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Rewiring the First Amendment: Meaning, Content and Public Broadcasting

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REWIRING THE FIRST AMENDMENT: MEANING, CONTENT AND PUBLIC BROADCASTING

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I. INTRODUCTION

That day in the Supreme Court, the day of the fateful argument in *Turner Broadcasting*,[1] the chamber packed with corporate combatants for access to the home, Justice Anthony Kennedy leaned across the bench and asked H. Bartow Farr, counsel to the cable television industry, a mischievous question:

> Justice Kennedy: Isn't Section 5 of the Cable Act—mandating the carriage of noncommercial television—more vulnerable than Section 4—mandating carriage of commercial broadcasters—under our decisions that prohibit content-based regulation of the press?
> Farr: (pausing for a deep breath to determine whether this was a trap or a trick question): I am arguing that they are both unconstitutional.
> Justice Kennedy: If public television, which I submit is most justifiable, is also the most vulnerable, doesn't that indicate that there is something wrong with the doctrine?[2]

Justice Kennedy may be the swing vote in the *Turner Broadcasting* case — testing the constitutionality of the "must-carry" provisions[3] of the Cable Television Consumer Protection Act of 1992 (hereinafter "1992 Cable Act")[4] — and his colloquy with Farr is worth analyzing for that reason alone.[5] But there is a more impor-

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1 *See* Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 38 (1993).

2 There is no official transcription of the oral argument; we have tried to reconstruct the exchange using the notes of several observers.

3 The relevant provisions of the 1992 Act are commonly referred to as "must-carry" or mandatory carriage provisions. In fact, commercial broadcasters may elect to deny carriage of their signals if they request consent (and payment) for retransmission or if, for some other reason, they fail to demand carriage. 47 U.S.C. § 325(b)(1) (1993). Noncommercial broadcasters may also waive the benefit of mandatory carriage. 47 U.S.C. § 535(b)(1). These conditions on mandatoriness could be interpreted as making the statutes somewhat irrational, or poorly tailored, if Congress' objective was to develop a coherent strategy of strengthening an integrated cable and over-the-air broadcasting system.

4 P.L. 102-385, 106 Stat. 1460 (1992).

5 As the author of the Court's opinion in Ward v. Rock Against Racism, 491 U.S. 781 (1989), Justice Kennedy wrote that "[t]he government's purpose is the controlling consideration" in determining whether a regulation is content-neutral or content-based. *Id.* at 791. In Simon & Schuster Inc. v. New York Crime Victims Bd., 112 S. Ct. 501 (1991),

tant reason. Justice Kennedy may be saying something oddly refreshing: just for a moment, let's not be ruled by the mechanical apparatuses that have become fixtures of First Amendment doctrine. Let's not divide the world into hyphenated categories of speech. Let's not be overwhelmed by the step-by-step analysis that has the appearance of the careful machine, but may doom us to nonsense. Let's ask what's at stake, let's determine the saneness or craziness of various outcomes, and ask, if necessary, whether the conventional modes of thinking about the relationship between Congress and the media, the complex gradations and fusty cubbyholes of the received tradition, need some reconsideration.

The debate Justice Kennedy sought to initiate concerned the status of those fragile carriers of cultural and instructional programming, noncommercial stations, and the capacity of Congress to assure that cable television systems would continue to carry them. But for the public broadcasting community, there was much more at stake than the constitutionality of Section 5 of the 1992 Cable Act. Already, a federal District Court has struck down another provision of the Act compelling direct broadcast satellite ("DBS") operators to dedicate a percentage of their channel capacity "for noncommercial programming of an educational or informational nature."[6] Cable channel set-asides for public, educational and government ("PEG") uses, imposed by local franchising authorities pursuant to 47 U.S.C. § 531, have been challenged, some-

Justice Kennedy concurred in order to express his displeasure with the Court's application of "ad hoc balancing" to a content-based regulation. *Id.* at 514. In Justice Kennedy's view, "the sole question" should be "whether the restriction is in fact content-based." *Id.* at 513. If it is, and does not fall in certain "historic and traditional categories," it should be struck down, without inquiring into compelling interests and narrow tailoring. *Id.* at 514. Justice Kennedy thus appears to be fashioning a bright line, intentionalist reading of the content-based distinction. It will be interesting to see how the Justice interprets the contradictory evidence about Congress' motives in enacting the must-carry rules; but Justice Kennedy's emerging First Amendment philosophy suggests that Farr may have been correct if he saw in the Justice's question a trap waiting to be sprung.

6 *See* Daniels Cablevision v. United States, 835 F. Supp. 1, 8-9 (D.D.C. 1993). Section 25 of the 1992 Cable Act required that direct broadcast satellite service providers reserve not less than 4% nor more than 7% of their channel capacity exclusively for "noncommercial programming of an educational or informational nature." 47 U.S.C. § 335(b)(1). Without reaching the question of whether the regulations were content-based, the *Daniels* court held that they failed even under the content-neutral standard, since "[t]here is absolutely no evidence in the record upon which the Court could conclude that regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest." 835 F. Supp. at 8. The court noted that there was no record evidence that "educational television is presently in short supply in the homes of DBS subscribers" or that Congress intended Section 25 to "quell anti-competitive DBS provider practices." *Id.* The court's decision is being appealed, though the appeal is in abeyance pending the outcome of the Supreme Court's decision in *Turner Broadcasting.*

times successfully, on constitutional grounds.[7] More important still, the outcome of *Turner* might have an impact on the scope of federal power to influence the architecture of the national information infrastructure. The public broadcasting establishment has put forward a proposal for reserving a portion of the "information highway" for certain public purposes, and an unreflective decision in *Turner* could inadvertently have an impact on the success of that initiative.[8] Even the original reservation of broadcast channels for educational purposes could be at risk.

Justice Kennedy's fleeting question had a certain poetic power because it hinted at the far-ranging consequences of one possible reading of First Amendment doctrine: namely that mandatory carriage is constitutionally permissible for commercial channels, but, inanely, not for educational channels because, in the first case, the law could be construed as "content-neutral," while in the second it could be characterized as "content-based." Pragmatic and strategic concerns combined with the limitations of doctrine to render the parties before the Court in *Turner* unable or unwilling to provide a fully convincing response to Justice Kennedy's paradox. No brief — even that of the public broadcasters — argued that the carriage of noncommercial stations could be mandated while the carriage of commercial stations, at least under present circumstances, could not. As we shall try to point out, that is not an illogical proposition. Yet the convergence of doctrine and strategy made it one that no party was prepared to articulate.

