it asserted that the command "that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."¹⁶³ Thus, the Court forcefully rejected the press' attempt to use the First Amendment as a shield against governmental structural regulation designed to give greater voice to those otherwise disadvantaged by the distribution or form of private media ownership.

When at least one competing paper is in danger of financial failure, the Newspaper Preservation Act overrides the antitrust laws and allows the competing papers to form a joint operating agreement (JOA) in which various business functions are merged, but the editorial functions are kept separate. As should be expected, given that the antitrust laws are intended to protect competition, this exemption from antitrust constraints advantages the exempted

¹⁶⁰ 326 US 1 (1945).

¹⁶¹ 326 US at 21. The Court, however, noted that this did not require AP to say things that it did not want to say.

¹⁶² 395 US at 387, 390, 392.

¹⁶³ 326 US at 20.

papers, disadvantaging their present or potential competitors. Unsurprisingly, some papers, especially suburban competitors of metro papers, opposed the Newspaper Preservation Act both in Congress and before the courts.¹⁶⁴ Likewise, some members of Congress argued that the Act “will preserve certain newspapers but will stifle competition in ideas by crippling the growth of small newspapers and preventing successful establishment of competing dailies.”¹⁶⁵ Nevertheless, the courts have upheld this media-specific structural law because of its permissible purpose of keeping alive independent editorial voices that might otherwise have been silenced by competition. The Court also has upheld a labor law exemption for newspapers published weekly or semiweekly with a circulation, primarily within the county of publication, of less than 3 thousand, in part because the exemption was “not a ‘deliberate and calculated device’ to penalize a certain group of newspapers.”¹⁶⁶

Like other FCC regulations, the FCC’s cross-ownership restrictions are often treated as First Amendment anomalies limited to the special category of broadcasting. Physical scarcity means that there cannot be any “unbridgeable First Amendment right to broadcast” and that not everyone can own a broadcast station.¹⁶⁷ However, a prohibition on *newspapers* holding a broadcast license in their own community burdens newspaper publishing. Generally the government cannot impose a burden on the exercise of a constitutional right—that is, on operating a newspaper. But in *National*

¹⁶⁴ See, e.g., *Committee for an Independent P-I v Hearst Corp.*, 704 F2d 467 (9th Cir 1983).

¹⁶⁵ HR Rep No 1193, 91st Cong, 2d Sess (1979), reprinted in 1970 USCCAN 3547–91, 3558, quoted in *Committee for an Independent P-I*, 704 F2d at 481.

¹⁶⁶ *Mabee v White Plains Publishing Co.*, 327 US 178, 184 (1946).

A major method of government influence on media content is to provide the media with easy, inexpensive access to government-favored information. By discriminating between types of media granted access, the government favors some type of media entities over others. Thus, although the Court of Appeals upheld the principle that once the government provides press facilities in the White House it cannot deny use of the facilities to “bona fide Washington-based journalists” for “arbitrary or less than compelling reasons,” the Court seemed unconcerned that the government limited usage rights to Washington-based journalists, which clearly distinguishes between papers. *Sberrill v Knight*, 569 F2d 124 (DC Cir 1977). More controversially, lower courts in California upheld the Los Angeles county sheriff’s and city police’s denial of press cards to specialized publications such as trade or college papers or to members of the media “who perform functions other than those directly connected with the regular gathering and distributions of hard core news.” *Los Angeles Free Press v Los Angeles*, 9 Cal App 3d 448, 452, 88 Cal Rptr 605, 608 (1970), cert denied, 401 US 982 (1971) (Black, Douglas, and Brennan dissenting).

¹⁶⁷ *FCC v National Citizens Committee for Broadcasting (FCC v NCCB)*, 436 US 775, 799 (1978) (quoting *Red Lion*, 395 US at 388).

Citizens Committee for Broadcasting, the Court unanimously upheld this structural regulation that specifically imposed a limit on newspapers—a limit that the rule did not impose on individuals or even the ordinary corporation.

The Court justified this structural regulation on the basis of the government's purpose "to enhance the diversity of information heard by the public"¹⁶⁸—a content-based concern. Or at least this characterization is urged by the dissent in *Turner*: "the Court is mistaken in concluding the interest in diversity . . . is content neutral. Indeed, the interest is not 'related to the suppression of free expression,' . . . but that is not enough for content neutrality. . . . The interest . . . is directly tied to the content of what the speakers will likely say."¹⁶⁹ The problem for the dissent in *Turner*, assuming it is right in its characterization, is that *NCCB* apparently says that rather than raising constitutional doubts, this content-based purpose helps justify a regulation of newspapers. And if it does that, why not justify a regulation of cable too? Surely cable should not receive greater protection.

D. THE ABERRATION: TORNILLO

Both history and legal precedent demonstrate that government often regulates media structure. This brings me to *Miami Herald v Tornillo*,¹⁷⁰ possibly the only Supreme Court decision that supports the proposition that the government cannot regulate press structure in order to improve the press' contribution to a robust communications environment.¹⁷¹ Of course, many decisions hold that the government cannot suppress communications by the press.¹⁷² The gov-

¹⁶⁸ *Id.* at 801 (quoting with approval the Court of Appeals decision, 555 F2d 938, 954 (DC Cir 1977)). Language from *Associated Press*, a newspaper case, is routinely cited for a similar proposition, often in the context of structural regulation cases. Specifically, *Associated Press* asserts that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." 326 US 1, 20 (1945).

