The Censorship of Television

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THE CENSORSHIP OF TELEVISION

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Democracy is a system that vests the ultimate power of governance in individual citizens. As evidenced by the rule requiring universal distribution of the franchise and our commitment to the one person-one vote principle, much of democracy's appeal flows from a postulate of the moral equality of citizens: the views of one person are assumed to be as worthy of respect as those of others.

This postulate causes many to cringe, because we know that certain people are in fact more qualified than others to exercise the power of governance. They are smarter, better informed, more aware of the world around them, and much more capable of exercising wise judgment. This fact has caused some to turn their backs on democracy altogether. Others have responded by seeking to allocate the franchise according to criteria that presumably test for knowledge and understanding. Although Americans have tried this alternative at various points in our history, we have since come to reject it, largely because it had been used to disenfranchise blacks and other minority groups. Our present strategy is more inclusive: we try to enlarge the knowledge and understanding of all citizens, not in an effort to eliminate distinctions among them, but rather to ensure that they are all capable of exercising the power of governance in a wise and intelligent way.

This, I believe, is one of the central functions of the formal education system and an important reason why we make elementary and secondary education mandatory. The purpose of such a system is not simply to endow individuals with the skills necessary to make them fully productive and sociable members of society. The system is also, and perhaps more importantly, designed to enable all of us to discharge the duties of citizenship. In this way, mandatory education gives substance to the egalitarian premises that underlie democracy.

The American formal education system, with both its public and private components, is vast and abundant. Indeed, it is one of the greatest treasures of our nation. But it is not without limits. Although some citizens pursue formal education well into their adult years, for most it comes to an end by their early twenties. By that time, it is fair to assume that the proper foundations have been laid. Yet democracy requires that the educational process continue—citizens must be able to update and re-evaluate their

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knowledge as the world around them changes, and they find themselves in new situations. A well-functioning democracy therefore depends not just upon a formal education system, but also upon an ongoing informal education system.

In the United States, this informal education system has many components—films, newspapers, books, journals of opinion, magazines, radio, political campaigns, billboards, marches, workplace conversations—but none is as important as television. The emergence of television as the paramount public medium can be attributed to a number of factors: television technology combines audio and video messages; it provides easy and rapid access to the citizenry; it is capable of instantly transmitting information from around the globe; and it pervades every domain, including the most intimate, the home.

Many of these same features can be found in the personal computer, which now and then doubles as a television set. Once linked through networks, the computer has introduced many novel communicative technologies, including electronic mail or "e-mail." This mode of communication effectively renders geographic distance meaningless and thereby greatly enhances the ability of individuals to interact with and learn from one another. E-mail has reshaped the contours of our informal education system in much the way the telephone once did. Another computer-based communication technology, the World Wide Web, has also had an enormous impact on this system, giving citizens direct and immediate access to vast sources of knowledge. Over the course of just a few years, the information stored within the major research libraries of the world has suddenly become available on the Web to every citizen who has access to a personal computer and learns to use it.

These computer-based means of communication, and the others that may emerge, will undoubtedly make citizens less dependent on television as a source of information. We must, however, be careful not to overstate their democratic value. Almost every household has a television, but less than twenty percent have access to the computer-based communication technologies. The unequal distribution of income has caused what has been called a "digital divide." The natural passivity of most citizens will also limit the role of the computer in the informal educational system. The Internet provides vastly more information than television, but does so only if citizens actively seek that information out. Television informs even the passive observer.

See NATIONAL TELECOMM. AND INFO. ADMIN., FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE (1998). Only 18.6% of American households had online access at the time of the study. The "least connected" groups in the United States were the rural poor, rural and central city minorities, young households, and female-headed households. Id. The study also found that the gap in computer ownership levels between higher-income households and lower-income households had expanded significantly in the past three years.
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Another source of television’s importance, as opposed to that of the computer, in our informal education system stems from its unique capacity to create a shared understanding. It defines the public. Computerized communication is private in the sense that citizens use computers to pursue individually what interests them and also to communicate individually with those they already know or want to know. With television, on the other hand, millions and millions of families watch the same show or the same news broadcast, often at the same time. For instance, every week more than ten million households watch the program 60 Minutes, and more than forty million households tuned in for the final episode of Seinfeld. Television is unique in its capacity to produce this type of shared experience and for that very reason can be regarded, at least today, as the paramount public medium.

Like the computer industry, the television industry is currently undergoing substantial technological changes, particularly in the methods by which programs are transmitted. In the past two decades, cable television has proliferated—more than sixty percent of all homes with television now have it, and that number is likely to grow. Cable television, as its name suggests, is transmitted into the home through a cable rather than via over-the-air broadcast signals. This method of transmission improves reception quality and increases the possible number of channels—today we have roughly eighty, and soon, we are told, we will have five hundred. For those individuals who subscribe to premium satellite transmission services, the ability to access hundreds of channels from within the home has already become a reality.

But while the proliferation of channels is of great significance to the television industry, to the individual television viewer, and of course to the governing regulatory regime, it will not lessen the importance of television as a public medium. The number of channels may proliferate almost indefinitely as a result of technological advances, but economic factors, including the costs of gathering news and producing television programs, will ensure that a relatively small number of channels will continue to dominate the spectrum. These channels will remain the principal institutions that construct the public agenda and shape public understanding.

Given television’s crucial role in our informal education system, it is essential that we protect it from threats that might impair its ability to perform this role properly. Traditionally, one of the greatest of such threats

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4 See Television Bureau of Advertising Online (visited June 23, 1999) <http://www.tvb.org/tvfacts/tvbasics/tv_basics6.html> (citing Nielsen Media Research, supra note 2), putting the number today at 67.5%.
5 See Research & Policy Analysis Dep’t, Nat’l Cable Television Ass’n, Cable Television Developments: Industry Overview §§ 1-A, 2-A (Fall 1994) (finding that the percentage of television households with cable television has grown every year in the past two decades).
has been "state censorship"—attempts by governmental actors to limit, directly or indirectly, the information and variety of opinions available to the public. The threat of state censorship is always present, and it has received a fair amount of attention from the Supreme Court, past and present. But of even greater significance in recent years has been the Court’s effort to come to terms with what I call "managerial censorship," a form of censorship in which the censor is not the state but an actor within the television industry itself. Whereas the Court’s decisions concerning state censorship have extended a well-established tradition, its engagement with managerial censorship has represented a striking new development in the law and posed challenges of a wholly different order.

I.