The broadcast industry participants, seeking to secure mandatory carriage for themselves, had no interest in arguing that non-commercial broadcasting had a stronger claim to mandatory carriage or drawing a distinction emphasizing the very public interest obligations that they seek to minimize. The cable industry clearly finds mandatory carriage of educational channels nearly as odious as must-carry for commercial broadcasters; moreover, cable's strongest arguments against regulation rely on depicting cable operators as speakers, vested with First Amendment rights that brook no infringement for any purpose. As discussed in more detail below, the United States went the furthest toward providing an analytic structure that could support a distinction between the

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[7] *See, e.g.*, Century Fed. Inc. v. City of Palo Alto, 710 F. Supp. 1552 (N.D. Cal. 1987), *appeal dismissed*, 484 U.S. 1053 (1988) (finding PEG access requirements unconstitutional).

[8] Drafters of proposed "Information Superhighway" legislation in the House and Senate have also proposed granting educational programming free or preferred access to video platforms provided by telephone companies and their video programming affiliates. *See* H.R. 3636, 103d Cong., 2d Sess. § 659 (1994); S. 1822, 103d Cong., 2d Sess. § 103 (1994).

merits of commercial and non-commercial mandatory carriage. But, obliged to defend Congress' position entire and perhaps motivated by the regulatory ambitions of a "new" Federal Communications Commission ("FCC"), the government shrunk back from making that argument explicit. Instead, the government, building on the positions of the two judges in the majority in the district court,[9] argued that the must-carry rules were merely economic regulation. That might have been a wise tactical approach. What it meant, however, was that the government did not have to engage in — indeed was required to avoid — any measuring of the justifications for the rules concerning noncommercial stations against those for commercial stations. Amici tended to see the issue in black and white, either as an instance of much warranted government intervention or as an affront to libertarian convictions. In either case, there was no room for distinctions between commercial and educational programming. Even public broadcasters, for strategic reasons, couched their argument for the constitutionality of Section 5 in terms that applied with equal force to Section 4.

It was not shyness that prevented the articulation of a strong view that public broadcasting was important to society and needed to be preserved and strengthened, and that the must-carry law was vital for those purposes. Beyond the pragmatic concerns that prevented all the participants in *Turner* from answering Justice Kennedy's question were limitations in the First Amendment doctrine itself, which appear to foreclose the merits-based analysis Justice Kennedy invited. For the inherited categories and sometimes mechanistic analysis of the First Amendment tradition do, as Justice Kennedy suggested, prompt the initial, improbable answer: yes, mandatory educational carriage is more constitutionally problematic than mandatory commercial carriage.

Lately, in the law reviews, largely in the context of discussions of hate speech and the treatment of pornography, an attack has been launched on the uniform application of strict scrutiny to content-based legislation relating to speech, and thus on the entire framework of current First Amendment doctrine. As Cass Sunstein has recently written:

> Sometimes constitutional doctrine seems to have lost sight of the point of central constitutional commitments. Sometimes the commitment to free speech seems like an abstraction insufficiently . . . connected with democratic goals, or indeed with any

[9] Turner Broadcasting System, Inc. v. United States, 819 F. Supp. 32, 40-41 and 819 F. Supp. at 57 (Sporkin, J., concurring) (D.D.C. 1993), *prob. juris. noted*, 114 S. Ct. 38 (1993).

clearly describable set of governing aspirations.[10]

There are ambiguities in Justice Kennedy's interchange with counsel. But we shall take his comment as a proper piece of such rule-skepticism in which we want to participate. The notion is not to argue or re-argue the Turner Broadcasting case. Rather, it is to use the opportunity it presents to consider the relationship of Congress to society as reflected, limited and, we would say, encouraged by the First Amendment; and to ponder questions that, even after *Turner*, will remain about the power of Congress to affect, through a variety of interventions, the nature and quality of American discourse. This aspect of the "must-carry" case — however it is decided — deserves scrutiny because it touches on so many recent developments in communications law: the implications of deregulation, the dreams of new multi-channel technology, the commitment to public television, and the relationship between democracy and regulation.

Here we elect to scale Mt. Everest by a slope steeper than that chosen by the parties, taking on more explicitly the question whether, economic regulation largely aside[11], Congress is warranted in imposing the kinds of architectural and structural laws contained in the 1992 Cable Act. We want to suggest that if the strict scrutiny requirement for "content-based" regulation means that Congress can compel cable operators to carry commercial broadcasters but precludes compulsion to carry public stations, the law is foolish. Indeed, without a content-based justification, selecting one set of speakers over another loses its constitutional mandate. We would argue, in fact, that Congress may be precluded, or is on the brink of being precluded, from preferring over the air commercial broadcasters as a class precisely because they have generally shucked their public interest obligations, or at least convinced Congress and the regulatory bodies to free them from enforceable duties to carry certain kinds of programming. We don't mean that all such public interest requirements are good, or effective, or even necessarily constitutional. But if this category of providers of programming — local commercial broadcasters — is not, in some meaningful obligatory way, distinguished from other commercial programmers, the basis for preferring them seems weak indeed.

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[10] Cass Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 797 (1993). *See also* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 107 (1993).

[11] Economic regulation is relevant, even in our analysis, in determining what kind of entity may be subject to regulation. (*See* part IV, *infra*).

If the absence of a meaningful content basis for preferring commercial broadcasters should impair their entitlement to "must-carry" treatment, precisely the converse is true for noncommercial broadcasters. These entities have been mandated to carry on government's historic responsibility to educate the citizenry and more recent undertaking to subsidize the arts. As the Court recognized on a historic occasion, "education is perhaps the most important function of state and local governments," its importance recognized by "[c]ompulsory school attendance laws and the great expenditures for education."[12] The historic centrality of education to government's mission and the democratic enterprise suggests that the federal government was acting constitutionally when it set aside portions of the spectrum for noncommercial, educational and instructional uses and, again, when it mandated access to cable channels for providers of such programming. That doesn't necessarily mean government can commandeer office space for the National Endowment for the Arts in every worksite or force the construction of schools on every block; but we argue that there are legal bases for some compulsion in the structuring of the cable television system to require the carriage of noncommercial stations. At bottom, we are suggesting a "jurisprudence of meaning," an interpretation of the First Amendment in which some notion of the word "content" is properly relevant to at least some types of Congressional decision-making in the First Amendment area.[13]

II. CONTENT-BASED FAVORITISM

Although it has come in for some revision in recent years, the core significance of the content-based, content-neutral distinction remains unchanged: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[14] Accordingly, content-based regulations "presumptively violate the First

[12] Brown v. Board of Education, 347 U.S. 483, 493 (1954); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance").

