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# Distorting the Press

*Heidi Kitrosser*

American journalism is an essential public good. Representative democracy would mean little were the people not capable of informing themselves, sharing ideas with one another, and overseeing those who govern them. It was this understanding, along with a hard-won knowledge of the lengths to which powerful actors will go to suppress the free flow of information and ideas, that led Revolutionary-era thinkers "routinely [to] suggest[] that the 'Liberty of the Press' was 'a great Bulwark of the Liberty of the People'. . .."[1] These lessons have been relearned generation after generation throughout American history. In the 1970s, for instance, Justice Stewart spoke approvingly of investigative journalists' dogged pursuit of abuses of power, like those that brought down the Nixon presidency.[2] Relating those examples back to the pre-Revolutionary Crown's efforts to stymie the press, Stewart remarked that the Crown understood all too well that "the free press meant organized, expert scrutiny of government."[3] Today, with authoritarianism on the march at home and abroad and with misinformation and disinformation as growing problems,[4] we need a vibrant, professional press more than ever.

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[1] RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. Colo. L. Rev. 499, 537–38 (2019) (quoting Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 69 (1960) (internal citations omitted)).

[2] Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 631 (1975).

[3] *Id.* at 634.

[4] *See generally*, *e.g.*, Masha Gessen, Surviving Autocracy (2020); Sophia Rosenfeld, Democracy and Truth: A Short History (2019); Steven Levitsky & Daniel Ziblatt, How Democracies Die (2018); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. Rev. 78 (2018).



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And yet, just as we need it most, the American press is in crisis. The troubles are partly sociopolitical, fueled by the same antidemocratic forces that make journalism so essential today.[5] The crisis also has a substantial economic component. As Victor Pickard put it recently, "We no longer have a commercial market that can support the levels of journalism that democracy requires."[6] He elaborates that the collapse of the traditional revenue model for journalism has had dire consequences: Since 2005, "the U.S. has lost almost one-third of its newspapers and nearly two-thirds of its newspaper journalists . . . [M]ore than one half of American counties have little or no access to local news."[7] Pickard aptly concludes that "[t]his isn't just a journalism crisis: it's a democracy crisis."[8]

Although no single elixir will save the American press, enhanced public funding is among the tools needed to address its existential crisis. In a sense, this is an old idea. As Martha Minow observes, "[p]ublic resources to support journalism and news have been a feature of American life since shortly after the founding of the nation. Early postal subsidies permitted newspapers to be sent through the mail at reduced rates," and "[t]axpayer dollars . . . support public broadcasting."[9] Still, public support for journalism in the United States is paltry compared to state financial investments in news media in other democratic nations.[10] Pickard and Timothy Neff note, for example, that "[a]t $465 million dollars, 2020 federal funding of US public media amounted to just $1.40 per capita. By comparison, countries such as the UK, Norway, and Sweden devote around $100 or more per capita toward their public media."[11] Relative to other democracies – indeed, relative to countries that considerably outrank the United States in a leading index of world democracies[12] – the United States has ample room for growth in public media funding.

[5] *See, e.g.*, Levitsky & Ziblatt, *supra* note 4, at 198–203; RonNell Andersen Jones & Sonja R. West, *The Fragility of the American Press*, 112 Northwestern U. L. Rev. 567, 571–72, 580–93 (2017).

[6] Niala Boodhoo, *Victor Pickard: A New Business Model for Journalism*, 1 Big Thing (Feb. 22, 2024) (transcript and recording available at https://www.axios.com/2024/02/22/victor-pickard-a-new-business-model-for-journalism).

[7] Victor Pickard, *Taking Media Out of the Market*, LPE Project (Jan. 31, 2024), https://lpeproject.org/blog/taking-media-out-of-the-market/.

[8] *Id.*

[9] Martha Minow, Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech 138 (2021).

[10] *See* Minow, *supra* note 9, at 138; Timothy Neff & Victor Pickard, *Raising the Bar for Journalism*, Media Ineq. & Change Ctr., https://www.asc.upenn.edu/sites/default/files/2021-06/MIC_Infographic_Authors.pdf (last visited June 22, 2024); Victor Pickard & Timothy Neff, *Op-Ed: Strengthen Our Democracy by Funding Public Media*, Colum. Journalism Rev. (June 2, 2021), https://www.cjr.org/opinion/public-funding-media-democracy.php; Catherine Buni, *Four Ways to Fund – and Save – Local Journalism*, NiemanReports (May 7, 2020), https://niemanreports.org/articles/4-ways-to-fund-and-save-journalism/.

[11] Pickard & Neff, *Op-Ed*, *supra* note 10.

[12] *See EIU Democracy Index 2023*, Economist Intel. Unit 9, Table 2 (2024), https://www.eiu.com/n/campaigns/democracy-index-2023/.

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However, public funding raises the specter of state capture. The concern is a legitimate one, but it is hardly insurmountable. Indeed, as just noted, the United States has maintained some form of support for the news media since shortly after its founding, and some of the world's strongest democracies far exceed the United States' level of investment in public media. The solution is not to abandon the idea of public support but to ensure that protections are in place to shield public journalism from partisan or political capture. Such protections necessarily are multi-faceted, with aspects that evolve over time as conditions shift. They include funding-source decisions, legislative and regulatory directives, and informal norms. The governing constitutional framework, too, is a matter of no small importance. In this chapter, I focus on the latter.

Specifically, I explore First Amendment tools to protect publicly subsidized journalism against state capture. Although I emphasize judicial decisions and arguments, I urge readers to keep in mind the larger legal, social, and political frameworks within which such decisions and arguments exist. In other words, courts and litigation comprise but one piece of the anti-capture infrastructure. Furthermore, although constitutional arguments typically center on courts, they can and should be made in other venues as well. First Amendment considerations, including those that I raise here, ought to be weighed not only by courts but also by legislators crafting funding legislation.

My constitutional arguments center primarily on what I call the "anti-distortion principle." To be clear, the principle I discuss here is different from the similarly named concept that was raised in some campaign finance cases. I say more about the distinction between the two in the accompanying footnote.[13] As I use the term here, the anti-distortion principle is the notion that the government may not impose conditions on subsidized speech that would distort the very nature of the type of speech at issue or the process through which it is created. For example, should a state create a program to fund "investigative journalism on state and local issues important to the community" but prohibit using the funds for stories that "cast the governor in a negative light," the prohibition would raise valid anti-distortion concerns. The state, one could reasonably object, is purporting to fund investigative

[13] Proponents of restricting corporate political expenditures long have argued that corporate wealth distorts electoral debates. The Supreme Court adopted this reasoning in the 1990 case of Austin v. Michigan Chamber of Commerce, citing the "'corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990) (quoted in Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. L. REV. 989, 991 (2011)). Twenty years later, the Court rejected this anti-distortion rationale and overruled *Austin* in Citizens United v. Federal Election Commission, 558 U.S. 310, 348–52 (2010). *See also* Hasen, *supra* at 996–97. The anti-distortion interest cited in the campaign finance cases is obviously quite different from the one that I embrace in this chapter. As I explain in this chapter's text, I use the term to describe conditions on government funding or employment that distort the nature of the funded expressive enterprises.

