Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech

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I. INTRODUCTION: CONTENT-BASED LAWS THAT PROMOTE FAVORED CONTENT

Current free speech doctrine appears to rest on a mistake. Consider two hypothetical laws affecting American speech. First, cable carriers like Comcast and Time Warner offer video-on-demand TV service, through which customers can watch thousands of TV shows and movies "on demand," not on a predetermined schedule.[1] Suppose Congress determines that video-on-demand services could inform the public about key issues during an election campaign and passes a law requiring each local cable carrier to post, on demand, a ten minute campaign video from each candidate listed on the local ballot. Under current doctrine, this law—meant to promote informed democratic decision making—would likely be subject to the strictest constitutional scrutiny as "content-based" and be struck down as unconstitutional.

Second, consider a network-neutrality requirement. Cable and phone carriers offer high-speed Internet service to consumers,[2] and traditionally

1. Annual Assessment of Competition in the Delivery of Video Programming, *Twelfth Annual Assessment*, 21 F.C.C.R. 2503, para. 57 (2006).

2. By international standards, the "high-speeds" available in the United States remain quite slow. *See* DEREK TURNER, BROADBAND REALITY CHECK II: THE TRUTH BEHIND AMERICA'S DIGITAL DECLINE 4 (2006), *available at* www.freepress.net/docs/bbrc2-final.pdf.

did not block, degrade, or slow down certain Web sites.[3] That is, a user could access everything on the Internet, from CNN.com to the most obscure blog, without discrimination. In 2005 and 2006, phone and cable executives declared they would exercise their "editorial" control over their "pipes" and favor some Web sites while degrading or blocking others.[4] In 2008, the FCC found that Comcast blocked online technologies, including BitTorrent, that are used by software companies to compete with cable television.[5] Suppose Congress concludes that letting cable and phone companies restrict access to online content would reduce the diversity of sources and content available to Internet users, and therefore passes a "network neutrality" law enabling users to access and share all content online.[6] Many of the phone and cable companies and their defenders, including one leading constitutional scholar, argue that this law—which would condemn actions like Comcast's that employed the same censorship tools used in China[7]—would be unconstitutional for violating the free speech rights of telecommunications companies.[8] Under current doctrine, courts may agree.[9]

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3. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS 147-76 (2001); Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

4. For examples, see *Blocking Innovation*, Save The Internet, http://www.savetheInternet.com/=threat#abuse (last visited Jan. 30, 2009).

5. *See* Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, *Memorandum Opinion and Order*, FCC 08-183 (rel. Aug. 20, 2008). Professor Ammori was the lead attorney on this case and the primary author of the filings against Comcast. *See, e.g.*, Bob Fernandez, *FCC Ruling on Comcast Would Be Big Win for a Geek*, PA. INQUIRER, July 31, 2008, at A1; Peter Svensson, *Consumer Groups Ask FCC to Fine Comcast: Report Showed Cable Company Hindered Some File Sharing by Subscribers*, MSNBC.COM, Nov. 1, 2007, http://www.msnbc.msn.com/id/21579686/.

6. Net neutrality caused considerable controversy in 2006, both derailing an omnibus communications bill sailing through Congress and holding up the merger of AT&T and BellSouth. *See, e.g.*, John Dunbar, *"Net Neutrality" Would Be Democrats' Pet*, WASH. POST, Oct. 23, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102300505.html; Tim Wu, *Bellweather: Ma Bell is Back. Should You Be Afraid?*, SLATE, Jan. 4, 2007, http://www.slate.com/id/2156918; Posting of tkarr to Save the Internet Blog, (Dec. 8, 2006), http://www.savetheinternet.com/blog/2006/12/08/congress-closes-telco-bill-dies-on-the-vine/.

7. *See* Peter Svensson, *Consumer Groups Ask FCC to Fine Comcast*, ASSOCIATED PRESS, Nov. 1, 2007, *available at* http://www.msnbc.msn.com/id/21579686/; *see also* Petition of Free Press et al. for Declaratory Ruling at 3-14, Broadband Industry Practices, FCC WC Docket No. 07-52 (rel. Nov. 1, 2006), *available at* http://www.freepress.net/docs/fp_et_al_nn_declaratory_ruling.pdf.

8. Harvard Law School Professor Laurence Tribe has made this argument. *See, e.g.*, Frank Pasquale, *Larry Tribe's Lochner?*, CONCURRING OPINIONS, Aug. 28, 2007, http://www.concurringopinions.com/archives/2007/08/larrys_lochner.html. For an argument that network neutrality may be unconstitutional, see Randolph J. May, Op-Ed, *Net Neutrality Would Violate the First Amendment Rights of ISPs*, NAT. L.J., Aug. 16, 2006, at

How can the First Amendment be understood to invalidate, or even seriously question, these laws that promote diverse political speech? Much of the problem has to do with mistaken assumptions about the cornerstone of free speech doctrine: content analysis.

Content analysis provides strict scrutiny for "content-based" laws (like the video-on-demand law) and a balancing test for "content-neutral" laws (like the network neutrality law).[10] Scholars, judges, and Justices almost uniformly assume that laws meant to promote favored content, even diverse or political content, are "content-based" and considered as problematic as those meant to suppress disfavored content. In fact, the Supreme Court has wrongly suggested that one of the "settled principles of our First Amendment jurisprudence" is to apply strict scrutiny to laws meant to promote an informed citizenry.[11] Scholars widely assume that this "settled" principle is normatively desirable, as content-based laws are seen as threats to freedom of speech.[12]

23, *available at* http://www.law.com/jsp/article.jsp?id=1155559192876 (conceding net neutrality is content-neutral); Comments of Time Warner Cable, Inc., Broadband Industry Practices, FCC WC Docket No. 07-52 (rel. Feb. 13, 2008); *see also* Moran Yemini, *Mandated Internet Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 14 VA. J.L. & TECH. (forthcoming 2009), *available at* http://ssrn.com/abstract=984271. I do not agree that the *Turner* test necessarily invalidates network neutrality rules. *See, e.g.*, Ex Parte Comments of Timothy Wu & Lawrence Lessig, High-Speed Access to the Internet Over Cable and Other Facilities, FCC CS Docket No. 02-52 (rel. Aug. 22, 2003) *available at* http://www.freepress.net/files/wu_lessig_fcc.pdf; Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103 (2007).

9. *Cf.* Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994); Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001).

10. *See, e.g.*, GEOFFREY R. STONE, CONSTITUTIONAL LAW xi, 1049-1484 (2005) (organizing freedom of expression subchapters based on content-analysis); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 789-94 (categorizing the "two ways" government might abridge speech as either content-neutral or content-based); Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57; John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103 (2005); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 123-25 (1981); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

11. *See* Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 639 (1994).

12. *See, e.g.*, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995) (discussing *Turner*'s paradox); Laurence H. Winer, *The* Red Lion *of Cable, and Beyond?*—Turner Broadcasting v. FCC, 15 CARDOZO ARTS & ENT. L.J. 1, 27-35 (1997)

The widely shared and deeply held assumptions about content analysis are wrong. They neither reflect existing law nor conform to the First Amendment's normative goals. Government need not be "neutral" regarding speech, and can promote particular classes of content. Government often favors content that is traditionally believed necessary for an informed citizenry, such as viewpoint-diverse, political, local, and educational content,[13] which here I call "democratic content." Democratic content is widely believed to deserve vigilant protection because of its role in democratic decision making[14] and because politicians have incentives to suppress such speech.[15] According to most precedent, in fact, content-based promotion is acceptable, subject to a mere viewpoint-neutrality requirement.[16] And such promotion should be acceptable, as it serves First Amendment values of participatory democracy and individual liberty.

Although most precedent supports content-based promotion,[17] such promotion is questioned in two areas. The first is compelled individual speech in certain circumstances. I address this issue at the end of this Article. Generally, this exception makes sense, but for reasons *other* than content neutrality, and therefore does not support a claim for content neutrality.

The second exception is the focus of this Article, both because this Article argues that we should abandon this particular exception (unlike the other) and because the exception's domain significantly impacts how

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(arguing that *Turner I* was content-based); *see also* Nancy J. Whitmore, *The Evolution of the Intermediate Scrutiny Standard and the Rise of the Bottleneck "Rule" in the* Turner *Decisions*, 8 COMM. L. & POL'Y 25, n.199 (2003) (collecting articles claiming that *Turner* was wrong because must-carry was content-based).

13. *See Turner I*, 512 U.S. at 677, 688 (O'Connor, J., dissenting) (taken together, "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs," aim to produce an "informed electorate"); Kagan, *supra* note 10, n.145 (claiming a "prohibition on the government's" attempts "to improve the content of the speech market"); *see also* Turner Brdcst. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 222 (1997).

14. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 272 (1998) ("[T]here is little dispute that one of the most important themes of [First Amendment] doctrine is the Amendment's function 'as the guardian of our democracy'") (internal quotation omitted); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 562 (1991) ("Everyone seems to agree that political speech lies at the core of the First Amendment's protection."); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002) (quoting Republican Party of Minn. v. Kelley, 247 F.3d 854, 861 (8th Cir. 2001)) (condemning a law burdening "a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office"); FCC v. League of Women Voters of Cal., 468 U.S. 364, 381 (1984) (stating "[T]he expression of editorial opinions . . . lies at the heart of First Amendment protection.").

15. *See, e.g.*, *League of Women Voters*, 468 U.S. at 381.

16. *See infra* Part II.

17. *See infra* Part II.

Americans communicate with one another. This exception is for the regulation of speech carried over telephone and cable *wires*,[18] particularly certain services, such as cable television (including video-on-demand) and perhaps Internet service, though not wireline phone calls.[19] Wireline media may be the lone problematic exception in part because the Supreme Court most explicitly conflated content-based suppression and promotion in dicta in a landmark case involving a cable-access rule, *Turner Broadcasting Co. v. FCC*, in 1994.[20] Considering that Americans watch television for four hours a day and get most of their news from cable, broadcast TV, and the Internet,[21] this exception has a profound impact on American speech.

Moreover, this "exception" could jeopardize the ambitious technology agenda of President Barack Obama. During the 2008 campaign, then-Senator Obama issued an ambitious "innovation agenda" calling for stringent media ownership rules, an unwavering commitment to network neutrality, and high-speed Internet access for all.[22] Indeed, increasingly, Congress, the FCC, and the States have been debating content-promoting communications policies,[23] including ownership limits and access rules, which consciously aim to promote access to private infrastructure for particular content—generally, diverse, educational, and political content

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18. For a discussion of different platforms offering TV service and their respective usages, see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Twelfth Annual Report*, 21 F.C.C.R. 2503 (2006). For those offering voice service, see Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eleventh Report*, 21 F.C.C.R. 10947 (2006); INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, FCC, TRENDS IN TELEPHONE SERVICE (Feb. 2007), *available at* 2007 WL 439063.

19. Generally, scholars argue that all platforms should be treated with very strict protections for their owners, supposedly unlike broadcast. *See, e.g.*, Christopher S. Yoo, *The Rise and Demise of the Technologically-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003); Time Warner Entm't Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc).

20. Turner Brdcst. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 180 (1997); *see also* Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 622 (1994).

21. *See, e.g.*, Comments of United Church of Christ et al. at 41-42 2006 Quadrennial Review, FCC MB Docket No. 06-121 (rel. Oct. 23, 2006) (and sources cited therein) [hereinafter United Church of Christ Comments].

22. OBAMA FOR AMERICA, BARACK OBAMA: CONNECTING AND EMPOWERING ALL AMERICANS THROUGH TECHNOLOGY AND INNOVATION (2007), *available at* http://obama.3cdn.net/780e0e91ccb6cdbf6e_6udymvin7.pdf.

23. In 2006, the House passed, and the Senate Commerce Committee reported, an omnibus communications act. *See* David Hatch, *Stevens Concedes "Net Neutrality" May Kill Telecom Bill This Year*, TECHNOLOGY DAILY, Sept. 12, 2006, *available at* http://saveaccess.org/node/458. Several states, including California, Texas, and Michigan, have adopted major communications legislation. *See, e.g.*, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 5101 (2007).

necessary for an informed citizenry.[24] But, lower courts have wrongly used heightened scrutiny through content-analysis to invalidate wireline regulation meant to promote democratic content. These cases invalidate speech-enhancing legislative attempts and discourage other legislatures from passing similar laws.[25]

Take, for example, network neutrality, which is highly contentious, [26] at the top of President Obama's campaign promises regarding technology, and far more practically important than academics' darling topics like flag burning or hate speech.[27] Every major consumer group has endorsed network neutrality;[28] Moveon.org and the Christian Coalition of America are in the same pro-network-neutrality coalition;[29] the Senate and House committees on commerce and on the judiciary have held hearings on network neutrality;[30] every Democratic presidential candidate in 2008, as well as Republican Mike Huckabee, endorsed network neutrality;[31] thousands of press and legal articles have discussed network neutrality;[32] at

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24. The same is true, I would argue, of universal service rules, which aim to promote communications and information capabilities to all Americans. *See* Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1552, 1556 (N.D. Cal. 1987); PETER HUBER, MICHAEL K. KELLOGG, & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 1316 (2nd Ed. 1999) (presenting telephone build-out as a "speech" problem because it "requires connecting up to listeners and/or speakers that the provider would rather avoid").

25. *See infra* Part III.

26. John M. Peha, William H. Lehr & Simon Wilkie et al., *The State of the Debate on Network Neutrality*, 1 INT. J. COMM. 709, 709 (2007) ("The debate over 'network neutrality' has recently emerged as the single most important communications policy issue—at least within the United States—that is now being debated around the world."); Charles Babington, *Neutrality On the Net Gets High '08 Profile*, WASH. POST, Feb. 20, 2007, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/19/AR2007021900934.html.

27. *See generally* Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005).

28. *See* Save the Internet: Join Us, http://savetheInternet.com/=coalition (last visited Jan. 30, 2009).

29. SavetheInternet.com, Moveon.org & The Christian Coalition, *When it Comes to Protecting Internet Freedom, the Christian Coalition and MoveOn Respectfully Agree* (2006) (advertisement), *available at* http://cdn.moveon.org/content/pdfs/MoveOnChristianCoalition.pdf.

30. *See, e.g.*, ANGELE A. GILROY, CONGRESSIONAL RESEARCH SERVICE, NET NEUTRALITY: BACKGROUND AND ISSUES (2007), *available at* http://www.fas.org/sgp/crs/misc/RS22444.pdf; Anne Broache, *Politicos Make New Push for Net Neutrality Policing*, CNET.COM, Mar. 11, 2008, http://www.news.com/8301-10784_3-9891217-7.html?tag=nefd.top.

31. Anne Broache, *Obama Pledges Net Neutrality Laws if Elected President*, CNET.COM, Oct. 29, 2007, http://www.news.com/8301-10784_3-9806707-7.html (noting also Gov. Huckabee's support).

32. *See, e.g.*, ROBERT D. ATKINSON & PHILIP J. WEISER, INFO. TECH. & INNOVATION FOUND., A "THIRD WAY" ON NETWORK NEUTRALITY (2006), *available at* http://www.itif.org/files/netneutrality.pdf; Peter Burrows & Olga Kharif, *The FCC, Comcast, and*

least four major bills have been introduced to codify network neutrality;[33] 800 rock bands have endorsed network neutrality, including OK Go, whose singer testified before Congress;[34] millions of Americans have shared and downloaded YouTube videos supporting network neutrality, as well as signed petitions to Congress.[35]

Without network neutrality, unions could be blocked when trying to organize (which happened in Canada[36]); YouTube and its competitors would not provide a platform for political videos and parodies,[37] but would be squeezed to pay "taxes" to phone and cable companies (as phone executives have publicly wished[38]); and the Participatory Culture Foundation would not be able to offer its 3,500 channels of political and

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Net Neutrality, BUS. WEEK ONLINE, Feb. 26, 2008, *available at* http://www.businessweek.com/print/technology/content/feb2008/tc20080225_498413.htm; Brett M. Frischmann & Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383 (2007), *available at* http:// ssrn.com/abstract=1014691; Herman, *supra* note 8; Lawrence Lessig, *In Support of Network Neutrality*, 3 J.L. & POL'Y FOR INFO. SOC'Y 185 (2007); Lawrence Lessig & Robert W. McChesney, Op-Ed, *No Tolls on the Internet*, WASH. POST, June 8, 2006, at A23, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html; Howard A. Shelanski, *Network Neutrality: Regulating With More Questions Than Answers*, 6 J. TELECOMM. & HIGH TECH. L. 23 (2007); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003); Yemini, *supra* note 8; Christopher Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1 (2005).