[13] The case for content-based regulation we advocate here is limited to affirmative government speech requirements. There are good reasons to retain the bright-line rule against content-based *prohibitions* of speech, but these concerns — e.g., distortion of public debate or improper government motivation — are not implicated, or are implicated to a far lesser degree, when government affirmatively mandates speech on a particular topic. *See generally* Geoffrey R. Stares, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). We do not propose relaxing the bright-line rule against content-based prohibitions of speech.

[14] Police Department v. Mosley, 408 U.S. 92, 95 (1972).

Amendment."[15]

Section 5, the provision of the 1992 Cable Act mandating carriage of noncommercial broadcast stations, is content-based on its face; among other things, it defines a "qualified noncommercial educational television station"[16] in part as any station that "transmits predominantly noncommercial programs for educational purposes."[17] As even the government grudgingly conceded — though perhaps it should have seized upon it for its advantage — that section "might be characterized as favoring educational speech over entertainment."[18] That may be far from a viewpoint distinction, but it certainly includes some subject matters and excludes others on the basis of their content.[19]

If Section 5 is content-based, then, so goes the prevailing First Amendment logic, it must be subject to the withering gaze of a heightened scrutiny that few laws withstand. But that conclusion may be premature. The tradition is not a monolith: there are instances, in the context of mandated access, in which the recognition of content has been deemed a permissible basis for government intervention, and in some cases, the very basis for the regulation's constitutionality. These precedents suggest that, in a limited set of circumstances, the recognition of a content basis

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15 Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). Much of the argument to the Court in the *Turner Broadcasting* case concerned the ongoing battle over the definition of "content-based." *Compare Renton*, 475 U.S. at 47 (content-neutral speech regulations are "those that are *justified* without reference to the content of the regulated speech") (citations and internal quotation omitted) *and* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) *with* Simon & Schuster v. Members of New York State Crime Victims Bd., 112 S. Ct. 501, 509 (1991) (rejecting the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas") *and* City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1516 (1993) (in "commonsense understanding," a regulation is content-based when the question of whether any particular expressive act or utterance "falls within the ban is determined by the content" of that act or utterance). That debate has no bearing on the question we consider herein, because Section 5 is, we would concede, "content-based" under any of these definitions.

16 47 U.S.C. § 535(l)(1)(1993).

17 *Id.* § 535(l)(1)(B).

18 Brief for the Federal Appellees at 38 n.25, Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 38 (Sept. 28, 1993) (No. 93-44).

19 A preference for "educational" programming is probably best classified as a subject-matter, rather than a viewpoint-based content distinction. Some cases suggest that subject-matter distinctions should be accorded a lower level of scrutiny than viewpoint-based distinctions, *see, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (applying content-neutral balancing to subject-matter restriction). However, the Court has not recognized the general validity of this distinction, and has said that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537-38 (1980). *See* also Boos v. Barry, 485 U.S. 312, 319 (1988) (O'Connor, J.) (subject-matter restriction was properly treated as content-based regulation); Simon & Schuster, Inc. v. New York Crime Victims Bd., 112 S. Ct. 501 (1991) (overturning subject-matter-based speech restriction).

need not trigger a presumption of invalidity or heightened scrutiny; they chart a doctrinal ground on which unabashedly content or subject-matter based regulation may be defended.

Later in this essay, we deal with the troublesome question of "who is a speaker," or, more technically, what kinds of entities involved in the communications chain are susceptible to any content-based regulation at all. Broadcasters have for many reasons been viewed as uniquely vulnerable to regulation.[20] But cases dealing with access to television and radio licensees are more broadly relevant because they demonstrate that a content basis for regulation is not only permissible, but may be necessary to a regulation's constitutionality. Regulations governing broadcast licensees have typically been subjected to a positive content-based test: only if an appropriate content is mandated by the rule, and an appropriate purpose served, has broadcast regulation been upheld.[21]

Such a linkage between the nature of the content distinction drawn and the permissibility of intervention is articulated in *CBS* v. *FCC*.[22] That case upheld a provision of the Communications Act requiring licensees to allow reasonable access to time on broadcasting stations to "a legally qualified candidate for Federal elective office on behalf of his candidacy."[23] The Court invoked the scarcity rationale to explain why broadcasters were subject to such regulation. But the nature of the speaker was not sufficient to establish the permissibility of the regulation. Rather, the Court made clear that it was the content of the compelled speech that made the access permissible. The Court emphasized that it had "never approved a *general* right of access to the media."[24] The statute at issue was unobjectionable because it created only a "*limited* right to 'reasonable' access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced."[25] In clearing the First Amendment hurdle, the nature of the subject

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20 *See, e.g.*, Hon. Kenneth Cox, *The FCC, the Constitution, and Religious Broadcast Programming*, 34 GEO. WASH. L. REV. 196 (1965) (discussing authority for and constitutionality of FCC's consideration of program content, particularly religious content, in licensee renewal and comparative proceedings).

21 Although the government, on behalf of the FCC, rehearsed some of the following themes in its briefs, *infra* at 506-09, it did not argue that the subjects mandated by Sections 5 & 6, such as localism or education, validated the statute because of the public interest or other First Amendment value in speech concerning those subject matters. That omission weakened the government's "even if it is content-based" defense and removed any basis for distinguishing mandatory carriage of educational and commercial broadcasters.

22 453 U.S. 367 (1981).

23 *See* 47 U.S.C. § 312(a)(7)(1993).

