



TOURO UNIVERSITY
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Touro Law Review

Volume 15 | Number 4

Article 18

1999

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Recommended Citation

Neuborne, Burt (1999) "Conflicting Claims to First Amendment Rights," *Touro Law Review*. Vol. 15: No. 4, Article 18.

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CONFLICTING CLAIMS TO FIRST AMENDMENT RIGHTS

*Burt Neuborne**

Honorable George C. Pratt :

Our next speaker, Burt Neuborne, of NYU Law School, is not only a law professor, constitutional scholar, and one of the leading scholars particularly in the area of the First Amendment, but as life goes on, his career broadens. He is now a television commentator frequently and even a movie star. He is in, I guess, every media there is known to man and women. Burt, you have the next half-hour, plus.

Professor Burt Neuborne:

Thank you, thank you. I had not planned to speak about my movie career, but given the slightest opening, I will. You will note that one of the cases that I may talk about is the *Hustler*¹ case, which I became deeply interested in only after I got the part in *People v. Larry Flynt*.² I asked them, "How did you come to ask me to play this role?" The two writers told me they were blocked one night writing the script and decided to have a couple of beers. They turned on the television and I was doing some "talking head" somewhere. They said, "That is Jerry Falwell's lawyer. That is the guy that is going to play Jerry Falwell's lawyer," which I thought was terrific, until I got the shooting script that said "Falwell's pompous and obnoxious lawyer approaches"—so much for my TV persona.

As veterans of past meetings recall, what I try to do during this slot is a summary of the Supreme Court's First Amendment jurisprudence. We are usually hard pressed to fit the cases into the

* John Norton Pomeroy Professor of Law and Legal Director of the Brennan Center for Justice at New York University.

¹ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1987).

² *PEOPLE v. LARRY FLYNT* (Columbia TriStar 1996).

time allotted. This is a strange term, and for all I know there may be something significant in this. But in the past term, unlike the last five or ten years where fully ten percent of the court's docket was taken up with important First Amendment cases, usually nine or ten for us to talk about--and this is on a docket that's shrinking all the time--for the first time this past term, there are only two First Amendment cases that are really significant. And only one of them, I think, is important to document. Since nature abhors a vacuum, that means I will get a chance to give a little retrospective look at the Rehnquist Court's First Amendment jurisprudence, and the predictions about some of the important issues that are likely to come up in the near future. One of the issues may be campaign finance reform, which is on the docket, and there are two certiorari positions on the docket for Friday's conference that are quite significant in that area and we will see where it occurs.

The first case is *Arkansas Educational Television Network v. Forbes*.³ This is an important sort of combined First Amendment, equal protection, democracy, and journalism case. The case is relatively simple, but very important. Public television in Arkansas decides to sponsor a debate between the candidates, and they just automatically invite the Republican and Democratic candidates.⁴ It is a congressional election. One of the third party candidates says, "Wait a minute. I'm on the ballot too and I may not win, but I managed to satisfy the relatively onerous requirements of getting on the ballot by petition in Arkansas to run for Congress."⁵ You cannot hold one of these debates without including all of the candidates because that would be a viewpoint choice by government.⁶ Because it is a public television station, a government funded television station, the government would be making a choice to favor the two established parties, the two major parties, the Republicans and Democrats, at the expense of this third party candidate who had gotten on the ballot."⁷

³ 118 S. Ct. 1633 (1998).

⁴ *Id.* at 1637.

⁵ *Id.* at 1638.

⁶ *Id.*

⁷ *Id.* at 1640.

The Arkansas television people said, "We want to put on a debate that will force the two candidates who have a chance to win to clash with one another and really have a serious discussion of issues.⁸ If we put on everybody who is running, what we will get is a kind of cacophony.⁹ We have a finite amount of time and we are making a journalistic decision, just like we would make a journalistic decision as to what would go into a newspaper.¹⁰ We are making a journalistic decision that this is the debate that really ought to go on only between the two major candidates.¹¹ To invite everybody is to in effect weaken the news value, the educational value that we think the program has."¹²

You can see that in this First Amendment case, unlike the usual First Amendment cases, you do not know who is wearing the First Amendment white hat. You do not know who the good guy is in this case, who can trot out the First Amendment as the club to beat the other people in the case. When it is a Hyde Park speaker and a policeman shutting down the speaker, then you know who is the speaker. You know who is supposed to get the First Amendment protection. But in the case like *Arkansas Television*, you've got a multiplicity of people, all of whom can claim legitimately that they have a significant First Amendment interest.¹³ The Arkansas Television Station is putting on the program. We are used to thinking of journalists as having very important First Amendment interests. You think about the newspaper cases and you cannot interfere with the editorial discretion of a journalist about what goes in the paper. The educational TV people say, "We are publicly funded, but we are journalists and perform the same kind of function. We should be entitled to the same First Amendment insulation about our decisions as the media." The two major party candidates say, "We have important First Amendment interests in having a serious debate with each other because we are the two people who will likely win and we want to inform the electorate so

⁸ *Id.*

⁹ *Id.* at 1643.

