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The Rise and Demise of the Technology-Specific Approach to the First Amendment

Christopher S. Yoo

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Articles

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CHRISTOPHER S. YOO*	
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INTRODUCTION

Congress and the Federal Communications Commission (FCC) have historically relied on models of media regulation that were shaped by the distinct physical and economic characteristics of the communications media governed by the Communications Act of 1934.¹ Originally, person-to-person communications were available only through wire-based technologies, which were character-

1. See Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 178 n.23, 286–90 (2002).

ized by the high fixed costs that have traditionally been associated with natural monopolies. As a result, such communications were governed by the “Telephone Model,” which incorporates the system of common carriage obligations and rate regulation that has represented the traditional regulatory response to natural monopoly. Mass communications, by contrast, originally employed the electromagnetic spectrum as its sole means of transmission. As a result, regulatory authorities relied on what they perceived to be the unique physical qualities of spectrum-based communications in developing the system of administrative licensing, content restrictions, and affirmative programming obligations associated with the “Broadcast Model” of regulation.²

This technologically balkanized approach to regulation remained coherent only so long as each type of communications was available solely through a distinct means of transmission. The emergence of cable television, however, began to cause this tidy regulatory division to unravel because it allowed mass programming to reach consumers via wire-based technologies previously dedicated to person-to-person communications. The arrival of wireless telephony completed the collapse of this scheme by making it possible to receive person-to-person communications over the spectrum. Furthermore, the impending shift of all networks to packet switched technologies promises to cause all of the distinctions based on the means of conveyance and the type of speech conveyed to collapse entirely. Indeed, the FCC has spent much of the last half-century struggling with the policy implications of technological convergence.

At the same time that Congress and the FCC were developing their technology-specific approach to telecommunications policy, the courts were engaging in the parallel process of developing a technology-specific approach to the First Amendment. Expanding on the sentiment reflected in Justice Robert Jackson’s declaration in *Kovacs v. Cooper*³ that each means of communications represents a “law unto itself,”⁴ the Supreme Court suggested that the First Amendment might apply differently to each communications medium.⁵ Although one might

2. See *infra* notes 60–67, 80–89, 104–07 and accompanying text (detailing the relevant regulatory provisions governing broadcasting). A third model focuses on the problems associated with vertical integration in media-related industries. Unlike the Telephone and Broadcast Models, the problems that represented the focus of this regulatory approach were not unique to any particular transmission technology. On the contrary, regulators have long expressed concern about vertical integration when regulating the structure of both the broadcast and telephone industries. See generally *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d*, 460 U.S. 1001 (1983); FEDERAL COMMUNICATIONS COMMISSION, REPORT ON CHAIN BROADCASTING (1941). The most distinctive feature of this model, however, is the increasing reliance on access requirements as a remedy to the problems of vertical integration. Because these access requirements were primarily developed in the context of cable regulation, it seems appropriate to refer to this approach as the “Cable Model.” 47 U.S.C. §§ 532, 534, 548(c)(2)(B) (2000).

3. 336 U.S. 77 (1949).

4. *Id.* at 97 (Jackson, J., concurring).

5. *E.g.*, *FCC v. League of Women Voters*, 468 U.S. 367, 377 (1984) (“[W]e have recognized that ‘differences in the characteristics of new media justify differences in the First Amendment standards applied to them.’” (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969))); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . must be assessed for First

have expected a plethora of technology-specific First Amendment standards to emerge, in actuality the Court restricted itself to two. The first, most strongly associated with newspapers and other forms of print, accords an almost prohibitive degree of protection against governmental interference.⁶ The second, developed in the context of broadcasting, has been more permissive of governmental regulation. In a series of decisions highlighted by *NBC v. United States*⁷ and *Red Lion Broadcasting Co. v. FCC*,⁸ the Court announced that the physical scarcity of the electromagnetic spectrum justified according broadcasters a lesser degree of First Amendment protection. The Court has relied on this so-called scarcity doctrine to uphold a wide range of structural and content regulations. The Court's subsequent decision in *FCC v. Pacifica Foundation*⁹ held that the unique pervasiveness and accessibility of broadcasting provided a further basis for subjecting broadcast regulations to a lower level of First Amendment scrutiny.¹⁰ The scheme that has emerged has been aptly dubbed a "virtual celebration of public regulation"¹¹ that has largely obscured the extent to which the current regulatory approach to broadcasting represents a constitutional anomaly. Had the Court failed to recognize these two grounds for upholding more intrusive regulation of broadcasting, it is almost certain that the principal features of the broadcasting model would not have withstood constitutional scrutiny.¹²

The possibility of variable First Amendment standards has had a dramatic impact on other media as well. Until courts resolved whether a new form of communications was more like broadcasting or more like traditional media (such as print), private parties and regulators could do little more than speculate about the constitutional propriety of any particular regulatory provision. The Supreme Court's continuing struggle with the proper First Amendment standard to be applied to cable television nearly fifty years after its emergence underscores the significance of the costs associated with such uncertainty.¹³

Amendment purposes by standards suited to it. . . ."); see also *Reno v. ACLU*, 521 U.S. 844, 868 (1997) ("[E]ach medium of expression . . . may present its own problems."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (same); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems."); *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 220 (1975) (same). Many courts cite *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952), for the proposition that "[e]ach method tends to present its own peculiar problems." As then-Chief Judge Harry Edwards has pointed out, such citations ignore that in the next sentence the *Burstyn* Court emphasized, "[b]ut the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Id.*; see also *Action for Children's Television v. FCC*, 58 F.3d 654, 673 n.7 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting) (quoting the same phrase).

6. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

7. 319 U.S. 190 (1943).

8. 395 U.S. 367 (1969).

9. 438 U.S. 726 (1978).

10. *Id.* at 748.

11. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 71 (1991).

12. For a detailed review of these decisions, see *infra* notes 35–36, 41–59, 68–72, 90–98 and accompanying text.

13. The unsettled nature of the First Amendment standard to be applied to cable is well illustrated by the composition of recent Supreme Court decisions. See, e.g., *Playboy Entm't Group v. FCC*, 529 U.S.

Similar problems have threatened to impede the ongoing transition to digital television technologies. As the conversion of the music industry from analog-format vinyl albums to digital-format compact discs demonstrates, digital technologies allow for far more efficient storage and transmission of information. They also allow content to be copied without any material signal degradation. As a result, the conversion to digital technology promises to revolutionize the quantity, quality, and variety of television services available to the typical American consumer. Although many do not realize it, the conversion to digital television is already well underway. FCC regulations required that all television stations supplement their current analog signal with a digital signal by May 1, 2002.¹⁴ The governing statute also calls for all stations to cease transmitting analog signals altogether and to broadcast solely in digital by December 31, 2006.¹⁵ Although compliance has been less than perfect,¹⁶ it is clear that digital television is in the process of becoming a reality.

Despite the ongoing deployment of digital television, little progress has been made in determining whether and how digital broadcasting should be regulated. The first concrete step was the appointment of the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (commonly known as the "Gore Commission"), which issued its Final Report in December 1998.¹⁷ The FCC has initiated regulatory proceedings based largely on the Report's recommendations,¹⁸ but as of yet, none of those proceedings has reached completion. Moreover, FCC resolution of the regulatory scheme to be applied to digital television will represent only the first round in what is almost

803 (2000) (5-4 decision); *Turner Broad. Sys. v. FCC*, 520 U.S. 1890 (1997) [hereinafter *Turner II*] (5-4 decision); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996) (fragmented decision producing six largely mutually inconsistent opinions). As Justice Thomas eloquently put it:

Our First Amendment distinctions between media . . . placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media.

Denver Area Educ. Telecomms. Consortium, 518 U.S. at 813-14 (Thomas, J., concurring in the judgment in part and dissenting in part).

14. Annual Assessment of Status of Competition in Mkt. for Delivery of Video Programming, Eighth Annual Report, 17 F.C.C.R. 1244, 1283 ¶ 82 (2002).

15. 47 U.S.C. § 309(j)(14)(A) (2000). The Act does contain an escape clause that will permit stations to retain both channels if 85% of the households in their broadcast area have not purchased digital receivers by that time. *Id.* § 309(j)(14)(B)(iii).

16. See FCC, Remedial Steps for Failure to Comply with Digital Television Constr. Schedule, Order and Notice of Proposed Rulemaking, 17 F.C.C.R. 9962 (2002).

17. ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE (1998) [hereinafter GORE COMMISSION REPORT].

18. See Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking, 15 F.C.C.R. 22946 (2000); Pub. Interest Obligations of TV Broad. Licensees, Notice of Inquiry, 14 F.C.C.R. 21663 (1999); FEDERAL COMMUNICATIONS COMMISSION, REPORT TO CONGRESS ON THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS AS THEY TRANSITION TO DIGITAL TELEVISION (2001) [hereinafter REPORT TO CONGRESS], available at <http://www.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.doc>.

certain to be a somewhat protracted legal battle. Under the technology-specific approach to the First Amendment, the constitutionality of digital television regulations cannot finally be resolved until the courts address the constitutional standard that will be applied to this medium. Until that occurs, lingering questions about the proper scope of regulation threaten the reliance interests of broadcasters, programmers, and viewers alike in ways that can forestall the realization of the new technology's potential benefits. Similar uncertainty is likely to surround the deployment of other spectrum-based technologies that are waiting in the wings, such as third-generation wireless (3G), which promises to bring the power of the Internet into handheld devices, and an associated series of fixed wireless technologies.¹⁹

In addition to these instrumental considerations, the Court's technology-specific approach to the First Amendment suffers from certain debilitating conceptual, technological, and doctrinal shortcomings, only some of which have been recognized by commentators. In particular, I argue that courts and policy-makers have yet to recognize the manner in which the scarcity doctrine sustains and is sustained by the overriding culture of regulation that surrounds broadcasting. Put simply, because the amount of spectrum available at any moment is itself a product of regulation, any reliance on spectrum scarcity in effect allows regulation to serve as the constitutional justification for other regulations.²⁰

The impending arrival of a wide range of new broadcast technologies, such as digital transmission, improved filtering, program storage, video-on-demand, spread spectrum, and packet switching, promises to alter the underlying constitutional analysis in fundamental ways.²¹ Finally, courts and commentators have largely overlooked how the Supreme Court has been distancing itself from the key decisions that serve as the foundation for the technology-specific approach to the First Amendment. Although the Court has stopped short of repudiating these precedents outright, it appears increasingly reluctant to extend these principles to other media or to continue applying them to broadcasting itself.²²

Given the ongoing collapse of the rationales for treating media differently under the First Amendment, supporters of the Broadcast Model have begun to turn to alternative justifications for upholding its constitutionality. Most notably, a group of scholars led by Cass Sunstein²³ and Owen Fiss²⁴ have drawn on the

19. The emerging fixed wireless technologies include multipoint distribution services (MDS), instructional television fixed services (ITFS), and Interactive Video Data Services (IVDS).

20. See *infra* subsection II.A.2.

21. See *infra* sections II.B, III.C.

22. See *infra* sections II.C, III.B.

23. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (paperback ed. 1995) [hereinafter SUNSTEIN, *DEMOCRACY AND FREE SPEECH*]; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) [hereinafter SUNSTEIN, *PARTIAL CONSTITUTION*]; CASS R. SUNSTEIN, *Television and the Public Interest*, 88 CAL. L. REV. 499 (2000).

24. See, e.g., OWEN M. FISS, *LIBERALISM DIVIDED* (1996) [hereinafter FISS, *LIBERALISM DIVIDED*]; OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) [hereinafter FISS, *IRONY OF FREE SPEECH*]; OWEN M. FISS, *The Censorship of Television*, 93 NW. U. L. REV. 1215 (1999).

language in *Red Lion*, opining that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,”²⁵ to elaborate a new, largely instrumental basis rooted in the principles of civic republicanism for upholding the constitutionality of the existing regime of broadcast regulation.²⁶ At some points, their theories offer a sweeping reconceptualization of the First Amendment regarding all media rather than an attempt to rationalize regulatory intervention concerning broadcasting in particular.²⁷ In other words, their solution to the impending collapse of the distinction between broadcasting and other media is not to fight it, but rather to argue that such a reunification should center on the broadcast precedents rather than the precedents following the print tradition. The more recent statements of their theories retreat from this notion and instead suggest that the unique role that television plays in the public discourse justifies differential treatment under the Constitution.²⁸

These myriad developments suggest the need for a critical reexamination of the historical and contemporary justifications underlying the Court’s technology-specific approach to the First Amendment. Part I describes three distinguishing features of the Broadcast Model and analyzes the largely overlooked fact that were it not for the different constitutional standard applied to broadcast regulation, each would represent an archetypical violation of conventional First

25. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

26. For other proposals invoking democratic principles to justify the existing regime of broadcast regulation, see Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1718–25 (1997); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1193–1203 (1993); see also Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 176–93 (1995) (arguing that democratic principles do not justify the type of content-based regulation traditionally associated with the Broadcast Model, but provide support for structural regulation); Ronald J. Krotoszynski, Jr. & A. Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. ILL. L. REV. 813, 863–64 (same). Other scholars have employed similar arguments as support for proposals to reform our copyright system. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996). For my response, see Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933 (2000).

27. See FISS, LIBERALISM DIVIDED, *supra* note 24, at 18, 149–50; SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 107–14.

28. See FISS, *supra* note 24, at 1217; Sunstein, *supra* note 23, at 527–31. Because this Article is organized around the primary rationales upon which the FCC and the courts relied, I omit discussion of other theories that attempt to justify upholding the Broadcast Model of regulation. Most notably, I do not discuss attempts to reconceptualize broadcast regulation as a quid pro quo for using the spectrum free of charge. For examples of such attempts, see Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children’s Educational Television*, 9 HARV. J.L. & TECH. 11, 17 (1996); Logan, *supra* note 26, at 1725–45; Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 GEO. WASH. L. REV. 686, 687–90 (1998); Phil Weiser, *Promoting Informed Deliberation and a First Amendment Doctrine for a Digital Age: Toward a New Regulatory Regime for Broadcast Regulation*, in DELIBERATION, DEMOCRACY, AND THE MEDIA 11, 14–18 (Simone Chambers & Anne Costain eds., 2000). In omitting discussion of these arguments, I do not mean to suggest that I believe that they are unimportant. On the contrary, it is my hope that I will have the opportunity to address these theories in my subsequent work.

Amendment principles. It then reviews the precedents to determine the justifications upon which the FCC and courts have relied to uphold these features. From that, only two rationales emerge: (1) the physical scarcity of the electromagnetic spectrum and (2) the uniquely pervasive and accessible nature of the broadcast medium.

Each of the succeeding Parts examines one of the two rationales for the technology-specific approach to the First Amendment identified in Part I. Part II evaluates the scarcity doctrine from an analytical, technological, and doctrinal standpoint. The analytical discussion begins with a review of the economic analysis first offered by Ronald Coase²⁹ that has become one of the most established critiques of scarcity. I then offer a novel conceptual criticism that focuses on the tendency of the scarcity doctrine to permit regulation to serve as the constitutional justification for more regulation. The basic problem stems from the Supreme Court's increasing willingness, as demonstrated in two recent cases, to blindly accept other forms of regulation as part of the constitutional baseline when evaluating the constitutionality of any particular restriction. As a result, the scarcity doctrine largely ignores that scarcity is primarily the product of other regulatory decisions made by Congress and the FCC. Thus, relying on scarcity effectively allows regulation to serve as the constitutional justification for additional regulation. This effect transforms the technology-specific First Amendment from a transitional ambiguity into a theory that allows the overriding culture of regulation to become self-reinforcing.

The other contribution of Part II is to evaluate whether recent technological and doctrinal developments have undermined scarcity as a constitutional justification. With respect to technology, I conclude that the arrival of a wide range of new television technologies promises to render the scarcity doctrine an empirical nullity—if it has not done so already. With respect to recent judicial decisions, I suggest that the scarcity doctrine may not have as much vitality as many believe. Although the doctrine has never been explicitly repudiated, a close reading of subsequent decisions reveals that the Court has severely limited its scope. Not only has the Supreme Court consistently refused to extend it to other media, what has gone largely unrecognized is that the Court's most recent broadcast cases have exhibited an extreme reluctance to rely on the scarcity doctrine even with respect to broadcasting. Together these decisions provide reason to believe that the Court may be closer to abandoning the doctrine than is generally thought.

Part III addresses the second traditional justification for according broadcasting a lesser degree of constitutional protection than other media, which is the unique pervasiveness and accessibility of broadcasting that formed the basis of the Court's decision in *Pacifica*. A close analysis of *Pacifica*'s reasoning reveals that the opinion suffers from deep analytical flaws that place it in conflict with the overall sweep of the Court's First Amendment jurisprudence. As a doctrinal matter, moreover, a review of the most recent indecency decisions reveals that

29. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

the courts have essentially foreclosed the possibility that *Pacifica* will be extended to any other media and have raised questions about its continuing applicability to broadcasting. A technological critique of *Pacifica* provides additional reasons to question whether it can support the technology-specific approach to the First Amendment. The emergence of the V-chip and the impending arrival of video-on-demand promise to render unconstitutional any attempts to regulate television based on its supposed pervasiveness and accessibility.

Part IV examines the extent to which the civic republican visions of Cass Sunstein and Owen Fiss can provide an alternative constitutional justification for upholding the Broadcast Model. My analysis yields three core criticisms. First, the civic republican theories fail to come to grips with the major tradition in our First Amendment jurisprudence that holds autonomy to be an important free speech value. Second, even if one were to acquiesce to ignoring autonomy, the civic republican theories ultimately prove to be quite problematic from the standpoint of implementation. Not only are they too incompletely specified to provide any useful guidance on how to resolve free speech issues, they also fail to engage in any serious comparative institutional analysis of the relative merits of government intervention over private ordering. As a result, they fail to offer any response to the long tradition of distrust of governmental regulation of speech that characterizes the enactment history and doctrinal development of the First Amendment. Finally, the civic republican theories do not advance any plausible solution to certain technological obstacles to their theories. Thus, even if one were to accept all of the arguments offered by Sunstein and Fiss, it remains difficult, if not impossible, to see how their theories would bring about the world that they seek.

The failure of the justifications for enforcing a technology-specific vision of the First Amendment makes its continuing existence something of a puzzle. Part V explores possible reasons for the adoption and persistence of the technology-specific approach. Upon close analysis, it appears that the Broadcast Model is in large part a reflection of the state of judicial thinking at the time the broadcast industry emerged. Although that provides an explanation for why courts chose a technology-specific approach in the first instance, it fails to explain the doctrine's persistence. I then explore public choice explanations for the continuation of the doctrine. Although public choice theory offers a plausible descriptive explanation for the persistence of the technology-specific approach to the First Amendment, it fails to provide any normative justification for sustaining it.

I. THE PRIMARY FEATURES AND RATIONALES UNDERLYING THE BROADCAST MODEL

This Part describes the three principal regulatory features of the Broadcast Model: (1) the licensing of broadcast stations, (2) the imposition of content-based restrictions on certain types of programming, and (3) the imposition of affirmative speech obligations. It also explores why courts have sustained these features despite the apparent archetypical violation of the First Amendment constituted by each feature. A review of the relevant precedents reveals that the FCC and the courts have relied exclusively on two rationales to justify sustain-

ing broadcast regulations that otherwise would not have survived constitutional scrutiny. The first rationale is the physical scarcity of the electromagnetic spectrum.³⁰ The second rationale is the uniquely pervasive and accessible nature of broadcasting upon which the Court relied in *Pacifica*.

A. LICENSING OF BROADCAST STATIONS

Since the enactment of the Communications Act of 1934, the FCC has had the unquestioned authority to license broadcast stations in accordance with the “public interest, convenience, and necessity.”³¹ That the FCC is permitted to license broadcast speakers represents something of a First Amendment anomaly. The Supreme Court has repeatedly recognized that licensing of media speakers has been regarded as the quintessential threat to the freedom of speech since the days of Blackstone and John Milton.³² As the Court observed in *City of Lakewood v. Plain Dealer Publishing Co.*,³³ schemes that require licenses to be periodically renewed pose problems similar to those posed by prior restraints, in that they allow licensors to “measure their probable content or viewpoint by speech already uttered. A speaker in this position is under no illusion regarding the effect of the ‘licensed’ speech on the ability to continue speaking in the future.”³⁴ The applicability of this observation to broadcasting is evident when one considers that during the early days of broadcast regulation, the Federal

30. The Court recently summarized its broadcast precedents as follows:

The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees.

Turner Broad. Sys. v. FCC, 512 U.S. 622, 637–38 (1994) (citations omitted).

31. 47 U.S.C. § 307(c)(1) (initial grants) (2000); *id.* § 309(k)(1)(A) (renewals).

32. *See* Thomas v. Chicago Park Dist., 534 U.S. 316, 320 (2002) (noting that “the core abuse against which [the First Amendment] was directed was the scheme of licensing laws implemented by the monarch and Parliament . . . in 16th- and 17[th]-century England” and attributing opposition to licensing to Blackstone); *see also* City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 760 (1988) (“Indeed, a law requiring the licensing of printers has historically been declared the archetypal censorship statute.” (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *152)); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) (“The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his ‘Appeal for the Liberty of Unlicensed Printing.’ . . . While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.”); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) (acknowledging that the struggle against “the legislative power of the licensor” has animated attempts to protect the freedom of the press since the days of Blackstone); *Republica v. Oswald*, 1 U.S. (1 Dall.) 319, 325, 328 n.* (1788) (noting that the impermissibility of “any attempt to fetter the press by the institution of a licensor” had been settled since the reign of William the Third and had been recognized by Blackstone). *See generally* Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985) (discussing the history of the English licensing statute).

33. 486 U.S. 750, 760 (1988).

34. *Id.* at 759–60 (citation omitted); *see also* Riley v. Nat’l Fed’n of Blind, 487 U.S. 781, 801 (1988) (“[W]hen a State enacts a statute requiring periodic licensing of speakers, at least when the law is

Radio Commission (FRC) initially required stations to seek renewal every six months. The ever-present threat of nonrenewal allowed the FRC to exercise direct control over the content of broadcast programming.³⁵ The subsequent lengthening of the license term mitigates, but does not eliminate, this effect.³⁶

Consequently, the Court has long required that all licensing schemes contain clear standards that cabin the licensing authority's discretion.³⁷ As the Court noted in *City of Lakewood*, such standards reduce the likelihood of the self-censorship that occurs when the inability to discern the line between the permissible and the impermissible leads speakers to restrict themselves to speech favored by the licensing authority.³⁸ Furthermore, clear standards enhance judicial review by "provid[ing] the guideposts that . . . allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."³⁹ Without such guideposts, it is "far too easy" for licensing officials to justify their actions through "*post hoc* rationalizations" and "the use of shifting or illegitimate criteria."⁴⁰

Measured against these criteria, the broadcasting regime clearly fails. Commentators have long criticized the basic licensing standard provided by the Communications Act of 1934 (that is, the public interest) as the epitome of analytical emptiness.⁴¹ The FCC could have construed the statute in a manner that

directly aimed at speech, it is subject to First Amendment scrutiny to ensure that the licensor's discretion is suitably confined." (citing *City of Lakewood*, 486 U.S. at 755–56); cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68–71 (1963) (recognizing that a regulatory scheme that permitted an administrative agency to threaten speakers with post hoc punishment for speech they had already uttered was tantamount to a system of prior restraint).

35. See Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 46 (2000). See generally David J. Brennan, *Printing in England and Broadcasting in Australia: A Comparative Study of Regulatory Impulse*, 22 ADELAIDE L. REV. 63 (2000) (comparing the regulation of printing in England from 1484 to 1695 with the regulation of broadcasting in Australia during the 20th Century, and explaining how special control over each medium arose).

36. As a result, it is somewhat surprising that the scholarly literature on broadcast regulation has made only passing reference to the Court's licensing jurisprudence and has done so largely in terms supportive of the constitutionality of broadcast licensing. See Reed E. Hundt, *The Public's Airways: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1114–15 (1996); Harry Kalven, *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15, 48 (1967); Logan, *supra* note 26, at 1743; Matthew L. Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429, 476 (1997); Weinberg, *supra* note 26, at 1108, 1113, 1131, 1134.

37. *FW/PBS v. City of Dallas*, 493 U.S. 215, 225–26 (1990); *City of Lakewood*, 486 U.S. at 769–70; *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

38. 486 U.S. at 757–58.

39. *Id.* at 758.

40. *Id.*

41. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* § 12 (1951); HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 55 (1962); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 100 (1993); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 347 (1987); Gary Lawson, *Delegation and the Constitution*, CATO REV. BUS. & GOVT. REG., No. 2-2, at 29 (1999); Glen O. Robinson, *Title I, The Federal Communications Act: An*

provided sufficient standards to constrain its discretion.⁴² Indeed, the FCC may be obliged to do so as a matter of administrative law.⁴³ Unfortunately, the FCC has never applied the public interest standard in a manner that imposed any meaningful constraints. The ad hoc approach initially followed by the FCC was denounced by both congressional observers and distinguished commentators for its arbitrariness and its susceptibility to manipulation for political purposes.⁴⁴ Later attempts to clarify these standards⁴⁵ employed a multifactor balancing test that was far too malleable to foster consistency or predictability in the decision-

Essay on Origins and Regulatory Purpose, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 3, 14 (Max D. Paglin ed., 1989); *cf.* *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (dissenting from the majority's decision to uphold the constitutionality of the Sentencing Guidelines by finding that Congress had provided the Sentencing Commission with sufficient guidance to curtail excessive legislative discretion). Commentators recognized this problem from the start. See Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930) ("Public interest, convenience or necessity" means about as little as any phrase that the drafter of the Act could have used . . ."). It is true that the Court has regarded the public interest standard as constituting an "intelligible principle" sufficient to satisfy the demands of the nondelegation doctrine. See, e.g., *NBC v. United States*, 319 U.S. 190, 226 (1943). Those decisions, however, simply addressed the limitations on the structure of government embodied in the Constitution and did not consider whether the First Amendment compelled greater specificity.

42. See *Poulos v. New Hampshire*, 345 U.S. 395, 403–05 (1953); *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941).

43. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 55–57, 219–20 (1969); Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 CORNELL L. REV. 452, 480–81, 484–85 (2002).

44. See AD HOC ADVISORY COMM. ON ALLOCATIONS TO THE SEN. COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG., *ALLOCATION OF TV CHANNELS*, (Comm. Print 1958); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT [HOOVER COMMISSION], COMMITTEE ON INDEPENDENT REGULATORY COMMISSIONS, *TASK FORCE REPORT* app. N, at 40 (1949); FRIENDLY, *supra* note 41, at 72; EMMETTE S. REDFORD, *PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT ORGANIZATION, THE PRESIDENT AND THE REGULATORY COMMISSION* 27 (1960); Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 689–90, 694 (1959); Louis L. Jaffe, *The Scandal in TV Licensing*, HARPER'S WKLY., Sept. 1957, at 77, 79.

45. Policy Statement on Comparative Broad. Hearings, Public Notice, 1 F.C.C.2d 393 (1965). Specifically, the 1965 Policy Statement identified seven criteria to guide its decisionmaking:

1. whether the applicant owned other media properties;
2. whether the license holder would act as station manager;
3. the programming proposed by the applicant;
4. the applicant's past broadcast record;
5. whether the applicant proposed to operate the station part-time or twenty-four hours a day;
6. the applicant's character;
7. other factors.

Id. at 394–99. By its own terms, the 1965 Policy Statement applied only to the issuance of new licenses. *Id.* at 393 n.1. The FCC later made it the operative standard for license renewals as well. *Seven League Prods., Inc. (WIII)*, 1 F.C.C.2d 1597, 1598 ¶ 5 (1965) (mem. op. & order); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970).

making process.⁴⁶ The FCC's grant of the vast majority of renewal applications did not preclude the existence of real harms stemming from the lack of clear standards. As the Court noted in *Thornhill v. Alabama*⁴⁷:

The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by the reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.⁴⁸

Charles Whitehead, who was Director of Telecommunications Policy during the Nixon Administration, put it even more bluntly when he said, “[t]he main value of the sword of Damocles is that it hangs, not that it drops.”⁴⁹

Confronted with such plastic criteria, applicants for broadcast licenses have had little choice but to tailor their speech to what they perceived to be the FCC's preferences.⁵⁰ The reported cases and academic commentary cite numerous historical examples of such self-censorship.⁵¹ Indeed, it now appears that the chill caused by the lack of clear standards was far from accidental. In delivering his celebrated “Vast Wasteland” speech, then-FCC Chairman Newton Minow

46. See Amendment of Comm'n's Rules to Allow Selection from Among Competing Applicants for New AM, FM, & Television Stations by Random Selection (Lottery), Notice of Proposed Rulemaking, 4 F.C.C.R. 2256, 2259 ¶¶ 24–28 (1989) [hereinafter Lottery NPRM]; Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39 (1971); Henry Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 501–02 (1975); Mathew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717, 748–51 (1979); see also ROGER NOLL ET AL., *ECONOMIC ASPECTS OF TELEVISION REGULATION* 112–14 (1973). Thomas Hazlett recounts two particularly dramatic illustrations of the malleability of the FCC's licensing criteria. In one case, the full Commission did not offer any reasons whatsoever for its licensing decision and simply directed its Office of Opinions and Review to justify its decision post hoc. In another case, the Office of Opinions and Review drafted a hundred-page opinion supporting a particular licensing decision, only to redraft it into an equally lengthy opinion justifying the opposite result after the full Commission abruptly changed its mind. Thomas W. Hazlett, *Digitizing “Must-Carry” Under Turner Broadcasting v. FCC* (1997), 8 SUP. CT. ECON. REV. 141, 177–78 (2000).