24 CBS v. FCC, 453 U.S. at 396.

25 *Id.*

matter qualifying for mandatory carriage was decisive: the statute was permissible because it made "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[26]

Similarly, in *Metro Broadcasting, Inc.* v. *FCC*,[27] the Court recognized that non-remedial race conscious measures were permissible in licensing decisions to the extent they had a content-based effect on programming.[28] *Metro Broadcasting* held that FCC policies giving minorities a preference in comparative hearings and allowing the "distress sale" transfer of a license to a minority enterprise in a noncomparative hearing were "substantially related to the achievement of the important objective of broadcast diversity."[29] This holding rested on the view that "there may be important differences between the broadcasting practices of minority owners and those of their non-minority counterparts,"[30] and that an owner's minority status "influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities."[31] What made the preference constitutional was that minority ownership correlates with a distinctive type of programming. In the absence of this content-based rationale — if, in other words, a minority broadcaster could be expected to provide no *distinctive* content, and hence no greater addition to diversity than a non-minority broadcaster — the decision might have been different.[32]

Insofar as they are premised on the goal of increasing the diversity of information available to the public, even putatively content-neutral rules, like cross-ownership restrictions, are permissible *because* of their content-based effects. In *FCC* v. *National Citizens Committee for Broadcasting*,[33] the Court upheld the FCC's regulations barring common ownership of a newspaper and broadcast licensee in the same locality.[34] Although the Court found that the regula-

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26 *Id.*
27 497 U.S. 547 (1990).
28 *Id.*
29 *Id.* at 600.
30 *Id.* at 580.
31 *Id.* at 581.
32 The Court made clear that the legislation was not justified by Congress, nor its constitutionality assessed, as a remedy for victims of past discrimination. *Id.* at 566.
33 436 U.S. 775 (1978).
34 *Id.* Similar cross-ownership rules apply to cable. *See, e.g.*, 47 U.S.C. § 533(a)(1993) (cable-broadcast licensee); 1992 Cable Act § 11(a) (cable-MMDS/SMTV); 47 C.F.R. § 76.501(a)(1)(1993) (cable-network); 47 U.S.C. § 533(b)(1993) (cable-telephone). *But see* Chesapeake and Potomac Telephone Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993) (finding § 533(b) facially unconstitutional under First Amendment).

tions were not content-related, they passed First Amendment muster because they "enhance[d] the diversity of information"[35] and were "a reasonable means of promoting the public interest in diversified mass communications."[36] That conclusion in turn relied on the FCC's judgment that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination."[37] In other words, the regulation was constitutional because it was reasonable for the FCC to conclude that the content of separately held media would be more diverse than the content of media commonly owned.

The Court's opinions interpreting the FCC's statutory authority over cable under the Communications Act of 1934 were also premised on content-based concerns. It was because cable was reasonably perceived as placing in jeopardy educational broadcasters and commercial broadcasters providing outlets for "local self-expression" that the FCC had authority to regulate cable systems.[38] In *United States* v. *Midwest Video Corp.*,[39] the Court further concluded that "the regulatory authority . . . generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."[40] The Court held that the local origination requirements at issue in *Midwest* were reasonably designed to "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."[41]

Similar principles have been applied to more recent instances of cable regulation. Lower court cases that have upheld mandatory cable carriage have recognized the content-based interests underly-

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35 *Id.* at 801 (quotation omitted).

36 *Id.* at 802 (citation omitted).

37 *Id.* at 797 (citation omitted).

38 United States v. Southwestern Cable Co., 392 U.S. 157, 174-76, nn.39, 44 (1968).

39 406 U.S. 649 (1972) (plurality opinion).

40 *Id.* at 667.

41 *Id.* at 667-68 (quotation omitted). The Court further ruled, in FCC v. Midwest Video Corp., 440 U.S. 689 (1979), that maximization of outlets for local expression and like goals did not overcome the explicit statutory ban on treating broadcasters and, by analogy, cable operators as common carriers. Therefore, the Court rejected the FCC's claimed authority to mandate cable access channels, absent such explicit Congressional authorization as appears in the 1992 Cable Act. *Id.* at 707-09. The Court indicated that the claim that such access channels violated the First Amendment rights of cable operators was "not frivolous," but made clear that the constitutional issue did not determine the Court's decision or "sharply influence" its construction of the statute. *Id.* at 709 n.19.

ing the requirement.[42] For example, in *Chicago Cable Communications* v. *Chicago Cable Commission*,[43] the Seventh Circuit upheld a cable franchise provision requiring the franchisee to produce and program a certain amount of local origination programming each week, defined as programming developed "specifically for the community" the cable operator serves."[44] The circuit court recognized that the requirement was content-based, but applied a peculiar amalgam of intermediate scrutiny, as defined in *United States* v. *O'Brien*,[45] and strict scrutiny.[46] The court observed that "[p]romotion of community self-expression can increase direct communication between residents by featuring topics of local concern,"[47] and concluded that "[e]ncouragement of 'localism' certainly qualifies as an important or substantial interest."[48]

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[42] Lower courts that have rejected content-based cable regulation on the basis of more exacting scrutiny have typically done so, not because of the content prescribed, but because of the degree of infringement on the cable operator's rights. *See* Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846, 67 Rad. Reg.2d (P & F) 366 (C.D. Cal. Jan. 5, 1990), *aff'd in part, vacated in relevant part*, 13 F.3d 1327 (9th Cir. 1994). In *Preferred*, a district court considered Los Angeles' cable franchise community participation, PEG and public access requirements. Although its rulings have been vacated as premature, the district court's reasoning remains instructive and the Ninth Circuit hinted that, in formulating a new policy, "the city may well heed the concerns of the learned district judge." 13 F.3d at 1333. The district court found that the localism and access requirements were all content-based. 67 Rad. Reg.2d (P & F) at 372, 375. Applying what may be yet another mezzanine level of scrutiny, the court required that the regulation be "precisely drawn" to serve a "compelling state interest." *Id.* at 373 (citations omitted). Significantly, the court found that both localism and the access rules served compelling interests. But, applying an exacting tailoring standard, the court found the localism provision acceptable only because it was a "consideration" rather than a formal requirement, *id.* at 374, and struck down the access provisions on the grounds that the city had failed to show "with any specificity" that an allotment of one-sixth of the operator's channel capacity to access channels was narrowly tailored to further any relevant interest. *Id.* at 374-76. However, the court's ruling left open the possibility that, on some further showing of need, such access channel provisions would have been upheld. Moreover, the *Preferred* court's hard-line view did not appear to turn on the content basis for these regulations; the court also struck down concededly content-neutral option-to-buy and franchise term-of-years rules on the ground of insufficient tailoring. *Id.* at 380-81. This result may be contrasted with Chicago Cable Communications v. Chicago Cable Commission, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044, 1550-51 (1990), which accepted a four and one-half hour weekly localism requirement as narrowly tailored, without demanding that the city show with any degree of "specificity" why it had chosen four and one-half rather than, say, two hours. The difference between these results appears to turn on the extent of the infringement on the cable operator and the courts' understanding of the cable operator's rights as a First Amendment speaker, rather than on the regulation's content basis. These issues are further explored in part IV, *infra*.