¹⁰ *Id.*

¹¹ *Id.* at 1638.

¹² *Id.*

¹³ 118 S. Ct 1633 (1998).

they can cast the best possible vote. And, of course, you've got the minority party candidate, the third party candidate who says, "This is ridiculous. Everybody is talking about the First Amendment candidate. It is my voice that ought to be injected into the political process so we have a reasonable chance of electing wrestlers as governors of states." So, it is the voice of the third party trying to enter the process, saying we are the First Amendment champions, riding the white horse and waving the First Amendment.

Finally, there is the audience, the people out there who need the information. What benefits them most in a case like this? What you have is a model of an emerging, more complex First Amendment world in which more than one person has a legitimate claim as to whom the First Amendment applies. This case parallels the case during the Presidential election when Ross Perot was excluded from the debate between Bush and Clinton. There you did not have a state action hook. The notion of whether the First Amendment is involved with a privately sponsored debate made it very difficult to litigate that case. This is that same issue in the context of a publicly sponsored debate.

The Eighth Circuit¹⁴ held that in choosing to create the debate, the public television station had created a public forum and that it could not exclude from the public forum on the basis of content, on the basis of the identity and the nature of the speaker.¹⁵ The court held that creating a public debate on television is like building a park.¹⁶ You cannot say who can come into that park and speak and who cannot.¹⁷ The Eighth Circuit then required that all candidates who are certified and on the ballot must be a participant in any publicly sponsored debate, and the Supreme Court reviewed that decision.¹⁸ The position of the candidate, which is the Eighth Circuit position, was that the real voice we are worried about is the outsider.¹⁹ This minority party candidate is basically being discriminated against

¹⁴ *Forbes v. Arkansas Educ. Television Network*, 93 F.3d 497 (8th Cir. 1996), *rev'd*, 118 S. Ct. 1633.

¹⁵ *Id.* at 503.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 504. *See Arkansas Television*, 118 S. Ct. 1633.

¹⁹ *Id.*

because he is not a Republican or a Democrat; but he is a candidate and he has satisfied the requirements of the State of Arkansas to get on the ballot.²⁰ You cannot treat candidates differently.²¹ All candidates have to be treated the same.²²

The educational television position was that the journalists have complete First Amendment discretion.²³ This is essentially a news judgment about how to structure a news event. As such, the news judgment has to be deferred to and you have to trust the journalists, even though they are government paid journalists, to do the right thing and to try to structure this so that the best information comes out.

As usual, of course, there was no organized brief on behalf of the audience. Very few people speak for the audience in American First Amendment law. Then there was an intermediate brief that we submitted from the Brennan Center at NYU,²⁴ which is a new center that has been set up to honor Justice Brennan and which attempts to make itself heard on issues of democracy. We said both the AETC position and the journalists' positions are wrong.²⁵ Both extreme positions are wrong.²⁶ You do not have to have everybody, and you do not have to delegate total discretion to the journalist.²⁷ What you should try to do is find an intermediate position that says this is not exactly like a private setting so that the journalists do not have complete discretion, but they do have limited discretion to set up the debate.²⁸ However, they must do so in a way that will maximize its educational and news value to the public.²⁹ Our suggestion was that there should also be firm regulations in effect before the event that will govern the exercise of

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 504.

²³ *Id.*

²⁴ See Amicus Curiae Brief of the Brennan Center for Justice at NYU School of Law in support of Respondent, *Arkansas Educ. Television Comm. v. Forbes*, 93 F.3d 497 (8th Cir. 1996) (No. 96-779).

²⁵ *Id.* at 11-14.

²⁶ *Id.* at 20-22.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

that discretion, so that the discretion is not *ad hoc* discretion that could be simply hidden discrimination in favor of a particular candidate.³⁰

Well, the Court bought half of our position.³¹ It bought that this was indeed a mixed setting in which the First Amendment rights of the journalists and the First Amendment rights of the excluded candidate had to be in some way balanced so that you do not go to an extreme where one's rights obliterate the other.³²

What the Court said was that presumptively the journalists can invite whomever they want, but the one thing they cannot do is discriminate on the basis of content.³³ In other words, the journalists cannot say, "I'll take this candidate and this candidate, but this candidate I'm not going to have on the basis of content." This is the first time I have ever seen the court do one of these hybrid First Amendment situations where they recognized that this is a journalism decision, but they also recognized that there are important values at stake for other players in the system and they try to work out a general plan that deals with both.³⁴

