

# THE FIRST AMENDMENT DOCTRINE OF UNDERBREADTH

WILLIAM E. LEE\*

A familiar First Amendment doctrine is the requirement that laws affecting freedom of expression be precisely tailored. One part of precise tailoring, overbreadth, invalidates laws that include within their reach actors or circumstances that do not present the danger the government seeks to avoid.<sup>1</sup> But laws can also be improperly tailored because they are too narrow.<sup>2</sup> The concern for underinclusion—when a law targets some conduct or actors for adverse treatment, yet leaves untouched conduct or actors that are indistinguishable in terms of the law's purpose—originated as an equal protection concept, but since the 1970s has become an increasingly important aspect of First Amendment methodology.<sup>3</sup>

---

\* Professor, Henry W. Grady College of Journalism and Mass Communication, University of Georgia.

1. See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (fighting words ordinance invalid because it is susceptible of application to protected speech). See generally Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983).

A law can also be improperly tailored because it does not use the least restrictive means that will accomplish the government's end. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (valid governmental purpose cannot be pursued by broad means if the end can be more narrowly achieved). See generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); Robert M. Bastress, Jr., Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974). Also, a law can be improperly tailored because the means chosen do not adequately serve the governmental interest. See, e.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (striking down an ordinance that only peripherally promoted the village's substantial interest in protecting the public from fraudulent solicitations).

2. Professor Nimmer called such laws "overbroad". MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 2.06[B] at 2-93 to 97 (1984). See generally Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447 (1989).

3. See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In *Erznoznik*, the city sought to justify as a traffic regulation an ordinance prohibiting drive-in theaters from exhibiting films containing nudity. The Court noted that while legislatures can generally deal with one part of a problem without addressing the entire problem, regulations that discriminate on the basis of content are impermissible unless clear reasons exist for the distinctions. Because a wide variety of scenes in movies would also distract motorists, no justification existed for distinguishing movies containing nudity. *Id.* at 215.

Following the Supreme Court, lower courts began to incorporate underinclusiveness as part of First Amendment analysis. See, e.g., *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986) (ban on inmates

This is a highly controversial methodology; a law's narrowness may be attacked as insufficiently promoting a governmental interest, or it may be defended because of its limited reach. The application of this methodology is also puzzling. Sometimes laws that create a slight burden on First Amendment rights are invalidated because only a few actors are targeted. In other instances, if the law imposes a minimal burden on free expression the Court defers to legislative judgments concerning which sources of a problem the government should regulate.

Recently, in *R.A.V. v. City of St. Paul*,<sup>4</sup> the Court invalidated a law that proscribed only those fighting words addressing race, color, creed, religion, or gender. Justice White, in a concurring opinion, criticized the Court's use of what he called the "underbreadth" doctrine because it allows worthless and unprotected speech to go unpunished until a legislature cures the defect by enacting a broader prohibition.<sup>5</sup> Justice Stevens, in a concurring opinion, also criticized the Court, claiming that its decision constrained the power of legislatures to make distinctions based on content; the decision meant that within a category of proscribable content, the government must either proscribe all speech, or no speech at all.<sup>6</sup> To Justice Stevens, legislatures could reasonably conclude that the harm caused by racial fighting words was distinct from that caused by other types of words.<sup>7</sup> Justice Scalia, author of the *R.A.V.* opinion, disclaimed any concern for underinclusiveness, and instead stated that the case rested upon a content-discrimination limitation. Differential treatment of expression is permissible as long as "there is no realistic possibility that official suppression of ideas is afoot."<sup>8</sup>

Although *R.A.V.* leaves many questions about differential treatment unanswered, it illustrates the tension created by the desirability of equal treatment and the competing need for distinct treatment. In some in-

---

receiving newspapers but not magazines found to be underinclusive means of reducing the threat of fires and clogged toilets); *Mann v. Smith*, 796 F.2d 79 (5th Cir. 1986) (ban on inmates receiving newspapers and magazines found to be underinclusive means of preventing fires and clogged toilets because inmates could possess other potentially damaging materials); *Mission Trace Invs., Ltd. v. Small Business Admin.*, 622 F. Supp. 687 (D. Colo. 1985) (SBA's rule preventing loans to "opinion molders" underinclusive because it allows loans to advertising agencies whose clients include political candidates), *rev'd on other grounds sub nom.* *Ascot Dinner Theatre, Ltd. v. Small Business Admin.*, 887 F.2d 1024 (10th Cir. 1989).

4. 112 S. Ct. 2538 (1992).

5. *Id.* at 2553 (White, J., concurring).

6. *Id.* at 2562 (Stevens, J., concurring).

7. *Id.* at 2565.

8. 112 S. Ct. at 2547.

stances, distinct treatment prevails. For example, sexually oriented expression is treated differently from political expression.<sup>9</sup> The government may choose which communicators use nonforum properties.<sup>10</sup> The government may grant subsidies to some speakers but not others.<sup>11</sup> And attorney speech concerning pending cases is subject to greater restriction than the speech of nonparticipants.<sup>12</sup> Yet the importance of equality is often stated in recent First Amendment cases. The Court believes that public debate is distorted when the government restricts some speakers while allowing the participation of others who are similar to the restricted class. As the Court succinctly wrote, "When speakers and subjects are similarly situated, the State may not pick and choose."<sup>13</sup>

Defining whether differential treatment of communicators is permissible can involve factors other than the characteristics of the communicators. For example, in *First National Bank v. Bellotti*,<sup>14</sup> involving a restriction on corporate political expression, the Court found the state's effort to control who spoke on certain issues illegitimate. Thus, the Court was unwilling to accept the state's claim that there were relevant characteristics distinguishing the burdened and unburdened classes from one another. If the Court finds the state's goal to be permissible, it can give states great latitude in defining the burdened and unburdened classes. For example, in *Leathers v. Medlock*,<sup>15</sup> the Court upheld a law

9. See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (zoning of sexually oriented movie theaters); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

10. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (exclusion of group from interschool mail facilities); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

11. See, e.g., *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (tax exempt status for veterans' organizations that lobby not available to other lobbying groups). Cf. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (Congress may choose not to fund abortion-related speech). See generally Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

12. *Gentile v. State Bar*, 111 S. Ct. 2720 (1991). Although *Gentile* concerns speech that has the possibility of prejudicing judicial proceedings, and press coverage can create that danger, the Court's analysis distinguished attorneys from other speakers on grounds such as fiduciary obligations that do not apply to the press. Moreover, the analysis in *Gentile* focused on the difference between participants and nonparticipants, rather than the difference between attorneys and the press. Cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (even the press can be restrained from publishing materials obtained during discovery if the press is a litigant). *Gentile* is outside of the scope of this Article.

13. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 55 (1983).

14. 435 U.S. 765 (1978). See *infra* notes 51-59, 243-54 and accompanying text.

15. 111 S. Ct. 1438 (1991). See *infra* notes 216-41 and accompanying text.

that taxed cable television subscriptions and exempted newspaper sales and subscription magazine sales. Because raising revenue was a legitimate goal, and the law was viewpoint neutral, the differential treatment was accepted without any assessment of whether there were relevant differences among the media.

This Article explains why the Supreme Court approaches differential treatment in such diverse ways. Because the topic of differential treatment of categories of expression has been explored elsewhere,<sup>16</sup> this Article primarily focuses on differential treatment of communicators. In addition, because the press is frequently singled out for special treatment, the author discusses the question whether the press should be regarded as special. This Article argues that there are powerful reasons for preventing the government from discriminating among members of the press.<sup>17</sup> These reasons also require that the government not discriminate between the press and nonpress communicators.

## I. THE FIRST AMENDMENT AND UNDERINCLUSIVE LAWS

### A. *Equal Freedom or Equal Suppression?*

While the press plays an important role in our society,<sup>18</sup> the Court—with the exception of Justice Stewart's lonely voice<sup>19</sup>—consistently rejects the claim that the press deserves special First Amendment protection.<sup>20</sup> In *Austin v. Michigan Chamber of Commerce*,<sup>21</sup> however, the Court ruled that a law favoring the press over nonpress corporations did not violate equal protection because of the *unique* role of the press.<sup>22</sup> In

---

16. See, e.g., Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Stephan, *supra* note 9.

17. This Article does not address differential treatment of print and electronic media, which arguably rests upon broadcaster use of the electromagnetic spectrum. A vast literature criticizes the rationales for distinct treatment of broadcasting. See, e.g., MATTHEW L. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES* (1986). This Article is concerned with differential treatment of speakers in instances in which, for the purpose of regulation, no relevant characteristics justify the treatment.

18. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (the press as a handmaiden of effective judicial administration has an impressive record of service over several centuries).

19. *Zurcher v. Stanford Daily*, 436 U.S. 547, 576 (1978) (Stewart, J., dissenting) (claiming that newsrooms should not be subject to police searches); Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975) (stating that press freedom is distinct from freedom of speech).

20. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporters, like all citizens, must respond to valid grand jury subpoenas).

21. 494 U.S. 652 (1990). See *infra* notes 269-305 and accompanying text.

22. 494 U.S. at 667.

a dissenting opinion Justice Kennedy analyzed the law solely in First Amendment terms and claimed that the First Amendment prohibited this distinction among speakers.<sup>23</sup>

Serious problems are created by framing free expression cases in equal protection terms. As *Austin* illustrates, assessing a legislative distinction in equal protection terms may yield results that conflict with First Amendment doctrine. The more common complaint about the use of equal protection in free expression cases is that it merely masks First Amendment values. For example, in *Carey v. Brown*<sup>24</sup> and *Police Department v. Mosley*,<sup>25</sup> in which picketing laws were invalidated because of content-discriminatory features, the decisions tracked First Amendment doctrine; the equal protection references added nothing of substance.<sup>26</sup>

Most importantly, a perverse aspect of framing freedom of expression cases in equal protection terms is that equal suppression may be more important than equal liberty. That is, if equality is defined by uniform burdens, the fact that the law reaches all similarly situated speakers may well be dispositive. In an influential article, Professor Karst argued that in free expression cases, the principle of equality necessarily means equal liberty.<sup>27</sup> To Karst, equal liberty was part of the central meaning of the First Amendment.<sup>28</sup> A court reviewing a uniformly applicable law must be concerned with the law's impact on freedom; even a uniformly applicable law can impermissibly restrict First Amendment rights. Addition-

23. *Id.* at 712-13 (Kennedy, J., dissenting).

24. 447 U.S. 455 (1980) (statute prohibiting residential picketing invalid because of exemption for labor picketing).

25. 408 U.S. 92 (1972) (ordinance prohibiting picketing near school invalid because of exemption for labor picketing).

26. See, e.g., *Carey*, 447 U.S. at 471-72 (Stewart, J., concurring) (what was actually at stake in *Carey* and *Mosley* was the basic meaning of the constitutional protection of free speech); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1076 (1979) (*Mosley's* reliance on equal protection was gratuitous); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 561-63 (1982) (*Carey* is a First Amendment decision masquerading in the form of equality); Roy A. Black, Case Comment, *Equal But Inadequate Protection: A Look at Mosley and Grayned*, 8 HARV. C.R.-C.L. L. REV. 469, 473 (1973) (*Mosley* is so laden with elements of First Amendment analysis that it would have made sense without any mention of equal protection).

Justice Scalia recently admitted that cases like *Mosley* fuse the First Amendment into the Equal Protection Clause with the acknowledgment that the First Amendment underlies the analysis. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2544 n.4 (1992).

27. Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975).

28. *Id.*

ally, the conclusion that the government has unconstitutionally discriminated among speakers does not necessarily determine the constitutionality of a law uniformly restricting all speakers. Free expression cases must address the substantive definition of freedom, an inquiry that is easily avoided within the equal protection framework.

How equality is defined affects the remedy for discriminatory laws. For example, when a legislature is found to have unconstitutionally prohibited picketing on certain topics, equal suppression allows it to cure the defect by prohibiting all picketing.<sup>29</sup> An emphasis on equal freedom, however, would lead to a different result. The legislature could cure content-discriminatory features by enacting a content-neutral law that uniformly regulates matters such as the number of pickets and the time of picketing rather than prohibiting all picketing. This approach increases the class of actors affected by the law, while the burden imposed upon the class is lessened.

Thinking about the remedy to a discriminatory law also illuminates whether the defect is the law's tailoring or its goal. If broadening the ban on picketing to all topics is constitutional, conceivably the defect of the law is the distinction among topics. However, if extending the ban to all topics still leaves an impermissible restriction on First Amendment rights, the state's interest is insufficient to justify the prohibition. The Court's criticism of tailoring, therefore, may be a surrogate for criticism of the goal's importance and the underlying value choices the law represents.

---

29. Courts sometimes fear that eliminating differential treatment may cause even greater harm to freedom of expression. For example, in *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *rev'd sub nom.* *Boos v. Barry*, 485 U.S. 312 (1988), the court of appeals found that a law concerning demonstrations near embassies was permissible even though certain demonstrations were banned because of their content. Striking out the element of content discrimination and leaving a content-neutral prohibition would broaden the statute's application, "a peculiar outcome." *Id.* at 1474. *Cf.* *Carey v. Brown*, 447 U.S. 455, 475 (1980) (Rehnquist, J., dissenting) (criticizing the Court's approach because the state would fare better by adopting a more restrictive means). In dissent, Chief Judge Wald stated that the importance of the equality principle justifies elimination of content distinctions. Because of the dangers of viewpoint discrimination, and the core value of equality, Wald stated that an alternative that restricts more speech, but preserves equality, is less restrictive of First Amendment freedoms. 798 F.2d at 1493 (Wald, C.J., dissenting). Wald's dissent is an example of the dangers created by an emphasis on equal suppression. In addition, the majority overlooks the possibility of a content-neutral law that is less restrictive than a total ban on picketing. The availability of a content-neutral alternative was critical in the Supreme Court's invalidation of the law. 485 U.S. at 325-29.

### B. *The Dangers of Underinclusive Laws*

The concept of equal freedom provides a powerful explanation of why one should disfavor underinclusive laws affecting freedom of expression. However, the concept contains a significant shortcoming. One can acknowledge the importance of equality while narrowly defining the class of actors entitled to equal treatment. This may be especially significant in cases involving new types of speakers. For example, the necessity of treating established media alike is readily apparent, but a new medium like cable may be regarded as distinct largely because of its newness. Justifications other than equality should also animate the First Amendment's hostility to underinclusive laws. These laws can harm the self-governing process and reflect illegitimate motivation. In addition, these laws may chill speech and have viewpoint-discriminatory effects.