[43] 879 F.2d 1540.

[44] *Id.* at 1543 n.3.

[45] 391 U.S. 367 (1968).

[46] 879 F.2d at 1549-50.

[47] *Id.* at 1549.

[48] *Id.* (citing Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986)). *See also* Daniels Cablevision v. United States, 835 F. Supp. 1, 6 (D.D.C. 1993) ("PEG and leased access provisions were enacted to serve a significant regulatory interest, viz. affording speakers with lesser market appeal access to the nation's

These cases demonstrate that First Amendment doctrine already recognizes, even if a historically separate compartment, an important exception to the content-based rule. In a limited class of cases, where the government affirmatively mandates speech or carriage of others' voices and where the regulation is imposed on the appropriate type of entity, content-based regulation is permissible, provided the prescribed content serves ends consonant with First Amendment values and the regulation is narrowly tailored to achieve that end. In our view, Sections 5's mandatory carriage of educational programming satisfies this test.

III. Why Section 5 Is Different From Section 4

This review of the law of "content-based favoritism" immediately should suggest the major differences between Section 4 and Section 5 of the 1992 Cable Act. While these two provisions are usually grouped together, they have very different histories, different purposes, different degrees of tailoring of means to ends and different roles in a democratic society. Congress, we believe, should be able to mandate access for noncommercial stations precisely because of their content and precisely because the statute is fairly well tailored to meet Congress' objective. On the other hand, Section 4, which mandates carriage of commercial stations, is far less supportable because there is little content justification for preferring them to other commercial competitors for cable carriage and the method for implementing the asserted government interest is far more clumsy.

The mandatory educational carriage requirements in Section 5 of the 1992 Cable Act serve a purpose that goes to the core of First Amendment values, adding voices crucial to the makeup of a healthy public sphere.[49] The public role in education, from com-

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most pervasive video distribution technology"); Telesat Cablevision v. City of Riviera Beach, 773 F. Supp. 383, 411-12 (S.D. Fla. 1991) (PEG channels are permissible content-neutral regulation); Erie Telecommunications v. City of Erie, 659 F. Supp. 580, 599-601 n.31 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1984) (upholding, under *O'Brien* standard, leased access and PEG channel requirements of one public, one religious, three educational, one library, one social service, one arts and sports, one hospital, two leased, and two government access channels; requirements furthered the substantial interest in "making cable television available for the dissemination of ideas by the general citizenry;" limitations on cable operators' editorial discretion were "not of the magnitude necessary" to violate First Amendment). *But see, e.g.*, Century Fed. Inc. v. City of Palo Alto, California, 710 F. Supp. 1552 (striking down PEG requirements), *appeal dismissed*, 484 U.S. 1053 (1988); Group W. Cable Inc. v. City of Santa Cruz, 669 F. Supp. 954, 968-69 (N.D. Cal. 1987) (same); Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1104-05 n.6 (collecting cases overturning cable regulations).

[49] The importance of adding "instructional, educational, and cultural" voices to the public sphere was recognized by Congress as a basis for creating the Corporation for Public

pulsory school attendance laws to massive government investment, is integrated into the grain of American democratic processes.[50] Speech that educates, that prepares the public to confront the task of collective decision-making and familiarizes citizens with the great public questions of the day and the views of fellow citizens is of paramount importance to a First Amendment that lays the foundation for democratic self-governance and the search for "political truth".[51] Education of the population generally, like public education of the nation's youth, is crucial to the "preparation of individuals for participation as citizens" and inculcates "fundamental values necessary to the maintenance of a democratic political system."[52] It is "required in the performance of our most basic public responsibilities" and "the very foundation of good citizenship."[53] Insofar as the First Amendment also serves to promote the self-realization of individuals, education on all subjects that may "develop their faculties"[54] and "awaken" the individual to "cultural values"[55] is also a central First Amendment concern.

There are further aspects of Section 5 — mandating carriage of noncommercial channels — that distinguish it from Section 4. Under Section 5, cable operators in service areas that do not have a local public broadcast station are required to import one: the law provides a step toward universal access to public television. No similar requirement exists under Section 4.[56] In addition, the swath required in terms of the number of channels to be occupied is far

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Broadcasting ("CPB") as a mechanism for funding public broadcasting. 47 U.S.C. § 396(a)(1)(1993). Congress found that supporting public broadcasting "furthers the general welfare" by encouraging programming that is "an expression of diversity," "involves creative risks," and "addresses the needs of unserved and underserved audiences." § 396(a)(5), (6). The 1992 amendments to the CPB's authorizing statute make explicit the link between public broadcasting and the democratic process, expressing Congress' view that public stations constitute "valuable local community resources for . . . address[ing] national concerns and solv[ing] local problems." § 396(a)(8). Moreover, it is clear that government may "participate in the marketplace of ideas" and "contribute its own views to those of other speakers." Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033, 1038 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) (quoting Community Service Broadcasting v. FCC, 593 F.2d 1102, 1110 n.17 (D.C. Cir. 1978)).

50 *See generally* LAWRENCE CREMIN, AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE 1876-1980 (1988) (discussing relationship of public education to democracy).

51 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also* State v. University of Maine, 266 A.2d 863, 868 (Me. 1970) ("'*educational* television broadcasting'" would be a "misnomer if state law could effectively preclude" state-supported educational broadcasters from presenting political interviews by candidates for public office, "programs which are by their very nature essential to the educational process").

52 *See* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

53 Brown v. Board of Education, 347 U.S. 483, 493 (1954).

54 *Whitney*, 274 U.S. at 375.

55 *Brown*, 347 U.S. at 493.

56 This may be because there is no community requiring such a rule; *i.e.*, no community served by cable that does not have local commercial broadcast stations.

less, an intervention that is more surgical and less subject to being characterized as significantly foreclosing the cable operator's right to choose among program providers or bundle programming to maximize consumer welfare. Finally, while there is only very limited evidence that cable operators have bounced or threatened to drop commercial stations, weaker public broadcasting offerings have been and may continue to be displaced (and thrown back to their pale UHF origins) to a much greater degree.[57] In short, for public broadcasting, mandatory carriage served a great public good, the must-carry rules were modest, and the alternatives — including the dread A/B switch — would clearly weaken the institution of noncommercial outlets.

