The Social Construction of Information Poverty

Information and Socioeconomic Class in U.S. Constitutional Law

by Sandra Braman

The Supreme Court's information policy decisions support socioeconomic class divisions "by providing relatively few protections for media available to those at the bottom of the socioeconomic scale, directly limiting spending in some cases, deferring to labor law, and defining informational rights and responsibilities by profession."

Predictions about how new information technologies will affect different socioeconomic classes range from suggestions that class lines will be abolished to warnings of a greater knowledge gap. People see different futures not only because they may be looking at different realities, but because they have different ideas about how a variety of social forces affect the shape and direction of technological development and distribution. Political will, availability and distribution of resources, cultural norms, and legal residue and innovation all influence which, how, and how fast technologies will develop, to whom they become available, under what constraints, and to whose advantage.

One factor determining the actual impact of the new technologies on specific classes is information policy. Although information policy as a distinct and coherent body exists in few nation-states, in the United States (as elsewhere) a corpus of rules, drawn from constitutional, statutory, common, and regulatory law, can be identified that functions as an information policy and can be analyzed as such.

Two heuristics help us identify laws, regulations, and decisions that fall within the information policy domain. The notion of an "information production chain" described by Machlup (5) and Boulding (1) can be adapted and used to define the domain as including those policies that apply to any stage of a chain that includes information creation (creation, generation, and collection), processing (algorithmic and cognitive), storage, transportation, distribution, destruction, and seeking. The all-inclusiveness of this approach permits identification of information policy irrespective of body of law as traditionally defined. This approach also permits exclusion of certain types of information, actors, or processing from some or all steps of the chain in response to cultural, aesthetic, religious, or political concerns.

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The second heuristic is the notion of latent, as well as manifest, information policy. Manifest policy, such as traditional First Amendment law or law of intellectual property, directly and explicitly deals with information creation, processing, flows, and use. Latent policy indirectly or implicitly shapes information and its flows. Latent policy develops as a side effect of decisions made in other areas, synergistically when policies made in different areas combine with often unintended effects, and when information policy is subsumed under other labels. Trade law, securities regulation, and zoning decisions are among the sources of latent information policy.

These conceptual tools can be used to identify the information policy of any decision-making arena or governmental unit. The information policy of the United States Supreme Court is of particular interest at this historical conjuncture.

First, though there are a number of different ways of defining information, the broadest and most significant treat information as a constitutive force in society (2). From this perspective, which should provide the first and final analyses during the policy-making process, decisions about information policy are decisions about the way society will be structured—how socioeconomic classes will be formed and how people can act within and between them. Thus, the decisions of the Supreme Court, the governmental institution assigned the task of making judgments in light of their constitutive impact on society, are of particular interest in the information policy realm.

Second, during the formative phase of a policy-making process, constitutional bases for policy making are of particular importance. Identification of information policy as a distinct realm for policy making is recent, and the analytical tools are still being developed. Thus there is great need for understanding of constitutional principles and modes of thinking.

U.S. Supreme Court information policy decisions of the 1980s were examined here for their impact on the relationship between information and socioeconomic class. By the 1980s, a sufficiently high level of technological change had permeated society for a long enough period of time to permit new types of problems to rise to the Supreme Court level. The decade also saw the beginnings of a shift in the nature of the Supreme Court into its fourth historical period of relative conservatism. While it is true that changes in the makeup of the Court—and in the minds of justices who continue to sit—mean one can never predict the outcome of future cases, certain trends are nonetheless clearly identifiable.

An examination of these decisions reveals a constitutional information policy that has the effect of producing and reproducing socioeconomic class lines by (a) acknowledging the relationship between informational class and socioeconomic class, (b) upholding labor-management lines developed to reify a specific type of industrial organization, (c) assigning differential informational rights and responsibilities by profession, and (d) distinguishing among the informational rights available to different economic groups.
The Supreme Court is explicitly aware of the relationship between socioeconomic and informational class and has addressed it directly in several cases. Some of these cases dealt with access to training in the creation, processing, storage, and use of information—that is, with education. In other cases, the Court explored problems of people who are informationally or socioeconomically disadvantaged.

Brennan articulated the Court's general philosophy in *Plyler v. Doe* (457 U.S. 202 [1981]), in which it was declared unconstitutional to deny children of illegal aliens access to the free Texas public educational system:

*Education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests . . . Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause* (pp. 221–222).

