

The Cultural Exception to Trade Laws

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Preliminary Comments

Organizers of the discussion to which this chapter contributes asked whether “flow’ [is] the right metaphor to analyze digital information.” Although “flow” might suggest to some a natural physical rather than a human interactive process and although scientists rightfully must consider the former, the more important democratic and social concern and the concern that should provide direction even to the scientists is the quality and nature of the latter. Another term in the conference title, “information,” however, is more problematic and biased. A focus on “information” encourages fetishistic notions such as the view I hear occasionally that “information is power,” a view no better than the notion ridiculed by Arendt that “power grows out of the barrel of gun.”¹ It is a view that frequently misguides positivist social science which does not see that the serious matters are the questions and values that provide the basis for any interest in information.² Information, like a commodity, is something that in itself is inert but that can be transferred from one person to another. It is not the key element, however, when the Internet is considered from the perspective of either democratic or communications theory. When I e-mail a friend asking, “Where should we meet for dinner?” I do communicate information—I communicate that I know some English, which she probably already knew, that I believe

we are meeting for dinner but at a yet-to-be-determined location, and that I am interested in her view on that issue. But to identify “information” as the important feature of this e-mail is to emphasize the most commodified and, for many purposes, the least important feature of my activity. The activity here is participation in a communicative interaction, in which information and flow are parts, but the important aspect from most value perspectives is the interpersonal activity. To emphasize information would be like describing the law, upheld by the Supreme Court in *Erie v. Pap's AM*,³ that required dancers to wear at least pasties and G-strings, as being about textiles and not about the expressive activity of nude dancing. Both digital formats and Internet-type communications are used in many activities that are ill described by the term “information.” Much better for describing the interaction, but still sometimes unedifying, might be the more inclusive term “communication,” which includes the more politically or sociologically important activities of choosing, sending, and receiving.

Of course, the new digital technologies change and enlarge opportunities in social life. As the ease and expense of activities change—here, for the most part, go down—their occurrence will change. The social and normative significance of these changes can be variable. Consider two examples. These new technologies have at times facilitated politics, allowing easier delivery of salient motivational and organizing communications (of which factual information is often an important but seldom the sole element) that sometimes have led to expressive street activities that have in turn even played central roles in bringing down governments. In general, taking my cue from Brandeis's admonition that “the greatest menace to freedom is an inert people,”⁴ I count this development mostly as a plus. In contrast, my experience tentatively suggests that one consequence of student use of the Internet has been student papers containing increased amounts of trivial information that to some degree displaces references to, and consideration of, better-quality writing and, even more important, shows less careful and original thought about the meaning or significance of information in the paper. Of course, this need not happen—the paper could have better information with no reduction in other qualities. Still, the change in the “cost” of one element that goes into a paper could predictably lead to this unwanted change.

More relevant for what follows, the normative and evaluative significance of changes in the difficulty and expense of a particular activity is likely to vary with context. Cultural contexts, for example, vary in whether isolation from a broader world or colonization by outside interests presents the greater threat to the welfare of members of the given culture. The relevant economic observation is that the first threat is potentially reduced and the second potentially increased because of the increased ease of transmission of cultural materials or participation in cultural activities. With this thought I will turn to making several observations, and drawing several distinctions, in reference to four topics relevant to trade in cultural or communication products: culture, economics, protectionism, and legal policy.

Culture: Two Comments and Two Distinctions

Culture's importance for human life merits some brief comment. First, following observations well developed by Will Kymlicka, for many persons, engagement in an effective, operative, living culture in which they learn of human practices may be essential for a healthy identity, autonomy, and the experience of life having meaning.⁵ Experiences of cultural loss or major disruptions to a person's culture can not only be impoverishing but can lead literally to suicide—or more generally to a loss of confidence and sense of value and meaning. Any liberal must recognize that a cultural "home" is often a central element of the context that makes autonomy or meaningful individual choice possible.⁶ Second, although possibly somewhat more controversially, cultural diversity is a significant public good. It can add resilience and resources to human civilization almost as, biologists report, genetic variety can for nonhuman animal species. Likewise, many find that cultural diversity can add to the quality of human experience—as illustrated by the delight many people have long taken in cultural tourism or sampling.