Had the regulatory regime been different, one might have been able to argue that commercial stations as well clearly deserved the benefit of must-carry status. In an historic vision of the evolution of broadcasting in the United States, commercial broadcasters were holders of a public trust, encapsulating a bundle of obligations thought to be necessary for the public interest. These obligations included providing service to the local community, coverage of controversial issues of public importance in a way that exhibited fairness, preferred access to candidates as advertisers, programming for children and other aspects of a well-rehearsed litany.

By and large, though not completely,[58] the broadcast industry has successfully convinced the FCC — and even Congress — that it should not have to abide by these public trust obligations. During the heyday of deregulation the 1980's, broadcasters argued that most of these restrictions were unconstitutional given the waning of scarcity and that they should not be shackled in competition with emerging media technologies. The success of their lobbying efforts is nowhere more evident than in the recent decision of the FCC concerning so-called "home shopping" licensees. When Congress mandated the carriage of commercial stations, it had to determine how broad that mandate would be—would it, in fact, include the spate of outlets that were now largely devoted to bringing additional consumer opportunities to couch-ridden viewers? Congress, in Section 4, required the FCC to determine whether

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57 Between 1985 and 1988, 153 public television stations, nearly half of all such stations, were dropped or denied carriage 463 times by 347 cable systems. *Cable System Broadcast Signal Carriage Survey*, STAFF REPORT BY THE POLICY AND RULES DIVISION (FCC Mass Media Bureau), Sept. 1, 1988, at 10. During the same period, 182 public television stations were involuntarily repositioned on 541 occasions. *Id.* at 19.

58 *See, e.g., Video 44*, 5 F.C.C.R. 6383, 6385 (1990) (denying license renewal to broadcaster that had converted to pay-TV format). *See generally* J. Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1114-30 (1993).

these stations met the "public interest" standard. If they did, they would have to be carried like their more noble and traditional brethren; if they did not, their licenses would be in jeopardy. After notice and a period of extensive comment, the FCC decided that these stations, by and large, met the public interest standard.[59]

For the purposes of this essay, we do not take issue with the determination that home shopping corresponds to the FCC's current vision of the "public interest." But we do believe that the FCC's embrace of home shopping stations undermines any content-based claim that commercial stations are eligible for the privilege of mandatory carriage. And this is not because there is something wrong or debased about home-shopping. It is, rather, because no relevant criteria exist to distinguish the group of aggregated program providers called "local commercial stations" from the aggregated program providers called cable networks, and Congress, therefore, cannot Constitutionally prefer one over the other.[60]

Another stated basis for mandatory carriage, included in Congress' findings, is the need to preserve "free television," especially for the forty percent of American households who do not subscribe to cable. The argument suggests that if commercial broadcasters are not carried, their capacity to bargain for programming will decline and their ability to survive will decline as well. But the commitment to preserve broadcast television implies some set of functions that the medium serves — functions (or content, to slip back into the jargon of the doctrine) that justify protection. The bread and circuses aspect of television might be among its most important roles: but, without slighting the ideal of equal access to the benefits of leisure, it may be doubted whether preserving the free availability of such offerings is of sufficient First Amendment value to justify laws mandating their carriage. If Section 4 is to meet a First Amendment test, then the particular content that Congress is favoring should meet some loftier standard than the minimalist conception of the public interest currently governing commercial broadcast regulation.[61]

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[59] *See In the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 5321 (1993). The cornerstone of that decision was a reaffirmation of the assumptions of the FCC's deregulatory agenda: "we find no reason to believe that home shopping stations would survive in an increasingly competitive video marketplace if viewers were dissatisfied with their level of commercialization." *Id.* ¶ 27, at 5327.

[60] Again, this argument does not speak to any ground for Congressional intervention because of antitrust violations or other discriminatory actions by vertically integrated cable operators.

[61] This is not to denigrate the important public interest that commercial broadcasting

IV. The Problem of Regulating "Speakers"

Two presumptions, cornerstones of the First Amendment doctrine, have prompted doubts about Section 5. We have discussed the familiar principle that content-based regulation is subject to heightened scrutiny resulting almost automatically in invalidation. The second principle might be called speaker absolutism: the presumption that speakers' rights are minimally dependent on the characteristics of the entity claiming speakerhood or its special history — its place in the continuum between audience and creator — but derive often from nothing more than an entity's self-designation as a speaker. This principle suggests that any distinction between Sections 4 and 5 will make little constitutional difference, since both are equally invalid intrusions on speakers' rights.

There is something rightfully worrisome about the slippery slope that threatens if spectrum scarcity is not required to rationalize government regulation. There must, it appears, be something special about cable that warrants government regulation. In its *Turner* brief, the FCC identified the additional ingredient required to sanction government regulation as "market dysfunction":

> the power of private entities to silence others' speech justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical limitations on the medium of delivery (as in *Red Lion*); from economic monopoly (as in *Associated Press*); from advantages secured through government (as in *Red Lion* and *Austin*); or from a combination of the three (as in this case).[62]

The government's omnibus approach has much to be said for it: cable operators display elements of the scarcity rationale (access to poles and conduits), economic monopoly (the power and incentive to discriminate against broadcasters competing for advertising, whether "natural" or conferred by a franchise) and government advantages (from initial government selection to government-protected monopoly). Maybe none of these individually is quite sufficient to merit intrusive regulation; but described as aspects of the same dysfunctional beast, the appearance may be enough to merit a firm government hand.[63]

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serves, including in-depth coverage presenting opposing points of view on issues of public importance. A rule mandating carriage of all commercial broadcasting, however, is poorly tailored to secure carriage of such public interest programming in the absence of any significant legal obligation on the broadcaster to provide it.

[62] Brief for the Federal Appellees at 35-36, *Turner Broadcasting* (No. 93-44).