Brennan directly questions the value of creating and perpetuating a "subclass of illiterates," as do Powell in a concurrence and Burger in a dissent. Denial of the right to education is understood to be particularly unfair in this case because it would result from (in Brennan's biblical terms) visiting the sins of the parents upon the children.

The Court here widens the notion of cost from the short-term efficiency concerns of the school system to the long-term cost concerns of society. On the one hand, it is argued, the savings that would result from excluding those children had not been demonstrated to have a significant educational benefit. On the other hand, the cost to society of a subclass of illiterates is demonstrably high in terms of crime, unemployment, etc. Brennan notes that concern for protecting resources is not sufficient to justify the use of a particular classification system for allocating those resources.

Brennan stops just short of calling education a fundamental right, but Blackmun, in a concurrence, equates it with the right to vote. Blackmun does, however, question the ability of the judiciary to adequately assess the effects of complex social policies, while Burger dissents because he feels that the Court does not have jurisdiction to address the problem of illegal immigration. Marshall, in a concurrence, reinforces the link between education and basic constitutional values.

Although in *Plyler* the Court would not permit a line to be drawn between children of illegal aliens and others, in *Martinez v. Bynum* (461 U.S. 321 [1982]) the Court was willing to exclude Mexican children living with relatives in Texas from the state's free public schools. The Court, through Powell, this
time accepted the school system's argument that a residence requirement is justified in order to protect system efficiency. Provision of primary and secondary education is again stressed as one of the most important functions of local government. Marshall notes in dissent, however, that the relationship between exclusion of students and system efficiency again had not been proven.

The Court has been ambivalent about whether institutions should be able to use handicapped status to draw class lines. In one education case, the Court was willing to support some specialized services, though not all those requested. In another case, however, it supported the decision of the Federal Communications Commission not to require signing for the deaf on publicly funded television.

The decision in *Board of Education, Hendrick Hudson Central School District v. Rowley* (458 U.S. 176 [1981]) came in response to a request by parents of a deaf child to trade some elements of her specialized educational program for a sign-language interpreter. The student in this case was able to catch less than half of what was said in the classroom under her present program (though, even so, she consistently achieved above-average grades). In terms that will penetrate other discussions of access, Rehnquist's opinion noted the complexities of defining equal access under the Education of the Handicapped Act:

> [F]urnishing handicapped children with only such services as are available to non-handicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services... The right of access to free public education...is significantly different from any notion of absolute equality of opportunity regardless of capacity (pp. 198-199).

Rehnquist specifically mentions that the amount of financial resources spent per child does not have to be equal.

The Court in *Rowley* ultimately defined a basic floor of opportunity that included access to specialized instruction and related services individually designed to provide educational benefit to the child; operationalization of the standard was left to the states, and parents were assigned the role of protecting children from state and local decisions. White's dissent in this case accused Rehnquist and the Court of backing down from constitutional policy-making responsibilities. In his eyes, the Court is competent to decide that a child who is hearing less than half of what is said does not have equal access to the classroom.

In another decision dealing with the handicapped, the Court upheld the FCC's decision that public television stations do not need to be accessible to
the deaf, despite requirements of the Rehabilitation Act of 1973. Pressed by a citizens' group that sought denial of a license renewal because signing was not offered, in Community Television of Southern California v. Gottfried (459 U.S. 498 [1982]) the Court denied the importance of the Rehabilitation Act as information policy and accepted the FCC's exclusion of the deaf from participation in public television.

Burger's opinion in Bethel v. Fraser (478 U.S. ———, 92 L. Ed.2d 529 [1986]), a case dealing with punishment for sexual speech in a high school, addressed the school function of ensuring that every individual finds a place within the social order. The school is described as a direct instrument of the state; the objective of public education is to inculcate the fundamental values required for maintaining a democratic system. Expelling a student for sexual innuendoes in a student assembly speech is justified because behavior as well as curriculum is to "teach by example the shared values of a civilized social order" (Bethel, p. 448).

The Court also addressed problems generated by today's underclass. In Boag v. MacDougall (454 U.S. 364 [1980]), a District Court had rejected as frivolous a prisoner's complaint about solitary confinement because the complaint was illiterate. In a per curiam (brief and unanimous) decision the Supreme Court reversed the District Court, insisting that unartful pleadings must be construed liberally. The Court focused on ensuring that lack of skill in information creation does not hamper an individual's efforts to articulate his or her rights within the legal system or to receive appropriate protections.