"Congress shall make no law . . . abridging the freedom of speech, or of the press." This is the text of the First Amendment, and though it is not clear exactly where television fits into this provision as a purely exegetical matter—Is it speech? Is it the press? Would it be either as understood by the original framers?—it is now well settled that the Constitution protects television from threats to the discharge of its democratic mission. As previously indicated, one such threat comes from what can be termed state censorship: action by state agencies or actors that seek to control television programming.

One particularly egregious example of state censorship came in the early 1970s, when President Nixon attempted to get the Federal Communications Commission ("FCC") to impose sanctions against broadcasts that criticized his administration. The sanctions he proposed included withdrawing the licenses of stations carrying such broadcasts. In this instance, the state interference stemmed from the President’s dislike for what the broadcasters had to say about him and his policies. Rarely can this type of motive be identified, and such motivation is not a necessary condition for a First Amendment violation. For example, President Nixon’s subsequent attempt to suppress the publication of the Pentagon Papers was justified on the grounds of national security, not on the basis of his dislike for the account those documents gave of our military involvement in Vietnam. Of course, the national security rationale may have been pretextual, a mere cover for a disagreement which no doubt existed. Nonetheless, the Court’s review—which would have been identical if the Papers were to have been published on CBS rather than in The New York Times—was not grounded on that assumption. The Court took the Administration’s actions at face value and assumed that the request for an injunction was predicated completely upon national security grounds. The question was whether this jus-
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tification was sufficient given the necessarily adverse effect of the injunction sought: a limitation of the public’s access to information.

In recent years, the threat of state censorship has been posed more by Congress than by the President. Congress has proceeded through the enactment of general rules—as opposed to actions aimed at specific speech, as in the *Pentagon Papers* case—and has done so in the name of decency rather than national security. A case in point is the Cable Act of 1992,8 which was aimed at patently offensive depictions of sexual activity. The statute in question did not so much prohibit certain television programs, as would a criminal statute or an injunction, but rather interfered with the public’s access to them. Specifically, the 1992 law and its implementing regulations required cable operators—companies that assemble the programs and transmit them to viewers—to place indecent programs on a separate channel, to block this channel, to unblock it within thirty days of a subscriber’s written request for access, and to reblock it within thirty days of a subscriber’s request for reblocking. These restrictions only applied to programs on “leased access channels,” which are channels that federal law requires cable operators to reserve for commercial lease by unaffiliated third parties. In addition to imposing the restrictions above, the regulations required the programmers of leased channels to alert cable operators of their intent to broadcast indecent material at least thirty days before the scheduled broadcast date.

In the *Denver Area* case,9 the Supreme Court held this scheme unconstitutional. The Court’s opinion was written by Justice Breyer, and for two reasons it strikes me as an important deepening of the First Amendment tradition against state censorship. One reason arises from the Court’s sensitivity to the speech-restrictive dimensions of the regulatory scheme. The instrument of censorship in the *Pentagon Papers* case was an injunction that would have flatly prohibited the publication of certain information. In contrast, the concern in *Denver Area* was with inconveniences, burdens, obstacles, and costs—all of which might impair the free flow of information to would-be viewers, but none of which has the bite of an injunction or of any other instrument of the civil or criminal law. Of concern to Justice Breyer was the burden on the viewer who might want a single show, as opposed to the entire channel; or the viewer who might want to choose a channel without any advance planning (the “surfer”); or the one who worries about the danger to his reputation that might result if he makes a written request to subscribe to the channel (as opposed to simply flipping on the remote).10 None of these viewers face insurmountable burdens—each of them, if determined, can get access to the desired programming by following the es-

10 See id. at 754.
tablished procedures—but it is to the Court’s credit that it nonetheless protected them against the statute’s impairments.

The Court’s sensitivity to the impairment of viewer freedom is all the more remarkable because the standard it employed was a comparative one. The Court did not hypothesize or advocate an absolute freedom, but rather acknowledged—by noting that the declared purpose of the regulation (the protection of minors) is a compelling one—that some regulation might well be appropriate. It struck down the segregate-and-block requirement of the 1992 Act not because it impaired viewer freedom, but because it was more of an impairment than many other alternatives. The Court’s concern was with the incremental impairment created by the segregate-and-block requirement as opposed to that entailed in, for instance, requiring operators to scramble and block individual programs, requiring them to code programs so that they can be blocked using V-chip technology, or requiring them to provide viewers with screening devices known as “lock-boxes.” Because the 1992 segregate-and-block requirements compared unfavorably with these alternatives, they were struck down as being “overly restrictive” (a phrase Justice Breyer used repeatedly).

The second way in which Denver Area represents an advance over the past concerns the nature of the material censored in that case: sexual material. In the Pentagon Papers case, the content of the publication to be censored was of great and obvious political importance. The Court could therefore justify its action in terms that gave full expression to the democratic theory of the First Amendment; the suppression of the Papers would have severely compromised the citizen’s right to be informed fully about matters of public concern—specifically, the conduct of the American government in the Vietnam War. In Denver Area, on the other hand, the state censorship was aimed at sexual depictions and sought to preserve certain standards of decency. There is no denying that the depiction of sexuality is an important part of cultural freedom and that political freedom is inextricably linked to culture (as Meiklejohn was fond of saying, you need to read Ulysses in order to vote). Nonetheless, the case for First Amendment protection is less clear and compelling in this context than it is when the material to be censored relates directly to public policy.

Throughout history, the Court has always tolerated some state censorship of sexual material, either as a concession to original understanding, or as a reflection of a doubt as to the importance of such material in our political life, or as an effort to accommodate strongly held popular sentiments, or perhaps in anticipation of more recently expressed feminist concerns about equality. Starting in the late 1950s, however, the Supreme Court limited the power of the state censor by creating a constitutional definition of what

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11 See id. at 755-60.
12 See, e.g., id. at 760.
could be validly proscribed: obscenity. If, and only if, the material satisfied the three criteria that the Court used to define obscenity (i.e., the material appealed to a prurient interest in sex, was patently offensive, and was without redeeming social value) could it be censored.\textsuperscript{14}

Over the past forty years, the Court has confronted many attempts to water down this constitutional definition of obscenity or, to put it differently, to enlarge the scope of the censor's jurisdiction over sexually explicit material. Thus far, the Court has by and large resisted such efforts, and the constitutional definition of obscenity has become a fixity of the First Amendment. However, the Court has on occasion created exceptions to this definition and the protections it provides. One exception, created in a case decided in the 1998 Term, allowed the National Endowment for the Arts to use indecency as a negative factor in its assessment of applications for grant money.\textsuperscript{15} This exception was justified by reference to the special rules that relate to subsidization—denying a grant is not the same as suppressing independent speech—and has only limited applicability to the regulation of television. The same cannot be said of the other exceptions. The Court has allowed the definition of obscenity to be lowered in order to protect children from sexual material,\textsuperscript{16} and it has also allowed the FCC to use a decency standard when regulating the content of radio programs.\textsuperscript{17} In creating this latter exception, the Court was greatly moved by the presence of radio in the home and the difficulty in shielding children from its broadcasts.