In *Bellotti*, the Court criticized a restriction on corporate expression because of its impact on the public's access to information, not its effect on the rights of speakers. Although language in *Bellotti* refers to a right to receive information, the case really rests on the importance of self-government.<sup>30</sup> The Court stated that because citizens "are entrusted with the responsibility for judging and evaluating" the merits of conflicting arguments, laws that restrict the public's access to information harm the process of self-government.<sup>31</sup> Implicit in the self-governance rationale is a strong presumption against government action that burdens some speakers and skews "the stock of information from which members of the public may draw."<sup>32</sup> Thus, the government is disqualified from restricting the subjects that certain speakers may address.<sup>33</sup>

The fear of underinclusion also guards against the danger that the politically powerless will bear the brunt of governmental burdens while the powerful are excluded. Laws treating a segment of the media differently from other media may reflect the relative political power of different media. For example, local newspapers are generally monopolies and have considerable influence with state and local legislators. Other segments of the press, such as national magazines, do not have the same influence with state and local legislators and are thus more vulnerable to regulation. This inequality in political power may explain why retail newspa-

---

30. William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 327-31.

31. 435 U.S. 765, 791 & n.31 (1978).

32. *Id.* at 783.

33. *Id.* at 785.

per sales are generally exempt from sales tax in states where magazine sales are not exempt.<sup>34</sup> Additionally, media institutions frequently seek government protection from competitors. The newspaper industry's campaign to have Congress prevent telephone company entry into electronic publishing is perhaps the best known contemporary example.<sup>35</sup> In their classic article on equal protection, Tussman and tenBroek argue that legislative submission to political pressure does not constitute a fair reason to exclude the politically powerful from legislation affecting the less powerful but similarly situated for the purpose of the law.<sup>36</sup>

It is possible to infer from underinclusive laws that the legislature selected the burdened class in order to harm that class. The flip side of this in freedom of expression cases is that the legislature may have selected the favored class in order to chill the speech of the members of that class. Central to the decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*<sup>37</sup> is the Court's belief that when the press receives favored treatment, the legislature can then threaten the press with the possibility of more burdensome treatment.<sup>38</sup> This "threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government."<sup>39</sup>

Differential treatment of communicators based upon subject matter, as in *Arkansas Writers' Project, Inc. v. Ragland*,<sup>40</sup> is unconstitutional. The underlying apprehension is that the government's action skews the mar-

---

34. Brief Amicus Curiae of Dow Jones & Company, Inc. at 6-7, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38). See *infra* note 214.

35. For a discussion of this and other instances of newspaper publishers seeking to use the government to restrain competition, see PHILLIP D. MINK, *NEWSPAPER PUBLISHERS & FREEDOM OF SPEECH: USING THE FIRST AMENDMENT TO PROTECT NEWSPAPERS FROM COMPETITION* (1989). Of course, many other communicators have sought government protection from competitors. For example, a consistent theme in the history of election law is the effort of groups to gain advantage over rivals. John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 411 (1980).

36. Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 350 (1949). See also *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("nothing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they apply legislation").

37. 460 U.S. 575 (1983). See *infra* notes 184-98 and accompanying text.

38. 460 U.S. at 588.

39. *Id.* at 585. The Court believed that differential treatment of the press suggests that the goal of the regulation is related to suppression of expression. *Id.*

40. 481 U.S. 221 (1987) (law exempting religious, professional, trade, and sports magazines from sales tax found unconstitutional). See *infra* notes 199-213 and accompanying text.

ketplace of ideas.<sup>41</sup> But facially-neutral laws that differentiate among communicators may also harm the marketplace. By granting a certain segment of the press preferential treatment, the government may be seeking to enhance the presentation of particular ideas or subjects. Conversely, the government's action may also have the effect of retarding the presentation of some ideas and subjects. For example, a law taxing cable subscriptions but exempting newspaper sales may have the effect of favoring certain ideas or subjects that are associated with newspapers and disfavoring ideas associated with cable. Great difficulties exist in discovering the disparate impact of a facially content-neutral law. Courts are poorly equipped to evaluate media content to determine if particular ideas and viewpoints are associated with a particular medium of communication.

A solution to this problem is the adoption of a prophylactic rule requiring uniform treatment of similarly situated segments of the press, as well as uniform treatment of press and nonpress entities. This was the thrust of Justice O'Connor's opinion in *Minneapolis Star*. Others have voiced similar views. For example, Professor Ely argues for a prophylactic rule because "First Amendment freedoms are so peculiarly delicate, and the possibility of discrimination against certain ideas without effective judicial review is so evident, that taxes imposed in a First Amendment area must be universal and uniform."<sup>42</sup>

Given the dangers posed by underinclusive laws, why is any misfit between the means and the end allowed? The Court has a variable standard. Sometimes no amount of misfit is allowed, yet other times no amount of misfit is too much. Sometimes a plausible reason for exclusions is necessary. Other times only a compelling reason will suffice. And sometimes the Court is deferential in its scrutiny of the state's interest. Yet, as the recent decision in *Simon & Schuster, Inc. v. New York State Crime Victims Board*<sup>43</sup> illustrates, the Court occasionally disagrees

---

41. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) ("a law . . . permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship."). See generally Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

42. John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1330 (1970).

43. 112 S. Ct. 501 (1991). In *Simon & Schuster*, New York required that proceeds from the sale of a criminal's story be used to compensate the criminal's victims. New York argued that its interest was to compensate victims out of the proceeds of the sale of stories of their victimization. The Court, however, found that this merely posited the effect of the statute as the state's interest. "If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it

with the definition of the state's interest and concludes that the law is improperly tailored. To understand the variable standard, the Article will discuss cases in which the Court addressed possible misfit.

### 1. *Underinclusion as a Violation of the First Amendment*

In cases in which the Court finds that a law affecting freedom of expression is underinclusive, the misfit undermines the validity of the state's interest,<sup>44</sup> does not sufficiently promote the interest,<sup>45</sup> or presents the danger of suppression of ideas.<sup>46</sup> Four cases, *First National Bank v. Bellotti*,<sup>47</sup> *Florida Star v. B.J.F.*,<sup>48</sup> *R.A.V. v. City of St. Paul*,<sup>49</sup> and *City of Cincinnati v. Discovery Network, Inc.*<sup>50</sup> illustrate the Court's treatment of this type of law.

At issue in *Bellotti* was a Massachusetts law prohibiting certain expenditures by business corporations for the purpose of influencing the vote on referenda, except those materially affecting the property or assets of the corporation. Referenda concerning the taxation of the income,

---

makes all statutes look narrowly tailored." *Id.* at 510. The Court agreed that compensation of crime victims was a compelling interest, but found no legitimate reason to define the interest in compensation solely in terms of profits from storytelling.

44. See *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) (the underinclusiveness of a ban on public broadcast station editorials undermines the substantiality of an interest in preventing private groups from propagating their views via public broadcasting); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 79 (1981) (Powell, J., concurring) (the underinclusiveness of a ban on live entertainment undermines any argument about the need to maintain the residential nature of the community); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978) (the underinclusiveness of a ban on corporate referenda expenditures "undermines the likelihood of a genuine state interest in protecting shareholders"). Cf. *Carey v. Brown*, 447 U.S. 455, 465 (1980) (residential picketing statute violates the Fourteenth Amendment because its underinclusiveness fatally impeaches the state's claim that it is concerned with maintaining domestic tranquility).

45. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (law prohibiting mass media disclosure of the identity of a rape victim, but allowing disclosure by other means that may be as harmful, does not satisfactorily serve the interest in privacy); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (interest in encouraging fledgling publications is not served by content-based approach to taxation of magazines); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979) (statute punishing newspaper disclosure of the identity of a juvenile offender, but allowing broadcast disclosure, does not accomplish its stated purpose in protecting anonymity).

46. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-48 (1992) (selective prohibition of fighting words creates the risk that the city is seeking to handicap the expression of particular ideas); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored views).

47. 435 U.S. 765 (1978).

48. 491 U.S. 524 (1989).

49. 112 S. Ct. 2538 (1992).

50. 61 U.S.L.W. 4272 (U.S. Mar. 24, 1993).

property, or transactions of individuals were specified as not affecting the property or assets of corporations.<sup>51</sup> The appellants sought to make expenditures concerning a ballot proposition allowing a graduated income tax for individuals. The state defended the restriction as necessary to protect corporate shareholders by preventing use of corporate resources to express views with which some shareholders may disagree. The Court questioned the genuineness of this interest because a particular type of ballot question was singled out for special treatment. This suggested that the legislature had an impermissible motivation—silencing corporations on particular subjects.<sup>52</sup>

The law was also regarded as underinclusive because it applied only to business corporations and not to other entities in which persons may hold an interest or membership such as labor unions and other associations. “Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation.”<sup>53</sup> Significantly, the law did not prevent corporations from using corporate funds to express views on issues that were not the subject of referenda, even though shareholders might disapprove of those views. Finally, the law did not restrict lobbying. These attributes undermined the plausibility of the state’s purported concern for shareholders.<sup>54</sup> Even assuming that the interest in protecting shareholders was compelling, the link between the interest and the prohibition was insufficient to justify the restriction on speech.<sup>55</sup>

In his dissent, Justice White believed the Court was substituting its judgment for that of the legislature. The legislature could permissibly find, on the basis of experience which the Court lacks, that other activities and forms of association did not present the problems posed by corporate expenditures on referenda.<sup>56</sup>

---

51. 435 U.S. at 768 n.2.

52. *Id.* at 793. The Court stated that “the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” *Id.* at 784-85. Professor Nimmer argues that underinclusive laws restricting speech create a conclusive presumption that the state’s actual interest is content-based. NIMMER, *supra* note 2, § 2.06[B] at 2-94.

53. 435 U.S. at 793. For criticism of the comparison between stockholders of a corporation and members of a union, see Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235, 292-94 (1981).

54. 435 U.S. at 793.

55. *Id.* at 795. The statute was also overinclusive because it prohibited corporate expenditures even if shareholders unanimously authorized the expenditure. *Id.* at 794.

56. *Id.* at 816 n.13 (White, J., dissenting).

The difference between the majority and Justice White is explained by the majority's belief that the law seriously burdened First Amendment rights.<sup>57</sup> In contrast, Justice White regarded the law as only minimally affecting freedom of expression.<sup>58</sup> Because of this difference, the Court was unwilling to allow any misfit; Justice White, however, believed the Court should defer to the legislature's choice of means in an arena in which the "expertise of legislators" is at its peak.<sup>59</sup>

In *Florida Star* the Court overturned a verdict in favor of a rape victim whose identity was disclosed by a newspaper. Because of a Florida statute punishing disclosure of a rape victim's name in "any instrument of mass communication," the trial court found the newspaper was per se negligent. The Supreme Court drew upon *Smith v. Daily Mail Publishing Co.*,<sup>60</sup> concluding that publication of lawfully obtained information about a matter of public concern can be punished only when the state is furthering an interest of the highest order.<sup>61</sup> Although the Court acknowledged that the interests in protecting victims' privacy, protecting victims from retaliation by their assailants, and encouraging victims to report their crimes were highly significant,<sup>62</sup> it concluded that the publisher should not be punished.

One of the grounds relied upon by the Court was the law's underinclusiveness. The law prohibited publication of identifying information only if it appeared in an instrument of mass communication; other methods of communication that would be as harmful to the interests were permitted. "An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large

---

57. The Court regarded the speech in question as indispensable to the democratic process, 435 U.S. at 777. Because the people are responsible for judging arguments concerning government policy, the government is forbidden from restricting access to expression "lest the people lose their ability to govern themselves." *Id.* at 791 n.31.

58. Justice White believed that corporate expression was entitled to less protection than expression which contributes to self-realization. *Id.* at 809 (White, J., dissenting). Further, the law did not prevent corporate officials from publicizing their views at their own expense. *Id.* at 808-09. To Justice White, the law had the effect of merely curtailing the volume of expression. *Id.* at 821.

59. *Id.* at 804.

60. 443 U.S. 97 (1979) (law punishing disclosure of identity of juvenile offender).

61. 491 U.S. 524, 533 (1989).

62. *Id.* at 537.

numbers of strangers.”<sup>63</sup> Due to the importance of the First Amendment interests at stake, the Court was unwilling to allow the state to claim that partial prohibition at least created partial relief. The state must demonstrate its commitment to advancing the privacy interest by applying its prohibition evenhandedly “to the smalltime disseminator as well as the media giant.”<sup>64</sup> Without more inclusive precautions against alternative forms of dissemination, the Court was unwilling to regard the selective ban on publication by the mass media as satisfactorily serving the asserted interests.<sup>65</sup>

Justice Scalia in a concurring opinion argued that it was sufficient to decide this case solely on the grounds of underinclusivity. A law cannot be regarded as protecting an interest of the highest order if it leaves appreciable means of damage to that interest unprohibited.<sup>66</sup> Like the majority, Justice Scalia believed that oral disclosure of a victim’s identity among friends would cause as much discomfort as mass publication.<sup>67</sup> Justice Scalia concluded, “This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest ‘of the highest order.’”<sup>68</sup>

In his dissent, Justice White, joined by Chief Justice Rehnquist and Justice O’Connor, argued that the majority’s reliance on *Daily Mail* was misplaced, because those who are victims of crimes have privacy interests “infinitely more substantial” than the privacy interests of those accused of crimes.<sup>69</sup> In Justice White’s view, this case required greater sensitivity to the privacy interest. Consequently, he attached less significance to the interest in press freedom than the majority.<sup>70</sup> On the issue of underinclusiveness, Justice White claimed that other press cases involving underinclusiveness have involved circumstances in which a legislature singled out one segment of the news media for adverse treatment<sup>71</sup> or singled out the press for adverse treatment in comparison to other similarly situated enterprises.<sup>72</sup> The Florida law evenhandedly covered all forms of mass

---

63. *Id.* at 540. Justice White, though, believed that Florida tort law would reach the neighborhood gossip. See *infra* text accompanying note 74.

64. 491 U.S. at 540.

65. *Id.* at 540-41.

66. *Id.* at 541-42 (Scalia, J., concurring in part and concurring in the judgment).

67. *Id.* at 542.

68. *Id.*

69. *Id.* at 545 (White, J., dissenting).

70. *Id.* at 551-53.

71. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

72. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983).

communication. The law could exclude neighborhood gossips "because presumably the Florida Legislature has determined that neighborhood gossips do not pose the danger and intrusion to rape victims" that mass communication poses.<sup>73</sup> Justice White also claimed that the majority's analysis was misguided because it focused solely on the rape victim statute and did not acknowledge that other aspects of Florida law, such as the general privacy tort, could reach the neighborhood gossip.<sup>74</sup>

The difference between the majority and the dissent is explained by the importance each attached to the competing rights of press freedom and privacy. To the majority, punishing publication of truthful information was an "extraordinary measure,"<sup>75</sup> especially because the information concerned a matter of paramount public importance.<sup>76</sup> Moreover, if the press were liable for publication of information lawfully obtained from the government, the Court believed the press would engage in self-censorship.<sup>77</sup> Justice White's dissent, however, treated the newspaper's behavior as irresponsible<sup>78</sup> and causing great harm to the rape victim.<sup>79</sup> Any significant interest in reporting the victim's identity was outweighed by the invasion of privacy. If the First Amendment protected publication of this victim's name, Justice White believed the tort of public disclosure of private facts was obliterated.<sup>80</sup>

Despite its rhetoric, one should not read *Florida Star* as though remedial action by the legislature to broaden the law would make it constitutional. Including the neighborhood gossip within the law's reach would leave intact the law's serious impact on publication of newsworthy information. While the Court's language appears to leave open this corrective action by the legislature, the Court's criticism of the means may be a surrogate for criticism of the law's result. Likewise, the defects of the law in *Bellotti* would not be cured by expanding the ban to unions and other associations. In these settings, the preferred result under the First

---

73. 491 U.S. at 549 (White, J., dissenting).