Atkins v. Parker (472 U.S. 115 [1984]) involved the question of whether notice of a change in the Food Stamp Act—with consequences that vary in significant detail from person to person—must be individualized. It was argued
that only with specific data can people know how to plan their household budgets. Such information is also required in order to decide whether to appeal the agency’s decision to change the amount assigned; in this case, the agency knew that miscalculations had been made for a large class of recipients. The Court held that individualized notice was not required because, in Stevens’s words, “The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny” (p. 131).

Marshall’s dissent evolved from the fact that most unsophisticated recipients were unable to translate the general notice into terms meaningful to themselves. Brennan argued that logic, history, and function require individualized information about a change in food stamp laws. His dissent points to what may be a key area of information policy in the future: the relationship between statutory entitlements—the “new” property interests of the underclass—and information issues. Since statutory property rights like food stamps or Medicaid exist only to the degree determined under law, questions about decision-making techniques and mandated information flows affect the creation and protection of these new types of property rights.

In sum, the Court is sensitive to the relationship between information and socioeconomic class. It is in general opposed to the idea of using information policy decisions to create socioeconomic class lines and tries to diminish the impact for today’s subclass. The arguments offered stress the value to both the individual and to society, emphasizing harmonization of society as a goal.

The fact that efficiency is so often used as a counterargument points to the importance of how a system itself is defined. Something that is inefficient in the short term for a local system (such as a school) may be efficient in the long term for the broader system of society in general. Disagreements in this area are often simply over where to draw the system boundaries. The value of harmonization of the social system seems at this point to dominate over notions of civil liberties or social equity.

Despite a general position to the contrary, in specific areas, such as labor relations, the Court is willing to uphold class stratifications. In Ellis v. Brotherhood of Railway, Airline & Steamship Clerks (466 U.S. 435 [1983]), the Court made explicit its understanding that labor laws abridge First Amendment rights. In United Steelworkers of America v. Sadlowski (457 U.S. 102 [1981]), it made clear that speech rights granted union members are not coextensive with First Amendment rights.

In National Labor Relations Board (NLRB) v. Hendricks County Rural Electric Membership Corp. (454 U.S. 170 [1980]), class membership was actually determined by the type of information to which an employee had access. The Court held that it was legitimate to keep employees with a labor nexus, i.e., access to management information concerning labor matters, out of the bargaining unit. Employees with access to other confidential information, such as that regarding sales contracts or government relations, however, must be permitted to enter the union.
Brennan's opinion emphasizes that it was precisely to control information flows at the corporate decision-making level that the labor-management line was drawn in the first place; he suggests that this is a service for labor as well as management. At issue in this case was whether class lines should be drawn by function (access to confidential information) or by role ("secretary" was not specifically mentioned in the law). The Court felt that the informational function was more important than role in determining legal status. Powell, however, felt that the Court still went too far by permitting some employees with access to confidential information into the bargaining unit. Explaining his view of congressional intent, he describes in detail how a secretary could pass critical information to union members during a strike.

Decision making internal to a union was at issue in two cases. Business agents fired by a new union president (Finnegan v. Leu, 456 U.S. 431 [1981]) and union members who didn't want dues spent on non-union political activities (Ellis v. Brotherhood) complained that their First Amendment rights had been abridged. The Court in both cases upheld the right of union management to make its own decisions, justifying this position—as well as their intrusion into internal union decision making in general—as necessary to protect union democracy.

Non-union workers' access to decision-making processes of the government as an employer was the issue in Minnesota State Board for Community Colleges v. Knight (465 U.S. 271 [1983]). Non-union members of the state college faculty claimed a right to have their views heard by government officials who made policy affecting the college, a right denied by the Court in O'Connor's quite clear language: "Appellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education" (p. 283). In this opinion O'Connor also explicitly denies constitutional status for academic freedom.

Marshall's concurrence in this case suggests a more subtle approach, determining the authority of a decision-maker to choose information sources according to the nature of the decision at issue and the institutional environment in which it must be made. Stevens dissents because he feels that it is unacceptable to make the union the only authorized spokesperson for all employees on political as well as contractual matters. He is outraged that the Court should suggest a state interest in fostering any private monopoly on information flows.