¹⁶⁹ 114 S Ct at 2477.

¹⁷⁰ 418 US 241 (1974).

¹⁷¹ Probably the case most problematic from the perspective taken here is *Pacific Gas & Electric Co v Public Utilities Com'n*, 475 US 1 (1986). Both the opinion there and the Court's treatment of the case in *Turner* found that it involved the same issues as *Tornillo*, leaving open the possibility that it will be limited in the same way *Turner* limited *Tornillo*.

¹⁷² The press tax cases were mostly suppressions—the tax usually imposed special burdens on the press. None are plausibly interpreted as government initiatives to improve the communications order (except by the impermissible means of suppression). Moreover, in characterizing the taxes, the Court notes that there is never any revenue need to impose a tax on just the press because revenue can be even better obtained from a broader tax. Generally

ernment cannot constitutionally suppress such communications because the communications are scandalous; it cannot prohibit the press from editorializing on election day; and it cannot prevent public broadcasting from editorializing.¹⁷³ Suppression is barred. But like all subsidies, structural regulation aimed at promoting affirmative performance generally is permitted.

But is *Tornillo* really to the contrary—at least as interpreted by *Turner Broadcasting*? In *Tornillo*, the Court advanced both a narrow and broad basis for invalidating a statute that provided political candidates a right of reply to newspaper attacks. Broadly, the Court said that the Constitution forbids the government from compelling newspapers “to publish that which “reason” tells them should not be published’”¹⁷⁴ It explained that “[t]he choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment.”¹⁷⁵ The statute failed “because of its intrusion into the function of the editors.”¹⁷⁶ These statements support a broad prohibition of any government action that mandates inclusion of any content in a newspaper—and if applied to cable, would dispose of the law in *Turner* without even considering the content-discrimination issue.¹⁷⁷

these special taxes on the press seem like intentional burdens on the exercise of a constitutional right. Tax exemptions are a different matter. *Leathers v Medlock*, 499 US 439 (1991), applied little serious scrutiny to an exemption for some but not other portions of the media. However, earlier in *Arkansas Writers' Project v Ragland*, 481 US 221 (1987), the Court struck down an exemption that made distinctions among the press. *Arkansas Writers* is not contrary evidence to the assertion that the government can act or regulate to structure the press as a means to improve press performance. The breadth of the exemption in *Arkansas Writers* and the narrowness of the tax's application to only one to three publications suggest that the baseline for magazines should be seen as exemption. At least this is so given that the government could not persuasively explain the differential treatment as an attempt to promote the government's view of an ideal press. In fact, the Court recognized that a state interest in encouraging fledgling publications might be compelling, but found the exemption here could not be rationally seen to promote that end.

¹⁷³ *Near v Minnesota*, 283 US 697 (1931); *Mills v Alabama*, 384 US 214 (1966); *FCC v League of Women Voters*, 468 US 364 (1984).

¹⁷⁴ 418 US at 256 (quoting *Associated Press*, 326 US at 20 n 19).

¹⁷⁵ *Id.* at 258.

¹⁷⁶ *Id.*

¹⁷⁷ Even this broad reading of *Tornillo* leaves unexamined questions that could leave a major role for governmental structural regulation. Only forced content seems ruled out. I have argued that the First Amendment protects press freedom but does not identify who the press is. Baker, *Human Liberty* ch 11 (cited in note 24). In the United States, most commentators without reflection identify the press with owners, although in some Western democracies this makes no more (and maybe less) sense than identifying the press with the editors and journalists. Even in this country, courts recognize a limited constitutional testimonial privilege for “reporters,” not owners. Despite the majority opinion in *Branzburg*

More narrowly, the Court in *Tornillo* emphasized that under the challenged statute the duty to print was triggered only by the newspaper's initial decision to print criticism. This duty, the Court explained, improperly "exact[s] a penalty on the basis of content."¹⁷⁸ "Punishing" a newspaper for its communicative choices is directly contrary to basic First Amendment principle. In addition, the threat of this "penalty" could deter editors from printing critical commentary, with the result that "political and electoral coverage would be blunted or reduced."¹⁷⁹ This narrower rationale rules out only laws that "penalize" or "deter" the publication of particular content.

The broad and narrow rationales differ significantly. If cable were treated like newspapers, the must-carry rules are obviously impermissible under the broad reading of *Tornillo*. In contrast, the narrow rationale poses no problem for most structural regulation. It does not speak to the question of whether the government can mandate, even for content-motivated reasons, access opportunities that do not turn on the newspaper's own constitutionally protected behavior.¹⁸⁰ Of course, various structural regulations might pose other constitutional problems. But the narrow rationale in *Tornillo* does not itself rule out laws that compel newspapers to accept noncommercial ads on a common carrier basis, to publish statements by all candidates for office, to publish ownership or circulation information, or to identify advertisements as such.