33. Anne Broache, *Net Neutrality Field in Congress Gets Crowded*, CNET.COM, May 19, 2006, http://www.news.com/Net-neutrality-field-in-Congress-gets-crowded/2100-1028_3-6074564.html.

34. Timothy Karr, *OK Go to Congress: OK Act*, HUFFINGTON POST, March 13, 2008, http://www.huffingtonpost.com/timothy-karr/ok-go-to-congress-ok-act_b_91337.html.

35. Posting of tkarr to Save the Internet Blog, (Dec. 8, 2006), http://www.savetheinternet.com/blog/2006/12/08/congress-closes-telco-bill-dies-on-the-vine/.

36. *See, e.g.*, The Telus Blockade and the Law, http://www.michaelgeist.ca/content/view/914/125/ (July 26, 2005).

37. *See, e.g.*, Gil Kaufman, *Will.I.Am's "Yes We Can" Obama Video Spawns John McCain "No You Can't" Spoofs*, MTV.COM, Feb. 12, 2008, http://www.mtv.com/news/articles/1581403/20080212/will_i_am.jhtml.

38. *See* Spencer E. Ante & Roger O. Crockett, *Rewired and Ready for Combat*, BUSINESSWEEK, Nov. 7, 2005, at 110, *available at* http://www.businessweek.com/magazine/content/05_45/b3958089.htm (quoting the AT&T CEO Edward E. Whitacre Jr. saying that software and online companies "don't have any fiber out there. They don't have any wires. They don't have anything . . . . They use my lines for free—and that's bull. For a Google or a Yahoo! or a Vonage or anybody to expect to use these pipes for free is nuts!"); Arshad Mohammed, *Verizon's Executive Calls for End to Google's "Free Lunch,"* WASH. POST, Feb 7, 2006, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601624.html (quoting Verizon Senior Vice President and Deputy General Counsel, John Thorne, as stating "The network builders are spending a fortune constructing and maintaining the networks that Google intends to ride on with nothing but cheap servers. . . . It is enjoying a free lunch that should, by any rational account, be the lunch of the facilities providers.").

entertainment television for free online (which is why that organization filed with the FCC regarding Comcast's secret blocking of technologies used by Miro[39]).

In response to the enormous public support for network neutrality, the phone and cable companies invested over $100 million in lobbying Congress and the FCC.[40] Should they fail with Congress and the FCC—which appears likely with Barack Obama's election—they will press First Amendment claims in the courts. Their frequent (and, of course, exceptional) First Amendment lawyer, Harvard Law School Professor Laurence Tribe, has already asserted that network neutrality laws would violate the First Amendment.[41] He does so largely on the shaky foundation of content analysis.

To properly unpack the content distinction, and therefore to make First Amendment analysis relevant for the twenty-first century, we must face the issue of mass media and Internet regulation and its impact on free speech doctrine.[42]

Constitutional debate over media regulation usually focuses not on content analysis, but on other arguments, such as an individual's right to be heard,[43] the fostering of collective democratic discourse,[44] the benefits of an unconcentrated media system,[45] and free speech and culture.[46] On the

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39. *See* Reply Comments of Free Press, et al., Broadband Industry Practices, FCC WC Docket No. 07-52, (rel. Feb. 28, 2008), *available at* http://www.freepress.net/docs/freepress_comcast_petition_reply_comments.pdf.

40. Ted Hearn, *Mad Money: Cable, Phone, Net Companies Have Spent $110 Million This Year To Influence Telecom Reform. Was It Worth It?*, MULTICHANNEL NEWS, Oct. 23, 2006, at 14, *available at* http://www.multichannel.com/article/CA6383576.html.

41. *See, e.g.*, Pasquale, *supra* note 8; *see also infra* note 46.

42. *See* Kagan, *supra* note 10, at 464-72 (discussing media cases briefly only to endorse *Miami Herald* over *Red Lion* and the *Turner* dissents over the *Turner* majorities); Stone, *Content-Neutral Restrictions*, *supra* note 10, at 98; *see also* Ammori, *Curriculum*, *supra* note 27.

43. Jerome A. Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495 (1989).

44. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

45. C. Edwin Baker has argued that courts should distinguish between rules structuring media and those regulating content. *See* Baker, *Turner*, *supra* note 10. Yochai Benkler has eloquently defended the benefits of a decentralized information environment. YOCHAI BENKLER, THE WEALTH OF NETWORKS 261-65 (2006); *see also* Ammori, *Curriculum*, *supra* note 27, at 73-80; Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030 (2004). Arguments for or against decentralization are partly tied to content. *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV., 354, 377-82 (1999); *cf.* Neil W. Netanel, *The Commercial Mass Media's Continuing Fourth Estate Role*, *in* THE COMMODIFICATION OF INFORMATION (Niva Elkin-

other side, arguments include media companies' right to be free from compelled speech,[47] problems with the underlying rationales in certain cases,[48] and analogies and distinctions among different media.[49] While these other frameworks may be useful,[50] courts and scholars generally apply content analysis[51]—the appropriate analysis should distinguish between suppression and promotion.

Koren & Neil W. Netanel, eds., 2002); Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005).

46. *See, e.g.*, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

47. *See, e.g.*, William E. Lee, *Cable Modem Service and the First Amendment: Adventures in a "Doctrinal Wasteland*," 16 HARV. J.L. & TECH. 125 (2002); Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083 (1999); James A. Bello, Comment, Turner Broadcasting System, Inc. v. FCC*: The Supreme Court Positions Cable Television on the First Amendment Spectrum*, 30 NEW ENG. L. REV. 695, 735 (1996) (relying on Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974)) ("Irrespective of whether the regulations are deemed content based, strict scrutiny should be applied because the must-carry provisions interfere with the editorial discretion of cable operators."); *see also* Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007) (discussing and responding to opponents of access rights); *cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 817 (1996) (Thomas, J., concurring in part, dissenting in part) (characterizing public access channels as "forc[ing] an unwilling operator to speak"). For arguments on Internet delivery, see Barron, *Understanding the First Amendment Status of Cable*, *supra* note 43; Ex Parte Submission of Timothy Wu & Lawrence Lessig, High-Speed Access to the Internet Over Cable and & Other Facilities, FCC CS Docket. No. 02-52 (rel. Aug. 22, 2003).

48. *See, e.g.*, William W. Van Alstyne, *The Möobius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539 (1978) (and sources cited therein); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, n.145 (1993) (collecting sources attacking the "scarcity" rationale).

49. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062 (1994) ("Courts often succumb to the temptation to analogize new electronic technologies media to existing technologies for which they have already developed First Amendment models.").

50. *See* Marvin Ammori, The First Amendment's Structure (unpublished manuscript, on file with author).

51. Authors analyzing *Turner I* generally argued the rules should have been subject to strict scrutiny. *See, e.g.*, Winer, *supra* note 12; Whitmore, *supra* note 12, at 48, n.199 (2003) (collecting articles); *Leading Cases*, 108 HARV. L. REV. 139, 276 (1994). By contrast, an article by C. Edwin Baker and two short articles co-authored by Monroe Price and Donald Hawthorne suggested that courts should endorse government attempts to promote particular content for an informed citizenry. *See* Baker, *Turner*, *supra* note 10; Donald W. Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning, Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499 (1994); Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of* Turner Broadcasting *and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65 (1994). Baker argued that corporate institutions, unlike individuals, should be subject to structural regulatory rules, even if content-motivated, and demonstrated that government had in fact long engaged in content-motivated structural regulation of the press. But his article focused on the distinction between structure and content, and between corporate entities and real

Scholarly debate over content analysis has overlooked the distinction between content-based promotion and suppression.[52] This Article fills that gap and advances what is, perhaps surprisingly, a revolutionary argument in First Amendment literature.[53] Simply stated: free speech doctrine does and should explicitly distinguish between laws meant to promote favored content (particularly the content necessary for an informed citizenry) and those meant to suppress disfavored content. While scholars may proffer objections to this principle—based on the role of government, institutional competence concerns, private property rights, or the treatment of newspapers—none is persuasive.

Part II of this Article presents the conventional wisdom on content analysis and its role in press regulation, as well as the preferable framework introduced here. Part III demonstrates that, as a matter of positive law, considerable precedent reflects that content promotion is unproblematic, if it is viewpoint-neutral. Part IV demonstrates that permitting democratic content promotion conforms to the First Amendment's purposes. That part also rejects the objections to permitting content promotion, particularly in media regulation.

II. CONVENTIONAL WISDOM ON CONTENT

The conventional view of content analysis is that all laws based on content should be subject to strict scrutiny.[54] While subject to many nuances, the conventional view can be stated briefly. "Viewpoint" discrimination generally refers to laws discriminating against speakers based on particular views, beliefs, or opinions, especially views associated with one political party or on highly controversial matters of public

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individuals, not content -promotion and -suppression. *See* Baker, *Turner*, *supra* note 10. In a later paper on copyright, almost in passing and with little elaboration, Baker stated, "[a]rguably the First Amendment is best understood to distinguish between content *suppression* and content *promotion*, condemning only the former." C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAN. L. REV. 891, 930-31 (2002). Price and Hawthorne focused on the educational value of noncommercial television. *See* Hawthorne & Price, *Rewiring the First Amendment*, *supra*. Neither of these articles contrasts *Turner*'s analysis with doctrinal areas beyond media, advances the broader positive and normative arguments for accepting content-based promotion generally, or proposes any applicable test, such as a viewpoint-neutrality test, or other administrable limit for content- promotion.

52. *See supra* notes 10 and 12.

53. *See supra* note 51 (discussing the only scholars who have, to my knowledge, hinted at a similar argument).

54. *See, e.g.*, Baker, *Turner*, *supra* note 10, at 117 n.88; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (discussing conventional "content" analysis's boundaries); *see also infra* notes 64-67 and accompanying text.

importance.[55] Courts routinely invalidate laws discriminating against viewpoints with very few exceptions—applying a rule against viewpoint discrimination even for speech with no First Amendment protection and where content discrimination would be permissible.[56]

"Content" is broader than viewpoint, in that it also includes "subject-matter."[57] For example, a law suppressing political (or, say indecent) speech would be content-based but not viewpoint-based;[58] a law suppressing *Republican* political (or indecent) speech would be viewpoint-based.[59] A law promoting content would be one favoring political or educational speech in general,[60] while one favoring a viewpoint would require a particular view, such as pledging allegiance to the flag.[61]

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55. Laws can raise the danger of viewpoint discrimination for one of two reasons. First, they could penalize or favor certain viewpoints. Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 660 (1994) (distinguishing must-carry from laws "structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas"). Second, they could grant government standardless discretion, with which government could potentially manipulate and chill certain viewpoints. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (parades); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 769-70 (1988) (news racks); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (parades); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (leaflets and meetings in streets and public places); Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (leaflets); *see also* Erwin Chemerinsky, *Court Takes a Narrow View of Viewpoint Discrimination*, 35 TRIAL 90, 90 (Mar. 1999). One exception to this narrow definition is religion. *See* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 168 (1996).

56. *See, e.g.*, Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666 (1998) (viewpoint neutrality for limited public forum); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (viewpoint neutrality for "fighting words," which lack constitutional protection). The most well-known exception is government speech. *See, e.g.*, Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411 (2004).

57. *See, e.g.*, Heins, *supra* note 55, at 101 (noting courts often use the terms content and viewpoint interchangeably).

58. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997) (involving suppression of indecent content); FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984).

59. *See* News Am. Publ'g Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988) (invalidating a law requiring one particular conservative media owner to divest newspapers or TV stations).

60. *See, e.g.*, Time Warner Entm't Co. v. FCC, 93 F.3d 957, 971-73 (D.C. Cir. 1996) (upholding grant of authority to local franchises to require cable carriage of public, educational, and governmental channels); Policies and Rules Concerning Children's Television Programming, *Report and Order*, 11 F.C.C.R. 10660 (1996).

61. *See* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986) (law requiring utility company to include envelope inserts from organization opposing the company's views); Wooley v. Maynard, 430 U.S. 705 (1977) (law requiring drivers to have license plates of state message of "Live Free or Die"); W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624 (1943) (law requiring schoolchildren to pledge allegiance to the flag).

Current doctrine on content analysis suggests that laws characterized as "content-based" receive strict scrutiny and are struck down.[62] This doctrine is believed to further the First Amendment's underlying goals, such as democracy and autonomy.[63] But to serve democracy and autonomy, the content-based rule has numerous, varied exceptions,[64] which suggest that content discrimination is meant to do something else—such as discover political viewpoint discrimination.[65] Despite the necessity of a myriad of necessary coping exceptions,[66] some analysts defend content analysis as the least imperfect doctrinal alternative available.[67]

Under content-analysis, both content-based and content-neutral laws receive a "heightened" scrutiny above rational basis, though content-based laws receive more stringent scrutiny than content-neutral laws.

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62. *See, e.g.*, McDonald, *supra* note 10, at 1365, n.63 (explaining that every law classified as content-based by a Supreme Court majority has been struck down, and that *Burson v. Freeman*, 504 U.S. 191 (1992), and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), are not exceptions). Technically, strict scrutiny requires that government prove both a compelling interest and narrow tailoring through using the least restrictive means. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

63. *See, e.g.*, McDonald, *supra* note 10; Stone, *Content Regulation*, *supra* note 10, at 251 ("[T]he [content] distinction . . . is consistent with core first amendment values.").

64. Government may suppress content including obscenity, fighting words, sexual harassment, fraud, criminal conspiracy, deceptive advertising, collusive agreements, blackmail, and passing military secrets to foreign enemies—all based on content. *See, e.g.*, Schauer, *supra* note 54; *see also* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992). Laws targeting "commercial" content are not for that reason deemed content-based. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980). Laws suppressing indecent content are judged content-neutral if focused on "secondary effects." *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); FCC v. Pacifica Found., 438 U.S. 726 (1978) (suggesting indecency can be regulated as to children).

65. *See, e.g.*, Kagan, *supra* note 10 (arguing the exceptions mean to smoke out illicit motive). Indeed, the Court often confusingly uses the terms "content" and "viewpoint" interchangeably, characterizes content discrimination as aimed at "message," and has suggested that the main problem with content discrimination is the threat of viewpoint discrimination. *See, e.g.*, Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 641-43 (1994) (and cases cited therein); United States v. Eichman, 496 U.S. 310, 315, (1990); Heins, *supra* note 55.

66. *See, e.g.*, Baker, *Turner*, *supra* note 10, at 116 (criticizing the use under content analysis of scrutiny levels without normative analysis for "deflect[ing] discussion from the real issues"); McDonald, *supra* note 10 (cataloguing the "coping" mechanisms necessary in content analysis); Redish, *supra* note 10, at 113 (arguing that the distinction is "theoretically questionable and difficult to apply").

67. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (noting "regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable," but claiming that "no better alternative has yet come to light").

III. DESCRIPTIVE ARGUMENT: CONTENT PROMOTION DOES NOT RECEIVE HEIGHTENED SCRUTINY, AND MUST MERELY BE VIEWPOINT-NEUTRAL

Precedent makes clear the usual rule—government can attempt to promote favored democratic content, so long as government does not favor or disfavor particular viewpoints.

A. Doctrinal Areas Endorsing Viewpoint-Neutral Content Promotion

Precedent supporting this rule includes limited public fora, subsidized speech, copyright, and speech exceptions in general laws, and the regulation of broadcasting and other major mass media.

1. Limited Public Fora, Subsidies, Copyright, and Other Speech Exceptions

The free speech doctrine of four non-media areas reflects the viewpoint-neutral test. First, generally, government can create a limited public forum to *promote* particular subject matter and speakers—such as for student speaking activities or public television debates—so long as government does not discriminate among viewpoints.[68] Such promotion is not subject to strict scrutiny or to intermediate scrutiny, and such promotion need not be narrowly tailored or minimally burdensome—in contrast to other speech that the government does *not* promote.[69]

Second, generally, government can *subsidize*, and thereby promote, favored content.[70] For example, though government cannot impose special taxes exclusively on newspapers (suppression); by contrast, it can generally provide tax exemptions to subsidize newspapers (promotion).[71] Also, without strict or intermediate scrutiny, it can subsidize some nonprofit

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68. *See, e.g.*, Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Ark. Educ. TV Comm'n v. Forbes, 523 U.S. 666 (1998); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995).

69. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); *see also* Burson v. Freeman, 504 U.S. 191, 214 (1992) (Scalia, J., concurring) ("Instead, I believe that [the challenged law], though content-based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum.").

70. *See, e.g.*, Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217 (2002) (trying to make sense of subsidized speech doctrine); Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Martin H. Redish & Daryl L. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996).

71. Leathers v. Medlock, 499 U.S. 439 (1991) (in dicta, noting that newspapers were excepted from a general sales tax); *cf.* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (upholding exception to campaign finance laws for media companies' speech).

speech while not subsidizing for-profit or lobbying speech;[72] it can fund some art and not other art;[73] it can fund some educational institutions and not others.[74]

Third, copyright law enables the government to promote content supporting what Neil Netanel has called a "democratic civil society."[75] Government provides property-like benefits to foster "original" content, thereby promoting diverse content.[76] It also provides content-based benefits through fair use, which permits a defense against copyright infringement specifically for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. . . ."[77] Copyright law also provides several content-based exemptions for schools and libraries,[78] as well as compulsory licenses, such as one for noncommercial broadcasting.[79]

Fourth, with the most minimal scrutiny, government can impose speech-based exceptions to general laws in order to promote *certain* content.[80] For example, bans against importing materials from enemy countries may constitutionally exempt certain publications in order to promote access to that content.[81] Laws banning commercial sales can exempt newspapers without exempting all other content.[82] Courts have generally not subjected these laws to strict or intermediate scrutiny unless the exceptions appeared targeted at viewpoints.[83]

Similarly, government can promote commercial speech, subject to far less scrutiny than when restricting such speech. Burdens on commercial

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72. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983); Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n, 358 F.3d 1228 (10th Cir. 2004).

73. *See* Nat'l Endowment for Arts v. Finley, 524 U.S. 569 (1998).

74. *See* Fee, *supra* note 10, at 1138-39, and sources cited therein (discussing public schools); *cf.* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

75. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

76. *See, e.g.*, *id.*; *see also* Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J. L. & TECH. 289 (2003).

77. 17 U.S.C. § 107 (2000). *See also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 544 (2004).

78. §§ 108, 110.

79. § 118. For additional exceptions, see Tushnet, *supra* note 77, at 553; *see also* Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004) (discussing commercial exceptions).

80. *See, e.g.*, Note, *Speech Exceptions*, 118 HARV. L. REV. 1709, 1729-30 (2005).

81. *See* Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991) (addressing posters).

82. *See* Weinberg v. City of Chicago, 310 F.3d 1029, 1035-36 (7th Cir. 2002) (rejecting the contention that the law's exception for newspapers made it content-based or invalid).

83. *See, e.g.*, *id.* at 1036; *cf. Walsh*, 927 F.2d at 1238-39 (Williams, J., concurring).

speech must meet an intermediate—but increasingly demanding[84]—scrutiny set forth in *Central Hudson v. Public Service Commission of New York*.[85] But the Supreme Court has been explicit that this test is usually met easily when government is promoting, not suppressing, commercial speech, such as by compelling commercial disclosures.[86]

2. Broadcast Media Regulation: Making Sense of Radio, Television, and Satellite Doctrine

For decades, scholars have debated the logic of the free speech doctrine applied to broadcast media, arguing that the doctrine made no sense.[87] But the best framework for understanding that doctrine is to distinguish between laws promoting democratic content and those suppressing content. For example, the usual explanations for broadcast doctrine ("scarcity" of spectrum licenses and "pervasiveness" of broadcasting) merely suggest why broadcasting could get minimal scrutiny. But neither one can explain why *any* broadcast law gets struck down, though broadcast laws do get struck down.

Content promotion is a better framework. Broadcast regulation generally permits government to promote certain favored, democratic content with little scrutiny, while applying far more stringent scrutiny to attempts to suppress disfavored speech or to engage in viewpoint discrimination. For example, *Red Lion Broadcasting Co. v. FCC*[88] involved two affirmative requirements: an individual right of reply and a requirement that broadcasters provide news in a balanced way. The Court concluded both were content-promoting,[89] and used the language of

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84. *See* Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836 (2005).

85. 447 U.S. 557 (1980).

86. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("[A]ppellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [W]e have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . ."). Recent cases involving advertising funds seem to take compelled commercial-speech claims seriously, but their impact is limited, as the last case in the line made clear that compelling contributions to the funds is constitutional. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); *see also* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 558 (2006) (arguing that compelled subsidies for commercial speech had been deemed unproblematic in every Supreme Court case other than *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), which struck down an advertising fund).

87. *See, e.g.*, Ammori, *Curriculum*, *supra* note 27.

88. 395 U.S. 367 (1969).

89. *Id.* at 393 (characterizing the fairness doctrine as speech-promoting, stating, "[a]nd if experience with the administration of those doctrines indicates that they have the net

minimal—not intermediate—scrutiny to uphold the requirements.[90] In a 1978 case, *FCC v. National Citizens Committee for Broadcasting* (*NCCB*),[91] again with minimal scrutiny, the Court upheld a limit on newspapers owning broadcast stations, concluding that the limit was a reasonable means to *promote* diverse content through diverse ownership.[92] With minimal scrutiny, television and radio broadcasters have been subject to many other national and local, vertical and horizontal ownership limits meant to promote diverse and local political content.[93] In 1981, in *CBS v. FCC*,[94] the Court upheld the requirement that broadcasters grant access to candidates for federal elective office because the rule promoted "the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[95] In 1996, applying *Red Lion*, the D.C. Circuit upheld the requirement that satellite TV companies carry noncommercial educational broadcasters, as "a reasonable means of promoting the public interest in diversified mass communications."[96] That same year, TV broadcasters did not even challenge rules that effectively required them to air children's educational programming, perhaps because minimal scrutiny would have applied to such content-based promotion.[97]

By contrast, the Court applied a higher standard where the *suppression* of political speech was involved. In *FCC v. League of Women Voters*,[98] scarcity or no scarcity, the Court invalidated a government ban on editorializing by government-funded public stations, even using the language of intermediate—not minimal—scrutiny to strike down the ban.[99]

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effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications").

90. *Id.* at 379 (merely requiring the FCC to act reasonably); *see also* Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 637 (citing *Red Lion* as an example of less rigorous, not intermediate, scrutiny).

91. 436 U.S. 775 (1978).

92. *Id.* at 797.

93. *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (including the history of national and local horizontal rules); Schurz Comm., Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992) (discussing the history of certain vertical rules).

94. 453 U.S. 367 (1981).

95. *Id.* at 370.

96. Time Warner Entm't Co. v. FCC, 93 F.3d 957, 977 (D.C. Cir. 1996) (quoting FCC v. Nat'l Citizens Comm. for Brdcst., 436 U.S. 775, 802 (1978)).

97. *See* The Children's Television Act of 1990, 47 U.S.C. §§ 303a-303b; Children's Television Programming, *Report and Order*, 11 F.C.C.R. 10660 (1996); *cf.* Time Warner Entm't Co. v. FCC, 93 F.3d 957 (1996) (applying *Red Lion*).

98. 468 U.S. 364 (1984).

99. *Id.* at 380 (stating the test as whether the law is "narrowly tailored to further a substantial governmental interest") (relying on, wrongly it seems, *Red Lion*, among others).

It characterized the ban, repeatedly, as "suppressing" particular "content."[100]

Similarly, different rationales generally apply to content-based promotion and content-based suppression. In *FCC v. Pacifica Foundation*,[101] a case involving the suppression of indecency on radio, the Supreme Court specifically refused to apply the scarcity rationale[102] because "scarcity has justified *increasing* the diversity of speakers and speech, [but] it has never been held to justify censorship."[103] Unlike *Red Lion* and *NCCB*, which were unanimous and sweeping, *Pacifica* was a five to four decision characterized by the majority as emphatically narrow.[104] More recent circuit court cases involving the suppression of broadcast indecency, based on *Pacifica*'s narrow holding, have explicitly applied strict scrutiny.[105]

Like suppressing content in *League of Women Voters* and *Pacifica*, when government enacts a broadcast law to suppress a viewpoint, the law receives heightened scrutiny. For example, although *NCCB* applied minimal scrutiny to uphold the ban on owning a newspaper and broadcast station in the same area,[106] the D.C. Circuit later applied an intentionally unspecified heightened scrutiny to a law directly aimed at two specific cross-ownerships controlled by Rupert Murdoch, the conservative Australian media mogul. The law's operation and enactment appeared motivated by animus toward Murdoch's viewpoint.[107]

Finally, laws *restricting* commercial speech receive more scrutiny than laws *promoting* democratic content. Generally, the standard applied to commercial speech is thought to be lower than that applied to political speech. But *Red Lion* and *NCCB* involved political speech and applied minimal scrutiny, while commercial speech—even in broadcast regulation—has received a higher, intermediate standard.[108] Applying more

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100. *See, e.g.*, *id.* at 383, 386 n.16, 390, 391, 393, 397.

101. 438 U.S. 726 (1978).

102. *Id.* at 770 n.4 (Brennan, J., dissenting) ("[The majority and concurring opinions] rightly refrain from relying on the notion of 'spectrum scarcity' to support their result."). *Compare id.* at 748-51 (not relying on scarcity) *with id.* at 731 n.2 (noting that the FCC's decision had relied partly on scarcity).

103. *Id.* at 770 n.4 (Brennan, J., dissenting) (quoting Pacific Found. v. FCC, 556 F.2d 9, 29 (D.C. Cir. 1977)).

104. *Id.* at 750 ("It is appropriate, in conclusion, to emphasize the narrowness of our holding.").

105. *See, e.g.*, Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 464-65 (2nd Cir. 2007); Action for Children's TV v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995).

106. *See* FCC v. Nat'l Citizens Comm. for Brdcst., 436 U.S. 775, 797 (1978).

107. News America Publ'g Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

108. *See, e.g.*, Greater New Orleans Brdcst. Ass'n v. United States, 527 U.S. 173 (1999); United States v. Edge Brdcst. Co., 509 U.S. 418 (1993); Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986).

scrutiny to commercial speech in broadcasting than to political speech, while apparently odd, is easily explained: the commercial speech cases involve suppression while *Red Lion* and *NCCB* involve promotion.[109]

3. Other Media Regulation: Voice Telephone and the Postal-Press System

Despite prevailing thought among constitutional scholars, broadcast regulation's doctrine of permitting content promotion is the rule with media regulation, not the exception.[110] Both the wireline phone system and the print medium have both been subject to minimal scrutiny for content promotion and heightened scrutiny for content suppression.

Phone service has long been a central means of communication, even for news[111] and political advocacy,[112] but phone carriers have long been subject to a range of rules promoting democratic content, such as ownership and cross-ownership limits, some as part of consent decrees. Ownership limits include those against owning broadcast stations,[113] telegraph companies,[114] computer companies,[115] electronic publishing,[116] and owning both local and long-distance lines.[117] These rules have at times been justified in reference to ensuring the availability of diverse democratic content.[118] More importantly, phone carriers have been subject to the most

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109. *Cf.* Yoo, *supra* note 19, at 290-92 (arguing instead that the commercial speech cases reflect the demise of scarcity).

110. *See* Baker, *Turner*, *supra* note 10, at 93-111; *see also* Ammori, The First Amendment's Structure, *supra* note 50.

111. *See, e.g.*, JOHN P. ROBINSON & MARK R. LEVY, THE MAIN SOURCE: LEARNING FROM TELEVISION NEWS 1986 (concluding the Americans receive much of their news by word of mouth through discussions).

112. *See, e.g.*, American Association of University Women, How to Build a Phone Tree, http://www.aauw.org/issue_advocacy/phonetree.cfm (last visited Jan. 26, 2009).

113. *See* Ilene Knable Gotts & Alan D. Rutenberg, *Navigating the Global Information Superhighway: A Bumpy Road Lies Ahead*, 8 HARV. J.L. & TECH. 275, 280 (1995) (discussing the Dill-White Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927) (repealed 1934)); *see also* KELLOGG, THORNE, & HUBER, *supra* note 24, at 19-20.

114. There was not quite a cross-ownership ban, but AT&T—the dominant telephone company—committed in 1913 to divest Western Union, the dominant telegraph provider. *See* KELLOGG, THORNE, & HUBER, *supra* note 24, at 16-17.

115. AT&T, which was a monopoly provider, agreed in a 1956 consent decree not to engage "in any business other than the furnishing of common carrier communications services." United States v. Western Elec. Co., 1956 Trade Cas. (CCH) para. 68,246 (D.N.J. 1956); *see, e.g.*, David McGowan, *Between Logic and Experience: Error Costs and* United States v. Microsoft Corp., 20 BERKELEY TECH. L.J. 1185, 1203-04 (2005).

116. United States v. AT&T, 552 F. Supp. 131, 183-86 (D.D.C. 1982).

117. Gerald W. Brock, *Interconnection Policy and Technological Progress*, 58 FED. COMM. L.J. 445, 445-50 (2006) (discussing AT&T's 1984 consent decree and the 1996 Telecommunications Act).

118. *See, e.g.*, *United States v. AT&T*, 552 F. Supp. at 183-86 (relying on *Red Lion* and other media cases, imposing the restriction on electronic publishing because "AT&T's entry

extensive access regime, that of common carriage. This requires phone carriers to provide carriage to all individuals seeking voice access (without "editorial" discretion), which in turn promotes diverse content at the expense of phone companies' editorial control.[119]

Government has attempted to promote democratic content in the print media since before the writing of the Constitution. As Richard Kielbowicz, Ed Baker, and Paul Starr have recounted, the federal government provided enormous postal subsidies to newspapers over other print content. For decades, postal service was the central means of disseminating newspapers and other information, and these postal subsidies were essential to structuring the nation's communications system.[120] The rates benefited publications addressing public affairs, political events, or educational matters, and some specifically promoted local or national content to foster certain kinds of democratic discussion. These subsidies incidentally burdened content not eligible for these benefits, such as commercial and personal mailings.[121]

Specifically, government has promoted political content. Newspapers, which received the largest subsidies, were valued (even by the Founders[122]) primarily for their political "content."[123] The 1825 postal rules specified that "newspapers" must provide "an account of political or other occurrences,"[124] and in 1828, the postmaster general specified newspapers should include "political events."[125]

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into the electronic publishing market poses a substantial danger to First Amendment values").

119. *See* Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976); Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976).

120. *See* RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860s (1989) (discussing the history the postal-press system).

121. *See id.*; PAUL STARR, THE CREATION OF THE MEDIA; POLITICAL ORIGINS OF MODERN COMMUNICATIONS 83-152 (2004); Baker, *Turner*, *supra* note 10; *see also* Lewis Publ'g Co. v. Morgan, 229 U.S. 288 (1913).

> [W]hen 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." It also . . . specifically denied the second-class rate to "regular publications designed primarily for advertising purposes. . . ."

Baker, *Turner*, *supra* note 10, at 107-08 (quoting Post Office Act of March 3, 1879, 20 Stat. 335). Another example of newspaper regulation to promote democratic content is the application of competition and antitrust rules. Associated Press v. United States, 326 U.S. 1, 20 (1945).

122. *See* KIELBOWICZ, *supra* note 120, at 35, 121.

123. They also carried content including "information on commodity prices, history, exploration, philosophy, and agricultural practices." *See id.* at 131.

124. *See id.* at 123 (quoting U.S. POSTAL SERV., POSTAL LAWS & REGULATIONS OF THE UNITED STATES: 1825 37 (1825)) (noting they also had to be published at least weekly).

125. *See id.* at 124.