47. 310 U.S. 88 (1940).

48. *Id.* at 97.

49. Quoted in *Yale Broad. Co. v. FCC*, 478 F.2d 594, 605 n.22 (D.C. Cir. 1973) (Bazelon, C.J., dissenting from denial of rehearing en banc).

50. See Louis L. Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1695 (1969).

51. See, e.g., *Action for Children's Television v. FCC*, 59 F.3d 1249, 1266 (D.C. Cir. 1995) (Tatel, J., dissenting); *Cnty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978); *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 409 (D.C. Cir. 1974) (Bazelon, C.J., dissenting from rehearing en banc); *Yale Broad.*, 478 F.2d at 605–06 (Bazelon, C.J., dissenting from denial of rehearing en banc); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 78 n.60 (D.C. Cir. 1972) (Bazelon, C.J., dissenting); *Inquiry into Section 73.190 of Comm'n's Rules & Regulations Concerning Alternatives to Gen. Fairness Doctrine Obligations of Broad. Licensees*, Report, 102 F.C.C.2d 145 (1985); LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 175–82 (1987); ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 121–27 (1983); David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 215–16, 235–36, 244–51.

asked rhetorically “Why should you want to know how close you can come to the edge of the cliff?” and admonished broadcasters against “playing brinkmanship with the public interest.”⁵² The entire enterprise has become so disreputable that it has drawn criticism from commentators sympathetic to the Broadcast Model⁵³ and from the FCC itself.⁵⁴ After the D.C. Circuit eventually struck down the entire regime as arbitrary and capricious,⁵⁵ Congress subsequently enacted legislation completely eliminating the FCC’s discretion over new licenses⁵⁶ and severely limiting its discretion with respect to renewals.⁵⁷ Although the revised renewal process reduced the scope of the FCC’s licensing discretion, it still requires the FCC to base its renewal decisions on a series of highly subjective inquiries, including the perpetuation of the requirement that the FCC find renewal to be in the public interest.⁵⁸ The FCC has ruled that existing policy statements and case law will serve as the primary guide to its public interest analysis.⁵⁹ As a result, it is hard to regard the FCC’s licensing

52. Newton M. Minow, Address to the National Association of Broadcasters (May 9, 1961), reprinted in NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION AND THE FIRST AMENDMENT 185, 192 (1995).

53. See Hundt & Kornbluh, *supra* note 28, at 12, 13; Weinberg, *supra* note 26, at 1115, 1204.

54. See, e.g., Formulation of Policies & Rules Relating to Broad. Renewal Applicants, Third Further Notice of Inquiry and Notice of Proposed Rulemaking, 4 F.C.C.R. 6363, 6363–64 ¶ 6 (1989); Amendment of Comm’n’s Rules to Allow Selection from Among Competing Applicants for New AM, FM & Television Stations by Random Selection Lottery, Notice of Proposed Rulemaking, 4 F.C.C.R. 2256, 2259 ¶¶ 24–29 (1989). In fact, the FCC has proposed abolishing the comparative renewal process altogether. See Formulation of Policies Relating to Broad. Renewal Applicant, Stemming from Comparative Hearing Process, Report and Order, 66 F.C.C.2d 419, 429 ¶ 22 (1977); Formulation of Policies Relating to Broad. Renewal Applicant, Stemming from Comparative Hearing Process, Notice of Inquiry, 88 F.C.C.2d 120, 121 n.1 (1981).

55. See *Bechtel v. FCC*, 10 F.3d 875, 878–86 (D.C. Cir. 1993) [hereinafter *Bechtel II*]; *Flagstaff Broad. Found. v. FCC*, 979 F.2d 1566, 1571 (D.C. Cir. 1992); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) [hereinafter *Bechtel I*]. The D.C. Circuit’s principal concern was that these standards had been promulgated through a policy statement that had never been subjected to the rigors of the notice and comment process. As a result, the FCC had never provided a sufficient administrative justification for the criteria that it chose.

56. See 47 U.S.C. § 309(l) (2000). Although the statute only required auctions for applications filed on or after July 1, 1997, Congress gave the FCC the option of using auctions to resolve the backlog of disputes that had accrued following the invalidation of the FCC’s previous licensing criteria in *Bechtel II*. See *id.* In addition, the statute specifically exempted noncommercial educational and public broadcast stations from the auction mandate. As a result, the FCC has continued to rely on comparative hearings in allocating certain licenses, including those for low power FM radio. Creation of Low Power Radio Serv., Report and Order, 15 F.C.C.R. 2205, 2258–59 ¶ 136 (2000).

57. See 47 U.S.C. § 309(k) (2000).

58. Specifically, the statute requires the FCC first to consider: (1) whether the station has served the public interest, (2) whether the station has committed any serious violations, and (3) whether the station’s nonserious violations, taken together, constitute a pattern of abuse. *Id.* § 309(k)(1). Only if the renewal applicant fails to satisfy these three criteria and the FCC fails to find any mitigating factors that would justify the imposition of lesser sanctions can the FCC compare the incumbent’s application with that of other applicants. *Id.* § 309(k)(3); see also Lili Levi, *Not with a Bang but a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243, 279–80 (1996).

59. Implementation of Sections 204(a) & 204(c) of Telecomms. Act of 1996 (Broad. License Renewal Procedures), Order, 11 F.C.C.R. 6363, 6364 ¶ 5 (1996).

scheme as providing the type of clear standards needed to withstand conventional First Amendment scrutiny.

The Supreme Court has nonetheless relied on the scarcity doctrine to uphold the constitutionality of the scheme. As the Court observed in its seminal decision in *NBC v. United States*,⁶⁰ the unique physical characteristics of broadcasting dictated that only a fixed number of speakers could broadcast at any particular time, and private ordering had proven ill-suited to apportioning opportunities to speak.⁶¹ As a result, the Court concluded that government allocation was essential if the spectrum was to be developed as a resource.⁶² Consistent with the spirit of the day,⁶³ the Court also concluded that the realities of modern governance made it impossible for such licensing to be governed by criteria any clearer than the public interest standard. When faced with a “a field of regulation which was both new and dynamic,” it was inevitable that Congress would give the FCC powers that were “not niggardly[,] but expansive.”⁶⁴ As a result, the Court regarded the public interest standard to be “as concrete as the complicated factors for judgment in such a field of delegated authority permit.”⁶⁵

It is only by using the scarcity doctrine to frame the issue as a Hobson’s choice between allowing broadcasting to flounder in chaos or imposing public interest licensing that the Court’s decision seem explicable. As the Court later noted in *Red Lion Broadcasting Co. v. FCC*,⁶⁶ “It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.”⁶⁷

B. NEGATIVE CONTENT RESTRICTIONS

The second principal regulatory feature of the Broadcast Model is the prohibition of certain categories of programming. Although the Communications Act of 1934 specifically prohibits censorship,⁶⁸ the overall regulatory regime does,

60. 319 U.S. 190 (1943).

61. *Id.* at 212–13.

62. *Id.* at 226.

63. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 95–103, 132–40 (1938) (noting that flexible standards were necessary to facilitate judicial review of administrative adjudications and to preserve the traditional roles of administrative adjudications as fact-finding proceedings, while according deference to the lawmaking power of Article III courts).

64. 319 U.S. at 219.

65. *Id.* at 216 (internal quotation marks omitted).

66. 395 U.S. 367 (1969).

67. *Id.* at 389; see also *id.* at 376–77 (“Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public ‘convenience, interest, or necessity.’” (footnote omitted)).

68. 47 U.S.C. § 326 (2000).

in fact, authorize some content-based restrictions of speech. The most significant direct restriction is the statute forbidding the broadcast of indecent or profane speech.⁶⁹ In addition, the federal licensing authorities have long regulated content indirectly by treating program content as one of their primary licensing criteria.⁷⁰ The FRC initially refused to relicense broadcasters who transmitted speech that it perceived to be of low-value.⁷¹ The FCC continued the practice, primarily focusing on speech that it perceived to be indecent.⁷²

The Supreme Court has repeatedly held that content-based restrictions on speech are presumptively invalid.⁷³ As the Court noted in *Consolidated Edison Co. v. Public Service Commission*,⁷⁴ “[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.”⁷⁵ Content restrictions based upon the supposed offensiveness of speech are particularly problematic.⁷⁶ Rather than

69. 18 U.S.C. § 1464 (2000). Other direct content-based restrictions include prohibitions of certain types of advertising. *Id.* §§ 1304, 1307.

70. *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969) (“In applying [the public interest] standard the Commission for 40 years has been choosing licensees based in part on their program proposals.”); *NBC v. United States*, 319 U.S. 190, 217 (1943) (“Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of ‘public interest, convenience, or necessity.’”); *KFKB Broad. Ass’n v. FRC*, 47 F.2d 670, 672 (D.C. Cir. 1931) (“[T]he commission is necessarily called upon to consider the character and quality of the service to be rendered.”); 3 FRC ANNUAL REPORT 3 (1929) [hereinafter FRC THIRD ANNUAL REPORT] (“[T]he kind of service rendered by a station must be a means of appraising its relative standing and must be considered by the commission in making assignments.”); 2 FRC ANNUAL REPORT 161 (1928) [hereinafter FRC SECOND ANNUAL REPORT] (“[T]he commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to favor those which render the best service.”).

71. FRC THIRD ANNUAL REPORT, *supra* note 70, at 34, 36; FRC SECOND ANNUAL REPORT, *supra* note 70, at 160, 169; Howard A. Shelanski, *The Bending Line Between Conventional “Broadcast” and Wireless “Carriage,”* 97 COLUM. L. REV. 1048, 1054–57 (1997) (describing the “public interest limitation on content” required by both the Radio Act of 1927 and Telecommunications Act of 1934, and providing examples of denials of license renewals subsequent to each Act). For fulsome and colorful recounts of the most salient cases in this regard, see POWE, *supra* note 51, at 13–30.

72. *See, e.g.,* *Pacifica Found. v. FCC*, 438 U.S. 726, 758–61 (1978) (discussing George Carlin’s “Filthy Words” monologue); *Yale Broad. Co. v. FCC*, 478 F.2d 594, 603–04 (D.C. Cir. 1973) (Bazelon, C.J., dissenting from denial of rehearing en banc) (considering songs with drug-oriented lyrics); *Infinity Broad. Corp.*, 2 F.C.C.R. 2705 (1987) (mem. op. & order) (concerning “The Howard Stern Show”); *Pacifica Found.*, 2 F.C.C.R. 2698 (1987) (mem. op. & order) (ruling on a broadcast of a play about two gay men dying of AIDS). For overviews of the FCC’s actions, see POWE, *supra* note 51, at 165–90; THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 104–19 (1994); Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 85–112, 117–19, 132–36 (1992–93).

73. *See, e.g.,* *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345–46 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984).

74. 447 U.S. 530 (1980).

75. *Id.* at 538; *accord* *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

76. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because

providing a basis for restricting speech, “the fact that society may find speech offensive” instead provides “a reason for according it constitutional protection.”⁷⁷

The prohibition of content-based speech restrictions applies with equal force in the context of licensing. Even when the state is justified in imposing periodic licensing, “the Constitution requires that the [licensing authority] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered.”⁷⁸ Even if the criteria applied do not discriminate explicitly on the basis of content, the Court will nonetheless treat them as content-based if the licensing authority “must necessarily examine the content of the message that is conveyed” when deciding whether to issue the license.⁷⁹

Given the explicitly content-based nature of the direct prohibitions on indecent broadcasts and the FCC’s licensing criteria, the broadcast regulatory regime appears to contradict conventional First Amendment principles. The courts and the regulatory authorities initially relied exclusively on the scarcity doctrine to uphold attempts to restrict low-value speech.⁸⁰ As the Court noted in *NBC v. United States*, because “[t]he facilities of radio are limited and therefore precious,” the FCC was justified in preventing “wasteful use” of broadcast frequencies.⁸¹ In addition, the public interest standard necessarily required the FCC to award licenses to the applicant who would provide the best service to the community. Simply put, the Court could not conceive how the FCC could identify the best applicant without considering the content of the service to be transmitted.⁸²

In the 1970s, the FCC began to articulate what it acknowledged was a new

society finds the idea itself offensive or disagreeable.”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (“At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”); *Street v. New York*, 394, U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers.”).

77. *Pacifica Found. v. FCC*, 438 U.S. 726, 745 (1978); *accord NBC v. FCC*, 516 F.2d 1101, 1179 (D.C. Cir. 1975) (Bazelon, C.J., dissenting from the order vacating the previous order granting rehearing en banc) (“I seem to recall that it is controversial speech and not the right to assert that one’s speech is not really controversial which should be protected.”).

78. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 760 (1988).

79. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (internal quotation marks omitted) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)).

80. *See KFKB Broad. Ass’n v. FRC*, 47 F.2d 670, 672 (D.C. Cir. 1931); *FRC SECOND ANNUAL REPORT*, *supra* note 70, at 161, 170. *See generally* Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 *FED. COMM. L.J.* 605, 629 (1997) (“Scarcity, of course, has always been the underlying *raison d’être* for broadcast regulation. Because one person’s transmission is another’s interference, Congress concluded that the federal government has the duty both to select who may and who may not broadcast . . .”).

81. 319 U.S. 190, 216 (1943).

82. *Id.* at 216–17 (reasoning that if content were an impermissible basis for awarding licenses, “how could the Commission choose between two applicants for the same facilities . . . ?”).

rationale for upholding content-based restrictions of broadcast speech⁸³ that eventually received the approval of the Supreme Court in *FCC v. Pacifica Foundation*.⁸⁴ Calling the reasons for the First Amendment distinction between broadcasting and other media “complex,” the Court argued that a lower degree of First Amendment protection was justified, in part, because broadcasting was “uniquely pervasive,” in that it often “confronts the citizen . . . in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”⁸⁵ In addition, “[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”⁸⁶ Finally, the Court relied on the fact that broadcasting is “uniquely accessible to children.”⁸⁷ Although the Court emphasized the narrowness of its holding,⁸⁸ the rationale outlined in *Pacifica* represented a justification for extending a lower level of First Amendment protection to broadcasting that was completely independent of the scarcity doctrine.

Supreme Court acceptance of the pervasiveness and accessibility rationales prompted a dramatic shift in the manner in which the FCC justified the constitutionality of the negative content restrictions that it imposed. In time, the FCC would explicitly abandon any attempt to justify its indecency restrictions on the scarcity doctrine and would opt instead to rely solely on the rationales announced in *Pacifica*.⁸⁹

C. AFFIRMATIVE PROGRAMMING OBLIGATIONS

Finally, federal regulators have long ruled that licensees are required to do more than just refrain from uttering certain types of dispreferred speech. Licensees also bear an affirmative obligation to carry certain types of preferred speech. Early efforts specified a broad range of programming that the FRC and FCC expected broadcasters to include.⁹⁰ In subsequent decisions, the FCC

83. See *Pacifica Found.* (WBAI-FM), 56 F.C.C.2d 94, 96–97 ¶¶ 8–9 (1975) (mem. op. & order), on reconsideration, 59 F.C.C.2d 892 (1976), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978); see also Report on Broad. of Violent, Indecent, & Obscene Material, 51 F.C.C.2d 418, 419–20, 423 (1975); cf. *Sonderling Broad. Corp.* (WGLD-FM), 41 F.C.C.2d 777, 782 ¶ 16 (1973) (mem. op. & order), *aff'd sub nom.*, Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397 (D.C. Cir. 1974); Jack Straw Mem. Found. (KRAB-FM), 29 F.C.C.2d 334, 336 ¶¶ 5–6 (1971) (initial decision of hearing examiner); E. Educ. Radio (WUHY-FM), 24 F.C.C.2d 408, 410–12 ¶ 8 (1970) (notice of apparent liability).

84. 438 U.S. 726 (1978).

85. *Id.* at 748.

86. *Id.*

87. *Id.* at 749–50.

88. *Id.* at 750.

89. *Pacifica Found.*, 2 F.C.C.R. 2698, 2699 ¶¶ 10–11 (1987) (mem. op. & order); see also *Action for Children’s Television v. FCC*, 58 F.3d 654, 664–69 (D.C. Cir. 1995) (en banc); *Indus. Guidance on Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, Policy Statement, 16 F.C.C.R. 7999, 8000 ¶ 4 (2001).

90. See FEDERAL COMMUNICATIONS COMMISSION, PUBLIC SERVICE RESPONSIBILITIES OF BROADCAST LICENSEES (1946) (emphasizing the importance of public affairs and local programming), *reprinted in*

placed particular emphasis on the obligation to provide news, public affairs, and other nonentertainment programming.⁹¹ The most celebrated of these obligations is the now-defunct Fairness Doctrine, which required that broadcasters cover controversial issues of public importance in a balanced manner.⁹²

The FCC has since abolished the bulk of its affirmative programming requirements.⁹³ Only a handful of affirmative broadcasting obligations remain in force today. For example, the federal election statute places broadcasters under an obligation to carry political advertisements for certain candidates for public office.⁹⁴ Similarly, the FCC has construed the Children's Television Act of 1990 (CTA)⁹⁵ as requiring that all broadcasters provide at least three hours of

DOCUMENTS OF AMERICAN BROADCASTING 151, 198–208 (Frank J. Kahn ed., 2d ed. 1973); FRC THIRD ANNUAL REPORT, *supra* note 70, at 34 (requiring broadcasters to provide “a well-rounded program, in which entertainment, consisting of music both classical and lighter grades, religion, education and instruction, important public events, discussion of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place”); En Banc Programming Inquiry, Report and Statement of Policy, 44 F.C.C. 2303 (1960) (identifying fourteen “major elements usually necessary to meet the public interest”). The fourteen elements listed by the 1960 *En Banc Programming Inquiry* were:

- | | |
|--|--------------------------------|
| 1. opportunity for local self-expression | 8. political broadcasts |
| 2. development and use of local talent | 9. agricultural programs |
| 3. programs for children | 10. news programs |
| 4. religious programs | 11. weather and market reports |
| 5. educational programs | 12. sports programs |
| 6. public affairs programs | 13. service to minority groups |
| 7. editorials by licensees | 14. entertainment programs |

91. *Id.* See Formulation of Policies & Rules Relating to Broad. Renewal Applicants, Competing Applicants, & Other Participants to Comparative Renewal Process and to Prevention of Abuses of Renewal Process, Second Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 F.C.C.R. 5179, 5191 ¶ 84 (1988); Formulation of Policies & Rules Relating to Broad. Renewal Applicants, Competing Applicants, & Other Participants to Comparative Renewal Process & to Prevention of Abuses of Renewal Process, Third Further Notice of Inquiry and Notice of Proposed Rulemaking, 4 F.C.C.R. 6363, 6368 n.11 (1989) (citing *Radio Station WABZ, Inc.*, 90 F.C.C.2d 818, 840–42 (1982), *aff'd sub nom. Victor Broad., Inc. v. FCC*, 722 F.2d 756, 762, 764–65 (D.C. Cir. 1983)).

92. See Applicability of the Fairness Doctrine in Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (July 9, 1964); Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949).

93. Revision of Programming & Commercialization Policies, Ascertainment Requirements & Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076, 1093 ¶ 36, 1095–96 ¶¶ 40–43 (1984), *on reconsideration*, 104 F.C.C.2d 358 (1986), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987) (mem. op. & order) (repealing the Fairness Doctrine), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989); Repeal of the Personal Attack and Personal Editorial Rules, Order, 15 F.C.C.R. 20697 (2000) (repealing the rules for both broadcast and cable television operators).

94. Federal law requires broadcasters to carry political advertisements by candidates for *federal* office. 47 U.S.C. § 312(a)(7) (2000). The statute also strictly limits the amount that the broadcaster can charge for doing so. *Id.* § 315(b)(1). Broadcasters may refuse to carry political advertisements by *state* and *local* candidates. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) [hereinafter *CBS v. DNC*]. Should broadcasters choose to accept any such advertisements, however, they must do so on a nondiscriminatory basis. 47 U.S.C. § 315(a) (2000).

95. 47 U.S.C. § 303b(a)(2) (2000).

children's programming each week.⁹⁶ The FCC has, however, proposed expanding the affirmative programming obligations demanded of digital broadcasters. Specifically, it envisions requiring digital broadcasters to provide more local, issue-oriented programming; a larger number of public service announcements; additional children's programming; mandatory rights of reply; and greater coverage of political campaigns, including free air time for political candidates.⁹⁷ Moreover, the CTA requirement that the FCC consider whether any renewal applicant has served the public interest leaves open the possibility that the FCC may subject broadcasters to additional affirmative programming obligations in the future.⁹⁸

The Court has traditionally cast a jaundiced eye towards attempts to impose affirmative speech obligations on other media.⁹⁹ For example, in *Miami Herald Publishing Co. v. Tornillo*,¹⁰⁰ the Court struck down a statute requiring newspapers to provide a right of reply as an impermissible intrusion into their editorial judgment and control.¹⁰¹ The Court implicitly reaffirmed this principle in *Turner Broadcasting System v. FCC (Turner I)*,¹⁰² which involved a First Amendment challenge to a statute requiring local cable operators to carry all local broadcast stations within their service area (commonly known as "must-carry"). In upholding the must-carry requirements, the Court suggested that it would have held otherwise if the statute had attempted to specify the content of the speech that cable operators were obligated to carry.¹⁰³

The Court's decisions in *Turner I* and *Tornillo* leave little doubt that applying these general First Amendment principles to the type of affirmative programming requirements historically imposed on broadcasters would lead to their invalidation. The Supreme Court has nonetheless relied on the scarcity doctrine to uphold the imposition of affirmative programming obligations with respect to broadcasting.¹⁰⁴ As the Court held in *Red Lion Broadcasting Co. v.*

96. Policies & Rules Concerning Children's Television Programming, Report and Order, 11 F.C.C.R. 10660, 10662 ¶ 5, 10718–19 ¶ 120 (1996). A broadcaster could provide less than three hours per week if they were able to demonstrate a commitment to education and informing children that was the equivalent of three hours. *Id.*

97. See REPORT TO CONGRESS, *supra* note 18, at 5–10, 16, 24–26; GORE COMMISSION REPORT, *supra* note 17, at 48, 56–59; Hundt, *supra* note 36, at 1096; William E. Kennard, "What Does \$70 Billion Buy You Anyway?": Rethinking Public Interest Requirements at the Dawn of the Digital Age, Remarks at the Museum of Television and Radio (Oct. 10, 2000), available at <http://www.fcc.gov/Speeches/Kennard/2000/spwek023.html>.

98. Levi, *supra* note 58, at 278–80.

99. For an excellent discussion of the cognitive and dignitary harms associated with imposing affirmative content obligations on media, see Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 Nw. U. L. REV. 1083, 1114–17 (1999).

100. 418 U.S. 241 (1974).

101. *Id.* at 258.

102. 512 U.S. 622 (1994).

103. *Id.* at 655.

104. *E.g.*, *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (upholding a "limited right to 'reasonable' access" for declared political candidates in an election); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367,

FCC,¹⁰⁵ the inherent physical limitations of the spectrum justified requiring broadcasters to serve as a proxy for other speakers because “as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.”¹⁰⁶ The FCC’s most recent children’s television decision also invoked *Pacifica* as a justification for upholding the constitutionality of the requirement that all broadcasters provide three hours of children’s programming on the ground that the government’s interest in ensuring that children are exposed to educational programming is at least as significant as its interest in protecting them from exposure to indecent material.¹⁰⁷

Thus, even though each of the key features of the Broadcast Model of regulation represents an archetypical violation of conventional First Amendment principles, the Court has nonetheless relied on two key rationales to uphold each feature’s constitutionality: (1) the scarcity doctrine associated with *NBC* and *Red Lion* and (2) the unique pervasiveness and accessibility of broadcasting associated with *Pacifica*. As a result, the constitutionality of the Broadcast Model depends entirely on the continuing viability of these rationales as justifications for having a technology-specific First Amendment. The next two Parts will consider each of these rationales in turn, focusing on the manner in which analytical, technological, and doctrinal developments have systematically called both of them into question.

II. THE RISE AND (IMPLICIT) DEMISE OF THE SCARCITY DOCTRINE

As the foregoing discussion has shown, the scarcity doctrine has represented the principal justification for extending a lesser degree of First Amendment protection to broadcasting. This Part will provide my own assessment of the scarcity doctrine. Section A will provide an analytical critique of scarcity by analyzing two theoretical problems with the doctrine. The first is the now-standard economic argument that, to the extent that scarcity is meaningful at all, it applies with equal force to all media and thus does not serve to differentiate broadcasting. The second is a novel critique advanced for the first time in this Article that focuses on the Court’s growing tendency, when assessing the constitutionality of a particular regulatory provision, to treat all other features of the regulatory regime as fixed. The problem with doing so is that those other features are frequently themselves the product of regulation. As a result, treating

394 (1969) (upholding the right to equal access for a public figure who was “personally attacked” over that same broadcast medium); *cf.* *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 543 (1980) (using scarcity to hold *Red Lion* inapplicable to compelled speech with respect to other media); *Pac. Gas & Elec. v. Pub. Util. Comm’n*, 475 U.S. 1, 10 n.6 (1986) (plurality opinion) (distinguishing the mail from broadcast on scarcity grounds and declaring unconstitutional a policy that prohibited utility companies from including political flyers in monthly billing statements).

105. 395 U.S. 367 (1969).

106. *Id.* at 389.

107. Policies and Rules Concerning Children’s Television Programming, Report and Order, 11 F.C.C.R. 10660, 10731–32 ¶¶ 155–156 (1996).

these other regulatory features as part of the constitutional baseline threatens to allow regulation to serve as the constitutional justification for more regulation.

Section B will offer a technological critique of the scarcity doctrine. Although commentators have long noted that the development of cable television and other alternative television technologies eliminated the spectrum as a constraint on the number of people who can speak, the Court has largely disregarded the point, opting instead to view broadcasting as a universe unto itself. The impending arrival of a series of new broadcast technologies, including digital transmission, program storage, video-on-demand, spread spectrum, and packet switching, holds the promise of eliminating spectrum as a physical constraint even if broadcasting is viewed in isolation from other media. Once the economic limitations endemic to all markets become more important than the physical limitations of the spectrum, the scarcity doctrine will collapse as a basis for distinguishing broadcasting from other media.

In the face of such a withering attack, it is somewhat surprising that the scarcity doctrine has persisted. Section C chronicles its doctrinal history, beginning with the move towards its abandonment during the 1980s and ending with the Court's surprising reaffirmation of the doctrine in *Metro Broadcasting, Inc. v. FCC*.¹⁰⁸ Since that decision was handed down, the courts have shown increasing signs of discomfort with the scarcity doctrine. Not only have the courts consistently refused to extend it to other media, they have even appeared reluctant to continue to apply the doctrine to broadcasting. It appears that the scarcity doctrine may well be in the process of dissipating with a whimper, rather than a bang.

A. "AN INSIGHT MORE FUNDAMENTAL THAN WE CAN USE"¹⁰⁹: THE THEORETICAL CRITIQUE OF SCARCITY

1. The Analytical Emptiness of Scarcity

As noted above, the FCC and the Supreme Court have long relied on the scarcity doctrine to justify according less First Amendment protection to broadcasting than to other media. The Supreme Court believed that broadcasting was unique in that the number of available channels was strictly limited. Because of this limitation, it was essential for the government to become directly involved in allocating opportunities to speak.

Commentators have long recognized, however, that "there is a devastating—even embarrassing—deficiency in this analysis,"¹¹⁰ in that the limited nature of the spectrum as a resource does not serve to distinguish broadcasting from any other medium of communication.¹¹¹ As Ronald Coase observed:

108. 497 U.S. 547, 566–67 (1989).

109. Kalven, *supra* note 36, at 30.

110. BOLLINGER, *supra* note 11, at 89.

111. The leading critiques of scarcity include KRATTENMAKER & POWE, *supra* note 72, at 204–19; POWE, *supra* note 51, at 200–08; MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 9–18

[I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this of itself, does not call for government regulation.¹¹²

It is of no consequence that the Court believed that the amount of spectrum available was absolutely limited. For example, the amount of land and the number of Rembrandts is fixed and finite; yet, that fact has never been thought to require the government to decide who should use those resources and for what purpose. The typical solution to the problems of allocation is the creation of well-defined property rights in spectrum. Once that is done, the market can allocate the spectrum through a price mechanism without the need for any administrative involvement whatsoever.¹¹³

Nor does the potential for interference serve to distinguish broadcasting from other forms of communication. The same problems would arise if more than one person tried to speak in the same place at the same time. Indeed, interference is a potential problem for all goods. As Ronald Coase has noted, “the use of a piece of land simultaneously for growing wheat and as a parking lot would produce similar results.”¹¹⁴ Such problems, moreover, are easily solved without governmental allocation. The solution is simply to provide owners with a cause of action to enforce their property rights against trespassers.¹¹⁵

The implications of Coase’s critique were so sweeping that contemporary commentators and policymakers could not bring themselves to take it seriously. The reaction of First Amendment scholar and fellow University of Chicago professor Harry Kalven is fairly representative. Calling Coase’s argument “an

(1986); Coase, *supra* note 29, at 13–14; Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 221–26 (1982). For a more comprehensive enumeration of the critiques of the scarcity rationale, see J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1231 n.63 (1993) (collecting commentary).