Perhaps encouraged by the creation of these exceptions, Congress has become persistent in its attempts to enlarge the scope of the censor's jurisdiction over sexually explicit material; it has repeatedly sought to move the law from an obscenity standard to an indecency standard (the crucial difference being the elimination in the latter of the third criterion—the requirement that the sexual depiction be without redeeming social value). The Court has generally resisted these efforts as well. For instance, in \textit{Reno v. ACLU},\textsuperscript{18} it held unconstitutional those provisions of the 1996 Telecommunications Act that prohibited indecent transmissions on the Internet, and it took a similar position in \textit{Denver Area} when it struck down the 1992 Cable Act's segregate-and-block provisions.

Although the \textit{Denver Area} Court acknowledged that the segregate-and-block provisions protected children and thereby furthered a compelling interest, it was equally mindful of the provisions' adverse impact on the pro-

\begin{footnotes}
\item[18] 521 U.S. 844 (1997).
\end{footnotes}
gramming available to adults. The Court affirmed and emphasized the principle of Butler v. Michigan: the Constitution does not permit the state to reduce the material available to adults to the level of what is appropriate for children. The Court was also careful to distinguish and thus contain FCC v. Pacifica Foundation, which had upheld a ban on indecent language on a radio show in the name of protecting children. In Pacifica, the Court had noted that radio shows come into the home without any warning or advance notice, thereby increasing the risk of exposing children to material they should not hear and undermining parental control. In Denver Area, the Court acknowledged the similarly invasive nature of television—like radio, it becomes available in the home with a mere flick of a switch—but the Court refused to let this feature of the medium become the predicate for a broad extension of the censor’s power over sexually explicit material. The Pacifica ban was aimed solely at afternoon shows, so the interests and needs of adults could easily be accommodated by night shows. No analogous limitation confined the ban at issue in Denver Area.

Through both its sensitivity to the speech-abridging aspects of regulation and its protection of sexual material, the Denver Area Court deepened and strengthened the First Amendment’s protections against state censorship. Indeed, using the Pentagon Papers case of 1971 as a benchmark, I think it is fair to say that many of the Court’s recent decisions, above all Denver Area, have extended these protections as they apply to television.

II.

Protection against state censorship is a traditional domain of First Amendment jurisprudence, and therefore the Court’s recent strengthening of such protection, while highly laudable, has in some respects been fairly unsurprising and straightforward. The Court’s contribution in dealing with another form of censorship—what I have called managerial censorship—is more difficult to assess, though here too I detect a subtle, but favorable, shift in the law, once again spearheaded by Justice Breyer.

Under the model of state censorship, we assume two autonomous agencies—some government officials and, say, a television station—and we further assume an antagonistic relationship between the two. The action of the government officials impinges upon the freedom of the television station in a way that limits the information available to the public. From the standpoint of the media industry, the threat of such censorship is external. With managerial censorship, the threat is internal: it arises from operating

21 See Pacifica, 438 U.S. at 726.
22 See id. at 748-49.
24 See id. at 744.
decisions made within the industry itself, which may serve to interfere with or preclude public access to certain information.

The managerial censorship model is predicated on a more nuanced understanding of the relationship between the media and the state than that hypothesized by the state censorship model and, more generally, by classical liberal theory. Rather than assuming that there is always and everywhere an antagonism between the state and the media, the notion of managerial censorship recognizes that in fact, every media organization receives significant benefits from the state. Some such benefits can be found in the laws of contract, property, and corporations, and in the provision of services such as police and fire protection that are generally available to all citizens. In addition, the government has played a leading role in the development of television technology, and it continues to provide distinct benefits and privileges to the various entities within the television industry. Each over-the-air broadcaster receives a license from the federal government that gives it exclusive permission to use a portion of the electromagnetic spectrum; cable operators receive easements from local governments that permit them to run their wire cables through town streets; and public television stations receive direct subsidies from all levels of government, though these vary in amount from station to station and from year to year.

Such entanglements between the state and the television industry create a special risk of state censorship. As the Nixon example mentioned earlier illustrates, the state might manipulate the award or renewal of broadcast licenses to favor the administration’s friends or to punish its enemies. Alternatively, the grant of easements or the award of subsidies might be controlled with similar purposes in mind. For the most part, however, these dangers have not materialized. The television industry, including both its private and public components, has not become the puppet of the political branches of government, but rather has emerged as a collection of autonomous decision centers.

Although regulators have looked at the content of programs when awarding broadcast licenses, they have only done so to make certain that there is sufficient coverage of public issues and to enforce well-defined boundaries regarding depictions of sexuality. Localities have placed a price on the grant of easements, but only to provide public access to cable as a means of communication. Furthermore, public television has been permitted a strong measure of autonomy from funding agencies, and for many constitutional purposes it is treated in much the same way as the private sector of the industry. This was the overarching message of FCC v. League of Women Voters, in which the Supreme Court invalidated a ban on editorializing in the Public Broadcasting System. This ban would have been unthinkable in the private context, and it was struck down largely for that reason.

Unlike the more traditional conception of censorship, the theory of managerial censorship does not differentiate between state-financed and privately financed stations, nor does it make much out of the grant of easements and licenses. It treats all television stations as autonomous decision centers. The focus is instead on the way in which these stations exercise their autonomy. This may seem like a perverse source of concern, since the tradition that guards against state censorship seeks to increase and protect the autonomy of media organizations. Under the managerial censorship theory, however, this autonomy is conceived as serving only instrumental purposes: it exists so that citizens may learn what they need to know to exercise their democratic prerogative properly. The theory recognizes that the exercise of managerial control can sometimes interfere with the achievement of this end. Thus, the desirability of media autonomy becomes entirely contingent upon how the media serves the informational needs of the public.

A.

The danger that managerial censorship poses to First Amendment interests was another issue that the 1992 Cable Act raised and that the Court addressed in Denver Area. As previously discussed, one provision of the 1992 Act required cable operators to segregate and block indecent material appearing on leased channels, and the Court struck down this provision as an impermissible form of state censorship. Another contested feature of the 1992 Act did not impose a requirement on cable operators, but rather authorized them to prohibit indecent programs on two types of channels—leased channels and public access channels—over which they would ordinarily possess no editorial control. In both instances, the authority given to the cable operator acted as a double check—Breyer refers to it as a "veto"—on the programming decisions of another media organization. This double check was upheld for the leased channels but not for the public access ones.