Kymlicka stresses a distinction between orientations toward culture. First is what may be described as a fundamentalist valuation—something American critics often accuse, usually unfairly, the French of promoting. The fundamentalist ideal is "preservation"—a closed culture that restricts as much as possible outside, and often inside, forces of change. I describe

this as the “museum” view of culture because, in effect, it would make the inhabitants museum specimens for whom change is, to the extent possible, forbidden. Second is a liberal conception that emphasizes culture’s openness to change. This liberal conception affirms community members’ individual as well as collective right to change their culture and their cultural commitments but recognizes that the very possibility of exercising this freedom often can depend on a secure cultural grounding.

The other significant distinction here is between activities and commodities—or between doing and consuming culture. Neither should be disdained. Still, for many purposes, “doing” may be most significant. Like education, involvement in cultural creation and cultural practices produces meaningful personal experiences and increases not only personal but also collective capacities that are beneficial to members of the community beyond the individual actor.⁷ Moreover, those benefits accrue whether or not the activity produces commodities that sell in markets. It would be a crabbed and uninformative economics that valued these cultural activities solely on the basis of the market value of its output. George Gerbner, communications scholar, activist, and former dean of the Annenberg School for Communication, captured the distinction’s importance when he argued that the quality of society declines sharply when children hear stories primarily from people with something to sell rather than people—usually parents, teachers, or friends—with something to tell.

Economics

Probably the economically most significant feature of intellectual products, including many cultural products, is a high creation (first copy) cost as compared with low (or nonexistent) costs for subsequent copies. The consequences of this feature most relevant here are, first, a tendency toward competitive dominance of larger-audience products. Generally an average consumer would prefer to receive at a given price a creation on which more attention or resources have been lavished. At a given cost in terms of price or time, audience members will tend to prefer an expensive product to a cheaply produced product. The first typically attracts the larger audience. In this scenario, the large audience pays for the high-

cost, presumably high-quality, first copy. Second, as long as price discrimination is not costless and complete, the market will not produce some of these products that, collectively, people do or would value (as measured by their willingness and ability to pay) more than they cost. Third, competition from the large products first described can cause additional products to fall in the second described category. Competition from the expensively produced products can reduce the demand for other products, newly making products unprofitable even though they still would be valued at more than their cost. That is, introducing a blockbuster (expensive) product can cause a downward shift in the demand for alternative products, and this shift can make some of those alternative products unprofitable (without perfect price discrimination) even if the products are still valued more than they cost. In fact, this impact of competition sometimes will occur even though the successful product generates less surplus (value over resources used) than the products that it competitively displaced would produce. In these circumstances competition would directly cause increased economic inefficiency.

Fourth is an issue suggested by Gerbner and brilliantly developed in a legal context by Yochai Benkler in his discussion of copyright.⁸ As long as the only significant economic effect of a legal or technical change is to reduce costs, the change might seem at first unambiguously beneficial. But reflection shows that this is not so clear. Commercial production of cultural products often competes with noncommercial production. Both commercial and noncommercial forms are valuable and inevitable. Thus, a change that reduced costs even if it advantaged one more than the other would seem unambiguously good—and would be largely irrelevant for policy purposes—except for two facts. Cost reductions or increased ease of production that differentially benefit either commercialized or noncommercialized production affects their respective competitive position—the share of people's attention, often described in the commodified term of market share, of the form most benefited would predictably increase. Moreover, as is likely, commercial and noncommercial production systematically may have different degrees of positive and negative externalities. If the competitively disadvantaged form of production generally generated either higher surplus value or greater net positive externalities, competition could cause a change that allows for cost reduc-

tion or greater ease in production to actually lead to a net social loss. If alternative legal or technical changes (or legal responses to technological changes) are possible, the choice between them raises the policy issue of which is most valuable. Troublingly, the market provides no basis to make the comparison. Even if the market gives some evidence of the changes' value in respect to commercial production, it offers no measure of the value of the actual or potential benefit or harm to noncommodified production. Similar points might be made about how legal or technological changes can affect competition between more individually or locationally specific production and collective and diffused noncommercial production.⁹

Economists' tendency to equate profits with welfare efficiency merely clouds the issue.¹⁰ Given inevitable competition between forms of production and consumption combined with the potential of competition to cause the failure of the most valuable creative activities, a technological innovation that decreases the cost or increases the ease of one form of cultural production, by advantaging that form, could have a net effect of reducing social welfare. Certainly, there is no guarantee that the new result of competition is the best available. Particularly to be feared, I suggest (but have not demonstrated), are changes that lead to less participation by people in a community in cultural production and to an increase in the relative extent of commercialized production. Moreover, these observations are exacerbated if the technological or legal change—copyright was Benkler's example—that reduces costs for or increases benefits of one form of production increases costs of another form.