[63] There are dangers courted by this approach, however. Seduced by the language of economics and references to "market power," courts may apply the market dysfunction

Other aspects of cable "speakers," and other forms of analysis, are also relevant to determining cable's susceptibility to government regulation. A cable operator has aspects of speaker and conduit. In the past, these separated functions have not been overt factors in First Amendment analysis, and there has been a shying away from them. The fact that a cable operator may perform editorial functions, but typically is less involved in producing the content of the information it provides than are newspapers,[64] or may have foregone speech opportunities as the price of a government benefit it was free to take or leave, might be relevant to the cable operator's rights, but provides an uncomfortable ground for curtailing them.[65] At the deepest level, the contention of cable operators that they are speakers poses the question of how speakers are constituted in our society, whence they come, and how they emerge from the doctrinal corpus, fully armed with the panoply of First Amendment protections.

For most of our history, speakers were self-created, not the consequence of massive government patronage and protection. The new technology tells of a watershed, requiring a vast government partnership with private industry. New communications technologies, massive and expensive, have depended on government subsidy, favorable regulation, and protection from competition. These "speakers" are not so virginal as their soapbox

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theory narrowly, confining the scope of permissible government intervention to antitrust enforcement. Alternatively, if market dysfunction is given a broad reading, it may seem boundless in its consequences, mandating access without regard to the audience's needs.

64 *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In the traditional view, newspapers exercise active supervision and editorial responsibility not only over the selection of material for inclusion, but also over the writing and viewpoint of articles and editorials. Cable operators also clearly possess "a significant amount of editorial discretion regarding what their programming will include." City of Los Angeles v. Preferred Communications, 476 U.S. 488, 494 (1986) (quoting FCC v. Midwest Video Corp., 440 U.S. 689 (1979)). On the other hand, as various participants in the *Turner* debate argued to the Court, cable operators typically do not exercise the idealized newspaper's control over editorial content. A cable operator may turn much responsibility for content over to the entity providing programming for a particular channel, although it cannot escape all liability for that programming. This distinction may be disappearing, however, as newspapers entering electronic publishing serve increasingly as conduits for unedited information provided by others.

65 *See* Rust v. Sullivan, 500 U.S. 173 (1991) (rejecting unconstitutional conditions argument where clinics were free to reject conditioned subsidies). One further factor that might be relevant in determining whether an entity is a speaker is the identification of a carrier with the speech carried. An individual or enterprise may be "forced either to appear to agree with" the views expressed through mandated access "or to respond." Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1, 15 (1986). Today, cable operators are unlikely to be identified with the views carried on their programming, although that may be changed by law or custom. For the present, given the enormous variety of information conveyed over cable systems, there can be no presumption of endorsement or expectation that a cable operator advocates every contentious view expressed on one of its channels.

antecedents. Unlike their adopted forbears, they have embraced the power of the state to extend their power and often depended on the state to provide them with a protected zone for growth. It is after this period of close relationship that businesses founded on the new technology assert, on First Amendment grounds, an immunity from the power of the state so as to maintain and enlarge their position. The cable industry, for example, successfully persuaded the government to guarantee access to telephone poles, easements across private lands, and compulsory licenses to broadcast television programming. More than that, cable advocates successfully lobbied Congress in 1984 to place limits on valid municipal powers to charge franchise fees, regulate rates, and condition the award of franchises themselves. Having achieved power of national proportions, in large part through a structure of government policy, cable now asserts that it is a speaker, with full First Amendment protection, forgetting the nature of its birth. Not only because it is a *quid pro quo*, not only because public resources are used, but rather because there is a long partnership in the evolution of the industry, does government have an interest in the new technology and a stake in its future.[66]

Ithiel de Sola Pool saw the issue of media and technology convergence far earlier than most. In *Technologies of Freedom*,[67] he recognized the collapse of categories — the disappearance, in an electronic future, of "newspapers" as such or other historically defined entities with strong speech-related privileges. His contribution was to recognize the liberating aspect of this evolution and to urge the extension of the mantle of freedom. But the collapse of categories has other possible outcomes. We need to retain the absolute protection that newspapers traditionally have received; but we shall have to be discerning to determine, in the electronic future, what participants perform the "newspaper" function. Questions that have long been obscured, distinctions that have been safely buried, will now come to the forefront. As the must-carry cases illustrate, in the world of new technologies, more attention has to be paid to developing the jurisprudence of speakerhood.

V. Conclusion: Enriching the Public Sphere

This essay is not just a Rodellian cry against the suffocating possibilities of doctrine, extended bit by bit without a sense of con-

66 *See* Cass Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 278-91 (1992); *see generally* Cass Sunstein, The Partial Constitution (1993).

67 Ithiel De Sola Pool, Technologies of Freedom (1983).

text. We have sought to separate out two elements of the federal cable law — commercial and non-commercial must-carry — and show how they have very different pedigrees, consequences and justifications. In that way, this essay has tried to provide a response to Justice Kennedy's question at oral argument: the First Amendment tradition is not so foolish and it can be interpreted to support a role for government in bolstering noncommercial broadcasting and other valid speech interests, while denying it to commercial channels, at least under the present regulatory regime.

Indeed, that intervention is part of a history of government's efforts to affect the structure of the public sphere. Must-carry rules are just one example of a long-running historic debate about how speakers may obtain access to the public and Congress' role in shaping that access. By considering the nature of access, its theoretical rationale and characteristic embodiments, some texture may be fitted to a jurisprudence of meaning. A longer perspective may help illustrate why shaping public discourse should be considered a basis for government intervention, rather than an embarrassment requiring rationalization on other grounds.[68]

"Access," in communications policy, is an umbrella for the determination, among other things, of who can use the electronic media to speak, when they can speak and under what conditions. Confusingly, but deeply embedded in the idea of access are fundamental notions connecting communications technology, democratic discourse and the public sphere. Improved access is said to be one of the by-products of the modern free speech tradition as competition in the marketplace produces new opportunities for communication. But the notion of access, even the very word itself, brings forth echoes of easement, of the capacity of one person to go across the property of another. We speak of the right of a land-locked nation to have access to the sea. Access sometimes implies an extraordinary right, a situation in which the property in-

[68] For the view that the First Amendment obliges government actively to shape public discourse to ensure robust debate on significant public issues, see Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). The benefits of such efforts must be balanced against the risks of government distorting public discourse. Even when it does not still the voices of others, government may in theory "drown out" unsupported points of view. *See Lathrop* v. *Donohue*, 367 U.S. 820 (1961) (Harlan, J., concurring). *But see First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 789 (1978) (dismissing the argument that, because of their wealth and power, corporations' "views may drown out other points of view," in the absence of any showing that "the relative voice of corporations has been overwhelming"). Government allocation of speech opportunities also carries risks, among them the harm that may befall those competing candidates for access not granted the opportunity to speak through mandated access. Such problems cannot be resolved in the abstract; but the type of educational access programming imposed by Section 5 raises them only to a minimal degree.

volved is in the control of another but where circumstances require that the perquisites of ownership be modified for a specific purpose. In a highly romantic form, access suggests a search to replicate mythic conditions of the imagined village by the use of high technology, fulfilling a desire to recreate a world wherein any person can talk to any other person. Access doctrines provide an index of ways to reconstruct the mass media so the predominant mode is no longer the few speaking to the many, but, at the least, the many speaking to the many.