The dissent in the case accepted the notion that there ought to be formal hard rules in effect on how this discretion gets exercised as a condition of the journalists having this type of discretion.³⁵ The majority said they did not think that was necessary.³⁶ So, the basic norm that comes out is that on future educational television debates, educational television can make a judgment about who comes on.³⁷ It does not have to put all the candidates on, as long as it is not excluding candidates on the basis of content.³⁸

Now, those of you who are practicing lawyers will know that this is a bonanza for you. This is another one in a long history of Supreme Court decisions where the rightness or wrongness of a

³⁰ *Id.*

³¹ *Forbes v. Arkansas Educ. Television Network*, 118 S. Ct. 1633 (1998).

³² *Id.*

³³ *Id.* at 1641.

³⁴ *Id.*

³⁵ *Id.* at 1643-49 (Stevens, J., dissenting).

³⁶ *Id.* at 1639.

³⁷ *Id.* at 1640.

³⁸ *Id.* at 1639.

decision turns on motive. Is the motive really hostility to the content or is there some other legitimate non-content basis for the justification, for the exclusion, that is just a prescription for litigation? My sense is that what will happen in the future in these cases, especially without any hard rules in effect as to discretion, is that these exclusions will be challenged on the basis of the pretext—that the real reason that the person was kept off the ballot was the hostility in content. We have not seen the end of these cases by any means.

I should say that the phantom issue that was hovering behind this case, and what had at least some members of the Court very concerned, was public financing of elections. As you may know from reading the papers now, four states have gone to full public financing. We have full public financing now in Maine, Vermont, Massachusetts, and Arizona has just adopted by referendum.³⁹ One of the hard issues as the country confronts the notion of whether it wishes to subsidize the process is going to be how to allocate the money; who gets what? Does every candidate get the same amount, no matter what their level of support or do you tilt toward the more established candidates? Is that not unfair? Doesn't that just perpetuate the status quo? There will be very hard questions about how to allocate this money.

And I think what the court may have been doing in *Arkansas Television* is leaving the broadest opening for thinking about this without closing this down, because if the ACLU had been accepted in *Arkansas Television*, the principle would have continued over to the funding of elections. And all candidates would have essentially had to have been treated the same way, and there is some concern that this would have meant the end of serious public financing. On the other hand, if they had said total discretion, if they bought the journalists' position, then the concern would be that if we ever do go to a public financing position that gives the government — the

³⁹ Paul Carrier, *Big Hurdles Still Ahead for Campaign Finance Reforms*, PORTLAND PRESS HERALD, Nov. 7, 1996, at 10A; Timothy J. Connolly, *White's Cause: Clean Elections Law*, SUNDAY TELEGRAM, Feb. 14, 1999, at B1; Phoenix, *State Gets Federal OK for 2 Propositions*, THE ARIZONA REPUBLIC, Feb. 18, 1999, at B1; Bob Hohler, *Election Finance Targeted in Equality Fight*, *Big Money Seen as Insidious Force*, THE BOSTON GLOBE, Nov. 29, 1997, at A1.

powers that be -- much too much discretion in the allocation of this money. I think what the Court may have been doing is setting up a shadow, a regime for dealing with the next issue down the pike, but of course that is just speculation.

The second interesting case to come before the court --

Honorable George C. Pratt:

Can I ask you just one question?

Professor Neuborne:

Sure.

Honorable George Pratt:

Is news value a permissible consideration?

Professor Neuborne:

Yes.

Honorable George C. Pratt:

Isn't news value based on content?

Professor Neuborne:

The criteria are so soft, I know. The Court avoided actually coming down with the laundry list of particular criteria, but I think they would have said educational value of the performer instead of news value. I am not sure what that means -- that is why we were so insistent that there be written guidelines in effect so there would be a full public discussion as to what the criteria might be or should be before it went in. I am very skeptical about the practicality of what emerges from the Supreme Court in *Arkansas Television*.⁴⁰

⁴⁰ 118 S. Ct 1633 (1998).

They tell you that you are not supposed to use content but then by not requiring hard rules be in effect in advance and by accepting the notion of soft criteria like this, they virtually invite content based judgments that are hidden — that are described in non-content based terms. That is why I predict that many will be litigating these issues because they are very litigatable at this point.