Expanded use of digital technologies and the Internet has affected many market and nonmarket activities—such as the activity of political discussion and organizing mentioned earlier. However, for the present discussion probably the most important economic consequence is that they make *distribution* of (or, from the consumer perspective, access to) cultural products easier and cheaper. Reduced distribution costs will tend to have two somewhat conflicting effects on the type of cultural product produced and consumed. First, the decrease in *this* cost should increase the economic role of high first copy/low subsequent copy effect. The reduced distribution cost should encourage mega-products and greater audience concentration.¹¹ Second, this reduced cost should

encourage production of new products that previously were not profitable (even if earlier they were also valued at more than their cost) and of noncommodified or noncommercial cultural products by those who do not seek an economic return and for whom subsidized production is possible given the elimination or drastic reduction of distribution costs. This second effect provides the ground for many of the romantic visions about new abundances and empowerments flowing from online digital technologies—but the first foretells the possibility of problematically increased concentration of audience attention on relatively few sites in the online world. The net result may be both greater dominance of audiences by a few commercial giants and greater availability of diverse content for those ready to seek it. Academics and visionaries who tend to fall into the second group should not blind themselves to the likelihood of—in fact, the empirical evidence suggesting—the first effect. Still, for both economic and democratic reasons that I do not try to develop here, policy might be well designed to seek to enhance the second effect as compared with the first.

Protectionism: Strong and Weak

Protectionist cultural trade policies take a wide variety of forms. At least in the cultural and media context, a useful, policy-relevant qualitative distinction can be made between strong and weak protectionism. Strong protectionism strives to keep out either all or certain categories of foreign “culturally polluting” material or, when this is not possible, to seriously limit its circulation. Weak or soft protectionism constitutes policies that systematically burden without eliminating or aiming to eliminate foreign access to the domestic market, often with the burden specifically designed to help subsidize local cultural material. Keeping foreign content out is neither a goal nor a dominant effect of weak protectionism.

The most extreme version of strong protectionism bars imports and adopts other rules and practices, such as limitations on television or radio receivers that can be tuned to foreign broadcasting or jamming electronic transmissions or filtering Internet content, aimed at that exclusionary result. More targeted versions of strong protectionism are also possible. Requiring an import license for each specific video, audio, or written

program or publication that involves censorial content judgments is an example. Similarly, the aim of reducing the presence of foreign content, for instance by limiting the number of import licenses given per year, also illustrates strong protectionism. Sufficiently high tariffs may achieve a similar exclusionary goal of allowing elite access without creating mass cultural pollution (or unwanted political ideas).

Weak protectionism, on the other hand, should not be understood as merely a quantitatively watered-down version of strong protectionism. Rather than being merely further down a protectionism continuum, it is a qualitatively different type of policy implemented mostly by different types of rules. As noted, it does not aim to keep foreign culture out but rather to promote local culture. Examples of weak protectionism include taxing sales of imports more than domestic content or even taxing sales of both but using the revenue to subsidize only local content or cultural endeavors. Likewise, screen or play time quotas that impose no limit on presentation of foreign material but require proportionate presentation of local material in effect props up the market for local material. Theaters can always show profitable foreign content as long as they are willing to show, even at a loss, domestic content. The policy thereby uses the former, the foreign, to “subsidize” the latter, the domestic. Soft protectionism can also take the form of legal rules biasing advertising expenditures toward supporting domestic rather than foreign cultural or media materials.¹² These supports for domestic or local culture can receive a variety of justifications. As the discussion of market failures in the media or cultural context suggests, these justifications will be shown below to often be fully consistent with the liberal premise of respect for individual choice.