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journalism while short-circuiting the reporting and editing processes that characterize it. This would enable political actors to use a discipline – investigative journalism – associated with rigorous information-gathering and corroboration practices to launder political messaging. Such message laundering undermines key values associated with the Speech and Press Clauses, including government distrust and checking the powerful.

Neither the concept of anti-distortion nor the importance of public funding is unique to the press. Rather, each is part of a larger phenomenon that I call public knowledge production and that I explored in earlier work.[14] Public knowledge producers – which I define very similarly to Vicky Jackson's definition of "knowledge institutions" – are "those government entities, officials, or employees who, in the ordinary course of their work, engage in 'knowledge production or dissemination … according to disciplinary norms.' This includes government scientists, economists, and other disciplinary experts."[15] It also includes publicly employed or subsidized journalists and teachers. As with publicly supported journalism, public knowledge production on the whole fills informational and educational gaps that the commercial marketplace alone cannot provide. Its existence does, however, demand vigilance against state capture.

Given the presence of public knowledge production in the United States – within and outside of the realm of journalism – and given the risks of state capture, it is unsurprising that the foundations of an anti-distortion principle already exist in aspects of free speech case law. Still, the principle requires substantial elaboration, both because its articulation in judicial precedent is underdeveloped and because there are countertendencies in the case law that must be addressed.

The principle's justification – that is, the reason why distortion is concerning from a First Amendment perspective – is only thinly gestured at in existing precedent. The same is true of the principle's implementation – in other words, of how one can determine the nature of a type of speech or of an expressive institution and assess whether it has been distorted. Furthermore, applying anti-distortion analysis to journalism implicates the First Amendment's Press Clause as well as its Free Speech Clause. It also is far from clear where the anti-distortion principle ends and the "government speech doctrine" begins. The latter is the notion that when the government employs personnel or subsidizes private speakers to convey the

[14] Heidi Kitrosser, *Protecting Public Knowledge Producers*, 22-17 KNIGHT FIRST AMEND. INST. (Dec. 16, 2022), https://knightcolumbia.org/content/protecting-public-knowledge-producers, *reprinted in* 4 J. FREE SPEECH L. 473 (2023) (subsequent citations will use the pagination from the Journal of Free Speech Law reprinting)). *See also* Heidi Kitrosser, *"A Government That Benefits from Expertise": Unitary Executive Theory & the Government's Knowledge Producers*, 72 SYRACUSE L. REV. 1473 (2022).

[15] Kitrosser, *"A Government That Benefits from Expertise," supra* note 14, at 1491. *See also* Kitrosser, *Protecting Public Knowledge Producers*, *supra* note 14, at 481.

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government's own message, the First Amendment simply does not apply; the government may impose whatever restrictions it likes on the resulting speech.

In Section 23.1 of this chapter, I elaborate on what the case law presently has to say about both anti-distortion and government speech. Sections 23.1.1 and 23.1.2 discuss cases that entail public knowledge production apart from journalism, whereas Section 23.1.3 focuses entirely on cases involving the press. In Section 23.2, I aim to build out the anti-distortion principle's theoretical underpinnings, elaborating on why distortion undermines key values associated with speech and press freedoms. In Section 23.3, I draw from existing cases, particularly those involving public or subsidized news media, to identify guidelines that courts and legislatures can use to determine when distortion is afoot.

## 23.1 WHAT JUDICIAL PRECEDENT CURRENTLY SAYS ABOUT DISTORTION, GOVERNMENT SPEECH, AND STATE-SUBSIDIZED JOURNALISM

### 23.1.1 *Traces of an Anti-distortion Principle in the Case Law*

Although it is far from a coherent or well-theorized concept in the case law, traces of an anti-distortion principle can be detected in various areas of judicial precedent. Perhaps the best-known example to this effect is the standard for evaluating speech conditions in limited public forums. In such cases, courts ask whether the restriction is viewpoint-neutral and reasonable in light of the forum's nature and purpose.[16]

The Supreme Court offered its most overt and detailed embrace of an anti-distortion principle in *Legal Services Corporation v. Velazquez*.[17] The *Velazquez* Court held unconstitutional a statutory restriction limiting the arguments that federally funded legal services corporation attorneys ("LSC attorneys") could make in litigation. Pursuant to the restriction, LSC attorneys could argue only that state or federal statutes had been misapplied in their clients' cases; they were barred from challenging the laws themselves as unconstitutional or, in the case of the state laws, as violating federal law.[18] Writing for the Court, Justice Kennedy emphasized that LSC attorneys were not engaged in "government speech."[19] Their role, rather, was

[16] *See, e.g.*, Rosenberger v. Rector, 515 U.S. 819, 829 (1995) ("[o]nce it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is 'not reasonable in light of the purpose served by the forum,' nor may it discriminate against speech on the basis of its viewpoint") (internal citations omitted). *See also* Legal Services Corp. v. Velazquez, 531 U.S. 533, 544 (2001) (describing *Rosenberger* as premised on the idea that the government "could not elect to use . . . a college publication structure in a regime which prohibits speech necessary to the proper functioning of [that] system[] . . ..").

[17] 531 U.S. 533 (2001).

[18] *Id.* at 537–39.

[19] *Id.* at 541–43, 547–48.

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to speak on behalf of their private, indigent clients.[20] Crucially, they were charged to do so through "an existing medium of expression" – the legal system.[21] However, in limiting the stock of arguments from which LSC attorneys can draw to advise and advocate for their clients, the government impermissibly "distorts the legal system by altering the traditional role of the attorneys" as zealous advocates for their clients.[22] Among the problems with such distortion is that it "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."[23] The Court stressed that "[a]n informed, independent judiciary presumes an informed, independent bar."[24] Justice Kennedy thus relied partly on descriptive reasoning, observing that the restriction conflicts with "the traditional role of the attorneys" and with the judiciary's expectation that lawyers will conform to that role.[25] He also invoked normative concerns about the impact of such distortion on the legal system. Indeed, he suggested that normative considerations were especially strong in this case because the restriction "insulate[d] the Government's interpretation of the Constitution from judicial challenge,"[26] thus implicating "central First Amendment concerns."[27]

An anti-distortion principle also can be discerned in several cases involving free speech on university campuses. Echoing *Velazquez*, the Court in these cases drew on descriptive understandings of what university life and academia entail and on normative views regarding the features that imbue them with constitutional value. In *Rosenberger v. Rector and Visitors of the University of Virginia*,[28] for example, the Court held that the University of Virginia's (UVA) system for subsidizing student groups is akin to a limited public forum; as such, the subsidies cannot constitutionally be allocated on the basis of viewpoint or in a manner unreasonable in light of the subsidy program's purpose.[29] UVA had breached these limits by denying funds on the basis of viewpoint.[30] The Court stressed the denial's incompatibility with the nature and mission of universities, positing: "In the university setting . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[31]

The constitutional salience of an anti-distortion principle for public academia is also reflected in *Garcetti v. Ceballos*.[32] *Garcetti* established that public employees

[20] *Id.*
[21] *Id.* at 542–43.
[22] *Id.* at 544.
[23] *Id.* at 545.
[24] *Id.*
[25] *See supra* text accompanying notes 23–25.
[26] 531 U.S. at 548.
[27] *Id.* at 547.
[28] 515 U.S. 819 (1995).
[29] *Id.* at 823–24, 829–30.
[30] *Id.* at 830–32, 834–35.
[31] *Id.* at 835.
[32] 547 U.S. 410 (2006).