Union members were favored over non-union members in a different way in United Brotherhood of Carpenters & Joiners of America v. Scott (463 U.S. 825 [1982]). Here, non-union workers who were beaten and had their work destroyed by union members alleged a conspiracy to deprive workers of their First Amendment rights of association. The Court chose to interpret conspiracy law as narrowly as possible and found no First Amendment violation because there was no state action.

A law against permitting non-union members to influence union elections through financial support beyond a specified limit was upheld in United Steelworkers of America v. Sadlowski. Again, the Court relied on the notion of pro-
tecting union democracy. White dissented, emphasizing that to restrict funds spent on speech is to restrict speech itself.

In National Association for the Advancement of Colored People (NAACP) v. Claiborne Hardware Co. (458 U.S. 886 [1981]), the Court came down on the side of a union boycott, even though some members of the group involved engaged in behavior not protected by law. Stevens's opinion noted that speech does not lose its protection just because it encourages others to act; nor do the actions of some cause an entire group to lose protection for their speech activities. In two cases, International Longshoremen's Association, AFL-CIO v. Allied International (456 U.S. 212 [1981]) and DeBartolo Corp. v. NLRB (463 U.S. 147 [1982]), the Court refused to protect picketing of companies related to the target (secondary picketing), based on distinctions among stages of production.

In the area of labor relations, then, the Court is quite willing to use information policy decisions to reinforce socioeconomic divisions, even using access to information itself as a demarker of class lines. Union members in general are favored over non-union, and union management over rank and file. We are reminded of the tenuousness of academic freedom.

The Court acknowledges that the free speech rights of unions are not coextensive with those of the First Amendment, for unions are not facets of the state in the sense required for state action under the First Amendment. What is more interesting, however, are the arguments made by the government for intruding into nongovernmental speech activities in the first place. During a time when greater amounts of a wider variety of types of power are being ceded from the public to the private sector, the question of information policy internal to organizations such as unions (or corporations), as well as the "foreign policy" of organizations as they interact across institutional boundaries, becomes of key importance.

The Court also linked socioeconomic and informational class by defining informational rights, limits, and responsibilities according to profession. During the period under study, the Court ruled on the informational practices of attorneys, physicians, law enforcement professionals, stock market tippees, and investment counselors.1

FBI v. Abramson (456 U.S. 615 [1981]) explored the informational rights and responsibilities of law enforcement officials as it unraveled a Freedom of Information Act (FOIA) case dealing with work papers. At stake were investigatory records that had been subsequently incorporated into records compiled for other purposes, and the question was whether an FOIA exemption still applied once the information had been processed again. The Court said yes: Once information has been processed for law enforcement purposes, it is always protected, regardless of subsequent further processing, transportation, or exchange. Blackmun, dissenting, is uncomfortable with the trend toward treating information differently for legal purposes depending on its source and argues that

1 Journalistic practices have been explored by the judiciary in the past (3, 4).
information shouldn't have to be “parsed” for its sources in order to determine legal treatment.

In a rare unanimous opinion, *US v. Arthur Young* (465 U.S. 805 [1983]), the Court stressed the importance of information collection—and therefore accountants—to the functioning of the tax system as a whole. In this case, a corporation tried to withhold documents from the Internal Revenue Service (IRS) by calling them work products. Accountants here were distinguished from attorneys in terms of the nature of their public service. Accountants are responsible to the entire society; thus, the public interest demands that communications between accountants and those whom they are auditing be accessible to governmental inspection. Attorneys, on the other hand, are understood to serve private clients, not the public, making privileged communications between attorney and client acceptable.

*Federal Trade Commission (FTC) v. Grolier* (462 U.S. 19 [1982]) specifically explored the question of whether the status of protection of attorneys’ work products changes with the stage of the litigation process. The Court held such papers to be protected irrespective of the status of the litigation for which the information had been prepared. There was concern that without such protection, much of what is now written down while preparing a case would no longer be recorded for fear of disclosing working methods to current or potential opponents.

The Court concluded in *Upjohn v. US* (449 U.S. 383 [1980]) that the work products doctrine also applies to attorneys working within the corporate context. Thus, attorneys’ questionnaires to corporate employees regarding bribes to foreign governments were protected from collection by the IRS. The Court stressed the need to be able to predict when one will have privileged communication.