Liberal and Democracy-Oriented Trade Policies

A closed or museum culture requires keeping out foreign cultural materials just as many authoritarian states often seek to keep out foreign media that show advantages of non-authoritarian (or alternative authoritarian) political regimes. If such a repressive accomplishment is not feasible, the goal is at least to reduce circulation of foreign material as much as possible, especially among the broader public. Thus, cultural preservation

from this museum cultural perspective maps onto the policy of strong protectionism almost perfectly. Often critics of cultural protectionism assume that this museum concept of culture provides the only justification—other than the economic goal of advantaging a politically powerful domestic industry or overtly serving authoritarian ends—for any deviation from “free” trade in the media or cultural spheres. These critics then rightly proceed to show both the illiberality and ultimate futility of cultural protectionism so conceived. Nevertheless, most democratic countries that pursue cultural preservation neither have this exclusionary aim nor adopt strong protectionist measures.

Weak protectionists do not deny that its citizens value, benefit from, and should receive outside media content. Such content can provide material vital for cultural and political development. Any bar on its import, as is implicit in strong protectionism, would be a significant violation of international human rights law¹³—and that human rights law provides the arena in which objections to restraints on cultural imports should be debated. However, these international rights should not provide an objection to weak protectionism. A country’s use of taxes, tariffs, subsidies, or similar legal policies attempts to structure beneficially an inherently artificial economic realm—a realm that necessarily takes its form on the basis of legal choices implicit in the design of property rights, contractual options, and income distributions. As to this world of commerce, a polity has the responsibility to craft rules that it believes best serve human interests, both consumptive and, hopefully, democratic interests.

My claim is that weak cultural protectionism can be fully consistent with, and in some circumstances arguably required by, a liberal commitment to promotion of individual choice and autonomy. As noted, two economic features of intellectual or media products support this claim. First, the mostly mega-products of international trade will increase competition’s tendency to displace smaller market products (and, here, specifically domestic products) despite these smaller products’ being valued more than they cost. Competition can do this even when the displaced products produce more surplus value than the imported products. Second, international trade also creates new marketing windows that increase opportunities for comparatively easy price discrimination that

exacerbates this effect of displacing products that produce considerable surplus value with goods that produce little if any. That is, a mere desire for a market to ideally serve people's money-backed preferences can justify weak protectionism.

Weak protectionism can also serve a healthy democratic order. In most contexts, local media are more likely than foreign media to provide positive democratic externalities—to serve the media's democratic watchdog function and to participate in and inform domestic political discourse. Likewise, local media can both help teach, and equally relevantly be part of a cultural group's implicit discussion of, self or group identity. For many people, local media support and help provide the secure context from which meaningful choice is possible as well as the understanding necessary for wisely choosing changes. In addition to these market-improving pro-democratic effects, any egalitarian commitment to serve all people's cultural, identity, and political needs should see even a market perfectly responsive to money-backed preferences—with its implicit one-dollar/one-vote weighting—as an improper measure of and inadequate response to individual preferences. The market exacerbates this problem by its inherent tendency to provide more for dominant cultural positions because of their larger or richer set of consumers over which the market firm can spread first copy costs. Weak protectionism can improve responsiveness to the claims of these groups not well served by the market.¹⁴ And as long as the weak protectionism is enacted by a democratically legitimate political order, the presumption must be that it represents responsiveness to a one-person/one-vote measure of people's preferences in place of the less egalitarian (arguably less legitimate) dollar-backed measure.

All these considerations point to the legitimacy of subsidizing some otherwise marginal local cultural content and improving its competitive position relative to materials with larger audiences over whom first copy costs are spread or which are better able to price discriminate. These considerations go to liberal and egalitarian affirmative valuations of a historically grounded but changing culture as a context of individual choice. They go to the economic welfare maximization goals. That is, they provide a reason to support weak protectionism as a trade policy in the media realm and a cultural exception to international trade agreements.

A contextual asymmetry in this argument should be noted. The idea of an open culture as well as democratic needs that sometimes justifies weak protectionist measures can at other times justify virtually the opposite. Weak protectionism does not deny that people in all countries can value and benefit from culturally alien content as well as from foreign informational content. Rather, its premise relates to specific qualities of markets in intellectual or cultural content that can lead to the competitive failure of more valuable—and in the foregoing argument, domestic—cultural material and activities. Nevertheless, whether free trade oversupplies foreign and undermines more valuable domestic content is contextually variable. This damaging consequence of free trade is more likely the smaller and poorer the country. The opposite “inefficiency” is also possible. The market may supply people in some countries less foreign material than they want as measured by the economic standard of willingness and ability to pay. At times, these foreign materials may be more valuable than the domestic content that displaces them. Weak protectionism may further disadvantage already economically disadvantaged foreign content.