Public access channels are channels that cable operators dedicate to municipalities in exchange for the easements that allow them to run their wires through city property. Within each city, the control of the programming on these channels is vested in a supervisory board or manager, typically a nonprofit organization financed by municipal funds. These boards and managers are capable of screening out indecent shows and thus protecting interests, such as the well-being of children, that might otherwise be threatened. This itself is a form of managerial censorship, but the Court was willing to leave it in place. What it objected to, as evidenced by its invalidation of the further veto power of the cable operator, was a second tier of managerial censorship.

27 Id. at 763.
28 See id. at 737.
In defense of this second tier, the proponents of the 1992 Act pointed to the risk of a mistake in the first tier (the public access channel's manager or supervisory board). The Court acknowledged the risk of such a mistake: the supervisors might not screen out indecent shows that should be excluded.\(^29\) The problem for the Court, however, was the risk of error on the other side: as Breyer put it, "the risk that the veto itself may be mistaken; and its use, or threatened use, could prevent the presentation of programming, that, though borderline, is not 'patently offensive' to its targeted audience."\(^30\) By itself, this response is not wholly adequate, for it merely leaves us to choose between the risk that the supervisory manager will screen too little and the risk that the cable operator will screen too much. In invalidating the veto power of the cable operator, the Court might have been making some pragmatic or offhand judgment as to which kind of error is more probable. Or, more plausibly, it might have been implicitly making a normative judgment about the quality of the errors. From the First Amendment perspective, the error of the cable operator is worse than that of the public access channel's supervising manager—more speech is better.\(^31\)

The Court was, however, less sensitive to the dangers of managerial censorship—or perhaps more tolerant of them—when it came to the cable operator's control over the leased channels. The 1992 Act gave cable operators the same authority to prohibit sexually explicit programming on leased access channels that it gave them over public access channels, but

\(^29\) See id. at 763.

\(^30\) Id.

\(^31\) Whose free speech rights was Breyer protecting? The rights at issue either belong to the programmers who might use public access channels, or to the public in general, which under standard analysis has a First Amendment right to receive information. See Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). See generally Dana R. Wagner, The First Amendment and the Right To Hear, 108 YALE L.J. 669 (1998). In his dissent in Denver Area, Justice Thomas denied that the public has any independent First Amendment interest in receiving information. Whatever reception right the public might have, according to him, is derived from the rights of those who produce the pertinent information—that is, "speakers" in the more classical sense. See Denver Area Telecomm. Consortium, 518 U.S. at 812-24. Justice Thomas also tried to foreclose the attempt to derive the public's interest from the First Amendment interest of programmers who use the public access channels. In his view, cable operators manage a purely private communication system, and as a result, public access programmers have no First Amendment right to have their shows transmitted by these operators. As he put it, "a programmer is protected in searching for an outlet for cable programming, but has no free-standing First Amendment right to have that programming transmitted." For support he drew an analogy to the physical world: "The author of a book...has no right to have the book sold in a particular bookstore without the store owner's consent." Id. Breyer not only disputed Thomas's major premise—that the public has no independent First Amendment interest—but also rejected Thomas's analysis of the property law regime; programmers were not intruding into private property, as Thomas would have us believe, but rather might be seen as using a public easement that government created on or over private property. See Turner Broad. Sys. v. FCC, 520 U.S. 180, 225 (1997) (Breyer, J., concurring)(discussed infra note 45). Speaking more generally, I would add that whatever value property rights may have in general in demarcating the proper bounds of First Amendment rights, see OWEN M. FISS, LIBERALISM DIVIDED 7, 24, 47 (1996), they are of little use here, when we deal with the so-called emerging technologies and there is no settled understanding of who possesses what property rights.
the Court chose to uphold this authority in the former context while invalidating it in the latter. In making this distinction, the Court was expressing greater confidence in public managers than in the holders of leased channels to strike the right balance between speech and the welfare of children. Breyer repeatedly described the managers of public access channels as “locally accountable” and “publicly accountable.” In contrast, the program managers of leased channels are driven by considerations of profit; their programming will be as sexually explicit as the market will allow. Although these managers must consider the size and profile of their audiences and the willingness of advertisers to become associated with their programs, the resulting constraints are likely to be weaker than those that discipline the managers of public access channels. Of course, the cable operators themselves are also driven by considerations of profit, but these operators are selling a different product—the cable service itself—and though they tend to have monopoly positions in each community, they are accountable to the public agencies that grant these monopolies. Their ability to veto programming on leased channels will undoubtedly be somewhat restrictive of speech, but Breyer, never an absolutist, must have assumed that their censorial power would be less pernicious in this context than in the public access context.

B.

In Denver Area, the Supreme Court confronted two distinct regulatory techniques that Congress had employed to curb the prevalence of so-called indecent programs on cable. With leased channels, cable operators were empowered to prohibit indecent material and, at the same time, obliged to segregate such material onto a separate channel, where it would be blocked until a subscriber requested access. With public access channels, they were simply given the veto power. The grant of the veto power and the segregate-and-block requirement could both be viewed as enhancements of cable operators’ managerial powers over other components of the television industry, notably the programmers who utilize leased channels and public access channels. On the other hand, the 1992 Cable Act also restricted the managerial decisions of cable operators by requiring them to carry the programs of over-the-air broadcasters, thereby guaranteeing that cable subscribers will receive those programs.

This portion of the 1992 Act, known as the “must-carry” provisions, came before the Court on two separate occasions. On the first (Turner I), a sharply divided Court remanded the case for further evidentiary hearings. Four of the justices thought the must-carry provisions were invalid. Justice Kennedy wrote the opinion supporting the remand and argued that a remand was necessary to determine whether sufficient facts existed to support the


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law, but he had only four votes. The ninth justice—Stevens—was prepared to sustain the law without any further inquiry, but acquiesced in the remand in order to form a majority. On the second occasion (Turner II), the Court upheld the must-carry provisions as a valid exercise of Congressional authority. The original four dissenters adhered to their view, and once again Kennedy wrote for four justices. In Turner II, Stevens was one of the four. He wrote a separate concurrence, but only to praise Kennedy’s opinion and to underscore its central theme. However, one of Kennedy’s original bloc—Blackmun—had retired and was replaced by Breyer. As the must-carry provisions returned to the Court, all eyes turned to him. He supplied the crucial fifth vote to sustain those provisions, but on a different theory than Kennedy’s. In Turner II, Justice Breyer wrote a separate concurrence and distanced himself from the terms of analysis Kennedy had used in Turner II, or for that matter, Turner I.