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receive no First Amendment protection against termination or other job-related penalties for speech that they convey in the course of doing their jobs. The *Garcetti* rule is of a piece with government speech doctrine and thus largely antithetical to anti-distortion principles. However, the *Garcetti* Court left the door open to an exception for the expressive work of public school academics, acknowledging that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[33] An academic freedom exception is necessarily grounded in an anti-distortion principle, specifically in the notion that the state may not create or fund an institution of a type ordinarily characterized by academic freedom but then curtail that freedom.

*Garcetti* and *Rosenberger* stand on the shoulders of several McCarthy-era cases that extoll the virtues of academic freedom and suggest that its compromise distorts pedagogy and scholarship. In *Keyishian v. Board of Regents*, for example, the Court invalidated New York statutes "barring employment on the basis of membership in 'subversive' organizations. . . ."[34] The suit had been brought by a group of state university faculty members, and the Court stressed the laws' incompatibility with academic freedom. "The classroom," it wrote, "is peculiarly the 'marketplace of ideas.'"[35] The laws would distort the classroom's very nature. The Court framed this point partly in descriptive terms, telling readers what the classroom "*is*."[36] But it also invoked normative concerns about the free speech value served by an undistorted classroom. For example, the Court quoted an earlier case to the effect that "[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth . . . Teachers and students must always remain free to inquire, to study and to evaluate . . . otherwise our civilization will stagnate and die."[37]

Courts also have touched on anti-distortion reasoning in cases involving public libraries. For example, in *United States v. American Library Association*,[38] a plurality of the Supreme Court, as well as the two concurring justices, all relied partly on their understanding of ordinary library practices to assess the constitutionality of a statutory condition on federal funding for public libraries. The statutory provisions required public libraries that receive federal funding for internet access to use blocking software to prevent patrons from accessing child pornography, obscenity, and other "visual depictions" harmful to minors.[39] The libraries were permitted to

[33] *Id.* at 425.
[34] Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967), *quoted in* Connick v. Myers, 461 U.S. 138, 144 (1983).
[35] *Id.* at 603.
[36] *Id.* (emphasis added).
[37] *Id.* at 603 (citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).
[38] 539 U.S. 194 (2003).
[39] *Id.* at 201.

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disable the blocking software during periods of lawful adult usage and, in some cases, juvenile usage.[40] Writing for the plurality, Chief Justice Rehnquist reasoned that the law's constitutionality could not be resolved without "first examin[ing] the role of libraries in our society."[41] In performing this assessment, Rehnquist mixed a descriptive understanding of what libraries do with a normative take on what they should do to fulfill their "worthy missions of facilitating learning and cultural enrichment."[42] He concluded that libraries must make content-based judgments as to which materials "have 'requisite and appropriate quality.'"[43] In the same vein, public libraries should be free to offer patrons the "vast amount of valuable information" on the internet without also being forced to give them access to obscenity or child pornography.[44] The plurality thus upheld the statutory conditions. The two concurring justices – Kennedy and Breyer – cited the constitutional significance of the fact that the law permitted libraries to unblock the software upon request by adult patrons.[45] Justice Breyer also elaborated on the nature of libraries from both descriptive and normative perspectives, citing their role as "critically important sources of information"[46] and comparing their traditional practices – including content selection and the employment of closed stacks – to the challenged statutory condition.[47]

As these examples demonstrate, traces of an anti-distortion principle are scattered throughout First Amendment case law. Yet the idea remains undertheorized, and two points especially call for development. First, the *why*. That is, why it matters, from a First Amendment perspective, whether government conditions distort the nature of funded speech or speech institutions. Second, the *how*. That is, how interpreters should determine the nature of certain types of speech or expressive institutions. Lack of clarity on these points heightens the anti-distortion principle's vulnerability to an encroaching government speech doctrine.

### 23.1.2 *Government Speech Doctrine*

There is indeed tension between the anti-distortion principle and the Supreme Court's widening embrace of the "government speech doctrine." Government speech doctrine is typically traced to the 1991 case of *Rust v. Sullivan*.[48] In *Rust*, the Supreme Court upheld federal regulations barring family planning clinics from

[40] *Id*. at 198–201.
[41] *Id*. at 203.
[42] *Id*.
[43] *Id*. at 204.
[44] *Id*. at 200. Indeed, Chief Justice Rehnquist observed that numerous public libraries had already begun to use filtering software before the statutory provisions at issue were enacted. *Id*.
[45] *Id*. at 214 (Kennedy, J., concurring); *id*. at 219 (Breyer, J., concurring).
[46] *Id*. at 216 (Breyer, J., concurring).
[47] *Id*. at 217–20 (Breyer, J., concurring).
[48] 500 U.S. 173 (1991).

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mentioning abortion in the course of providing federally subsidized counseling.[49] The *Rust* Court characterized the regulations as doing nothing more than setting boundaries on the scope of a government-funded program.[50] It was the *Rosenberger* Court that first framed *Rust* as a government speech decision.[51] *Rust*, it said, had "recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[52]

*Rust* itself embodies the tension between the government speech doctrine and anti-distortion. Critics of *Rust* have argued that the challenged conditions forced medical providers to choose between funding and professional and ethical norms. As Robert Post put it, the regulations sought to "override [physicians'] necessary exercise of independent professional judgment."[53] They also upended patients' expectations of the care that they would receive from a funded clinic: "In a world where physicians routinely exercise independent judgment, patients come to expect and rely on that judgment."[54] Post's insights help to illuminate the distorting effect of the regulation on the speech of subsidized medical professionals. Five years after Post's article was published, the Supreme Court issued its opinion in *Velazquez*, recognizing the distorting effect of the challenged restrictions on LSC attorneys. Although the *Velazquez* Court made some effort to distinguish *Rust*, explaining that the latter involved a "programmatic [governmental] message,"[55] that distinction failed to account for the distorting effect of directing medical professionals to convey the government's messaging. *Velazquez* and *Rust* thus represent two strains in the case law – the anti-distortion principle and government speech doctrine – and the tension between them.

In the years since *Rust* was decided, government speech doctrine has expanded considerably. This has prompted commentators and jurists to express alarm, much of it over the risk that government largesse will be leveraged to silence disfavored private voices and views.[56] For example, the Supreme Court held in *Walker v. Tex. Div., Sons of Confederate Veterans*[57] that specialty license plates in Texas, even those designed by private groups to reflect private hobbies and interests, constitute

[49] *Id.* at 191.
[50] *Id.* at 196.
[51] *Rosenberger*, 515 U.S. at 833.
[52] *Id. See also Velazquez*, 531 U.S. at 541 (explaining that "*Rust* did not place explicit reliance" on the government speech rationale, but that, "when interpreting the holding in later cases . . . we have explained *Rust* on this understanding.").
[53] Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 173 (1996).
[54] *Id.* at 174.
[55] *Velazquez*, 531 U.S. at 548.
[56] *See, e.g.*, Matal v. Tam, 137 S.Ct. 1744, 1758 (2017); Walker v. Tex. Div., Sons of Confederate Veterans, 576 U.S. 200, 221 (2015) (Alito, J., dissenting); Mary-Rose Papandrea, *The Government Brand*, 110 NORTHWESTERN U. L. REV. 1195, 1197–98, 1226–34 (2016); Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 231–41 (2021).
[57] 576 U.S. 200 (2015).