Debates surrounding the MacBride Commission and a New World Information Order once emphasized this point about asymmetries—namely, that an imbalance existed in which the developed world received inadequate information about the South.¹⁵ (And because news agencies of the North dominated, especially in cross-national contexts, countries of the South often received inadequate information about and from its neighbors—and sometimes about itself—and instead obtained primarily news filtered through the economic lens and, hence, content interests of the North!) Very roughly, whether too much or too little imported content is the problem will correspond roughly to whether the country is a net cultural product exporter or importer. Reliance on the market would predictably result in the United States especially and maybe some regional powerhouses—potentially Brazil, India, and China—receiving insufficient imports to serve either its democratic needs or its consumer desires. Though unlikely to be politically acceptable within international trade negotiations, the ideal policy might be to allow weak protectionism but only for net cultural importing countries. In fact, except for the real likelihood of political manipulation of many forms of subsidies, people in

a country like the United States could benefit from subsidizing imports—as arguably occurs to a limited extent when its public broadcasting stations present foreign (usually British) content. Certainly, both Americans and the world might benefit if the American public were more aware of both cultural and informational content from abroad. More specifically, the economic tendencies described above that sometimes justify both weak protectionism and subsidies of domestic content also suggest that markets may provide consumers in the United States and other cultural exporting countries with less foreign material than their citizens value.

Finally, two further observations might be made about this political-cultural-economic argument. First, though not spelled out, this economic argument as well as justice-based distributive values also supports variation between different states' intellectual property laws. The competing policy issues are complex, but there is no reason to think the same rules are ideal for different contexts and, hence, so-called harmonization will often be an misguided aim. Second, it should be noted that these arguments against a pure free trade regime internationally apply equally to domestic media and cultural policies. Subsidizing and otherwise favoring certain domestic cultural materials and activities, especially noncommercial content and commercial materials aimed at poorer and smaller cultural or identity groups, can lead to welfare and democratic or egalitarian gains in any country.¹⁶ Traditional notions of free trade are warranted neither internationally nor domestically in relation to media content, just as suppression (censorship or strong protectionism) is objectionable in both contexts. Domestically, this difference is partially embodied in U.S. constitutional doctrine that permits virally all structural regulation directed specifically at the media sphere while ruling out censorship.¹⁷ A similarly attractive result would occur in the international context if protectionism were debated in terms of human rights law rather than of trade law.

Postscript: A Global Public Sphere

Globalization presents a possible new, democracy-based argument against protectionism: Multinational corporations currently dominate the world in the interest of profits. Only international legal responses can provide adequate responses serving the interests of people. The situation

parallels the American (constitutional) recognition of the necessity of federal, rather than sole reliance on state, regulation of the domestic U.S. economy. *Legitimacy* in this international regulation requires more than transparency. Major democratic deficits exist unless the international regulatory regime, whether by new entities or those such as the World Bank or International Monetary Fund, is itself subject to control by a global democratic public sphere. From these conclusions, the need for a global culture and public sphere, supported by unimpeded international trade in informational products, might be proposed.

Whatever the merits and possibilities of an eventual democratically responsive international political order, democrats might wisely conclude that, in the short to intermediate term, legal or policy power at the international level will be even more dominated by multinational corporate economic interests than it is at the domestic level. Thus, for now, possibly democratic advocates should be most oriented toward increasing the democratic quality as well as the power of more local governments. If so, communications policy should most centrally aim at promoting a more robust and democratically supportive domestic communications order. For many countries, this will include weak protectionism as well as domestic subsidy programs that would be contrary to standard free trade principles.

Even if in the long term the international order develops global democratic governmental institutions, recommendations of free trade and for a unified global cultural order may be misguided. The capacity for groups to participate in a nondominated authentic manner within any broader political or cultural discourse requires that they be grounded in an informed and secure sense of their own values and identity. Purportedly open public spheres are often actually dominated by the most power groups or interests—at least unless more marginal groups are first given the opportunity to have their own “subaltern counterpublic” spheres in which they formulate their own positions.¹⁸ Thus, an inclusive democratic sphere presumes the existence of robust smaller public spheres in which identity groups—and nations—formulate, debate, maintain, and change their own values. This point does not deny that global government requires some form of global public sphere but does problematize its appropriate structure. The inherent

economic advantages of the global commercial cultural and information products as contrasted to the value of smaller public spheres suggest that, though both are needed, free trade's tendency to give legal priority to commercial global communications firms would be misguided. In a sense, such a policy represents a misguided conception of how multiple public spheres contribute to democracy. It fails to see the necessity of nurturing smaller public spheres for each cultural (or national) group that an inclusive democratic should hope will be able to participate globally.