The second issue, the second important case in the Supreme Court, *National Endowment for the Arts v. Finley*,⁴¹ turned out to be not a very important practical one. I thought it would be very important, but on a practical level it turned out to be less important. This case deals with, again, something that is going to be increasingly important in the next century in terms of free speech law—government decisions to subsidize certain kinds of speech.⁴² And I suggested to you that the *Arkansas Television* case is a subsidy case deep down because these are public funds being used to create a platform for private people to speak on.⁴³ And it is a free platform, so there is a subsidy there.⁴⁴ And the question is how do we deal with the constitutional rules governing subsidized speech. I am going to come back and talk about that in a second because I think that may be the most important issue that is coming out of these cases.

The *National Endowments for the Arts* case involves a program that was put into effect many years ago to create the National Endowment, as a way of funneling money to the artistic community in an effort to foster the broadest possible and richest diversity of artistic expression in the United States.⁴⁵ It was really an effort to say the wealthy do not decide what artist is worthy. There will be public money to support the arts instead of the old usual rule that a few rich families set the taste for everybody else by establishing the art market and deciding what is successful and what is not in the artistic world. This was a really marvelous effort to break away from that and to say there will be a broad diversity of art available

⁴¹ 118 S. Ct. 2168 (1998).

⁴² *Id.*

⁴³ *Arkansas Television*, 118 S. Ct. at 1639.

⁴⁴ *Id.*

⁴⁵ *Finley*, 118 S. Ct. at 2171.

because the public will subsidize it. And it has been generally conceived to be a very successful, wonderful program. But, of course, one of the criteria of the program has to be excellence. You are not going subsidize garbage. You do not want to subsidize bad art; you want to subsidize good art, so that immediately puts the government into the business of deciding what good art and bad art is. With all of the difficult definitional problems about what excellence means, over the years the temptation to add more criteria became uncontrollable because if the government is providing the money then politicians worry about how it is being spent. When one of the leading performance artists in the United States likes to take off all her clothes and bathe herself in chocolate on a stage, the question emerges in certain portions of the United States whether the government should pay for it.⁴⁶ That is what precipitated this issue. I mean, one of Karen Finley's major performances is to get naked and roll around in chocolate and the question is who should pay for it?⁴⁷

I, myself, am willing to pay very substantial amounts for it. So Congress imposed an additional criteria on top of excellence.⁴⁸ And the additional criteria were that it could not be indecent.⁴⁹ You could not fund indecent art, and you could not fund art that failed to respect the values of the people.⁵⁰ Two criteria that I am sure we in this room can immediately know exactly what they mean. You do not fund indecent art, and you do not fund art that does not respect the values of the people.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* See 20 U.S.C. §§ 954(c)(1)-(10) which provides for "grants in aid" or "loans" for arts projects and programs proposed by individuals or groups of "exceptional talent" who are "traditionally underrepresented recipients of financial assistance," to be funded through the National Endowment for the Arts. *Id.*

⁴⁹ See *id.*

⁵⁰ 20 U.S.C. § 954(d)(1). Section 954(d)(1) provides that in choosing recipients of grants for the arts, the Chairperson of the National Endowment of the Arts shall ensure that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public" *Id.*

There was an uproar in the art community over that and Congress backed away in the statute. They backed away and modified the statute to say that these are not obligatory criteria, these are predatory criteria the Endowment should keep in mind while it's giving out the funds.⁵¹ Of course, its final judgment on excellence is the real criteria that will govern.⁵² That is the way the statute reads. The statute reads in this rather bizarre way. They lay out the criteria of indecency and fidelity to the Nation's values, but just say that these are things you should keep in mind.⁵³ They are not binding. That was challenged. The criteria were challenged on the grounds that, "Yes, this is a subsidy, but there are limits on the extent to which the government can control the allocation, even of subsidized money."⁵⁴ It is the government's money, yes, but even the government's money is bounded in some sense by the First Amendment.

Arkansas Television is consistent with that, because to the extent it places First Amendment constraints on what the network can do,⁵⁵ it is essentially saying this is the subsidy. However, it is a subsidy that has to be allocated in accordance with First Amendment constraints.⁵⁶ It can not be allocated pursuant to content-based judgments.⁵⁷

The *National Endowment for the Arts* case is again a powerful reaffirmation of the notion that subsidized speech has some restrictions attached to it.⁵⁸ But what the Court did is pull the teeth of the program by saying, "Well, if you said it was predatory then it's predatory."⁵⁹ Then we are going to say it is predatory, and therefore we are not dealing with hard and fast criteria.⁶⁰ And since we are not dealing with hard and fast criteria, we do not see how

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998).

⁵⁵ *Arkansas Educ. Television Network v. Forbes*, 118 S. Ct. 1633 (1989).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Finley*, 118 S. Ct. at 2175.

⁵⁹ *Id.* at 2176.