If there is to be democratic discourse, it is important who controls the forum. A strong, though not universal belief exists in the link between the ownership of the media and the social narrative of their content. Ownership patterns are not everything: government regulation can impose harsh restrictions on the most private of systems and a publicly owned forum can be democratically run. But ownership is a factor. The commitment to privatization of the media in the transition societies has, as one of its premises, this bond between ownership and content. Diversifying ownership has another seeming advantage. Because access solutions seem most objectionable if they require a government official to determine whether the range of stories told and pictures shown properly represents some desired or actual reality, or range of possible realities, a more abstract solution —affecting the composition of proprietors — has seemed preferable.[69] Thus, what might be called "ownership access" — forcing diversity among owners to achieve diversity in content — has been a favored technique of Congress and the FCC.[70]

As we have argued, the must-carry rules are, to the extent they are defensible, content-based regulation. But they can also be perceived as distinguishing on the basis of ownership: in that way, too,

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[69] The doctrinal limitations we have explored in this essay are a principal reason for this reliance, in the United States, on putatively content-neutral ownership regulations as a proxy for content-based regulation.

[70] Ownership access is also less onerous than other forms of "content neutral" access. For example, conditional access requirements trigger access when the speaker raises some issue or viewpoint. Such access provisions penlize speech, and may do so on a content basis, because they impose costs and burdens on speakers based on what they have said. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974). As the Court observed in *Tornillo*, "[f]aced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statue, editors might well conclude that the safe course is to avoid controversy." *Id.* at 241; *see also* Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1, 14 (1986) (where access was awarded only to those who disagreed with a speaker's views, the speaker was compelled to "contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views;" in the circumstances, it might decide "the safe course is to avoid controversy"). Because both Sections 4 and 5 are absolute access requirements, they do not incur this danger of dampening the burdened speaker's expression.

the relationship of Section 5 — the noncommercial carriage rule — and Section 4 — the commercial station carriage rule — can be parsed. There are reasons that are readily understandable why licensees owned by colleges and universities, school districts and "public broadcasting entities," organizations instrumental to the "supreme[ly] importan[t]"[71] function of educating the citizenry, should be favored. These are "owners" whose relationship to narrative is important and requires bolstering, much as is the case with minorities. In the American context, on the other hand, in which the alternative to affording commercial broadcasters space on cable is to open those channels to commercial cable programmers, the rationale for preferring commercial broadcast licensees is scarcely evident.

Nor is the 1992 Cable Act the first occasion on which the value of providing a larger forum to non-commercial voices has been recognized. When the FCC established its Table of Allocations for the distribution of television broadcast licenses in the early 1950's, it reserved channels for educational purposes.[72] This was access to spectrum, not access across the broadcast license reserved by others. It was out of that reservation that the public broadcasting system emerged. The reservation can be seen as a wholesale act of providing access, first for colleges and municipalities that wished the opportunity to use the new medium to accomplish their public responsibilities to instruct, and then for a far broader range of cultural institutions. It was a fundamental decision about the architecture of the electronic public sphere. Twenty years later, many local governments, as part of a highly competitive system for awarding local cable franchises, required that cable operators set aside a certain amount of channel time for governmental, educational and public uses.

These steps — both in the reservation of broadcast spectrum and the allocation of cable channels — have to be understood in terms of shaping the opportunity for discourse. The reservations are a partial effort to compensate for the fundamental decision that the channels of communication in the United States are essentially private and commercial. In enacting them, federal and local governments recognized that a public sphere limited to commercial channels with private broadcasters as gatekeepers would be

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71 Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

72 *See* Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952). In its recent high definition television proceeding, the FCC has indicated that this channel reservation policy will apply to the assignment of high definition channels. *See* Second and Third Reports in MM Docket No. 97-268 (May 8, 1992 and Sept. 17, 1992).

fundamentally and irretrievably impaired: the variety of potential communicators and the richness of public issues required that there be alternate mechanisms for communicating, for sending and receiving information. The must-carry rules can be read as another step in this direction. But, here too, the distinction between Section 4 and Section 5 becomes evident. The carriage rules of Section 5 have a determinate, understandable and defensible relationship to enhancing the public sphere. Section 4 provides for more access for commercial speakers, but without any basis for distinguishing between their contribution to the public sphere and what can be expected from their cable-originated competitors.

For all this, it must be acknowledged that American communications policy has not produced, through government intervention, the ideal public sphere. The efforts to create diversity of ownership or ownership access did not, during the broadcast era, produce meaningful diversity of content or necessarily alter paths of entry into the halls of discourse. There may have been deep and systemic reasons for this failure. There has always been something tinny about access talk. Access claims in the American broadcasting experience have not been sufficiently grounded in theory even where they appear to be adequately justified empirically. Access doctrines too often reflect a search for an ersatz politics of pluralism, a surface architecture of free speech that combines the trappings of government noninterference with the illusion that narratives — the stories of the good life — are fairly distributed among its tellers. Special steps to create ownership by minority licensees might have been accepted as a way to avoid harsher pressures for programming changes.

Because most elements of access regulation have been halting, half-way and under-theorized, failing to come to grips with any of these deeper questions, the yield has been relatively unproductive in terms of contribution to democratic dialogue: what we have gotten in the United States is a failed fairness doctrine, clumsy efforts to harmonize the growth of cable with the coexistence of broadcasting, and a badly conceived and damaging set of rules concerning the political process (with many built-in irrationalities). Justice Kennedy's question, glancing and ambiguous as it was, suggests a more principled, less compromising view: we can look at consequences, we can look at the architecture of discourse and the special contribution that noncommercial television can offer. It would be a grave misfortune if, at the outset, the mechanistic application of First Amendment doctrine were used, ironically, to prevent government from so addressing the need for a robust public sphere.