In several major postal acts from the 1790s to the 1970s, Congress granted free or cheap rates to newspapers. Several rates promoted national content and speaker localism. In order to promote national content by local speakers, the "exchange" system (codified in 1792) permitted publishers to send one copy of its newspaper to any other publisher; this huge postal burden ensured national content in all local papers.[126] Other carriage promoted local news. In various laws,[127] Congress experimented with promoting local and rural newspapers over distant papers by ensuring free or cheap carriage within a certain number of miles, within a county, or within a state.[128] Implicit subsidies for newspapers and magazines remain today.[129]

To a lesser extent, access policy promoted other speech central to an informed public. While early acts provided pamphlets and magazines with rates higher than newspaper rates,[130] Congress later lowered magazine rates,[131] but only for particular speakers.[132] To support "public discussion," for example, an 1879 law required all publications receiving a low second-class rate to publish "information of a public character, or be devoted to literature, the sciences, arts, or some special industry, and have a legitimate list of subscribers."[133] In 1917, Congress charged different rates for the advertising and editorial portion of magazines, subsidizing the editorial portion.[134]

Access policy also promoted noncommercial and educational content. Government has subsidized the mailings of nonprofit organizations since at least 1874.[135] At that time, it subsidized certain associations, suggesting benefits for content, including "educational institutions, labor unions, and benevolent, fraternal, professional, literary, historical, and scientific

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126. *See id.* at 145 (quoting Act of Feb. 20, 1792, 1 Stat. 238) (permitting a printer to send one paper to "each and every other printer of newspapers within the United States, free of postage").

127. *See id.* at 81-82 (discussing laws in the 1840s and 1850s).

128. *See id.* at 3, 31-36, 59-61, 86-92, 102; *see also* STARR, *supra* note 121, at 263.

129. *See, e.g.*, C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, n.180 (1998) (and citations therein).

130. *See* KIELBOWICZ, *supra* note 120, at 36, 122.

131. *See* STARR, *supra* note 121, at 261.

132. *See* KIELBOWICZ, *supra* note 120, at 123 (quoting U.S. POSTAL SERV., *supra* note 124, at 37).

133. *See* STARR, *supra* note 121, at 261 (quoting Post Office legislation passed in 1879).

134. *See* KIELBOWICZ, *supra* note 120, at 36.

135. *See* Richard B. Kielbowicz & Linda Lawson, *Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal*, 11 HARV. J.L. & PUB. POL'Y 347 (1988); *see also* Rachelle V. Browne, *New Eligibility Requirements For Nonprofit Mail*, A.L.I.-A.B.A LEGAL PROB. OF MUSEUM ADMIN., March 20, 1994, at n.1, *available at* C896 ALI-ABA 13 (Westlaw).

societies."[136] In 1976, Congress directed rate setting to consider certain content: "the educational, cultural, scientific, and informational value to the recipient."[137] Congress reaffirmed its favoritism to noncommercial content in 1993 by imposing tests which excluded commercial mailings.[138]

Historically, to support these rates for political, diverse, local, and noncommercial content, government set above-cost rates for commercial speech, as letters were primarily commercial.[139] For example, the 1792 Act set letter rates 25 to 115 times higher than newspaper rates.[140] In addition, based on content—not cost—government provided higher rates for advertising circulars than for magazines.[141] Government also burdened entertainment; in 1843, the Post Office denied lower newspaper rates to fiction published in newspaper format, effectively killing the genre.[142]

While minimal scrutiny has been applied to content promotion, strict scrutiny has been applied to the content-based suppression of telephony, such as indecency regulation,[143] and to newspaper actions suggesting targeted content suppression or viewpoint discrimination.[144]

B. No Precedent for Strict or Intermediate Scrutiny of Content Promotion

There is no precedent in Supreme Court case law for assuming that content-based promotion, if viewpoint-neutral, deserves strict or intermediate scrutiny.

The case that most clearly suggested heightened scrutiny for content-promoting laws was a Supreme Court decision involving cable television, often known as *Turner I.* The issue in *Turner I* was whether Congress violated the freedom of speech by requiring cable carriers, such as Comcast and Time Warner, to carry local broadcast stations, such as local NBC affiliates.[145] One key question was whether the law was content-based: was Congress favoring the content of local broadcast stations' speech?

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136. *See* Kielbowicz & Lawson, *supra* note 135, at 351 (noting "Congress in 1912 clarified the law by expressly permitting fraternal, professional and benevolent periodicals" to carry advertising yet still qualify for the subsidies).

137. *See id.* at 373 (quoting Postal Reorganization Act Amendments of 1976, Pub. L. No. 94- 421, 90 Stat. 1303, 1311 (codified at 39 U.S.C. § 3622(c)(11) (2006))).

138. *See* Browne, *supra* note 135, at 17 (and citations therein).

139. KIELBOWICZ, *supra* note 120, at 34, 83.

140. *See id.* at 34, 60.

141. STARR, *supra* note 121, at 261.

142. *See id.* at 137; *see also* KIELBOWICZ, *supra* note 120, at 133.

143. Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

144. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); *cf.* Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

145. For a description of these requirements, see Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 631 n.2, 643 n.6 (1994).

Congress clearly suggested that local broadcasters deserved carriage because of their content, noting that broadcasters provided diversity of content, local news, local public affairs, and educational programming.[146]

In *Turner I*, the majority maintained that the provisions were content-neutral, whereas the dissent maintained that they were content-based. The principal dissent was straightforward: "[p]references for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content."[147] Therefore, they are content-based and deserve strict scrutiny. Indeed, the dissent stated, this preferred content was meant to produce an "informed electorate,"[148] a "concededly praiseworthy" goal,[149] although one that the First Amendment should thwart in that case. The majority[150] also admitted that Congress seemed to value certain content—particularly what Congress itself called "local news, public affairs programming and other local broadcast services critical to an informed electorate."[151]

But all nine Justices appeared to agree that laws meant to promote particular content, *no less than* laws meant to suppress content, should be subject to strict scrutiny.[152] The majority just defined "content" narrowly to avoid holding the law to be content-based.[153]

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146. *Compare id.* at 648, *with id.* at 677, 688 (O'Connor, J., dissenting).

147. *Id.* at 677 (O'Connor, J., dissenting).

148. *Id.* at 677, 688. (O'Connor, J., dissenting).

149. *Id.* at 685 (O'Connor, J., dissenting).

150. Justice Stevens joined the majority merely to have a disposition of the case and would have preferred to uphold the law without a remand. *Id.* at 669-74 (Stevens, J., concurring).

151. *Id.* at 648 (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2 106 Stat. 1460, 1460 (codified as amended at 47 U.S.C. § 521 note)). *But see id.* at 677, 688 (O'Connor, J., dissenting) (using the quote as evidence of impermissible content-basis). Additionally, carriage for noncommercial educational stations derived from Congress's perception of the stations' role in providing "educational and informational programming to the Nation's citizens" and their role in educating the public. *Id.* at 648.

152. *Id.* at 639 (claiming cable's "physical characteristics may have [a role] in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence").

153. *Id.* at 643.

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

Id. (internal citations omitted).

In fact, the Court seemed hesitant to state or deny that *promotion* of particular subject-matter is subject to strict scrutiny. *Id.* at 644, 647. It suggested at one point that content-suppression and viewpoint-promotion were problematic, in keeping with my argument: "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its *content*.

So the majority's first mistake was appearing to concede that laws *promoting content* could be classified as content-based and subject to strict scrutiny. This mistake is why the video-on-demand hypothetical beginning this Article may be problematic.

The majority's second mistake was applying the usual test for content-neutral regulations to a law promoting content. The usual test is an intermediate scrutiny standard often referred to as the *O'Brien* test, named for the case announcing it.[154] The standard generally requires that the government not burden "substantially more *speech* than necessary" to advance the important interests.[155] Similarly, other judicial phrasings do not refer to any particular speakers, but merely refer to a burden on speech.[156]

A key factor in the Court's mistake here was the interpretation of this language to mean the *cable carrier's* speech, not "speech" alone.[157]

Laws that compel speakers to utter or distribute speech bearing a particular *message* are subject to the same rigorous scrutiny." *Id.* at 642 (internal citations omitted) (emphasis added).

Moreover, the Court ignored content-sensitive preferences that did not suggest viewpoint-preferences. *Compare id.* at 650-51 (stating noncommercial stations had no special content requirements), *with* 47 C.F.R. § 73.621(a) (noncommercial stations "will be used primarily . . . for the advancement of educational programs"); Turner Brdcst. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 223-24 (1997) (avoiding decision on content-sensitive low-power provisions); *Turner I*, 512 U.S. at 644, n.6 (same); *Turner I*, 512 U.S. at 632 (exempting station content that substantially duplicates another carried station or multiple national network affiliates).

154. United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (involving draft-card burning).

155. *Turner II*, 520 U.S. at 185, 190.

156. Government can choose any means if its interest "would be achieved less effectively absent the regulation." *See Turner I*, 512 U.S. at 662 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). This formulation does not inherently privilege certain speakers. In addition, government cannot choose a means "if there are numerous and obvious less-burdensome alternatives," but this question too does not turn on burdens to a particular speaker. *See* Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 199 (4th Cir. 1994) (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417, n.13 (1993)). Justice Breyer's *Turner II* phrasing of "proper fit" is unclear, but turns on "speech-enhancing" and "speech-restricting" alternatives, without privileging particular speakers. *Turner II*, 520 U.S. at 227 (Breyer, J., concurring).

157. The majority remanded to the lower court for "substantial evidence" of the interest and narrow tailoring. In *Turner II*, the Court upheld the regime, again splitting 5-4, finding that Congress had substantial evidence for both prongs. Justice Breyer, who had not been on the Court when *Turner I* was heard, concurred in the judgment, on somewhat different grounds. *Turner II*, 520 U.S. at 227 (Breyer, J., concurring) (not endorsing the provisions' anticompetitive rationales).

Justice Breyer's fifth-vote concurrence is generally agreed to contain *Turner II*'s central holdings. *See, e.g.*, LAURENCE H. TRIBE, WHY THE COMMISSION SHOULD NOT ADOPT A BROAD VIEW OF THE "PRIMARY VIDEO" CARRIAGE OBLIGATION (2002), *submitted with* Ex Parte Presentation of Nat'l Cable & Telecomm.s Ass'n, Carriage of Digital TV Brdcst. Signals, FCC CS Docket No. 98-120 (rel. July 9, 2002), *resubmitted with* Ex Parte

Government could burden no more of the cable carrier's speech than necessary; the judiciary does not scrutinize the burden on speech generally. While perhaps government should not burden more "speech" than necessary,[158] in media cases, government may be burdening some speech (like a cable operator's) for the benefit of other speech (like a broadcaster's or an independent programmer).[159] There is not necessarily a burden *on* speech, just a burden on some speech for the benefit of other speech. While

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Presentation of Nat'l Cable & Telecomms. Ass'n, Carriage of Digital TV Brdcst. Signals, FCC CS Docket No. 98-120 (rel. Nov. 24, 2003); *see also* CHARLES J. COOPER, MICHAEL W. KIRK, & BRIAN S. KOUKOUTCHOS, A MANDATORY MULTICAST CARRIAGE REQUIREMENT WOULD VIOLATE BOTH THE FIRST AND FIFTH AMENDMENTS (2006), *submitted to the FCC under* Ex Parte Comments of the Nat'l Cable & Telecomm. Ass'n, CS Dkt. No. 98-120 (rel. Sept. 6, 2005), *available at* http://www.ncta.com/DocumentBinary.aspx?id=128; DONALD B. VERRILLI & IAN HEATH GERSHENGORN, A CONSTITUTIONAL ANALYSIS OF THE "PRIMARY VIDEO" CARRIAGE OBLIGATION: A RESPONSE TO PROFESSOR TRIBE (2002), *submitted to the FCC under* Ex Parte Presentation of Nat'l Ass'n of Brdcst., Carriage of Digital TV Brdcst. Signals, FCC CS Docket No. 98-120 (rel. Aug. 5, 2002); HELGI C. WALKER et al., PROMOTING THE PUBLIC INTEREST BENEFITS OF BROADCASTING IN THE NEW MILLENIUM: THE FCC CAN AND SHOULD UPDATE ITS EXISTING CARRIAGE REGULATIONS TO MEET THE DEMANDS OF THE DIGITAL AGE, *submitted to the FCC under* Ex Parte Presentation, Carriage of Digital TV Brdcst. Signals, CS Docket No. 98-120 (rel. June 6, 2006).

Justice Breyer also suggested, but did not state, that government could attempt to *promote* content for an informed citizenry; indeed, he wrote, national communications policy "seeks to facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve." *Turner II*, 520 U.S. at 227 (Breyer, J., concurring). Understandably, Justice O'Connor's dissent characterized Justice Breyer's concurrence as admitting the must-carry laws were content-based. *Id.* 230-58 (O'Connor, J., dissenting). But Justice Breyer disagreed, and in fact endorsed the application of *O'Brien*, as though the must-carry provisions were accurately characterized as content-neutral. He suggested, however, that the tailoring test should turn on a "proper fit" between "potentially speech-enhancing and speech-restricting and speech-enhancing consequences." *Id.* at 227 (1997) (Breyer, J., concurring); *see also* Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280 (2005) (critiquing this formulation).

158. *See* United States v. O'Brien, 391 U.S. 367 (1968).

159. *See* Donald Verrilli & Michelle Goodman, Turner Broadcasting *and the First Amendment*, COMM. LAW., Summer 1997, at 7, 11 ("[N]ew technologies . . …. involv[e] many, often competing, speech interests, [so] the Court will move away from tiered scrutiny."); Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1074 (1992) ("The traditional approach focuses on two interests: the interest of the telephone company as a speaker and the government's interest. It fails to take into account . . . [the speech interests of] 'the telephone company's customers.'"). Speakers include those providing or seeking to provide programs, content, or Web sites, as well as viewers, listeners, and users. Certain rules will benefit some speakers at the expense of others, benefiting some speech at the expense of other speech. *Cf.* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 974-77 (D.C. Cir. 1996) (programmers have standing to bring claim against the satellite set-aside); *Turner II*, 520 U.S. at 227 (Breyer, J., concurring) (discussing competing speech interests). There is no precedential or normative reason for favoring the wireline carrier's speech over other speech. Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 647 (1994).

there may be potential dangers with such regulation, the risks are not addressed by requiring narrow tailoring versus the *wireline carrier's* speech.[160]

Over the last decade, *Turner I* and its mistakes have had a profound impact on the regulation of major media.[161] It is considered the default media test and most media regulations are generally concerned with content.[162] Ownership limits and access rules aim not only to decentralize the media system but also to promote democratic content—to promote more diverse sources, on the assumption (endorsed by the Supreme Court) that diverse sources provide viewpoint-diverse content.[163] Some observers, including Justices, suggest ownership limits and access rules are content-based for this reason.[164] Numerous access laws also favor particular kinds of content, such as educational, local, or political content.[165]

Turner I's dicta had no basis in precedent. *Turner I* cited the usual definition of a content-based law, which turns on whether or not the law *suppresses*, burdens, or restricts speech based on its content.[166] In *Turner I*,

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160. Cases with speech interests on both sides resemble many non-speech cases involving balancing of competing, equally compelling, interests. *See* Miller v. Schoene, 276 U.S. 272 (1928); STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39-56 (2005).

161. Historically, the debate over the constitutionality of ownership and access rules has been framed in terms other than content-analysis, as the debate even predates content-analysis. The Supreme Court did not announce content-analysis until its 1972 decision in *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972); *see also* McDonald, *supra* note 10, at 1359-60, 1364. This was years after *Red Lion* and Jerome Barron's classic article. *See* Jerome A. Barron, *Access to the Press–A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). The analysis did not become the dominant paradigm until the late 1980s to early 1990s. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); Boos v. Barry, 485 U.S. 312 (1988). Content-neutral tests are often traced to *United States v. O'Brien*, 391 U.S. 367 (1968), as well as to a 1975 article by John Hart Ely about flag desecration. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

162. Media rules are also concerned with economic competition, but regulating economic competition is generally subject to minimal scrutiny, and is somewhat tangential to the reason why media regulation receives First Amendment scrutiny.

163. *See* FCC v. Nat'l Citizens Comm. for Brdcst., 436 U.S. 775, 780 (1978) (stating "[T]he Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints . . .").

164. *See, e.g.*, *Turner I*, 512 U.S. at 678 (O'Connor, J., dissenting) ("[T]he Court is mistaken in concluding that the interest in diversity . . . is content neutral.") (citations omitted); *see also* Sinclair Brdcst. Group, Inc. v. FCC, 284 F.3d 148, 172 (D.C. Cir. 2002) (Sentelle, J., concurring and dissenting in part) ("[T]here may be merit to petitioner's argument that the 'diversity' rationale is essentially content-based. . . .").

165. *See supra* Part III.A.2. & III.A.3.