Crucial to Kennedy’s analysis in both Turner I and Turner II was his view that must-carry requirements are not a form of content regulation. The segregate-and-block and the double-check provisions of the 1992 Act had specifically targeted programs on the basis of their content, and for that reason, Kennedy had insisted in Denver Area that a strict standard of review was necessary: not only did the statute’s end need to be compelling, which he was willing to concede, but the fit between its means and this end had to be tight. Because he did not believe that the fit was sufficient, he was prepared in that case to strike down all of the contested provisions of the 1992 Cable Act, including the one upheld by the majority (i.e., the one that gave cable operators a veto power over sexually explicit programming on leased channels). With the must-carry provisions involved in Turner, however, Justice Kennedy used a more lax standard of review—intermediate scrutiny rather than strict—and he justified this approach by denying that the provisions of the 1992 Act at issue were a form of content regulation.

In fact, some of the must-carry provisions of the 1992 Act were defined in terms of content. The must-carry provision for low-power broadcast stations—which Kennedy refused to address, surely to keep to the lower standard of review—was conditioned upon an assessment of the station’s capacity to cover “local news and informational needs.” In addition, there was a separate must-carry provision for public, noncommercial broadcasters, and it is fair to read that provision as being structured in terms of program content as well. Still, these provisions, and the must-carry obligation in general, differ from the segregate-and-block and double-check provisions of the 1992 Act, which were aimed at forcing programs off the

35 See Denver Area Telecomm. Consortium, 518 U.S. at 780 (Kennedy, J., concurring in part and dissenting in part).
36 See Turner I, 512 U.S. at 623; Turner II, 520 U.S. at 189.
spectum, or at least out of the home, on the basis of their content. So al-
though the must-carry provisions were a species of content regulation inso-
far as they affected the mix of programs available to viewers, they were
fundamentally different from the regulations at issue in Denver Area.

The rationale for the restrictions on managerial prerogative contained
in the must-carry provisions was ambiguous. On one reading, these provi-
sions were a form of antitrust regulation: their purpose was to preserve
competition in the television industry. Many cable operators own cable
programming firms, and the fear may have been that these operators would
favor their own programmers to the detriment of over-the-air broadcasters.
Cable is the growing sector of the industry, and over-the-air broadcasters
would not survive economically if the cable operators dropped them.

On another reading, the concern behind the must-carry provisions was
not the maintenance of competition but rather the availability of informa-
tion to the public. Because only sixty percent of the television market had
access to cable, the collapse of the over-the-air broadcasting industry would
mean forty percent of the market would be left without television and thus
deprived of an important source of information. At that juncture, some
further number might decide to subscribe to cable, but that would still leave
without television those who could not afford such a subscription (over-the-
air broadcasting is free) and those who live in communities that cable pro-
viders do not yet serve. From this perspective, the must-carry rules do not
seek to further antitrust policy but rather free speech. The power of cable
operators is curbed in order to enlarge the communicative freedom and ca-
pability of the ordinary citizen.

There is no logical inconsistency between the antitrust and free speech
rationales—a highly competitive industry is a step toward freedom insofar
as it proliferates sources of information. However, antitrust policy, as it is
presently understood, does not protect competitors but competition, and in
many circumstances this allows it to tolerate significant degrees of concen-
tration. The antitrust and free speech rationales for the must-carry provi-
sions, therefore, begin to diverge once it can be shown that the cable
operators’ decision to favor cable programmers, either their own or those of
others, is justifiable as a matter of economic efficiency. If this is the case,
antitrust policy would permit the collapse of the broadcast industry, and
some significant portion of the public would be left without the information
television provides. Efficient markets can be a source of freedom, but they
can also constrain it.

In both Turner I and Turner II, Kennedy analyzed the must-carry pro-
visions in antitrust terms. The remand in Turner I was to ascertain whether
there was adequate factual basis to justify Congress’s concern as to the
danger of anti-competitive practices by cable operators, and in Turner II he
concluded that there was. Congress had ample reason, he said, to fear that
cable operators would engage in predatory practices that would disfavor
over-the-air broadcasting and work to the advantage of cable programmers, particularly those owned by the cable operators themselves.

The vertical integration in the cable industry is indeed considerable—cable operators integrated with programmers serve seventy percent of all subscribers—yet the antitrust warrant for the must-carry provisions is unclear. As Judge Williams pointed out early in the proceedings, the risk of predatory practices arising from integration of the cable industry calls for a rule against discrimination, not a must-carry policy.\(^{38}\) In response, Justice Kennedy pointed to the resource burdens that broadcasters would bear when bringing individual antitrust suits against predatory cable operators.\(^{39}\) He was therefore prepared to treat the must-carry provisions largely as a kind of preemptive antitrust measure. Importantly, however, he did nothing to disclaim or to disassociate himself from the free-speech rationale.

Justice Breyer was not so politic. Breyer’s primary purpose in writing a separate concurrence was to disassociate himself from the antitrust rationale upon which Kennedy’s opinion relied. For Breyer, the value of free speech was powerful enough to sustain the statute on its own. What was of concern to him were the homes without cable and the loss to them—indeed, to all of society—that would result if over-the-air broadcasters were dropped, regardless of the economic desirability of such an occurrence. Citing with manifest approval the classic decisions that gave life to the democratic theory of the First Amendment—Justice Brandeis’s concurrence in \textit{Whitney v. California},\(^{40}\) \textit{Associated Press v. United States},\(^{41}\) and \textit{New York Times v. Sullivan}\(^{42}\)—Breyer conceptualized the must-carry rules and their curtailment of managerial prerogatives as furthering a “national communication policy” that seeks “the widest possible dissemination of information from diverse and antagonistic sources.”\(^{43}\) He then went on to state, “That policy, in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve.”\(^{44}\)

Breyer was very clear about the costs to speech that the bar on managerial prerogative entailed. “It interferes,” he wrote, “with the protected interests of the cable operators to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs.”\(^{45}\) He rooted each of these


\(^{39}\) See Turner II, 520 U.S. at 189.

\(^{40}\) 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring).

\(^{41}\) 326 U.S. 1 (1945).

\(^{42}\) 376 U.S. 254 (1964).

\(^{43}\) Turner II, 520 U.S. at 226-27 (Breyer, J., concurring).

\(^{44}\) Id. at 227.