74. *Id.* at 549-50. Justice Scalia, though, did not believe that it was clear that Florida's general privacy law would reach the neighborhood gossip. *Id.* at 542 (Scalia, J., concurring in part and concurring in the judgment).

75. 491 U.S. at 540.

76. *Id.* at 537.

77. *Id.* at 535, 538.

78. *Id.* at 547 & n.2 (White, J., dissenting) (stating that it is not too much to ask the press in instances such as this to respect simple standards of decency).

79. *Id.* at 542-43.

80. *Id.* at 551-53.

Amendment is for all communicators to enjoy equal freedom to communicate.

There are settings, though, such as in *R.A.V.*, in which the defect of a law is cured by increasing its breadth. In that case the city sought to defend its selective fighting words ordinance as a means of insuring the basic human rights of members of groups that have been historically subject to discrimination.<sup>81</sup> Justice Scalia's opinion for the Court found this compelling interest was promoted by the law.<sup>82</sup> However, because fighting words were properly regulated as an impermissible *mode* of speech, like a noisy sound truck, their regulation could not be based on the underlying message.<sup>83</sup> The law failed the dispositive test of whether the content discrimination was necessary because the "only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out."<sup>84</sup> Justice Scalia concluded that a fighting words ordinance not limited to the favored topics would serve the interest and eliminate the danger of viewpoint discrimination.<sup>85</sup>

In his concurring opinion, Justice White found the law overbroad because it reached protected expression that caused hurt feelings or resentment.<sup>86</sup> He strongly disagreed with the Court's treatment of the content distinction.<sup>87</sup> Drawing on *Burson v. Freeman*,<sup>88</sup> decided a month before

---

81. 112 S. Ct. 2538, 2549 (1992).

82. *Id.*

83. *Id.* at 2545.

84. *Id.* at 2550.

85. *Id.*

86. 112 S. Ct. at 2559 (White, J., concurring). He was joined in this part of his opinion by Justices Blackmun, Stevens, and O'Connor.

87. Justice White, joined by Justices Blackmun and O'Connor, felt that within a category of proscribable expression, the government may treat subsets differently without violating the First Amendment. *Id.* at 2553. The distinction between the Court and Justice White is buttressed by the different manner in which they viewed fighting words. Justice White believed that fighting words are not a means of exchanging views. Rather, fighting words are a means of provoking violence. Consequently, a ban on fighting words or a subset would not drive ideas from the marketplace. *Id.* The Court argued that categories of proscribable speech are not "invisible" to the Constitution; they may be regulated only on the basis of their distinctively proscribable content. 112 S. Ct. at 2543. Because fighting words were sometimes "quite expressive" of ideas, their treatment must be viewpoint neutral. *Id.* at 2544.

Justice Stevens disagreed with the analysis of both the Court and Justice White and proposed "a more complex and subtle analysis, one that considers the content and context of the regulated speech, and the nature and scope of the restriction on speech." *Id.* at 2567 (Stevens, J., concurring).

88. 112 S. Ct. 1846 (1992) (law prohibiting political speech near polling places found constitutional). See *infra* text accompanying notes 154-69.

*R.A.V.*, Justice White claimed that content distinctions are justified when narrowly tailored to serve a compelling interest. The St. Paul law was justifiable because the reasons for prohibiting fighting words have special force when applied to groups that have "long been the targets of discrimination."<sup>89</sup> If the city broadened the law, it would create a more restrictive alternative, which the Court would find defective because it is not precisely tailored to the need identified by the government.<sup>90</sup>

Justice White stated that it was inconsistent to hold that a city could proscribe an entire category of speech, but not selectively target a subset of that category.<sup>91</sup> Justice White believed that the Court's opinion meant that a narrowly drawn content-based law could never be valid if the object could be accomplished by banning a wider category of speech.<sup>92</sup> Consequently, governments were in the position of either enacting sweeping bans, or not legislating at all.

In the Court's view, a legislature could make distinctions within a category of expression under certain circumstances, such as if the basis for the distinction consists of the very reason the entire class of speech is proscribable.<sup>93</sup> Other bases may exist, but the touchstone is that the law must not suppress ideas. Save for that limitation, the regulation of fighting words, like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive instances alone.<sup>94</sup> Justice White predicted these exceptions would confuse lower courts, and Justice Stevens called them ill-defined.<sup>95</sup>

The Court framed its decision in terms of content discrimination and expressly disclaimed any concern for underbreadth. The Court stated that legislatures could selectively regulate proscribable speech in a viewpoint-neutral manner. For example, legislatures could proscribe obscenity only in certain media and markets.<sup>96</sup> The Court was signalling that it was not questioning every regulation of proscribable speech, but its com-

---

89. 112 S. Ct. at 2557 (White, J., concurring). Justice Stevens also found this to be reasonable. *Id.* at 2565 (Stevens, J., concurring).

90. *Id.* at 2554 n.5 (White, J., concurring)

91. *Id.* at 2553.

92. *Id.* at 2554.

93. 112 S. Ct. at 2545. Another basis for differential treatment of a subclass of proscribable speech is that the subclass is associated with particular secondary effects. *Id.* at 2546.

94. *Id.* at 2547.

95. *Id.* at 2560 (White, J., concurring), *id.* at 2562 n.1 (Stevens, J., concurring).

96. 112 S. Ct. at 2545.

ment provokes more questions than answers.<sup>97</sup>

One should not read the Court's willingness to tolerate viewpoint-neutral underinclusive regulations in the area of proscribable speech as necessarily applying to protected expression.<sup>98</sup> As noted previously, although one can view the selectivity of a law as an attribute because the government has limited the reach of the law, one can also view it as a defect that undermines the legitimacy of the state's interest. Perhaps justifications for the selective regulation of protected expression exist, but careful exploration of the justifications opens a dialogue on the advisability of: (1) broadening the class of actors affected by the prohibition; (2) broadening the class but lessening the law's burden; or (3) eliminating the law altogether.

Although the *R.A.V.* Court expressed a willingness to tolerate viewpoint-neutral underinclusive restrictions of proscribable speech, the subsequent *Discovery Network* case indicates the Court's animosity toward such restrictions of protected expression. The case involved a challenge to Cincinnati's decision to promote aesthetics and public safety by proscribing newsracks containing commercial publications, while allowing newsracks containing newspapers. The distinction was based on Supreme Court statements that commercial speech is less protected than other expression.<sup>99</sup> Cincinnati believed that treating the categories of expression alike would lower the protection of noncommercial expression.<sup>100</sup> Only sixty-two commercial dispensing devices were affected, which left between 1,500-2,000 newsracks on city streets.

One of the troubling aspects of Cincinnati's regulatory scheme was

---

97. As Justice Stevens observed, the Court "does not tell us whether . . . fighting words such as cross-burning could be proscribed only in certain neighborhoods where the threat of violence is particularly severe . . ." *Id.* at 2562 n.1 (Stevens, J., concurring).

98. Similarly, Justice White's criticism of "underbreadth" may also apply to the context of proscribable speech. *Id.* at 2553.

99. *See, e.g.,* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (the Court has afforded commercial speech a limited measure of protection "commensurate with its subordinate position in the scale of First Amendment values"). Justice Blackmun, who claimed that the Court's "chickens have come home to roost" in the *Discovery Network* case, found that Cincinnati's reading of the Court's commercial speech cases was understandable. Nonetheless, he argued that the status of commercial speech was not based on its lesser value to consumers, but on the need to protect consumers from deception and other such harms. 61 U.S.L.W. 4272, 4278 & n.2 (U.S. Mar. 24, 1993) (Blackmun, J., concurring).

100. *See* Brief for Petitioner at 28 (providing newsracks with commercial publications the same treatment as newsracks with noncommercial publications would violate the First Amendment protection of noncommercial speech). *City of Cincinnati v. Discovery Network, Inc.*, 61 U.S.L.W. 4272 (U.S. Mar. 24, 1993) (No. 91-1200).

that the city had no precise definitions of newspapers and commercial publications.<sup>101</sup> Both newspapers and respondents' publications featured core commercial speech as well as noncommercial speech. The difference between the publications was simply a matter of degree.<sup>102</sup> The lack of clear definitions presented the potential for "invidious discrimination of disfavored subjects,"<sup>103</sup> a condition found unacceptable in a previous newsrack case, *City of Lakewood v. Plain Dealer Publishing Co.*<sup>104</sup> The *Discovery Network* Court set this concern aside, and assumed for the purpose of deciding the case that the respondents' publications contained only "core" commercial speech and newspapers contained no such speech.<sup>105</sup> Thus, the issue in the case was whether the "low value" of commercial speech was sufficient justification for the selective ban on newsracks.

Justice Stevens, joined by Justices Blackmun, O'Connor, Scalia, Kennedy, and Souter, found that the city attaches "more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech."<sup>106</sup> Commercial speech, the Court noted, may be of more value to the audience than political discourse.<sup>107</sup> Therefore, any distinction drawn between newsracks must be related to the city's interests in safety and aesthetics. In this case, however, the distinction bore no relationship to the asserted interests.

The Court believed that all newsracks, regardless of content, were equally threatening to the asserted interests. For example, the Court stated that respondents' newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each new-

---

101. Newspapers were defined as publications that are published daily or weekly and *primarily* present coverage of current events. 61 U.S.L.W. at 4274. Commercial publications were those printed materials that advertise the sale of goods or services. *Id.* at 4272 n.2. The Court noted that newspapers include core commercial speech, and conversely the respondents' publications included some noncommercial speech. *Id.* at 4275. "Presumably, respondents' publications do not qualify as newspapers because an examination of their content discloses a higher ratio of advertising to other text, such as news and feature stories, than is found in the exempted publications." *Id.* at 4274 (footnote omitted).

102. *Id.* at 4275.

103. *Id.* at n.19.

104. 486 U.S. 750 (1988).

105. 61 U.S.L.W. at 4275.

106. *Id.* at 4274.

107. *Id.* at 4275 n.17 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977)). *See also id.* at 4276 n.21 (the interest in protecting the free flow of information is still present when such expression is found in a commercial context).

srack, whether containing 'newspapers' or 'commercial handbills' is equally unattractive."<sup>108</sup> The city's interests were not tied to distinctive effects of commercial content.<sup>109</sup> Furthermore, no secondary effects attributable to the newsracks existed that distinguished them from the permissible newsracks.<sup>110</sup> The Court concluded, "In the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.'" <sup>111</sup>

Due to Chief Justice Rehnquist's oft-stated animosity to First Amendment protection of commercial speech,<sup>112</sup> his dissent was not surprising. Chief Justice Rehnquist dissented because he believed commercial speech had low value. Moreover, he claimed Cincinnati's action was consistent with the Court's commercial speech precedents.<sup>113</sup> Chief Justice Rehnquist claimed the Court has never suggested that commercial speech can be favored over noncommercial speech, "but before today we have never even suggested that the converse holds true."<sup>114</sup>

The differing views of the majority and the dissent on the status of commercial speech explains their approaches to underinclusivity. The majority believed that commercial speech should be freely available to consumers who may value it highly.<sup>115</sup> Although commercial speech presents peculiar dangers, such as deception and coercion that are appropriately subject to regulation, these dangers have "little, if any application to a regulation" of the distribution practices of commercial publications.<sup>116</sup> Consequently, the Court closely examined the fit of the law and concluded that its benefits were paltry because it did not reach the vast majority of noncommercial newspaper racks that were equally

---

108. *Id.* at 4276. The Court added that in terms of aggregate impact, newspapers were "arguably the greater culprit because of their superior number." *Id.*

109. *Id.* & n.21.

110. *Id.* at 4277.

111. *Id.* at 4276.

112. *See, e.g.*, his dissent in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 790 (1976).

113. 61 U.S.L.W. at 4279-80 (Rehnquist, J., dissenting). Chief Justice Rehnquist was joined by Justices White and Thomas.

114. *Id.* at 4281.

115. *See supra* note 107.

116. 61 U.S.L.W. at 4276 n.21.

responsible for safety and esthetic problems.<sup>117</sup> Chief Justice Rehnquist believed it was appropriate to place the burden entirely on commercial speech because such speech is less central to the concerns of the First Amendment than noncommercial speech. He claimed that every newsrack removed from the sidewalks marginally served the asserted interests and the government need not completely fulfill its objectives.<sup>118</sup> Because the city had burdened less speech than necessary to achieve its goal, the underinclusivity was not fatal.

Chief Justice Rehnquist believed that treating commercial speech like noncommercial speech would force cities to choose between either prohibiting more speech or allowing "the proliferation of newsracks on its street corners to continue unabated."<sup>119</sup> But as the majority noted, it is possible to regulate the size, shape, appearance, or number of all newsracks.<sup>120</sup> This regulation would not level the protection of noncommercial expression because it does not completely ban newsracks. The Court found the availability of an obvious and less-burdensome alternative to the restriction of commercial speech was a relevant consideration in determining whether the fit of a law was reasonable.<sup>121</sup>

Two important questions, which are not directly answered in this case, bear on the general problem of underinclusive laws. First, the Court did not directly answer whether a complete prohibition on all newsracks would be constitutional. It assumed, *arguendo*, that a city might prohibit newsracks on public property. However, the Court noted that it granted certiorari in part because of the importance of newsracks as a means of disseminating speech.<sup>122</sup> More importantly, though, the importance the Court placed on the option of broadening the class affected by the law (all newsracks), but adopting measures less burdensome than a prohibition, indicates a complete prohibition would not be favored. Also, the tone of the majority opinion reflects the importance of equal freedom, rather than the concept of equal suppression. Second, the Court did not directly answer whether commercial speech must be treated like fully protected categories of speech if the regulation is not directed at content

---

117. *Id.* at 4274 & 4276.

118. *Id.* at 4280 (Rehnquist, C.J., dissenting).

119. *Id.* at 4281. Chief Justice Rehnquist believed that a city could order removal of all newsracks from its rights-of-way. *Id.* But see *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991) (citation of cases finding a complete ban on newsracks unconstitutional).

120. 61 U.S.L.W. at 4273.

121. *Id.* at 4274 n.13.

122. *Id.* at 4273 & n.10.

or specific adverse effects stemming from the content.<sup>123</sup> However, the Court's emphasis on how commercial and noncommercial publications were "equally" responsible for the problems of concern to the city<sup>124</sup> illustrates that distinct treatment of commercial and noncommercial speech must be justified by characteristics relevant to the law's purpose.<sup>125</sup>

## 2. *Permissible Laws that Selectively Target Sources of a Problem*

In certain First Amendment settings the Court finds that legislators may approach problems one step at a time,<sup>126</sup> or that targeting only a few sources of a problem does not undermine the justification for a law.<sup>127</sup> The Court also finds that the government should not be faulted for limiting the reach of a law,<sup>128</sup> and even that underinclusion is more appropriately addressed in equal protection challenges.<sup>129</sup> Two cases, *City*

---

123. *Id.* at n.11. In his concurring opinion, Justice Blackmun argued that truthful, noncoercive commercial speech concerning lawful activities was entitled to full First Amendment protection. *Id.* at 4279 (Blackmun, J., concurring).