166. *See* Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002) (noting the challenged clause "prohibits speech on the basis of its content"); City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) ("Generally, the government has no power to restrict

the majority and dissent could cite, at most, nine cases even suggesting the proposition that content-based promotion deserves exacting scrutiny.[167] But eight of them are generally irrelevant to this issue because they involved viewpoint-based laws and not merely content-based laws.[168] The ninth

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speech based on content. . . ."); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (characterizing the law at issue as "indiscriminately outlawing a category of speech, based on its content"); R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (describing government's limited power to "to proscribe . . . speech on the basis of a content element"); Burson v. Freeman, 504 U.S. 191, 211 (1992) (Kennedy, J., concurring) (discussing "the Court's recent First Amendment precedents suggesting that a State may restrict speech based on its content in the pursuit of a compelling interest"); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) ("This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment."); *see also supra* note 152 and accompanying text.

167. *See Turner I*, 512 U.S. at 641-43; *id.* at 677-78 (O'Connor, J., dissenting); *see also* Baker, *Turner*, *supra* note 10, at n.88 (providing a different discussion of nine of these cases, reaching a similar conclusion).

168. In two cases, the cited language is dicta, as the cases did not involve subject-matter promotion. Ward v. Rock Against Racism, 491 U.S. 781, 792-93 (1989) (upholding law as content-neutral); *R.A.V.*, 505 U.S. at 391 (noting that the law engaged in "actual viewpoint discrimination"). Moreover, that dicta referred to the problem of promoting "message," which seems to refer to viewpoint, not content or subject matter. *See Turner I*, 512 U.S. at 642 (quoting *Ward*, 491 US at 791) (referring to speech regulation based on "[agreement or] disagreement with the message it conveys"); *see also id.* (quoting *R.A.V.*, 505 U.S. at 386 (referring to "hostility—or favoritism—towards the underlying message expressed"). In another two cases, the laws were structured in ways suggesting not content-promotion but targeted content- or viewpoint-suppression. *Turner I*, 512 U.S. at 676-78 (O'Connor, J., dissenting) (citing Ark. Writers' Project v. Ragland, 481 U.S. 221, 231-32 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)). *Turner I* notes that "both [taxes schemes] were structured in a manner that raised suspicions that their objective was, in fact, the suppression [not promotion] of certain ideas." *Id.* at 660; *see also* Rust v. Sullivan, 500 U.S. 173, 194 (1991) (noting *Arkansas Writers' Project* singled out "a disfavored group," not a favored group, "on the basis of speech content"). The dissent in *Turner I* also cited *Leathers v. Medlock*, 499 U.S. 439, 447 (1991), which *upheld* the challenged law that seemed to promote newspaper content, while not promoting cable content, which supports my argument that government can promote news content.

Another three cited cases pertained to exemptions to general anti-picketing statutes for labor disputes. Carey v. Brown, 447 U.S. 455, 466-68 (1980); *but see id.* at 473-74 (Rehnquist, J., dissenting) (disputing the majority's factual characterization); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972); Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring). The Justices deciding these cases naturally regarded these laws as promoting a viewpoint or message—picketers tend to take one viewpoint (labor's) of a dispute, not the other (shareholders'). *Cox*, 379 U.S. at 580 (Black, J., concurring) ("[I]f the streets of a town are open to some views, they must be open to all [views]."); *see also Mosley*, 408 U.S. at 95 (noting distinction for labor's "message").

An eighth case could suggest that promotion of subject-matter alone is problematic, but the primary concern seemed to be viewpoint-discrimination, as the government was

case, *Metromedia, Inc. v. City of San Diego*,[169] arguably struck down a viewpoint-neutral law promoting subject matter, but is an "exception" that proves the rule. The law at issue did not promote educational, diverse, political, or even ideological speech. The law forbid displaying specific signs in specific areas, but had more exemptions for commercial speech than for ideological speech. The Court found that promoting advertising at the expense of noncommercial speech "inverts" the Court's usual preference for "ideological" speech, suggesting perhaps a government intent or effect of suppressing ideological speech.[170] This case suggests only that promoting content *other than democratic content* at the expense of democratic content may be problematic.

As with the lack of precedent for strict scrutiny, there is no precedent for applying intermediate scrutiny to content promotion.

C. Wireline Regulation: An Unjustified Aberration

Despite the dicta in *Turner I*, to the extent that wireline regulation is actually an aberration from prevailing doctrine, this departure is wholly unjustified. One cannot distinguish wireline regulation, the aberration, from the normal areas of broadcast, telephony, limited public fora, subsidies, copyright, and speech exceptions.[171] The most accepted means of distinguishing these areas would turn on the distinction between government and *private* property. One could argue that wireline regulation involves private property, but that the other areas discussed involve either

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targeting a news magazine. In *Regan v. Time*, 468 U.S. 641, 648-49 (1984), the federal government brought criminal charges against Time Magazine under a criminal counterfeiting statute for a cover photo depicting dollar bills. Eight Justices held that an exemption to that law, for "news-worthy" publications in these circumstances, was impermissibly content-based. But the holding should not be misread; other exceptions for newsworthy content are constitutional, including copyright's fair use. *See* 17 U.S.C. § 107 (2006). The problem was that the government was attempting to read the exception for "newsworthy" as an open-ended standard to judge that a *news magazine's* cover one month is not "newsworthy." The concern may have even been more salient in *Regan*, as the statute provided criminal penalties. *See* Reno v. ACLU, 521 U.S. 844, 872 (1997).

169. 453 U.S. 490 (1981) (plurality).

170. *Id.* at 513-15 & n.18.

171. Scholars have attacked the notion that speech should not receive a different constitutional standard based on the media, and often argue that media's disparate treatment should be reconciled. *See* Laurence H. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Keynote Address at the First Conference On Computers, Freedom & Privacy (Mar. 26, 1991) (transcript available at http://www.epic.org/free_speech/tribe.html) (proposing amendment making freedom of speech "fully applicable without regard to the technological method or medium"); *see also* THE MEDIA INSTITUTE, RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed., 1997). A famous exception embraces the differing standards for addressing differing First Amendment concerns. *See* Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

government-owned property (as with broadcast regulation, limited public fora, or subsidized speech) or the act of government shaping property rights (as with fair use in copyright and speech exceptions). The First Amendment plays a different role when government property is involved.[172] But this property argument is not persuasive, so adopting an exception based on it for wireline regulation would lack basis.

First, private property is not sufficient to distinguish wireline regulation because property is not the relevant doctrinal issue, descriptively or normatively. Descriptively, under existing law, the magnitude of the property burden alone does not trigger a constitutional speech violation. Consider several examples. Common carriage and interconnection rules severely burden telephone companies' ability to use their physical property for speech, yet common carriage is generally considered far less constitutionally problematic than the far more minimal "property" burden in a newspaper right-of-reply rule.[173]

Outside of media, government can often burden property owners to favor the speech of others, such as by requiring shopping mall owners to permit speech on their owned premises.[174] Like common carriage and a shopping mall statute, general laws such as those concerning antitrust,[175] labor,[176] and child labor[177] may burden media companies' property just as much or more than media- or speech-specific laws. Yet such rules are generally *not* subject to heightened scrutiny merely because they burden speech property,[178] even for newspaper companies.[179]

Indeed, since any property can improve a speaker's ability to reach audiences, almost every law regulating any property should be subject to a First Amendment challenge if regulating speech property resulted in

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172. *See, e.g.*, Ammori, *Curriculum*, *supra* note 27, at 70-72 (and sources cited therein); Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41 (1992).

173. *Turner I*, 512 U.S. at 684 (O'Connor, J., dissenting) (stating "it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies . . .").

174. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

175. Associated Press v. United States, 326 U.S. 1 (1945).

176. Associated Press v. NLRB, 301 U.S. 103 (1937).

177. GEORGE SELDES, FREEDOM OF THE PRESS 304 (1935) (noting that the *Los Angeles Times* called child labor "what long experience has demonstrated to be, without exception, the greatest training school for city-bred boys in existence"); *id.* at 303 (noting that Franklin D. Roosevelt stated "freedom of expression . . . will be scrupulously respected—but it is not freedom to work children . . .").

178. *Turner I*, 512 U.S. at 640-41; Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1294-97 (2005).

179. Associated Press v. NLRB, 301 U.S. 103 (1937).

heightened scrutiny.[180] One could try to limit scrutiny only to media-specific laws regulating property, but this limitation would seem appropriate only to ensure that government is not suppressing a *free press*. The limitation is unrelated to property.

Conversely, property is not the key concern when government property is involved. For example, government cannot engage in content-based regulation in traditional public fora like government-owned parks.[181] So, to accept this objection, one would have to turn positive First Amendment law on its head.

Normatively, private property should not be a key free speech concern for several reasons. Without reference to free speech theory, it is unclear *whose* property rights would be supreme for First Amendment purposes. In addition to wireline carriers, viewers also have property rights—in their radios, TVs, telephones, and computers.

Moreover, to argue that property matters for broadcast, subsidy, or other regulation, one would need a larger theory of the First Amendment underlying that assumption. For example, one would not assume that government can violate the Equal Protection Clause in broadcast regulation—such as by allocating licenses (or providing a subsidy or setting aside a forum) only to white people—merely because it "owns" the airwaves; nor could government engage in cruel and unusual punishment against broadcasters in spite of the Eighth Amendment. To distinguish broadcasting (or public fora or subsidies) because government "owns" the airwaves or other property rests on a larger—but unarticulated and undefended—conception of what the First Amendment means.[182]

Second, even if property were or should be relevant, it would not distinguish wireline regulation. Like limited public fora, subsidized speech, and broadcast regulation, one could characterize wireline regulation as also involving government property. Wireline companies receive massive benefits from governments, including (historically) exclusive franchises, compulsory copyright licenses, and access to rights-of-way.[183] Indeed, government always confers massive benefits on individuals and entities,

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180. *See, e.g.*, Cass R. Sunstein, *Lochner's Legacy*, 87 COLUMBIA L. REV. 873 (1987); *see also* Ammori, *Curriculum*, *supra* note 27, at 80, n.145 (sources cited therein), Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

181. *See, e.g.*, McDonald, *supra* note 10, at 1363-65.

182. *See, e.g.*, Fee, *supra* note 10, at 1155 (making this point about the government-as-speaker doctrine). For an article on property and speech, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 UNIV. CHI. L. REV. 49 (1996); *see also* Epstein, *Politics of Distrust*, *supra* note, 172.

183. *See* Implementation of Section 621(a)(1) of the Cable Comm. Policy Act, *Report and Order and Further Notice of Proposed Rulemaking*, 7 F.C.C.R. 5101 (2007); Hawthorne & Price, *Rewriting the First Amendment*, *supra* note 51, at 516.

such as property law itself, as well as contract law, corporate law, and limited liability.[184] But these benefits are neither necessary nor sufficient to permit speech regulation in any area.

Similarly, content-promoting access rules and ownership limits shape property rights, just as do copyright law or speech exceptions. Wireline companies do not necessarily have, in their bundle of property rights, the right to exclude all access seekers or the right to buy more and more lines free of ownership limits.[185] Moreover, government usually can shape property law to promote substantive values, such as providing exceptions for easements and adverse possession to ensure economic development and efficiency. With copyright and other property, government promotes valued speech, an interest even more powerful than mere efficiency. So government similarly should be able to shape wireline property, like other property, to promote efficiency or an informed and robust democracy.[186]

There is no reason to assume that property distinguishes wireline regulation from all the other areas of First Amendment doctrine where content promotion is permitted. There is a conflict between wireline regulation and these other areas, and, based on normative values, that conflict should be resolved by aligning wireline regulation with the other areas of speech doctrine: content-based promotion of democratic content deserves minimal scrutiny.

IV. NORMATIVE ARGUMENT: LAWS PROMOTING DEMOCRATIC CONTENT SHOULD RECEIVE MINIMAL SCRUTINY FOR MERE VIEWPOINT-NEUTRALITY

Government attempts to promote democratic content should be subject to a viewpoint-neutral test, not *Turner*'s content analysis. The most widely accepted values underlying the First Amendment support this conclusion, and potential objections do not undermine it.

A. Promoting Democratic Content Furthers the First Amendment's Underlying Purposes

To determine the applicable standard of scrutiny in any doctrinal area, one must usually refer to an underlying theory of free speech because the

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184. *See, e.g.*, SUNSTEIN, *supra* note 44.

185. *See, e.g.*, Daniel A. Farber, *Access and Exclusion Rights in Electronic Media: Complex Rules for a Complex World*, 33 N. KY. L. REV. 459 (2006).

186. Because of certain *speech-based* concerns, however, including audience confusion or dignitary harm to the speaker, regulation of certain property, like private homes, may necessarily be more problematic than regulating other property, such as shopping malls or cable lines. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 96-100 (1980) (Powell, J., concurring).

bare phrase "freedom of speech" (or "of the press")[187] does not indicate *which* speech should be protected (for example, fraud versus political leaflets) or what kind of regulation would undermine that freedom.[188] Rather, "freedom of speech" generally is defined in relation to underlying theories justifying that freedom.

The leading theories involve participatory democracy or individual autonomy,[189] though scholars can define democracy or autonomy differently.[190] As these rationales are usually defined in the literature, both support content promotion. Indeed, courts and scholars often explain how content promotion furthers democracy or autonomy when courts ensure democratic content by striking down laws restricting it—rather than when Congress or the FCC legislate to promote such content.[191] Moreover, the argument against promoting democratic content based on democracy or an autonomy theory is generally less common than arguments based on practical considerations, so only a brief theoretical discussion is necessary.

The democracy rationales for free speech focus on speech's role in ensuring self-government, fostering an informed citizenry, permitting collective decision making, and safeguarding democratic decision-making processes that enable political change.[192] Its defenders include Alexander Meiklejohn,[193] Cass Sunstein,[194] Robert Bork,[195] Owen Fiss,[196] and C.

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187. For an argument that the Press Clause should have a distinct interpretation from the Speech Clause, see C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007) (and sources cited therein).

188. *See* Schauer, *supra* note 54.

189. *See, e.g.*, TRIBE, *supra* note 10, at 785-89. Other, but less widely accepted theories include promoting tolerance, LEE BOLLINGER, THE TOLERANT SOCIETY (1986); promoting good character, Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567 (1999); checking government (which can be classed with the democracy theories), Vincent Blasi, *The Checking Value in First Amendment Theory*, AM. BAR FOUND. RES. J. 521 (1977); providing nonviolent safety valves for dissent, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies"); and promoting truth, Weinberg, *supra* note 48, at 1113-64 (critiquing this marketplace of ideas theory).

190. *See, e.g.*, C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317 (1998) (discussing several conceptions of democracy); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001) (discussing conceptions of autonomy).

191. *See, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984); Kagan, *supra* note 10.

192. *See, e.g.*, POST, *supra* note 14, at 268-89 (critiquing some theories of free speech and democracy).

193. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

194. *See, e.g.*, SUNSTEIN, *supra* note 44.

195. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

Edwin Baker (when corporate or press speech, not individual speech, is involved).[197]

Supreme Court cases, especially those involving media regulation, often emphasize democracy rationales: speech that is "'indispensable to the discovery and spread of political truth,'" according to *League of Women Voters*, is the form "which the Framers of the Bill of Rights were most anxious to protect";[198] a core First Amendment goal, according to *Red Lion*, is "producing an informed public capable of conducting its own affairs."[199]

Educational, political, and viewpoint-diverse content can naturally promote democracy. If citizens have more access to viewpoint-diverse local and national political information, as well as educational content, they can make better decisions regarding political options and better hold elected officials to account for incompetence or corruption.[200] Courts and scholars have long accepted the common sense assumptions that diverse viewpoints support robust political debate;[201] that political speech supports democratic decision making;[202] that local political speech fosters better decision making about local political matters;[203] and that educational speech supports citizen education.[204] They also have rejected the notion that all content deserves equal treatment. The First Amendment, in some areas, specifically favors democratic content—for example, by providing

196. *See, e.g.*, OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996).

197. *See, e.g.*, EDWIN C. BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994); Baker, *Media Citizens Need*, *supra* note 190. Ed Baker limits this democratic analysis to the Press Clause, applying autonomy analysis for the Speech Clause. *See* Baker, *Press Clause*, *supra* note 187.

198. FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984) (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

199. Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 392 (1969).

200. *See infra* notes 201-204 and accompanying text.