\(^{45}\) Id.; see supra note 31.
three interests in the First Amendment and acknowledged that the must-carry policy "exacts a serious First Amendment price," which he unashamedly characterized as a "suppression of speech." But he then went on to state that there are "important First Amendment interests on both sides of the equation," thereby fully recognizing that occasionally some speech has to be restricted in order to further other speech. In such a situation, Breyer maintained, the statute at issue should be upheld if two conditions are met: (1) there are no alternative ways of achieving the furtherance of the speech objectives that are "significantly less restrictive" than the one chosen, and (2) the speech-enhancing consequences dominate the speech-restrictive ones. In describing the last condition, Justice Breyer spoke of requiring a "reasonable balance" between the speech-restricting and speech-enhancing elements.

Thirty years ago, the Supreme Court announced a similar approach in the Red Lion case, which upheld portions of the FCC's fairness doctrine that were specifically aimed at the problem of managerial censorship. One aspect of this doctrine gave people personally attacked in broadcasts a right of reply; another gave political candidates an opportunity to respond to editorials; and a third, perhaps the most important, required radio and television broadcasters to cover issues of public importance in a fair and balanced way. For the past thirty years, the Supreme Court has turned its back on the decision to uphold these regulations and the principle that Red Lion announced: sometimes, when there are speech interests on both sides of an issue, one form of speech must be sacrificed for another. This precedent has remained on the books, but subsequent decisions have drained it of much of its vitality. As recently as Turner I, the Supreme Court construed Red Lion as being rooted in the technology of over-the-air broadcasting—specifically, the use of the electromagnetic spectrum and the resulting medium scarcity.

In his opinion, however, Justice Breyer cited Red Lion approvingly twice, and he applied its underlying principle to the cable industry. He thereby freed this principle from its technological moorings and introduced the idea that what is crucial, at least for the democratic theory of the First Amendment, is not spectrum scarcity but economic scarcity. In limiting, and thus justifying his approach, Breyer underscored the economic power of cable operators: because cable systems are "physically dependent upon the availability of space along city streets," they face "little competition"

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46 Id.
47 Id.; see also IRONY, supra note 17, at 19.
48 See Turner II, 520 U.S. at 227 (Breyer, J., concurring).
49 Id.
51 See Turner I, 512 U.S. at 622.
52 See Turner II, 520 U.S. at 226-28 (Breyer, J., concurring).
and constitute "a kind of bottleneck that controls the range of viewer choice." It matters not, he quickly added, whether the operators use this "economic power for economic predatory purposes."

Breyer's entire approach represents a revitalization of Red Lion, and his discussion of the economic power of cable operators allows the principle of that case to transcend the specific technological context in which it was born. This is an important move in the law, and my sense is that Breyer was very much aware of this move and was especially anxious about it, as it enables the suppression of some speech in the name of enhancing other speech. His anxiety broke through most acutely when he reminded us of the particular form of state intervention involved in the case before him. He wrote, "In particular, I note . . . that some degree—at least a limited degree—of governmental intervention and control through regulation can prove appropriate when justified under O'Brien (at least when not 'content based')." One is left to wonder why Red Lion is one of the cases cited immediately following this sentence and, furthermore, what he meant by "at least." The appearance of this particular phrase twice in one sentence—once within the parenthesis, once between dashes—suggests that these qualifications were inserted during the final moments of the editing process, when he began to feel the full weight of what he was doing.

C.

The significance of these qualifications became apparent in Arkansas Educational Television Commission v. Forbes, decided in May 1998, in which the Court once again attempted to come to grips with the problem of managerial censorship. Here the Court dealt not with the prerogatives of cable operators, but rather with those of the managers of a public television station. The station in question had decided to hold a public debate among congressional candidates, and it had excluded one person running for office, Ralph Forbes, on the grounds that he was not a serious candidate. Forbes brought suit in federal court, challenging this exercise of managerial prerogative. His case made its way up through the appellate process and ultimately reached the Supreme Court, which refused to provide him with relief.

Justice Kennedy wrote the Court's opinion. In it, he asked whether the public-television debate was a public forum, decided that it was not, applied a lax standard of review, and then concluded that this standard was satisfied. His mode of analysis could not be attractive to Breyer, who in Denver Area had studiously avoided such a formalistic and categorical approach

53 Id. at 227-28.
54 Id. at 228.
55 Id. at 227-28.
57 See id.
and who for that very reason was sharply criticized by Kennedy. It is therefore somewhat surprising that Breyer joined Kennedy's opinion. True, Denver Area involved cable, one of the so-called "new technologies" (though it was hardly new anymore), and Forbes involved over-the-air broadcasting. But Breyer did not indicate in Denver Area that his refusal to apply the traditional public-forum analysis was due to technological differences in the method of transmitting cable and broadcast signals. Indeed, in that case, Justice Souter wrote a separate opinion to defend Breyer's analysis and therein made reference to technological changes and the need to have a freer hand when facing new situations, but Breyer declined to pick up that theme himself. My own sense is that Breyer did not use the categorical analysis in Denver Area simply because he did not find it useful or illuminating. He was, however, willing to acquiesce to Kennedy's use of that mode of analysis in Forbes as a gesture of deference; he most likely acted on the principle that the author of the Court's opinion was entitled to use whatever mode of analysis he found helpful.

Although Justice Breyer's acquiescence in Kennedy's mode of analysis is somewhat puzzling, it is not difficult to identify important substantive differences between Turner II and Forbes that might have led him to be more respectful of managerial prerogatives in one case than in the other. First of all, in Forbes the Court dealt not with cable operators, but with a television station and the officials who make programming decisions. In Turner II, Breyer was very clear that the economic power of cable operators provided a basis for compromising their speech interests to further those of listeners and other programmers; he took a similar position in Denver Area, at least when it came to analyzing the veto powers of cable operators. In contrast to cable operators, station managers do not act as bottlenecks and thus lack the economic power that so worried Breyer in the earlier cases. Moreover, the prerogatives of those who make the programming decisions for a station appear more central to First Amendment concerns than those of cable operators. In choosing the array of programs, cable operators engage in a form of editing, but the creative and artistic elements of those who make programming decisions for a station are more pronounced and might be seen as giving rise to a more powerful First Amendment claim.