In *Turner*, the Court distinguished the right-to-reply in *Tornillo*

v. Hayer, 408 US 665 (1972), most courts read the dissenting and concurring opinions in *Branzburg* together to recognize this right. Franklin & Anderson, *Mass Media Law* 600 (cited in note 125). Likewise, the Court's precise language in *Tornillo* refers to the "function of editors." Imagine an editor asserting that the owner cannot stop her from printing that which she chooses. What is required of law in order to protect the "exercise of editorial control and judgment" or to avoid "intrusion into the function of the editors"? Even if the government cannot intrude on editors, *Tornillo* leaves open the possibility that the government by statute could protect their role from intrusions by owners, at least if the purpose of intervening on the editor's rather than the owner's side was to support rather than undermine the integrity and constitutional role of the press.

¹⁷⁸ 418 US at 256.

¹⁷⁹ *Id.* at 257.

¹⁸⁰ If *Tornillo* does not make editorial control sacrosanct but only prohibits punishment for constitutionally protected publication decisions, then the government should be able to require publication of governmentally specified content as a remedy for a law violation (that is, for behavior that the First Amendment does not protect). This possibility could explain the concurrence of Justices Brennan and Rehnquist in *Tornillo*, where they asserted that *Tornillo* left open the question of mandatory publication as a remedy for libel. 418 US at 258 (Brennan and Rehnquist concurring).

from the must-carry rules on two grounds.¹⁸¹ The Court noted the “technological differences between newspapers and cable,” the importance of which apparently lies in the potential cable technology creates “for abuse [by] this private owner over a central avenue of communication.”¹⁸² Here it cited the portion of *Associated Press*, emphasized above, for the proposition that the government can intervene to prevent “private interests” from restricting “the free flow of information and ideas.”¹⁸³

More relevantly here, the Court only credited the narrow rationale in *Tornillo*. It explained that, unlike the right-to-reply law, the must-carry rules “exact no content-based penalty,” and there is no suggestion that they “will force cable operators to alter their own messages” or “cause a cable operator or cable programmer to conclude that ‘the safe course is to avoid controversy,’ . . . and by so doing diminish the free flow of information and ideas.” To the extent *Tornillo* applies to cable, this narrow reading was essential to the holding in *Turner*. And given this reading of *Tornillo*, there is scant Supreme Court precedent for restricting content-based structural regulation of the media.

IV. DOCTRINAL DOGMAS

Turner reached a sensible result. Thus, I might limit my objections to its analysis of content discrimination in the media context. But *Turner* may illustrate a deeper problem with constitutional doctrine. The force and legitimacy of constitutional law depend on it embodying normative commitments that restrict government’s choice of ends and of means. Increasingly prevalent, relatively mechanical constitutional “tests” often abstract too much from underlying constitutional normative commitments. My claim is that *Turner* illustrates this failure. More generally, it illustrates that the further judicial tests and doctrine move from embodying prohibitions of precisely identified normative evils, the more likely the analysis will lead to error.

¹⁸¹ It also mentioned a third point, that the must-carry rules will not force a change in cable’s own messages to respond to the must-carry programming. 114 S Ct at 2466. I treat this point as merely an aspect of the narrow interpretation of *Tornillo*, which emphasizes that the government should not influence or penalize the newspaper’s own speech.

¹⁸² *Id.* at 2466.

¹⁸³ *Id.*

Doctrinal tests often permit quick and easy application of constitutional mandates. Doctrinal analysis identifies factors that in the most familiar cases lead to the "right" constitutional result. Courts can then use these factors within tests and announced levels of scrutiny to enhance predictability and to guide their audiences. In addition, some doctrines serve useful analytic tasks, especially in contexts where a court can more acceptably label another branch of government "confused" than call it "immoral." For example, a court may "know" that an objectionable governmental purpose exists (e.g., to suppress speech or invidiously deny equality). Ordinarily the court can still judiciously examine the law, accept any governmental suggestion of a benign purpose at face value, but strike the law for not relating sufficiently to that purpose. Although the point usually is unspoken, the court will convincingly have shown that the benign purpose does not really explain the law. The court thus invalidates the law without drawing the bottom line—that is, without announcing that the law is best understood as having a normatively unacceptable purpose. In order to do this, however, the court must manipulate levels of scrutiny in order to pick out those laws with impermissible purposes. Use of factors that correlate with objectionable purposes aid this task—although it is obviously a mistake to confuse the correlation with the evil.

Other, less defensible influences probably contribute to the prevalence of these doctrinal devices. First is ideology. Most constitutional tests purport to structure a constrained balancing. This balancing easily harmonizes with a commitment to a utilitarian or some similar pragmatic accounting in which judicial rationality appears triumphant despite a world in which the alleged subjectivity of values has stripped rationality to its instrumental surface.¹⁸⁴

Institutional forces also press toward mechanically applying apparently discrete factors within a relatively value-free doctrine. Tests focus and organize lawyers' arguments. Analytic and rhetorical skills often rewarded in law school can be brought to bear on fact situations when applying these tests. Dispassionate arguments then focus on empirical and logical matters, often avoiding except by implication the key ethical issues. Finally, after narrowing the dispute to nonideological matters and apparently giving both sides

¹⁸⁴ Baker, 58 Tex L Rev 1029 (cited in note 76).

their due, the tests permit "reasoned" conclusions.¹⁸⁵ In *Turner*, for example, the lawyers can heartily agree that content discrimination is bad and then quarrel over whether it is present.