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government speech.[58] Dissenting on behalf of himself and three other justices, Justice Alito lamented the Court's "capacious understanding of government speech"[59] that "threatens private speech that government finds displeasing."[60] As *Walker* demonstrates, the risks of a growing government speech doctrine are not limited to distortion,[61] but they very much include distortion.

The government speech development most conducive to distortion is the *Garcetti* rule – that is, the holding of *Garcetti v. Ceballos* to the effect that public employees have no First Amendment protection for expression that they convey in the course of doing their jobs. Although the *Garcetti* Court's reasoning is murky and at points even contradictory,[62] it relies at least partly on a government speech rationale, characterizing public employee work product speech as speech that "the employer itself has commissioned or created."[63] To support this point, it cites *Rosenberger*'s description of *Rust*'s holding: "When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[64] The assumption that government employees invariably convey a government-crafted message when they speak runs headlong into distortion concerns in the many cases in which employees are hired to provide professional judgment and expertise. Recall that the *Garcetti* Court itself implicitly acknowledges this insofar as it suggests the possible necessity of an exemption for public academics.

The clash between government speech doctrine and anti-distortion aims is cast in especially sharp relief in litigation regarding *Garcetti*'s academic exception. For example, in *Pernell v. Florida Board of Governors* – a case currently pending on appeal before the U.S. Court of Appeals for the Eleventh Circuit – the defendants urged the District Court for the Northern District of Florida to reject an academic exception to *Garcetti*, noting that the *Garcetti* Court had not definitively established one. The defendants characterized professorial classroom speech as "heartland government speech."[65] As such, they argued, a state legislature may dictate its contents.[66] The district court rejected this position, deeming it incompatible with the Supreme Court's "clear constitutional concerns," reflected in *Garcetti* and

[58] *Id*. at 204–05, 214–15; *id*. at 221–22, 225–26 (Alito, J., dissenting).
[59] *Id*. at 222 (Alito, J., dissenting).
[60] *Id*. at 221.
[61] *See also*, *e.g.*, *Matal*, 137 S.Ct. at 1758 (drawing the line at treating the grant of a trademark as an event that transforms private speech into government speech and observing, "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.").
[62] *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 311, 332–36 (2015).
[63] *Garcetti*, 547 U.S. at 422.
[64] *Id*. (citing *Rosenberger*, 515 U.S. at 833).
[65] Defendants' Memorandum of Law in Support of Motion to Dismiss at 10, Pernell v. Fla. Bd. of Governors, No. 4:22-cv-304 (N.D. Fla. Sept. 22, 2022).
[66] *Id*.

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elsewhere, for academic freedom.[67] Thus far, every federal appellate court to have considered the issue similarly has exempted scholarly and pedagogical speech in higher education from *Garcetti*'s reach.[68]

### 23.1.3 *State-Subsidized Journalism in Existing Case Law*

Courts have also considered the reach of government speech doctrine and anti-distortion principles in the context of public journalism and state subsidies for private press entities. A leading Supreme Court case in this regard is *Arkansas Educational Television Commission v. Forbes*.[69] Writing for the *Forbes* Court, Justice Kennedy held that a public television station had not violated the First Amendment by refusing to include Ralph Forbes in a televised candidates' debate for a congressional seat. Justice Kennedy found that the debate was a nonpublic forum but concluded that the station's decision to exclude Forbes was viewpoint-neutral and reasonable in light of the forum's purpose.[70] Given Forbes' lack of public and financial support as a candidate, the station's decision "was a reasonable, viewpoint-neutral exercise of journalistic discretion."[71]

A few aspects of *Forbes* are especially relevant to our inquiry. First, the majority relied on its descriptive understanding of the natures, respectively, of broadcast journalism and of candidate debates. With respect to the former, Justice Kennedy repeatedly invoked the notion that editorial discretion is a core feature of journalism. As such, he explained, it typically is inappropriate for courts to treat broadcast programs as forums at all.[72] On the other hand, the nature of a candidate debate – specifically, the fact that in airing it, a broadcaster traditionally implies "that the views expressed [are] those of the candidate, not its own"[73] – makes it "a nonpublic forum, from which AETC could exclude Forbes in the reasonable, viewpoint-neutral exercise of its journalistic discretion."[74] Second, the majority considered normative factors in concluding that candidate debates are forums, albeit nonpublic ones, and thus not entirely outside the reach of First Amendment analysis. It cited the "exceptional significance" of candidate debates "in the electoral process," observing that "[d]eliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates."[75] Third, the majority left open a question that is especially germane to

[67] *Pernell* at *9–*10.
[68] *See* Heim v. Daniel, 81 F.4th 212, 224–28 (2d Cir. 2023)
[69] 523 U.S. 666 (1998).
[70] *Id.* at 682.
[71] *Id.* at 683.
[72] *Id.* at 673–75.
[73] *Id.* at 675.
[74] *Id.* at 676.
[75] *Id.* at 675–76.

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this chapter: the extent to which Congress, rather than courts, has leeway to impose access demands on public broadcasters. Justice Kennedy explained that the First Amendment would not necessarily "bar the legislative imposition of neutral rules for access to public broadcasting."[76] However, "in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."[77] The Court's discussion and the underlying controversy all took place against the backdrop of a statutory scheme that imposed duties on broadcasters "to schedule programming that serves the 'public interest, convenience, and necessity.'"[78]

The Supreme Court did grapple with congressional restraints on public broadcasters in a series of mid-twentieth-century cases. Although these cases preceded the development of modern government speech doctrine, they reflect an instinct to reconcile the government's ability to define its own projects with the editorial independence that the Court associated, descriptively and normatively, with the news media. The government benefits at stake in these cases included both subsidies and broadcast spectrum. The latter was a limited commodity, and Congress had conditioned its use on broadcasters' serving the "'public interest, convenience, and necessity.'"[79] Writing for the majority in 1984's *FCC v. League of Women Voters* ("*LWV*"), Justice Brennan explained that "given spectrum scarcity," broadcast licensees could be treated "as fiduciaries for the public. . .."[80] Using this rationale, the Court in previous cases had rejected First Amendment challenges to both the FCC's "Fairness Doctrine"[81] and a "limited right of 'reasonable' access" to the broadcast airwaves for "legally qualified federal candidates."[82] Still, the Court maintained that broadcasters retained "'the widest journalistic freedom consistent with their public [duties].'"[83] "Indeed," Brennan wrote, "if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust."[84] The *LWV* Court paired these words with action, holding that Congress had exceeded constitutional limits when it barred broadcasters who received any funding from the congressionally created Corporation for Public Broadcasting from airing editorials.[85] In the Court's view, the editorial ban violated

[76] *Id*. at 675.
[77] *Id*.
[78] Indeed, the *Forbes* Court's discussion and the underlying controversy took place against the backdrop of this requirement. *Id*. at 673 (quoting 47 U.S.C. § 309(a)).
[79] *Id*. (quoting 47 U.S.C. § 309(a)).
[80] 468 U.S. 364, 377 (1984).
[81] *Id*. at 378 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969)). The Fairness Doctrine "require[d] broadcasters to provide adequate coverage of public issues and to ensure that this coverage fairly and accurately reflect[ed] the opposing views." *Id*.
[82] CBS v. FCC, 453 U.S. 367, 396 (1981), *cited in LWV*, 468 U.S. at 378.
[83] *LWV*, 468 U.S. at 378 (quoting *CBS*, 453 U.S. at 395) (additional internal citation omitted).
[84] *Id*. (citing CBS v. DNC, 412 U.S. 94, 124–27 (1973)).
[85] *Id*. at 366, 395.