201. *See, e.g.*, Metro Brdcst., Inc. v. FCC, 497 U.S. 547, 571 n.16 (1990); FCC v. Nat'l Citizens Comm. for Brdcst., 436 U.S. 775, 797 (1978)) ("'[I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination'"); Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2003); Benkler, *Autonomy*, *supra* note 190. For an argument against promoting viewpoint diversity through "government action," see Yoo, *Architectural Censorship*, *supra* note 45.

202. *See, e.g.*, *League of Women Voters*, 468 U.S. at 381-82.

203. *See, e.g.*, 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, paras. 73-79 (discussing the FCC's historical concern with localism).

204. *See, e.g.*, Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 648 (1994) (noting Congress's conclusion that "educational and informational programming" has a role in educating the "Nation's citizens").

special protection to speech on "matters of public concern" for libelous speech and the speech of public employees.[205]

While perhaps one does not need a highly sophisticated theory of democracy to make this argument,[206] we can use make use of four classes of democracy theories, as categorized by C. Edwin Baker.[207] The first group of theories, "elite democracy," assumes that expert technocrats should make political decisions.[208] Even those elites, however, use wireline media. They would probably make considerable use of the electoral speech in the video-on-demand hypothetical, and they would likely get their news online, due partly to network neutrality.[209] The three other groups of theories assume government must rest on broader participation, not elite competence, but differ on *how* individuals and groups should or do participate—by promoting individual interests, aggregating interests to seek a "common" good, or by doing both.[210] Under any of these theories, however, society benefits from increased and more diverse discussion about political affairs—to recognize individual and group interests, to mobilize with others with similar interests, to understand the interests and views held in common of others, and to formulate policy for common social interests.[211] Individuals would benefit from more diverse political content under any of the assumptions of how they should interact with one another, though some groups could benefit more or less based on actual flows of information. In short, the democratic rationales support content-based promotion of democratic content.

Beyond democracy rationales, autonomy also supports the constitutionality of promoting democratic content. As Thomas Emerson, Yochai Benkler, and C. Edwin Baker (regarding individual speech) have most fully argued, freedom of speech ensures that individuals can exercise and develop their autonomy.[212] Autonomy is a somewhat "nebulous

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205. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Connick v. Myers, 461 U.S. 138 (1983).

206. *See* POST, *supra* note 14, at 273 (claiming several theories would lead to similar conclusions regarding the benefits of public discourse).

207. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002); Netanel, *supra* note 45; Magarian, *supra* note 47.

208. BAKER, MARKETS, *supra* note 207, at 129-34.

209. *E.g.*, Project for Excellence in Journalism, State of the News Media 2006: Audience, http://www.stateofthemedia.com/2006/narrative_online_audience.asp?cat=3&media=4 (last visited Jan. 29, 2009) ("College graduates are clearly the group over all with the most regular online news consumption.").

210. BAKER, MARKETS, *supra* note 207, at 135-37.

211. *Id.* at 135-53.

212. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); For Emerson's argument, see First Nat'l Bank v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting) (citing THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966)) (discussing "what some have considered to be the principal function of the First

concept" referring to individuals' freedom—either their freedom to express themselves (or act) however they wish, to develop their faculties and humanity as they choose, and to align their actions with their preferences, and in turn, their preferences with their inner "self."[213]

Access and ownership rules promote access to such content, so the rules further the autonomy interests of the millions of listeners, viewers, and users of media. As perhaps the leading autonomy theorist C. Edwin Baker has argued, individuals bear legitimate claims to autonomy, while artificial entities structured by law—including media corporations—should not be seen as bearers of autonomy.[214] Government structures the media environment and media corporations, adopting corporate and media law to promote social goals. Because government must balance competing social goals in shaping entities, government can shape the entities to further collective goals—including democracy and *individual* autonomy—without respect for the contingent, non-pre-existing "autonomy" of the entity it is in the process of shaping.[215] Individuals, including listeners, viewers, and users, can best exercise their autonomy when they have access to a range of divergent views about how they should lead their lives.[216] Indeed, under existing law, government can regulate the autonomy of corporations in many ways—including securities disclosures—and has long "regulated" media companies' speech in ways that it could not regulate individuals' speech.[217]

Even if one wrongly ascribes autonomy to corporations and media entities,[218] one cannot conclude that ownership or access rules are necessarily problematic. Courts would still have to balance the autonomy interests of corporations as speakers against those of the millions of

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Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment"); for Benkler's argument, see Benkler, *Autonomy*, *supra* note 190.

213. *See, e.g.*, Benkler, *Autonomy*, *supra* note 190, at 26, 32, 34-35. Some scholars, such as Robert Post, link the democracy and autonomy rationales because of the individual autonomy's importance to self-government. *See, e.g.*, POST, *supra* note 14, at 268-89; TRIBE, *supra* note 10, at 787. Others argue that the democracy and autonomy rationales often support the same outcome in particular cases, including media regulation cases. *See, e.g.*, Baker, *Press Clause*, *supra* note 187 (discussing areas where the theories would lead to different results); *Bellotti*, 435 U.S. at 777 n.12 ("The individual's interest in self-expression . . . [and] the concern for open and informed discussion . . . often converge."). C. Edwin Baker further argues that individual rights are grounded in autonomy and press rights in democracy. *See* Baker, *Press Clause*, *supra* note 187.

214. *See* Baker, *Turner*, *supra* note 10**,** at 62-82.

215. *See id.*; Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* (Brennan Ctr. for Justice, White Paper for the First Amendment Program Mar. 2001), *available at* http://www.benkler.org/WhitePaper.pdf.

216. *See* Benkler, *Autonomy*, *supra* note, 190.

217. *See supra* Part III.A.

218. *See, e.g.*, Magarian, *supra* note 47 (cataloguing and critiquing the authors making this assumption).

individuals as listeners. But there is no persuasive reason in speech theory for favoring the interests of those very few (profit-seeking, government-structured, and artificial) speakers over the First Amendment interests of individuals.[219] There are two common, unpersuasive arguments. The first rests on property rights, which can be rejected for reasons similar to those discussed above: that property is not the relevant normative principle and if it were, it would be nonetheless indeterminate.[220] The second rests on extreme distrust of government, which can be rejected for reasons explained in the next section.

B. The Political Branches Should Have a Role in Promoting Democratic Content

Most people tend to agree that democratic content furthers the First Amendment's underlying goals, but those who object to government promoting democratic content tend to do so based on notions about the proper role of government in society and practical considerations about government incentives.[221] They argue that government should have no role in valuing content,[222] that valuing content would improperly skew the speech market,[223] and that even content promotion likely reflects the censorial incentives of government.[224] These objections are misplaced.[225]

First, government does and should have a role in "valuing" particular content. Its role is not necessarily to remain neutral. Government often values speech "content" by suppressing some content with minimal judicial

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219. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (noting the First Amendment "necessarily protects the right to receive" speech) (internal quotations omitted); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (upholding rights of citizens to receive mail where the First Amendment did not apply to speakers, who were abroad); Red Lion Brdcst. Co. v. FCC, 395 U.S. 367, 390 (1960) (holding that the speech rights of viewers and listeners are "paramount" over the broadcast speakers). Even if one looks within the entities to their employees' autonomy, these can often conflict, as among editors, publishers, and owners. It is unclear whose autonomy courts should protect.

220. *See supra* Part II.C.

221. Many have critiqued content analysis in general, for example as descriptively inaccurate, see for example, Baker, *Turner*, *supra* note 10; Fee, *supra* note 10; *cf.* Schauer, *supra* note 54; as impractical because of the difficulty in determining whether a law is content-based, see Redish, *supra* note 10; and as providing too little protection for speech incidentally burdened by content-neutral laws, see for example, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 313-14 (1984) (Marshall, J., dissenting); Alexander, *supra* note 10.

222. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (U.S. 1991); Alexander, *supra* note 10, at 932-45.

223. Stone, *Content Regulation*, *supra* note 10, at 198; *but see* Baker, *Turner*, *supra* note 10, at 84-88 (critiquing this argument).

224. *But see* Fee, *supra* note 10, at 1152-56 (critiquing this position).

225. *See* Ammori, *Curriculum*, *supra* note 27, at 70-72 (discussing government distrust theories).

scrutiny, such as suppressing sexual harassment, fraud, criminal conspiracy, deceptive advertising, defamation made with actual malice, or collusive agreements.[226] Government also values content when it funds public schools, libraries, advertising campaigns, or subsidized or government speech. This includes providing the public with agency records under the Freedom of Information Act or publishing laws and regulations.[227] More broadly, the Constitution need not require government neutrality; in many ways, the Constitution is substantive, as illustrated by favoring democracy over monarchy and freedom over slavery.[228] Moreover, with content promotion, government likely furthers *citizens*' roles in valuing speech central to the First Amendment by increasing the amount and diversity of democratic content for the citizens—not the government—to face, grapple with, and value.

Second, despite any "anti-skewing" arguments, government *should* distort or skew the speech environment toward more democratic content. As detailed in the previous paragraph, government already skews content with laws ranging from outlawing conspiracy to funding public education. One would need a theory for why skewing in wireline media regulation is more problematic than skewing in conspiracy and public education, and that theory cannot simply be an "anti-skewing" principle. In addition, a rule against "skewing" is incoherent because there is no pre-governmental, non-skewed, speech market.[229] Existing entitlements affect speech, such as entitlements for property, contract, copyright, and innumerable communications-specific laws. So remaining "neutral" in any particular case privileges these existing entitlements.[230] Government should be able to "skew" this already-skewed market to promote more diverse, political, educational, or local content because the existing market baselines[231] may not account for democratic content's positive externalities,[232] and may lead to less democratic content than socially optimal or desirable.[233]

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226. *See* Schauer, *supra* note 54.

227. *See, e.g.*, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005); United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003); Freedom of Information Act, 5 U.S.C. § 552 (2007).

228. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-67 (1980).

229. *See* Baker, *Turner*, *supra* note 10, at 84-85.

230. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 2-7 (1993) (critiquing what he terms "status quo neutrality," which favors the status quo by being ostensibly neutral); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

231. For the classic constitutional argument on the economics of media content see BAKER, MARKETS, *supra* note 207.

232. Farber, *supra* note 14, at 566-67.

233. *See, e.g.*, Daniel A. Farber, *Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U. L. REV. 789 (2000); R. Randall Rainey,

Third, despite extreme government distrust, content-promoting laws do not necessarily reflect a censorial purpose. Attempts to *promote* democratic content are less likely to reflect impermissible purposes—such as incumbency-protection, intolerance, or paternalism—than those suppressing content. Like content-neutral laws, content-promoting laws do not single out disfavored content, and thus are a clumsy means to targeting any disfavored content. Like a time, place, or manner restriction, the must-carry regime in *Turner* would be ineffective at targeting *disfavored* content; the same is true of the video-on-demand hypothetical, a librarian's decision to buy certain books, or most media ownership limits.[234]

Fourth, scholars suggest that the political branches simply cannot be trusted in any, even "benign," speech regulation.[235] But an adequate consideration of comparative institutional competencies and incentives demonstrates that extreme government distrust is misguided for content-based promotion of democratic speech. The history of public television, public schools, limited public fora, and subsidized speech suggests that democratic content promotion is not invariably or usually a cover for censorship.

Beyond ignoring the history of these areas, this government distrust argument rests on faulty assumptions about the relative institutional incentives and competencies of government concerning content promotion. The ambiguous phrase "freedom of speech" is defined not only with reference to underlying theories but also to institutional competencies and incentives (as this objection of "never trust government [except the judiciary]" suggests). Institutional choice is central to the First Amendment, the defining feature of which is the constitutionalizing of free speech and thereby entrusting to the judiciary the policing of other

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S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L. J. 269 (1993).

234. It does not matter if democratic promotion protects some incumbents for the same reason why it does not matter if additional information benefits most competent agents. *See, e.g.*, Kermit Roosevelt, Note, *The Costs of Agencies:* Waters v. Churchill *and the First Amendment in the Administrative State*, 106 YALE L.J. 1233 (1997). To the extent that additional information reduces those agency costs and permits the public to support agents, even incumbent agents, who are competent and responsive to public interests, the First Amendment generally favors, not disfavors, that result. *Cf.* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995).

235. As Redish and Kaludis noted,

> [S]cholarly equanimity in the face of government's insertion of its regulatory power into the marketplace of private expression is grossly inconsistent with the venerable tradition of healthy skepticism of the governmental regulation of expression. It is also inconsistent with much of the actual history of such regulation, which has more than justified such skepticism.

Redish & Kaludis, *supra* note 47, at 1086-87 (internal citations omitted).

governmental institutions. While one could contest the usual assumptions made about society's regulatory institutions,[236] even under those assumptions it is acceptable to permit the political branches to promote viewpoint-neutral democratic content. The political branches are institutionally imperfect, but *all* regulatory institutions are imperfect, including norms, markets, legislatures, agencies, and courts.[237] One must compare the institutions' relative imperfections to determine how best to promote freedom of speech and its underlying values, as this objection attempts, but fails, to do.

In First Amendment thinking, in distrusting government relative to the judiciary, scholars apparently assume relative incentives and competencies based on unrealistic assumptions about a "textbook" free speech problem.[238] In this problem, soapbox speakers and pamphleteers exchange views in an American location akin to Hyde Park's Speaker's Corner, a public park location where speakers of all stripes debate and lecture. The government then arrests and charges a dissenter because it disagrees with the dissenter's views. Norms and the market seem to be working fine; everyone at the park could stand on inexpensive soapboxes and chat with anyone else. But the political branches seem dysfunctional. Government officials have incentives to silence dissenting speech. The officials' relative competencies, such as fact-finding and balancing of competing social goals, are unnecessary since the facts and goals are simple and straightforward. Government officials have speech-restrictive incentives, and the lone dissenter cannot effectively convince government because he has no army of lobbyists, no budget for campaign contributions, and (because he is silenced and in jail) no ability to organize other citizens to help. Meanwhile, the judge (one assumes, not a jury[239]) is seen as

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236. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 190 (1987) (noting one could argue that "arguments made about one institution can be made reasonably well for the other"). Shifting assumptions, of course, one could argue that the judiciary has speech-restrictive incentives as well.

237. *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); MARK TUSHNET, TAKING THE CONSTITUTIONAL AWAY FROM THE COURTS (1999); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998); Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

238. *See* Ammori, *Curriculum*, *supra* note 27, at 92-121 (discussing scholars' focus on street corner speech over mediated speech); Kathleen M. Sullivan, *Discrimination, Distribution, and Free Speech*, 37 ARIZ. L. REV. 439, 439-40 (1995) (claiming recent "leading First Amendment litigants" include a Ku Klux Klan member, the American Nazi party's head, and a young cross-burning skinhead).

239. Juries are often assumed to reflect local prejudice against the dissenter. *See, e.g.*, Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 527 (1970) ("[T]he jury cannot be expected to be sufficiently sensitive to the first amendment interests involved in any given proceeding."); *cf.* Marvin Ammori, *Public Opinion and Freedom of Speech* 14 (John S. and James L. Knight Foundation, White Paper, July 14, 2006), *available*

insulated from politics, brave, wise, and heroic. The judge should not defer to government.

In wireline regulation, it is not so clear that the political branches are untrustworthy and the judge is a hero. Unlike in a Speaker's Corner, private speech regulation of wireline industries, such as norms and markets, may *not* ensure the robust debate and diverse content of a Speaker's Corner.[240] Actual experience suggests that "private regulation" has led to little political or educational programming and considerable fluff and violence on wireline television.[241] Norms often do little to ensure robust media debate and can even enforce silence.[242] Markets are also imperfect. Unlike a Speaker's Corner, economic failures pervade media markets. Advertising, public good qualities, externalities, and concentrated ownership may reduce outlets' responsiveness to public demands and weaken their roles as watchdogs.[243] In addition, the wireline industries subject to *Turner* (local cable and phone markets) are extremely concentrated—often monopolies or duopolies[244]—and thus deviate from the classical market model.[245] Imposing constitutional barriers to ownership and access rules, as the *Turner* standard does, *enshrines* the markets' imperfections because ownership limits and access rules could increase the competition in these markets.[246] So, with *Turner*'s scrutiny, there would be even less reason to trust the outcomes of wireline markets.

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at http://research.yale.edu/isp/papers/ISP_PublicOpinion_fos.pdf (disputing the assumption that the public is speech-restrictive).

240. *See* Lessig, *supra* note 237, at 664 (discussing the role of norms and markets).