The above diagnosis is at best suggestive. Here, I briefly offer two related but speculative points: First, the Court often completely ignores established and obviously applicable tests if they would lead to the substantively wrong result—a practice that suggests the tests' substantive bankruptcy. Second, when taken seriously, these judicial tests can confuse analysis and deflect discussion from the real issues—as did the emphasis in *Turner* on whether must-carry rules are content-based.

Because I think this doctrinal focus of *Turner* represents a general problem in constitutional law and because I think one of the unfortunate developments in First Amendment analysis over the last twenty years is its increasing resemblance to Equal Protection doctrine, I will illustrate these points with examples drawn from both Equal Protection and First Amendment case law. Of course, a few examples will be inadequate to establish my speculative claims, both because advocates of these tests will be able to contest the interpretation of any example and because few will argue that the tests are always adequately sculpted. Moreover, most advocates of these tests will concede that occasionally normative constitutional concerns will conflict with and ought to prevail over the test.¹⁸⁶ Still, illustrations of the doctrinal failures can be suggestive. They can support the claim that, at best, these tests provide useful, rule-of-thumb indications of what a proper normative analysis would show in commonly considered contexts. But the illustrations also support the claim that these tests can misguide analysis if they are used to substitute for normative analysis.

As developed over that last dozen years, the Court's widely criticized public forum doctrine illustrates a rush from substance to more mechanical doctrine, with the resulting doctrine then being either ignored or misdirecting inquiry.¹⁸⁷ Of course, any desirable

¹⁸⁵ A superb critique of this doctrinal stupidity is presented in another review of *Turner*. Hawthorne and Price, 12 *Cardozo Arts & Enter L.J.* 499 (cited in note 18).

¹⁸⁶ "The simple lesson of [*Brown v Socialist Workers' 74 Campaign Committee*, 459 US 87 (1982)] is that when the commitment to neutrality conflicts with the commitment to preservation of ideas in the political marketplace, the latter will prevail." Stone & Marshall, 1983 *Supreme Court Review* 583, 626 (cited in note 29).

¹⁸⁷ There have been many effective critiques of the Court's public forum analysis. See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis*:

conception of government will recognize government's authority to use its resources to carry out public purposes. It follows that the First Amendment's restriction on government's power to suppress speech cannot mean that government must never stop a speaker from using the government property she chooses to speak. The government must be allowed to restrict the speech that interferes with its chosen uses of public resources. Linguistically, the government's choice to use its property for various public purposes does not "abridge" speech freedom even if, in a sense, it "limits" speech freedom. Justice Marshall's formula for the Court in *Grayned v Rockford*¹⁸⁸ sums up these observations. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹⁸⁹ This formula directly embodied crucial constitutional values. Nevertheless, as the Court faced claims of speech rights in a widening variety of circumstances, it changed its focus into a "forum" categorization. Constitutional review would be severe if the challenged regulation applied within a traditional public forum, like streets and parks, or a designated public forum—places "opened [by the government] for use by the public as a place for expressive activity."¹⁹⁰ All other property constituted nonpublic forums in which regulation of speech was subjected to the more relaxed reasonableness review.

In the progression I describe, public forum doctrine illustrates the tendency to generate legal categories that distance normative constitutional concerns. The results are predictably bad. The most obvious problem in this doctrine is that the category of "designated public forums" was presumably intended to provide significant protection of speech in many contexts other than traditional public forums. However, as long as the government can remove the designation at will, and as long as government intent is determinative, a governmental restriction that someone challenges will itself constitute the basis for the challenge to fail—the restriction shows that

Content and Context in First Amendment Adjudication, 70 Va L Rev 1219 (1984); Lawrence Tribe, *American Constitutional Law* 986–997 (Foundation, 2d ed 1988). For an alternative to this public forum approach, see Baker, *Human Liberty* chs 7 & 8 (cited in note 24).

¹⁸⁸ 408 US 104 (1972).

¹⁸⁹ *Id.* at 116.

¹⁹⁰ *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45 (1983).

the government does not wish the arena to be a public forum.¹⁹¹ More generally, the public forum analysis diverts attention from the real issues—most prominently, whether the restriction is needed in order for the government to achieve its purposes in the use of the property in question.

The doctrine's bankruptcy is evident in the Court's finding that a ban on the distribution of literature in an airport violates the First Amendment. In *Lee v International Society for Krishna Consciousness*,¹⁹² four Justices concluded that the airport was a public forum and the ban was invalid, four others disagreed on each point, and the ninth, Justice O'Connor, created two separate majorities by concluding that the airport was not a public forum but that the ban on leafletting was unconstitutional. For the majority, rejection of the traditional public forum categorization seemed mandated since tradition hardly covers these new facilities. Moreover, the government, as illustrated by its rule challenged in the litigation, certainly did not wish to designate airports as public forums. Four of the Justices who reached this formalistic conclusion effectively used the analysis to distance themselves from the normative issues that should be controlling; they voted to uphold the restriction.