112. Coase, *supra* note 29, at 14; *see also* KRATTENMAKER & POWE, *supra* note 72, at 204 (“‘Scarce resource’ is a redundant phrase. Every resource is scarce, be it oil, gas, clean water, trees, or iron ore. A ‘nonscarce resource’ is a contradiction in terms.”).

113. Coase, *supra* note 29, at 14.

114. *Id.*

115. In the words of Thomas Hazlett:

The interference problem is widely recognized as one of defining separate frequency “properties”; it is logically unconnected to the issue of who is to harvest those frequencies. To confuse the *definition* of spectrum rights with the *assignment* of spectrum rights is to believe that, to keep intruders out of (private) backyards, the government must own (or allocate) all the houses. It is a public policy non sequitur

Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 138 (1990); *see also* KRATTENMAKER & POWE, *supra* note 72, at 207 (“To prevent chaos (interference) in broadcasting or publishing, . . . requires not a commission, but a system of property rights. It follows . . . that if one decides to create a commission, it need do no more than define and protect property rights (that is, allocate spectrum among certain users and define and punish interference.”).

insight more fundamental than we can use,” Kalven declared it to be “so radical by today’s views that although I am persuaded of its correctness, I am not clear how it can be used in public discussion.”¹¹⁶ As a result, Kalven rejected it as a theoretically interesting nonstarter. Rather than take it seriously, Kalven thought it would be more constructive to explore policy options within a context that took the existing broadcast regime as given.¹¹⁷ Kalven was not alone in this regard. Academics and policymakers alike initially greeted Coase’s argument with ridicule.¹¹⁸ Even the group of University of Chicago economists who would become some of Coase’s biggest champions unanimously rejected his argument at first blush.¹¹⁹ Subsequent scholars have not been so reticent, and Coase’s critique of the scarcity doctrine has now become the conventional wisdom. In fact, it is now so broadly accepted that even those scholars who are sympathetic to the Broadcast Model tend to abjure any reliance on the scarcity doctrine.¹²⁰

2. Existing Regulations as a Constitutional Baseline

There is another fundamental conceptual problem associated with using scarcity to justify holding broadcasting to a lower standard of First Amendment scrutiny. In concluding that the electromagnetic spectrum was scarce, the Court took as given the background factors that determined the total amount of spectrum allocated to broadcasting. The problem with this analysis is that the amount of spectrum allocated to broadcasting was itself purely a product of regulation. Without recognizing that it was doing so, the Court in effect allowed these other regulatory provisions to become part of the constitutional baseline used to determine whether a particular regulation violated the First Amend-

116. Kalven, *supra* note 36, at 30.

117. *Id.* at 32 (“The key task is to explore what policy can be worked out for the independence of broadcasting if we continue to license commercial broadcasting and do not auction the licenses.”) (emphasis in original).

118. See R.H. Coase, *Comment on Thomas W. Hazlett: Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 577, 579 (1998); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–17 (1960) [hereinafter Coase, *Social Cost*]; Thomas W. Hazlett, *The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase’s “Big Joke”*: An Essay on Airwave Allocation Policy, 14 HARV. J.L. & TECH. 335, 343 (2001).

119. This group included such future Chicago School mainstays as Aaron Director, Milton Friedman, John McGee, and George Stigler. See *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 220–21 (Edmund W. Kitch ed., 1983).

120. See, e.g., BOLLINGER, *supra* note 11, at 87–90; SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 92, 110–12; Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children’s Television Programming*, 45 DUKE L.J. 1193, 1247 (1996); Logan, *supra* note 26, at 1701–05; Weinberg, *supra* note 26, at 1106; Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1070–77 (1994). The lone exceptions appear to be former FCC Chairmen Newt Minow and Reed Hundt. See MINOW & LAMAY, *supra* note 52, at 131 (1995); Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COMMERCE 527, 542–43 (1996).

ment.¹²¹

The Supreme Court followed this analytical approach in two recent decisions involving emerging communications media. For example, in *Reno v. ACLU*,¹²² the Court based its refusal to allow First Amendment challenges to regulation of the Internet on the lower level of scrutiny applied to broadcasting and on the ground that the Internet had never “been subject to the type of government supervision and regulation that has attended the broadcast industry.”¹²³ The implication of this reasoning is clear: Had the Internet, like broadcasting, been subject to longstanding regulation, that fact alone would have been a consideration supporting the constitutionality of additional regulation.

The existence of other regulations played an even more specific role in the plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.¹²⁴ In that case, the Court struck down a statutory provision allowing local cable operators to refuse to carry indecent programming on public access channels while upholding a parallel provision authorizing cable operators to refuse to carry indecent programming on their leased access channels.¹²⁵ The plurality based its distinction between the two provisions in part on the different regulatory legacies surrounding public and leased access. That leased access channels had not historically been subject to significant municipal regulation justified regarding editorial control over those channels as part of the cable operators’ First Amendment prerogatives. Granting them the right to refuse to carry indecent programming on those channels thus represented a restoration of their constitutional rights.¹²⁶ In contrast, public access channels had historically been subject to much more intrusive regulation. Because providing cable operators with greater control over their public access channels “d[id] not restore to cable operators editorial rights that they once had, . . . the countervailing First Amendment interest is nonexistent, or at least much diminished.”¹²⁷ Thus, the plurality’s reasoning justified editorial control over

121. For a related argument, see Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 38–45 (2002).

122. 521 U.S. 844 (1997).

123. *Id.* at 868–69.

124. 518 U.S. 727 (1996).

125. “Public access channels” are channels that municipalities require cable operators to set aside for use by the local community. *See id.* at 734. Perhaps the most celebrated portrayal of public access programming is the recurring sketch on *Saturday Night Live* entitled *Wayne’s World*. “Leased access channels” are a federal regulatory response to the growth of vertical integration in the cable industry. The requirement grew out of the concern that if cable operators and large cable networks were under the same corporate umbrella, those cable operators would have an incentive to exclude unaffiliated programmers in ways that would harm competition. For example, it is said that Time Warner was able to forestall NBC’s first attempt to set up a news network in direct competition with CNN simply by having all of the cable operators under its control refuse to carry the new network. As a result, Congress enacted legislation requiring all cable systems to offer part of their channel capacity for commercial lease by unaffiliated networks. *See Yoo, supra* note 1, at 223–24.

126. 518 U.S. at 761.

127. *Id.* at 761; *see also id.* at 766 (arguing that the provision in question “would not significantly restore editorial rights of cable operators”).

leased access channels as part of the constitutional baseline because those channels had not previously been subject to intrusive regulation. Conversely, the past imposition of successful regulation on cable operators became a justification for changing the relevant constitutional baseline in ways that tended to permit additional regulation in the future.

In addition, the plurality also emphasized that cities had generally required that public access channels be supervised by an “access channel manager,” an entity that is often a governmental actor and typically overseen by a local supervisory board. In the plurality’s view, the presence of an access channel manager indicated that less First Amendment harm would result from striking down a statute giving cable operators greater editorial control over those channels.¹²⁸ This reasoning treated the existence of access channel managers as part of the relevant baseline for evaluating the extent to which the provision in question intrudes on the First Amendment. The plurality’s reasoning is tantamount to saying that the presence of a governmental censor obviates the need for private discretion over public access channels.

This last observation underscores the manner in which the plurality’s analysis begs an important question. Before it could properly rely on the legacy of public access regulation as an appropriate constitutional baseline, it should have considered whether the various elements of that legacy were themselves constitutional. In other words, before the plurality could rely on the presence of an access channel manager as support for its constitutional position, it should have evaluated the constitutionality of the use of access channel managers. Courts, however, are understandably loath to treat a constitutional challenge to one particular provision as an open invitation to consider the constitutionality of other aspects of a regulatory scheme. It is far more common for them to assume the propriety of the other elements not being challenged without formally resolving the issue.¹²⁹ Although the Court’s desire to circumscribe the number of statutory provisions under review is understandable, this approach raises the serious danger of allowing regulation to become self-reinforcing. Simply put, it permits regulation, if imposed for a long enough time, to become part of the relevant constitutional baseline that in turn justifies other forms of regulation. Such reasoning is valid if and only if the other features of the regulatory regime that help form the constitutional baseline are themselves constitutional. The *Denver* plurality, however, failed to address this question.

This mode of analysis provides another reason to question the analytical coherence of the scarcity doctrine. In arguing that the number of channels is strictly limited, the scarcity doctrine accepts as a relevant constitutional baseline those decisions that determined how many channels are available for broadcasting in the first instance. In so doing, the scarcity doctrine elides the fact that the

128. *Id.* at 761–62.

129. *See id.* at 821 n.6 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that the constitutionality of leased access and public access were not at issue in that case).

amount of spectrum allocated to broadcasting is itself the product of a series of regulatory decisions concerning: (1) the total amount of spectrum allocated to television broadcasting, (2) the manner in which stations were allocated to particular communities, and (3) the manner in which those stations are allocated to particular licensees. An examination of each of these regulatory decisions reveals that the FCC resolved these questions in a manner that limited the supply of and heightened the demand for broadcast channels.¹³⁰ Scarcity is thus revealed to be a direct product of FCC regulation. As a result, to rely on scarcity to uphold the constitutionality of the Broadcast Model is to permit the overriding culture of regulation to become its own constitutional justification.

a. The Amount of Spectrum Allocated to Broadcasting. The manner in which the Federal Radio Commission (FRC) initially determined the amount of spectrum that would be available for broadcasting provides one of the most telling examples of how the scarcity of channels is a direct result of regulatory decisionmaking. In its first significant action concerning broadcasting, the FRC refused to follow the example set by European nations, which assigned more spectrum to broadcasting despite having fewer radio stations to accommodate, and rejected the recommendation of an international conference that had designated additional bands of the spectrum for radio broadcasting.¹³¹

The FRC's stated reason for doing so was to avoid rendering existing radio sets obsolete.¹³² Reliance on this concern was, to put it mildly, remarkably shortsighted. The one-time costs associated with changing receiving equipment at such a nascent stage in the industry's development were slight in comparison to the long-term benefits that would flow from having a greater range of programming options.¹³³ Furthermore, preserving existing radio sets only served to heighten the problems of scarcity. Improved receiver technology can serve as a substitute input for spectrum because better tuners allow stations to be spaced closer together and to operate at lower power without causing any reduction in

130. The discussion that follows is based in part on several excellent histories of the FCC's spectrum allocation decisions. See HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, NETWORK BROADCASTING, H.R. REP. NO. 85-1297, at 17-37 (1958) [hereinafter BARROW REPORT]; ALLOCATION OF TV CHANNELS, REPORT OF THE AD HOC ADVISORY COMM. ON ALLOCATIONS TO THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG. 17-32 (1958) [hereinafter BOWLES REPORT]; ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 176-91 (3d ed. 1982); Henry Geller, *A Modest Proposal for Modest Reform of the Federal Communications Commission*, 63 GEO. L.J. 705, 707-09 (1975); Hazlett, *supra* note 115, at 143-63; Thomas L. Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875, 886-981 (1981); Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1578-93 (1962).

131. Hazlett, *supra* note 115, at 155 (citing HARRY J. LEVIN, THE INVISIBLE RESOURCE 20-21 (1971)).

132. 1 FRC ANNUAL REPORT 13 (1927); see also POOL, *supra* note 51, at 115, 141 ("Use of new, shorter wave bands would not only have obsoleted existing radio sets but would also have required more expensive multiband sets and transmitters The market notion that, when a resource is scarce, one provides more of it in higher priced ways and thereby restricts the demand, did not fit within a populist notion of cheap broadcasting.").

133. Hazlett, *supra* note 115, at 155-56.

quality.¹³⁴ The decision to safeguard existing receiver technology exacerbated scarcity by keeping in place a large number of low quality, often homemade, receivers that were difficult to tune accurately and were not properly shielded against interference.¹³⁵

Federal regulators repeated these mistakes when apportioning spectrum for television. When the FCC first allocated spectrum for television broadcasting in 1937, it set aside sufficient spectrum in the VHF band for 19 television channels.¹³⁶ The FCC soon recognized that this amount of spectrum was insufficient to support a competitive national television service. As a result, it concluded that the best long-range solution was for television to reside entirely in the UHF band.¹³⁷ Because technical obstacles to UHF broadcasting remained, the FCC decided in 1945 to permit the deployment of television in the VHF band on an interim basis, while exhorting the industry to act quickly to solve the problems associated with UHF.¹³⁸ Because television's tenure in VHF was intended to be temporary, the FCC allowed the number of VHF channels allocated to be reduced from nineteen to thirteen¹³⁹ and eventually to twelve.¹⁴⁰

When the moment arrived for VHF broadcasters to move into the UHF spectrum, however, the FCC flinched. Even though the agency continued to acknowledge that television would best be served if it were shifted entirely into the UHF band,¹⁴¹ once again the prospect of forcing incumbent broadcasters and viewers to abandon their investments in existing equipment prevented the FCC from making spectrum more broadly available.¹⁴² Instead, the FCC opted to overlay UHF assignments on top of the existing VHF assignments without

134. POOL, *supra* note 51, at 141, 152–53; Fowler & Brenner, *supra* note 111, at 222 n.70; Sidak, *supra* note 111, at 1230.

135. Steven Phipps, “*Order Out of Chaos*”: *A Reexamination of the Historical Basis for the Scarcity of Channels Concept*, 45 J. BROAD. & ELEC. MEDIA 57, 67 (2001).

136. Frequency Allocation to Servs. in Frequency Bands from 30,000 kc to and Including 300,000 kc, Commission Order No. 19, 4 F.C.C. 30 (1939); Frequency Allocation to Servs. in Frequency Bands from 30,000 kc to and Including 300,000 kc, Report of the Commission, 4 F.C.C. 582 (1939). The FCC reduced the allocation to eighteen channels in 1941. Broad. Servs. Other than Standard Broad., 6 Fed. Reg. 2282, 2283 (May 6, 1941).

137. See Allocation of Frequencies to Various Classes of Non-Gov'tal Servs. in Radio Spectrum from 30 Kilocycles to 30,000,000 Kilocycles, 39 F.C.C. 68, 129–30 (1945) [hereinafter Allocation of Frequencies]; Public Release, 39 F.C.C. 16, 16 (1939); BARROW REPORT, *supra* note 130, at 18–19, 21; Geller, *supra* note 130, at 707–09; Schuessler, *supra* note 130, at 888.

138. Allocation of Frequencies, *supra* note 137, at 130.

139. *Id.* at 129; Schuessler, *supra* note 130, at 886 n.41, 887.

140. Amendments to Comm'n's Rules & Regulations Governing Sharing of Television Channels & Assignment of Frequencies to Television & Non-Govt. Fixed & Mobile Servs., 39 F.C.C. 336 (1948). See generally BARROW REPORT, *supra* note 130, at 18–19, 21; Schuessler, *supra* note 130, at 890.

141. See Second Report on Deintermixture, 13 Rad. Reg. (P & F) 1571, 1577–78 ¶ 18 (1956); Television Broad. Serv., Third Notice of Further Proposed Rule Making, 16 Fed. Reg. 3072, 3074 (F.C.C. Apr. 7, 1951).

142. See BOWLES REPORT, *supra* note 130, at 76 (noting testimony of FCC Commissioner Hyde that the refusal to reallocate television stations to the UHF band stemmed from “the fact that these stations were constructed, the investments made, [and] the public accustomed to listening to them”); Schuessler, *supra* note 130, at 909–10.

forcing any station to change frequencies. The problem is that UHF stations confront several operating disadvantages when compared with VHF stations.¹⁴³ The decision to intermix UHF and VHF stations inevitably caused UHF to fail as a service.¹⁴⁴

The scarcity created by these initial allocation decisions was perpetuated and aggravated by the FCC's disinclination to reallocate spectrum to broadcasting from other uses, even when those uses had proven unviable¹⁴⁵ and despite dramatic increases in total amount of usable spectrum.¹⁴⁶ Other regulatory decisions compounded scarcity still further. For example, one might have expected technological innovations to reduce the amount of spectrum required by each channel until eventually new channels could be introduced. FCC policy eliminated any incentive for broadcasters to search for such savings by forcing television and FM broadcasters to adhere to a fixed table of allocations and by greatly restricting the way in which they could use any spectrum that was conserved.¹⁴⁷ The FCC eventually realized that its regulatory scheme did not provide any incentive for broadcasters to use spectrum efficiently.¹⁴⁸ Although it eventually liberalized its rules, it did so in a way that channeled any additional spectrum towards subsidiary communications services, such as paging and data transmission, rather than towards additional broadcasting options.¹⁴⁹

143. These disadvantages included 20 to 25% more electric power consumption by UHF stations than VHF stations, UHF stations are harder to tune in, and UHF stations are subject to greater interference from terrain and buildings. In addition, at the time most receivers could not receive UHF signals. See 1 FEDERAL COMMUNICATIONS COMMISSION NETWORK INQUIRY SPECIAL STAFF, *NEW TELEVISION NETWORKS* 69–76 (1980) [hereinafter *NEW TELEVISION NETWORKS*]; Note, *The Darkened Channels*, *supra* note 130, at 1580.

144. See Geller, *supra* note 130, at 708–09; Note, *The Darkened Channels*, *supra* note 130, at 1580–93.

145. Sidak, *supra* note 111, at 1233. Most notably, although such spectrum-based services as multichannel multipoint distribution services (MMDS) and instructional television fixed services (ITFS) have proven to be abject failures, the FCC has refused to reallocate that spectrum for other uses. See Amendment of Part 2 of Comm'n's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Servs., First Report and Order, 16 F.C.C.R. 17222, 17333–38 ¶¶ 19–30 (2001) (refusing to reallocate spectrum devoted to ITFS and MMDS and limiting newly authorized mobile use to incumbent licensees). In addition, large numbers of assignments for noncommercial, educational television stations also remain unused. See Deletion of Noncommercial Reservation of Channel *16, 482–88 MHz, Pittsburgh, Pa., 11 F.C.C.R. 11700, 11708 ¶ 18 (1996) (mem. op. & order) (noting that the FCC had never eliminated a noncommercial allotment even when vacant for a long period or proven not to be economically viable).

146. See *infra* notes 173–74 and accompanying text.

147. As Yochai Benkler has pointed out, the FCC replicated these mistakes when rolling out digital television. Despite the drastically different characteristics of digital broadcasting, the FCC simply assigned the same amount of spectrum to digital stations that it had previously assigned to analog stations. See Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 98–100 (2001).

148. See Amendment of Comm'n's Rules Concerning Use of Subsidiary Communications Authorizations, 48 Fed. Reg. 28,445, 28,447 ¶ 15 (June 22, 1983); Amendment of Comm'n's Rules Concerning Use of Subsidiary Communications Authorizations, 47 Fed. Reg. 36,235, 36,238 ¶ 14 (proposed Aug. 19, 1982).

149. See 47 C.F.R. §§ 2.106, 73.127, 73.293, 73.665 (2000) (authorizing broadcasters to transmit subsidiary communications services); *id.* §§ 73.295(a), 73.667(a) (defining subsidiary communications services).

It is not yet clear how much the FCC's position on spectrum flexibility is likely to change in the near future. A group of distinguished economists, including several Nobel laureates, recently filed a statement with the FCC asking it to permit licensees to reallocate spectrum to different uses.¹⁵⁰ A recent report authored by the FCC's Spectrum Policy Task Force has proposed adding some flexibility to the FCC's current command-and-control approach to spectrum regulation.¹⁵¹ Thus far, policymakers have yet to allow such spectrum markets to emerge.

Scarcity is thus partly the result of the manner in which the FCC has determined how much of the spectrum may be used for broadcasting and its general reluctance to revisit that determination. As will be discussed in the succeeding subsections, other regulatory decisions regarding the number of stations that should be assigned to each community and how those stations should be assigned to particular individuals had an equally strong influence on restricting the supply of and increasing the demand for spectrum.

b. The Allocation of Stations to Particular Communities. In addition to setting the total amount of spectrum dedicated to broadcasting, the FCC also had to develop some means for assigning particular channels to particular communities around the country. The FCC followed allocation principles that attempted to assign at least two television stations to as many communities as possible.¹⁵² Although the FCC did so in an attempt to disperse control of television broadcasting as broadly as possible, the final allocation plan actually exacerbated the problems of scarcity significantly by making it essentially inevitable that television would be dominated by three large networks.

Understanding why this is the case requires an appreciation of one of the

150. Promoting Efficient Use of Spectrum Through Elimination of Barriers to Dev. of Secondary Markets, Comments of 37 Concerned Economists, WT Docket No. 00-230 (F.C.C. 2001), available at <http://www.aei.org/ct/ct hazlett010207.pdf>.

151. FCC SPECTRUM POLICY TASK FORCE, REPORT 5-6 (Nov. 2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/doc-228542A1.pdf. (recommending expansion of exclusive use and commons models with reservation of command-and-control regulation to situations involving public interest objectives and treaty obligations).

152. Specifically, the FCC assigned television stations according to the following priorities:

- (1) to provide at least one television service to all parts of the United States;
- (2) to provide each community with at least one television broadcast station;
- (3) to provide a choice of at least two television services to all parts of the United States;
- (4) to provide each community with at least two television broadcast stations; and
- (5) to assign any channels which remain unassigned under the foregoing priorities to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.

Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report and Order, 41 F.C.C. 148, 167 ¶ 63 (1952).

basic economic qualities of television programming.¹⁵³ Perhaps the most singular economic feature of the broadcast industry is its cost structure, in that the creation of television programming requires the incurrence of large, upfront, first-copy costs, whereas the costs of reproducing and distributing additional copies are relatively minor. This cost structure causes average cost to decline over all relevant volumes, as the large upfront investment is amortized over an increasingly large number of viewers. When faced with such a declining cost structure, efficiency increases with every additional viewer reached. Networks also possess certain advantages in dealing with advertisers. Using a centralized purchasing agent makes it easier for the advertiser to reach its goals and provides the program provider greater flexibility in compensating advertisers if a particular program does not do as well as expected. In addition, increasing use of satellites to distribute programming puts a premium on the ability to distribute the same program to a broad geographic area.¹⁵⁴

These considerations give programming that is able to reach a national audience a decisive economic advantage over programming that is only distributed locally. The problem is that by their very nature, individual stations can only reach limited geographic areas. As a result, the only practical way for them to gain the benefits associated with national distribution is to affiliate with a network with a national reach. Two conclusions follow: First, local stations have a natural tendency to affiliate with networks whenever possible. Second, the number of independent voices is determined by the number of available *networks* rather than the geographic dispersion of television *stations*.

Because diversity in communication depends on the number of networks, the problem with the broad dispersion of television stations becomes clear. The FCC's allocation plan dictated that a substantial part of the country would be served by only three commercial television signals. A study conducted by the FCC in 1980 revealed that although ninety-two percent of U.S. households could receive at least three commercial television signals, only sixty-four percent of U.S. households could receive a fourth television channel.¹⁵⁵ This meant that a fourth network would necessarily operate at an extreme disadvantage in terms of national coverage. The problems confronting a fourth network were exacerbated further because even when a fourth commercial station was available, it was not infrequently a UHF station, which, as noted earlier, would face substantial technical disadvantages relative to VHF stations.¹⁵⁶ As a result, a fourth network would only be able to reach thirty-four percent of the country with a signal that was comparable in quality to those provided by the other three

153. The discussion that follows is based in part on Yoo, *supra* note 1, at 213–17, 232–37; and Christopher S. Yoo, Rethinking the Commitment to Free, Local Television: A Public Goods Analysis 27–35 (Sept. 28, 2002) (unpublished manuscript, available at http://ssrn.com/abstract_id=333702) (last visited Feb. 10, 2003).

154. BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 53–54 (1992).

155. NEW TELEVISION NETWORKS, *supra* note 143, at 68.

156. See *supra* note 143 and accompanying text.

networks.¹⁵⁷ Thus, despite evidence that sufficient demand existed to support as many as six networks,¹⁵⁸ the FCC's system for dispersing television stations geographically choked off the supply side of the equation by precluding a fourth network from emerging.¹⁵⁹

The FCC's decision was particularly regrettable because at the time it made its principal allocation decisions, it had before it proposals that would have substantially alleviated this problem. For example, an emerging fourth television network founded by the DuMont Corporation proposed that, instead of attempting to assign two stations to every possible community, the FCC should focus on assigning four VHF stations to as many major markets as possible. The DuMont plans would have increased the population receiving four or more channels to nearly ninety-five percent and increased the percentage of the population receiving technically comparable signals to ninety-three percent—levels that would have greatly increased the feasibility of a fourth network.¹⁶⁰ Another proposal, backed by CBS as well as DuMont, relied on a policy known as “deintermixture” to alleviate the problems of scarcity. Deintermixture would have required every city to be completely devoted to either VHF or UHF stations. Doing so would have mitigated UHF's disadvantage vis-à-vis VHF by obviating the need for UHF stations to compete directly with VHF stations.¹⁶¹

The FCC unfortunately rejected both of these proposals. It did so in part because adopting either one would have required incumbent broadcasters to shift to UHF and in so doing abandon their investments in their existing VHF facilities.¹⁶² History has proven the FCC incorrect. The DuMont network folded three years later¹⁶³ and UHF deployment was largely a failure.¹⁶⁴ Although the FCC continued to recognize that deintermixture remained the best solution to this problem, it pursued the policy without much ardor over the next decade, until it eventually abandoned it in 1962.¹⁶⁵

In the end, UHF television did not become viable until the emergence of cable television in the late 1970s. And even then, the FCC's initial response was to adopt policies that had the perverse effect of perpetuating scarcity. The FCC's initial reaction to cable television was to attempt to retard its development out

157. NEW TELEVISION NETWORKS, *supra* note 143, at 78, 81 tbl.15. Expansion of the analysis to include stations that were authorized but not operational does not materially affect the analysis. *Id.* at 78, 81 tbl.14 (noting that even when nonoperational stations are included, a fourth network would reach only 36% of the nation with comparable signals).

158. See 35 FCC ANNUAL REPORT 135, 137 (1969); NOLL ET AL., *supra* note 46, at 116–20.

159. Rolla Edward Park, *New Television Networks*, 6 BELL J. ECON. 607, 607–08, 614–16 (1975).

160. See Schuessler, *supra* note 130, at 891, 921–26, 929 tbl.10, 938–39 & tbl.16.

161. *Id.* at 906–13; Note, *The Darkened Channels*, *supra* note 130, at 1579–80.

162. Schuessler, *supra* note 130, at 909–10.

163. *Id.* at 908 n.180, 926 n.273.

164. Geller, *supra* note 130, at 708; Note, *The Darkened Channels*, *supra* note 130, at 1593.

165. KRASNOW ET AL., *supra* note 130, at 176–82; Schuessler, *supra* note 130, at 941–67; Note, *The Darkened Channels*, *supra* note 130, at 1583–93.

of fear that cable would eliminate the UHF stations' viability.¹⁶⁶ Ironically, cable would ultimately prove to be UHF's savior rather than its scourge because cable is what finally allowed UHF stations to achieve technical parity with VHF stations.¹⁶⁷ It was thus no accident that new broadcast networks began to emerge shortly after cable became well established.¹⁶⁸ The FCC thus has a long history of allocating channels in ways that exacerbated the problems of spectrum scarcity. The unfortunate reality is that the FCC continued to do so even when the technological means for alleviating the problems of spectrum scarcity already existed.

c. The Allocation of Individual Stations to Particular Licensees. Not only did federal regulatory policy exacerbate the problems of scarcity by restricting the supply of broadcast spectrum, it further compounded the problem by allocating spectrum to individual license holders in a manner guaranteed to stimulate excess demand. This is because the federal government has always given away initial licenses and renewed existing licenses for free.¹⁶⁹ It is an economic truism, however, that demand will outstrip supply whenever any good is given away for free. The ordinary solution to such shortages is to employ a price mechanism because any increase in price will simultaneously stimulate additional supply and reduce demand until the two reach equilibrium. Indeed, the longstanding existence of vibrant markets in which broadcast stations (and their accompanying licenses) are bought and sold suggests that a price mechanism would likely be quite effective in balancing demand with supply.¹⁷⁰ In light of this, the shortages associated with scarcity appear to be the direct result of the government's commitment to price licenses at zero.

As a result, scarcity emerges as an example of the technique discussed above with respect to *Reno* and *Denver*, in which the Court incorporates the features of the existing regulatory regime into its constitutional baseline when determining whether a First Amendment violation has occurred.¹⁷¹ The inevitable effect of this type of reasoning is to allow regulation to become self-reinforcing by permitting it to serve as a constitutional justification for additional regulation. The problem is that the Court never considered whether the other regulatory decisions that formed the baseline for scarcity could not themselves withstand constitutional scrutiny. Confronting the issue in terms of particular licensing

166. See, e.g., Amendment of Subpart L, Part 91, to Adopt Rules & Regulations to Govern Grant of Authorizations in Bus. Radio Serv. for Microwave Stations to Relay Television Signals to Community Antenna Sys., Second Report and Order, 2 F.C.C.2d 725, 774-77 ¶¶ 123-127, 778 ¶ 130 (1966).

167. Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS., Winter 1981, at 96-97; Hazlett, *supra* note 118, at 419-20.

168. For useful overviews of this era of cable regulation, see Besen & Crandall, *supra* note 167, at 93-124.

169. See, e.g., Hazlett, *supra* note 115, at 136.

170. *Id.* at 143-47.

171. See POOL, *supra* note 51, at 141 ("Such licensing was the cause not the consequence of scarcity.").

decisions, however, largely shields courts from any consideration of these underlying problems.