124. 61 U.S.L.W. at 4276.

125. The cases cited as support for the Court's proposition that distinctions must be related to the asserted interests involved restrictions on noncommercial speech. See *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 510 (1991) (distinction drawn by Son of Sam law between income derived from criminal's description of his crime and other sources has nothing to do with the state's interest in transferring the proceeds of crime from criminals to their victims); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (state's interest in residential privacy cannot sustain a distinction between permissible labor picketing and prohibited nonlabor picketing).

126. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 n.11 (1986) (noting that while corporations are not the only type of entities that might divert resources for political purposes, Congress can approach the problem step by step).

127. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665 (1990) (excluding unincorporated unions from a ban on political expenditures does not undermine the state's justification for regulating corporations).

128. *United States v. Kokinda*, 497 U.S. 720, 733-34 (1990) (postal service policy of allowing some speech activities but banning solicitation at post offices testifies of its willingness to provide as broad a forum as possible). Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 n.5 (1973) (rejecting equal protection challenge to law restricting the political activities of some government employees and stating that the government cannot be faulted for attempting to limit the reach of the law).

129. *Kokinda*, 497 U.S. at 733-34. For examples of cases in which lower courts rejected a First Amendment challenge based on underinclusiveness, see *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777 (2d Cir. 1990) ("Son of Sam" law designed to compensate victims of crimes is adequately tailored), *rev'd*, 112 S. Ct. 501 (1991); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986) (content-based law prohibiting certain demonstrations found to be adequately tailored), *rev'd sub nom.* *Boos v. Barry*, 485 U.S. 312 (1988); *Movie & Video World, Inc. v. Board of County Comm'rs*, 723 F. Supp. 695 (S.D. Fla. 1989) (government may classify adult oriented businesses differently than other establishments); *Authors League of America, Inc. v. Association of American Publishers*, 619 F. Supp. 798 (S.D.N.Y. 1985) (Congress can create restrictions under the Copyright Act that apply to

*Council v. Taxpayers for Vincent*<sup>130</sup> and *City of Renton v. Playtime Theatres*<sup>131</sup> illustrate the Court's deferential treatment of content-neutral laws that do not address all sources of a problem. *Burson v. Freeman*,<sup>132</sup> a rare instance of the Court sustaining a content-based restriction of political speech, is also discussed.

*Vincent* involved a municipal ordinance prohibiting the posting of signs on public property. The Court concluded the law was content neutral and the property was not a public forum.<sup>133</sup> The Court rejected the argument that the city's aesthetic interest was compromised because equally unattractive signs were allowed on private property. Based upon *Metromedia, Inc. v. City of San Diego*,<sup>134</sup> in which a law permitted on-site billboards but banned off-site billboards, the Court concluded that countervailing interests can outweigh aesthetic interests in certain settings. The interest of the private citizen in controlling use of his property justified the disparate treatment, as did the fact that the posting of signs on private property left open a significant means of communication.<sup>135</sup> Even if some blight resulted, the aesthetic interest was sufficiently advanced by prohibiting signs on public property.<sup>136</sup>

Justice Brennan, in a dissent joined by Justices Marshall and Blackmun, feared that aesthetics can be a facade for content discrimination.<sup>137</sup> Justice Brennan found that aesthetic objectives should be accepted as substantial and unrelated to suppression of expression only if the government demonstrates that it is comprehensively pursuing its objective.<sup>138</sup> This approach guards against the danger of content discrimination, indicates the government's commitment to achieving its objective, and facili-

---

some materials, but not all, without violating the First Amendment), *aff'd sub nom.* Authors League of America, Inc. v. Oman, 790 F.2d 220 (1986).

130. 466 U.S. 789 (1984).

131. 475 U.S. 41 (1986).

132. 112 S. Ct. 1846 (1992).

133. 466 U.S. at 804, 813-15.

134. 453 U.S. 490 (1981). In *Metromedia* the Court concluded that despite "the apparent incongruity," a city could allow equally distracting and unattractive billboards at on-site locations, but prohibit them off-site. *Id.* at 511-12.

135. 466 U.S. at 811.

136. *Id.* at 811-12.

137. *Id.* at 823-24 (Brennan, J., dissenting). Justice Brennan believed that particular media may be used disproportionately for particular messages and a facially-neutral restriction may be content-discriminatory. *Id.* at 823 n.5.

138. *Id.* at 828.

tates judicial review of the fit between the ends and means.<sup>139</sup> Justice Brennan's approach did not mean that all aesthetic problems must be addressed at one time. Rather, he required that laws promoting aesthetics target both expressive and nonexpressive activities. Also, these laws may not arbitrarily prohibit a form of speech with the same aesthetic characteristics as those forms of speech that are allowed.<sup>140</sup>

To the majority, the posting of signs on public property was not a uniquely valuable or important mode of communication.<sup>141</sup> Justice Brennan, however, regarded the posting of signs as a "time-honored" means of communication of critical importance to "the poorly financed causes of little people."<sup>142</sup> While the majority assumed that alternative means of communication were adequate,<sup>143</sup> Justice Brennan examined the alternatives and found that they were inadequate.<sup>144</sup> Consequently, he believed that the government's justifications must be examined with exacting scrutiny.

In *Renton*, the Court addressed a zoning ordinance affecting the location of adult movie theaters. The Court concluded that the ordinance was content neutral because it was aimed at secondary effects, such as crime, associated with adult movie theaters.<sup>145</sup> It was permissible to treat adult theaters differently from theaters showing other types of films because the secondary effects were associated only with adult theaters.<sup>146</sup> However, the respondents contended that the ordinance was underinclusive because it did not affect other adult businesses likely to produce secondary effects similar to those associated with theaters. The Court rejected this claim on the ground that when the ordinance was adopted there were no other types of adult businesses located in or planning to locate in the city. "That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory

---

139. *Id.* He found the fit between the means and the ends particularly difficult to measure in cases in which the government claimed an interest in aesthetics. *Id.* at 824-26.

140. *Id.* at 829.

141. 466 U.S. at 812.

142. *Id.* at 819-20 (Brennan, J., dissenting) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943)).

143. 466 U.S. at 812.

144. *Id.* at 820-21 (Brennan, J., dissenting).

145. 475 U.S. 41, 47-48 (1986).

146. *Id.* at 52. Thus, the ordinance was narrowly tailored because it only targeted theaters which had adverse secondary effects on the community.

treatment.”<sup>147</sup>

In his dissent, Justice Brennan, joined by Justice Marshall, regarded the ordinance as underinclusive and consequently content discriminatory. The selective treatment of adult movie theaters “strongly suggests that Renton was interested not in controlling the ‘secondary effects’ associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit.”<sup>148</sup> A presumption of statutory validity should not apply if classifications turn on content, and in this case no justification existed for treating adult theaters differently from other adult establishments.<sup>149</sup> Additionally, because at the time of the ordinance’s adoption no adult movie theaters were located in or planning to locate in the city, no legitimate reason for the city to limit its ordinance to movie theaters existed.<sup>150</sup>

The majority treated the burden on expression as slight because it merely affected the location of adult theaters. Also, the social interest in protecting this type of expression was diminished.<sup>151</sup> Consequently, the Court adopted an exceptionally deferential approach, concluding that the city did not have to conduct its own studies of the secondary effects associated with adult theaters, but could rely upon whatever evidence the city believed was relevant.<sup>152</sup> Justice Brennan believed the ordinance seriously restricted access to constitutionally protected expression. Closely examining the record, Justice Brennan concluded that the city’s concern for secondary effects emerged only after the ordinance’s adoption. Any “findings” concerning the secondary effects of adult theaters were speculative at best.<sup>153</sup>

---

147. *Id.* at 52-53. The Court found no reason to believe that the city would not amend its ordinance to include other kinds of adult businesses. *See Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-89 (1955) (legislatures may approach problems one step at a time).

148. 475 U.S. at 57 (Brennan, J., dissenting). Justice Brennan also found that many of the reasons for the ordinance were nothing more than expressions of dislike for the content of adult films. *Id.* at 59.

149. *Id.* at 58. While the Court concluded that the ordinance did not discriminate on the basis of viewpoint, 475 U.S. at 48-49, Justice Brennan observed that this subject matter restriction had a viewpoint-differential impact; adult films carry a different message about sexual morality than other categories of films. *Id.* at 56 n.1 (Brennan, J., dissenting).

150. *Id.* at 58 n.2.

151. 475 U.S. at 49 n.2.

152. *Id.* at 51-52 (“The First Amendment does not require a city, before enacting [a zoning] ordinance [affecting adult theaters], to conduct new studies or produce evidence independent of that already generated by other cities.”).

153. *Id.* at 58-62 (Brennan, J., dissenting) (Court’s approach largely immunizes such measures from judicial scrutiny, because a municipality can readily find other ordinances to rely upon).

At issue in *Burson* was a Tennessee statute prohibiting the solicitation of votes and the distribution or display of campaign materials within 100 feet of the entrance to a polling place. Due to the statute's content-based regulation of political speech in a public forum, the Court required that it narrowly advance a compelling interest.<sup>154</sup> The Court found the law promoted two compelling interests, the right to vote freely, and the integrity and reliability of elections.<sup>155</sup> The necessity of the law was demonstrated by the history of election reform; for nearly a century states have provided a secret ballot and a restricted zone around the voting booth.<sup>156</sup>

Due to the compelling interest in securing the right to vote freely, it was unnecessary for the state to submit empirical proof of the law's beneficial effects.<sup>157</sup> When the exercise of First Amendment rights interferes with the act of voting, and the burden on free expression is slight, legislatures may "respond to potential deficiencies in the electoral process with foresight rather than reactively . . ." <sup>158</sup> Also, because the law represented a minor geographic limitation on speech, it was sufficiently tailored even though the boundary could have been less than 100 feet.<sup>159</sup>

The respondents claimed that the law was underinclusive because other types of speech were allowed within the zone. The Court did not agree that the failure to regulate all speech rendered the statute fatally underinclusive. Ample evidence proved that candidates used campaign workers to intimidate voters and commit electoral fraud; no evidence indicated that other types of speech, such as charitable solicitation, harmed the electoral process. The Court stated, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist."<sup>160</sup>

In his dissent, Justice Stevens, joined by Justices O'Connor and Souter, called the Court's scrutiny "toothless."<sup>161</sup> The plurality's reliance on

154. 112 S. Ct. at 1850-51.

155. *Id.* at 1851.

156. *Id.* at 1855.

157. *Id.* at 1856. The Court stated, "Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout." *Id.* at 1856-57.

158. *Id.* at 1857 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

159. 112 S. Ct. at 1857. The Court concluded that some zone was necessary, *id.* at 1856, and at a certain distance government regulation of vote solicitation would be impermissible, but the Tennessee law was on the constitutional side of the line. *Id.* at 1857.

160. *Id.* at 1856.

161. *Id.* at 1866 (Stevens, J., dissenting) (quoting *Matthews v. Lucas*, 427 U.S. 495, 510 (1976)).

history confused history with necessity, and mistook the traditional for the indispensable.<sup>162</sup> Whatever the original historical basis for campaign-free zones, their continued necessity was not established, especially because elections today are far less corrupt than in the past.<sup>163</sup> Also, use of the secret ballot and heightened regulation of the polling place meant that controlling speech outside the polling place was unnecessary.<sup>164</sup>

On the selectivity of the law, the dissenters criticized the plurality's belief that there was no proof that activities like charitable solicitation posed the same dangers as campaigning. "This analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is *on the State*. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff."<sup>165</sup> Nor was the content discrimination necessary to further the state's interests. Many other nonpolitical speech activities, such as religious speech, would be just as threatening to order around the polls as political expression. The discriminatory features of the law severely undercut the credibility of the law's justification.<sup>166</sup>

Despite its rhetoric about exacting scrutiny, the plurality was generous to the state, largely because the burden on expression was viewed as slight and justifiable as a means of protecting "one of the most fundamental and cherished liberties,"<sup>167</sup> the right to vote.<sup>168</sup> The dissenters perceived the need to prevent campaigning within the polling place, but regarded the law as silencing a significant amount of protected expression.<sup>169</sup> Moreover, speech outside the polling place is especially important to certain groups of candidates, such as the poorly funded, who lack the resources to use other means of communication.<sup>170</sup>

One should not read Justice Stevens' dissent in *Burson* as advocating that the law be broadened to change the campaign-free zone to a speech-free zone. Rather, the underlying premise is that all speakers, regardless of subject matter, should have access to the area outside a polling place. Justice Stevens stated, "Although we often pay homage to the electoral

---

162. *Id.* at 1862.

163. 112 S. Ct. at 1863.

164. *Id.* at 1862. The evidence supported a need for restrictions inside the polling place. *Id.*

165. *Id.* at 1866.

166. *Id.* at 1864.

167. *Id.* at 1859 (Kennedy, J., concurring).

168. 112 S. Ct. at 1857.

169. *Id.* at 1866 (Stevens, J., dissenting).

170. *Id.* at 1864.

process, we must be careful not to confuse sanctity with silence.”<sup>171</sup> Justice Brennan in his dissenting opinions in *Vincent* and *Renton* stated that targeting only certain expressive activities raised the danger of content discrimination. Broadening those laws to include nonexpressive activities would presumably lessen that danger. But precision of regulation is multi-factored; broadening the class affected by a law does not address the separate question whether the burden on that class could be lessened.

Read together, *Bellotti*, *Florida Star*, *R.A.V.*, *Discovery Network*, *Vincent*, *Renton*, and *Burson* reveal two central concerns that determine whether the Court defers to the judgment of lawmakers on a law’s selectivity: the burden a law imposes on freedom of expression, and viewpoint neutrality. If a law only slightly affects speech and is viewpoint neutral, the Court is most likely to defer to a legislature. But these concerns can also operate independently of one another, as *R.A.V.* and *Discovery Network* indicate. Even though the “hate speech” law in *R.A.V.* had no impact on protected speech, it was illegitimately based on the viewpoints of proscribable expression. In *Discovery Network*, although the law was viewpoint neutral, it created an impermissible burden on a category of protected expression. Part II addresses whether the central concerns of viewpoint discrimination and a law’s burden on speech fully explain the Court’s analysis of laws providing differential treatment of the press.

## II. DIFFERENTIAL TREATMENT OF MEMBERS OF THE PRESS

The distinct treatment of the broadcasting and print media is generally justified by broadcaster use of the electromagnetic spectrum. This Article does not address that well-worn topic. Instead, the focus here is those instances in which a segment of the press is treated differently from other members of the press even though there are no relevant distinguishing characteristics. Although each of these cases involves taxation, general principles emerge which forcefully apply in other settings.