Justice O'Connor, the fifth Justice to find the airport was not a public forum, proceeded to examine the airport, reporting that the government had made it into a shopping mall.¹⁹³ She relied on authority that "[t]he reasonableness of the Government's restriction . . . must be assessed in light of the purpose of the forum and all the surrounding circumstances,"¹⁹⁴ and concluded that the regulation was not "reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately cre-

¹⁹¹ See *Cornelius v NAACP Legal Defense & Educ. Fund*, 473 US 788, 813 (1985) (Blackmun, joined by Brennan, dissenting); id at 833 (Stevens). Blackmun argued: "If the Government does not create a limited public forum unless it intends to provide an 'open forum' for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access . . . indicates that the Government did not intend to provide an open forum" The circularity here resembles that of Justice Rehnquist's "bitter with the sweet" approach to procedural due process, *Arnett v Kennedy*, 416 US 134 (1974) (plurality opinion), later rejected by the Court. See, e.g., *Cleveland Bd. of Educ. v Loudermill*, 470 US 532 (1985).

¹⁹² 112 S Ct 2701, 2709 (1992).

¹⁹³ 112 S Ct at 2713.

¹⁹⁴ Id at 2712 (quoting *Cornelius*, 473 US at 809).

ated.”¹⁹⁵ She explained that this followed because she could find no “problems intrinsic to the act of leafletting that would make it naturally incompatible with [the forum here].”¹⁹⁶ In other words, under the reasonableness label, O’Connor got awfully close to *Grayned*’s normatively based principle of looking to see if “the expression is basically incompatible with the normal activity of [the place].” Essentially, she had accepted forum doctrine only then wisely to ignore it. Her opinion was persuasive on the question of whether leafletting must be allowed, but her analysis was not aided by calling the airport a nonpublic forum.

Both the majority and dissent in *Cohen v Cowles Media Co.*¹⁹⁷ too quickly resorted to general First Amendment principles, which had been descriptively useful in paradigmatic cases, before considering the principles’ applicability to the normative issues at stake. Dan Cohen had provided several reporters information under a promise of confidentiality, but the newspapers published his name after editors at two papers independently decided Cohen’s identity as the source was an important element of the story. Because of the central principle that “[t]he publisher of a newspaper has no special immunity from the application of general laws,”¹⁹⁸ in a 5–4 decision, the Court found that the First Amendment does not block Cohen’s promissory estoppel suit against the papers. Justice Blackmun’s dissent effectively responded to this asserted principle with the invocation of *Hustler Magazine v Falwell*.¹⁹⁹ There, the Court protected speech that constituted an “intentional infliction of emotional distress” under a state tort “‘law of general applicability’ unrelated to suppression of speech.”²⁰⁰ Blackmun argued that the determinative principle was, instead, that “a State may not punish the publication of lawfully obtained, truthful information ‘absent

¹⁹⁵ Id at 2713.

¹⁹⁶ Id at 2714.

¹⁹⁷ 501 US 663 (1991).

¹⁹⁸ Id at 630 (quoting *Associated Press v NLRB*, 301 US 103, 132–33 (1937)). Unsurprisingly, in the dissent in *Cowles Media* joined by Justice O’Connor, Justice Souter cited O’Connor’s rejection of an analogous principle recently asserted in the free exercise area. 111 S Ct at 2522 (citing *Employment Div., Dept. of Human Resources of Oregon v Smith*, 494 US 872, 901 (1990) (O’Connor concurring)). Although a Court could consistently apply either principle, both principles are contrary to precedent and both undervalue the constitutional values at stake—free speech, an effective and robust press, and religious freedom.

¹⁹⁹ 485 US 46 (1988).

²⁰⁰ 501 US at 675.

a need to further a state interest of the highest order.’”²⁰¹ The majority, however, properly cited copyright laws to show that sometimes the state can punish publication of truthful statements.

Emphasis on these competing general principles unnecessarily confused the analysis. Certainly, *Hustler* shows that the majority’s general principle was inadequate. From the perspective of speakers for whom the prohibited activity is integral to their expression, laws of general applicability that are unrelated to speech can even amount to a form of (usually unintentional) content discrimination.²⁰² For example, from the perspective of the antiwar protestors, the law prohibiting burning draft card laws amounted to discrimination against their speech.²⁰³ The Court’s willingness to accept “as applied” challenges suggests that a court could refuse to apply a law to a particular expressive activity rather than strike down all applications.²⁰⁴

The majority in *Cowles Media* may be on better ground arguing that civil liability is appropriate because the information was not lawfully obtained²⁰⁵ or because the restriction on publication was “self-imposed.”²⁰⁶ In cases relied on by the dissent, the sole alleged wrong committed by the press was publication. In the case of promissory estoppel, the wrong was not merely publishing but publishing after promising not to. Surely the First Amendment does not allow a person to ignore with impunity all nondisclosure agreements between private individuals, for example, in court settlements²⁰⁷ or employment contracts.²⁰⁸

²⁰¹ *Id.* at 673 (citing *Smith v Daily Mail Publishing Co.*, 443 US 97, 103 (1979)).

²⁰² *Williams*, 139 U Pa L Rev at 659–61, 719–21 (cited in note 85).

²⁰³ Note that the Court in *O’Brien* imposed First Amendment scrutiny even after it found that the law, which was of general applicability, was unrelated to the suppression of speech.

²⁰⁴ *Williams* defends this approach. 139 U Pa L Rev at 709–14 (cited in note 85).