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the First Amendment because it forced licensees to refrain from behavior that descriptively constituted a core part of journalism and normatively bore substantial free speech value. As to the latter, Justice Brennan wrote for the majority that "the expression of editorial opinion … lies at the heart of First Amendment protection."[86] Preserving it "is part and parcel of 'a profound national commitment … that debate on public issues should be uninhibited, robust, and wide open.'"[87] The majority also melded its normative reasoning with descriptive observation, suggesting that the press is essential to democracy in part because of its tradition of editorial speech: "[T]he special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press … carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs."[88]

Finally, a recent U.S. District Court case from the District of Columbia – 2020's *Turner v. U.S. Agency for Global Media*[89] – directly tackles the tension between government speech doctrine and anti-distortion concerns regarding the press. Although *Turner* was never appealed, having been mooted by a change in administrations, it is remarkable in that it takes the view that *Garcetti*'s reasoning about a potential academic freedom exception extends to public news media. Specifically, Judge Beryl Howell concludes that "*Garcetti* does not apply to the core editorial or journalistic functions of government-employed journalists"[90] for the same reason that it ought not to apply to academics: "Freedom of the press holds an equally exalted place in the First Amendment firmament" as does academic freedom.[91] She follows this point with a long list of citations and quotations from Supreme Court opinions extolling the "essential role" of the press "in our democracy."[92] Judge Howell's analysis assumes that when the government creates or manages certain knowledge-producing institutions, including journalism and academia, the constitutional value of those institutions can limit the government's ability to distort the features that make them valuable.

Three additional aspects of *Turner* are instructive. First, because Judge Howell found *Garcetti* inapplicable to publicly employed journalists, she ordinarily would have proceeded to the so-called "*Pickering* balance test," whereby courts determine whether speech is on a matter of public concern and, if so, weigh "the employee's interest in protected speech against the government's interest in promoting efficiency. …"[93] However, because of procedural limits on federal employees' ability

[86] *Id.* at 381.
[87] *Id.* at 382 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
[88] *Id.* (internal citation omitted).
[89] 502 F. Supp. 3d 333 (D.D.C. 2020).
[90] *Id.* at 376.
[91] *Id.* at 375.
[92] *Id.* at 375 (quoting N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring)); *id.* (citing several additional Supreme Court cases).
[93] *Id.* at 376.

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to bring First Amendment claims directly in federal courts, the *Turner* court could consider only some of the plaintiffs' claims on the merits.[94] Specifically, Judge Howell limited her merits review to the plaintiffs' First Amendment challenge to the defendants' alleged breach of a statutory and regulatory firewall between the U.S. Agency for Global Media's (USAGM) political leadership and its professional journalists in editorial decision making.[95] Because the acts that comprised the alleged breach were "'generally applicable'" policies and practices rather than "'particularized disciplinary action[s],'" Judge Howell concluded that another legal standard – from *United States v. National Treasury Employees Union* (*NTEU*) – had to be imported into her application of the *Pickering* balance test.[96] Judge Howell thus asked, pursuant to *NTEU*, whether "the restrictions . . . allegedly imposed on [plaintiffs'] speech are no more restrictive than '"reasonably necessary to protect" various government interests.'"[97] The *Turner* Court rightly framed its use of the *NTEU* standard as premised partly on the greater reach – including the potential chilling effects – of broadly applicable policies and practices as opposed to post hoc, individualized employment actions.[98] Yet the *NTEU* standard might independently be justified as reflecting the lesser deference due to a nonexpert political appointee's ex ante policy decision as opposed to a post hoc, individualized determination by a supervisor who is an expert in the relevant field.

Second, in assessing the reasonable necessity of the challenged actions, the *Turner* court implicitly conducts an anti-distortion analysis. This is an intuitive move, as reasonable necessity cannot be determined without assessing an institution's characteristic needs and goals and the practices typically employed to meet those ends. Given the practical nature of this inquiry, Howell focuses on descriptive aspects of USAGM, its stations, and journalistic institutions generally. She compares the challenged acts to USAGM's statutory guidelines, including the directive that "U.S.-funded international broadcasting 'be conducted in accordance with the highest professional standards of broadcast journalism'"[99] and the statutory firewall that gives "evaluative and review responsibilities" to USAGM while leaving "day-to-day control . . . to the stations themselves."[100] She also consults Voice of America's

[94] *Id.* at 363–64 (explaining that alleged "personnel actions" must first be challenged through administrative channels under the Civil Service Reform Act).

[95] *Id.* at 366–68. *See also* Amended Complaint at ¶¶ 173–79, Turner v. U.S. Agency for Global Media, Case No. 20-cv-2885 (D.D.C. Nov. 4, 2020) (detailing plaintiffs' third cause of action, the constitutional claim regarding firewall breach).

[96] *Id.* at 377 (citing United States v. National Treasury Employees Union [NTEU], 513 U.S. 454 (1995)).

[97] *Id.* at 378 (quoting Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1436 (D.C. Cir. 1996) (citing *NTEU*, 513 U.S. at 474)). Before conducting this balancing test, Judge Howell determined that the plaintiffs' journalistic work plainly entailed "'matters of public concern.'" *Id.* at 376 (citing Pickering, 391 U.S. at 568).

[98] *Id.* at 377–78.

[99] *Id.* at 378 (quoting 22 U.S.C. § 6202(a)(5)).

[100] *Id.* (quoting Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1125 (D.C. Cir. 1985)).

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*Best Practices Guide* and USAGM's ethics policy in evaluating whether the defendants' alleged firewall breaches were "reasonably necessary," or whether alternative procedures were available to achieve their ends.[101] Additionally, Judge Howell compares some of the requirements imposed by USAGM on personnel to "standard journalistic practices."[102]

Third, the facts underlying *Turner* highlight the complexity that can arise in reconciling anti-distortion goals with legitimate government line-drawing concerning the scope of state projects. Yet *Turner* also illustrates that such difficulties are not insurmountable. The heightened complexity stems from the fact that USAGM oversees international broadcasting stations, most famously the Voice of America (VOA).[103] US international broadcasting efforts plainly are designed to serve diplomatic purposes; indeed, it is no coincidence that VOA began in the midst of World War II, with its first broadcast transmitted in Germany in 1942.[104] Accordingly, USAGM networks are charged by statute to ensure that their broadcasts are "consistent with the broad foreign policy objectives of the United States."[105] The networks also "shall include" in their broadcasts "a balanced and comprehensive projection of United States thoughts and institutions."[106] At the same time, the governing statutory authorities – and long-standing US and network representations as to the characters of the networks – demand journalistic independence in day-to-day operations and best journalistic practices.[107] Judge Howell reconciled these competing considerations by finding that the reasonable necessity standard was met with respect only to those managerial decisions that did not directly intrude into or threaten to chill day-to-day journalistic and editorial decision making.[108]