### A. Grosjean

In 1934 Louisiana enacted a two percent gross receipts tax on the sale of advertising in newspapers and magazines with a circulation of more than 20,000 copies per week. The larger daily newspapers in the state were opposed to the machine politics of Huey P. Long. During legislative debates Long provided legislators with a circular stating “these big

---

171. *Id.* at 1866.

Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2 cents per lie."<sup>172</sup> The appellees emphasized Long's punitive intent in their brief to the Supreme Court.<sup>173</sup>

The Supreme Court unanimously found the law a violation of the First Amendment, but references to punitive intent are oblique.<sup>174</sup> The opinion examined the historical relationship between the press and government, emphasizing colonial taxes that were designed to prevent or curtail the acquisition of knowledge of governmental affairs.<sup>175</sup> Justice Sutherland wrote that "[a] free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."<sup>176</sup>

Although its rhetoric concerning freedom of expression marks a striking departure from the Court's early First Amendment cases, *Grosjean* is most notable for its emphasis on the lines drawn by laws restricting First Amendment activity and the effect of such laws. In terms of effects, the Court perceived that the tax would limit revenue and restrict circulation, and *if* increased, the tax might destroy both advertising and circulation.<sup>177</sup> The power to tax the press differentially was the power to destroy the press.<sup>178</sup> It is important to note that the Court feared where differential taxation might lead, rather than the modest impact of the tax in question.

The concern for the possibility of an even more burdensome tax is tied to the line-drawing issue. If the tax were generally applicable, the legislature would have to face more widespread discontent.<sup>179</sup> The concern for

172. Appellee's Brief at 9, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (No. 35-303).

173. *Id.* at 26.

174. Professor Ely refers to *Grosjean* as a masterpiece of ambiguity. Ely, *supra* note 42, at 1330. Justice O'Connor wrote that the motivation of the legislature may have been relevant to the decision in *Grosjean*, but the Court has been very inconsistent in its reading of *Grosjean*. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 580 (1983). For contrasting readings of *Grosjean*, compare *United States v. O'Brien*, 391 U.S. 367, 384-85 (1968) (motivation was irrelevant in *Grosjean*) with *Houchins v. KQED, Inc.*, 438 U.S. 1, 9-10 (1978) (motivation was relevant in *Grosjean*).

175. There are significant questions about the accuracy of the Court's interpretation of history in *Grosjean*. See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 78 (1969).

176. 297 U.S. at 250.

177. *Id.* at 244-45.

178. But as Justice Holmes stated, the "power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting). Justice Rehnquist argued the same point in *Minneapolis Star*. 460 U.S. at 601 (Rehnquist, J., dissenting). See *infra* text accompanying note 195.

179. See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J.,

punitive intent would be lessened if the law were broader in its application. Yet, this tax was suspicious because it applied only to a limited group of newspaper publishers.<sup>180</sup> Thus, the law was viewed as a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled . . . ."<sup>181</sup>

*Grosjean* is an easy case because the class of those taxed was selected in order to harm that class. When this occurs, the distinctions drawn cannot stand.<sup>182</sup> However, in instances where punitive purpose is less apparent than in *Grosjean*, how are courts to determine that the lines drawn are constitutional? *Grosjean* provides a partial answer to this question because the narrowness of the class taxed caused the Court to view the law as unconstitutional. Because the state's interest was raising revenue, targeting only a small group of newspapers fatally undercut the validity of the law.<sup>183</sup> In any setting in which a segment of the press is treated differently from another segment, a court should conclude that a distinction not relevant to a law's purpose is unconstitutional.

### B. Minneapolis Star

*Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue*<sup>184</sup> presented the Court with a Minnesota law exempting newspapers from sales tax; use of paper and ink to produce publications, however, was taxed. Because the first \$100,000 worth of ink and paper used by a newspaper was exempt, the tax fell hardest on large newspapers. The Star & Tribune Company claimed that the law was a tax on knowledge in violation of *Grosjean*. The newspapers claimed that the state may not tax

---

concurring) (there is no more effective guarantee against arbitrary government than to require that the principles of law which officials would impose upon a minority must be imposed generally).

180. 297 U.S. at 251. In addition to targeting newspapers opposed to Long, the law also reached one newspaper that did not oppose him. Long announced that he tried to exempt that paper, but was unable to devise a method to do so. Transcript of Record at 43. There were four newspapers with circulation barely under 20,000. Appellee's Brief at 37. The district court questioned the distinction drawn by the statute, stating no one will presume a paper whose circulation is 20,000 is not doing precisely the same business as one whose circulation is slightly below that figure. *American Press Co. v. Grosjean*, 10 F. Supp. 161, 164 (E.D. La. 1935), *aff'd*, 297 U.S. 233 (1936).

For a modern example of a law affecting the press that was suspicious because it affected an astonishingly underinclusive class, see *News America Publishing, Inc. v. F.C.C.*, 844 F.2d 800 (D.C. Cir. 1988).

181. 297 U.S. at 250.

182. Ely, *supra* note 42, at 1332.

183. A law treating the press like other businesses, however, would not present the same suspicions. As *Grosjean* noted, the press is not exempt from ordinary forms of taxation. 297 U.S. at 250.

184. 460 U.S. 575 (1983).

newspapers on a different basis than it taxes other persons, and that content neutrality—a central claim of the state—was irrelevant in tax cases. Further, the newspapers stated that the constitutionality of a tax is determined by its effect, and not by an absence of punitive intent.<sup>185</sup>

Writing for the Court, Justice O'Connor stated that *Grosjean* was not controlling because while "motivation . . . may have been significant"<sup>186</sup> in *Grosjean*, no legislative history existed in the Minnesota case. More importantly, Justice O'Connor wrote that improper motivation is not the sine qua non of a violation of the First Amendment; even a law aimed at proper governmental concerns can be unconstitutional if its effect is unduly restrictive.<sup>187</sup> Rather than addressing the effect of the law, though, the Court emphasized the line-drawing issues.

Although newspapers may be subject to generally applicable economic regulations,<sup>188</sup> the Minnesota tax was presumed invalid because it was facially discriminatory. The Court believed that the power to tax differentially gives the government a powerful weapon against the taxpayer selected. And the Court concluded that differential treatment of the press, unless justified by some special characteristic, suggests that the goal of the regulation is related to suppression of expression.<sup>189</sup>

The state claimed, and Justice Rehnquist agreed, that this law actually imposed a lesser burden on the press than a generally applicable sales tax.<sup>190</sup> To Justice Rehnquist, the burden of the law on those affected, rather than the line drawn, was the critical issue. Given the absence of improper motivation, and the law's minimal burden, Justice Rehnquist found no violation of the First Amendment.<sup>191</sup> Justice O'Connor, however, advocated a prophylactic rule requiring that the press be treated like other businesses. This position is premised on two concerns. First,

---

185. Brief of Appellant at 17, 49; Reply Brief of Appellant at 15, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (No. 81-1839). The state's claim of content neutrality is found in the Brief of Appellee at 9.

186. 460 U.S. at 580. See *supra* note 174.

187. 460 U.S. at 592.

188. *Id.* at 581. The Court concluded that the law singled out publications for treatment that is unique in Minnesota tax law. *Id.*

189. *Id.* at 585, 588. The Court referred to the case as involving First Amendment principles rather than equal protection interests. 460 U.S. at 585 n.7. See *infra* note 208.

190. 460 U.S. at 597-98 (Rehnquist J., dissenting). Justice Rehnquist called the differential treatment standard used by the Court "unprecedented and unwarranted." *Id.* at 598. Because there was no infringement of a constitutional right, he believed that the law must meet only rational basis scrutiny. *Id.* at 599-600.

191. *Id.* at 603.

the Court believed that if the press received treatment that was less burdensome than the treatment given to nonpress entities, the press might engage in self-censorship to avoid losing its special treatment.<sup>192</sup> Second, the Court doubted the ability of courts to identify treatment of the press that was more burdensome than the treatment given to other entities. The possibility of judicial error poses too great a threat to concerns at the heart of the First Amendment.<sup>193</sup> *Minneapolis Star* raises interesting issues. The case is not based on a finding of any chilling effect. The Court favored a prophylactic rule based on what *might* happen with differential treatment of the press. This judicial assumption is similar to that which animates overbreadth doctrine. Also, by emphasizing the importance of treating the press like other businesses, *Minneapolis Star* rejects the view that the press needs special treatment. This calls into question every exemption of the press from a generally applicable law, such as the Newspaper Preservation Act<sup>194</sup> which exempts certain newspapers from the antitrust laws. In addition, the concern for uniform treatment cannot be confined to economic regulations; the chilling effect the Court feared would likely occur in any setting where the press has preferential treatment by legislative grace. Likewise, the Court's fear of its inability to detect the burden of differential taxation can be applied to other areas of regulation that present equally complex matters. While one might discount the Court's modesty, as Justice Rehnquist did,<sup>195</sup> the value of a prophylactic rule is the heart of *Minneapolis Star*.<sup>196</sup>

*Minneapolis Star* also raises the problem of a law targeting only a small number of newspapers. The Court relied upon this as an additional ground, almost as an afterthought,<sup>197</sup> but Justice White, in a separate opinion, found that this feature alone was sufficient to invalidate the law.<sup>198</sup> The same fears that guided the Court's determination that the press be treated like other businesses also require that different segments

---

192. 460 U.S. at 588.

193. *Id.* at 589-90.

194. 15 U.S.C. §§ 1801-1804 (1988).

195. 460 U.S. at 601 (Rehnquist, J., dissenting) (considering the complexity of the issues this Court resolves each Term, this admonition is difficult to understand).

196. Uniform treatment is not, however, a condition sufficient to establish the constitutionality of a law affecting the press. At some level, a uniformly applicable sales tax would place an intolerable burden on First Amendment rights.

197. 460 U.S. at 591-92.

198. *Id.* at 593 (White, J., concurring in part and dissenting in part).

of the press be treated alike if there are no differences relevant to the purpose of the law.

### C. Arkansas Writers' Project

In *Arkansas Writers' Project, Inc. v. Ragland*<sup>199</sup> the Court addressed an Arkansas statute exempting newspapers and religious, professional, trade, and sport magazines from sales tax. The appellant claimed that content discrimination was facially unconstitutional because there was no meaningful distinction between newspapers and magazines.<sup>200</sup> The state defended the law as a general tax that did not single out the press or burden First Amendment rights.<sup>201</sup> Amici curiae in favor of the appellant claimed that because many products, such as cotton, were exempt from the sales tax, the state used exemptions to promote particular industries.<sup>202</sup> Also, the tax exemption was flawed because it applied to only a few publications.<sup>203</sup> Finally, amici curiae asserted that the power to end the exemption gave the government the power to chill expression, especially for marginally profitable publications.<sup>204</sup>

Writing for the Court, Justice Marshall stated that under *Minneapolis Star* a law can be invalid for treating the press differently from other enterprises or treating a small group of the press differently from other members of the press. Selective taxation of either type poses the danger of abuse by the government.<sup>205</sup> Because the law applied to only a small number of magazines,<sup>206</sup> and did so on the basis of their content,<sup>207</sup> the

199. 481 U.S. 221 (1987).

200. Brief for Appellant at 20-22, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (No. 85-1370).

201. Brief for Appellee at 13-14, *Arkansas Writers' Project*, 481 U.S. 221 (1987) (No. 85-1370).

202. Brief Amicus Curiae of the City and Regional Magazine Ass'n at 6-7, *Arkansas Writers' Project*, 481 U.S. 221 (1987) (No. 85-1370).

203. Brief Amicus Curiae of Times Mirror Co. and Newsweek, Inc. at 9, *Arkansas Writers' Project*, 481 U.S. 221 (1987) (No. 85-1370).

204. Brief Amicus Curiae of the City and Regional Magazine Ass'n at 23, *Arkansas Writers' Project*, 481 U.S. 221 (1987) (No. 85-1370).

205. 481 U.S. 221, 228 (1987).

206. The appellant claimed it was the only Arkansas magazine subject to sales tax, but the tax commissioner stated that three magazines paid the tax. The Court found that whether three magazines or one magazine paid the tax was irrelevant because the burden fell on a limited group. 481 U.S. at 229 n.4. The Court regarded the Arkansas law as similar to the \$100,000 exemption in *Minneapolis Star*. *Id.* at 229.

207. The Court cited broad principles concerning content-based regulation, *id.* at 229-30, and in particular found government scrutiny of content as a basis for imposing a tax entirely incompatible with the First Amendment. *Id.* at 230.

state was required to show that the law served a compelling interest in a narrowly drawn fashion.<sup>208</sup>

Relying upon *Minneapolis Star*, the Court stated that although raising revenue is an important interest, the censorial threat of differential treatment undercuts this interest.<sup>209</sup> The law was also flawed because of its misfit. The state argued that the law was necessary to assist "fledgling" publishers, but Justice Marshall found that it was both underinclusive and overinclusive as a means of serving this interest. Magazines were exempt on the basis of content, regardless of whether they were fledgling or mature. Also, those publications that were fledgling but discussed topics other than the exempt topics were ineligible for the tax exemption.<sup>210</sup>

Justice Scalia dissented, claiming that the majority proceeded on the false premise that denial of an exemption from taxation is equivalent to regulation.<sup>211</sup> He believed this law was not meant to inhibit nor did it have the effect of inhibiting the appellant's publication.<sup>212</sup> His dissent overlooks the principle expressed by the majority in both this case and *Minneapolis Star*—the actual impact of a law is irrelevant if differential treatment of the press or a segment of the press is not justified by any relevant characteristic. The rationale behind this principle is that the Court fears the censorial threat of differential treatment. Justice Scalia did acknowledge the appropriateness of prophylactic rules to prevent

---

208. *Id.* at 231. Justice Marshall commented that the appellant's First Amendment claims were intertwined with interests arising under the Equal Protection Clause. *Id.* at 227 n.3. See also *Police Dep't v. Mosley*, 408 U.S. 92 (1972); *supra* notes 24-26 and accompanying text. Nevertheless, Justice Marshall stated that *Arkansas Writers' Project* would be analyzed primarily in First Amendment terms. See *supra* note 189.

Although Justice Marshall presented the test as one involving the question whether the law was narrowly drawn, he most likely meant that the law must be precisely tailored. As shown throughout this Article, a law can be narrowly drawn and yet imprecisely tailored.

209. 481 U.S. at 231-32.

210. *Id.* at 232. The state also claimed its policy was to foster communication. The Court stated that while this might justify a blanket exemption of the press from sales tax, it cannot justify selective taxation of certain magazines. Because communication on only certain topics was fostered, the law did not serve this purpose in any significant way. *Id.*

211. *Id.* at 236 (Scalia, J., dissenting). As long as the law was subject-matter based, rather than viewpoint-based, Justice Scalia claimed that the government could determine which subjects to subsidize. *Id.* at 236-38. The majority responded that the First Amendment's hostility to content-based regulation extends to subject matter restrictions. 481 U.S. at 230.