²⁰⁵ But cf. *Nebraska Press Association v Stuart*, 427 US 539, 572 (1976) (Brennan, with Stewart and Marshall, concurring in the judgment) (indicating that a prior restraint would be improper “no matter how shabby the means by which the information is obtained”). Moreover, the concept of “not lawfully obtained” must be formulated with care to avoid circularity. For example, it is different to prohibit a reporter from directing someone else to steal files to obtain information than to make it unlawful to receive information that someone had unlawfully obtained. Arguably, the second should not count as “not lawfully obtained” in that the only “wrong” in obtaining is “listening,” an activity arguably protected by the First Amendment. See *Pearson v Dodd*, 410 F2d 701 (DC Cir 1969).

²⁰⁶ 501 US at 671.

²⁰⁷ Compare *Seattle Times Co. v Rhinehart*, 467 US 20 (1984).

²⁰⁸ Compare *Snepp v United States*, 444 US 507 (1980).

Even if the retreat from the two general principles led to balancing, as recommended by Justice Souter's dissent, and even if the normative analysis favored a robust communications environment over the interests of the injured sources (as constitutional law has favored robust speech over the interests of libeled and emotionally distressed individuals), it is not clear which result best furthers First Amendment values. The ability of the press to bind itself contractually to confidentiality might aid it in gathering information from various sources.²⁰⁹ In fact, the need to make its promise of confidentiality believable was the basis of the press' attempt to justify a constitutional reporters' privilege not to be forced to expose their sources in judicial proceedings.²¹⁰ Thus, whether application of or exemption from contract rules would best support the press' performance of its role of informing the public is an empirical question. The answer is unclear and may vary with historical circumstances.

The flaws in the dissent's general principle—that the government cannot punish lawfully obtained, truthful information—may be similar to those in the principle accepted in *Turner* that content discrimination is always presumptively bad. The paradigm cases representing each principle involved suppression of speech. In some circumstances, however, punishment for a truthful publication, like structural regulation of the media designed to further content concerns, can serve the goal of increasing the capacity of

²⁰⁹ Note, *Damages for a Reporter's Breach of Confidence*, 105 Harv L Rev 277–87 (1991). A focus on which rule leads to greatest “quantity” or the greatest “overall stock of information,” *id.* at 280, is too simplistic. The press-source relationships that lead a source to give information to a reporter are sufficiently various and complex that any hypotheses concerning if and when the possibility of contractual enforcement of promises of confidentiality rights will aid the press in generating useful information must be developed with care. Contractual rights might lead primarily to greater leakage of inaccurate or, as in *Cowles Media*, truthful but inflammatory and misleading, information. If lack of contractual rights reduced press access to this information, it might improve the media's contribution to democracy. Moreover, whether individuals merit the protection of contractual promises varies. The times when responsible editors are most likely to choose to expose a confidential source because the source is itself newsworthy may, as in *Cowles Media*, be precisely the contexts where the source least deserves protection and, thus, least merits the benefits of contractual protection. These issues are carefully developed in Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 Rutgers L Rev 609 (1991).

²¹⁰ *Branzburg v Hayes*, 408 US 665 (1972). Of course, sources may rely heavily on their impression of the reliability of the reporter and little on some potential contractual right, meaning empirically that recognizing contractual rights will do more to restrain publication than to impede newsgathering. On the other hand, sources may have considerable fear of the government so that a testimonial privilege here would be beneficial.

the communications order to perform its democratic functions. The constitutional justification for copyright, which allows for punishment of certain truthful publications, is "to promote the progress of science and the useful arts."²¹¹ Basically, this instrumental justification assumes that overall copyright will increase the social availability of information and insight. The enforceability of contracts about confidentiality, like copyright, may restrict publication of some truthful information while serving to improve the overall set of communications. Of course, the First Amendment may require "fair use" limits on copyright. This suggests the question whether there must be "fair use" exemptions from contractual obligations.

Certainly, the claim that enforcement of promises of confidentiality benefits the communications order is contestable. Persuaded of the merits of the press' argument in *Cowles Media*, a state might completely exempt media entities from liability for violation of this type of promise. If it did, could a newspaper, frustrated by this limit on its news-gathering capacities, succeed with a First Amendment claim that the government had unconstitutionally adopted a media-specific law that denied it a generally available, valuable legal right, a right to enter into certain binding contracts? Surely, a state should be able to do what four Justices in *Cowles Media* thought was constitutionally compelled. Should not the answer be the same as with the constitutional challenge to the Newspaper Preservation Act—that the government can adopt media-specific laws to structure the media, even if they disadvantage some media entities, as long as the laws do not suppress speech or attempt to undermine press functioning?

Equal protection doctrine periodically becomes similarly dysfunctional. When it becomes analytic rather than normative, it is often wisely ignored or else it creates confusion. For example, a male-only selective service registration requirement, that is, a "classification by gender," did not "serve important governmental objectives" and was not "substantially related to *achievement* of those objectives," as required by mid-level scrutiny,²¹² since the government's possible objective of drafting only men could be as easily achieved whether or not women were also registered (assuming registration forms that had people check a box identifying them-

²¹¹ US Const, Art I, § 8, cl 8.