Notes

This essay is loosely based on previously published materials, especially C. Edwin Baker, *Media, Markets, and Democracy* Part III (2002).

1. Hannah Arendt, *On Violence* 11,52–53 (1969). She claimed, instead, that “power springs up whenever people get together and act in concert . . . ,” an account not far from Jürgen Habermas’s view that a public sphere results whenever people come together to speak.
2. See C. Edwin Baker, “Viewpoint Diversity and Media Ownership,” 61 *Fed. Comm.L.J.* 651 (2009).
3. 529 U.S.277 (2000).
4. *Whitney v. California*, 274 U.S. 357, 375 (927) (Brandeis and Holmes, concurring).
5. See, e.g., Will Kymlicka, *Liberalism, Community and Culture* (1989). See also Robert Post, “The Social Foundations of Privacy: Community and Self in the Common Law Tort,” in Robert Post, *Constitutional Domains* 51 (1995).
6. C. Edwin Baker, “Sandel on Rawls,” 133 *U. of Penn. L. Rev.* 895 (1985) (arguing Rawls argument is fully consistent with this point).
7. Cf. Jack M. Balkin, “Digital Speech and the Democratic Theory of Culture: A Theory of Freedom of Expression for the Information Society,” 79 *NYU L. Rev.* 1 (2004) (emphasizing a participatory, democratic cultural theory of free speech).
8. Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain,” 74 *NYU L. Rev.* 354 (1999). The way law differentially favors or disfavors commercial as compared with noncommercial production has been a significant, innovative theme in Benkler’s work. See, e.g., Yochai Benkler, “Coase’s Penguin.” 112 *Yale L. J.* 369 (2002).
9. See generally, Yochai Benkler, *The Wealth of Networks* (2006).
10. C. Edwin Baker, “Media Structure, Ownership Policy, and the First Amendment,” 78 *S. Cal. L. Rev.* 733 (2005).

11. Hamilton reports that though online presentation makes local newspapers available anywhere, online readership of the 100 top newspapers is *more* concentrated online than in print. James T. Hamilton, *All the News That's Fit to Print: How the Market Transforms Information into News* 197 (2004). Further empirical data on this concentration effect is summarized in C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (2007).
12. Canada - Certain Measure Concerning Periodicals, WT/DS31?AB/R; (97-2653); 1997 WTO DS Lexis 4 (June 30, 1997); Ted Magder, *Franchising the Candy Store: Split-Run Magazine and a New International Regime for Trade in Culture* (Canadian-American Center, U. of Maine, 1998).
13. Much international law protects the right to receive, seek, and disseminate information. See, e.g., Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10.
14. The point, however, is contextual. To the extent that an economically disfavored group identifies with people outside the country, weak protectionism could work to their disadvantage. One noted effect of the Internet is its capacity to allow some coalescing on international diasporas.
15. International Commission for the Study of Communication Problems, *Many Voices, One World* (1980) (MacBride Commission Report). See also Wolfgang Kleinwachter, "Three Waves of the Debate," in George Gerbner, Hamid Mowlana, and Kaale Nordenstrong, ed., *The Global Media Debate: Its Rise, Fall, and Renewal* (1993).
16. James Curran, "Mass Media and Democracy: A Reappraisal," in James Curran, ed., *Mass Media and Society* 3rd ed. (2000).
17. After the Court in *Turner Broadcasting System v. F.C/C.*, 512 U.S. 622 (1994), made clear that *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), basically all Supreme Court (but not all lower court) challenges to structural regulation of print, broadcast, or cable media have been rejected (except, arguably, regulations that closed down a media without any pro-media justification, *City of Los Angeles v. Preferred Communications*, 4476 U.S. 488 (1986)) have been rejected while censorious regulation is always invalidated. See generally C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 *Hofstra L. Rev.* 955 (2007); *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 *Sup. Ct. Rev.* 57.
18. Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in Craig Calhoun (ed.), *Habermas and the Public Sphere* 109, 123, 127 (1992).

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