212. *Id.* at 237 (Scalia, J., dissenting). Justice Scalia believed that if the law were manipulated to have a coercive effect, judicial relief would be possible. *Id.* This is similar to Justice Rehnquist's view in *Minneapolis Star*. See 460 U.S. at 601 (Rehnquist, J., dissenting).

viewpoint-based exemptions.<sup>213</sup>

Because *Arkansas Writers' Project* and *Minneapolis Star* involved laws treating a small group of one medium differently from other members of the same medium, questions remained about the power of the state to treat an entire medium differently from another medium.<sup>214</sup> *Leathers v. Medlock*<sup>215</sup> addressed those questions.

#### D. Leathers

Unlike *Grosjean* with its concern for the role of the press in our society, or the fear expressed in *Minneapolis Star* and *Arkansas Writers' Project* for the potential dangers of differential treatment, *Leathers* suggests that there are minimal First Amendment concerns when a medium is treated differently from other media.

In 1987 Arkansas imposed a sales tax on cable service while exempting print media and satellite services. The law was upheld by a chancery court because cable uses public rights of way.<sup>216</sup> The state supreme court, however, ruled that this attribute was not controlling.<sup>217</sup> Addressing the differential treatment of cable and satellite services, the state supreme court held that a tax that discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment.<sup>218</sup> Although the differential treatment of cable and satellite service was eliminated in 1989 when the legislature made the sales tax

---

213. 481 U.S. at 237 (Scalia, J., dissenting).

214. After *Minneapolis Star* and *Arkansas Writers' Project*, several tax laws treating one segment of the press differently from other segments were successfully challenged. See, e.g., *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1st Cir. 1987) (sales tax on magazines but not on newspapers found unconstitutional); *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. Sup. Ct. 1990) (same), cert. denied, 111 S. Ct. 1639 (1991); *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn. Sup. Ct. 1990) (same), cert. denied sub nom. *Commissioner of Revenue v. Newsweek, Inc.*, 111 S. Ct. 1639 (1991); *Dow Jones & Co., Inc. v. Oklahoma Tax Comm'n*, 787 P.2d 843 (Okla. Sup. Ct. 1990) (tax distinguishing between publications sold for more than 75 cents and those selling for less found unconstitutional); *Oklahoma Broadcaster's Ass'n v. Oklahoma Tax Comm'n*, 789 P.2d 1312 (Okla. Sup. Ct. 1990) (tax exemptions favoring print media over broadcast media found unconstitutional). Other challenges were unsuccessful. See, e.g., *Hearst Corp. v. Iowa Dep't of Revenue & Finance*, 461 N.W.2d 295 (Iowa 1990), cert. denied, 111 S. Ct. 1639 (1991).

215. 111 S. Ct. 1438 (1991).

216. Although unpublished, the opinion is contained as an appendix to the petition for writ of certiorari. *Petition for Writ of Certiorari*, App. C-10, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

217. *Medlock v. Pledger*, 785 S.W.2d 202, 203 (Ark. 1990), *aff'd in part & rev'd in part sub nom. Leathers v. Medlock*, 111 S. Ct. 1438 (1991).

218. *Id.* at 204.

also applicable to satellite services, the print media exemption remains. The state supreme court brushed aside the differential treatment of cable and print, stating its unwillingness to hold that all mass communication media must be taxed in the same way.<sup>219</sup> The state supreme court did not explain what characteristics distinguished cable from the print media.

Before the Supreme Court, the state sought to defend the law by arguing that cable's use of rights of way was a characteristic distinguishing cable from print.<sup>220</sup> Significantly, the state also argued that cable was simply not part of the traditional press such as newspapers.<sup>221</sup> It was justifiable to exempt newspapers from the sales tax "because of the long-standing relationship, exhibited by a lack of regulation, between government and the traditional press."<sup>222</sup> Finally, the state argued that the tax applied evenly to all cable operators.

The petitioners claimed that while distinctions may exist between cable and print communicators for the purposes of other types of regulation, there is no logical reason to differentiate between these segments of the press for the purpose of imposing a sales tax.<sup>223</sup> Moreover, the petitioners stated that the record revealed that cable transmits the same type of content as other media.<sup>224</sup> Accordingly, it was inappropriate for the state to selectively promote one medium over another. *Amici curiae* in support of the petitioners questioned the validity of distinguishing cable from other media because of cable's use of public property by noting that many communicators use public property<sup>225</sup> and that much of the prop-

---

219. *Id.*

220. Brief on the Merits by Appellant at 13-14, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-29). This point was also emphasized during oral argument. Transcript of Oral Argument at 7-9.

221. Brief on the Merits by Appellee at 4, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

222. *Id.* at 6. The state claimed that differential taxation was acceptable because the government and cable are connected in a way that government and newspapers are not. *Id.* at 13. *Amici curiae* in favor of the state's position claimed that a cable franchise is a substantial commercial benefit conferred by a city and thus justifies the distinct sales tax treatment. Brief of *Amici Curiae* the City of New York, the National League of Cities and the United States Conference of Mayors at 9, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

223. Brief for Petitioners at 34, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

224. *Id.* at 25. Because of the similarity of content between cable and newspapers, the petitioner argued that the state must show a compelling interest to justify the distinct treatment. Transcript of Oral Argument at 40. The state contended that because the law was content neutral, a rational basis for the distinction would be sufficient. *Id.* at 10.

225. Brief *Amicus Curiae* of the National Cable Television Association at 23, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

erty used by cable is privately owned.<sup>226</sup>

To the Supreme Court this case was unlike *Grosjean*, *Minneapolis Star*, or *Arkansas Writers' Project*. In Justice O'Connor's opinion, the necessity of a prophylactic rule and the presumption of unconstitutionality was absent. Instead, the Court viewed *Leathers* within the framework established by *Regan v. Taxation with Representation*,<sup>227</sup> which treated tax exemptions for speakers as subsidies that are a matter of legislative grace. Under this view of the case, cable had no First Amendment right to be exempt from the tax. By using the *Regan* framework, the Court fundamentally miscast the case. The key issue *Leathers* presented was whether there should be a prophylactic rule to prevent the chilling of speech by those media exempt from the tax.

The Court described the law as generally applicable because it applied to a broad range of speech-related and nonspeech-related products and services. Because cable was not singled out for taxation, the Court believed the law did not threaten the watchdog role of the press.<sup>228</sup> This overlooks the preferential treatment of the print media, which *Minneapolis Star* teaches could cause self-censorship among the print media to avoid loss of the tax exemption. Similarly, the Court's belief that the law was not based on an interest in censoring cable<sup>229</sup> ignores the possibility that the print media exemption may have been motivated by a desire to compromise the independence of the print media.

The Court believed that there was no danger of affecting a limited range of views because the tax applied to all cable operators.<sup>230</sup> However, a tax on a particular medium that exempts its competitors affects

---

226. Brief of Amici Curiae the Competitive Cable Association and the Media Institute at 12, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

227. 461 U.S. 540 (1983).

228. 111 S. Ct. at 1444. The Court claimed that the tax was unlikely to stifle the free exchange of ideas. *Id.* at 1447. A tacit assumption of this position is that the tax would not cause subscribers to drop cable service. This assumption is debatable because evidence in the record showed that the tax did cause some subscribers to cancel cable service. Joint Appendix at 80-81 (describing price sensitivity of cable customers and loss of subscribers due to sales tax). See generally SHEW, COSTS OF CABLE TELEVISION FRANCHISE REQUIREMENTS 17 (1984) (claiming that a franchise fee raises prices, causing fewer households to subscribe). If subscribers drop cable service but acquire similar information through another medium, the government's policy influences consumer preferences for media. Even if the availability of substitutes prevents the policy from stifling the free exchange of ideas, one may question why the government is permitted to affect consumer preferences for information outlets.

229. 111 S. Ct. at 1447.

230. *Id.* at 1444.

consumer preferences for information formats<sup>231</sup> and can distort the marketplace without targeting specific views. Why the government should have this power is unanswered in *Leathers*. The Court's claim that the law did not single out a narrow group because it reached all cable operators<sup>232</sup> is also unsatisfactory because it does not explain which media are entitled to equal treatment.<sup>233</sup> Because *Leathers* exhibits a complete lack of interest in a prophylactic rule requiring that the state treat similarly situated media equally, one may read the case as resting on a presumption that cable is not a full-fledged member of the press. Alternatively, the media at issue in *Leathers* may not be dispositive; one may read the Court's opinion in terms of the importance of facial content neutrality. That is, differential taxation of all members of any medium is acceptable as long as it is not content based.<sup>234</sup> Under this reading, the Court would have reached the same result if cable were exempt from the tax and the print media were taxed.

The Court's perception of viewpoint neutrality rests upon the claim that cable programming does not differ systematically from that offered by other media. This claim is dubious and irrelevant. First, trial courts have a difficult time perceiving cable as part of the press, so the strategy of the cable litigants was to show that cable transmits messages similar to those carried by other media, especially those exempt from the sales tax. No effort was made to establish the uniqueness of cable's messages. Thus, the record presented to the Court did not reveal the uniqueness of cable programming. Also, because the record established the similarity

---

231. Cable systems are generally subject to franchise fees, which can be as much as 5% of gross revenues. When the franchise fee is added to the sales tax, Arkansas cable systems were subject to an 11% tax on gross receipts. Cable systems may also be subject to utility taxes. In California 25% of a subscribers monthly bill is dedicated to taxation, much of which is imposed on a discriminatory basis. Brief Amicus Curiae of the California Cable Television Association at 20, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38).

232. 111 S. Ct. at 1444.

233. *Id.* at 1451 (Marshall, J., dissenting). Justice Marshall was critical of the majority's claim that the state could treat media differently as long as the number of media actors affected was not too "small." *Id.* Rather than looking at the total number of cable operators affected by the tax, Justice Marshall examined local market structures. Because most communities are serviced by only one cable company, the tax affected only a single actor in any given locale. *Id.* at 1452.

234. Just a few days after deciding *Leathers*, the Court denied certiorari to two cases involving differential taxation of newspapers and magazines. In *Hearst Corp. v. Iowa Dep't of Revenue & Finance*, 461 N.W.2d 295 (Iowa 1990), *cert. denied*, 111 S. Ct. 1639 (1991), the Iowa Supreme Court sustained the law because it was content neutral. In *Newsweek v. Celaurio*, 789 S.W.2d 247 (Tenn. 1990), *cert. denied*, 111 S. Ct. 1639 (1991), the Tennessee Supreme Court found that the law was content based and therefore unconstitutional.

of cable's content to that of other media, the Court saw no need to look for viewpoint-discriminatory effects. Second, if cable programming is identical to that of other media, what characteristics of cable justify the differential treatment? Recall that Arkansas argued that cable's use of public property and its lack of a tradition of freedom were sufficient justifications for differential treatment. Strikingly, the Court was uninterested in any justifications; a tax scheme that discriminates among speakers "does not implicate the First Amendment unless it discriminates on the basis of ideas."<sup>235</sup>

The Court's approach is backwards. Unless justified by distinguishing characteristics relevant to the purpose of the law, the Court should invalidate even content-neutral differential taxation of communicators. As Justice Marshall argued in his dissent, the Court should be skeptical of differential treatment because media players seek politically conferred advantages over their competitors.<sup>236</sup> Justice Marshall also feared that covert censorship occurs when the state favors those media it likes and punishes those it dislikes.<sup>237</sup> To guard against distortion of the marketplace,<sup>238</sup> he presumed differential taxation was unconstitutional and required that the state bear the burden of proving that the treatment was justified by some special characteristic of the medium or by some compelling interest.<sup>239</sup>

*Leathers* is the second case in recent years in which the Court declined an opportunity to clarify cable's First Amendment status. In *City of Los*

---

235. 111 S. Ct. at 1445. See *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (a tax scheme does not become suspect simply because it exempts only some speech). Based on *Regan*, the Court felt a strong presumption existed in favor of tax schemes. 111 S. Ct. at 1446. Also, drawing upon equal protection cases, the Court stated that inherent in the power to tax is the power to discriminate. See, e.g., *Madden v. Kentucky*, 309 U.S. 83 (1940) (in taxation, even more than in other fields, legislatures possess the greatest freedom in classification); *New York Rapid Transit Corp. v. New York City*, 303 U.S. 573 (1938) (no iron rule of equality has ever been enforced on the states in the field of taxation); *Magoun v. Illinois Trust & Sav. Bank*, 170 U.S. 283 (1898) (states have wide discretion in selection and classifying objects of legislation).

236. 111 S. Ct. at 1452 (Marshall, J., dissenting).

237. *Id.* at 1449-50.

238. Justice Marshall wrote, "Under the First Amendment, government simply has no business interfering with the process by which citizens' preferences for information formats evolve." *Id.* at 1453.

239. *Id.* at 1450. Justice Marshall did observe that the use of streets was insufficient justification for the sales tax because cable paid a franchise fee for the use of streets. *Id.* While distinct regulatory treatment might be tied to unique characteristics, there is no power in the state to burden cable with a selective tax absent a clear nexus between the special characteristic and the tax. *Id.* at 1450 n.2.

*Angeles v. Preferred Communications, Inc.*,<sup>240</sup> the Court determined it needed more facts about cable's use of rights of way before deciding if a potential operator's First Amendment rights were violated by an exclusive franchising policy. The sparse record on these technical matters in *Leathers* may explain the Court's unwillingness to address directly cable's First Amendment status. The signal sent by *Leathers*, however, is not encouraging. Many states currently impose significantly higher tax burdens on cable than on other media.<sup>241</sup> *Leathers* is bereft of any concern for the possibility of even greater burdens on cable, or the political dynamic that could explain why a new medium was taxed while its well-established and politically powerful competitor was exempt.

The Court may have disregarded the state's claim that cable was not part of the traditional press and viewed this as a content-neutral, generally applicable tax case. If this reading is correct, states are free to select which media are exempt from taxation without regard to distinguishing characteristics. This reading encourages those media with the greatest political influence to seek taxes disfavoring their competitors. Whether read narrowly as a cable case or broadly as a media case, *Leathers* allows politicians to use their ability to craft exemptions as a way of chilling speech.

### III. EXEMPTIONS FOR THE PRESS

The Court has consistently rejected press claims for special First Amendment status. Yet in *Austin v. Michigan Chamber of Commerce*,<sup>242</sup> the Court ruled that exempting broadcast stations, newspapers, and magazines from a law prohibiting corporations from making candidate expenditures was acceptable on equal protection grounds. One cannot reconcile the answer to the equal protection question in *Austin* with First Amendment doctrine. This Part argues that there are important reasons for a result different from that reached in *Austin*.

---

240. 476 U.S. 488 (1986).

241. See, e.g., Brief of Amici Curiae Cablevision Industries Corp., Comcast Corp., and Cox Communications, Inc. at 8-15, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (discussing differential taxation of cable in numerous states); Brief Amicus Curiae of the California Cable Television Association at 12-20, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (discussing differential taxation in California); Brief of the Indiana Cable Television Association, Inc. as Amicus Curiae at 1, *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (No. 90-38) (discussing differential taxation in Indiana).

242. 494 U.S. 652 (1990).