²¹² The language of mid-level scrutiny is taken from *Craig v Boren*, 429 US 190, 197 (1976) (emphasis added).

selves as either male or female). Thus, the classification quickly flunks mid-level scrutiny.²¹³ But both the majority and dissents in *Rostker v Goldberg* rejected this mechanical application of mid-level scrutiny because the analysis would lead to a decision creating only “superficial equality,”²¹⁴ a result that is “essentially useless”²¹⁵ or arguably “pointless.”²¹⁶

The real issue in *Rostker* was whether the majority was right that this classification “is not invidious”²¹⁷ or whether Marshall was correct that “[t]he Court today places its imprimatur on one of the most potent remaining public expressions of ‘ancient canards about the proper role of women.’”²¹⁸ Here is not the place to address that substantive argument. Rather, the point is that both the majority and dissents recognized that the crucial issue was substantive—not a mechanical application of mid-level scrutiny.

*Palmore v Sidoti*²¹⁹ exemplifies the opposite spectacle—the Court unanimously invalidated a use of race that strict scrutiny should have upheld. Florida had denied a white mother custody of her child because the woman’s new husband was black. The Court agreed that the “best interests of the child” is a “substantial government interest.”²²⁰ It did not, although it could,²²¹ dispute the trial

²¹³ The Court claimed that the classification “is not only sufficiently but also closely related to Congress’s purpose in authorizing registration.” *Rostker v Goldberg*, 453 US 57, 79 (1981). Although my comment feels uncomfortably like a semantic distinction, exemption of women does seem “closely related” to the majority’s conception of Congress’s purpose, but the gender classification is not related at all “to achievement” of that purpose, as required by *Craig*, in that universal registration would equally advance the purpose.

²¹⁴ *Id.* at 79.

²¹⁵ *Id.* at 84 (White and Brennan dissenting).

²¹⁶ *Id.* at 96 (Marshall and Brennan dissenting).

²¹⁷ *Id.* at 79.

²¹⁸ *Id.* at 86 (quoting *Phillips v Martin Marietta* 400 US 542, 545 (1971)). In addition, there was a factual quarrel about whether Congress had recognized that conscripted women would be useful in the wartime military. The dissent could also argue that the male-only registration system treats women invidiously by structuring future decision making in a manner which biases consideration of the value of women’s military involvement. At the time of an emergency draft, the country can only effectively look to the registrant pool. Any law that unnecessarily restricts consideration at that time of a legally imposed gender difference and that thereby locks women into current roles should be understood as invidious.

²¹⁹ 466 US 429 (1984).

²²⁰ *Id.* at 433.

²²¹ Given the vagaries of character development, even if the prevalent but inevitably not universal social reaction in the child’s community would be stigmatization, the placement’s full consequences for the child’s development will be varied and could even be profoundly beneficial. In contrast, the lesson that promotion of racial homogeneity is properly determinative of the family in which a child should be raised could profoundly damage the child’s ethical development.

court's factual premise—that the child would inevitably “suffer from the social stigmatization” if custody were granted to an interracial couple. Accordingly, considering race directly advances the best interests of the child, one of the state’s highest interests.²²² That is, this use of race apparently passes strict scrutiny. But the Court refused to permit it, explaining:

The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. . . . Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. . . . The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of [its mother].²²³

The Court ignored scrutiny analysis because to apply it would allow the state to be involved in giving invidious effect to, rather than opposing, the reality of private prejudice.²²⁴

Rostker and *Sidoti* both properly ignored the directives of scrutiny review just as the majority in *Turner* ignored content-based reasons for the must-carry rule. Like the dissent’s use of content discrimination analysis in *Turner*, taking equal protection scrutiny seriously can perhaps generate greater problems. This is possibly most obvious in the affirmative action context. Focus on determining what level of scrutiny to apply and then applying it misses the point. The challenge is to identify the substantive value at stake, to explain the value’s constitutional significance, and to determine whether the challenged practice offends the value.²²⁵ Not only is this inquiry

²²² The case surely did not turn on treating the “best interests of the child” as only a “substantial” rather than a “compelling” interest.

²²³ 466 US at 433–34.

²²⁴ *Sidoti* is obviously relevant to the heckler’s veto issue raised in *Feiner v New York*, 340 US 340 (1951). Likewise, if a generally legitimate reason for closing a swimming pool is its cost, but if the high cost per person results because racial integration leads to reduced attendance due to some people’s racist attitudes or to higher policing costs due to the danger of interracial turmoil, *Sidoti* suggests that closure would unconstitutionally give effect to private prejudice. Cf. *Palmer v Thompson*, 403 US 217 (1971).

²²⁵ A common but highly partisan view is that color blindness is a moral imperative—that taking race into account is inherently bad and that only its use to avoid a greater evil can justify the sin. An alternative view is that people can and do value race in various positive ways—as a person might value her own or others’ ethnicity, sexual identity, family history, or any distinguishing feature. And, likewise, that the state can make unobjectionable instrumental use of race, for example, in promoting a more egalitarian society. What the state cannot do, even if doing so would advance important goals, is to stigmatize or subordinate

necessary to sound constitutional analysis, but its careful completion makes the added question of what level of scrutiny to apply irrelevant.

*Metro Broadcasting v FCC*²²⁶ illustrates the befuddlement of traditional doctrine. The Court upheld affirmative action by avoiding mechanical application of doctrine. Several methods of obtaining broadcast licenses were open *only* to particular minorities. To uphold these programs, the Court emphasized that broadcast cases are different from other speech cases, and that a lower-level equal protection scrutiny governs Congressionally mandated programs.