## 23.2 WHY DISTORTION IS A FIRST AMENDMENT PROBLEM

The precedent described above reflects two things about existing free speech case law. First, government speech doctrine is potentially a very expansive means to empower federal and state legislative and executive bodies to cloak political messaging in the vestments of professional expertise – whether journalistic, pedagogical, scientific, or otherwise. Second, extant judicial doctrine contains the makings of an important counter-force – the anti-distortion principle – to guard against such expansion. However, the latter is currently lacking in two important respects. First, the *why* of anti-distortion – specifically, why distortion is a problem from a First

[101] *Id.* at 382.
[102] *Id.* at 383.
[103] *Id.* at 343–47.
[104] *Id.* at 341–44.
[105] *Id.* at 345 (quoting International Broadcasting Act § 303(a)(1)).
[106] *Id.* (quoting International Broadcasting Act § 303(b)(2)).
[107] *See, e.g., supra* text accompanying notes 100 and 101.
[108] *Turner*, 502 F. Supp. 3d at 378–85 (assessing specific firewall breach allegations under the reasonable necessity standard).

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Amendment perspective – is not explained with depth or consistency across the cases. Second, the *how* of the principle – that is, how one determines whether and when distortion exists – has not been considered with deliberateness, although aspects of it can be inferred from existing cases.

In this section, I consider the *why* question raised by the anti-distortion doctrine. I explain that distortion is a First Amendment problem for reasons involving both negative First Amendment theory, which focuses on the dangers of speech regulation, and positive First Amendment theory, which focuses on the affirmative benefits of speech and press freedoms. With respect to negative theory, distortion enables the government to pull the wool over the people's eyes, leveraging its largesse to present political, even partisan messaging as the product of disciplinary expertise. This is a cause for alarm whenever it impacts the expression of public employees or subsidized private actors. There are special bases for concern when the government claims to be funding journalism. Second, when the government purports to fund knowledge production but conditions its subsidies on speech restrictions that have a distorting effect, it undermines the affirmative First Amendment values of the very enterprise that it claims to subsidize. In the case of funded journalism, distortion undercuts journalists' ability to perform core First Amendment and structural constitutional functions: overseeing the actions of society's most powerful actors, including government actors, and educating the American public about important issues and events that impact their community and the larger world.

### 23.2.1 *Distortion and the Negative Theory of Speech and Press Freedoms*

Efforts to launder political messaging – that is, to pass it off as expertise by imposing pressure on public employees or subsidy recipients – are antithetical to one of the core values underlying the First Amendment's protections for free speech: distrust of government power.[109] As Helen Norton explains:

> While courts and commentators have long posited that speech deserves constitutional protection when it is affirmatively valuable in facilitating democratic self-governance, enlightenment, and individual autonomy, the First Amendment tradition also relies on what many call a negative theory of the Free Speech Clause. Under this approach, the Constitution protects speech not so much because it is so valuable, but instead because the government is so dangerous in its capacity to abuse its regulatory power.[110]

Negative theory is not mutually exclusive from positive theories of free speech, which include the notions that free speech facilitates the search for truth, is essential

[109] *See, e.g.*, Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, 22-07 Knight First Amend. Inst.3 (Oct. 19, 2022), https://knightcolumbia.org/content/distrust-negative-first-amendment-theory-and-the-regulation-of-lies.

[110] *Id.*

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to a democratic system, and enhances individual autonomy.[111] Indeed, Frederick Schauer has demonstrated that negative free speech theory lies at the core of all major theories of free speech value.[112] For example, the democracy theory of free speech might at first blush seem a contradiction in terms: a democracy-based argument for limiting the majority's power to restrict free speech. What makes sense of the theory is the reality of human, and hence governmental, fallibility. As Schauer writes: "We wish to preserve the freedom to criticize the policies of the majority because those policies may be wrong, just as any other judgment may be wrong."[113] Incompetence is not the only risk; those who govern us may be corrupt or abusive and may suppress or manipulate speech to shield themselves from criticism or unwelcome revelations.[114]

Heightened alert against government abuse or incompetence is well warranted when distortion is afoot. Although political actors generally are free to craft and convey whatever messages they like, it is another story when they use public employees or subsidized private actors as vehicles to convey those messages and present them to the public as products of professional judgment and expertise. In such cases, there is reason to fear either that the political actors who crafted the messages believe that they themselves have resolved the scientific or other question at issue, a conclusion that raises fallibility concerns, or that they are abusing their power by cloaking political messaging as expertise.

Negative free speech theory packs an additional punch when it is applied to the press, and the Constitution's Press Clause provides an additional textual hook for it as well. As Helen Norton writes, "[n]egative theory can help us understand the press clause as providing an especially robust shield from the government's retaliation,"[115] given the press's oversight role and its structurally and historically antagonistic relationship to the powerful actors, including government actors, whom it oversees.[116] There are distinct reasons to fear governments' efforts to leverage their largesse to dress self-scripted plaudits in the vestments of hard-hitting journalism or to squash critical reporting.[117]

[111] *Id.* at 3–4; *see also, e.g.*, Frederick Schauer, Free Speech: A Philosophical Enquiry 33–34, 44–46, 71–72, 86 (1982).
[112] Schauer, *supra* note 111, at 33–34, 44–46, 71–72, 86 (1982).
[113] *Id.* at 45.
[114] *See* Norton, *supra* note 109, at 3–4, 6–8.
[115] Helen Norton, *Reinvigorating the Press Clause Through Negative Theory*, *in* The Future of Press Freedom: Democracy, Law, and the News in Changing Times 161, 162 (RonNell Andersen Jones & Sonja R. West eds., 2025).
[116] *Id. See also, e.g.*, Andersen Jones, *supra* note 1, at 2443–44.
[117] *See also* Andersen Jones, *supra* note 1, at 546 ( "The government knows that as listeners 'we value the press for telling us what our elected officials are up to, so that we can, in turn, have an informed dialogue about their performance and make informed decisions about whether we wish to elect them again.' It has every incentive to attempt to use its power to shape and even forcibly control that content to make it favorable to the government.").

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One might argue that negative theory counsels against the government's financing journalism at all, given the dangers of abuse or error. Even if this view were a sound one, it would not detract from the importance of protecting against government capture through distortion when the government does fund press activities. More importantly, the argument against public financing overlooks two points: first, the affirmative value, indeed the essentialness of an active and robust press in American life; and second, the importance of public financing, perhaps today more than ever, as one of the tools with which to ensure the survival of the American press. I elaborate on both points in the next subsection.