B. “SCARCITY IS NOT ENTIRELY A THING OF THE PAST”¹⁷²: THE TECHNOLOGICAL CRITIQUE OF SCARCITY

At the same time that academic criticism has undermined the theoretical underpinnings of the scarcity doctrine, technological change has worked to erode its empirical foundations. Previous commentary focusing on technological change has raised two core criticisms. First, although the scarcity doctrine implicitly treats the total amount of available spectrum as fixed and unchanging, in reality, technological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use. The FCC’s technical staff has recognized that improvements in engineering have historically caused a steady increase in the amount of usable spectrum.¹⁷³ In addition, other developments have allowed us to make more efficient use of the spectrum already available. Improvements in channel spacing, the use of lower power, improved receiver technology, and other management techniques have further loosened the natural restriction imposed by the radio spectrum.¹⁷⁴ As a result, the number of over-the-air television stations that the average U.S. household can receive has more than tripled over the last twenty years.¹⁷⁵ Indeed, studies indicate that the average household has more options for broadcast television than for daily newspapers.¹⁷⁶

Second, the scarcity doctrine was further undercut by the arrival of alternative television technologies, such as cable television and direct broadcast satellite systems (DBS), capable of providing large numbers of channels without being subject to the type of constraints faced by broadcasters. These technolo-

172. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969).

173. See Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can’t Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 238 (1987) (quoting congressional testimony that the amount of usable spectrum had increased by approximately 20% each year for the last several decades).

174. See *id.* at 238–39; POOL, *supra* note 51, at 152–53; Fowler & Brenner, *supra* note 111, at 222–23; Sidak, *supra* note 111, at 1230.

175. Compare Review of Rules & Policies Concerning Network Broad. by Television Stations: Elimination or Modification of Section 73.658(c) of Comm’n’s Rules, Notice of Proposed Rulemaking, 3 F.C.C.R. 5681, 5685 ¶ 17 (1988) (reporting that the average U.S. household could receive 3.9 over-the-air television stations in 1980), with 1998 Biennial Regulatory Review—Review of Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of Telecomms. Act of 1996, Biennial Review Report, 15 F.C.C.R. 11058, 11064 ¶ 9 (2000) (reporting that as of 2000 the average U.S. household could receive thirteen over-the-air television stations).

176. Although the vast majority of U.S. households have a significant number of broadcast television options, over 98% of all U.S. cities have only one daily newspaper. See Eli M. Noam & Robert N. Freeman, *The Media Monopoly and Other Myths*, 29 TELEVISION Q. 18, 22 (1997). Compare Broadcast Station Totals as of September 30, 2001 (F.C.C. Oct. 30, 2001), available at http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0112.txt (reporting that there are presently 1676 broadcast television stations in the U.S.), with WORLD ALMANAC 276 (2002) (reporting that there are presently 1480 daily newspapers in the U.S.).

gies are now essentially universally available.¹⁷⁷ In fact, cable, DBS, and the other multichannel video program distributors (MVPDs) have eclipsed over-the-air broadcasting as the nation's primary source of television programming. The FCC estimates that approximately eighty percent of U.S. households subscribe to cable, DBS, or similar MVPD.¹⁷⁸ As a result, these alternative technologies have, in effect, eliminated the scarcity of the spectrum as a constraint to television-based communications.¹⁷⁹

The Supreme Court, however, has a long history of viewing each technology as a universe unto itself.¹⁸⁰ Its broadcasting precedents are no exception, as the Court has consistently refrained from treating the arrival of alternative television technologies as a basis for revisiting the scarcity doctrine.¹⁸¹ It thus seems that any attempt to overrule scarcity on empirical grounds is most likely to succeed if it arises within the context of broadcasting *simpliciter* without involving any alternative means of transmission.

It is this limitation that makes the current emergence of new broadcast technologies so potentially transformative.¹⁸² For the first time, the Court will be forced to entertain an empirical attack to the scarcity doctrine that has traction even if evaluated entirely from within the confines of broadcasting. The most sweeping technological development is the advent of digital television. Although digital television is often associated exclusively with high definition television (HDTV), what many people do not realize is that digital broadcasters have another option. Rather than transmitting the higher quality pictures associated with HDTV, digital broadcasters can instead use the greater efficiency of digital transmission to increase the number of channels transmitted. The FCC estimates that if the resolution of the television picture is left at its current levels, digital broadcasters can send five or more standard definition digital signals in the same amount of spectrum needed to send a single high definition digital signal.¹⁸³ The prospect of a fivefold increase in the number of channels that any household can receive makes it clear that economic limits have

177. Cable is now available in 97% of all U.S. households. Annual Assessment of Status of Competition in Mkt. for Delivery of Video Programming, Eighth Annual Report, 17 F.C.C.R. 1244, 1330 tbl.B-1 (2002). DBS is available to any home with a clear line of sight to the southern sky. *Id.* at 1299–1300 ¶ 122.

178. *Id.* at 1282 ¶ 79, 1338 tbl.C-1. It is arguable that the current level of MVPD penetration understates the true demand for television because the current availability of free, over-the-air broadcasting relieves many who are willing and able to pay for television programming from having to do so.

179. See Yoo, *supra* note 1, at 206–08, 228–29.

180. See *id.* at 285–86 (discussing the Court's historical tendency to assume that patents confer monopoly power without inquiring whether substitute technologies exist).

181. See *League of Women Voters v. FCC*, 468 U.S. 364, 376 n.11 (1984); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969). For a more complete discussion of the Court's reluctance to reconsider the scarcity doctrine in *League of Women Voters* notwithstanding the growth of cable television, see *infra* note 203 and accompanying text.

182. For an excellent, nontechnical overview of many of these emerging technologies, see BRUCE M. OWEN, *THE INTERNET CHALLENGE TO TELEVISION* 245–325 (1999).

183. *Advanced Television Sys. and Their Impact Upon Existing Television Broad. Serv.*, Fourth Report and Order, 11 F.C.C.R. 17771, 17772 ¶ 5 (1996), *modified*, 12 F.C.C.R. 3388 (1997).

surpassed the physical limits posed by the electromagnetic spectrum as the relevant constraint.¹⁸⁴

Waiting in the wings are a number of other technologies that should further enhance our ability to use the spectrum. Personal video recorders (PVRs) employ hard drives and other computer-based technologies to store up to 320 hours of digital programming.¹⁸⁵ Although industry leaders TiVo and ReplayTV have largely abandoned attempts to sell PVRs as freestanding units, this technology is in the process of being incorporated into other devices.¹⁸⁶ Widespread deployment of PVRs promises to allow broadcasters to increase the efficiency of spectrum use by using a greater proportion of the broadcast day for transmission without incurring the degradation in quality associated with current analog technologies. The Chairman of the FCC recently expressed his enthusiastic support for the technology, even going so far as to dub it, "God's machine."¹⁸⁷

Equally promising are the cluster of emerging "spread spectrum" technologies. Some of these technologies, including a popular one known as ultra-wideband (UWB) that serves as the basis for many wireless local area network (LAN) systems, operate by sending an extremely short duration pulse over a much broader range of the spectrum than is usual for spectrum-based devices. The diffusion of the signal allows UWB to transmit at such low power that it is almost indistinguishable from background noise. As a result, it allows more users to operate in the same spectrum without causing interference.¹⁸⁸ Indeed, some have claimed that the deployment of such technologies will obviate the need for spectrum rights altogether.¹⁸⁹ I am personally skeptical that such

184. See Yoo, *supra* note 1, at 213, 227–28. This fact makes it quite ironic that the Gore Commission and the FCC have used the arrival of digital television as a basis for calling for more intrusive regulation. See *supra* note 97 and accompanying text. Properly understood, digital television weakens, rather than strengthens, the traditional grounds for regulatory intervention.

185. See David P. Hamilton, *VCRs: Still Standing*, WALL ST. J., Mar. 5, 2002, at R8.

186. See Anna Wilde Mathews, *ReplayTV Will Exit Direct Set-Top Sales, Focus on Licensing Software to Others*, WALL ST. J., Nov. 28, 2000, at B10; Nick Wingfield, *Sony Agrees to License Video-Recording*, WALL ST. J., Oct. 19, 2001, at B6. Interestingly, Microsoft recently abandoned its efforts to market a PVR. See Rebecca Buckman, *Microsoft Corp. Disbands Division Making UltimateTV*, WALL ST. J., Jan. 23, 2002, at B21.

187. Jim Krane, *FCC Chief Is Big Fan of Digital Video Recorders*, PHILA. INQUIRER, Jan. 12, 2003, at E2.

188. See Revision of Part 15 of Comm'n's Rules Regarding Ultra-Wideband Transmission Sys., First Report and Order, 17 F.C.C.R. 7435, 7439 ¶ 7 (2002) [hereinafter UWB First Report and Order]; Revision of Part 15 of Comm'n's Rules Regarding Ultra-Wideband Transmission Sys., Notice of Proposed Rulemaking, 15 F.C.C.R. 12086, 12088 n.13 (2000) [hereinafter UWB NPRM]. The FCC recently authorized the marketing and operation of UWB devices. In so ruling, it limited communications services based on UWB to indoor activities and peer-to-peer operation. See Revision of Part 15 of Comm'n's Rules Regarding Ultra-Wideband Transmission Sys., First Report and Order, 17 F.C.C.R. 7435, 7437 ¶ 5 (2002).

189. See, e.g., LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE 184 (1999); Tom W. Bell, *The Common Law in Cyberspace*, 97 MICH. L. REV. 1746, 1766 (1999); Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 325–26, 394–97 (1998). For a discussion of this proposal appearing in the popular press, see Yochai Benkler & Lawrence Lessig, *Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC,

spread spectrum technologies can support the type of spectrum commons that these scholars envision. Although the airwaves may seem uncrowded initially, as the relevant technologies develop, the absence of well-defined property rights will eventually lead to the overuse and underinvestment associated with any commons.¹⁹⁰ This is particularly true with UWB, because widescale use of low power emissions would gradually raise the level of background noise that spectrum users will need to overcome. In addition, such problems are likely to be extremely hard to solve because interference in the spectrum is cumulative, and it is likely to be extremely difficult to identify the source of emissions that are fairly close to the level of background noise. Fortunately, other spread spectrum technologies exist that do not suffer from these flaws. For example, the FCC recently authorized the deployment of “software-defined radio” (SDR),¹⁹¹ which is the first spread spectrum technology to operate as a mass media.¹⁹² Unlike conventional radio, which employs transmitters that are hard-wired to transmit and receive on a single frequency, SDR employs computer-based technology to allow transmissions to shift dynamically among frequencies.¹⁹³ As a result, the audience can receive seamless service despite the fact that a particular broadcast may hop among different channels at different times of the day. The added flexibility provided by SDR promises to improve efficient use of spectrum in several ways. First, by enabling transmissions to adapt dynamically to local conditions, SDR makes it possible to maximize use of the available bandwidth. Second, it enhances incentives for conserving spectrum by making it easier for any savings to be transferred to alternative uses. Third, because the key elements of SDR equipment are based in software, not hardware, the shift to SDR can minimize the problems associated with nonuniform standards that vary from service to service and from country to country. Lastly, the software-oriented nature of SDR can also greatly facilitate the introduction of new, more spectrum-efficient technologies by lowering the costs of changing over receiving and transmitting equipment.¹⁹⁴ Admittedly, SDR is still in its nascent stages and deployment of SDR technology for

Dec. 14, 1998, at 12, 15 (“If spectrum can be shared, does the Constitution permit the state to silence the many so that CBS can speak?”). For a related proposal that would charge spectrum fees based on congestion, see Eli Noam, *Spectrum Auctions: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism*, 41 J.L. & ECON. 765 (1998) (advocating a “pay as you go,” license-free spectrum).

190. See Hazlett, *supra* note 118, at 481–85.

191. See Authorization and Use of Software Defined Radios, First Report and Order, 16 F.C.C.R. 17373 (2001) [hereinafter SDR First Report & Order]; Hazlett, *supra* note 118, at 444–46.

192. The FCC has made it clear that UWB does not encompass long-range spread spectrum technologies. See UWB First Report and Order, *supra* note 188, at 7437 ¶ 5; UWB NPRM, *supra* note 188, at 12088 n.13.

193. Because SDR uses specific channels, it is quite different from other spread spectrum technologies that disperse transmissions over a broader range in a nonchannelized fashion, such as UWB.

194. See SDR First Report & Order, *supra* note 191, at 17374 ¶ 5; Authorization and Use of Software Defined Radios, Notice of Proposed Rulemaking, 15 F.C.C.R. 24442, 24443 ¶¶ 3–4, 24446–48 ¶¶ 12–15 (2000); Inquiry Regarding Software Defined Radios, Notice of Inquiry, 15 F.C.C.R. 5930, 5933–36 ¶¶ 10–17 (2000).

television broadcasting is years from becoming a reality. Nonetheless, it is apparent that SDR has the potential to enhance the efficiency with which we can use the spectrum in some fairly dramatic ways.

And lurking over the entire scene is the impending conversion of broadcasting to packet-switched technologies. Unlike conventional communications media, which typically transmit information in a single, continuous stream, packet-switched networks divide information into smaller aggregations of data known as “packets.” The packets are then sent to their destination through the most efficient route and are reassembled. The conversion of broadcasting to packet-switched technologies should improve the efficiency of broadcast transmission in several ways. First, packet-switched networks can take full advantage of digital compression and other techniques developed to enhance the efficiency of computer networks. Dividing information into packets also allows for more efficient network use because different packets can be routed through whatever paths are least congested at the time of transmission. The use of packet-switched networks can thus enhance the ability of flexible technologies like SDR to use the available spectrum in the most efficient manner possible.

But perhaps the most important insight for the purposes of this Article is that packet-switched networks treat all different forms of communication and all means of transmission as essentially fungible.¹⁹⁵ The technology follows the same process of breaking digital information down into individual packets regardless of whether it is conveying a television program, a telephone conversation, or an e-mail message. In addition, it makes no difference in the end if the packets associated with a particular communication arrived via terrestrial broadcasting, satellite broadcasting, coaxial cable, the traditional twisted pair associated with telephony, or all of the above. As a result, the eventual conversion of television to packet switched technologies will render any remaining distinctions between the various media technologies meaningless because all of them will in essence become substitutes for one another.¹⁹⁶ Once that day arrives, any continued effort to draw distinctions among media will clearly become senseless.

C. WITH A WHIMPER, NOT A BANG: THE DOCTRINAL COLLAPSE OF THE SCARCITY DOCTRINE

Despite these analytical and conceptual problems, policymakers continue to regard the scarcity doctrine as beyond judicial reproach.¹⁹⁷ My own review of

195. See generally Yoo, *supra* note 1, at 289 (“The impending shift of all networks to packet-switched technology promises to cause all of the distinctions based on the means of conveyance and the type of speech to collapse entirely.”).

196. In fact, the various technologies may move beyond being substitutes to being complements. For example, it is easy to envision a combined system that completely devoted the broadcast frequencies to bringing content into the home while having the telephone line completely devoted to the return path.

197. See GORE COMMISSION REPORT, *supra* note 17, at 20 & n.12 (declaring *Red Lion* “the operative ruling in this area” and citing cases relying on it); Policies and Rules Concerning Children’s Television

the precedents suggests that the courts have not been completely oblivious to the analytical and empirical shortcomings of the scarcity doctrine and have even signaled willingness to consider overruling it. The initial push in that direction was ultimately blunted by an unusual confluence of issues in *Metro Broadcasting, Inc. v. FCC*.¹⁹⁸ Since then, however, the Supreme Court has once again begun to distance itself from the scarcity doctrine by refusing to extend it to other media and appearing to avoid relying on it even with respect to broadcasting. These developments suggest that there may be more reason to believe that the courts may be ready to abandon the doctrine than is commonly acknowledged.

1. A False Start in the Abandonment of Scarcity: From *League of Women Voters* to *Metro Broadcasting*

Even while offering the most celebrated statement of the scarcity doctrine, the Court's opinion in *Red Lion* recognized the possibility that improvements in technology might undermine its empirical basis. When considering the argument that scientific progress had rendered scarcity obsolete, the Court conceded that "[a]dvances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum."¹⁹⁹ The Court, however, saw technological change as a double-edged sword. Although scientific advances tended to improve our ability to employ the spectrum, those advances simultaneously created additional demand for it. The Court thus saw the obsolescence of scarcity as a question of which of these two effects would dominate in the long run. The Court declined to resolve the tension between these forces, concluding that in the absence of a concrete factual record, it was "unwise to speculate on the future allocation of that space."²⁰⁰ In postponing a decision on this issue rather than rejecting it out of hand, the Court implicitly recognized the possibility that scarcity might one day become a thing of the past.

The Court's subsequent decisions have been even more explicit in acknowledging the possibility that technology might undercut scarcity as a basis for upholding the constitutionality of broadcast regulation. For example, in *CBS v. Democratic National Committee*,²⁰¹ a plurality of the Court explicitly acknowledged that "the broadcast industry is dynamic in terms of technological change" and that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."²⁰² Justice Douglas put the matter even more directly: "Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it

Programming, Report and Order, 11 F.C.C.R. 10660, 10727-32 ¶¶ 149-151 (1996) (drawing a similar conclusion).

198. 497 U.S. 547 (1989).

199. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396-97 (1969).

200. *Id.* at 399.

201. 412 U.S. 94 (1973).

202. *Id.* at 102 (plurality opinion).

may be possible within 10 years to provide television viewers 400 channels through the advances of cable television.”²⁰³

This line of authority culminated in *FCC v. League of Women Voters*,²⁰⁴ in which the Court recognized that “[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.”²⁰⁵ Perhaps reluctant to open itself to the political heat that would accompany invalidating most of the extant regime of broadcast regulation, the Court declined to resolve the issue, holding instead that “[w]e are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.”²⁰⁶ Thus, notwithstanding its previous admonition that “[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake,”²⁰⁷ the Court felt the need to defer to the political branches.

Although the propriety of the Court’s decision not to resolve the issue is open to question, the *League of Women Voters* footnote nonetheless established a road map for the repudiation of the scarcity doctrine in the future. In light of the deregulatory bent of the Reagan Administration in general and the FCC in particular, the FCC did not wait long to take the Supreme Court up on its invitation.²⁰⁸ The year after the Court’s decision in *League of Women Voters*, the FCC issued a study reviewing the constitutionality of the Fairness Doctrine. Known as the *1985 Fairness Report*, this study concluded that the increase in the number of television stations and the emergence of cable television and other new television technologies had undercut scarcity as a basis for giving broadcasting a lesser degree of First Amendment protection than other media.²⁰⁹

203. *Id.* at 158 n.8 (Douglas, J., concurring in the judgment).

204. 468 U.S. 364 (1984).

205. *Id.* at 376 n.11 (citing Fowler & Brenner, *supra* note 111, at 221–26).

206. *Id.*

207. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *see also Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989):

To the extent that the federal parties suggest that we should defer to Congress’ conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment.

Id. at 129.

208. For a detailed and nuanced overview of the events that followed, see Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS., Aut. 1993, at 152–65, 177–78; *see also* Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 79 GEO. L.J. 59, 59–62, 66–87 (1987); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1009–12 (1989).

209. *Inquiry into Section 73.1910 of Comm’n’s Rules & Regulations Concerning Gen. Fairness Doctrine Obligations of Broad. Licensees*, Report, 102 F.C.C.2d 145, 204–17 ¶¶ 97–122 (1985) [hereinafter 1985 Fairness Report]. The Report also concluded that the Fairness Doctrine was constitu-

Strong congressional support for the Fairness Doctrine led the FCC to stop short of repealing it. In light of the Fairness Doctrine's standing as "a longstanding administrative policy and central tenet of broadcast regulation" and the existence of "proposals pending before Congress to repeal the doctrine," the FCC concluded that it would be inappropriate to repeal the Fairness Doctrine outright. Much as the Supreme Court had avoided deciding the constitutional issue in *League of Women Voters* by deferring to the political branches, the FCC sidestepped the issue as well, opting instead to "afford Congress an opportunity to review the Fairness Doctrine in light of the evidence adduced in this proceeding."²¹⁰

That the FCC stopped short of reaching the constitutional issue did not stop many contemporary observers from regarding the *1985 Fairness Report* as the type of signal that would justify the abandonment of the scarcity doctrine.²¹¹ In 1987, the FCC removed any remaining doubts about its intentions. In response to a D.C. Circuit decision ordering it to address the constitutional issues the FCC had avoided in the *1985 Fairness Report*,²¹² the FCC repealed the Fairness Doctrine.²¹³ In the course of doing so, the FCC reaffirmed its attack on the scarcity doctrine, concluding that "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media."²¹⁴ Even more importantly, the FCC explicitly indicated that it intended its action to represent the type of signal envisioned by the Supreme Court in *League of Women Voters*.²¹⁵ The FCC's bold action appeared to set the stage for a landmark renunciation of the scarcity doctrine that would bring the Broadcast Model to an abrupt end.

Somewhat surprisingly, however, the Supreme Court did not overturn the

tionally suspect in that it actually lessened the amount of diverse views available to the public. Faced with the obligation to provide balanced coverage whenever controversial issues are discussed, the FCC found that all too often broadcasters avoided the problem altogether simply by declining to address controversial issues at all. *Id.* at 159–88 ¶¶ 26–68. The Report further concluded that the Fairness Doctrine inhibited the expression of unorthodox views and gave the government too much power to influence the content of broadcast programming. *Id.* at 188–94 ¶¶ 69–76. In so ruling, the FCC provided a basis under which a court could reconsider the constitutionality of the Fairness Doctrine without calling the broader sweep of broadcast regulation into question. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393 (1969) (noting that the Court would reconsider the constitutionality of the Fairness Doctrine "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage"); *League of Women Voters*, 468 U.S. at 378 n.12 (offering a similar observation).

210. 1985 Fairness Report, *supra* note 209, at 148 ¶ 7; *see also id.* 227 ¶ 144, 246–47 ¶¶ 174–176.

211. *See Branch v. FCC*, 824 F.2d 37, 50 (D.C. Cir. 1987); *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987); *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 n.5 (D.C. Cir. 1986); Bloch, *supra* note 208, at 74 n.56; Spitzer, *supra* note 208, at 1009.

212. *See Meredith Corp.*, 809 F.2d at 874.

213. *See Syracuse Peace Council*, 2 F.C.C.R. 5043, 5053–54 ¶¶ 66–72 (1987) (mem. op. & order), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

214. *Id.* at 5058 ¶ 99.

215. *Id.* at 5053 ¶ 65.

scarcity doctrine in its next major broadcasting decision. To the contrary, in its 1990 decision in *Metro Broadcasting, Inc. v. FCC*,²¹⁶ a decision better known for its equal protection implications, the Court reaffirmed scarcity as a basis for applying a lower First Amendment standard to broadcasting.²¹⁷ Although the decision was closely divided on other issues, the dissent refused to challenge the majority's endorsement of the scarcity doctrine and instead accepted the notions that "First Amendment concerns support limited but inevitable Government regulation of the peculiarly constrained broadcasting spectrum" and that, as such, "measures adopted to further the interest in diversity of broadcasting viewpoints are . . . no[t] contrary to the First Amendment."²¹⁸

Coming after the FCC's attempt to answer the Supreme Court's request for a signal that would justify revisiting the scarcity doctrine, this reaffirmance came as something of a surprise. Even more striking was the Court's decision to apply an intermediate level of equal protection scrutiny to the minority preference programs at issue in *Metro Broadcasting*, as well as its reliance on a nonremedial governmental interest in sustaining the programs. Just the previous year in *City of Richmond v. J.A. Croson Co.*,²¹⁹ the Court had indicated that it would likely subject such programs to strict scrutiny and would hold any attempts to justify race-conscious measures as remedies for past discrimination to a fairly stringent evidentiary standard. The answer to these puzzles lies with Justice Byron White, one of two justices to vote with the majority in both *Croson* and *Metro Broadcasting*. Justice Brennan's papers reveal that White made a reaffirmation of *Red Lion* the price of his vote in *Metro Broadcasting*.²²⁰

Dominated as it was by the larger battle over affirmative action, the majority opinion in *Metro Broadcasting* can hardly be regarded as a ringing endorsement of *Red Lion*. Here was a clear case of the equal protection tail wagging the First Amendment dog. And yet, somewhat ironically, it is the broadcast implications that have proven more enduring. When the Court later overruled *Metro Broadcasting*, it left the decision's endorsement of scarcity intact.²²¹ In so doing, the Court brought the reexamination of the scarcity doctrine prompted by the *League of Women Voters* footnote to an unsatisfying and somewhat indeterminate end. Although there can be little question that the Court reaffirmed the

216. 497 U.S. 547 (1990).

217. *Id.* at 566–67 (“We have long recognized that ‘[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.’” (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))) (alterations in original).

218. *Id.* at 616 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting) (citing *Red Lion*, 395 U.S. at 389–90).

219. 488 U.S. 469 (1989).

220. See Devins, *supra* note 208, at 179.

221. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting* only “[t]o the extent that [it] is inconsistent” with the holding “that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny”).

scarcity doctrine as a formal matter, it did nothing to resolve the burgeoning questions about its continuing validity.

2. Scarcity After *Metro Broadcasting*

The reaffirmation of the scarcity doctrine in *Metro Broadcasting* blunted the momentum in favor of its outright abandonment initiated by the *League of Women Voters* footnote. *Metro Broadcasting* did not, however, mark an end to the judiciary's struggles with the doctrine's analytical and technological shortcomings. As the following subsection demonstrates, courts have severely restricted the doctrine's scope by consistently rejecting calls to extend it to other media. In addition, courts have even begun to curtail the scarcity doctrine with respect to broadcasting. While some lower court judges have continued to call for its repudiation, the Supreme Court has appeared to respond with avoidance, opting to rely on other principles to justify applying a lower level of First Amendment scrutiny even when a simple citation to the scarcity doctrine would have sufficed. The Supreme Court's scrupulous refusal to offer any endorsement of the scarcity doctrine suggests that the Court may be closer to abandoning the doctrine than is generally recognized.

a. The Refusal to Extend Scarcity to Other Media. The only time that the Supreme Court has found occasion to mention the scarcity doctrine since *Metro Broadcasting* was in the process of rejecting requests to extend it to other media.²²² The Court offered its most extensive discussion of the extent to which the scarcity doctrine would apply to other electronic media in *Turner I*. At issue was a First Amendment challenge to the so-called "must carry" statute, which required local cable operators to carry for free the signals of all full-power broadcast stations within their service area. Even though the Court had recognized that cable television was protected speech,²²³ the First Amendment standard that would apply to cable television remained an open question.²²⁴

222. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637–39 (1994) [hereinafter *Turner I*]. For earlier refusals to extend the doctrine to other media, see *Pac. Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 10 n.6 (1986) (plurality opinion); *Consolidated Edison Co. v. Public Utilities Comm'n*, 447 U.S. 530, 542–43 (1980); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (overturning a ban on the mailing of unsolicited contraceptive advertisements on the ground that "[o]ur decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication").

223. See *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 493–94 (1986); cf. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (noting that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include").

224. See *Preferred Communications*, 476 U.S. at 495 (declining "to express any more detailed views on the proper resolution of the First Amendment question"); *id.* at 496 (Blackmun, J., concurring) (joining the majority opinion subject to the understanding that "it leaves open the question of the proper standard for judging First Amendment challenges" to the cable regulations in question).

Just as numerous courts of appeals had held earlier,²²⁵ the Court flatly rejected the government's contention that cable television should be subject to the lower level of scrutiny that applied to broadcasting. In so holding, the Court acknowledged the longstanding criticism of the scarcity doctrine leveled by scholars and courts alike.²²⁶ In the end, however, the Court did not regard a case about cable to be an appropriate occasion to reconsider the application of the doctrine to broadcasting. "Whatever [scarcity's] validity"²²⁷ in the broadcasting context, the Court held that it did not apply to cable.²²⁸ As the Court explained:

[C]able television does not suffer from inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* . . . is inapt when determining the First Amendment validity of cable regulation.²²⁹

This conclusion commanded overwhelming support on the Court, garnering the votes of four of the Justices in the majority, as well as all four dissenting Justices.²³⁰ The only member of the Court not to address the issue explicitly was Justice Stevens, and his separate opinion did not indicate any disagreement

225. See *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1448–50 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986); *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44–46 (D.C. Cir. 1977).

226. See *Turner I*, 512 U.S. at 63 & n.5 (citing *Telecomms. Action & Research Ctr. v. FCC*, 801 F.2d 501, 508–09 (D.C. Cir. 1986)); BOLLINGER, *supra* note 11, at 87–90; POWE, *supra* note 51, at 197–209; SPITZER, *supra* note 111, at 7–18; Coase, *supra* note 29, at 12–27; Winer, *supra* note 173, at 218–40; Note, *The Message in the Medium*, *supra* note 120, at 1072–74.

227. See *Turner I*, 512 U.S. at 637 (“[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation”) (emphasis added).

228. *Id.* Some commentators have interpreted *Turner I*'s refusal to question the continuing vitality of scarcity as representing an implicit reaffirmation of the doctrine with respect to broadcasting. See Laurence H. Winer, *The Red Lion of Cable, and Beyond?*—*Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 21–22 (1997). The structure and tone of the majority opinion suggest that the Court reserved the issue as a matter of judicial restraint and not to signal its support for the doctrine.

229. 512 U.S. at 639.