### A. Bellotti

*First National Bank v. Bellotti*<sup>243</sup> was the first opinion in which the Court addressed an exemption for the press. In *Bellotti*, nonpress corporations were prohibited from speaking on certain referenda. The state defended the law by arguing that nonpress corporations do not have First Amendment rights.<sup>244</sup> The appellant, however, claimed that the public's interest in receiving ideas forms the foundation for First Amendment protection of corporate expression. Thus, the distinction between businesses that are part of the press and those that are not was ill-founded. "[I]t is of little or no significance whether the source of the information is a media or non-media source. It is the right to receive the message which counts."<sup>245</sup>

Writing for the Court, Justice Powell did not ask whether corporations have First Amendment rights. Instead, he asked whether the statute abridged expression the First Amendment was designed to protect. The answer was simple: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."<sup>246</sup> Because of the emphasis on the right to receive expression, Justice Powell concluded that the press does not hold a monopoly on either the First Amendment or the ability to enlighten.<sup>247</sup> If viewed from the perspective of the right to receive expression, characteristics that otherwise might be a basis for distinguishing media corporations from nonmedia corporations, such as shareholder consent,<sup>248</sup> are irrelevant.

On its face, *Bellotti* indicates that all communicators are similarly situated because of the audience's right to receive expression. However, this ties the assessment of similarity to a rather tenuous foundation. As previously shown, the right to receive expression "consists of a bundle of concepts, each of which has vitality in a narrow context."<sup>249</sup> A more certain foundation exists in *Bellotti's* concern for self-government. Ac-

---

243. 435 U.S. 765 (1978).

244. Brief for the Appellee at 13, *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (No. 76-1172).

245. Brief for Appellants at 42.

246. 435 U.S. at 777.

247. *Id.* at 782. In particular, some voters would be as interested in hearing appellants' views as the views of the possibly less knowledgeable media. *Id.* at 782 n.18.

248. For a discussion of the rights of shareholders in media and nonmedia corporations, see Brudney, *supra* note 53, at 240 (stockholder consent is not necessary before media corporations communicate with the public).

249. Lee, *supra* note 30, at 343.

ording to Justice Powell, the government is forbidden from restricting the public's access to expression "lest the people lose their ability to govern themselves."<sup>250</sup> The self-government perspective regards any effort by the government to dictate the subjects about which a person may speak as illegitimate.

In addition to the self-government perspective, two other aspects of *Bellotti* have significance for a discussion of *Austin*. The record in *Bellotti* did not indicate that corporate involvement created undue influence.<sup>251</sup> Moreover, the Court believed the undue influence argument would have an unsettling impact if applied to the news media. "One might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of the small and less influential members."<sup>252</sup>

The dispute in *Bellotti* about the First Amendment status of press and nonpress corporations also helps explain *Austin*. In a concurring opinion, Chief Justice Burger argued that the First Amendment does not belong to any definable category of persons or entities. It belongs to all who exercise its freedoms.<sup>253</sup> In his dissent, however, Justice Rehnquist stated that there is an important distinction between the First Amendment rights of the press and other speakers. When a state charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to liberty of the press essential to the conduct of its business.<sup>254</sup> Justice Kennedy, in his *Austin* dissent,

250. 435 U.S. at 791 n.31.

251. *Id.* at 789-90.

252. *Id.* at 791 n.30.

253. *Id.* at 802 (Burger, C.J., concurring).

254. *Id.* at 824 (Rehnquist, J., dissenting). Justice White in dissent claimed that there was no self-realization in corporate expression, *id.* at 807 (White, J., dissenting), a claim that the majority noted could also apply to press communication. 435 U.S. at 783 n.19.

Following *Bellotti* there was an outpouring of commentary on whether the expression of press corporations should be treated differently from that of nonpress corporations. Compare Brudney, *supra* note 53, (stockholder consent required before a nonmedia corporation can engage in political speech, stockholder consent is not necessary with media corporations) with F.W. Dietmar Schaefer, *The First Amendment, Media Conglomerates and "Business" Corporations: Can Corporations Safely Involve Themselves in the Political Process?* 55 ST. JOHN'S L. REV. 1 (1980) (expression of nonmedia corporations and media corporations is equally protected). Other commentators who propose a distinction between the rights of press corporations and nonpress corporations acknowledge that they lack a clear conception of the "press." See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 357 n.72 (1989).

Many have written about the issue of special status for the press and a common point of disagree-

would restate Chief Justice Burger's position. The *Austin* majority would repackage in equal protection terms Justice Rehnquist's distinction between press and nonpress corporations.

### B. Massachusetts Citizens for Life

*FEC v. Massachusetts Citizens for Life*<sup>255</sup> involved a federal statute prohibiting corporations and unions from using treasury funds for expenditures in connection with any federal election.<sup>256</sup> News stories, commentaries, and editorials distributed by broadcasters, newspapers, magazines, and other periodical publications, are not considered expenditures.<sup>257</sup> In *Massachusetts Citizens for Life (MCFL)*, a prolife group issued a special edition of its newsletter rating candidates on prolife issues and urging voters to vote prolife in an upcoming primary. The Federal Election Commission (FEC) brought an enforcement action against the group, and the district court ruled that the special edition was within the press exemption.<sup>258</sup> The court of appeals held that the special edition

---

ment is over the definition of the press. Floyd Abrams claims that the definitional difficulties are not insurmountable. Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 580-81 (1979). This simply misses the point. Of course the press can be defined, but every definition has some consequences. As Professor Lange wrote, if the term press is defined broadly enough to include the pamphleteer, the definition will approach "speech" to the point that exclusions are arbitrary and unjustified. If the definition is narrowed to exclude the pamphleteer, the result is perverse because the Framers recognized pamphlets as part of the press. David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 106 (1975). See also Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 607 (1979) (broad definition of the press loses the point that the First Amendment has special protection for the news media). As Professor Nicholson has written, the problem is not the impracticability of making a distinction between the press and other businesses, but in finding a theory that will justify a distinction. Marlene Arnold Nicholson, *The Constitutionality of the Federal Restriction on Corporate and Union Campaign Contributions and Expenditures*, 65 CORNELL L. REV. 945, 961 (1980).

255. 479 U.S. 238 (1986).

256. 2 U.S.C. § 441b (1988). Corporations may establish separate segregated funds, commonly known as PACs, if they want to financially participate in the electoral process. For commentary on this statute, especially in light of *Bellotti*, see Fletcher N. Baldwin, Jr. & Kenneth D. Karpay, *Corporate Political Free Speech: 2 U.S.C. § 441b and the Superior Rights of Natural Persons*, 14 PAC. L.J. 209 (1983); Roy B. Birnbaum, *The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti*, 28 AM. U. L. REV. 149 (1979); Bolton, *supra* note 35; Nicholson, *supra* note 254; Benjamin M. Vandegrift, *The Corporate Political Action Committee*, 55 N.Y.U. L. REV. 422 (1980).

257. 2 U.S.C. § 431(9)(B)(i) (1988). For a discussion of cases in which this exemption was at issue, see Martin Boles, *Regulating Newsletters Under the Federal Election Laws and the First Amendment*, 40 ARK. L. REV. 79 (1986).

258. 589 F. Supp. 646, 650 (D. Mass. 1984), *aff'd*, 769 F.2d 13 (1st Cir. 1985), *aff'd*, 479 U.S. 238 (1986).

was not within the press exemption, but found the law unconstitutional as applied because the newsletter did not implicate any of the governmental interests underlying the statute, such as the creation of political debts.<sup>259</sup>

Before the Supreme Court, the FEC claimed that if newsletters like these were within the news media exemption, the prohibition on expenditures would be virtually eliminated because any corporation or union that operated an in-house organ could use its treasury funds to distribute unlimited express advocacy to the general public.<sup>260</sup> Because the prolife group was not in the business of distributing newsletters, its actions were pure election advocacy.<sup>261</sup> The prolife group claimed that liberty of press is not the special province of the traditional institutional press, but a fundamental right that comprehends every sort of publication.<sup>262</sup> Moreover, the legislative history, though sparse, evinces an intent to give the terms 'newspaper' and 'periodical publication' the widest definition.<sup>263</sup>

The Supreme Court held that the special edition did not fit within the press exemption, nonetheless the statute was unconstitutional as applied to the prolife group. The group did not pose the danger of corruption of the political process, nor did the group divert contributor's funds because contributors were aware that the group was spending their money for political purposes.<sup>264</sup> Although Justices Rehnquist, White, Blackmun, and Stevens found the prohibition constitutional as applied to the prolife group, all members of the Court agreed that the special edition did not fall within the press exemption. No member of the Court questioned the validity of the statutory exemption for the press.

Writing for the Court, Justice Brennan agreed with the FEC that it was necessary to narrowly construe the press exemption, otherwise the door would open "for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to

---

259. 769 F.2d 13, 22-23 (1st Cir. 1985), *aff'd* 479 U.S. 238 (1986).

260. Brief for Appellant at 18, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (No. 85-701). It is permissible for such groups to distribute election materials if financed through a separate segregated fund. The FEC cited the proliferation of PACs as evidence that the law did not limit the free flow of political information. *Id.* at 24.

261. Transcript of Oral Argument at 8.

262. Brief for Appellee at 37, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (No. 85-701). At oral argument, counsel for the prolife group stated: "Freedom of the press is not a captive of the media conglomerates." Transcript of Oral Argument at 39.

263. Brief for Appellee at 20, *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986) (No. 85-701).

264. 479 U.S. 238, 258-61 (1986).

distribute campaign material to the general public, thereby eviscerating [section] 441b's prohibition."<sup>265</sup> Consequently the Court focused on factors such as disparity between the circulation of the regular newsletter and the special edition, the difference in staffs, and the fact that the special edition lacked the masthead that appeared on the regular newsletter.<sup>266</sup>

These factors can be regarded as superficial, but the distinction between press expression and expression by nonpress organizations rests on deeper concerns. The Court's opinion accepts the traditional fear of campaign participation by nonpress business corporations. *Bellotti* certainly raises provocative questions about the validity of that fear, but the Court avoided reconciling *Bellotti* with the statute. Also, by not questioning the press exemption, the Court was tacitly agreeing that speech by the press does not taint the political marketplace. Or stated differently, any tainting caused by the press is the price that must be paid for a free press. The statutory exemption stands at odds with the First Amendment doctrine that the press is not special.

The narrow definition of the press in *MCFL* was not harmful to the prolife group because the Court was willing to address whether speech by the prolife group damaged the political process. *MCFL*, however, concluded that the group was unlike a business corporation,<sup>267</sup> leaving the distinct impression that the Court would not closely examine a restriction on other types of corporations.<sup>268</sup>

### C. Austin

*Michigan Chamber of Commerce v. Austin*<sup>269</sup> concerned the Michigan Chamber of Commerce's attempt to advocate the election of a candidate by placing an advertisement in a newspaper. A state statute, however,

---

265. *Id.* at 251.

266. *Id.* at 250-551.

267. The Court distinguished the prolife group from business corporations because it: 1) was formed for the express purpose of promoting political ideas; 2) had no shareholders; and, 3) was not established by a business corporation or union and did not accept contributions from those groups. *Id.* at 264.

268. The *Bellotti* Court stated that it was not addressing the validity of restrictions on corporate participation in *candidate* elections. 435 U.S. 765, 788 n.26 (1978). Also as the *MCFL* Court noted, there is a difference between completely preventing corporate expression about candidates and requiring that corporations channel such expression through PACs. 479 U.S. at 259 n.12. The two cases left unresolved the validity of laws requiring that business corporations use PACs for expression about candidates.

269. 494 U.S. 652 (1990).

prohibits corporations from making expenditures in support of or in opposition to candidates. Corporations may establish separate segregated funds, commonly known as political action committees (PACs), for such activities. The Michigan law allows expenditures by broadcast stations, newspapers, magazines, or other periodicals for news stories, commentaries and editorials concerning candidates.

The Chamber filed suit to prevent enforcement of the law and the district court found the law constitutional.<sup>270</sup> The district court believed the distinction between corporations and unincorporated entities was justified by the threat of corporate power to the political process. The court considered the press exemption on equal protection grounds and concluded that the distinction was not between media and nonmedia corporations; the law would exempt any corporation's expression if it regularly published a periodical or operated a broadcast station.<sup>271</sup> The Court of Appeals for the Sixth Circuit found the law unconstitutional as applied to the nonprofit Chamber.<sup>272</sup>

Before the Supreme Court, the state claimed that the ability of the Chamber to engage in political speech was not inhibited by the requirement that corporations make expenditures through separate segregated funds.<sup>273</sup> Further, the state defended the press exemption as a recognition of the First Amendment right of the media to publish news and commentary about politics.<sup>274</sup> The law did not unconstitutionally discriminate between similar entities, but protected the integrity of the political process while leaving the media free to cover state election campaigns.<sup>275</sup>

The Chamber claimed that the law interfered with a corporation's ability to speak effectively, or perhaps even to speak at all. Between 25 percent and 50 percent of a PAC's funds are spent on its establishment and administration. Consequently, not all corporations can afford to form PACs, and those least able to form PACs are also least likely to cause

---

270. 643 F. Supp. 397 (W.D. Mich. 1986).

271. *Id.* at 405.

272. 856 F.2d 783 (6th Cir. 1988), *rev'd* 494 U.S. 652 (1990).

273. Brief for Appellants at 57, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (No. 88-1569).

274. Reply Brief for Appellants at 24-25, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (No. 88-1569).

275. *Id.*

corruption.<sup>276</sup> Because press corporations could communicate about candidates without having to establish PACs, the Chamber claimed the press had preferred status, contrary to First Amendment doctrine.<sup>277</sup> Moreover, the Chamber argued, it was untenable to claim that media corporations are less likely to corrupt the political process than other corporations.<sup>278</sup>

At oral argument, Justice O'Connor inquired about the media exemption. Counsel for the state explained that while a newspaper could not place a candidate advertisement in another newspaper, it could publish endorsements as part of the regular course of its business. This prompted members of the Court to question why press editorials and similar commentary were not regarded as distorting the electoral process.<sup>279</sup> Justice Kennedy in particular was concerned about the power of the state to dictate the circumstances of expression: "Well, you're saying—you're saying that corporations have too much power, that there is too much speech, that this is an evil, the corporations gather great deals of money, that they are created by the state. Therefore we give legislative deference. All of those arguments can be made to support the proposition that the AMA Journal, that the ACLU newsletter, ought to be regulated by the state."<sup>280</sup> When counsel for the state said it would only assert this power in the context of candidate elections, Justice Kennedy stated, "We are talking about a matter of principle."<sup>281</sup>

In an opinion that stands *Bellotti's* principles on their heads,<sup>282</sup> the Supreme Court upheld the law by a 6-3 vote with Justice Marshall writing for the Court and Justices Kennedy, Scalia, and O'Connor dissenting. The majority opinion addressed the separate segregated fund require-

---

276. Appellee's Brief at 28, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (No. 88-1569).

277. *Id.* at 7.