In *In re RMJ* (455 U.S. 191 [1981]), the Court held unconstitutional a lower court ruling that listed categories of information and language which attorneys were forbidden to use in advertising. Although these specifics were rejected, Powell’s opinion drew attention to the assumption underlying controls on attorney advertising: it is easier to deceive people when information is complex, sophisticated, and unfamiliar. There was also fear that uncontrolled advertising would be degrading to the profession.

Limits on the informational activities of physicians were also discussed during this period. In *Akon v. Akron Center for Reproductive Health* (462 U.S. 416 [1982]), a municipal ordinance that delineated just what and how information about abortions was to be transmitted by doctors to patients was held to be unconstitutional by a Court that believed such regulation intruded on the professionalism of physicians. In this case, the information specified went against previous Court thinking by espousing one specific theory of when human life begins. It was feared that the persuasive effect of the information, combined with the time and money required to conduct such conversations, might reduce the number of those choosing abortions.

The Court did support, however, compelling a physician to notify the parents of a minor who seeks an abortion in *H.L. v. Matheson* (450 U.S. 398 [1980]).
Burger here distinguished between knowledge and decision-making power, stating for the Court the view that informing the minor's parents confers the former but not the latter.

The informational rights and responsibilities of the "profession" of tippee in the stock market were explored in two cases during this period that defined a specific role for tippees in the "harmonized marketplace" often mentioned by the Court as an ultimate goal. In Dirks v. Securities and Exchange Commission (SEC) (463 U.S. 646 [1982]), the Court found no breach of SEC rules when a tippee broker passed on fraudulent information to clients before the public. The Court based its argument on the fact that the tippee's duty derives from that of the insider and is inherited with the transfer of information. Without an insider, reasoned the Court, there is no tippee responsibility under SEC rules.

In Bateman Eichler, Hill Richards, Inc. v. Berner (472 U.S. 299 [1984]), an insider provided false and incomplete information that was then passed on by a tippee. When sued by the tippee for fraud, the insider claimed that the tippee shared culpability. The Court found that the culpability of the two parties differed, with the tippee not as culpable as the tipper whose breach of duty gave rise to the tippee's liability in the first place. Brennan's opinion for the Court argues that denying the defense of shared responsibility best protects the investing public and promotes the national economy by allowing defrauded tippees to bring suit against defrauding insiders, deterring insider trading. He also notes that the in pari delicto ("at equal fault") defense is no good when there is an inequality of information.

The profession of investment advisor is distinguished from that of publisher in Low v. SEC (472 U.S. 181 [1984]). Stevens argues for the Court that the danger of fraud and deception is higher in personalized communications than in publications sold on the open market. Providing factual information about past transactions and market trends, and publishing newsletters on general market conditions, are protected as press activities.

Again, the nature of the service to the public is the criterion. Publishers serve the public interest by passing along information of value to the masses in an anonymous relationship; investment advisers develop person-to-person fiduciary relationships characterized by individualized advice. White's concurrence, however, notes that Congress does not have an untrammeled right to restrict speech by defining fiduciary relationships.

Definition of the informational rights and limits of various professions is based on two notions. First, the criterion used for determining those rights and limits is the nature of the relationship between professional and client and, in turn, between the client or "client" population and the general public; are they one and the same, overlapping, or in opposition? These features appear to define the public interest for the Court.

Second, there is a sense that all types of information are not equal in the eyes of the public in terms of ability to deceive. Cases discussed earlier, such as Atkins v. Parker, as well as those touched on here, refer to three sources of variance. There can be differences in the motivations and abilities of the sender of the message, in the level of difficulty or complexity of the message itself, or
in the ability of the receiver to handle the message on several levels. The regulatory consequence is to regulate more tightly those professions, such as law, that are thought to handle the more difficult, and therefore potentially deceptive, information.

Another consequence of constraints and protections on information activities of various professions is the establishment of property rights in information resources and the value added through processing. The tippee's rights over the property of information are increased as his or her liability for fraudulent information received from an insider decreases, for example, and police ownership of information processed for their purposes continues even when that information is reprocessed for other purposes.

In cases exploring the economics of information processing, the Court has treated differently media available at different levels of the socioeconomic scale, limited some expenditures, and moved toward the position that information services and resources should be available only for a fee. Some time was spent by the Court exploring the general relationship between money and speech. In Citizens against Rent Control/Coalition for Fair Housing v. Berkeley (454 U.S. 290 [1980]), a municipal ordinance prohibiting political associations from accepting over $250 per contribution was found unconstitutional. Here Burger stressed the importance of association in amplifying speech, ensuring that through collective effort people can make their voices heard when individually they might be lost.