Second, the issue before the Court in Forbes was not whether it was permissible for the state to intervene, as in the Turner cases, but whether the state was obliged to do so. Ralph Forbes claimed that the station had violated his free speech rights and those of the public by excluding him from

58 See Denver Area Telecomm. Consortium, 518 U.S. at 780 (Kennedy, J., concurring in part and dissenting in part).
59 See Denver Area Telecomm. Consortium, 518 U.S. at 774 (Souter, J., concurring).
60 See Turner II, 520 U.S. at 227-29 (Breyer, J., concurring).
the debate, and he turned to the federal court to provide him with access as a remedy for that violation. In so doing, he was effectively asking that court to constrain the managerial prerogatives of the station. At that point, the station would claim that any such interference with its prerogatives would itself constitute an abridgement of its First Amendment rights. In his Turner II concurrence, Breyer had articulated a framework for dealing with precisely this type of situation—a situation where speech interests lie on both sides of the equation—but the answer in that case came more easily because he was able and willing to defer to another branch of government. He allowed Congress to regulate and thus to make the choice between the speech interests. The question in Forbes, however, was not one of permission—was it permissible for Congress to constrain the managerial prerogatives of cable operators?—but rather one of obligation—did the First Amendment require the station to provide Ralph Forbes with access to the debate? As a result, sentiments of deference could not provide any help in resolving the conflict between the two speech interests.

Justice Kennedy was aware of all of these factors, particularly the distinction between permission and obligation, and he carefully limited the reach of the Forbes holding accordingly: “This is not to say the First Amendment would bar the legislative imposition of neutral rules for access to public broadcasting. Instead, we say that, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.” Earlier in the opinion, he emphasized the headaches and dangers courts would face if access were a constitutional obligation. As indicated by the phrase “in most cases,” however, he in fact recognized an exception, and in dicta created a limited right of access. This right was defined by two features: (a) access may be compelled for candidate debates, but only if (b) the station has denied the candidate the opportunity to participate in the debate “on the basis of whether it agrees with [the] candidate’s views.”

In thus creating a limited right of access, Justice Kennedy curbed the reach of managerial censorship in much the spirit of Denver Area and Turner II. Ralph Forbes lost, but over the long run the true significance of the decision, and perhaps the key to Breyer’s willingness to join Kennedy’s opinion, might lie in the annunciation of this access right. The emergence of this right is all the more striking because, in that case, it operated against a television station (as opposed to a cable operator) and arose in the obligation (rather than the permission) context.

In confining the limited right of access announced in Forbes to candidate debates, Justice Kennedy emphasized the unique role these debates play in our political life. He also explained that the format of such debates

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62 See Arkansas Educ. Television Comm’n, 118 S. Ct. at 1637-38.
63 Id. at 1640.
64 Id.
makes it unlikely to attribute the views of one speaker (the candidate seeking access) to those of another (the station). Fears about such false attribution have long made the Court uneasy about creating rights of access or even tolerating them when they have been created by others. In contrast, the other limitation that Kennedy imposed on the right of access—that access must only be granted to overcome an exclusion based on a disagreement with the candidate’s views—seems less sensible.65

In justifying this particular limitation, Justice Kennedy explained that such viewpoint discrimination would inevitably skew the electoral debate. What he overlooked is that every exclusion, regardless of its reason, will inevitably have this same effect. The only difference between a viewpoint-based exclusion and a viewpoint-neutral exclusion is the justification. Admittedly, as noted with the Nixon example considered during the prior discussion of state censorship, disagreement with a particular viewpoint is clearly not a proper justification for suppression or exclusion. But there may be other grounds for exclusion that are equally unable to justify the inevitable skew it produces. Such grounds can be deemed “arbitrary” and should not be permitted. Suppose, for instance, that a station excludes a candidate not because it disagrees with the candidate’s view, but because it believes the candidate is not popular or is not likely to win, or does not have the economic resources needed to mount an effective campaign. All of these rationales strike me as arbitrary and insufficient to justify the skew that the exclusion will produce.

The Forbes dissent, written by Justice Stevens and joined by Justices Souter and Ginsburg, focused on these problems and in so doing made an important contribution to our understanding of managerial censorship. Like Breyer, Stevens is no friend of the categorical approach, and he did not get involved in the public forum issue that so preoccupied the Kennedy opinion. That is, he did not dwell on whether the televised debate constituted “a designated public forum” or “a non-public forum.” (In a footnote, however, he noted almost as an aside that if, as claimed, the station admitted all “visible” or “newsworthy” candidates, then it created a designated public forum and not the non-public forum that Kennedy concluded existed.)66 Rather, Stevens argued that regardless of how the candidate debate is categorized under public forum doctrine, the First Amendment will not tolerate arbitrary definitions of its scope, and while viewpoint discrimination would constitute arbitrary exclusion, it is clearly not the only potential source of arbitrariness.

65 In other contexts, the Court disaggregated the state among its many functions, and applied a lesser standard, close to the one applied to private entities. For example, the Court curbed political activity on post office sidewalks and in airport terminals, where the state might be thought to be acting as property owner as opposed to sovereign. See Owen M. Fiss, Silence on the Street Corner, in Liberalism Divided, supra note 31, at 55-66. In those earlier cases, Justice Kennedy complained about the disaggregation, but in Forbes he reached the same result by rather unconvincingly characterizing the candidate debate on public television as a “non-public forum.” See infra note 66 and accompanying text.

66 Arkansas Educ. Television Comm'n, 118 S. Ct. at 1649 n.18 (Stevens, J., dissenting).
At this juncture, Stevens could have in fact inquired into the grounds for Forbes’s exclusion and determined whether it was arbitrary, but he instead chose another, more procedural tack. Drawing on a vital part of First Amendment state-censorship jurisprudence, he faulted the station for lacking “narrow, objective, and definite standards” for its exclusions. With a burst of real insight, he analogized the public television station managing its debate to a local authority issuing parade permits. In both cases, he said, there exists “a constitutional duty to use objective standards,” and the station must announce these standards in advance. Stevens traced this duty to the Shuttlesworth case, which arose from Dr. King’s 1963 Birmingham campaign, but in truth it goes all the way back to the Supreme Court’s 1938 decision in Lovell v. City of Griffin and the very beginning of the First Amendment tradition.

The appeal of the duty espoused by Stevens is manifold. For one thing, it would limit the ability of managers to use arbitrary standards, as the very construction of a list of objective criteria would produce an open discussion about the permissible grounds for exclusion. Every criterion would have to be openly defended and justified. Also, the duty to use objective, pre-announced standards would give the excluded candidate a better chance to prove that his or her exclusion was arbitrary or, under the rule of the majority, a form of viewpoint discrimination. As things currently stand, such proof can usually only be indirect; no manager is likely to create direct evidence that the candidate was excluded because of disagreement with his or her views. Once the standards for exclusion were promulgated, the manager would have to justify the exclusion in terms of one of the publicly announced criteria. The excluded candidate would then have a chance to show that this criterion had not been met, which would create a powerful indication that viewpoint discrimination or some other arbitrary basis for exclusion had been used.