⁶⁰ *Id.*

this really effects a significant intrusion into the First Amendment.”⁶¹ So they sustained as a matter of facial jurisprudence the existence of the statute.⁶² Whether or not there will be as applied challenge, I do not know at this point. The Court sustained as a matter of facial jurisprudence since it is the government’s money.⁶³ The government has very substantial control over how it spends in terms of what kind of speech it wishes to foster and what kind of speech it does not wish to foster.⁶⁴ As long as they were dealing with a relatively minor predatory statute they did not have to go to the mat and make final judgments on the levels of subsidized speech.⁶⁵

The *National Endowment of the Arts* case really does not advance the analysis on subsidized speech. It leaves us where we were before. I want to quickly review because I think the government’s role in subsidizing is so enormous that it subsidizes across the board. I am in the middle of challenging the restrictions on the legal service community. That case is still pending in the Second Circuit⁶⁶ and challenges the governments position that, “Hey, it’s our money, we can tell the legal services lawyer what to do with it.” My argument is that there are limits even on what the government can subsidize. That you cannot put content-based restrictions on, you cannot put different types of restrictions on. That is still pending in the Second Circuit.⁶⁷

There are two leading Supreme Court cases that you ought to keep in mind, because they are the two polar cases that tell you how subsidized speeches are going to be treated in the future: *Rust v. Sullivan*,⁶⁸ which is the case dealing with subsidized prenatal health programs and what doctors could say in those subsidized prenatal

⁶¹ *Id.*

⁶² *Id.* at 2177.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 2179.

⁶⁶ *Velazquez v. Legal Servs. Corp.*, No. 98-6006, 1999 WL 5300 (2d Cir. January 7, 1999).

⁶⁷ *Id.*

⁶⁸ 500 U.S. 173 (1991).

health programs;⁶⁹ and *Rosenberger v. The University of Virginia*,⁷⁰ which is a case involving allocations for subsidies for student newspapers at the state institution at the University of Virginia.⁷¹

In *Rust v. Sullivan*, as I am sure many of you know, Congress imposed a set of restrictions on doctors working for these federally funded prenatal care clinics.⁷² And what they said was that the doctors who work for the clinics cannot discuss abortion with their patients, even if they think abortion is a preferred medical option.⁷³ They can give information to the patients about where they can get additional information, but they can not themselves mention the word abortion or talk about it.⁷⁴ And nobody on the premises can.⁷⁵ So if you accept the federal subsidy, the argument was, you have to promise not to talk about abortion.⁷⁶

That was challenged in the Supreme Court as an obvious violation of the free speech rights of the doctors, the interference with their ability to practice medicine and interference with the ability for the patients to receive information that they need.⁷⁷ A classic, straight out First Amendment argument. The Supreme Court upheld the prohibition.⁷⁸ The Chief Justice writing for the Court upheld the prohibition, essentially saying this is a government program.⁷⁹ The government has decided to fund a program about prenatal care, but not to fund a program about abortion and conceptually the speaker here is the government. The doctor is just a mouthpiece for the government. The government can say to the doctor, "you say what we tell you to say, we're hiring you, essentially, as a microphone for our speech." The government wants to talk about things other than abortion, and you cannot on government time, using

⁶⁹ *Id.* at 178.

⁷⁰ 515 U.S. 819 (1995).

⁷¹ *Id.*

⁷² 500 U.S. at 178. *See also* 42 U.S.C. §§ 300-300a-6.

⁷³ *Id.*

⁷⁴ *Id.* at 179.

⁷⁵ *Id.*

⁷⁶ *Id.* at 180.

⁷⁷ *Id.* at 192.

⁷⁸ *Id.* at 194.

⁷⁹ *Id.*

government resources, go beyond what the government wants to say.⁸⁰

Now, that is dramatic. If the rule on subsidized speech is that whenever the government subsidizes the speaker then the government gets to call the tune, then the subsidized speech is essentially immune from free speech restrictions.

You may remember in *Rust v. Sullivan*, a five-four decision where Justice Souter was the fifth vote,⁸¹ there was a good deal of speculation that he would not continue to be a reliable fifth vote for that type of rule, but nobody knew what was going to happen. Subsidized cases and, for example, the legal services restrictions were analyzed initially exclusively under *Rust v. Sullivan*⁸² because if you can tell doctors what to say in *Rust*, of course, you can tell lawyers what to say in the legal services cases. That was a very quick analogy most judges made, and it was impossible to make any headway with the case. Then along comes *Rosenberger v. The University of Virginia*,⁸³ which is the second case and very important in the line.