241. *See, e.g.*, CONSUMER VOICE FOR COMMUNICATION CHOICE, YOUR GUIDE TO CHANNELS "A LA CARTE," Feb. 24, 2006, http://www.hearusnow.org/other/6/10/28/ (last visited Jan. 30, 2009).

242. *See* Ammori, *Public Opinion and Freedom of Speech*, *supra* note 239, at 18, 22.

243. BAKER, MARKETS, *supra* note 207; *United Church of Christ Comments*, *supra* note 21; Joseph E. Stiglitz, Information and the Change in the Paradigm in Economics, Nobel Prize Lecture, (Dec. 8, 2001) (transcript available at http://nobelprize.org/nobel_prizes/economics/laureates/2001/stiglitz-lecture.pdf).

244. *See* Joseph Farrell & Paul Klemperer, *Coordination and Lock-In: Competition with Switching Costs and Network Effects*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION (M. Armstrong & R. Porter eds., 2007) *available at* http://www.nuff.ox.ac.uk/users/klemperer/Farrell_klempererWP.pdf; TURNER, *supra* note 2, at 2-5 (detailing lack of competition in broadband market).

245. *See, e.g.*, TURNER, *supra* note 2, at 28 (noting predictable underprovision in the broadband market based on the concentrated market of phone and cable carriers for broadband provision).

246. It could also encourage the U.S. government to follow the model of other nations' governments and own media, such as municipal wireline and wireless projects, which the government, under *Turner*, can more easily regulate. So this result would be the opposite of that sought by those demanding government "stay out" of the media sector.

Unlike in a Speaker's Corner, government action in wireline media is not clearly or always likely censorial.[247] For highly technical laws, unlike, say, park regulation, legislators have considerable institutional competence to gather and weigh evidence,[248] as do executive agencies.[249] While their

247. This concern is sometimes framed as the judiciary needing to "err" on the side of "speech" by striking down all content-promoting laws out of concern for censorial motives. *See, e.g.*, Fee, *supra* note 10, at 1164-68; Kagan, *supra* note 10, at 415 ("if a court could determine governmental purpose directly, these rules, principles, and categories might all be unnecessary"); Stone, *Content-Neutral Restrictions*, *supra* note 10, at 79 ("[T]he Court should err on the side of free speech. It should allocate the risk of uncertainty to the government, not to speakers."). But, in addition to other problems, the soapbox example overlooks the social costs of wrongly striking down a potentially good law. If government is acting to promote political or diverse content, the price of striking down the law is higher than when government acts to suppress political or diverse content.

248. Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 664-68 (1994); Turner Brdcst. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997) (assuming legislators' better fact-finding capability). With media regulation alone, the Senate has a committee on Commerce, Science, and Transportation with jurisdiction over telecommunications and media issues. That committee consists of twenty-two senators. Each senator on the committee has a legislative advisor, usually an experienced lawyer, specializing partly in telecommunications issues. The committee itself has several telecommunications counsel, each with considerable industry expertise, focused exclusively on the issue. The House of Representatives has a committee, the House Committee on Energy and Commerce, with fifty-seven members, and a Subcommittee on Telecommunications and the Internet with thirty-three members. The subcommittee and its members also have staff who specialize in telecommunications issues. Beyond their committee and personal staff, congresspersons have access to reports and other information from the FCC, the expert agency regulating wireless and wireline communications, and can request information by legislation or by sending letters to the FCC Commissioners. *See, e.g.*, Deployment of Advanced Telecommunications Capability, *Notice of Inquiry*, 19 F.C.C.R. 5136 (2004). ("Congress instructed this Commission to conduct regular inquiries."); Letter from Senator Barbara Boxer to FCC Chairman Kevin Martin (Sept. 18, 2006), *reprinted in* Press Release, Boxer Concerned About Report Suppression at FCC (Sept. 18, 2006), *available at* http://boxer.senate.gov/news/releases/record.cfm?id=263223. Congresspersons' offices also have access to the Congressional Research Service, which is akin to an in-house think tank providing research reports on legislative issues.

249. The primary communications regulator, the FCC, has considerable expertise and is somewhat insulated from any particular elected official but still responsive to the political branches and industry. It is generally responsive to Congress and the majority of Commissioners, being from the President's party, often follow the administration's agenda. The FCC is also believed to be "captured" by regulated parties, who later claim in courts that their speech has been abridged, either because of limitations in agency officials' incentives or competencies. *See* Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwith Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 405 (2001) ("A recent FCC Chairman conceded that his agency had long been known as, 'Firmly Captured by Corporations.'") (quoting Reed E. Hundt, The Progressive Way, Speech at the Ctr. for Nat'l Policy (May 6, 1996)); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 52-64 (D.C. Cir. 1977) (discussing the FCC's improper secretive contacts with certain regulated parties).

incentives are not flawless,[250] some officials may have incentives to promote the availability of political, educational, and diverse content, as the officials may believe their electoral chances would benefit from increased political discussion.[251] If the official has been remarkably competent, she may want the public discussing politics. If she has been incompetent, she might still want the public discussing politics, as the public may assume—in the absence of information—that the official is *even more* incompetent than she was in actuality (or not just incompetent but also corrupt).[252] If other members of her party are more unpopular than she is, an incumbent may want the public to have enough political information to realize the differences between the party and the incumbent.[253] Or government may legitimately be correcting market failures, as it does in other areas. Or officials could feel electoral pressures "to foster appearances of 'openness.'"[254] In addition, the checks and balances of competing government institutions may foster intra-government pressures to promote political content and openness.[255] So, for content promotion, legislatures and agencies have far better fact-gathering capacity,[256] and their incentives are somewhat ambiguous, and sometimes positive.[257]

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250. *See, e.g.*, Magarian, *supra* note 47 (discussing pathologies such as campaign financing). Also, elections may not hold officials to account, as members of the House often run in gerrymandered districts where reelection is almost automatic and senators are up for election only once every six years.

251. Many theorists have explained why some incumbents would benefit from less speech. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980). House races usually receive little coverage and the districts are gerrymandered, so name recognition and incumbency can go a long way to ensuring reelection. *See* Richard S. Dunham et al., *Does Your Vote Matter?*, BUS. WK., June 14, 2006, *available at* http://www.businessweek.com/magazine/content/04_24/b3887068.htm.

252. *See, e.g.*, Farber, *supra* note 14.

253. *See, e.g.*, Press Release, Phil Singer, Democratic Victories Are A Bad Sign For Lincoln Chafee (Nov. 9, 2005) (arguing that moderate Rhode Island Senator Lincoln Chafee, up for reelection, "walks hand-in-hand" with the more conservative elements of the Republican party, particularly George W. Bush).

254. Weisberg v. U.S. Dept. of Justice, 631 F.2d 824, 830 n.37 (D.C. Cir. 1980) (discussing agencies' conflicting pressures of openness and nondisclosure). *See, e.g.*, *Obama Faces Questions On His Blind Trust*, MSNBC.COM, Mar. 8, 2007, *available at* http://www.msnbc.msn.com/id/17515394/; Michael Isikoff, *What's in Howard Dean's Secret Vermont Files?*, NEWSWEEK, Dec. 8, 2003, *available at* http://www.newsweek.com/id/60800.

255. For example, the legislature passed the Freedom of Information Act, which requires federal agencies to make certain agency records and other information public. *See, e.g.*, Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

256. Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 664-68 (1994).

257. Most judges, but not the federal Article III judges handling most First Amendment claims arising from the Communications Act, must run for election and reelection, so their incentives may be somewhat different. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). There is, however, considerable evidence that judges' decisions correlate with public opinion over

At the same time, unlike the imaginary soapbox dissenter, the judge is not the last and sole resort. Carriers have other institutional alternatives abundantly available to them, such as the political branches themselves. Wireline carriers can defend their interests before Congress, the FCC, and in the marketplace. Cable and phone carriers have an army of lobbyists and lawyers, give millions in contributions, and negotiate the laws that affect them.[258] Indeed, many of their most powerful lawyers served at the highest levels of government.[259] Moreover, unlike the textbook street corner dissenter, who confers an externality through dissent, carriers can internalize much of the benefits of their speech through profit, especially for entertainment and advertising,[260] and have considerable economic incentive to "speak" and to lobby government.[261] Unlike street corner dissenters, cable and phone carriers can fight officials with wide positive and negative coverage.[262] At the same time, the benefits to others are diffuse while the harms of regulation to media companies are large and focused, favoring their political ability to organize and lobby against more diffuse public interests.[263] So there is no reason to assume that judges are necessary to protect speech and an unfettered market, or that government can never be trusted with content promotion. In fact, judges may feel the need to put a finger on the scale of regulation in order to promote democratic content, rather than applying heightened scrutiny.

Finally, considering institutional incentives and competencies, the judiciary *need not generally require* certain ownership and access rules without any supporting congressional statute or FCC rule.[264] Even if the

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time, even on speech issues. *See* Ammori, *Public Opinion and Freedom of Speech*, *supra* note 239, at Appendix 1.

258. *See, e.g.*, Kate Ackley, *AT&T Takes Shape as Lobbying Giant*, ROLL CALL, Feb. 20, 2007, *available at* http://www.saveaccess.org/node/775; Ted Hearn, *Cable, Phone, Net Companies Have Spent $110 Million This Year To Influence Telecom Reform. Was It Worth It?*, MULTICHANNEL NEWS, Oct. 23, 2006, *available at* http://www.multichannel.com/article/CA6383576.html.

259. Digital Destiny Blog, http://www.democraticmedia.org/jcblog/?p=222 (Mar. 27, 2007, 08:56).

260. *See, e.g.*, BAKER, ADVERTISING AND A DEMOCRATIC PRESS, *supra* note 197, at 7-42, 62-70 (discussing advertisers' desire for a buying mood and the resulting preference for entertainment programming).

261. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

262. *See, e.g.*, Marvin Ammori, *A Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm*, 12 MICH. TELECOMM. & TECH. L. REV. 1, 6-7 (2005); PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2005 ANNUAL REPORT: LOCAL TV/OWNERSHIP (2005), http://www.stateofthenewsmedia.org/2005/printable_localtv_ownership.asp.

263. *See, e.g.*, KOMESAR, *supra* note 237, at 54-97; George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT SCI. 3 (1971).

264. *See* Magarian, *supra* note 47.

Supreme Court *would* require such rules,[265] the Court could instead recognize citizens' vital role in shaping communication possibilities. Media policies present questions at the heart of our democracy and there is no reason to insulate these issues from public debate and reserve the issues to judges, so long as the public can contribute.[266] The public should debate and determine whether the media system should be more or less commercial, more or less concentrated, more or less universally available, or provide more or less democratic content.[267]

In addition, citizens' media reform groups, such as Free Press and others, are not defenseless in the legislative arena.[268] Citizens' groups can draw on a solid majority of the public that opposes conglomerations of media power[269] and politicians could agree with the groups, or have incentives to respond to them, if the groups organize large numbers of otherwise inactive supporters.[270] Media policy questions have become subject to the participation of millions of Americans on the right and left.[271] Notably, the groups have even had some success, including in media

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265. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 174-81 (1973) (Brennan, J., joined by Marshall, J., dissenting).

266. My faith in citizen groups' ability before government, however, assumes the public can mobilize to respond to media issues and that they have spaces, like the Internet, to discuss these issues. *See, e.g.*, Ammori, *A Shadow Government*, *supra* note 262; *see also* Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U.L. REV. 645 (2004). It is partly for this reason that government must permit some autonomous space to individuals—whether or not government acts on the basis of content. *See infra* Part IV.E.

267. *See, e.g.*, ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935 (1993) (chronicling the debate over broadcast policy); *see also* Scott, *supra* note 266 (discussing the political battle over the FCC's broadcast ownership rules).

268. *See, e.g.*, Amy Schatz, *Nonprofit Takes On Big Media*, WALL ST. J., Mar. 7, 2007, at A8, *available at* http://online.wsj.com/article/SB117322652114528926.html (discussing media advocacy group Free Press, which has two dozen full-time employees, whose entire annual budget for 2006 was roughly $2.5 million).

269. *See* CONSUMER FEDERATION OF AMERICA, PUBLIC SUPPORT FOR MEDIA DIVERSITY AND DEMOCRACY IN THE DIGITAL AGE: A REVIEW OF RECENT SURVEY EVIDENCE (2002), http://www.consumerfed.org/pdfs/MediaSurvey10.31.02.pdf.

270. *See* KOMESAR, *supra* note 237, at 70 n.32 (referring to small groups that could act as catalysts and whose interests overlap with the general public's interest).

271. The 2002 review of broadcast ownership rules inspired several million Americans to file comments with the FCC opposing further broadcast concentration. *See, e.g.*, Scott, *supra* note 266. In 2006, over a million citizens signed petitions supporting network neutrality rules, and congresspersons and candidates had to respond to public pressure and proclaim their public support of network neutrality. Press Release, Craig Aaron, Free Press, Outpouring of Support for Net Neutrality Sweeps the Country, (Aug. 31 2006), *at* http://www.savetheInternet.com/=press13 (describing a 25-city campaign over several days that prompted four senators to announce their support for network neutrality). If the judiciary were the forum for such debate, the incentives and methods of citizens to participate in the debate would be different, as the judiciary would likely be less responsive to citizen participation. *See, e.g.*, ELY, *supra* note 251.

ownership and network neutrality, both with Congress and in the FCC case against Comcast.[272] Media issues have, surprisingly to some, started to become major political issues on which even presidential candidates must take a stand.[273]

Courts need not assume the political branches are stifling wireline carriers' speech as though those carriers are defenseless soapbox speakers. Nor should courts be an additional hurdle to pro-democratic regulation. Media companies may have inordinate influence before governments and regulators,[274] as they do before the courts,[275] and citizens' groups fighting these companies face huge barriers.[276] But when citizens do succeed in promoting democratic content through the concentrated media system, the courts should not stand in the way and apply heightened scrutiny.

At the same time, district and appellate courts lack competence to shape these laws. Judges should not be invited to select among a wide range of possible rules which include defining the possible contours of network neutrality,[277] video-on-demand regulation, local public access channels, and wireless regulation such as spectrum allocation, which in turn includes auction mechanisms, merit hearings, lotteries, geographical and frequency slices, license challenges, etc. Congress and a specialized agency, the FCC, can handle these issues with some deferential judicial oversight.

So, in sum, there are no clear institutional reasons—based on the role of government, valuing, skewing, or extreme government distrust—for requiring heightened scrutiny of viewpoint-neutral content promotion. Democratic content serves the First Amendment's core values and there is no good reason to believe government cannot have a role in promoting such content.

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272. *See, e.g.*, Scott, *supra* note 266 at 645; K.C. Jones, *AT&T Merger Contains First Net Neutrality Guidelines*, TECH WEB NEWS, Jan. 2, 2007, http://www.freepress.net/news/20078; Svensson, *supra* note 7.

273. *See* Babington, *supra* note 26.

274. *See, e.g.*, Magarian, *supra* note 47; *see also* J.H. SNIDER, SPEAK SOFTLY AND CARRY A BIG STICK: HOW LOCAL TV BROADCASTERS EXERT POLITICAL POWER (2005).

275. *See, e.g.*, Marc Galanter, *Why the "Haves" Comes Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

276. *See* Hearn, *supra* note 258 (nothing the phone and cable carriers spent up to $100 million on lobbying for the 2006 Communications Act, and against network neutrality).

277. *See, e.g.*, Press Release, Fed. Trade Comm'n, Workshop to Examine Broadband Connectivity Competition Issues, Including Network Neutrality (Jan. 9, 2007), *available at* http://www.ftc.gov/opa/2007/01/broadbandwrkshp.htm.

C. Case Law Involving Newspapers Actually Supports This Framework

Critics often object that media, including wireline media, should be treated *not* like the many broadcasting media, telephony, limited public fora, subsidies, copyright, and exceptions. Rather they should be treated "like newspapers," which are often wrongly believed to be immune from government regulation.[278] This immunity is usually celebrated.[279]

But the usual assumptions about newspapers' immunity from regulation are not true.[280] Courts do not automatically invalidate laws just because they impose some burden on newspapers.[281] And *Turner* did not suggest that the classic newspaper regulation case, *Miami Herald Publishing Co. v. Tornillo*,[282] stands for the proposition that newspapers are somehow immune from regulation—just that the law in *Miami Herald* resulted in less speech and threatened viewpoint discrimination.[283] In addition, as discussed above, the government used postal subsidies to actively shape the newspaper industry.