### 23.2.2 *Distortion and the Affirmative Benefits of Speech and Press Freedoms*

Courts and scholars have long relied on speech's affirmative value, often bolstered by negative theory, to justify and interpret First Amendment protections. To take a classic example, the Supreme Court in *New York Times Co. v. Sullivan* famously established a high bar for public official plaintiffs in defamation cases.[118] The majority opinion by Justice Brennan invoked the value of speech and press freedoms in enlightening and informing the people and thus in serving democracy and checking governmental power. Brennan quoted James Madison to the effect that, "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[119] Brennan also approvingly described Madison's view that "[t]he right of free public discussion of the stewardship of public officials was … a fundamental principle of the American form of government."[120] The *Sullivan* Court bolstered its discussion of these benefits with a nod to negative theory, quoting Justice Brandeis to the effect that "the occasional tyrannies of governing majorities" demand constitutional guarantees for free speech.[121]

Distortion robs expression of its affirmative First Amendment value. The problem is well illustrated by the example of the press. As reflected in *Sullivan* – which was technically a Free Speech Clause case but invoked the press's constitutional significance extensively in its reasoning[122] – courts and scholars frequently associate the press with democratic and oversight values.[123] These values cannot be served, however, by journalism that is compromised by distortion. This is particularly obvious with respect to journalism's checking or oversight function. A journalist

[118] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[119] *Id.* at 275 (quoting 4 Annals of Cong. 934 (1974)).
[120] *Id.*
[121] *Id.* at 270 (quoting Whitney v. California, 274 U.S. 357, 375–76 (Brandeis, J., concurring)).
[122] *See* Sonja R. West, *The Stealth Press Clause*, 48 Ga. L. Rev. 729, 730, 745 (2014) (characterizing *Sullivan* as a "stealth" press case because it embraced "the unique role of the press" while technically being "not really a 'press' case").
[123] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am. Bar Found. Rsch. J. 521 (2977)

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will obviously face a conflict in reporting on a person or entity who controls their substantive output. Distortion is also antithetical to the First Amendment's role in supporting democracy more broadly. To the extent that reporting involves politics or policy, it can be difficult to predict when it might entail checking – a journalist might, for example, stumble unexpectedly across a scandal – and the temptation for political interference thus remains a factor. Beyond checking, distortion intrinsically threatens to hijack features that make journalism central to a healthy democracy – its ability to spread information and ideas that are presumed to follow from fact-finding, corroboration, and learned analysis – to dress up and convey political messaging.

Furthermore, as noted earlier, it would not be desirable simply to write off government support for fear of distortion. American journalism is currently in a terribly precarious economic state, one that has decimated much investigative reporting and local news coverage.[124] Although public financing is not the only tool available for "saving the news,"[125] it is an essential part of the toolkit.[126] As current events demonstrate all too well, socially valuable reporting does not necessarily translate to commercial success. More so, private financial interests often will be antagonistic to investigative reporting or editorial commentary that oversees powerful public and private actors.[127] Public financing has its own problems, to be sure, not the least of which is the risk of state capture under even a robust anti-distortion framework. What is needed, ideally, is a diverse array of models for funding the news, ranging from the for-profit to the publicly funded to the private nonprofit. Yet if a publicly funded press is to possess the affirmative First Amendment values that make it worth supporting, anti-distortion principles are essential.

## 23.3 IDENTIFYING DISTORTION

Even if one supports the principle of anti-distortion in theory, there remains the practical question of how to determine when distortion is afoot. To make matters trickier still, identifying distortion is a two-step process. One must first define the baseline: What *is* the nature or ordinary practices of the knowledge institution or type of expression at issue? One then must ask whether the challenged condition or directive is reasonably compatible with that baseline.

These are not easy questions, but they are also not impassable ones. Because they are deeply fact-driven inquiries, there is no one-size-fits-all formula to resolve them. One can, however, identify factors for courts, legislatures, and other decision-makers to consider. The existing case law itself is a useful starting point toward this end.

[124] *See supra* notes 6–8.
[125] *See generally* Minow, *supra* note 9.
[126] *See supra* text accompanying notes 9–12.
[127] *See, e.g.*, Sonja R. West, *Press Exceptionalism*, 127 Harv. L. Rev. 2434, 2451 (2014) (citing the press' role in checking powerful private as well as public actors); West, *supra* note 122, at 754–55 (same).

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Recall from Section 23.1 that although courts have not identified anti-distortion as a distinct legal principle, they have implicitly considered whether distortion exists on a number of occasions. In this section, I draw from those cases to suggest several factors that courts, legislatures, and other decision-makers can use to guide distortion inquiries.

### 23.3.1 *Descriptive Considerations*

#### 23.3.1.1 The Government's Own Representations

In a sense, the anti-distortion principle amounts to a rule that the government cannot have its cake and eat it too in the realm of public knowledge production. That is, it cannot purport to sponsor expression grounded in disciplinary expertise but set conditions that sabotage that goal. In determining the nature of a given expressive enterprise or type of speech, then, the government's public representations as to what it is funding should loom large. Governments often make such assertions through statutory and regulatory authorities and other public pronouncements.

The *Turner* Court relied in part on such evidence. Judge Howell looked to statutory descriptions of the funded knowledge producer – in this case, USAGM and its networks – to determine its nature. For example, she emphasized the statutory directive that "U.S.-funded international broadcasting 'be conducted in accordance with the highest professional standards of broadcast journalism'"[128] and the statutory firewall that gives "'evaluative and review responsibilities'" to USAGM while leaving "'day-to-day control . . . to the stations themselves.'"[129] Although these provisions bear most directly on USAGM's statutory duties, Judge Howell also treated them as having First Amendment significance because they informed the "reasonable necessity" inquiry that she undertook pursuant to *NTEU*.[130]

I would add an additional rationale for treating these provisions as probative of the constitutionality of the defendants' actions: They bear on the nature of the broadcasting enterprise that the government purports to be funding. This enterprise is especially complicated given its diplomatic dimension, as discussed in Section 23.1.[131] Nonetheless, the United States repeatedly has indicated through the relevant statutory authorities and otherwise that "in contrast to the state-run propaganda that dominates media in the countries where VOA and its sister networks broadcast, US-funded international broadcasting outlets combat disinformation and deception with facts, told through an American lens of democratic values."[132] As the *Turner*

[128] 502 F. Supp. 3d at 378 (quoting 22 U.S.C. § 6202(a)(5)).
[129] *Id.* at 378 (quoting Ralis, 770 F.2d at 1125).
[130] *Supra* text accompanying notes 98–101.
[131] *See supra* text accompanying notes 104–109.
[132] 502 F. Supp. 3d at 342.

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Court put it, quoting an earlier case by the D.C. Circuit, "'to transform' these outlets 'into house organs for the United States government' would be 'inimical to [their] fundamental mission.'"[133] If distortion offends First Amendment values, then such transformation is a First Amendment problem.

### 23.3.1.2 Structure and Decision-Maker Identity

Structural factors, including the source of challenged actions or directives, are also highly probative of distortion. To illustrate, consider how a twist in the facts of *FCC v. League of Women Voters* might have altered the outcome. Recall that in *LWV*, the Supreme Court invalidated a statutory provision that barred broadcasters who received certain federal funds from running editorials.[134] Suppose instead that there had been no such statutory bar but that the producer of a particular news program, a career professional, had decided to stop running editorials on the program. Structurally, these circumstances suggest that the producer might well have been applying professional judgment grounded in expertise about programming choices. This indicia of non-distortion might be overcome by other factors, for instance, if there were evidence that the producer had faced pressure from politically appointed supervisors who did not like the content of recent editorials. The fact that the decision appeared at first blush to constitute a programming call by an expert decision-maker would not necessarily be decisive. But it would weigh in favor of a non-distortion finding.