278. *Id.* at 38. Counsel for the Chamber did not mention the press exemption during oral argument, but did note that unlike federal law, the Michigan law did not affect unincorporated labor union speech. Transcript of Oral Argument at 24-25. Because the state's interest was the impact of wealth on the political process, the law was arguably underinclusive because it did not restrict unions that have substantial wealth. *Id.* at 25.

279. Transcript of Oral Argument at 10-11.

280. *Id.* at 16.

281. *Id.*

282. Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 115 (noting that *Bellotti's* vitality is threatened by *Austin*); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 613 (1991) (the principles of *Austin* stand in absolute contradiction to the principles set out in *Bellotti*).

ment as a First Amendment issue, but treated the press exemption as an equal protection issue.

The Court admitted that the separate segregated fund requirement burdened corporate expression. As a consequence, the Court's test was demanding on its face—the law must be narrowly tailored to serve a compelling interest.<sup>283</sup> However, because the law channeled corporate expression through PACs and was not viewed as a complete ban, the Court was quite generous in its treatment of the state's interest and the law's tailoring. In contrast, the dissenters regarded the law as creating a complete ban on corporate political expenditures because speech by a PAC is distinct from speech by a corporation.<sup>284</sup>

Instead of preventing the financial quid pro quo,<sup>285</sup> the state's interest was "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public's support for the corporation's political ideas."<sup>286</sup> By requiring that expenditures come from a separate segregated fund, the Court believed the law insured that expenditures reflect actual public support for the political ideas espoused by corporations.<sup>287</sup> Justice Marshall's phrasing of the state's interest blends two distinct concepts. The first concept concerns the accumulation of wealth through state-conferred advantages. Certainly corporations are not alone in receiving special advantages from the state. The second concept concerns public support for political expenditures. This argument could justify prohibitions on wealthy individuals whose expenditures might not be proportional to public support for their political ideas. By combining both concepts the Court sought, according to Justice Scalia's dissent, to create one good argument out of two bad ones.<sup>288</sup>

The Court's treatment of independent expenditures as "corrosive and

---

283. 494 U.S. at 658-61.

284. Justice Scalia observed that the law prohibited the corporation, as a corporation, from engaging in political speech. "What the Michigan law permits the corporation to do is to serve as the founder and treasurer of a different association of individuals that can endorse or oppose political candidates." *Id.* at 681 n.\* (Scalia, J., dissenting). Speech by the separate segregated fund is not speech by the corporation.

285. 494 U.S. at 659. See *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) (hallmark of corruption is the financial quid pro quo: dollars for political favors).

286. 494 U.S. at 660.

287. *Id.*

288. *Id.* at 680 (Scalia, J., dissenting). He added, "When the vessel labeled 'corruption' begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship 'special privilege'; and when that in turn begins to go down, it returns to 'corruption.'" *Id.* at 685.

distorting” is a striking departure from its earlier position in *Buckley v. Valeo*<sup>289</sup> concerning the harmlessness of independent expenditures.<sup>290</sup> The record in *Austin* did not indicate that independent expenditures by corporations distort the political process.<sup>291</sup> The lack of a record, however, was insignificant to the Court. In rejecting the claim that the law was overinclusive because not all corporations have the wealth to distort the political process, the Court stated that because all corporations have special benefits, they have the *potential* to cause distortion.<sup>292</sup> There are less restrictive alternatives to prevent distortion. As Justices Scalia and Kennedy wrote, the law should not affect speech that lacks the potential to distort political discourse, such as that by small corporations.<sup>293</sup> Furthermore, if the concern is protecting shareholders, state corporation law, rather than the separate segregated fund requirement, is a less restrictive alternative.<sup>294</sup>

The Court addressed the media exemption as an equal protection issue, requiring that the distinction be justified by a compelling interest.<sup>295</sup> Media corporations have the same state-conferred benefits as other corporations, but Justice Marshall wrote that media corporations differ from other corporations in that their “resources are devoted to the collection of information and its dissemination to the public.”<sup>296</sup> This justification for the press exemption was considered in a vacuum rather than in reference to the state’s interest in preventing distortion of the political process. Given the state’s interest, how is the allocation of corporate

289. 424 U.S. 1, 45-47 (1976).

290. 494 U.S. at 682-83 (Scalia, J., dissenting); *id.* at 702 (Kennedy, J., dissenting).

291. Recall that no record of distortion existed in *Bellotti*. See *supra* text accompanying note 251. Bolton claims that there is no evidence in the majority of states, which do not regulate corporate political expenditures, that corporations exert undue influence or that there is more corruption than in states that regulate corporate expenditures. Bolton, *supra* note 35, at 413.

292. 494 U.S. at 661. Neither was the law viewed as fatally underinclusive because it allowed labor unions to make direct expenditures from their large treasuries. Unions did so without the benefit of state conferred advantages and their members could refuse to support political activities. *Id.* at 665.

293. *Id.* at 688 (Scalia, J., dissenting); *id.* at 704-05 (Kennedy, J., dissenting).

294. For an explanation of how state corporation law would control campaign expenditures, see Fisch, *supra* note 282, at 634-42.

295. 494 U.S. at 666. Curiously missing from the Court’s equal protection analysis is any claim that stockholders in nonmedia corporations do not expect corporate resources to be used for political speech. Justice Brennan emphasized the importance of protecting shareholders in his concurring opinion. *Id.* at 673-76 (Brennan, J., concurring). For a discussion of stockholder rights in media and nonmedia corporations, see Brudney, *supra* note 53.

296. 494 U.S. at 667.

resources a relevant distinction? The Court would have us believe that there is potential harm to elections by a nonpress corporation that devotes only 1 percent of its resources to communication. In contrast, the Court does not view a press corporation that devotes 100 percent of its resources to communication as potentially harming elections. Would not the resources available, rather than the percentage of resources devoted to communication, better indicate the potential for distortion? Also, given the variation among members of the press on factors such as audience size, would not some press outlets be more likely to cause distortion than others?

A serious problem is raised by the the Court's effort to use resource allocation as a ground to distinguish media corporations from other corporations. At what point does a corporation devote enough of its resources to the dissemination of information to qualify for the exemption? Answering this question is not as easy as it might seem. For example, how does one classify a conglomerate that operates media properties in addition to other lines of business?<sup>297</sup> The Court ignored this problem by perceiving corporations as either devoting all of their resources to communication (the press), or a far smaller amount (nonpress corporations).<sup>298</sup> The Court's resource distinction may be a facade for the social perception that press involvement in politics is acceptable, while involvement by nonpress corporations is feared.

After briefly raising the matter of how corporations allocate their resources, the Court quickly shifted to another reason for distinguishing the press from nonmedia corporations. According to the Court, the press plays a *unique* role in informing the public about newsworthy events.<sup>299</sup> As with the resources distinction, the role of the press was presented in a vacuum and not in relation to the interest in preventing distortion. Because of the important role the press plays in the dissemi-

---

297. In his dissent, Justice Kennedy observed that the web of corporate ownership that links media and nonmedia corporations is difficult to untangle for the purpose of any meaningful distinction. *Id.* at 712-13 (Kennedy, J., dissenting).

The Court's resource distinction also points out a flaw in the statute's definition of the press. Other communications enterprises, such as cable television systems and on-line computer information services, devote their resources to the collection and dissemination of information. These new technologies, which are similarly situated to newspapers and broadcast stations in terms of the Court's rationale, are excluded from the state's press exemption.

298. Many nonpress corporations have extensive communications programs as part of their public relations strategy. See SCOTT M. CUTLIP & ALLEN H. CENTER, *EFFECTIVE PUBLIC RELATIONS* 402-450 (5th ed. 1978).

299. 494 U.S. at 667.

nation of political information, would not the press be more likely to distort elections than nonpress corporations?<sup>300</sup>

While the Court was distinguishing the press from other corporations, it also claimed that the press does not have First Amendment rights superior to the First Amendment rights of others.<sup>301</sup> The Court's claim means that the state may treat the press differently from other speakers, but is not constitutionally required to do so. This obscures more than it illuminates. First, the notion that the exemption was purely a matter of legislative grace seems bizarre. A requirement that the press channel its political commentary through PACs is transparently invalid.<sup>302</sup> Second, to conclude that the press plays a unique role represents value judgments about the need for press freedom, the danger of nonpress corporate expression, and the significance of speech by each. These value judgments intensely involve the substantive definition of First Amendment rights.<sup>303</sup>

*Austin* is a prime example of why the Court should not address concerns central to the First Amendment under the Equal Protection Clause. If the Court had approached the distinction under the First

300. To Justice Scalia, media wealth was more likely to produce the "New Corruption" than wealth that is generally making money through other endeavors. *Id.* at 691 (Scalia, J., dissenting).

301. 494 U.S. at 668. Justice Scalia referred to the theory of the "New Corruption" as a dagger at the throats of the press because the press exemption was not constitutionally required. *Id.* at 691 (Scalia, J., dissenting).

302. As Justice Kennedy stated, "The First Amendment would not tolerate a law prohibiting a newspaper or television network from spending on political comment because it operates through a corporation." *Id.* at 712 (Kennedy, J., dissenting).

303. It is apparent that value choices underpin the Court's perception of the unique role of the press. Consider the applicability of the state's interest to the press. Because the role of the press is to inform the public, it has the potential to distort political debate. As Justice Scalia stated, "media corporations not only have vastly greater power to perpetuate the evil of overinforming, they also have vastly greater opportunity." *Id.* at 691 (Scalia, J., dissenting). The concern that a corporation's ideas reflect public support also applies to the press. For example, a television station whose news operation loses money must subsidize the news with revenue obtained from the sale of advertising during other types of programming. In this illustration, the resources available to support the station's political coverage and commentary have little to do with public support for the station's political ideology. A separate segregated fund requirement would serve to prevent the diversion of resources to political purposes.

By concluding that the state was justified in exempting the press, the Court assigned greater value to press communication than communication by others. Its equal protection analysis in *Austin* takes the following form:

- 1) When differentiating among speakers, a compelling interest must be served;
- 2) The press is unlike other speakers because of its unique role in informing society; and
- 3) Given that the press is unlike nonpress corporations, the statute does not violate equal protection.

The critical prong of this analysis is the second, which concludes that the press has a unique social role. This assigns greater value to press communication than communication by others.

Amendment, the answer seems straightforward. First Amendment doctrine treats all speakers as equally valuable and consequently entitled to equal freedom of expression. Because the state could not require that the media channel their political expression through PACs, and the First Amendment rights of the media are no different from those enjoyed by others, the state could not impose this requirement on nonmedia corporations.<sup>304</sup>

The *Austin* Court was oblivious to the impact of the press exemption on political communication, a concern that would have been appropriately addressed under the First Amendment self-governing rationale. Because the law left the press free to discuss candidates, but burdened other types of businesses with the separate segregated fund requirement, political debate was skewed. For example, the PAC requirement eliminated the speech of small corporations who lacked the resources to establish separate segregated funds. On some issues small corporations may possess information that is unavailable elsewhere. It is unreasonable to assume that the press will cover the views of these corporations because the press may want to avoid some issues or views due to conflicting business interests. For those corporations with the resources to establish separate segregated funds, the impact of their expression is lessened because the audience attaches little credibility to PAC expression.<sup>305</sup> Further, the special treatment of the press raises the prospect of a chilling effect, a consideration at the heart of *Minneapolis Star*.

#### IV. CONCLUSION

Justice White's concurring opinion in *R.A.V.*, contrasted overbreadth, which seeks to avoid the chilling of protected speech, with "underbreadth," which allows unprotected speech to remain unpunished until the legislature drafts a broader law. One should read his criticism of "underbreadth" in the context of unprotected expression. As shown throughout this Article, examining what a law excludes is a critical part

---

304. Justice Kennedy implicitly made the same point in his dissent. 494 U.S. at 712-13 (Kennedy, J., dissenting).

305. Communication research shows that source identity influences whether an audience will accept a position advocated in a persuasive message. See, e.g., MARVIN KARLINS & HERBERT I. ABELSON, *PERSUASION: HOW OPINIONS AND ATTITUDES ARE CHANGED* (1970). Justice Kennedy observed that the record showed that PACs suffer from a poor public image. 494 U.S. at 708 (Kennedy, J., dissenting).

of determining whether a law is precisely tailored. In certain situations, exclusions do pose the danger of chilling protected speech.

Any law of general applicability<sup>306</sup> that can be validly applied to the press should be. It may seem bizarre to advocate elimination of press exemptions as a way of preserving press freedom, but the prophylactic rule requiring the press be treated like other businesses is premised on the chilling effect created by exemptions. Furthermore, because exemptions from valid laws are a matter of legislative grace rather than a constitutional requirement, application of the law to the press does not harm First Amendment freedoms.

Conversely, any law that cannot be validly applied to the press should not be applied to other communicators. In other words, where a law could not be constitutionally broadened to include the press, the Court should be intensely skeptical of its application to other speakers. Otherwise, differentiation between the press and other speakers creates a two-tiered structure of First Amendment rights. At its heart, *Austin* creates two separate tiers of First Amendment rights, but does so under the facade of equal protection. Because the Court does not believe the press should have special First Amendment rights, addressing whether a law could be validly applied to the press is a potent way of defining its constitutionality for other communicators. Courts are sensitive to the need for press freedom; this sensitivity should extend to other communicators. Freedom of expression means "freedom for all, and not for some."<sup>307</sup>

The central importance of a law's burden on expression and viewpoint neutrality explain much of the Court's assessment of laws treating communicators differentially. A disturbing undercurrent, though, is the significance the Court attaches to particular communicators. In *Austin* the perception of the relative insignificance of corporate political expression, and the danger of that expression, may explain why the scrutiny was strict in name only. The opinion's rhetoric is revealing; nonpress corporations are described as funnels for political war chests,<sup>308</sup> while the press is "a constitutionally chosen means for keeping officials elected by the

---

306. Of course, general applicability is not a sufficient condition to guarantee a law's constitutionality; such laws must also have an incidental impact on expression. See, e.g., *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (state promissory estoppel law is a generally applicable law that does not burden publishing; enforcement of such laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons).

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

308. 494 U.S. at 659.

people responsible to all the people whom they were selected to serve.”<sup>309</sup>

A possible explanation is that the Court is drawing upon social conventions concerning the appropriate roles of different enterprises. There is a highly emotional appeal to the phrase freedom of the press. Additionally, our society is accustomed to the press playing an active role in the political process. The relatively new phenomenon of nonmedia businesses participating in politics has neither the emotional appeal nor social acceptance of press freedom. As Professor Lindblom wrote, large corporations do not fit into the prevailing vision of democracy.<sup>310</sup> Similarly, new communications technologies are perceived differently from established media. It is remarkable that a central part of the state’s argument in *Leathers* was that cable lacked a tradition of freedom. Claims such as this reveal the treatment of the new medium as basically premised on its newness. Unfortunately, by its total lack of interest in the state’s justifications, the *Leathers* opinion does nothing to prevent equally disordered treatment of other new media. Government action that favors some communicators should be disfavored.

---

309. *Id.* at 668.

310. CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 356 (1977).