230. See *id.* at 674–75 (O'Connor, J., joined in relevant part by Scalia, Thomas, & Ginsburg, JJ., concurring in part & dissenting in part) (“As the Court explains in Parts I, II-A and II-B of its opinion, which I join, cable programmers and operators stand in the same position under the First Amendment as do more traditional media.”). The primary disagreement between the majority and the dissent centered on whether must-carry represented structural rather than content regulation and whether must-carry was sufficiently narrowly tailored to survive the appropriate level of scrutiny. See *id.* at 675–78, 682–85 (O'Connor, J., concurring in part & dissenting in part). For an excellent review of the reasons for regarding must-carry as content based, see Winer, *supra* note 228, at 25–45.

with the proposition.²³¹

The Court similarly refused to extend the scarcity doctrine to the Internet in *Reno v. ACLU*.²³² The Court began by recognizing that scarcity was one of the “special justifications” for upholding more intrusive regulation of broadcasting than would be permissible with regard to other types of speakers.²³³ Because the Internet “provides relatively unlimited, low-cost capacity for communication of all kinds,” it “can hardly be considered a ‘scarce’ expressive commodity.”²³⁴ Together, *Turner I* and *Reno v. ACLU* appear to close the door on any possible extensions of the scarcity doctrine. The emergence of a media environment dominated by technological convergence, in which wire-based communications and spectrum-based communications are ready substitutes, it is essentially impossible that any one communications medium can be regarded sufficiently scarce so as to justify receiving separate constitutional treatment.²³⁵

b. The Tacit Abandonment of Scarcity with Respect to Broadcasting. In addition to precluding the possibility that the scarcity doctrine will be extended to other media, the courts have also distanced themselves from the doctrine with respect to broadcasting. A steady stream of separate opinions authored by lower court judges have continued to call for the doctrine’s abandonment.²³⁶ Even more telling has been the Supreme Court’s apparent reluctance to rely on the doctrine in its recent broadcasting decisions. When confronted with content-based restrictions on programming that, in earlier times, most likely would have been justified in terms of scarcity, the Court has assiduously avoided doing so and has instead relied on other legal principles to justify subjecting the restriction in question to a form of intermediate scrutiny.

For example, in *United States v. Edge Broadcasting Co.*,²³⁷ the Court invoked

231. *Turner I*, at 669–73 (Stevens, J., concurring in part & concurring in the judgment).

232. 521 U.S. 844 (1997).

233. *Id.* at 868.

234. *Id.* at 870.

235. See Yoo, *supra* note 1, at 285–89. There is another way in which recent cases promise to prevent the Broadcast Model from expanding to other media. The *Reno* Court also rejected extending the Broadcast Model to the Internet in part on the ground that the Internet has never been subject to the type of government supervision and regulation that has surrounded the broadcast industry. *Reno*, 521 U.S. at 868–89. This argument is, in effect, the converse of the arguments reviewed in subsection II.A.2.a. Just as the presence of existing regulation makes other forms of regulation more constitutionally palatable, the absence of regulation has the opposite effect. Because it is difficult to foresee how a new medium would be subject to regulation for a sufficiently long time to become part of the relevant baseline, it is possible that this language from *Reno* will serve to restrict the technology-specific approach to the First Amendment even further.

236. See, e.g., *Time Warner Entm’t Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc); *Action for Children’s Television v. FCC*, 58 F.3d 654, 672–76 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting); *Forbes v. Ark. Educ. Television Communications Network Found.*, 22 F.3d 1423, 1431 (8th Cir. 1994) (en banc) (McMillian, J., concurring in part & dissenting in part), *rev’d*, 523 U.S. 666 (1998); *Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1442 n.12 (8th Cir. 1993) (en banc) (noting the views of Judges Bowman, Beam, and Loken); *id.* at 1443 (R. Arnold, C.J., concurring in the judgment).

237. 509 U.S. 418 (1993).

the principles of commercial speech to apply a form of intermediate First Amendment scrutiny to uphold a federal restriction on the broadcast of lottery advertisements rather than following the more straightforward path taken by the district court of basing its decision on the scarcity doctrine.²³⁸ Similarly, in *Arkansas Educational Television Commission v. Forbes*,²³⁹ the Court invoked the public forum doctrine rather than the scarcity doctrine to justify applying a lesser form of First Amendment scrutiny when sustaining a public broadcaster's decision to exclude an independent candidate for Congress from a televised debate. Even more telling was that the Court discussed its broadcasting precedents solely to underscore the importance of preserving the broadcasters' editorial discretion without acknowledging the aspects of those cases supporting subjecting broadcasters to more intrusive regulation than other media speakers.²⁴⁰ Indeed, at least one Justice has subsequently construed *Forbes* as rejecting scarcity as a basis for regulating broadcast content.²⁴¹

Although it is possible to construe *Edge Broadcasting* and *Forbes* as exhibiting some discomfort with the scarcity doctrine, such a conclusion is anything but foregone. It was sufficient in those cases for the Court to rely solely on one doctrinal basis for applying a less restrictive First Amendment standard. Given that the restrictions in question passed the level of scrutiny applied, the Court was under no obligation to consider whether some alternative basis might also serve to sustain it. Therefore, as a formal matter, *Edge Broadcasting* and *Forbes* are ultimately ambiguous as to the fate of the scarcity doctrine.

The same cannot be said about the Court's most recent broadcasting case, *Greater New Orleans Broadcasting Ass'n v. United States*,²⁴² in which the Court applied commercial speech doctrine to invalidate certain federal restrictions on casino advertising. After holding that the restrictions in question did not satisfy the less restrictive standard imposed by the commercial speech doctrine, the presumption of constitutionality enjoyed by all federal legislation put the Court under an obligation to consider whether the restriction in question might be upheld on other grounds. Had the scarcity doctrine retained any vitality, it would have been appropriate for the Court to apply it to the facts of this case. Indeed, both the district court and the court of appeals relied in part on the scarcity doctrine when initially considering the case.²⁴³ The Court's failure to mention the scarcity doctrine in *Greater New Orleans* is thus considerably

238. *Id.*

239. 523 U.S. 666 (1998).

240. *Id.* at 673–75.

241. See *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 615 (1998) (Souter, J., dissenting) (citing *Forbes* for the proposition that "scarcity of air time does not justify viewpoint-based exclusion").

242. 527 U.S. 173 (1999).

243. See *Greater New Orleans Broad. Ass'n v. United States*, 866 F. Supp. 975, 980 (E.D. La. 1994), *aff'd*, 69 F.3d 1296, 1302 n.7 (5th Cir. 1995), *vacated*, 519 U.S. 801 (1996) (remanding for reconsideration in light of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)).

more telling than its failure to do so in *Edge Broadcasting* and *Forbes*. To the contrary, the Court's silence in *Greater New Orleans* is deafening.

The Court's apparent reluctance to rely on the scarcity doctrine in these cases thus raises the distinct possibility that, having stopped short of overruling the scarcity doctrine outright, the Court is nonetheless distancing itself from it. Given its conceptual and empirical infirmities, I would certainly welcome any indication that the doctrine is losing its vitality. That said, although the Supreme Court can avoid the illogic of the scarcity doctrine simply by ignoring it, lower courts cannot.²⁴⁴ Even judges who are well aware of the doctrine's shortcomings acknowledge that they remain bound by it until the Supreme Court overrules it.²⁴⁵ Until that happens, the lower courts may have no choice but to apply the scarcity doctrine to all new media that employ the electromagnetic spectrum as their primary means of transmission. In addition, regulatory authorities remain free to call for the type of intrusive regulation associated with *Red Lion* without having to acknowledge the scarcity doctrine's inherent flaws.²⁴⁶ It is thus clear that, until the Court finally inters the doctrine, scarcity will continue to exert an unfortunate distorting effect on lower court and regulatory decisionmaking.

III. Pervasiveness and Accessibility: New Rationales from *Pacifica*

Perhaps sensing the growing weakness of the scarcity doctrine, in recent years, the FCC has increasingly turned to the principles announced in *Pacifica* as the primary support for the constitutionality of the Broadcast Model. For example, the FCC invoked *Pacifica* as a basis for sustaining the constitutionality of requiring broadcasters to provide three hours of children's programming each week.²⁴⁷ Even more telling is the FCC's abandonment of any attempt to use the scarcity doctrine to justify its indecency restrictions and its decision to

244. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its decisions."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.")

245. See *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 161–62, 167–69 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045–46 (D.C. Cir. 2002); *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999); *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1998); *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 975–77 (D.C. Cir. 1996); *Branch v. FCC*, 824 F.2d 37, 49–50 (D.C. Cir. 1987); *Telecomms. Research & Action Ctr. v. FCC*, 801 F.2d 501, 508–09 (D.C. Cir. 1986).

246. See, e.g., Jonathan S. Adelstein, *The Last DJ?: Finding a Voice on Media Ownership*, Remarks at the Future of Music Coalition Policy Summit (Jan. 6, 2003), available at <http://www.fcc.gov/Speeches/Adelstein/2003/spjsa301.html> (calling for the preservation and extension of regulations based on *Red Lion*).

247. *Policies & Rules Concerning Children's Television Programming*, Report and Order, 11 F.C.C.R. 10660, 10731–32 ¶¶ 155–156 (1996).

rely solely on the rationales announced in *Pacifica*.²⁴⁸

The recent upsurge in *Pacifica*'s importance makes it appropriate to evaluate the extent to which the rationales announced in that decision can justify according less than full First Amendment protection to emerging media. This Part begins by critiquing the reasoning of the *Pacifica* opinion, both in terms of logical coherence and consistency with the precedents that existed at the time. It will then trace subsequent judicial discussions of *Pacifica*. Finally, this Part will analyze the impact that technological change has had on *Pacifica*. In sum, each of these considerations provides ample reason to question *Pacifica*'s vitality as a precedent.

A. THE THEORETICAL CRITIQUE OF *PACIFICA*

Critical analysis of the Court's *Pacifica* opinion reveals that its rationales are deeply flawed. Although the criticism of *Pacifica* is voluminous,²⁴⁹ for the purposes of this Article, it suffices to focus on the extent to which the *Pacifica* opinion can justify according broadcasting a lesser degree of First Amendment protection. Unfortunately, the opinion itself provides little guidance in this regard. Although the tone of *Pacifica* suggests that the Court was simply relying on the established justifications for applying a lower First Amendment standard to broadcasting,²⁵⁰ the rationales upon which the Court relied were actually quite novel. Unfortunately, the Court did not offer much in the way of articulating or defending these new rationales, and its meager explanations raised more questions than they answered.

As noted above,²⁵¹ the Court's first rationale for upholding the restriction on indecent speech was that broadcasting is "uniquely pervasive," in that it acts as an "intruder" that "confronts the citizen . . . in the privacy of the home."²⁵² It is

248. *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶¶ 10–11 (1987) (mem. op. & order); see also *Action for Children's Television v. FCC*, 58 F.3d 654, 664–69 (D.C. Cir. 1995) (en banc); Indus. Guidance on Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, Policy Statement, 16 F.C.C.R. 7999, 8000 ¶ 4 (2001).

249. See, e.g., KRATTENMAKER & POWE, *supra* note 72, at 196–202; POOL, *supra* note 51, at 134; POWE, *supra* note 51, at 209–15; STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 80–82 (1990); SPITZER, *supra* note 111, at 119–30; C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VILL. SPORTS & ENT. L.J. 45, 45 (1996); Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1229 (1978); Levi, *supra* note 72, at 139–40; Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 946–51 (1998); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 287–96 (1981); Laurence H. Winer, *The Signal Cable Sends, Part II—Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459, 493–502 (1987).

250. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("We have long recognized that . . . of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

251. See *supra* note 85 and accompanying text.

252. *Pacifica*, 438 U.S. at 748. If anything, the Court's emphasis on the home in *Pacifica* seems singularly misplaced considering that the complainant encountered the program at issue while driving in his car. See *id.* at 730.

hard to see how these considerations distinguish broadcasting from other media. Other media, such as books and the mail, are similarly pervasive and enter the home as easily, and yet the Court had previously struck down attempts to ban offensive speech transmitted over those media.²⁵³ In addition, it is far from clear that broadcasting can properly be regarded as an intruder. Viewers and listeners must purchase radio and television sets,²⁵⁴ and those sets must, of course, be turned on for people to be subject to such “intrusion.” As Justice Brennan noted, “switching on and listening to communications transmitted over the public airwaves” represents an affirmative decision “to take part . . . in an ongoing public discourse.”²⁵⁵

The Court also attempted to explain the supposed pervasiveness of broadcasting by arguing that “prior warnings cannot completely protect the listener or viewer from unexpected program content” and reasoning that “[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”²⁵⁶ The Court had never previously regarded listeners’ and viewers’ inability to obtain complete protection against exposure to unwanted speech as constitutionally significant. To the contrary, prior to *Pacifica* the Court had consistently held that when viewers encounter material they find offensive, “the burden normally falls upon the viewer to ‘avoid further bombardment of their sensibilities simply by averting their eyes.’”²⁵⁷ In the words of one lower federal court that the Supreme Court later cited with approval, the “short, though regular, journey from mail box to trash can . . . is an acceptable burden,

253. See *Butler v. Michigan*, 352 U.S. 380 (1957) (books); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (mail); see also KRATTENMAKER & POWE, *supra* note 72, at 220; POWE, *supra* note 51, at 210; SPITZER, *supra* note 111, at 120; Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1496 (1995).

254. As Thomas Krattenmaker and Scot Powe have noted, “radios and televisions are not forced upon citizens, but in fact are considered to be among the most valued household purchases. Intruders they are not.” KRATTENMAKER & POWE, *supra* note 72, at 220. Powe’s initial statement of this criticism was considerably more sardonic:

Whatever else the Court means, it is not true that the FBI or CIA breaks into millions of American homes to deposit the latest Sony radios in bedrooms and living areas. To the best of my knowledge, Americans bring radios and television sets into their homes because they desire them. . . . If homeowners truly believed that radio or television was an intruder, I would expect to see sets out on the streets for garbage collection. Instead, when I read my morning paper I see numbers of full-page ads for these very appliances, suggesting that the merchants believe, contrary to what the Court might think, that Americans desire radios and televisions.

POWE, *supra* note 51, at 210; see also SPITZER, *supra* note 111, at 120 (criticizing the notion that radio is “uniquely persuasive” because printed publications must also be ordered and purchased before they are delivered to one’s home).

255. *Pacifica*, 438 U.S. at 764–65 (Brennan, J., dissenting).

256. *Id.* at 748–49.

257. *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

at least so far as the Constitution is concerned.”²⁵⁸ This reasoning would seem to apply a fortiori to broadcast speech.²⁵⁹ In upholding limitations on potentially offensive advertising on streetcars, the Court explicitly distinguished broadcasting on the grounds that unlike “the billboard or street card placard” at issue in those cases, “[t]he radio can be turned off.”²⁶⁰

This conclusion draws further support from the reasoning of the Court’s opinion in *Rowan v. United States Post Office Department*.²⁶¹ In upholding a statute allowing people to have their names removed from mailing lists of those sending erotically arousing or sexually provocative materials, the *Rowan* Court emphasized the importance of making each “householder the exclusive and final judge of what will cross his threshold.”²⁶² Consequently, a statute that enhanced each homeowners’ ability to control what speech entered their homes was no more problematic than “a radio or television viewer twist[ing] the dial to cut off an offensive or boring communication and thus bar its entering his home.”²⁶³ The Court limited its holding by emphasizing that cutting off potentially offensive speech was permissible only to the extent that “the mailer’s right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.”²⁶⁴ The negative implication from this reasoning is clear: Although the possibility that some people may find particular speech offensive may justify upholding measures that enhance individuals’ ability to screen out potentially offensive material on a targeted basis, the potential for offensiveness does not justify the total suppression of the potentially offensive speech, which would also deprive

258. *Lamont v. Comm’r of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967), *aff’d*, 386 F.2d 449 (2d Cir. 1967), *quoted with approval by* *Bolger v. Youngs Drug Prods. Co.*, 463 U.S. 60, 72 (1983).

259. As Justice Brennan noted in dissent:

Whatever minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the “off” button, it is surely worth the candle to preserve the broadcaster’s right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.

Pacifica, 438 U.S. at 765–66 (Brennan, J., dissenting). In the Court of Appeals decision that led to *Pacifica*, Chief Judge Bazelon similarly observed that “having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erzoznik*; he can avert his attention by changing channels or turning off the set.” *Pacifica Found. v. FCC*, 556 F.2d 9, 26 (D.C. Cir. 1977) (Bazelon, C.J., concurring), *rev’d*, 438 U.S. 726 (1978).

260. *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932); *accord* *Lehman v. City of Shaker Heights*, 481 U.S. 298, 302 (1974); *see also* Schauer, *supra* note 249, at 294 (“Turning off a radio is much easier than averting your eyes from someone who is in the same room. Just try it sometime.”).

261. 397 U.S. 728 (1970).

262. *Id.* at 736. In support of this proposition, the Court quoted language from a previous case emphasizing the importance of “leaving ‘with the homeowner himself’ the power to decide ‘whether distributors of literature may lawfully call at a home.’” *Id.* (quoting *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943)).

263. *Id.*

264. *Id.* at 737.

access to those who wish to view such material.²⁶⁵ As Justice Brennan's dissent in *Pacifica* pointed out, the effect of such a blanket governmental prohibition is to take the discretion away from homeowners and to place it instead in the hands of the government.²⁶⁶ In addition, the clear suggestion of the Court's reasoning in *Rowan* is that the proper response of a person encountering unwanted broadcast speech is simply to "twist the dial to cut off [the] offensive or boring communication."²⁶⁷

The other rationale proffered by the *Pacifica* majority—that broadcasting is "uniquely accessible to children"²⁶⁸—fares little better.²⁶⁹ It is hard to see how broadcasting is any more accessible to children than newspapers, books, or the mail.²⁷⁰ Moreover, the Court had cautioned in *Butler v. Michigan*²⁷¹ that in attempting to protect children, the government could not "reduce the adult population to reading only what is fit for children."²⁷² And yet, banning indecent speech because children might be listening had precisely that effect.²⁷³ The Court's observation that adults interested in hearing such materials could purchase recordings or go to live performances²⁷⁴ has been criticized as "disingenuous," in that the alternatives offered by the Court are far from comparable

265. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701–02 (1977) (noting that the possibility that some people might find mailed contraceptive advertisements offensive and embarrassing "d[id] not justify the total suppression of advertising concerning contraceptives"). Compare *Ginsberg v. New York*, 390 U.S. 629, 641 (1968) (upholding statute barring sale of indecent materials to minors), with *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957) (overturning blanket ban on indecent materials affecting adults and children alike). The Court would later confirm this intuition in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71–72 (1983). See *infra* notes 286–88 and accompanying text.

266. *Pacifica*, 438 U.S. at 766 (Brennan, J., dissenting); see also *Pacifica Found. v. FCC*, 556 F.2d 9, 27 (D.C. Cir. 1977) (Bazelon, C.J., concurring) (distinguishing a statute that enabled a person to require removal of his name from all future mailing lists of a solicitor because the statute "empower[ed] the homeowner to determine what mail he will not receive, [and] avoided the constitutional problems involved in vesting the power to make any discretionary evaluation of the material in a government official").

267. *Rowan*, 397 U.S. at 737.

268. *Pacifica*, 438 U.S. at 749.

269. The facts underlying *Pacifica* make it a somewhat inapposite case for invoking the accessibility of broadcast speech to children as a rationale for upholding the regulation. Some parts of the Court's opinion leave the impression that the child exposed to Carlin's monologue was a first grader. See *id.* (expressing particular solicitude for "those [children] too young to read"). In fact, the child at issue was actually fifteen years old. See *POWE*, *supra* note 51, at 186; *Winer*, *supra* note 249, at 490 n.171. This was well above the age that the FCC thought at the time merited protection from indecent programming. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1341–42 (D.C. Cir. 1988); *KRATTENMAKER & POWE*, *supra* note 72, at 110 & n.32. In addition, the program in question was broadcast at two o'clock when broadcasters could reasonably expect most children to be in school. See *Pacifica*, 438 U.S. at 729.

270. See *POWE*, *supra* note 51, at 209; *Krattenmaker & Powe*, *supra* note 249, at 1233.

271. 352 U.S. 380 (1957).

272. *Id.* at 383.

273. As *Krattenmaker and Powe* note, "To hold broadcasting . . . to the level of hypothetical five-year olds who *may* be listening is indeed to invite the risk that the adult population may be reduced in its thinking to ideas fit for a child." *Krattenmaker & Powe*, *supra* note 249, at 1280.

274. *Pacifica*, 438 U.S. at 750 n.28.

in terms of affordability or ease of access.²⁷⁵ In addition, such reasoning would justify upholding the restrictions on the sale of indecent magazines struck down in *Butler*, as well as virtually any other technology-specific restriction on indecent speech.²⁷⁶ In sum, none of *Pacifica*'s proffered rationales can sensibly be read as being limited to broadcasting.

The key to unraveling this mystery lies in an earlier portion of the *Pacifica* opinion.²⁷⁷ Justice Stevens began the constitutional discussion of his *Pacifica* opinion by stating that indecency constituted low-value speech that “surely lie[s] at the periphery of First Amendment concern” and, as a result, was not worthy of constitutional protection.²⁷⁸ What is most notable about this rationale for the purposes of this Article is that it turned entirely on the content of the speech and did not depend in any way on the medium by which the speech was conveyed.²⁷⁹ Unfortunately for Justice Stevens, two of the five Justices that comprised his majority refused to join this portion of his opinion.²⁸⁰ Employing words that echoed Justice Harlan’s famous observation that “it is . . . often true that one man’s vulgarity is another’s lyric,”²⁸¹ Justice Powell, joined by Justice Blackmun, instead concluded that determining the relative value of particular speech “is a judgment for each person to make, not one for the judges to impose upon him.”²⁸²

It was only after Justice Stevens’s initial attempt to obtain five votes failed that he turned to the alternative rationales discussed above. As a result, Justice Stevens’s opinion reads like a non sequitur, first suggesting that indecent speech should not receive the full protection of the First Amendment regardless of the medium on which it is conveyed, but then immediately seeming to contradict itself by grounding the decision on the principle that broadcasting is different. Given Justice Stevens’s ambivalence about the media-specific nature of his opinion, it should come as no surprise that the rationales he offered to limit his holding to broadcasting were somewhat half-hearted. To say that the opinion is explicable in this manner, however, is not to say that it is justifiable. Read

275. Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 93 (1991).

276. See Krattenmaker & Powe, *supra* note 249, at 1239.

277. See KRATTENMAKER & POWE, *supra* note 72, at 198–201.

278. 438 U.S. at 743 (plurality opinion). Indeed, Justice Stevens equated indecent speech with obscene speech when he opined that “[t]hese words offend for the same reasons that obscenity offends.” *Id.* at 746.

279. That Justice Stevens first advanced this position in a decision involving adult movie theaters further underscores the assertion that he did not see it as applying only to broadcasting. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

280. See *Pacifica*, 438 U.S. at 729 (noting that only Chief Justice Burger and Justice Rehnquist joined the part of the opinion advancing the view that indecency represented low-value speech); *id.* at 761–62 (Powell, J., joined by Blackmun, J., concurring in part & concurring in the judgment) (rejecting Justice Stevens’s low-value speech rationale and relying solely on the “unique characteristics of the broadcast media”).

281. *Cohen v. California*, 403 U.S. 15, 21 (1971).

282. *Pacifica*, 438 U.S. at 761 (Powell, J., joined by Blackmun, J., concurring in part & concurring in the judgment).

critically, *Pacifica* falls short of providing an alternative basis for according to broadcasting a lesser degree of First Amendment protection.

Lastly and most importantly for the purposes of this Article, even if read as broadly as possible, *Pacifica* does not justify the full range of regulation associated with the Broadcast Model. At most, concerns about pervasiveness and accessibility to children would justify the imposition of a narrow range of negative content restrictions, likely limited to such areas as indecency and violence. The *Pacifica* rationales would not justify broadcast licensing, negative content restrictions in other areas, and affirmative programming obligations that constitute the other key features of the Broadcast Model. As a result, it is conceptually ill-suited to serve as the foundation for applying an alternative justification for the type of intrusive regulation that characterizes the Broadcast Model of regulation.

B. THE DOCTRINAL REJECTION OF *PACIFICA*

1. The Refusal to Extend *Pacifica* to Other Media

Given the analytical problems with the rationales underlying *Pacifica*, the Court has unsurprisingly and repeatedly refused to extend it to other media, including mailed contraceptive advertisements,²⁸³ telephony,²⁸⁴ and the Internet.²⁸⁵ The Court so held even though each of those media appears to be as pervasive and accessible to children as broadcasting. Instead, these opinions noted *Pacifica*'s acknowledgement of the narrowness of its holding and emphasized that, if allowed to stand, the restrictions at issue would limit adults to what was appropriate for children.²⁸⁶ As Justice Marshall eloquently quipped, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."²⁸⁷ It was more appropriate to expect recipients of unwanted material simply to discard it.²⁸⁸ Thus, as was the case with the scarcity doctrine, the Court's reluctance to extend *Pacifica* to other media arguably signaled its unease with it.

The single deviation from the Court's refusal to extend *Pacifica* to other media appeared in Justice Breyer's plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,²⁸⁹ which resolved a First Amendment challenge to three provisions of the Cable Television Consumer Protection and Competition Act of 1992 that restricted the transmission of

283. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983).

284. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989).

285. *Reno v. ACLU*, 521 U.S. 844, 886 (1997).

286. *Id.* at 870, 875–76; *Sable*, 492 U.S. at 128; *Bolger*, 463 U.S. at 74.

287. *Bolger*, 463 U.S. at 74.

288. *Id.* at 72; see also *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 542 (1980) (reasoning that recipients of unwanted mailings may "effectively avoid further bombardment of their sensibilities simply by averting their eyes" (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971))).

289. 518 U.S. 727 (1996).

indecent speech.²⁹⁰ The plurality argued that the Court's decision to hold the scarcity doctrine inapplicable to cable in *Turner I* did not foreclose the possibility that *Pacifica* might justify holding cable television to a lower standard of First Amendment protection.²⁹¹ The plurality proceeded to contradict a long line of lower court decisions holding *Pacifica* inapplicable to cable²⁹² and concluded that all of the considerations that underlay *Pacifica*—pervasiveness, invasion of the home, ineffectiveness of warnings, accessibility to children—applied with equal force to cable television.²⁹³ Thus, in applying *Pacifica* to cable, the *Denver* plurality raised questions about the correctness of the statements in *Pacifica* emphasizing the narrowness of its holding²⁹⁴ and asserting that it was limited to broadcasting.²⁹⁵ Indeed, the plurality implied that *Pacifica* might apply to all media when it indicated that it regarded the question “whether . . . *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue” as still being open.²⁹⁶ The plurality, however, ignored the sharp criticism leveled by five of the Court's members²⁹⁷ and refused to resolve which constitutional standard would be applied.²⁹⁸ In doing so, the Court articulated an assortment of standards, all of which appeared to be

290. Pub. L. No. 102-385, § 10(a)–(c), 106 Stat. 1460, 1486. Subsection (a) gave cable operators the discretion to refuse to carry indecent programming on leased access channels. 47 U.S.C. § 531(a) (2000). Subsection (c) gave cable operators similar authority over public, educational, and governmental access channels. § 10(c), 106 Stat. at 1486. Subsection (b) also required cable operators to segregate any indecent programming carried on leased access channels on a single channel and to block its transmission unless the viewer indicates otherwise. § 10(b), 106 Stat. at 1486. The decision holding subsection (b) unconstitutional was the only part of the Court's decision that commanded a clear majority of the Court. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 753–60; *id.* at 779 (O'Connor, concurring in part & dissenting in part) (joining Part III); *id.* at 781 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, & dissenting in part) (same).

291. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 748 (“The Court's distinction in *Turner [I]*. . . between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable. While the distinction was relevant in *Turner [I]* to the justification for structural regulations at issue there . . . , it has little to do with a case that involves the effects of television viewing on children.”).

292. *See Cruz v. Ferre*, 755 F.2d 1415, 1420–21 (11th Cir. 1985); *Cmty. Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1109–16 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Cmty. Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167–69 (D. Utah 1982); *see also Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) (suggesting in dicta that *Pacifica* was inapplicable to cable).

293. 518 U.S. at 744–45 (plurality opinion).

294. *Pacifica*, 438 U.S. at 750.

295. *Id.* at 748; *see also id.* at 762 (Powell, J., concurring in part & concurring in the judgment).

296. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 755 (1996) (plurality opinion).

297. *See id.* at 781, 784–87 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, & dissenting in part); *id.* at 817–18 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment in part & dissenting in part).