Blackmun's concurrence distinguishes the ability of funds to corrupt in the electing of a representative and in voting on ballot measures, where the people themselves render the ultimate political decision. Dissenting, White suggests that individuals find different types of speech activities interchangeable. Thus, assuming a user will easily and happily turn from one medium to another, for White denial of access to a particular medium is of no great concern.

The issue of limits on spending for speech was poignantly distilled in Walters v. National Association of Radiation Survivors (473 U.S. 305 [1984]). This case was brought by an organization of veterans who were victims of atomic bomb testing and of the use of Agent Orange in Vietnam. In seeking help from the government in coping with the effects of their service-induced injuries, individual veterans had found their attempts limited by a Civil War statute restricting to $10 the amount that a veteran can pay an attorney for representation when petitioning the government. (The fee was the Civil War equivalent of $580 in today's market.) This, claimed veterans of the 1980s, was an abridgment of First Amendment rights, since it was impossible to find adequate representation for such a fee.

The Court, through Rehnquist, here deferred to Congress and, stressing the age of the law, upheld it. Stevens, in disgust, dissented bitterly and starkly: "The Court does not appreciate the value of individual liberty" (p. 358). He points out that the right to have legal help when petitioning the government has never before been questioned and rejects the Court's reliance on administrative arguments. Stevens notes that the importance of adequate representation
in dealing with the Veterans' Administration had been made vivid by evidence that showed routine examples of cases denied because of poor preparation. In his eyes, this matter is not trivial: "If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society" (p. 370).

Cost barriers to access to the national information distribution system were at issue in U.S. Postal Service v. Greenburgh Civic Association (453 U.S. 114 [1980]). The association sought the right to use the mails without paying access fees (that is, buying stamps). Their First Amendment argument was that their small budget should not prevent them from being able to use the postal system. Rehnquist's opinion denying that claim was based on the historical relationship between the postal service and sovereignty itself, saying, "Government without communication is impossible" (p. 121). Administrative arguments such as protecting mail revenues and facilitating efficient and secure delivery of mails were accepted, with an emphasis on the quid pro quo: when privately owned mailboxes become a part of the nationwide system, their owners agree to abide by system rules; in exchange, owners receive not only the services provided by the post office, but also the protection of the mails.

White's concurrence saw the postal system as a public forum, but one whose use can be legitimately restricted to those who will pay the fee. For Brennan, the issue is free speech. His concurrence firmly upholds the importance of access to the mails, quoting Justice Holmes: "[T]he use of the mails is almost as much a part of free speech as the right to use our tongues" (Holmes in dissent, in U.S. ex rel Milwaukee Social Democratic Publishing Company v. Burleson, 255 U.S. 407 [1921], p. 437). Postal regulations are acceptable, Brennan believes, because they are reasonable regulations of "time, place, and manner." 2

Marshall dissented, arguing that the point of the Postal Provision of the Constitution was to place "the powers of the Federal Government behind a national communication service" (p. 142). While acknowledging the need to protect the economic viability of that service, he claims that the regulation in this case is inconsistent with that purpose. More important, he notes that the decision goes against the Court's previous stance that efficiency and economy must yield before speech as a value. He points to the District Court determination that

only by placing their circulars in the letterboxes may appellees be certain that their messages will be secure from wind, rain, or snow, and at the same time

2 "Time, place, and manner" regulation of First Amendment activities is permitted when there are no alternative regulatory mechanisms available, the regulation is drawn as narrowly as possible, and there are alternative channels of communication left open. Thus, for example, it is an acceptable time, place, and manner regulation that forbids making loud noise in a hospital zone, since alternative venues for speech are left open and there is no other way to serve the legitimate social goal of aiding the sick.
will alert the attention of the residents without notifying would-be burglars that no one has returned home to remove items from doorways or stoops. The court concluded that the costs and delays of mail service put the mails out of appel­lee's reach, and that other alternatives such as placing their circulars in door­ways are "much less satisfactory" (p. 144).

Marshall also distinguished the Postal Service from other public forums such as mass transportation because the very purpose of the Postal Service is to facilitate communication. He stressed the right of box owners to receive information as part of their First Amendment rights. And he notes the creeping spread of Post Office "property" rights:

I remain troubled by the Court's effort to transform the letterboxes entirely into components of the governmental enterprise despite their private ownership. Under the Court's reasoning, the Postal Service could decline to deliver mail unless the recipients agreed to open their doors to the letter carrier—and then the doorway, or even the room inside could fall within Postal Service control (p. 151).