Moreover, a viewpoint-neutral test for wireline media helps newspapers. While newspapers' conduit was the heavily-manipulated mail system, it is now increasingly wires and airwaves—as newspapers are being distributed via the Internet.[284] So, for example, network neutrality protects existing and new newspapers from being potentially blocked or degraded.[285] The legal scholars who argue by analogy to *Tornillo* for the speech rights of wireline conduits do so at the expense of twenty-first century protection for newspapers.

Indeed, a viewpoint-neutral test is acceptable for print. Content-suppressing laws are problematic. Those objecting to the right-of-reply laws generally object *not* because of content promotion, but because of the

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278. *See* Baker, *Turner*, *supra* note 10, at 58-62 (arguing that there is a different newspapers standard).

279. *See, e.g.*, Ammori, *Curriculum*, *supra* note 27.

280. *See* Baker, *Turner*, *supra* note 10, at 105-11.

281. *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945); Associated Press v. NLRB, 301 U.S. 103 (1937).

282. 418 U.S. 241 (1974).

283. Turner Brdcst. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 653-57 (1994); *see also* Baker, *Turner*, *supra* note 10, at 111-14.

284. Julia Angwin & Joseph T. Hallinan, *Newspaper Circulation Continues Decline, Forcing Tough Decisions*, WALL ST. J., May 2, 2005, at A1 (noting decreased print circulation); NEWSPAPER ASS'N OF AM., THE SOURCE: NEWSPAPERS BY THE NUMBERS (2006), *available at* http://www.sangabe.biz/adcenter/mediakit/the_source_newspapers_by_the_numbers.pdf (noting online newspaper readership has increased by 15.8% in 2005, and online advertising revenues at public newspaper companies grew 30%-60% in 2005).

285. Interestingly, newspapers commonly owned with cable systems have supported network neutrality. *See* Digital Destiny Blog, http://www.democraticmedia.org/jcblog/?p=52 (June 13th, 2006, 08:36).

threat of viewpoint discrimination in enforcement. Moreover, some rules may be constitutional when applied to cable carriers or broadcasters, but not newspapers, because of the bigger threat of viewpoint discrimination. Newspapers, unlike most cable channels, are primarily devoted to providing local content on political affairs and historically take editorial positions, while broadcasters and cable operators do not. So, a law affecting newspapers would evidence more viewpoint concerns, regardless of the "technology" used to deliver the paper's content.[286] For many laws, it could be possible to have processes that meet the viewpoint concern.[287] This fact does not evidence a need for differing First Amendment standards or to forbid government from promoting democratic content through major wireline media.[288]

V. HARD CASES

A. Decentralized Communications Systems Should Be Favored Whatever Content They Produce

One could also object that decentralized communications systems, not democratic content, should be the favored goal. Whether or not it promotes diverse content, decentralization ensures that many speakers can contribute to debate, that diverse forms of social associations are possible, that a handful of speakers do not have the power to control public discourse, and that government cannot manipulate and control communications by capturing (or being captured by) a small group of speakers.[289] Indeed, courts have often reaffirmed the value of the nation's communications

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286. *See Turner I*, 512 U.S. at 656 (distinguishing newspapers and cable carriers based on bottleneck considerations).

287. *See, e.g.*, Monaghan, *supra* note 239.

288. Indeed, in *Turner I*, the Court suggested that technological differences matter in analyzing particular laws but that different standards should be unnecessary. *Turner I*, 512 U.S. at 639 ("This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not."). So has the D.C. Circuit. Action for Children's TV v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) ("While we apply strict scrutiny . . . regardless of the medium affected . . . our assessment . . . must necessarily take into account the unique context of the broadcast medium.").

289. *See* BENKLER, WEALTH OF NETWORKS, *supra* note 45, at 261-65; Review of the Commission's Regulations Governing Television Broadcasting, *Report & Order*, 14 F.C.C.R. 12903, para. 15 (1999) ("the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level'") (quoting Commn's Rules Relating to Multiple Ownership of Standard, FM, and TV Brdcst. Stations, *Report and Order*, 45 F.C.C. 1476, para. 3 (1964)); City of L.A. v. Preferred Comm., Inc., 13 F.3d 1327, 1330-31 (9th Cir. 1994) ("[t]he risk that a single operator will be captured by city hall (or in turn will capture regulators) is far greater than where two or more operators face off against each other" than if there is only one speaker).

system fostering the "widest possible dissemination of information from diverse and antagonistic sources. . . ."[290]

The greatest defense of a decentralized communications structure has been made by Yochai Benkler, who is widely acknowledged as the "best communications theorist of our generation."[291] Even if Benkler is right about the benefits of a decentralized environment (and I agree with Benkler),[292] the content analysis that I have proposed would hopefully support the goal of decentralization. First, it would eliminate *Turner*'s problematic scrutiny that invalidates routine ownership and access limits—both of which favor decentralization. Second, under the test proposed in this Article, government would have incentives to favor procedural structures diminishing the threat of viewpoint discrimination. One procedure would be to adopt speaker-based, not content-focused, rules that promote diverse speakers. These speaker-based laws would increase content diversity, such as with ownership limits and well-defined access rules; content-focused rules would wrongly assign market power to a few owners and then regulate this content for "balance," which threatens viewpoint-discrimination.[293] As a result, the viewpoint-neutrality test should encourage decentralization by favoring speaker diversity.

Third, under current government assumptions, one need not choose either content promotion *or* diverse sources. Courts, Congress, and the FCC have generally agreed that diverse sources lead to diverse content.[294] If government changes its mind and decides, for example, that a small number of speakers would produce more diverse speech than a large number of speakers[295] (in opposition to 200 years of communications policy[296]), the courts may have to scrutinize this conclusion very carefully based upon the underlying values of the First Amendment. As it is, the

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290. Associated Press v. United States, 326 U.S. 1, 20 (1945).

291. LESSIG, *supra* note 3, at 23.

292. *See e.g.*, Ammori, The First Amendment's Structure, *supra* note 50.

293. *See, e.g.*, FCC v. Nat'l Citizens Comm. for Brdcst., 436 U.S. 775, 801-02 (1978).

294. *See, e.g.*, 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, para. 313 (2003) [hereinafter *2002 Biennial Regulatory Review Proposed Rulemaking*]; *Nat'l Citizens Comm. for Brdcst.*, 436 U.S. at 797 (quoting Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, *Second Report and Order*, 50 F.C.C.2d 1046, para. 111 (1975)) ("it is unrealistic to expect true diversity from commonly owned station-newspaper combination").

295. Indeed, some economic models, with contested assumptions, predict this result. *See, e.g.*, *2002 Biennial Regulatory Review Proposed Rulemaking*, *supra* note 294, at paras. 313-15 (discussing but rejecting the theory put forth most famously by Peter O. Steiner in *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q. J. ECON. 194 (1952)).

296. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945); KIELBOWICZ, *supra* note 120; Ammori, The First Amendment's Structure, *supra* note 50.

content-promoting test proposed here should generally support decentralized speech power, even if that is the ultimate goal.

B. The Individual Speech "Exception"

Although courts should generally permit viewpoint-neutral content promotion, there will be difficult questions. One of these concerns whether a law actually discriminates on viewpoint,[297] but the courts already have to address this distinction. Another concerns whether a law promotes speech or suppresses speech, but this distinction is already implicit in doctrine.[298] Courts often distinguish between content-based promotion and content-based suppression. With content-based suppression, government singles out and *burdens* a particular class of content that it disfavors. With content-based promotion, government singles out and *promotes* a particular class of content, such as educational speech, even to the incidental burden of other, nonfavored content.[299] Contrast the video-on-demand hypothetical with a law suppressing cable content about elections. While the distinction between promotion and suppression may blur at the edges,[300] in most cases courts should be able to discern the difference. Promotion is no more difficult to define than other terms commonly used in First Amendment

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297. For example, by email, Daniel Farber proposed a law fostering "diversity" of viewpoints on the issue of evolution. Because certain viewpoints, involving evolution, are dominant, such a law would likely be a subterfuge to promote creationist viewpoints. This law differs from the laws I endorse in the text, which promote diversity of viewpoints in a wider subject area, such as politics, not a specific controversial subject. But this case is not very difficult. Courts can determine that laws requiring diversity on a particular, narrow, subject matter, where one view is clearly dominant, are viewpoint-based. *C.f.* Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986).

298. *See supra* Part II.

299. In a philosophical sense, some content-comparison would necessarily occur even with content-promotion—promoting content *"Xx"* technically suppresses content "not-*Xx*." But favoring *Xx* does not suggest an intent to suppress any *particular* content. For example, if a government grants a subsidy to one artist out of thousands of applicants, the grant suggests favoritism to that artist's content. But it does not suggest hostility to any or all of the other applicants' content. Or contrast a library stocking its shelves with one book, out of the millions of options, which does not suggest hostility to particular content, with removing a controversial book from its shelves, which does. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982); Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 773 (8th Cir. 1982).

300. For example, in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), to decrease litter and clutter, a city revoked permits authorizing news racks of commercial circulars. The Court found no reasonable fit between decreasing litter and eliminating such news racks while permitting newspaper news racks. It remains unclear to me why a city cannot view newspapers as more valuable and worthy of cluttering sidewalks than advertising circulars, but whether courts should view the law as "promoting" of newspapers or "suppressing" commercial speech depends on the history and facts. Compare this with *Valentine v. Chrestenson*, 316 U.S. 52 (1942). Thanks to Daniel Farber for this point.

analysis.[301] Courts always deal with difficult cases and can handle these with no more or less difficulty than other such cases.[302]

Beyond these difficult cases, there should also be, at most, a limited exception where content promotion would be problematic—for individual compelled speech, only in certain spaces. Because First Amendment scholars often focus disproportionate attention on individual speech, they wrongly assume this limited exception is the rule. But even this "exception" is relevant for very few laws. Most laws that scholars propose as problematic for individual speech would be unconstitutional under the model proposed here; these laws involve viewpoint discrimination (such as forced pledges of allegiance)[303] or content suppression (such as disclosures that would disproportionately burden unpopular speech).[304]

In some circumstances, however, the judiciary should invalidate content-promoting laws that conflict with this notion—each individual should have the minimal autonomous space necessary in a democracy to develop considered judgments, alone or in conversation with others. That

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301. Scholars often claim First Amendment terms are ambiguous. Consider the following: for a discussion of "speech," see Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); for a discussion of "commercial speech," see Jackson & Jeffries, *supra* note 180; Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990); for a discussion of "content," see Redish, *supra* note 10; and for a discussion of "viewpoint," see Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983); Heins, *supra* note 55. But such terms are necessary, of course, to effect the First Amendment's purpose.

302. *See supra* note 301, sources cited therein, and accompanying text.

303. The most famous compelled speech cases involved iteration of a state-sanctioned political viewpoint. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating a law requiring drivers to have a license plate with a particular state-approved messages—"Live Free or Die"); W. Va. State Brd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating law requiring schoolchildren to pledge allegiance to the flag).

304. The Court has addressed laws requiring charities, political parties, and individuals to disclose information, such as the names of members or speakers, "promoting" that speech. In most of these contexts, the Court has found that disclosure of names will burden political speech rather than promote it. *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 199-200 (1999); Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). This right turns on whether the law will significantly burden speech, rather than being a general right against compelled speech or against promoting content. For example, the Court has upheld requiring individuals to disclose their contributions to major political parties. *Compare* Buckley v. Valeo, 424 U.S. 1 (1976) (upholding campaign disclosure requirements), *with* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (invalidating these same compelled disclosure laws as applied to unpopular parties because disclosure would expose individuals to stigma and deter them from contributing). Similarly, in some cases, government promotes content only when other content has been uttered, using a viewpoint-based trigger. *See* Pac. Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 13, 16 (1986) (invalidating a requirement that a utility company include certain messages in its billing envelopes, appearing to promote certain viewpoints and discourage others); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); *but cf.* Red Lion Brdcst. Co. v. FCC, 395 U.S. 367 (1969).

is, there should be some space where one can be free to speak or not speak whether or not the government acts with reference to content.

To begin, this right is not absolute. Often, with little harm to democracy or the autonomy necessary in a democracy,[305] government requires citizens to "speak" or "promote content" in many ways, including requiring disclosure of campaign contributions, relevant information at trial,[306] income (for tax purposes),[307] and *ex parte* meetings with agencies.[308] Rather, the judiciary should ensure that individuals have some access to minimal space to form their thoughts and communicate with one another.[309]

It is hard to quantify how much access to such space individuals constitutionally need, but the necessary space could mirror the areas where the Court has struck down even content-*neutral* laws. Even when content-neutral, government cannot ban individuals from communicating through lawn signs or through door-to-door soliciting;[310] cannot entirely close public fora, such as streets and parks, which are traditionally open to speech of all content by all persons;[311] and cannot ban even obscene speech, which lacks constitutional protection, in one's home.[312]

This sort of limited autonomous space, exempt from even content-neutral burdens, should be free of content-promoting laws for similar reasons.[313] Imagine a rule that requires each family to discuss politics at home for an hour per day. Within one's house, one should be free to utter or not utter whatever one chooses.[314] Institutional concerns also support this notion, as government promotion would likely be pernicious and

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305. For a more skeptical discussion of the harm of compelled speech, see Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 150 (2006).

306. *See* David W. Ogden, *Is There a First Amendment "Right to Remain Silent"?: The Supreme Court's Compelled Speech Doctrine*, 40 FED. B. NEWS & J. 368, 369 (1993).

307. *Id.*

308. *See, e.g.*, 47 C.F.R. §§ 1.1200-1.1204 (FCC *ex parte* rules).

309. *See*, Fee, *supra* note 10.

310. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002); City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

311. Such spaces can be subject to reasonable time, place, and manner restrictions. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

312. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

313. *See* Fee, *supra* note 10, at 1110-13 (collecting cases). A strong case could likely be made that the Internet should be included in this minimal space. *Cf.* Reno v. ACLU, 521 U.S. 844, 870 (1997) ("any person with a phone line [and neutrality guarantees] can become a town crier with a voice that resonates farther than it could from any soapbox"); *see also* Yemini, *supra* note 8.

314. Another problem with requiring such utterances in people's homes is that, to enforce the law, government would have to invade people's reasonable expectation of privacy in violation of the Fourth Amendment. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

permit government almost total power and surveillance into private spaces.[315] So these individual speech cases do not suggest that content promotion is problematic.[316] Nor should they. They represent a limited exception necessary in a democracy for respecting individual autonomy. By contrast, the mistaken and increasingly important exception for wireline regulation serves a harmful role in our democracy, lacks basis, and should be abandoned.

VI. CONCLUSION: REPLACING CONTENT NEUTRALITY

The prevailing assumptions about content-based laws are wrong. Laws promoting democratic content pose different risks from content-based laws meant to suppress disfavored content, and the constitutional test applied to content-promoting laws should focus on the main risk: viewpoint discrimination. Wireline ownership and access rules are currently the exception to the general rule—not the best reflection of doctrine. A viewpoint-neutral test, as usually applied in First Amendment analysis, would better serve that Amendment's purposes and support the national debate about how best to structure our society's democratic discourse.

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315. *See* Fee, *supra* note 10.

316. In other areas, "compelled speech" would be a problem, but again not because "neutrality" is required. For example, compelling subsidization of political messages by compelled members would permit government to establish powerful (semi-private) institutions, even with forced membership, that has political power disproportionate to its private support. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (unconstitutional to force union members in agency shop to contribute fees for political actions), *with* Keller v. State Bar of Cal., 496 U.S. 1 (1990) (unconstitutional to force lawyers required to join the California bar to contribute fees to support the bar's political actions); Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (constitutional to require students to subsidize student activities, even if the students disagree with some of the activities). *See also* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 655 (2002). These cases reflect a concern that organizations cannot leverage state-compelled membership into political power. In turn, government cannot establish groups through compelled membership and then enable the groups disproportionately to affect political affairs unrelated to whether or not their members actually agree with the group's message. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990) (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986)) ("[T]he political advantage of corporations is unfair because 'the resources in the treasury of a business corporation are not an indication of popular support for the corporation's political ideas.'"). In addition, there is also a line of expressive association cases, including *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Compelled association involves different problems from compelled speech, which are not addressed here.