In creating this duty, Stevens was very much aware of the practice of commercial stations and even made reference to it; he explained that he was asking no more of public stations than what was common practice in the industry in general. Yet, by drawing on precedents governing the issue of parade permits, he seemed to suggest that the duty to use objective standards was confined, as a constitutional matter, to public stations. After all, the First Amendment only applies to state actors. Similarly, Kennedy’s limited right of access appears confined to public stations. There is, however, reason to question whether either Stevens’s duty to use objective stan-

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67 Id. at 1644.
68 See id. at 1647-48.
69 Id. at 1649.
71 303 U.S. 444 (1938).
72 See Arkansas Educ. Television Comm’n, 118 S. Ct. at 1645 (Stevens, J., dissenting).
dards or Kennedy’s limited right of access should be limited to public television.

Commercial stations dominate the television industry. They are often thought of as “private”—in contrast to the public ones—because they are not financed by government funds; they receive their revenue largely from advertisements and in some cases by viewer subscriptions. However, these stations are fully entangled with the state, which gives them many substantial benefits, including the licenses and easements I described before. Is this sufficient? It is hard to be precise about these matters, but if race cases such as *Burton v. Wilmington Parking Authority*73 are any guide, certainly there seems to be enough involvement by the state in the operations of a commercial station to satisfy the state action requirement. True, there is not likely to be a nexus between the government’s involvement with a particular station—say, through the conferral of its broadcast license or the grant of an easement—and that station’s exclusion of a candidate; in such a situation, the government would not have required or in any way endorsed the exclusion. But the same argument could be made in the public broadcasting context: there is no nexus between the state’s subsidy of a station and the station’s decision to exclude.74 There is therefore reason to believe, or at least to hope, that the duties Stevens and Kennedy crafted in the public broadcasting context may, in time, be extended to the television industry as a whole.

III.

Those of us who write or teach are privileged. We can keep up with the world and explore issues of social importance by attending public lectures, by spending hours on end in the library, or by performing extensive on-line investigations. Most citizens, however, do not enjoy these luxuries and have come to depend on the mass media—and most notably, television—for their knowledge about issues and events beyond their immediate experience. It is only through television that they get a glimpse of candidates for public office and elected officials. A candidate debate, a news story, an elected public official’s broadcast, or even a talk show may be the only occasion a citizen has to consider issues of public importance and to hear conflicting viewpoints on them.

The Supreme Court’s recent decisions in *Denver Area, Turner,* and *Forbes* are all premised upon this observation. To their great credit, these decisions appreciate the role of television in our informal education system, and they seek to construct a set of rules that enables television to perform this role more effectively. Not all of the dynamics that can impair televi-


74 No nexus was present, for instance, in the classic state action case of *Shelley v. Kraemer,* 334 U.S. 1 (1948), although Justice Rehnquist insisted upon the existence of such a nexus in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972).
sion’s ability to perform its educational role are within the Court’s reach; some such dynamics are technological, others are economic, and still others have their roots in the frenzied pace of contemporary life. Yet in a modest but deliberate manner, the Court has focused on two dynamics that have interfered severely with television’s ability to discharge its democratic responsibility: state censorship and what I have called managerial censorship. Of the two, the latter has proved more difficult for the Court to grasp and to conceptualize.

To some extent, this difficulty is due to the fact that curbs on managerial prerogatives interfere with the very autonomy that the state-censorship tradition seeks to secure. To put the same point differently, remedying managerial censorship requires a measure of speech-abridging state action. This is most clearly the case in Turner II, where the imposition of the must-carry provisions was upheld, but it is also the case in Forbes, where the corrective action sought was a judicial decree granting a candidate a right of access to a televised debate, thereby curbing the station’s autonomy. Denver Area is rather peculiar in this regard, insofar as it involved a challenge to an act of Congress that gave cable operators a power they otherwise would not have, but it too deals with the conflict between protecting media autonomy and maximizing the information available to the public.

The other difficulty with the concept of managerial censorship stems from the challenge of defining the prohibited conduct with specificity. We cannot define the prohibited conduct in purely quantitative terms because, under conditions of scarcity, every programming decision has a censorial aspect—to run one program or carry one channel is necessarily to exclude another. Of course, we might try, as I have on occasion, to use some qualitative standard: the people should have the information they need to discharge their responsibility of governance properly. But giving concrete meaning to such a phrase is fraught with difficulty. Accordingly, what we find in the cases is a cautious and piecemeal effort to question particularized abuses of managerial prerogatives: a risk that cable operators might drop over-the-air broadcasters and thereby leave forty percent of American households without television; a power to veto sexually explicit programming on public access channels; a decision to exclude a Congressional candidate from a televised debate on public television.

Given these difficulties with the concept of managerial censorship, it is no wonder that it has divided the Supreme Court and that the fullest elaboration of the theory in recent times—Breyer’s opinion in Turner II—lacked the endorsement of a majority. In fact, no one else joined it. We should be careful, however, not to ignore the significance of that opinion for the future of the law. Admittedly, Breyer spoke only for himself, but his opinion was crucial for the formation of a majority, and though Kennedy did not explicitly endorse Breyer’s position, he in no way disputed or disavowed it. Perhaps Breyer’s opinion has as much right as Kennedy’s to claim the authority of the judgment. I would go further, however, and say that even if
Kennedy had obtained a majority there is a special force to Breyer’s concurrence that must be reckoned with.

The theory Breyer expounded is not entirely new. It had been developed by a number of scholars in recent decades. Yet in Breyer’s hands it achieved an authority that can only come from the fact that it served as the predicate for a judicial judgment, and for that purpose it matters not whether the judgment it supports obtained the vote of one justice, five justices, or nine. Breyer spoke as a public official. He was informed by the adjudicatory process and disciplined by the rules that govern it, and his words are part of the law itself. His *Turner II* opinion has an authority and generative power that a scholar’s work can never achieve.

Seen in this light, Breyer’s concurrence should be understood as a new turn in the law—a movement away from the libertarian doctrine that has so dominated the Court for the last twenty-five years. It constitutes the first hesitant step toward the recovery of a jurisprudence that sees the First Amendment more as a protection of the democratic system than as a protection of the expressive interests of the individual speaker. Justice Brandeis originally articulated the foundation for this approach in a separate concurrence in *Whitney v. California*, which was joined only by Holmes.  

As we can see from the subsequent history of that opinion, First Amendment doctrine, like the Amendment itself, pays special heed to dissident voices.

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75 *See* Whitney, 274 U.S. at 375-376 (1927) (Brandeis, J., concurring).