In *Rosenberger*, the University decided it would fund student newspapers with government funds, taxpayer funds.⁸⁴ But, it was afraid of violating the Establishment Clause. The University of Virginia is Jefferson's creation and the Establishment Clause was one of Jefferson's great hopes and aspirations.⁸⁵ So they decided it would not be faithful to Jefferson's memory to use taxpayer funds to fund religious newspapers.⁸⁶

So what they said to the student body was "secular newspapers would get funded, but newspapers put out by religious groups cannot."⁸⁷ They have to get their own funding somewhere else.

⁸⁰ *Id.* at 179-81.

⁸¹ *Id.* at 176.

⁸² See *Velazquez v. Legal Servs. Corp.*, No. 98-6006, 1999 WL 5300 (2d Cir. January 7, 1999).

⁸³ 515 U.S. 819 (1995).

⁸⁴ *Id.* at 823.

⁸⁵ *Id.*

⁸⁶ *Id.* at 873-74.

⁸⁷ *Id.* at 824-25.

That was challenged by the religious newspapers and taken to the Supreme Court.⁸⁸

Justice Kennedy in *Rosenberger* wrote a very interesting decision distinguishing this case from *Rust*.⁸⁹ It said that in *Rust*, the government was attempting to be the speaker, whereas here the government is attempting to empower private people to speak.⁹⁰ It is trying to empower other people to speak. When the government subsidy is an empowerment subsidy, not a speaking subsidy, the empowerment subsidy becomes subject to First Amendment constraints.⁹¹

He said you cannot discriminate between and among religious and non-religious newspapers without making an improper content based discrimination.⁹² Exactly what they said you could not do in *Arkansas Television*.⁹³ It is the content based discrimination that they are worried about. And, therefore, they said, even on subsidized funds, there is a restriction now, a First Amendment restriction on the way government subsidized funds go.⁹⁴

As long as you can meet a threshold showing that what the government is attempting to do is empower private people to speak and not empower itself to speak as a speaker, then it is permissible.⁹⁵ Now that is not always going to be crystal clear. And I suspect sometimes the extent to which the academy has infiltrated the Supreme Court. These are things that I expect my colleagues to come out with, not nine people who have an idea of how the world works. But, it is a highly opinionated, highly academic, highly conceptual notion of who the speaker is. And it comes back to what I started with, increasingly now the Court seems to be engaged in a First Amendment treasure hunt. The First Amendment treasure hunt is finding the person who is the speaker,

⁸⁸ *Id.* at 828.

⁸⁹ *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁹⁰ *Rosenberger*, 515 U.S. at 833.

⁹¹ *Id.* at 834.

⁹² *Id.* at 835.

⁹³ *Arkansas Educ. Television Network v. Forbes*, 118 S. Ct. 1633, 1643 (1998).

⁹⁴ *Rosenberger*, 515 U.S. at 837.

⁹⁵ *Id.* at 834.

the person who is entitled to be treated as the beneficiary of the First Amendment.

So in *Rust v. Sullivan*, it is the government who is the speaker.⁹⁶ In *Rosenberger*, it is the religious newspapers.⁹⁷ In *Arkansas Television* you tell me who they finally decided was the real beneficiary.⁹⁸ I think they could not decide who the First Amendment speaker was in that case so they compromised and came up with a hybrid that attempted to deal with the interests of both.⁹⁹

Now, in the couple of minutes that I have left, let me suggest to you that that process is also going on in a related area. And by the way, think about the consequences of a process, of the subsidy process for the legal service litigation. In the legal services litigation who is the speaker in the legal services case? Is the government the speaker or are they empowering the private groups to engage in legal analysis? Start off the argument by saying this is obviously an effort to empower private groups. The government stands up and says, this is obviously the government speaking through a government program. Then we both sit down having done our job as advocates and we leave it to the judge to decide who it is.

However, it is happening in one other area as well. The other important area is this notion of recognizing that the speech universe is immensely complex. What should it look like? It is happening in government-media regulation cases in the last couple of years as well.

Let me describe two cases just as an example. The first one is *Turner Broadcasting v. FCC* [hereinafter "*Turner I*"].¹⁰⁰ *Turner I*, as many of you know is a decision involving a congressional statute requiring cable television broadcasters to carry over-the-air signals for all over-the-air area broadcasters in their general area.¹⁰¹ The

⁹⁶ *Rust v. Sullivan*, 500 U.S. 173 (1991).

⁹⁷ *Rosenberger*, 515 U.S. 819.

⁹⁸ *Arkansas*, 118 S.Ct. 1633.

⁹⁹ *Id.* at 1643.

¹⁰⁰ 512 U.S. 622 (1994) [hereinafter "*Turner I*"].