Stevens's dissent also supports a right to receive information. On another front, he challenges the assumption that the mails must be a subsidized public monopoly and claims that the public interest may be better served by privatizing some portions of the system. He still challenges the dominance of efficiency as a value in the decision-making process:

Conceivably, the invalidation of this law would unleash a flow of communication that would sink the mail service in a sea of paper. But were that to happen, it would merely demonstrate that this law is a much greater impediment to the free flow of communication than is presently assumed. To the extent that the law prevents mailbox clutter, it also impedes the delivery of written messages that would otherwise take place (p. 155).

The Court defended subsidized public television in FCC v. League of Women Voters of California (468 U.S. 365 [1983]), declaring unconstitutional the Public Broadcast Act rule against editorializing by public stations. There was strong dissent in this case, however. Rehnquist argued that the government has the right to decide where it will spend its money and need not do so to support particular political positions or candidates through public television editorials. Stevens dis­sented from a radically different perspective. Recalling Hitler's use of radio, Stevens fears government propaganda and suggests that the difference between legislators and judges on this point may come from where they sit:

Members of Congress, not members of the Judiciary, live in the world of politics. When they conclude that there is a real danger of political considerations influencing the dispensing of this money and that this provision is necessary to insulate grantees from political pressures in addition to the other safeguards, that judgment is entitled to our respect (p. 416).
Restrictions on low-cost forms of speech were the subject of several other cases. Clark v. Community for Creative Non-Violence (468 U.S. 288 [1983]) dealt with the cheapest form of speech of all—sleep, available even to the homeless who wanted to demonstrate by sleeping in a park across from the White House. The group claimed abridgment of their First Amendment rights when they were denied a Park Service sleeping permit, arguing that without it the size and duration of the demonstration would decrease. (Many of the homeless were not as likely to participate without a place to sleep or without hot food.) The Court upheld the permit denial as a reasonable restriction of time, place, and manner, since other elements of the demonstration had been left in place, including a symbolic city, signs, and a day-night vigil; the group was not denied access to the media or to the public for their intended message.

Marshall dissented because he believes that the argument of efficiency again used here is not appropriate as a governing principle in information policy matters. He claims that its use leads to constitutionally insensitive decisions; his suspicions come from experience with problems that he believes are endemic to bureaucracies:

What the Court fails to recognize is that public officials have strong incentives to over-regulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must accommodate—on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity—the political power of the former is likely to be far greater than that of the latter.

Government agencies by their very nature are driven to over-regulate public forums to the detriment of First Amendment rights (pp. 315–316).

Marshall argues emphatically that content neutrality does not necessarily mean that the weight of a regulation will fall equally upon members of all classes:

A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse. This sort of latent inequality is very much in evidence in this case for respondents lack the financial means necessary to buy access to more conventional modes of persuasion.

A disquieting feature about the disposition of this case is that it lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas (pp. 313–314, n. 14).

Billboards, another relatively low-cost mass medium, were at issue in Metromedia v. San Diego (453 U.S. 490 [1981]). A city ordinance discriminating between billboards that advertised goods and services sold where they were being advertised, and those sold off-site, permitting the former and prohibiting
the latter, was declared an unconstitutional content distinction on its face. Although the city claimed traffic safety and aesthetic concerns, several justices in this case emphasized what they saw as the unique characteristics of billboards. Brennan’s concurrence in particular stressed their importance for certain purposes and speakers because of their relative inexpensiveness.

_Los Angeles v. Taxpayers for Vincent_ (466 U.S. 788 [1983]) discussed other inexpensive media—handbills and signs on public property, such as utility poles. The Court upheld the constitutionality of a municipal ordinance that restricted their use on aesthetic grounds, though both Blackmun and Brennan specifically rejected this argument because they saw no evidence of a comprehensive aesthetic program. Although it is acknowledged that the decision will reduce the total amount of communication in the city and prohibits people from communicating in a certain manner, Stevens defends the Court’s position:

_A distributor of leaflets has no right simply to scatter his pamphlets in the air—or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate means of communication does not diminish the State’s power to condemn it as a public nuisance_ (p. 809).

Further, while government property such as lampposts may be used for signs, “the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted” (p. 814).