An easy application of doctrine, however, would hold that the law was doubly unconstitutional. The program was explicitly race-based,²²⁷ violating Equal Protection, and its main justification was content-based (promoting minority-oriented programming), violating the First Amendment. Nevertheless, the Court held that the law's content-based purpose was sufficiently compelling to avoid equal protection invalidation. And apparently the equality-based interests in diversity were so obviously appropriate that no First Amendment challenge was considered—although presumably the race-based purpose of promoting a more racially diverse spectrum of voices would be sufficient to satisfy First Amendment scrutiny.²²⁸ Each presumptive constitutional offense apparently has a sufficient affirmative value to save the law from invalidation on the basis of its other constitutional offense. The critical features, which the traditional doctrinal tests obscure, are that the FCC program was a structural regulation, was not suppressive of speech, and was not racially invidious (although the dissent disputed this last point).

Often, however, scrutiny doctrine seems functional. Applying strict scrutiny when a law uses race as a criterion historically has appeared unproblematic for the same reason that most doctrinal

on the basis of race. Although both views can be elaborated with considerable sophistication and rhetorical power, my own conclusion is that the second is so clearly right that what lies in most need of explanation is the power and influence of the first view.

²²⁶ 497 US 547 (1990).

²²⁷ Of course, Brennan's majority opinion did not apply strict scrutiny. My claim is that mechanical versions of the doctrine would require its application and that avoidance of strict scrutiny will actually reflect substantive reasons that are believed to explain why the challenged use of race does not offend constitutional values.

²²⁸ The dissent emphasized that the interest was not merely with diversity but with promoting "distinct views . . . associated with particular ethnic and racial groups," id at 621, but did not raise a First Amendment objection to viewpoint discrimination.

tests often appear useful. Tests develop when they identify and turn on features that past judicial experience has shown usually correlate with constitutional offense. American history seldom shows race being used, especially by government, except in an invidious or subordinating manner. These uses should be blocked—but not because they fail strict scrutiny but because they are subordinating or invidious.

Occasionally, judicial tests aid thought. Even informed, intelligent, decent people bring their class or social backgrounds to their understandings. Ingrained conformity to conventional ways can obscure the invidiousness of seemingly inoffensive practices. Thus, government use of race (or sex), especially when not closely related to a legitimate governmental purpose, rightly raises the suspicion that the use embodies prejudice or stigmatization or should be understood as reflecting a subordinating purpose. But, still, this suspicion is just that—it should not substitute for normative analysis.

Problems with equal protection doctrine resemble problems with the content-discrimination doctrine in *Turner*. Historically, legal challenges to content discrimination often took place in situations involving censorship. The challenged law usually either suppressed disfavored expression or gave officials such unconstrained discretion that it effectively allowed censorship.

*Masley*²²⁹ provides an illustration. Even when majorities (or those in power) prefer a more serene life to the robust world of public controversy, some influential interests may gain a right to engage in self-expression. If the First Amendment requires government to permit speech where the speech does not interfere with the use to which government has devoted its property, or more moderately, generally requires government to permit speech in facilities like parks and streets, the baseline is free expression. Although occasionally circumstances require that expression be limited in order to serve some other interest, given that the baseline is free expression, a restriction that permits one content-defined category of speech demonstrates that the facility can tolerate expression. Therefore, the restriction must generally be interpreted as suppressing speech, not as subsidizing the permitted speech. It would be unconvincing, for example, to argue that the government's pur-

²²⁹ *Chicago Police Dept. v Masley*, 408 US 92 (1972).

pose in maintaining streets and sidewalks is to subsidize labor picketing.

The evil in *Mosley*, however, was suppression, not content discrimination. More recent cases have faced content discrimination that does not seem properly characterized as suppression. Various doctrinal moves have developed to allow these discriminations. One is to find that the content-based condition was not an unconstitutional condition. Another, as noted above, was to develop the non-public forum label, the legitimate function of which is to identify situations in which the permitted speech involves the government using its property to achieve non-speech-suppressive, public ends.

Thus, like the early cases involving the use of racial criteria, the early content-discrimination cases embodied impermissible purposes and were properly struck down. But in both the race and speech cases, the reason for invalidation was that the laws offended substantive values. Later, cases arose in which these substantive values were not at stake—or in which the substantive values even supported the use of race (affirmative action) or of content (diversity of voices or local information). These legitimate uses of race or content typically involve resource allocations or structural regulation. In the speech context, many of these content-based subsidies or content-motivated structural regulations are not constitutionally problematic. *Turner* is such a case. The invocation of standard content-discrimination doctrine in *Turner* only muddied the inquiry.

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My claim has been that the Court in *Turner* failed to pay attention to the value basis of the First Amendment and that doing so would have led to treating media entities very differently from individual speakers. Specifically, it would have led the Court to see that content-motivated structural regulation of the media is often perfectly proper. Rather than being a call for a radical rethinking, my conclusion on this point is in accord with our historical tradition, often considered and approved by the Court, of government structural interventions directed specifically at the media. The Court seemed to forget this history as it analyzed the must-carry rules in terms of whether they were content-based. My immediate claim is that this content-discrimination analysis is the

wrong approach and is not a faithful application of prior media law precedent. My deeper claim, only suggestively supported by the analysis of *Turner* and illustrations from other cases, is that the approach used in *Turner* reflects an increasingly common dysfunctional fixation on doctrinal tests and avoidance of normative analysis in constitutional analysis.