¹⁰¹ *Id.* at 630; 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), §§ 4, 5 (Supp. IV 1998). § 4 of the Cable Television Consumer Protection and Competition Act of 1992

congressional fear was that there is a natural rivalry between cable and over-the-air; over-the-air is free, cable charges money.¹⁰² If cable could put over-the-air broadcasters out of business, it would lose the only real competition that it has and would therefore be able to raise its rates.¹⁰³ So, there is a natural antipathy between the cable industry and the over-the-air broadcasting industry. That might cause the cable industry to attempt to pick off and destroy weak over-the-air broadcasters by not putting them on their network and thereby making their audience smaller and slowly but surely, strangling the over the air industry.¹⁰⁴ By picking off the weakest and then the next weakest and then the next weakest to the point where cable would then dominate. That is the story of over-the-air broadcasters in Congress.¹⁰⁵ Cable said, that is crazy, what are we going to do, take off popular signals for competitive advantage? The only signals we take off are signals no one wants to see, so what is the big deal?¹⁰⁶

But, over-the-air broadcasters said as a prophylactic matter to avoid the temptation to try to pick off the weak stations in the over-the-air industry, the cable broadcaster must carry every over-the-air signal.¹⁰⁷ And the cable broadcasters went into court and said, "That is ridiculous—you cannot tell us what to put on our television channels."¹⁰⁸ This is, of course, the same argument that the Arkansas Television stations had made, "We are journalists. We get to decide what goes on our media."¹⁰⁹

("Cable Act") provides in pertinent part: "A cable operator of a cable system with more than 12 useable activated channels shall carry the signals of local commercial televisions stations, up to one-third of the aggregate number of useable activated channels of such system." *Id.* § 5 of the Cable Act provides in pertinent part: "For purposes of this section, the term "local commercial television station" means any full power television broadcast station, other than a qualified noncommercial educational television station" *Id.*

¹⁰² *Turner I*, 512 U.S. at 629.

¹⁰³ *Id.* at 633-34.

¹⁰⁴ *Id.* at 634, 659.

¹⁰⁵ *Id.* at 632-34.

¹⁰⁶ *Turner Broadcasting v. FCC*, 117 S. Ct. 1174, 1192 (1997).

¹⁰⁷ *Id.* at 1190.

¹⁰⁸ *Turner I*, 512 U.S. 622, 634.

¹⁰⁹ *Arkansas Educ. Television Comm. v. Forbes*, 118 S. Ct. 1633 (1998).

The case went to the Supreme Court twice: *Turner I*,¹¹⁰ which I just described and *Turner Broadcasting v. FCC* [hereinafter "*Turner II*"].¹¹¹ Lawyers built wings on their houses in *Turner I* and *Turner II*. It really annoyed me because I was the only lawyer not building a wing on the house because of these cases. The case went to the Supreme Court twice, and in *Turner II*, Kennedy writes the opinion again.¹¹² He is becoming increasingly influential as the leading First Amendment Justice on the Court. He writes an opinion that says cable broadcasters should be treated like full First Amendment people.¹¹³ The two sides argued analogies. The cable broadcasters said, "We are just like newspapers."¹¹⁴ Over-the-air broadcasters said, "No, they are really just like us, over-the-air broadcasters. Therefore, they should be regulated because of spectrum scarcity."¹¹⁵

The Court refused to accept both extreme analogies. It said, ordinarily and for most things, cable broadcasters should have the same First Amendment rights as a newspaper.¹¹⁶ The government should not be able to regulate the cable industry by imposing restrictions on what they can say.¹¹⁷ But, they said, the cable broadcasters, in one very important sense, are gatekeepers.¹¹⁸ They have gatekeeper power over what Americans will see.¹¹⁹ And that gatekeeper power is so important that it can be regulated.¹²⁰ Congress can step in when there is a danger that the gatekeeper power is going to be abused and as long the regulation is not content-based, as long as what Congress is saying to the cable industry is not trying to regulate them on the basis of content, then

¹¹⁰ *Turner I*, 512 U.S. 622.

¹¹¹ *Turner Broadcasting v. FCC*, 117 S. Ct. 1174 (1997) [hereinafter "*Turner II*"].

¹¹² *Id.*

¹¹³ *Id.* at 1183-1202.

¹¹⁴ *Turner I*, 512 U.S. 622, 656.

¹¹⁵ *Id.*

¹¹⁶ *Turner II*, 117 S. Ct. 1174, 1186.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1190.

¹¹⁹ *Id.* at 1190.