Two aspects of *Turner* also reflect structural considerations. First, the core free speech violation that Judge Howell identified was a structural one – the breach of the firewall between political supervisors and career journalists. Second, recall that Judge Howell incorporated the relatively demanding *NTEU* test into the *Pickering* balancing test because she was evaluating "generally applicable" policies and practices rather than post hoc employee discipline.[135] Judge Howell rightly justified this move by reference to the relatively long reach of ex ante policies.[136] I would also add a second, independent basis for applying *NTEU*: an ex ante policy decision by a nonexpert political figure warrants considerably less deference than a fact-driven, post hoc determination by a career supervisor who is a professional in the field.

Finally, implicit in my attention to structure and decision-maker identity is the notion that "the government" is many things. For simplicity's sake, I refer throughout this chapter to statements that "the government" made or to actions that it took. However, it is important to keep in mind that even a single governmental unit – say, the US federal government or the government of a particular state or locality – comprises countless functions, departments, and people. For purposes of a

[133] *Id.* at 342 (quoting Ralis, 770 F.2d at 1125).
[134] *See supra* notes 85–88.
[135] *See supra* text accompanying notes 96–97 (citing *Turner*, 502 F. Supp. 3d at 377–78).
[136] *Supra* text accompanying note 96 (citing *Turner*, 502 F. Supp. 3d at 377).

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distortion inquiry, it matters a great deal who within the government issued a particular directive – whether, for example, they were elected or appointed politically, whether they were part of the career civil service, and whether their role is associated with a professional discipline.

#### 23.3.1.3 Evidence of Standard Practices

Knowledge production takes place within broader social and professional contexts laden with meaning. Particular types of knowledge production are associated with distinct professional and ethical norms, standard practices, and training.[137] As we saw in Section 23.1, courts frequently tap into this fact when they ask whether conditions on subsidized expression are constitutional.

To determine the nature and standard practices of a particular type of knowledge producer, courts draw from a hodgepodge of factors, including their own impressions, statements made in judicial precedent, legislative assumptions, and record evidence. In *LWV*, for example, the Supreme Court described editorials as central to journalism, invoking the press's "historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs."[138] To support this point, it cited earlier case law as well as the fact that the FCC had "for the past 35 years actively encouraged commercial broadcast licensees to include editorials on public affairs in their programming."[139] Outside of the broadcasting realm, recall that the Supreme Court in *Velazquez* relied on "the traditional role of the attorneys," which it took to encompass "the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case."[140] Finally, returning to the example of *Turner*, Judge Howell drew not only on statutory claims of allegiance to best journalistic practices and to a firewall between politics and journalism but also on other evidence of standard and best practices, including VOA's *Best Practices Guide* and USAGM's ethical code.[141] The *Turner* plaintiffs also provided testimony to the effect that best practices in private journalism include the use of firewalls between commercial and journalistic interests.[142]

### 23.3.2 *Normative Considerations*

Courts do not rely solely on descriptive factors to determine the nature of particular knowledge producers. They also lean heavily on normative considerations,

[137] *See supra* notes 14–15 and accompanying text.
[138] *See supra* text accompanying note 89.
[139] *LWV*, 468 U.S. at 382.
[140] *Velazquez*, 531 U.S. at 545.
[141] 502 F. Supp. 3d at 382.
[142] *See* Kitrosser, *Protecting Public Knowledge Producers*, *supra* note 14 and accompanying text (quoting Declaration of Amanda Bennett in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 3–4, ¶ 10, *Turner*, 502 F. Supp. at 333).

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emphasizing the importance of protecting those features that carry First Amendment value. In *Forbes*, for example, the Court observed not only that candidate debates are best characterized descriptively as nonpublic forums but that categorizing them as such – which subjects them to viewpoint discrimination and reasonableness rules – is warranted given their "exceptional significance" "in the electoral process."[143] Similarly, in *LWV*, the Court described editorials as a core aspect of broadcast journalism but also emphasized their importance to values associated with speech and press freedoms. Editorials are, the Court stated, "part and parcel of 'a profound national commitment … that debate on public issues should be uninhibited, robust, and wide open.'"[144] Finally, in *Turner*, Judge Howell spoke of the firewall both as something that the United States had effectively pledged to honor and as essential to preserving the integrity of USAGM's news coverage. For example, to support her conclusion that the plaintiffs likely would succeed in their First Amendment claims regarding the defendants' newsroom intrusions, Judge Howell observed that "journalists and editors have already refrained from engaging in certain speech" and are "less willing to take on controversial but important stories and exercise greater caution in making statements that may offend defendants."[145] The significance of these observations is particularly pronounced when they are juxtaposed with Judge Howell's rationales for exempting the press from *Garcetti*'s reach, including the notions that "[f]reedom of the press holds an … exalted place in the First Amendment firmament" and that "[t]he press was [meant] to serve the governed, not the governors."[146]

## 23.4 CONCLUSION

Neither the First Amendment in its own right, nor courts interpreting it, can make publicly funded knowledge producers impervious to state capture. First Amendment case law does, however, contain a surprisingly rich set of arguments and ideas to grapple with the problem of capture. Most importantly, it contains the seeds of an anti-distortion principle to the effect that the government may not condition funding – whether through employment or through a subsidy on a private actor – in a manner that distorts the nature of the type of speech or expressive institution that it purports to fund. The anti-distortion principle is important in its own right, and as a tool to limit a risk factor for capture – government speech doctrine – that was created by the judiciary itself.

Of course, judicial doctrine and litigation can get us only so far. Anti-distortion arguments grounded in case law are but one tool to support public knowledge

[143] *Forbes*, 523 U.S. at 675–76. *See also supra* text accompanying note 75.
[144] *LWV*, 468 U.S. at 382 (quoting *Sullivan*, 376 U.S. at 270). *See also supra* text accompanying notes 86–88.
[145] *Turner*, 502 F. Supp. 3d at 381.
[146] *Id.* at 375 (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)).

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production and to protect against its capture by the state. Such arguments most obviously can be wielded in litigation. They can also be invoked in the legislative drafting process to help guide the design of statutes regarding public employment or funding of knowledge producers. More so, the underlying threats against which anti-distortion principles guard – particularly the danger that political actors will launder partisan or political messaging to pass it off as the product of disciplinary expertise – can be raised in public discourse.

Perhaps somewhat counterintuitively, anti-distortion arguments also provide occasion to encourage public knowledge production. This is so for at least two reasons. First, the anti-distortion principle is justified not only by the government distrust associated with negative speech theory but by the positive aspirations of affirmative free speech theories. Second, robust anti-distortion principles are responsive to an argument routinely made against state funding – that is, the risk of capture.

Journalism's existential crisis casts into sharp relief both the affirmative benefits that anti-distortion principles help to foster and the dangers against which they guard. With respect to the former, recall the arguments that an active press is essential to oversee powerful government and private actors and, more broadly, to make democracy function. Where the market alone cannot provide this public good, some state support is essential; that support itself must be subject to anti-distortion principles to protect the funded reporting's value. With respect to the latter, government capture of the media bears harms that an anti-distortion principle is essential to guard against. To be sure, the anti-distortion principle is far from sufficient to save journalism. But insofar as public funding is an essential part of any rescue mission, so too is the anti-distortion principle.

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