Brennan, dissenting again, defended the use of inexpensive media such as signs as distinct and critically important, particularly for the “little people.” He stressed many of the characteristics that also contribute to the attraction of billboards as a distinct medium:

_Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. There may be alternative channels of communication, but the prevalence of a large number of signs in Los Angeles is a strong indication that, for many speakers, those alternatives are far less satisfactory_ (p. 819).

Clearly, the Court understands that access to funds greatly facilitates the exercise of First Amendment rights, including the right to petition the government and the right to association, as well as speech and press rights. In _USPS v. Greenburgh Association_, as well as in other cases, the Court begins to restrict information goods and services to those who can pay, raising a cost barrier to access.

Media available to those at the bottom of the socioeconomic scale are the least protected. Thus, the cycle of the mutually reinforcing link between socioeconomic and informational class is completed: socioeconomic deprivation directly translates into an informational handicap that has, in turn, a potential socioeconomic consequence.
Harmonization—of the social system, of the marketplace—has come to replace the free flow of information as the metaphor that dominates Court thinking. It appears in discussions about matters as far-ranging as education and the stock market. Even explorations of the nature of the public interest responsibilities of various professions hinge on an at least implied notion of how each profession fits into a harmonized marketplace or society.

Efficiency, as a result, has risen to the top of the value hierarchy used to justify Supreme Court decisions. The appropriateness of cost-benefit analysis in constitutional decision making has been questioned elsewhere in Court decisions. Constitutional scholar Lawrence Tribe (6) opposes using any type of mathematical calculation as the basis for decision-making in the constitutional realm, where, he claims, one should not be just allocating resources among existing categories in a predetermined manner but rather redefining the categories themselves and relationships within and among them.

In the cases discussed here, various justices argued the pros and cons of efficiency as a constitutional value, and decisions came down on both sides. It is clear, however, that the impact of “efficient” (bureaucratic) administration of justice is felt most heavily by those who are already the most disadvantaged. Content neutrality is another regulatory technique that has come to be questioned.

The Court has displayed a tendency often found in public opinion on First Amendment matters: it will stand on principle when principle is cast in general terms, but will change position when faced with a specific question. Thus, while in general the Court opposes the production or reproduction of socioeconomic class lines through its information policy decisions, in particular instances it is quite willing to uphold the constitutionality of a system that blocks information flow from non-union members to their government employers. It is willing to subject its own soldiers—largely from the lower socioeconomic ranks—to nuclear fallout and Agent Orange, and then deny them the right to hire the necessary representation to petition the government for help in coping with their injuries.

In general, the Court does support socioeconomic class divisions through its information policy decisions by providing relatively few protections for media available to those at the bottom of the socioeconomic scale, directly limiting spending in some cases, deferring to labor law, and defining informational rights and responsibilities by profession. The Court also brings to our attention ways in which information policy decisions actually create or destroy property rights.

Information policy stands between the development of new information technologies and their actual impact on various classes. Future decision making could be guided by more comprehensive thinking and research about the effects of existing policy as well as exploration of the normative issues involved.

References
The Information Gap / Information and Socioeconomic Class


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**Cable TV for the Deaf**

Newcomers to the Gallaudet campus soon notice the number of TVs mounted in many areas where people gather—the cafeteria, the snack bar, and building lobbies. Instead of the piped-in music so common to public buildings, at Gallaudet there is something visual going on.

The Department of TV, Film, and Photography operates a 36-channel cable television system reaching classrooms, offices, and dorms across the Gallaudet campus. The system provides instructional, institutional, and entertainment programs for the Gallaudet community.

Several channels are devoted to various categories of Instructional programming, including three separate sign language channels. Other channels are used to broadcast instructional films requested by teachers for classroom purposes. Also available is a channel featuring full-time religious programming selected by the Office of Campus Ministries.

The system carries all local Washington- and Baltimore-area broadcast television stations. Network programs are presented with open captions, eliminating the need for decoders with television sets on campus.

Another channel presents original Gallaudet productions and captioned versions of programs of special interest to the campus community. The programs include "Deaf Mosaic," "The President's Forum," special convocations and events, and sports coverage. Certain activities are presented live with real-time captions for those who cannot attend in person. Recently a number of informational programs about AIDS and substance abuse were captioned and broadcast.

Three full-time cable operators provide dubbing and playback services and prepare a monthly cable program guide.