¹²⁰ *Id.* at 1187-1203.

it is a perfectly legitimate regulation.¹²¹ Congress may regulate as long as it builds an important record showing that it is necessary.¹²²

Now, of course, as Judge Pratt has pointed out, knowing when something is content-based and knowing when it is not content-based is not easy. Four members of the court were convinced in *Turner II* that this was content-based regulation saying, "If you have to carry a particular kind of signal, that looks like it is content-based to me."¹²³ Five members of the court said, "Nonsense, that is not content-based because the content of over the air and the content of cable are really indistinguishable, so it is not as though we are really singling out the media with a unique content and treating it differently."¹²⁴ So the difficulty of deciding what content-based is, is right there, but the key is a recognition of shared First Amendment interests.

Look at the various people in this situation who had First Amendment hats. The cable broadcasters claiming that they were the First Amendment beneficiaries, the over-the-air broadcasters claiming that they were the First Amendment beneficiaries, the audience claiming that it was the First Amendment beneficiary, and Congress claiming that it was exercising some sort of First Amendment concern by regulating the structural nature of the communications industry. Once again the court could not choose and did not choose. It comes out with a hybrid of trying to mix and match the First Amendment interest in each.¹²⁵

The last case is *Denver Area Broadcasting*,¹²⁶ which is equally complex. *Denver Area Broadcasting* deals with two things: first, that there will be "public access" channels on your cable,¹²⁷ and second, that those channels can be available for ordinary public

¹²¹ *Id.*

¹²² *Id.* at 1203.

¹²³ *Id.* at 1205-1218 (O'Connor, J., dissenting) (joined by Justices Scalia, Thomas, and Ginsburg).

¹²⁴ *Id.* at 1189-1203.

¹²⁵ *Id.*

¹²⁶ *Denver Area Educ. Telecommunications Consortium v. Federal Communications Comm'n*, 518 U.S. 727 (1996).

¹²⁷ *Id.* at 734.

broadcasting.¹²⁸ I should say as a matter of policy, that it is the least used resource in the United States now. Huge amounts of communication potential are tied up in these public access channels, most of which broadcast material that nobody wants to see. That is an asset that reformers are going to look at very carefully in the years to come because it is a potential asset that is monumentally under-utilized in every community. This asset has a chance to be a very important one because it is four or five channels on every cable system.

The Court upheld the notion of that type of public access, essentially saying that cable broadcasters could be viewed as speakers for some things and conduits for other things.¹²⁹ In other words, they could be forced to set up this large portion of their property over which they would have essentially no viable control. Efforts to censor would be looked on by the courts with a great deal of hostility.¹³⁰ They would treat the public access channels as though they were genuine speakers and give them speaker power to decide what they would carry and efforts to control them would be declared unconstitutional.¹³¹

Secondly, in terms of the leased access channels, the channels that broadcast soft porn at night, the channels that somebody can just come on and buy time, the question is, who is the speaker there?¹³² Is it the cable broadcaster whose facilities are being leased? Is it the lessor who has purchased the time? Is it the audience? How do we work out the First Amendment calculus?

The particular regulation was one that said that anybody who wants to receive the soft porn material over the leased access channels has to ask for it.¹³³ You have to write to the station, preferably you have to obtain a countersignature by your wife, and say, "I would like this material broadcast into my home." And of course the station said, "We'll keep that, you know, confidential. No one will know. Absolutely confidential." And the question

¹²⁸ *Id.*

¹²⁹ *Id.* at 760-66.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 736.

¹³³ *Id.* at 735, 754.

was, is that constitutional?¹³⁴ Does it violate the First Amendment to set up a system whereby cable broadcasters are able to say this is what we want?¹³⁵ We do not want to broadcast this into anybody's house that does not want it. We want them to tell us they want it before it can go.

What the Supreme Court did, surprisingly, was to strike down the regulation.¹³⁶ They said, of course, that this is a complicated mix of what interests can be adequately satisfied by allowing anybody who does not want the offensive channels to contact the cable station and say block it.¹³⁷ So there has to be a blocking mechanism in place.¹³⁸ But it is an opt-out system, not an opt-in system.¹³⁹

The Court held on First Amendment grounds.¹⁴⁰ Again, that is an example of attempting, in a complex situation with lots of First Amendment participants, to forge a First Amendment doctrine that tries to give the most protection to everybody. If I had one lesson to suggest to you, I think that it is the voice of the future talking to us. I think the single issue easy First Amendment case will still occur. But, those days ended with the flag burning case.¹⁴¹ That was the cycle that told us what to do with the easy cases. The hard cases that are going to come up in the future, in the years to come, are cases in which more than one person plausibly seeks access to speak. It is going to mean that in election cases, in media regulation cases, sometimes in cases involving schools, we are going to see an increasingly mixed First Amendment doctrine in an effort to do justice to all the participants.

¹³⁴ *Id.* at 754-60.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 760, 768.

¹⁴¹ *Texas v. Johnson*, 491 U.S. 397 (1989).