298. *Id.* at 742 (plurality opinion) (“[W]e believe it unwise and unnecessary to pick . . . one specific set of words now”); *see also id.* at 768 (Stevens, J., concurring) (finding it “unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this”); *id.* at 775 (Souter, J., concurring) (acknowledging the plurality's “unwillingness to announce a definitive categorical analysis in this case”).

less stringent than strict scrutiny.²⁹⁹

The *Denver* plurality's attempt to revive *Pacifica* ultimately proved short-lived. The Court's subsequent decision in *United States v. Playboy Entertainment Group, Inc.*³⁰⁰ appears to have foreclosed the possibility that *Pacifica* could serve as a new foundation for accordng certain media less than full First Amendment protection. *Playboy* involved a First Amendment challenge to a statute requiring cable operators either to "fully scramble or otherwise fully block" channels that are "primarily dedicated to sexually-oriented programming" or else to limit their transmission to hours when children were unlikely to be viewing.³⁰¹ In sharp contrast to the language in *Denver* suggesting that some other standard might apply, the *Playboy* Court squarely held that all attempts to regulate indecency on cable television are subject to strict scrutiny.³⁰² In so holding, the court explicitly abandoned *Pacifica*'s concern with the ineffectiveness of warnings and returned instead to the view that individuals are expected to protect themselves from transient exposure to offensive material "'simply by averting [our] eyes.'"³⁰³ Moreover, because cable and broadcast television are largely indistinguishable in the extent to which they invade the home and are accessible to children, the Court's decision to extend full First Amendment protection to cable in *Playboy* can only be regarded as a rejection of the proposition that either of those considerations justified permitting more intrusive regulation of speech.³⁰⁴

What is perhaps most startling about the *Playboy* decision is the completeness of the majority's victory on this point. Writing on behalf of the four dissenters, Justice Breyer also accepted strict scrutiny as the unquestioned

299. See *id.* at 733 (stating that regulations must be "appropriately tailored to achieve [a] basic, legitimate objective"); *id.* at 741 (noting that regulations must be "address extraordinary problems" and be "appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *id.* at 743 (noting that regulations must "properly address[] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech"); *id.* (stating that regulations must be a "sufficiently tailored response to an extraordinarily important problem"). Equally puzzling was the *Denver* plurality's willingness to strike down a parallel provision governing public access channels. For the problems with this portion of the plurality's analysis, see *supra* notes 124–29 and accompanying text.

300. 529 U.S. 803 (2000).

301. Telecommunications Act of 1996, Pub. L. No. 104-104, § 505, 110 Stat. 56, 136.

302. *Playboy*, 529 U.S. at 811–14.

303. *Id.* at 813 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971) and citing *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975)).

304. I do not mean to suggest that the Court did not place any emphasis on the extent to which these two media intruded into the home. In fact, the Court specifically noted that the case turned on the difference from broadcasting that, "[c]able systems have the capacity to block unwanted channels on a household-by-household basis." *Id.* at 815. Nor do I mean to suggest that accessibility to children played no part in the Court's analysis. On the contrary, the Court regarded the feasibility of using technology to restrict minors' access to indecent material to be an important consideration. *Id.* at 814. A close reading of the opinion reveals, however, that the Court believed that these considerations were only relevant in evaluating whether the statute in question represented the least restrictive means available. They played no role in determining the level of First Amendment protection that cable received.

standard.³⁰⁵ In the process, Justice Breyer appears to have completely abandoned the language in his *Denver* plurality indicating that some lower standard may apply. If anything, Justice Breyer appears to chide the majority for even suggesting that the applicable standard was at issue.³⁰⁶ It thus seems that, despite the disagreement in *Denver* on this very point just five years earlier, the Court is now unanimous in believing that cable television should receive full First Amendment protection. *Playboy* thus seems to foreclose the possibility that *Pacifica* will have any applicability to cable television or any other medium outside of broadcasting.

2. *Pacifica*'s Questionable Vitality with Respect to Broadcasting

At the same time the Supreme Court was shutting the door on the possibility that *Pacifica* might apply to other media, FCC and judicial decisions began to raise doubts about *Pacifica*'s vitality with respect to broadcasting as well. Almost from the time the decision was handed down, the FCC has taken steps to distance itself from *Pacifica*.³⁰⁷ Following the announcement of the decision, the FCC suggested that it was limiting *Pacifica* to its facts and restricted its application only to repeated use of the seven expletives at issue in that case.³⁰⁸ As a result, the FCC did not bring any indecency enforcement actions for nearly a decade.³⁰⁹

Even when FCC interest in indecency enforcement revived in 1987,³¹⁰ the

305. *Id.* at 836, 846 (Breyer, J., dissenting).

306. *See id.* at 836 (Breyer, J., dissenting) (arguing that “[t]his case involves the application, not the elucidation of First Amendment principles” and the application of “established First Amendment law; . . . [t]he basic, applicable First Amendment principles are not at issue”); *id.* at 846 (noting that “[t]his disagreement is not about . . . basic First Amendment principle”).

307. For excellent reviews of the FCC's early enforcement practices with respect to indecent speech, see Levi, *supra* note 72, at 86–112; KRATTENMAKER & POWE, *supra* note 72, at 104–14; Robinson, *supra* note 249, at 949–59.

308. *See* WGBH Educ. Found., 69 F.C.C.2d 1250, 1254–55 ¶ 10 (1978) (mem. op. & order); *see also* Rahall Broad. of Ind., Inc., 94 F.C.C.2d 1162 (1983) (mem. op. & order) (“The *Pacifica* decision . . . affords the commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast.”); *Pacifica* Found., 95 F.C.C.2d 750 (1983) (mem. op. & order) (“The opinion of the Court [in *Pacifica*] specifically stated that it was not ruling that ‘an occasional expletive . . . would justify any sanction’ Applying these principles to the instant case, it is clear that petitioner failed to make a prima facie case”); *Serv. Broad. Corp.*, 46 Rad. Reg. 2d (P & F) 413 (1979) (“While it is true that we may impose sanctions on a licensee who has aired obscene, indecent, or profane language, we have no factual evidence that this is the case here [T]he Commission does not attempt to regulate the rhetorical quality of language spoken on the air.”).

309. *See* *Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 ¶ 4 (1987) (mem. op. & order) (on reconsideration), *rev'd on other grounds sub nom.* *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter *ACTI*].

310. In a troika of decisions handed down on the same day, the FCC made three substantive changes to its indecency standards. First, it made clear that in addition to the repeated use of expletives, indecency covered other forms of sexually and scatologically oriented speech. *See* *Infinity Broad. Corp.*, 2 F.C.C.R. 2705, 2706 ¶ 9 (1987) (mem. op. & order) (ruling that speech can be indecent even in the absence of expletives if it includes sexual innuendo which, in context, is susceptible of only one meaning); *Regents of Univ. of Cal.*, 2 F.C.C.R. 2703 (1987) (mem. op. & order) (ruling that speech can be indecent even in the absence of expletives when it describes or depicts sexual organs or activities);

agency continued to distance itself from the notion that broadcasting was subject to a lower level of First Amendment scrutiny. Notably, the FCC's renewed interest in indecency enforcement coincided with its explicit abandonment of scarcity as a constitutional justification for restricting indecent broadcasts.³¹¹ Even more dramatic was the FCC's rejection of the notion that *Pacifica* justified subjecting indecency restrictions on broadcasting to a lower First Amendment standard than other media.³¹² Instead, the FCC maintained that the indecency restrictions that applied to broadcasting were "consistent with the First Amendment protection applicable to print."³¹³ After several false starts,³¹⁴ a series of D.C. Circuit opinions eventually sustained the FCC's new indecency initiatives.³¹⁵ In these cases, however, the court agreed that strict scrutiny applied to regulations restricting indecency on broadcasting in the same way that it applied to similar restrictions on other media.³¹⁶

Since that time, there has been only one judicial challenge to the merits of an FCC indecency determination,³¹⁷ and that case held that restrictions on the broadcast of indecent material are subject to strict scrutiny.³¹⁸ The FCC settled that case after the district court denied its motion to summarily dispose of the constitutional challenge, agreeing as a condition of that settlement to publish more definitive industry guidance regarding its enforcement policies with re-

Pacifica Found., Inc., 2 F.C.C.R. 2698, 2699–700 ¶ 13 (1987) (mem. op. & order) (ruling that speech can be indecent in the absence of expletives if it describes or depicts sexual or excretory functions in a manner patently offensive under contemporary community standards). Second, the FCC signaled a greater willingness to apply its indecency regulations to programs broadcast after ten p.m. See *Pacifica*, 2 F.C.C.R. at 2699–700 ¶ 16, 2701 ¶ 25; *Regents of Univ. of Cal.*, 2 F.C.C.R. at 2704 ¶ 6. Third, the FCC appeared to extend its indecency decision to cover children over the age of twelve. See *Pacifica*, 2 F.C.C.R. at 2699–700 ¶ 16; *Regents of Univ. of Cal.*, 2 F.C.C.R. at 2704 n.10; *Infinity*, 2 F.C.C.R. at 2707 n.14.

311. *Pacifica*, 2 F.C.C.R. at 2699 ¶ 11.

312. *Id.*

313. *Id.*

314. *ACT I*, 852 F.2d 1332 (D.C. Cir. 1988) (vacating and remanding the FCC's decision to regulate indecent programs broadcast after ten p.m.); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991) [hereinafter *ACT II*] (vacating and remanding subsequent FCC order implementing statute calling for complete ban on broadcast indecency).

315. *ACT I*, 852 F.2d at 1337–40 (upholding the FCC's revised definition of indecency); *Action for Children's Television v. FCC*, 58 F.3d 654, 664–69 (1995) (en banc) [hereinafter *ACT III*] (upholding construing indecency as also protecting children aged twelve through seventeen and upholding prohibition of the broadcast of indecent speech between six a.m. and ten p.m.); *Action for Children's Television v. FCC*, 59 F.3d 1249, 1259–62 (D.C. Cir. 1995) [hereinafter *ACT IV*] (upholding FCC's procedure for enforcing the indecency statutes).

316. *ACT I*, 852 F.2d at 1343 n.18; *ACT II*, 932 F.2d at 1509; *ACT III*, 58 F.3d at 659–60; *ACT IV*, 59 F.3d at 1252; *id.* at 1263 (Edwards, C.J., concurring with reservations). *But see ACT IV*, 59 F.3d at 1262 (noting but declining to rely on the district court's contention that broadcasting received a lower degree of First Amendment protection than print).

317. See *ACT IV*, 59 F.3d at 1254 (noting that *United States v. Evergreen Media Corp.*, 832 F. Supp. 1183 (N.D. Ill. 1983), represented the only judicial challenge to an FCC indecency action); Robert Corn-Revere, *Eye of the Beholder*, BROAD. & CABLE, Apr. 16, 2001, at 30 (same).

318. *Evergreen*, 832 F. Supp. at 1184.

spect to broadcast indecency.³¹⁹ When the FCC finally issued industry guidance seven years later,³²⁰ it again recognized that all attempts to restrict broadcast indecency were subject to strict scrutiny.³²¹ The FCC's and the courts' willingness to subject restrictions on broadcast indecency to strict scrutiny cannot easily be squared with *Pacifica*'s suggestion that such programming is subject to a lower First Amendment standard. Instead, it suggests that, although *Pacifica* continues to influence the way the applicable legal principles play out in each particular factual context, it no longer serves as a justification for deviating from the strict scrutiny standard that applies to all other media.

C. THE TECHNOLOGICAL EVISCERATION OF *PACIFICA*

In addition to the analytical and doctrinal shortcomings of the *Pacifica* opinion discussed above, two technological developments raise further questions about *Pacifica*'s continuing vitality. The Supreme Court has repeatedly emphasized that *Pacifica* does not apply when viewers are unlikely to encounter indecent speech by accident and when prior warnings are likely to be effective.³²² The Court has also emphasized that prohibitions of indecent speech cannot stand when alternative means exist that enable individual viewers to control what they see and hear.³²³ This is true even if individual viewers must take affirmative steps to protect themselves and their families from inadvertent exposure to such speech and if the means of self-protection are not foolproof.³²⁴

319. See Indus. Guidance on Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, Policy Statement, 16 F.C.C.R. 7999, 8016 n.23 (2001) [hereinafter *Indus. Guidance*].

320. This occurred despite the FCC's promise to issue such guidance within nine months. See Corn-Revere, *supra* note 317, at 30.

321. *Indus. Guidance*, 16 F.C.C.R. at 8000 ¶ 3. The FCC's issuance of this industry guidance appears to have signaled renewed interest in indecency enforcement, as the FCC issued Notice of Apparent Liability to radio stations for broadcasting a cleaned-up version of Eminem's song, "The Real Slim Shady," as well as Sarah Jones's anti-misogynist rap protest, "Your Revolution." See KBOO Found., 16 F.C.C.R. 10731 (2001) (notice of apparent liability for forfeiture); Bill McConnell, *FCC Hip-Hop Deep in #@!**, BROAD. & CABLE, July 9, 2001, at 28. Those proceedings may provide another opportunity for judicial confirmation that broadcasting should receive full First Amendment protection. Although the FCC eventually rescinded its action with respect to Eminem, see Citadel Broad. Co., 17 F.C.C.R. 483, 485–86 ¶¶ 8–9 (2002) (mem. op. & order), its action against Sarah Jones's work appears destined to end up in the courts, see Bill McConnell, *Rapper Sues FCC*, BROAD. & CABLE, Feb. 4, 2002, at 16.

322. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 823–26 (2000); *Reno v. ACLU*, 521 U.S. 844, 867, 869–70 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127–28 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983).

323. *Playboy*, 529 U.S. at 816; *Reno*, 521 U.S. at 877; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 756 (1996) (plurality opinion); *Sable*, 492 U.S. at 128; *Rowan*, 397 U.S. at 736–37.

324. See *Playboy*, 529 U.S. at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time."); see also *Reno*, 521 U.S. at 876–77 (noting that, as an alternative to the Child Decency Act, "the District Court found that 'despite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.'" (emphasis in

Once such means exist, the proper balance of First Amendment interests places the burden on parents and viewers to take the appropriate steps.

These doctrinal considerations underscore the potential constitutional significance of technologies that increase viewers' ability to control what appears on their television sets. The emerging dominance of multichannel video providers, such as cable television and DBS,³²⁵ has greatly enhanced the ability of audiences to tailor their viewing environment to their personal preferences. The protection from exposure to unwanted programming is not complete, however, because filtering by changing the channel still involves some fleeting contact with unwanted material. Although the weight of Supreme Court authority suggests that such transient exposure lacks constitutional significance, the issue is not completely free from doubt.³²⁶

Regardless of the final resolution of that debate, the emergence of technologies that allow viewers to screen out unwanted programming promises to offer a more definitive interment of the rationales in *Pacifica* for according a lower degree of First Amendment protection. The most important of these is the development of the "V-chip," which if properly programmed can block the display of programs receiving particular content ratings. The Telecommunications Act of 1996 started in motion the steps necessary to make the V-chip universal, first by requiring that all television sets over thirteen inches manufactured in January 2000 or later contain a V-chip,³²⁷ and second by essentially requiring the industry to establish a rating system.³²⁸ The bulk of the scholar-

original)); *Sable*, 492 U.S. at 128–29 (refusing to uphold legislation denying adults access to "dial-a-porn" when it found credit card, access code, and scrambling rules a "less restrictive means, short of a total ban, to achieve the government's interest in protecting minors").

325. As noted earlier, MVPDs have now captured well over 80% of all U.S. households. *See supra* note 178 and accompanying text.

326. Compare *supra* notes 257–67, 283–88, 303 and accompanying text (noting that *Cohen*, *Erzoznik*, *Rowan*, *Bolger*, *Sable*, *Reno*, and *Playboy* did not regard the possibility of transient exposure as sufficient to justify restrictions on speech), with *supra* notes 86, 256, 293 and accompanying text (noting the contrary conclusion drawn by *Pacifica* and the *Denver* plurality opinion).

327. 47 U.S.C. § 303(x) (2000).

328. The statute gave the broadcast industry one year in which to implement a voluntary rating system. If it failed to do so, the FCC would promulgate one itself. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(e)(1)(A), 110 Stat. 56, 139–42 (originally codified at 47 U.S.C. § 303(w)). The major networks subsequently agreed to a rating system. The system initially adopted by the industry employed six basic ratings based on age: TV-Y for young children, TV-Y7 for children 7 and younger, TV-G for general audiences, TV-PG to suggest parental guidance, TV-14 for kids 14 and older, and TV-MA for mature audiences only. The industry later agreed to supplement the basic ratings with a series of content codes: S for sex, V for violence, L for foul language, D for sexual innuendo, and FV for fantasy violence in programs for children 7 and older. *See* Implementation of Section 551 of Telecomms. Act of 1996, Report and Order, 13 F.C.C.R. 8232 (1998); Paige Albinak, *Ratings Get Revamped: Networks, Except for NBC, Agree to Add Content Labels*, BROAD. & CABLE, July 14, 1997, at 4. All of the broadcast networks have agreed to implement the age-based ratings and all except NBC have agreed to use the content codes. Among cable networks, only Black Entertainment Television, QVC, and the Home Shopping Network have refused to rate their programs. *See* Bill McConnell, *Non-Violent TV*, BROAD. & CABLE, Feb. 7, 2000, at 40. The scholarly consensus, even among those who advocate self-regulation by the broadcast industry, concedes that the ratings are properly regarded as

ship on the V-chip has focused on the constitutionality of Congress's decision to mandate its installation and, in effect, to require program ratings.³²⁹ What has largely escaped scholarly attention is that, at least with respect to television, widescale deployment of the V-chip will render all attempts to restrict the broadcast of indecent programming unconstitutional. As newer televisions displace older sets, the V-chip should effectively prevent those who do not wish to be exposed to indecent speech from encountering such speech by accident. In addition, as the Court held in *Playboy*, the technological ability to block unwanted channels on a household-by-household basis "enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners."³³⁰ As a result, as recognized in the only portion of the *Denver* opinion that commanded a majority of the Court, the V-chip constitutes a less restrictive means sufficient to render any ban on indecent speech unconstitutional.³³¹

In addition, a new technology known as video-on-demand (VOD) promises to reduce the danger of unwanted exposure to indecent speech even further. When fully deployed, VOD will give viewers total control over the programming that enters their homes. As a result, it promises to transform television from a "push" technology, in which control over what speech will be conveyed resides with media companies, into—at least in part—a "pull" technology, in which individuals decide for themselves which programs they would like to see. Unfortunately, widescale deployment of VOD is not yet feasible. In the meantime, MVPDs are in the process of deploying a related technology known as near video-on-demand (NVOD) that provides some of the same functionality. Unlike pure VOD, which is a point-to-point service that allows a content provider to deliver a particular program to a particular customer on request, NVOD is a point-to-multipoint service in which customers can select from among a broad range of viewing choices offered by the content provider. Providing the same range of options to all viewers allows NVOD to use bandwidth more efficiently than VOD. It remains an interactive, pull-oriented service that gives the audience greater control of what is viewed. Current NVOD options are relatively limited, consisting mainly of a small number of pay-per-view offerings. The FCC's most recent annual assessment of the televi-

the product of a state mandate. See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 755–56 (1999); Spitzer, *supra* note 36, at 436–54; Denise R. Polivy, Note and Comment, *Virtue by Machine: A First Amendment Analysis of the V-Chip Provisions of the Telecommunications Act of 1996*, 29 CONN. L. REV. 1749, 1761–73 (1997).

329. See J.M. Balkin, *Media Filers, the V-Chip and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1157 (1996); Edwards & Berman, *supra* note 253, at 1514–15; Spitzer, *supra* note 36, at 454–90; Polivy, *supra* note 328, at 1773–79.

330. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000).

331. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 756 (1996) (noting that the impending arrival of the V-chip suggests that the segregation and blocking requirement imposed by statute was not sufficiently tailored); see also Edwards & Berman, *supra* note 253, at 1513–14 (noting that the V-chip promised to "empower" parents to regulate all aspects of their children's viewing").

sion industry indicates that cable and DBS providers are investing large amounts of capital in an effort to make available a wider range of NVD services.³³²

As the television programming received increasingly becomes the product of the desires of each individual household, the justifications for governmental intervention to prevent accidental contact with unwanted speech weaken. In so arguing, I do not mean to overstate my case. It is quite possible that some viewers may prefer that television be a predominantly passive experience.³³³ As a result, it is not yet possible to determine precisely where along the push-pull spectrum television will ultimately settle. In time, however, the increase in viewers' ability to control what they see will eventually alter the constitutional analysis by undermining the basic reasons announced in *Pacifica* for subjecting broadcasting to a different level of First Amendment scrutiny.

It thus appears that the pervasiveness and accessibility rationales of *Pacifica* are in the process of being overrun by technology, as well as by theory and doctrine in almost precisely the same manner as the scarcity doctrine. As of today, however, *Pacifica* remains good law, and regulatory authorities remain free to advance policies based on it. This danger may be more real than is generally recognized: Three of the five current FCC Commissioners have recently issued public calls for greater restrictions on indecent programming.³³⁴ It is thus clear that until the Supreme Court formally abandons *Pacifica*, that decision is likely to continue to be invoked as a basis for allowing the level of First Amendment scrutiny to vary technology by technology.

IV. BEYOND SCARCITY AND *PACIFICA*: THE TURN TO CIVIC REPUBLICANISM

The collapse of the traditional justifications for holding broadcasting to a lower First Amendment standard has led scholars to search for new constitutional bases for the Broadcast Model. Drawing inspiration from the statement in *Red Lion* contending that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,”³³⁵ these scholars have offered a new basis for holding broadcasting to a lesser level of First Amendment scrutiny rooted in the needs of democratic self-governance. This Part analyzes such efforts through the work of Owen Fiss and Cass Sunstein, who have offered the most elaborate theories of this kind.

According to Fiss, the conventional wisdom holding that the First Amendment protects the autonomy of speakers for its own sake is simply wrong. Rather, he argues, the true central value of the First Amendment is the promo-

332. Annual Assessment of Status of Competition in Mkt. for Delivery of Video Programming, Eighth Annual Report, 17 F.C.C.R. 1244, 1264–65 ¶¶ 40–41, 1271 ¶ 54, 1286–87 ¶ 92, 1292–93 ¶ 103, 1318–21 ¶¶ 187–90, 1322–23 ¶ 194 (2002).

333. OWEN, *supra* note 182, at 8, 10–11, 218–20.

334. See Bill McConnell, *Critics Are Out for (No) Blood on TV*, BROAD. & CABLE, Jan. 27, 2003, at 1; Siobhan McDonough, *Too Much Indecency Allowed on Airwaves, FCC Commissioner Says*, SAN DIEGO UNION-TRIB., Nov. 22, 2002, at A11.

335. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

tion of the robust public debate needed to support democratic decisionmaking.³³⁶ As Fiss puts it, “[a]utonomy is protected not because of its intrinsic value, . . . but rather as a means or instrument of collective self-determination. We allow people to speak so others can vote.”³³⁷ The circumstances that existed when the First Amendment came of age, however, caused courts and commentators to confuse the true end of the First Amendment with the means used to promote that end. At that time, access to speech venues was easy and the social structure relatively decentralized. In such a world, courts could safeguard the proper functioning of the democratic process simply by protecting the autonomy of speakers, because doing so typically represented the best available means for fostering robust public debate.³³⁸ The identity of these interests eventually came to be enshrined in the doctrinal rule against content regulation, which Fiss acknowledges emerged as “the cornerstone of the Free Speech Tradition.”³³⁹

When the focus shifts from the street corner speaker to CBS, Fiss argues, the opportunities for communication become much more limited. In such a world, an autonomy-based First Amendment that conceives of free speech as a shield around the speaker necessarily sanctions the crowding out of other speech.³⁴⁰ Even more problematic in Fiss’s eyes is the growing inequality in the distribution of power that he believes characterizes the social structure of contemporary society.³⁴¹ In such a world, protecting autonomy will only induce what Charles Lindblom called “circularity,” in which both markets and governmental processes tend to reflect and reinforce the existing social structure.³⁴² In such a world, the congruence between the autonomy principle and the public debate principle disappears. Quite the contrary, the two principles often become antagonistic because the protection of autonomy may cause the public debate to become decidedly one-sided and insufficiently robust.³⁴³

As a result, Fiss argues that if the First Amendment is truly to promote democratic self-determination, fundamental jurisprudential changes are required. Because autonomy can no longer serve as a proxy for the promotion of robust public debate, we as a society must promote public debate more directly. In addition, the law should recognize that private entities can threaten free speech values to the same extent as the government. As a result, Fiss argues that it is appropriate to look to the state not just as an enemy of speech, but rather as a possible means for mitigating the obstacles to robust public debate created by

336. FISS, LIBERALISM DIVIDED, *supra* note 24, at 13–17, 36–38.

337. *Id.* at 13.

338. *Id.* at 12–13, 37–38.

339. *Id.* at 12.

340. *Id.* at 15–16.

341. *Id.* at 38.

342. *Id.* at 10, 23, 43.

343. *Id.* at 13–14, 19.

private ordering.³⁴⁴ Fiss does not offer much detail about the circumstances under which such governmental intervention would be appropriate and the form that such intervention would take, aside from offering a fairly general endorsement of the existing scheme of broadcast regulation.³⁴⁵ He simply suggests that the government could regulate speech in a manner similar to a parliamentarian at a town meeting.³⁴⁶ A more complete definition of what constitutes robust public debate would be helpful, but is not strictly necessary. Concerns about the quality of public discourse under the current regime provide enough impetus for action.³⁴⁷

Sunstein offers a similar critique of the existing autonomy-oriented approach to the First Amendment. Although Sunstein identifies certain features that cause broadcast markets to fail,³⁴⁸ he focuses the bulk of his analysis on noneconomic considerations. Specifically, Sunstein argues that when properly understood, the First Amendment is designed to ensure that citizens are exposed to the types of communication they need to participate in a deliberative democracy.³⁴⁹ Indeed, the history of the First Amendment up until the 1970s can be seen as an ongoing debate between this vision of free speech and an alternate vision that viewed the First Amendment as protecting individual autonomy. In the 1980s, however, the autonomy vision prevailed and freedom of speech has ever since become increasingly identified with the preservation of free economic markets.³⁵⁰ In Sunstein's opinion, the results of this shift have been catastrophic. Television news has alternately become either overly sensationalized or unduly focused on such trivial matters as entertainment personalities and "human impact" anecdotes. Coverage of political campaigns has largely been reduced to a monistic focus on "horse race" issues, and statements by political candidates have deteriorated into mere "sound bites" rather than a serious discussion of the issues.³⁵¹

The reasons for the destitution of the media are clear to Sunstein. A First Amendment that equates speech with economic markets strives to satisfy what individuals want. The choices we make as individuals, however, do not necessarily coincide with what we need as citizens actively engaged in a public discourse.³⁵² In addition, Sunstein argues that, while the economic approach largely takes individual preferences as exogenous, individual media preferences are in reality the product of the type of programming that is currently being

344. *Id.* at 19–20, 39–41.

345. *Id.* at 149.

346. *Id.* at 85, 101, 117–19, 153; FISS, IRONY OF FREE SPEECH, *supra* note 24, at 21–24.

347. FISS, LIBERALISM DIVIDED, *supra* note 24, at 16, 26.

348. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 62–71; Sunstein, *supra* note 23, at 514–17.

349. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at xvi–xix, 18–20.

350. *Id.* at 3–8.

351. *Id.* at 58–67.

352. *Id.* at 18; Sunstein, *supra* note 23, at 520.

broadcast.³⁵³ Consequently, Sunstein argues that using the media's ability to satisfy existing preferences as the measure of current performance is ultimately somewhat circular, in that it effectively allows the status quo to serve as its own justification.³⁵⁴ Taking existing preferences as exogenous also suffers from a different problem, in that it takes existing distribution of wealth as given. As such, it is analogous to the willingness to regard the current distribution of common law entitlements as a neutral constitutional baseline that was rejected during the New Deal.³⁵⁵

Sunstein's solution to this state of affairs is to return to a "Madisonian" vision of the First Amendment that focuses not on promoting individual autonomy, but rather on promoting the broad communication about matters of public concern needed to facilitate democratic decisionmaking.³⁵⁶ To accomplish this, the government should be permitted to foster broad and deep attention to public issues, as well as public exposure to an appropriate diversity of views.³⁵⁷ In addition, Sunstein argues that his approach would require distinguishing between political speech, which would receive the highest degree of protection, and nonpolitical speech, which necessarily plays a lesser role in fostering democratic deliberation.³⁵⁸ Sunstein offers little guidance as to how to deploy such a program, calling the remedies "obscure" and "far from clear."³⁵⁹ Instead, Sunstein advocates a "frankly experimental approach"³⁶⁰ and tentatively proposes a series of possible remedial measures.³⁶¹ Uncertainty about the precise steps to be taken should not prevent the government from taking action. When confronted with a system that is so clearly imperfect, something must be done.³⁶²

A number of common features unite both Fiss's and Sunstein's visions of free speech. Both view speech in largely instrumental terms, valuing it for its contribution to other, more fundamental principles rather than as an end in and of itself. In addition, both hold similar views about the fundamental principle that free speech is supposed to promote. In contrast to other instrumental theories, such as the one advanced by Holmes and Mill that favors protecting speech to promote the search for truth,³⁶³ Fiss and Sunstein agree that the true meta-value underlying our commitment to free speech is the proper functioning

353. Sunstein, *supra* note 23, at 74.

354. *Id.* at 19, 71–74.

355. *Id.* at 28–34, 178–79.

356. *Id.* at xvi–xix.

357. *Id.* at 20–21.

358. *Id.* at 9, 122–23, 130–37.

359. *Id.* at 21.

360. SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 221.

361. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 35, 43, 81–88.

362. *Id.* at 21, 89; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 222.

363. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JOHN STUART MILL, *On Liberty*, in *THREE ESSAYS* 5, 26–44 (Richard Wollheim ed., Oxford Univ. Press 1975) (1859).

of the democratic process.³⁶⁴ Both generally endorse the existing scheme of broadcast regulation, possibly augmented by the restoration of mandatory rights of reply, greater support for public television, additional limitations to campaign contributions, and improved coverage of political issues, perhaps encompassing free air time for politicians.³⁶⁵ Both endorse adopting a less hostile attitude towards governmental interference with private speech. In their view, if an obstacle to democratic self-governance exists, it makes little difference whether the obstacle is the result of private ordering rather than state action.³⁶⁶ As a result, both Fiss and Sunstein call for eliminating the current doctrine's presumption against content-based restrictions of speech³⁶⁷ and compelled speech.³⁶⁸ Both argue that the unique role that television plays in the public discourse justifies the application of a different constitutional standard.³⁶⁹ In particular, their general acceptance of government intervention leads them to find the licensing of speakers largely unproblematic.³⁷⁰ Finally, although both profess uncertainty about the specific remedies to be applied, both concur that the current state of affairs is so dire that something must be done.³⁷¹

This Part will analyze Fiss's and Sunstein's theories and assess their potential as an alternative basis for upholding the constitutionality of the Broadcast Model. In particular, I will focus on what I believe to be the three major shortcomings of their proposals. Section A offers a critique from outside the civic republican model by evaluating the extent to which Fiss and Sunstein respond to arguments that view autonomy to be a central free speech value. The role of individual autonomy and the proper way to reconcile it with collective decisionmaking have represented one of the dominant theoretical questions in First Amendment theory over the last half century. My concern is that, upon

364. Fiss's embrace of the instrumental vision of free speech is open and unqualified. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 36–38. Sunstein is more circumspect, but only on the margin. Although Sunstein reserves the possibility of other values underlying free speech, SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 129–30, he would accommodate those values only by adjusting the lower level of protection he would accord to nonpolitical speech rather than by adjusting the higher level of protection that his approach would extend to political speech. *Id.* at 129–30, 135–36, 147–48.

365. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 19, 22, 149, 152; FISS, *IRONY OF FREE SPEECH*, *supra* note 24, at 56; SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 35, 43, 81–88; SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 23, at 221–22; Owen M. Fiss, *Money and Politics*, 97 *COLUM. L. REV.* 2470 (1997); Sunstein, *supra* note 23, at 525.

366. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 18–23, 38–41; SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 34.

367. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 19, 152–53; SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 178–79.

368. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 155–57; FISS, *IRONY OF FREE SPEECH*, *supra* note 24, at 68, 82–83; SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 46–48.

369. *See* Fiss, *supra* note 24, at 1217; Sunstein, *supra* note 23, at 527–31.

370. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 17, 19, 51, 150; FISS, *IRONY OF FREE SPEECH*, *supra* note 24, at 64 (arguing that licensing is irrelevant to the scope of regulatory authority); SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 108–10 (same).

371. *See supra* notes 347, 362 and accompanying text.

close analysis, Fiss and Sunstein, for the most part, simply assume away the conflict between the individual and the collective will. To the extent that they engage this conflict at all, they do so in terms inconsistent with the values of democracy they purport to support.

Moving to a critique from inside the civic republican model, section B argues that even if one accepts the instrumental vision of speech proposed by Fiss and Sunstein, their proposals are too incompletely articulated to provide much concrete policy guidance. The result is an approach to regulation that is essentially ad hoc and all too dependent on direct normative value judgments that Fiss and Sunstein fail to articulate clearly, let alone defend. Finally, section C argues that Fiss and Sunstein have failed to come to grips with certain limitations to their theories imposed by recent technological developments. Simply put, the increase in the number of available media outlets and the impending arrival of video-on-demand promise to prevent television from playing the transformative role that Fiss and Sunstein envision.

A. CRITIQUES FROM OUTSIDE THE MODEL: THE ROLE OF AUTONOMY

The central premise of the work of both Fiss and Sunstein is that the First Amendment exists to serve the democratic process. They view speech as a means towards promoting this value rather than an end in and of itself. To the extent that other First Amendment values exist, they are subordinate to this fundamental commitment. To the extent that autonomy conflicts with the needs of the democratic process, it simply must give way.³⁷²

This is a powerful vision of free speech that traces back to Alexander Meiklejohn and Harry Kalven.³⁷³ It appears to have played a role in such landmark decisions as *Red Lion Broadcasting Co. v. FCC*³⁷⁴ and *New York Times Co. v. Sullivan*.³⁷⁵ This vision of the First Amendment has also proven to be quite controversial. Free speech theorists have long disputed the extent to which promoting the democratic process constitutes the central value of the First Amendment. A number of powerful theories have emerged that value speech as an end unto itself rather than as a means for promoting other values.

This section evaluates Fiss's and Sunstein's attempts to come to grips with these alternative, autonomy-based visions of free speech. It begins by describing the major autonomy-based theories, including those theories incorporating hybrid approaches that attempt to combine both descriptive and ascriptive visions of free speech. It then analyzes the specific ways in which Fiss and

372. FISS, LIBERALISM DIVIDED, *supra* note 24, at 146; SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 81; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 220.

373. See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960); Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

374. 395 U.S. 367 (1969).

375. 376 U.S. 254 (1964).

Sunstein attempt to reconcile their positions with autonomy. Upon close analysis, it becomes clear that their primary analytical gambit is to assume the problem away by positing that individual choices and the outcome of the collective decisionmaking processes will tend to converge. As a result, both of their theories fail to engage the conflict between the individual and the collective will that has long represented one of the foremost problems of liberal political theory.

1. Theories of Autonomy

This subsection presents the major autonomy-based approaches to the First Amendment. It begins by describing the two major variants of such theories, which include those that treat autonomy as an indispensable attribute of individual dignity and those that believe autonomy's status as a free speech value follows inexorably from our commitment to a democratic form of government. It then outlines a number of hybrid models that combine autonomy with descriptive approaches to the First Amendment.

a. Deontological Theories of Autonomy. First and foremost, Fiss and Sunstein view the First Amendment in terms of whether individuals are able to gain exposure to the speech needed to participate in democratic self-governance in a meaningful way. Viewed in this manner, freedom of speech is largely a descriptive concept that refers to an empirical condition that must be achieved. Their work contrasts directly with scholars who have drawn on the Kantian precept that all individuals be respected as ends unto themselves³⁷⁶ to construct theories that view free speech as an irreducible attribute of personal sovereignty. Under these theories, autonomy is not a condition that is attained, but rather an entitlement that is ascribed to people based either on moral grounds flowing from the need to respect each individual as an independent moral agent or on political grounds resulting from their status as constituent members of the democratic body politic. The result is an ascriptive vision of the First Amendment that respects autonomy regardless of whether it furthers any particular instrumental value.³⁷⁷ The most forceful statement of this position appears in the work of Ronald Dworkin. Dworkin rejects views that “treat[] free speech as

376. IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* *428 (James W. Ellington trans., Hackett 2d ed. 1983) (1785). For a helpful analysis of Kant's theory of free speech, see Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159 (1997).

377. See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); JOHN RAWLS, *A THEORY OF JUSTICE* § 40, at 251–57 (1971); DAVID A. J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 165–74 (1986); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 227, 232–34, 240–44 (1985); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213–22 (1972). For general discussions on the distinction between ascriptive and descriptive visions of liberty and autonomy, see Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877–78 (1994); Robert Post, *Meiklejohn's Mistake Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1129–33 (1993).

important *instrumentally*, that is, not because people have any intrinsic moral right to say what they wish, but because allowing them to do so will produce good effects for the rest of us.”³⁷⁸ Instead, Dworkin argues in favor of a First Amendment that values autonomy in general, and speech in particular, because it is an “essential and ‘constitutive’ feature of a just political society that government treat all its adult members . . . as responsible moral agents.”³⁷⁹

Dworkin’s dignitary vision of free speech has two aspects. The first aspect focuses on people’s moral responsibility to “mak[e] up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith.”³⁸⁰ The existence of this obligation implies that “[g]overnment insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions.”³⁸¹ The second aspect focuses on the more active role of the individual as speaker. From this perspective, moral responsibility carries with it “a responsibility not only to form convictions of one’s own, but to express these to others.”³⁸² A government that “disqualifies some people from exercising” their responsibility to form and communicate their own convictions “on the ground that their convictions make them unworthy participants” forfeits much of its claim to legitimacy.³⁸³ The vision of a “liberal society committed to individual moral responsibility” thus requires that the rejection of “*any* censorship on grounds of content,” even if it involves speech that we loathe.³⁸⁴

b. Democratic Theories of Autonomy. Other scholars have argued that respect for autonomy as an independent value is necessarily implicit in our commitment to democracy. For example, Martin Redish argues that “the concept of democracy itself is ultimately premised on a belief that individuals are capable of exercising control over decisions that directly affect their lives and morally deserve to do so.”³⁸⁵ Autonomy would thus seem to go hand in hand with democracy as a matter of definition because in the absence of a commitment to autonomy, it is difficult to see why society would adopt a democratic system of

378. RONALD M. DWORKIN, *FREEDOM’S LAW* 199–200 (1996).

379. *Id.* at 200; *see also id.* at 7 (arguing that freedom of speech represents an indispensable aspect of “treat[ing] all those subject to its dominion as having equal moral and political status”).

380. *Id.* at 200.

381. *Id.*; *see also id.* (arguing that “withholding an opinion from us on the ground that we are not fit to hear and consider it” thus deprives us of “our dignity, as individuals”).

382. *Id.*

383. *Id.*

384. *Id.* at 205.

385. MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 19–29 (1984). He has since published articles using his theory to critique the work of Fiss and Sunstein. *See* Redish & Kaludis, *supra* note 99, at 1107–10, 1119–21; Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 284–90 (1991).

government in the first place.³⁸⁶ Indeed, Redish argues: “Since a belief in societal self-determination underlies our entire political system and constitutional structure, however, we cannot reject that belief without simultaneously rejecting the American form of government. Such logic would necessarily constitute a rejection of the first amendment, rather than an interpretation of it.”³⁸⁷

Robert Post offers a similar argument that focuses less on the direct relationship between autonomy and democracy and more on the role speech plays in the democratic process. In Post’s view, speech allows “democracy . . . to reconcile individual autonomy with collective self-determination” by “instill[ing] in citizens a sense of participation, legitimacy, and identification” sufficient to induce them to support the substantive outcomes of the political process even when they disagree with such outcomes.³⁸⁸ This constitutive vision of speech necessarily “presupposes that those participating in public discourse are free and autonomous” because, without such autonomy, it is impossible to see how the public discourse could possibly mediate between the individual and the collective will.³⁸⁹ As a result, Post argues that democratically based theories of free speech entail an ascription of autonomy for its own sake, and all attempts to regulate speech on the grounds that individuals cannot fully participate in the political process “contradict the central premise of our democratic enterprise.”³⁹⁰

c. Hybrid Theories of Autonomy. It is particularly telling that even scholars who, like Fiss and Sunstein, are willing to treat the promotion of healthy democratic processes as a First Amendment value have generally regarded it as only one of several competing values.³⁹¹ For example, Thomas Emerson rejected the notion that freedom of expression amounted to nothing more than “a

386. REDISH, *supra* note 385, at 21; *see also* Redish & Kaludis, *supra* note 99, at 1121 (“Absent personal intellectual autonomy, the individual members of society cannot make truly free choices. Absent the individual citizens’ ability to make such free choices, the concept of a democratic society is rendered incoherent.”).

387. Redish & Lippman, *supra* note 385, at 276; *see also id.* at 273–74 (arguing that “baseline free speech principles are so centrally intertwined with the values that underlie our political structure—popular sovereignty and self-determination—that abandoning the former would be impossible without weakening or abandoning the latter”).

388. Post, *supra* note 377, at 1115.

389. *Id.* at 1128.

390. *Id.* at 1132.

391. *See* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 35–46, 60–72, 85–86 (1982) (critiquing free speech arguments based on democracy and individuality and finding it unnecessary to accord primacy to either one); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *Nw. U. L. REV.* 1212 (1983) (reviewing and rejecting First Amendment theories based on promoting democratic processes and individual autonomy in favor of an eclectic approach to the First Amendment); Geoffrey R. Stone, *Autonomy and Distrust*, 64 *U. COLO. L. REV.* 1171 (1993) (advocating a theory of free speech that combines concern for autonomy with an instrumental distrust of government intervention); *see also* Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. REV.* 1615 (1987) (reviewing the work of Baker and Redish and advocating the rejection of foundation theories in favor of resolving First Amendment disputes through practical reason).

technique for arriving at better social judgments through democratic procedures,”³⁹² arguing instead that freedom of expression at the same time encompassed the value of self-fulfillment.³⁹³ Similarly, after offering a powerful synthesis of the existing descriptive and ascriptive visions of free speech, Richard Fallon argues that each is simultaneously fundamental, yet irreconcilable and irreducible to a common metric. As a result, Fallon calls for a balancing approach.³⁹⁴ In so arguing, Fallon explicitly rejects Fiss’s and Sunstein’s attempts to reject autonomy as a value. As Fallon notes, despite their best efforts, Fiss and Sunstein “cannot sensibly advocate enlightened democracy at the expense of autonomy; to do so would get the order of values backwards.”³⁹⁵

C. Edwin Baker advances the most multifaceted and nuanced hybrid argument. For individuals, Baker views free speech in largely deontological terms. Like Dworkin, Baker argues that “the key ethical postulate” underlying the First Amendment is that “respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values.”³⁹⁶ As a result, Baker rejects as inherently illegitimate any collective practice that is inconsistent with treating each person as morally independent.³⁹⁷

At the same time, Baker augments his dignitary vision of individual autonomy with arguments based in the democratic process that are reminiscent of Redish’s and Post’s. Under this view, “[d]emocratic decision making gives each person the same potential say in results, a say that properly would represent the person’s autonomous choice or commitment.”³⁹⁸ Thus, the “normally accepted account of our constitutionalism” necessarily “treats certain values—human dignity, respect for individuals[’] equality and autonomy—as fundamental and directs that democracy must operate within the constraint of respect for these values.”³⁹⁹ The very existence of a democratic system of government, therefore, presupposes certain “fundamental constitutional restraints on democratic choice” that are based in autonomy.⁴⁰⁰

392. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 14 (1966).

393. *Id.* at 4–7, 8–11, 14–15 (acknowledging both individual self-fulfillment and participation in decisionmaking as free speech values while declining to settle on a single foundation value).

394. Fallon, *supra* note 377, at 899–901.

395. *Id.* at 884.

396. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 59 (1989). Baker elaborates as follows: “Respect for people as autonomous agents implies that people should be viewed as responsible for, and given maximal liberty in, choosing how to use their bodies to develop and express themselves; and should be given an equal right to try to influence the nature of their collective worlds.” *Id.* at 58–59.

397. *Id.* at 48–49.

398. *Id.* at 49.

399. *Id.* at 50; *see also id.* at 49 (reasoning that “the practices of democratic decision making . . . can often be understood as properly implementing equal respect for persons as autonomous agents”); C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 327–28 (1998) (arguing that “popular participation or, at least, real opportunity for participation is crucial . . . to maintain a popular sense of government . . . [This] legitimizing practice must include participatory democracy—only this process recognizes both people’s right to choose [autonomy] and people’s equality as to this fight”).

400. BAKER, *supra* note 396, at 50.

Although Baker views individual speech in largely ascriptive terms, he refuses to extend this view to corporate speech on the grounds that liberty is a personal attribute that does not apply to collective institutions.⁴⁰¹ However, Baker does make an exception for media corporations, in light of the unique role envisioned for the Fourth Estate by the Press Clause.⁴⁰² With respect to the press, Baker argues that the government should promote what he calls “Complex Democracy,” which is an intermediate position that attempts to capture the best elements of what he calls “Liberal Pluralist Democracy,” which treats values as exogenous to politics and looks to the democratic process to mediate among the varying conceptions of the good, and what he terms “Republican Democracy” of the type advocated by Fiss and Sunstein.⁴⁰³

As the existence of these alternative theories demonstrates, the vision of free speech upon which Fiss and Sunstein rely is far from self-evident. Many theorists would object to their attempt to place democratic decisionmaking at the center of the First Amendment, and many of those who would not object would nonetheless repudiate the instrumental, descriptive vision of free speech that they propose. Equally telling is that most of those theorists who do not reflexively object to governmental attempts to regulate speech in ways that promote collective self-determination still recognize that the needs of the democratic process must be balanced against the needs of individual autonomy. The attractiveness of Fiss’s and Sunstein’s theories thus turns largely on their ability to come to grips with these autonomy-based visions of free speech. The balance of this section will examine Fiss’s and Sunstein’s attempts to do so.

2. Fiss on Autonomy

It should now be clear that the democratically oriented vision of free speech upon which Fiss relies represents one of the most highly contested issues in free speech theory. Unfortunately, Fiss fails to offer much in the way of theoretical justification for it. For the most part, Fiss simply posits his vision of free speech, at some points categorically averring that it represents the dominant perspective⁴⁰⁴ and at other points calling it “almost axiomatic.”⁴⁰⁵ To the extent that Fiss engages autonomy-based arguments at all, he discards them in a somewhat conclusory manner. He simply declares that autonomy is “protected not because of its intrinsic value, . . . but rather as a means or instrument of collective self-determination.”⁴⁰⁶ Fiss later makes explicit what this argument already clearly implied: “In fact autonomy adds nothing, and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit

401. *Id.* at 200–31; C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 66–72.

402. See BAKER, *supra* note 396, at 225–49; Baker, *supra* note 401, at 80–81.

403. Baker, *supra* note 399, at 327–40.

404. FISS, LIBERALISM DIVIDED, *supra* note 24, at 13, 36–37.

405. *Id.* at 114.

406. *Id.* at 13.

true collective self-determination.”⁴⁰⁷ To the extent that the speech people choose fails to reflect democratic values, little is lost by failing to respect that choice.⁴⁰⁸

Autonomy thus falls away as an independent value not by virtue of any sustained analysis, but rather as a byproduct of the central value that Fiss simply declares to be at the heart of the First Amendment. It seems quite problematic to dispose of one of the central questions of free speech theory through the use of a simple *ipse dixit*.⁴⁰⁹ Fiss’s refusal to engage the larger debate surrounding the role of autonomy in the First Amendment is made more troubling by his central commitment to democracy. As noted earlier, many scholars who have begun from the same starting point have found autonomy to be a necessary concomitant rather than a potential obstacle to democracy.

Equally debatable is the particular vision of democracy embedded in Fiss’s work. By Fiss’s own admission, his vision of the way speech interacts with the political process is entirely listener-based, perhaps best captured in the pithy statement, “[w]e allow people to speak so others can vote.”⁴¹⁰ As Robert Post has pointed out, this “offers a strikingly passive image of the democratic citizen”⁴¹¹ that does not take democracy’s participatory dimensions into account. The omission is important because “[i]ndividual citizens can identify with the creation of a collective will only if they believe that collective decisionmaking is in some way connected to their own individual self-determination.”⁴¹² Active participation thus provides the means through which people reconcile themselves with collective decisions with which they personally disagree.⁴¹³

In fact, Fiss’s summary rejection of autonomy is part of a far more fundamental desire to reorder the basic constitutional relationship between the individual and the state. Fiss claims not to disturb the sharp dichotomy between state and citizen presupposed by classical liberalism.⁴¹⁴ Upon closer inspection, it becomes clear that this disclaimer cannot be taken at face value. Under the classic conception of liberalism, liberty is equated with freedom from governmental interference. Fiss’s vision of free speech demands more. He claims that the state bears an obligation to provide each individual with the means to exercise that liberty in a meaningful way.⁴¹⁵

As a result, it is possible to construe Fiss’s argument as another strand of the

407. *Id.* at 15.

408. *Id.* at 146.

409. Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1525 (1997) (arguing that Fiss “cannot simply rule out a priori the independent constitutional value of individual autonomy”).

410. FISS, LIBERALISM DIVIDED, *supra* note 24, at 13.

411. Post, *supra* note 409, at 1526.

412. *Id.* at 1524.

413. *Id.* at 1527; *see also* Post, *supra* note 377, at 1115–16.

414. FISS, LIBERALISM DIVIDED, *supra* note 24, at 17–18.

415. *Id.* at 19–22.

broader constitutional debates surrounding the vision of due process inspired by Charles Reich's seminal article *The New Property*⁴¹⁶ and the clash between formal and substantive equality. Indeed, at times, Fiss explicitly frames his work in precisely this manner.⁴¹⁷ It thus seems apt to describe Fiss's proposal as calling for a shift from what might be termed formal liberty to substantive liberty. That he would find such a vision of free speech attractive is unsurprising. He is an admirer of *Goldberg v. Kelly*,⁴¹⁸ and he has also argued against interpreting the Equal Protection Clause simply as a limit against governmental interference.⁴¹⁹ Situating his work in this manner only underscores its weakness, however. As Fiss himself recognizes, the Court's equal protection and due process jurisprudence has already rejected the vision of the relationship between the individual and the state that he proposes.⁴²⁰ Although it remains open for Fiss to propose some basis for a different outcome with respect to free speech, at this point he has not done so.⁴²¹

3. Sunstein on Autonomy

Sunstein offers a somewhat more elaborate justification for rejecting autonomy as a free speech value. His argument in favor of a First Amendment focused on promoting democratic processes is quite complex, invoking the intellectual precepts of history, communitarianism, and practical reason.⁴²² In addition, he criticizes the coherence of the willingness of autonomy-based visions of free speech to regard individual preferences as pre-political.⁴²³ In this section, I will critically assess each of these arguments. A close analysis reveals that Sunstein's historical arguments lack a substantial foundation. Even more problematic is his invocation of communitarianism and practical reason because the manner in which he applies each theory has the effect of simply assuming away the conflict between autonomy and democracy. Most troubling is his attempt to undermine preferences, which I find to be fundamentally inconsistent

416. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

417. FISS, LIBERALISM DIVIDED, *supra* note 24, at 35–36, 99–102. For a discussion about Sunstein's attempt to raise a similar argument, see *infra* notes 660–61 and accompanying text.

418. 397 U.S. 254, 265 (1970) (suggesting that the Due Process Clause might recognize an inherent right to a basic subsistence level of governmental support); see also Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 792, 804 (1990) (lauding *Goldberg v. Kelly* as a “triumph of . . . substantive rationality,” “a magnificent achievement,” and “a monument to our own little enlightenment”); *Tributes to Robert M. Cover*, 96 YALE L.J. 1699, 1720 (1987) (remarks of Owen Fiss) (calling *Goldberg v. Kelly* “the culmination of the Golden Age of American Law” and “bemoaning its demise”).

419. FISS, LIBERALISM DIVIDED, *supra* note 24, at 99; Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 23 (1979); *Panel Presentation: Equality in Education*, 74 F.R.D. 269, 276–81 (1977) (remarks of Owen Fiss).

420. On equal protection, see FISS, LIBERALISM DIVIDED, *supra* note 24, at 99. On due process, see Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1123 (1991); *Tributes to Robert M. Cover*, *supra* note 418, at 1720.

421. See also *infra* subsection IV.B.1.c (discussing Fiss's views on the state action doctrine).

422. See *infra* notes 424–27, 439–41, 445–47 and accompanying text.

423. See *infra* notes 450–52 and accompanying text.

with most democratic forms of government. None of these approaches offers a satisfactory reconciliation of the conflict between the individual and the collective will, which represents perhaps the central problem lying at the heart of liberal and democratic theory.

a. The Role of History. Sunstein initially attempts to rebut theories that view the First Amendment as a bulwark that protects individual autonomy by invoking history. He argues that viewing the First Amendment in terms of promoting collective self-determination follows from James Madison's recognition of the need for people to "freely examine public characters and measures" if they are to exercise their democratic obligations in a meaningful manner.⁴²⁴ He finds further support in such notable opinions as Justice Brandeis's concurrence in *Whitney v. California*⁴²⁵ as well as the opinions of the Court in *Red Lion Broadcasting Co. v. FCC*⁴²⁶ and *New York Times Co. v. Sullivan*.⁴²⁷

A review of the historical record reveals that this so-called "Madisonian" vision of the First Amendment, which Sunstein uses as a trope throughout his work, is more Sunstein's creation than Madison's. Sunstein's historical discussion consists of a single quotation from Madison, without any discussion of Madison's broader writings.⁴²⁸ An examination of the scholarship studying Madison's views on free speech reveals that Sunstein's claim is quite controversial. Although some share Sunstein's vision,⁴²⁹ others have interpreted Madison's views on free speech as fitting better with the deontological approach to free speech discussed above.⁴³⁰ In addition, another burgeoning branch of the commentary argues that Madison espoused a view of free speech closely related to the Lockean theory of property rights.⁴³¹ In either case, the result is a view that is much more attuned with the protection of speech as an individual or natural right than it is with the instrumental promotion of democracy. The invocation of a single line of Madison's writings is thus insufficient to establish the principle that Sunstein seeks.⁴³²

424. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at xvii (quoting 17 JAMES MADISON, *Report of 1800*, in THE PAPERS OF JAMES MADISON 341 (David Mattern et al., 1991)).

425. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), *discussed in* SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 26–28.

426. 395 U.S. 367 (1969), *discussed in* SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 48–49.

427. 376 U.S. 254 (1964), *discussed in* SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 38–41.

428. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at xvii.

429. *See, e.g.*, DWORKIN, *supra* note 378, at 200.

430. *See* David A.J. Richards, *Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779, 796–800 (1999).

431. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996); John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751, 1760–62 (1994).

432. As Jack Balkin has famously quipped, "Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin: It is a tribute to a great man and his achievements, but bears only a limited connection to his views." J.M. Balkin, *Populism and Progressivism as Constitu-*

Nor does the series of landmark decisions cited by Sunstein enhance the historical pedigree of his theory. As an initial matter, his reliance on precedent is somewhat curious in light of his recognition that the judicial consensus generally supports an autonomy-oriented vision of the First Amendment.⁴³³ In any event, when read closely, the opinions that Sunstein cites fall short of establishing the primacy of deliberative democracy as a First Amendment value. Although there are clearly strains of Sunstein's vision in Justice Brandeis's concurrence in *Whitney*, the opinion's emphasis on the "belie[f] that the final end of the state was to make men free to develop their faculties" and that the Founders "valued liberty both as an end and as a means"⁴³⁴ is far more suggestive of a hybrid approach that seeks to balance the interests of autonomy and democracy than accord primacy to the latter.⁴³⁵ The Court's opinion in *New York Times Co. v. Sullivan* suffers from similar limitations. Although the opinion has been both lauded and criticized for adopting the type of democracy-enhancing instrumental approach that Sunstein favors,⁴³⁶ other commentators have disagreed, noting that the opinion depended as much on an analogy to seditious libel and concerns about a possible "chilling effect."⁴³⁷ In the end, the only authority that clearly stands in Sunstein's corner is *Red Lion*, and even Fiss has conceded that that decision represents "something of a freak" that has never grown to cover other media.⁴³⁸

b. The Turn to Communitarianism. Sunstein also attempts to resolve the conflict between autonomy and the needs of the democratic process by turning

tional Categories, 104 YALE L.J. 1935, 1955 (1995) (reviewing SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23).

433. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 3–5.

434. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

435. See DWORKIN, *supra* note 378, at 201; see also Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 684–85 (1988) (offering an alternative reading of Brandeis's concurrence in *Whitney*).

436. Compare DWORKIN, *supra* note 378, at 202–09 (criticizing Justice Brennan's "almost exclusive [reliance] on the instrumental justification in his opinion" because it limited First Amendment protection to "cases involving libel of 'public officials' rather than extending protection to all libel defendants"), with Kalven, *supra* note 373, at 209 (praising the *New York Times* Court for "returning to the essence of the First Amendment . . . found in its limitations on seditious libel" and being "carried along by a momentum of insight about the democratic necessities of free speech"); see also William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14–16 (1965).

437. Farber & Frickey, *supra* note 391, at 1634–35.

438. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 20; see also FISS, *IRONY OF FREE SPEECH*, *supra* note 24, at 72 (characterizing *Red Lion* as a "stray"). In his later work, Fiss finds an endorsement of *Red Lion* in Justice Breyer's concurrence in the judgment in *Turner II*, as well as general support for his approach in the plurality opinion in *Denver* and Justice Stevens's dissent in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Fiss, *supra* note 24, at 1220–26, 1229–31, 1234–35. It should be noted that none of the opinions that Fiss cites commanded a majority of the Court. A close reading of those opinions, moreover, reveals that they are more consistent with the hybrid approach discussed above, which accords weight to both autonomy and instrumental concerns, than it is with the purely instrumental approach that Fiss advocates.

to communitarian principles. He posits that when political processes are functioning properly, the interests of the collective and the individual will tend to be the same. Indeed, Sunstein suggests that so long as the machinery of democracy is in good working order, it may be appropriate to define the outcome of the deliberative process as “political truth.”⁴³⁹ Sunstein’s earlier writings provide a more fulsome elaboration of this theme:

The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue. The process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals.⁴⁴⁰

Thus, in Sunstein’s perfect polity, there is no conflict between autonomy and the needs of the democratic process because, in a properly constructed deliberative democracy, these interests tend to converge.⁴⁴¹

The communitarian aspects of Sunstein’s argument thus propose to solve the conflict between his theory and autonomy simply by positing the convergence of the individual and the collective will. On a theoretical level, Sunstein assumes away the conflict with autonomy in much the same way as does Fiss. On a more empirical level, the heterogeneity of modern society provides ample reason to doubt that the consensus that Sunstein envisions will in fact emerge.⁴⁴² It is not even clear, moreover, that such consensus would be normatively desirable. This is because “consensus is not generally the condition of autonomy; rather, autonomy is more typically exhibited in divergence of substantive . . . views” in which different people “affirm very different conceptions of the public and private good.”⁴⁴³ Under this view, dissensus “is the goal and characteristic symptom of a genuinely free society” rather than “a problem in need of . . . regulation.”⁴⁴⁴

439. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 19. It should be emphasized that Sunstein regards the deliberative process as an integral part of the means by which substantive values are selected. The implication is that one cannot bypass the democratic process and derive moral truth directly. The difference in emphasis is critical. As Martin Redish and Gary Lippman have pointed out, “[i]f one believes in the imposition of externally derived moral truth through governmental decisionmaking, the concept of democracy is rendered at best a nuisance and at worst a serious social harm.” Redish & Lippman, *supra* note 385, at 278.

440. Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1550, 1554 (1988) (footnote omitted).

441. See Baker, *supra* note 399, at 334; Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 *GEO. L.J.* 373, 385 (1993).

442. See Post, *supra* note 377, at 1115 (calling any postulated fusion of the individual and collective wills “unconvincing under modern conditions of heterogeneity”).

443. Gardbaum, *supra* note 441, at 386–87.

444. *Id.* at 387.

c. The Appeal to Practical Reason. Sunstein further seeks to support his democratically oriented view of the First Amendment by invoking the methodology of practical reason. Sunstein describes his methodology as similar to the notion of reflective equilibrium developed by John Rawls,⁴⁴⁵ in which “theory [is] adjusted to conform to [considered] judgments, and vice versa, until we reach a state of equilibrium.”⁴⁴⁶ He employs this approach to reject a number of countervailing theories, including autonomy, as inconsistent with certain considered judgments that he regards as unquestionably correct.⁴⁴⁷

Although Sunstein’s statement of the methodology of practical reason is satisfactory, his application of it leaves much to be desired. Adherents of practical reason would doubtless find the level of abstraction at which Sunstein speaks and his resort to first principles quite troublesome. There is, moreover, little reflection of the Rawlsian reflective equilibrium in Sunstein’s application. Rather than oscillating back and forth between the general and the specific until fusion is achieved, Sunstein’s approach treats certain preferred case outcomes as fixed and uses them to support or invalidate particular theories.⁴⁴⁸ Such an approach is hardly faithful to the notions of pragmatism, which rely on sensitivity to complex webs of values and a search for the best legal answer in light of both history and context.⁴⁴⁹ In addition, his methodology makes his substantive results little more than a product of which case outcomes he chooses to hold constant and which case outcomes he chooses to critique. It would be as easy to hold the Court’s well-established hostility towards content-based regulation constant and use that insight to invalidate Sunstein’s theory. As a result, Sunstein’s turn to pragmatism amounts to little more than the assumption of the results that his theory is trying to prove.

d. The Assault on Preferences. Finally, Sunstein attempts to refute the importance of autonomy by attacking the notion that individual preferences are pre-political. Instead, Sunstein argues that individual preferences are the product of the existing set of social and legal rules. Because preferences are largely the product of the speech that already exists and the social structure that created it, Sunstein argues that any attempt to justify current outcomes in terms of those preferences is ultimately circular, in that it simply tends to validate the status quo.⁴⁵⁰ True autonomy lies in the realization of those preferences that individuals would have held had they been exposed to higher quality programming that incorporated a broader range of viewpoints. Consequently, it is not necessarily a violation of autonomy to deviate from current preferences because “the inclu-

445. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 298 n.13 (citing RAWLS, *supra* note 377).

446. *Id.* at 133.

447. *Id.* at 133, 141, 142–43, 148, 175–76.

448. *Id.*

449. See Farber & Frickey, *supra* note 391, at 1641–43.

450. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 19–20, 73–74.

sion of better options . . . does not displace a freely produced desire.”⁴⁵¹ On the contrary, “[i]f more and better choices are made available, the outcome may well be to promote autonomy, rightly understood.”⁴⁵²

This argument touches on an issue that has long pervaded liberal political theory. It inheres in the work of John Rawls, who turns to idealized choices made behind a “veil of ignorance” to justify the imposition of outcomes consistent with the collective good without violating the central tenets of democracy and liberalism.⁴⁵³ The work of John Stuart Mill exhibits a deep ambivalence over the choice between actual and idealized preferences. At times, Mill seems to define liberty as the realization of the desires that a person would hold if exposed to a more complete range of experiences.⁴⁵⁴ At other times, Mill strongly criticized this perspective, arguing that it essentially treated the laboring classes as children or savages unfit for the privileges of freedom. As a result, Mill contended that such an approach was inconsistent with the principles of freedom and democracy.⁴⁵⁵

That said, the attack on preferences strikes me as profoundly antidemocratic. If one regards an individual’s personality as a social construct subject to improvement by the state, there would seem to be little reason for the state to accord any particular respect to the outcomes of the democratic process.⁴⁵⁶ Indeed, there is a disturbingly illiberal overtone to Sunstein’s critique of preferences. As Isaiah Berlin has argued, acknowledging a distinction between what people actually want and what they ought to want risks justifying coercion in the name of the “true” or “real” interests of the person being coerced.⁴⁵⁷ It also opens the door to the imposition of an eruditiocracy, in which the preferences of the elite classes are simply imposed on others. This danger does not appear to trouble Sunstein. He notes, “Of course it is possible or even likely that the well-educated will disproportionately enjoy high-quality broadcasting. But this is precisely because they have been educated to do so, and high-quality education is not something to be disparaged.”⁴⁵⁸ It is this aspect that has led some

451. *Id.* at 74.

452. *Id.*

453. RAWLS, *supra* note 377, at 136–42.

454. JOHN STUART MILL, UTILITARIANISM 8–17 (George Sher ed., Hackett Publ’g Co. 1979) (1861). See generally Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 689–90 (1985).

455. MILL, *On Liberty*, *supra* note 363, at 124, quoted in Post, *supra* note 377, at 1131 n.90.

456. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 284 (1991) (arguing that “the state undermines the *raison d’être* of its own enterprise to the extent that it itself coercively forms the ‘autonomous wills’ that democracy seeks to reconcile into public opinion”); see also Post, *supra* note 377, at 1133 (“[O]ne cannot but be struck by the sharp anomaly of regulating democratic elections on the premise that voters are not autonomous and free.”).

457. ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 131–34 (1969), cited in Fallon, *supra* note 377, at 886 n.65.

458. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 91.

critics to condemn Sunstein's proposal as "indefensible."⁴⁵⁹

This dilemma can be illustrated by the following thought experiment.⁴⁶⁰ Suppose that a group of voters cast their votes in a racially discriminatory manner and that this group is sufficiently large to control the outcome of an election. Suppose further that their racist views result directly from the narrowness of the viewpoints to which they have been exposed. It is hard to imagine that any democratic system would sanction disregarding the actual votes cast and entering results that more accurately reflect the voters' "true" or idealized preferences. This is so even though the normative value at issue—the elimination of racial discrimination—represents perhaps the most morally attractive and strongest justification for intervention. If democratic theory will not allow us to overturn outcomes of elections in the name of promoting idealized preferences over actual preferences, the close connection between speech and votes makes it hard to see why such intervention would be permitted with respect to speech. Even when addressed at the level of speech rather than outcomes, this type of intervention still smacks of the Rousseauian notion of being forced to be free.⁴⁶¹

Lastly, any theory that seeks to promote idealized preferences will confront severe implementation problems. It must offer some basis for identifying those preferences with sufficient confidence to justify subjecting individuals to such coercion. It is the difficulties surrounding any attempt to articulate such a theory that is the focus of the next section of this Article.

B. CRITIQUES FROM INSIDE THE MODEL: TURNING THEORY INTO PRACTICE

To this point, I have focused on a theoretical critique that is largely external to what Fiss and Sunstein propose. This Section, in contrast, takes Fiss's and Sunstein's theoretical assumptions as given in an attempt to offer an internal critique of their work. It begins by exploring a number of typical constitutional questions that would naturally arise out of an attempt to extend the Broadcast Model to another medium of communication. I conclude that the framework that Fiss and Sunstein have proffered is too incompletely articulated to support a principled theory of free speech. The primary problem is that their theories fail to offer any basis for making the types of decisions and tradeoffs necessarily required by their democratically oriented vision of free speech.

This section then considers three institutional models that Fiss and Sunstein suggest can provide some guidance as to the type of communications environment needed to promote collective self-determination: the New England town meeting, Jeffersonian democracy, and the history of broadcast regulation by the

459. See Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's Democracy and the Problem of Free Speech*, 62 U. CHI. L. REV. 423, 443 (1995).

460. I borrow the outlines of this hypothetical example from Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 323 n.109 (1995).

461. See Fallon, *supra* note 377, at 885.

FCC. Upon close analysis, it becomes clear that none of them provide much assistance in determining the needs of a properly functioning democratic process.

1. Implementation of the Fiss-Sunstein Approach

As noted earlier, Fiss and Sunstein offer only minimal guidance as to the substance of their idealized vision of the democratic process.⁴⁶² Fiss invokes the concept of “robust public debate” as if the concept were self-explanatory. Simply put, the validity of government intervention turns on “whether the intervention in fact enriches rather than impoverishes the debate.”⁴⁶³ His failure to offer much elaboration on what such a concept requires does not trouble him. He flatly states that a benchmark definition specifying what robust public debate requires would be helpful but is not strictly necessary.⁴⁶⁴ Fiss recognizes that fashioning particular remedies will present “no easy question.”⁴⁶⁵ This is particularly so because of the omnipresent danger that regulation designed to enrich public debate may in fact impoverish it.⁴⁶⁶ As a result, the problems of balancing the various interests are likely to be “excruciating.”⁴⁶⁷ Still, Fiss ultimately places his faith in “the deliberate and incremental methods of the law” and takes comfort in “the old notion that it is easier to identify an injustice than to explain what is justice.”⁴⁶⁸

For his part, Sunstein offers a bit more guidance as to what his idealized vision of the democratic process requires. Although in a perfect world Sunstein would insist on a more complete set of preconditions,⁴⁶⁹ in the end he identifies two minimum requirements for a deliberative democracy to function properly: (1) a broad and deep attention to public issues and (2) public exposure to an appropriate diversity of views.⁴⁷⁰ In addition, Sunstein argues that the commitment to deliberative democracy requires extending a greater degree of protection to political speech than to nonpolitical speech.⁴⁷¹

Although such guidance is helpful, Sunstein recognizes that it leaves many questions unanswered and that the particular remedies to be applied “remain[] obscure.”⁴⁷² As a result, Sunstein calls for the government to be “frankly

462. See *supra* notes 345, 359–61 and accompanying text.

463. FISS, LIBERALISM DIVIDED, *supra* note 24, at 26.

464. *Id.* at 16.

465. *Id.*

466. *Id.* at 23–24.

467. *Id.* at 25.

468. *Id.* at 26.

469. See SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 20 (asserting that conditions for a properly functioning deliberative democracy include “adequate information; a norm of political equality . . . ; an absence of strategic manipulation of information, perspectives, processes, or outcomes; and a broad public orientation toward reaching right answers rather than serving self-interest”).

470. *Id.* at 20–21.

471. *Id.* at 123, 130–37.

472. *Id.* at 21; see also *id.* (noting that the appropriate remedy for the public’s failure to pay sufficient attention to public affairs “is far from clear”).

experimental” in working out the details.⁴⁷³ While the remedies may be unclear, what is clear to Sunstein is that “the current system is worse than imperfect; it creates extremely serious obstacles to a well-functioning system of free expression.”⁴⁷⁴ As a result, if a particular reading of the First Amendment bars such experimentation, then it is the First Amendment that must give way.⁴⁷⁵

The problem with such ad hoc approaches is that they fail to provide much guidance as to how to implement the systems that they envision. As Richard Fallon has pointed out, when speech is viewed in purely instrumental terms, “[c]laims of positive liberty are often at stake on both sides of debates about regulating speech.”⁴⁷⁶ As a result, any such theory “would need to specify how competing claims to positive liberty ought to be weighed.”⁴⁷⁷ The need for some articulation of this vision is further underscored by the use of the same analytical starting point as Fiss and Sunstein by scholars as diverse as Harry Kalven, Robert Bork, Vincent Blasi, and Lillian BeVier to develop radically different visions of free speech.⁴⁷⁸ A brief review of three constitutional issues likely to be raised by any attempt to extend the Broadcast Model to another medium should help illustrate just how difficult these implementation issues will be.

a. Affirmative Programming Obligations. One of the centerpieces of Fiss’s and Sunstein’s proposals is the continuation and expansion of affirmative programming obligations. As noted earlier, both tentatively propose a regulatory system that includes requiring greater and more appropriate coverage of political campaigns, greater support for children’s television, and the reinstatement of compulsory rights of reply.⁴⁷⁹ The difficulty is that in the absence of a clear articulation of what the democratic process requires, we lack a benchmark for determining whether and how much of any particular type of programming is needed.

Consider, for example, the call for greater support for children’s television.

473. SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 23, at 221.

474. *Id.* at 222; *see also* SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 89.

475. *See* SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 81 (arguing that “the First Amendment should not operate as a talismanic or reflexive obstacle to our efforts to experiment with different strategies for achieving free speech goals”); SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 23, at 220 (asking rhetorically why the Constitution should “bar a democratic decision to experiment with new methods for achieving their Madisonian goals”).

476. Fallon, *supra* note 377, at 884.

477. *Id.* at 885; *see also* Post, *supra* note 377, at 1112 (asking, without “a standard by which the quality of the thinking process of the community can be assessed[,] [h]ow . . . could it be known whether public discourse is actually meeting the common needs of all the members of the body politic?”); Redish & Kaludis, *supra* note 99, at 1109 (arguing that Fiss and Sunstein “must establish some workable standard by which . . . redistributive decisions are to be made”).

478. *See generally* Kalven, *supra* note 373; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 523; Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299 (1978).

479. *See supra* notes 345, 351, 365–68 and accompanying text.

Sunstein denigrates the current system as “clearly unsuccessful in terms of both quality and quantity” and avers that a “strong case” exists for requiring broadcasters to do more.⁴⁸⁰ The long tradition of decrying the quality of television programming gives this assertion a certain surface credibility.⁴⁸¹ But a more critical examination reveals that Sunstein’s claim may not be as plausible as it first seems.⁴⁸² Many observers insist that the quantity and quality of educational programming available to children has never been better.⁴⁸³ The Corporation for Public Broadcasting has increasingly redirected its resources towards children’s television. As a result, PBS has been able to augment its offerings with a growing cadre of new shows, including such hits as “Between the Lions” and “Zoboomafoo.” In addition, channels available on cable and other MVPDs, such as Nickelodeon, the Disney Channel, the ABC Family Channel, and new cable offerings such as Noggin, which is a joint venture between Nickelodeon and the Children’s Television Workshop, are providing an increasing variety of high-quality educational programming targeted at children, including such critically acclaimed shows as “Blue’s Clues,” “Bear in the Big Blue House,” and “Dora the Explorer.”⁴⁸⁴ In fact, Nickelodeon’s success in developing these programs has led CBS to give Nickelodeon control of its entire Saturday morning schedule, the day part that has long been the central focus for children’s programming. ABC has similarly delegated control of its Saturday morning programming to Disney and NBC has leased three hours of its Saturday morning lineup to the Discovery Channel.⁴⁸⁵ These educational options are augmented still further by the growing array of channels, such as the Discovery Channel, Animal Planet, and CNN, that offer news and documentary features targeted towards children.⁴⁸⁶ The increasing diffusion of video cassette recorders (VCRs) has expanded parents’ educational programming options even further because roughly ninety percent of U.S. households own a VCR⁴⁸⁷ and

480. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 84; *see also* SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 23, at 221 (“There is a strong case for public promotion of high-quality programming for children or for incentives, imposed by government on broadcasters, to provide such programming.”).

481. *See* Newton M. Minow, Address to the National Association of Broadcasters (May 9, 1961) (commonly known as the “Vast Wasteland” speech), *reprinted in* MINOW & LAMAY, *supra* note 52, at 185–96.

482. For a skeptical evaluation of Sunstein’s dismal assessment of contemporary news coverage, *see infra* note 493 and accompanying text.

483. *See, e.g.*, Tim Goodman, *Glory Days for Kids’ TV*, S.F. CHRON., Apr. 23, 2001, at E1 (observing that children’s television has become “one of the most competitive arenas in the industry” characterized by “a remarkable raising of standards and a mind-boggling array of options”).

484. *Id.*

485. Frank Ahrens, *That’s All Folks; Saturday Morning Tradition Fades as Networks Bow Out on Kids’ Shows*, SEATTLE TIMES, Jan. 26, 2002, at A3.

486. Goodman, *supra* note 483, at E1.

487. *See* Annual Assessment of Status of Competition in Mkt. for Delivery of Video Programming, Eighth Annual Report, 17 F.C.C.R. 1244, 1288 ¶ 96 (2002) (estimating VCR ownership at 90%); 2002 INTERNATIONAL TELEVISION & VIDEO ALMANAC 14 (47th ed., Tracy Stevens ed., 2002) (estimating VCR ownership at 86%); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 573

educational video cassettes are available through local video rental outlets and public libraries. All of these outlets have the added benefit of being less susceptible to the types of advertising pressure that can lead to the systematic underprovision of children's programming in the first place.⁴⁸⁸

And even those who agree with Sunstein's point about the inadequacy of children's television must confront the issue of how much additional programming is required. Current law makes it easier for stations to obtain renewal if they provide at least three hours of "core" children's programming each week.⁴⁸⁹ The level of detail with which Sunstein has articulated his theory provides little basis for determining whether three hours is in fact enough and how much more, if any, would be required.⁴⁹⁰

Similar problems surround Sunstein's call for free air time for political candidates. Any such scheme would immediately raise a host of practical questions. How much free air time and at what point in the campaign? Should the mandate apply to presidential elections, all federal elections, or state and local office as well?⁴⁹¹ Indeed, one could easily argue that state and local candidates present the more compelling case for such support. Presumably, each of these decisions would be made with respect to the particular demands of an idealized democratic process. But the lack of definition in Sunstein's proposal makes it impossible to determine how these issues should be resolved.

tbl.915 (1998) (estimating VCR ownership at 82%); TV DIMENSIONS 2000, at 137–38, 140 (Ed Papazian ed., 2000) (estimating VCR ownership at 91%).

488. The FCC's most recent assessment of the sufficiency of the current level of children's television focuses solely on the amount of children's programming provided by commercial television stations. See Policies & Rules Concerning Children's Television Programming, Report and Order, 11 F.C.C.R. 10660, 10676–79 ¶¶ 37–41 (1996) [hereinafter 1996 Children's Television Order]. As a result, it ignores the significant contributions to the children's television environment being offered by PBS, cable, and other nonbroadcast outlets. The FCC's reasons for doing so result primarily from the legislative intent expressed in enacting the Children's Television Act of 1990. *Id.* at 10680–81 ¶ 43; Policies & Rules Concerning Children's Television Programming, Report and Order, 6 F.C.C.R. 2111, 2116 ¶ 30 (1991). As a policy and constitutional matter, however, it does not seem sensible to ignore the contribution to the educational and information needs of children provided by alternative sources of programming. See Children's Television Programming & Advertising Practices, Report and Order, 96 F.C.C.2d 634, 645–46 ¶¶ 29–30 (1983) [hereinafter 1983 Children's Television Order]. It is true that less affluent households may not be able to afford cable programming. As I discuss in a later portion of this Article, this problem can be redressed more effectively through other means. See *infra* section V.E.

489. 1996 Children's Television Order, *supra* note 488, at 10718–19 ¶ 120.

490. There are other, equally thorny definitional issues lurking within the children's television issue. The FCC limits its definition to shows that have "serving the educational and informational needs of children aged 16 and under as a significant purpose." *Id.* at ¶ 84. Presumably, Sunstein's theory would have to justify ignoring programming oriented towards the entire family despite the contribution of that programming to the education of children. See 1983 Children's Television Order, *supra* note 488, at 646–47 ¶ 31. In addition, the FCC chose not to limit its definition to programming that furthers children's "cognitive and intellectual development," opting instead to include programs that promote children's "social and emotional development" as well. 1996 Children's Television Order, *supra* note 488, at 10701 ¶ 87. Such a distinction runs the simultaneous risk of being unmanageable and being susceptible to manipulation.

491. Compare 47 U.S.C. § 315(a) (2000) (guaranteeing equal access to all candidates), with *id.* 47 U.S.C. § 312(a)(7) (2000) (limiting reasonable access to federal candidates).

In addition, Sunstein seems to envision a particular format for this speech, suggesting that it should be used for substantial speeches on substantive issues and should not be used for “sound bites” or “infotainment.”⁴⁹² The source of these particular limitations is far from clear. Indeed, the preference for particular formats threatens to skew the debate in substantive ways. As the original Kennedy-Nixon debates and the subsequent wrangling over debate formats during every presidential election since has demonstrated, the choice of format will typically favor particular candidates. It is equally hard to understand precisely what to make of Sunstein’s infotainment criticism.⁴⁹³ Two of the most significant media events of the 1992 presidential campaign—Ross Perot’s appearance on “The Larry King Show” and Bill Clinton’s stint as a saxophone player on “The Arsenio Hall Show”—appear to fall outside of the type of speech that Sunstein seeks to promote. Yet both cases underscore the extent to which the format can play an integral role in shaping democratic outcomes.

In addition, the existence of multiple affirmative programming obligations inevitably raises the prospect that policymakers will have to trade off two forms of high-value speech against each other. The omnipresent reality of limited resources as well as the mandates of administrative law will inevitably force the regulatory authorities to offer a more reasoned explanation of how to resolve these competing claims in a rational manner. The demands of Sunstein’s vision of the First Amendment will be no less insistent. Sunstein’s failure to provide any basis for resolving such questions is particularly surprising in light of his frequent dismissal of competing theories as too ad hoc.⁴⁹⁴ Such criticism would seem to apply with equal force to his own work.

b. The Distinction Between Political and Nonpolitical Speech. Both Fiss and Sunstein place the greatest importance on speech that promotes collective self-determination. As a result, any implementation of their theories raises two questions. First, precisely what types of speech merit greater solicitude under the First Amendment? Second, what degree of protection does that greater solicitude entail? I will consider each question in turn.

Neither Fiss nor Sunstein offer a satisfactory description of what types of speech warrant the highest degree of First Amendment protection. Fiss is quite vague on this point. Although he constantly emphasizes the importance of promoting robust public debate, he never offers much in the way of explanation of what types of speech fall within its scope. As a result, we are left to infer his position from the examples that he provides. Unfortunately, even these examples are not easily synthesized. Apparently the photographs of Robert Map-

492. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 60–61, 82, 85; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 221; Sunstein, *supra* note 23, at 553–54.

493. See Sunstein, *supra* note 23, at 527 (denigrating MSNBC as “soft news”).

494. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 141, 146, 150; see also *id.* at 178 (criticizing free speech theories based on the marketplace of ideas on the ground that the proponents are unable to describe what a properly functioning marketplace of ideas would look like).

plethorpe, which unabashedly offer vivid depictions of the sexual practices of the gay community, qualify as a contribution to robust public debate,⁴⁹⁵ while the cross burning banned by the ordinance at issue in *R.A.V. v. City of St. Paul*⁴⁹⁶ does not.⁴⁹⁷ Fiss's discussions of these particular examples only serve to confuse the issue further. On the one hand, Fiss argues that the political content of the Mapplethorpe exhibit stemmed from the fact that it represented an "angry protest" by the gay community and that the shocking nature of some of the pictures represented an intrinsic part of that protest.⁴⁹⁸ On the other hand, with respect to *R.A.V.*, Fiss regards the shocking nature of the speech as a justification for its regulation rather than its protection.⁴⁹⁹ Although it is undoubtedly possible to reconcile these positions, Fiss does not offer any means for doing so. Anyone attempting to turn his theory into a coherent scheme of regulation is left guessing about what speech should be regarded as worthy of the highest levels of First Amendment concern.

Sunstein offers a little more guidance in identifying the types of speech that will obtain the most protection under his theory. Sunstein would reserve the highest degree of First Amendment protection for "political speech,"⁵⁰⁰ which he defines as speech "both intended and received as a contribution to public deliberation about some issue."⁵⁰¹ As a result, his definition would encompass "all art and literature that have the characteristics of social commentary," including *Ulysses*, *Bleak House*, and the Mapplethorpe exhibit.⁵⁰² The key to keeping this distinction from losing all meaning is to eschew focusing on whether particular speech has political consequences.⁵⁰³ This argument necessarily suggests that it is the intent, rather than the reception, that gives his definition analytical traction.

Even as an exercise in pure line drawing, the distinction proffered by Sunstein is somewhat questionable. Indeed, it bears a striking similarity to the test announced in *Spence v. Washington*⁵⁰⁴ for distinguishing between expressive and nonexpressive conduct that has been criticized as indeterminate.⁵⁰⁵ A

495. FISS, LIBERALISM DIVIDED, *supra* note 24, at 91–94.

496. 505 U.S. 377 (1992).

497. FISS, LIBERALISM DIVIDED, *supra* note 24, at 111–20.

498. *Id.* at 94.

499. *Id.* at 116–17. Equally curious is that at one point Fiss finds political content in "The Love Boat" because it projects a particular view of the world. And yet, immediately thereafter he calls the choice between "The Love Boat" and "Fantasy Island" trivial. *Compare id.* at 15, *with id.* at 17.

500. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 9–11, 121–22.

501. *Id.* at 130 (emphasis omitted); SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 236.

502. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 152–53.

503. *Id.* at 131, 154.

504. 418 U.S. 405, 410–11 (1974) (holding that conduct falls within the ambit of the First Amendment if "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

505. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW § 11.3.6.1, at 868 (1997); R. Polk Wagner, Note, *The Medium Is the Mistake: The Law of Software for the First Amendment*, 51 STAN. L. REV. 387, 394 (1999).

more fundamental problem is that Sunstein's test appears to bear little relation to his theory of free speech. When viewed from the perspective of promoting collective self-determination, Sunstein's admonition against focusing on the effects of particular speech appears quite strange. On the contrary, one might think that his desire to promote the democratic process might lead him to focus solely on the impact of the speech and to ignore individual motivation altogether.

With respect to the second question, even after it is determined that particular speech merits the greatest degree of First Amendment protection, it is hard to determine precisely what this additional solicitude would entail. Again, it is Sunstein who provides the more complete articulation. In his view, attempts to regulate political speech carry the strongest presumption of unconstitutionality and require a showing of likely, immediate, and grave harm.⁵⁰⁶ Although this statement accords well enough with conventional doctrine, it is hard to reconcile with the specific policy measures that Sunstein proposes. For example, one of the reforms that Sunstein advocates is the improvement of news coverage, particularly with respect to elections.⁵⁰⁷ Sunstein's clear endorsement of governmental interference with such a core political process raises seemingly intractable questions about what it means to treat regulations of political speech as presumptively unconstitutional. Indeed, his willingness to do so is ironic considering that one of his primary arguments for protecting political speech is the greater likelihood of government partiality.⁵⁰⁸

c. State Action Doctrine. In calling for governmental intervention to redress distortions caused by private speech choices, Fiss and Sunstein must also confront the state action doctrine. Although a number of free speech theorists have called for an end to the public-private distinction,⁵⁰⁹ Fiss and Sunstein claim to be more circumspect and eschew any desire to abandon the doctrine altogether.⁵¹⁰ Their reasons for doing so are understandable. The state action doctrine has long been central to the relationship between the individual and the state in classic liberal thought⁵¹¹ and has played a critical role in mediating

506. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 9, 122–23.

507. *Id.* at 59–62, 81–82, 85.

508. *Id.* at 134.

509. See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 394–414. See generally Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 689–91 (1994) (collecting commentary).

510. Fiss disclaims any intent “to deny altogether the distinction between state and citizen presupposed by classical liberalism.” FISS, LIBERALISM DIVIDED, *supra* note 24, at 18. Sunstein is even more lavish in his praise for the doctrine, arguing that “[i]n fact there should be enthusiastic agreement that the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question.” SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 204; see also *id.* at 71, 160; SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 36 (“The constitutional text aims at ‘Congress,’ not at the owners of newspapers and radio stations.”).

511. See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 87–89 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); BERLIN, *supra* note 457, at 124.

between the individual and the collective will by “preserv[ing] an area of individual freedom.”⁵¹² Fiss’s and Sunstein’s stated commitment to limiting the First Amendment to state action insinuates that they will provide a theory that will allow courts to distinguish private action from state action based on the needs of the democratic process. A review of their proposals reveals that no such principled distinction emerges.

Fiss argues that the affairs of broadcasters and the state are sufficiently intertwined to justify regarding the former as state actors. Broadcasters receive the benefits of the state’s general laws of contract, property, corporations, and taxation. In addition, broadcasters depend upon the licenses they receive from the federal government that give them the exclusive right to use a portion of the spectrum, and public broadcasters in particular depend upon federal subsidies. Most importantly, Fiss argues that broadcasting serves the important public function of educating the citizenry. As a result, broadcasters are properly regarded as a hybrid of the public and private.⁵¹³

The problem is that none of the criteria proposed by Fiss provides a principled basis for distinguishing between state and private action. Consider, for example, his argument that reliance on background principles of private law is sufficient to support a finding of state action. Any such rule would swallow the doctrine whole because it would in effect bring everything within the ambit of state action.⁵¹⁴ Equally expansive is Fiss’s suggestion that because broadcasters

512. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); *accord* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

513. FISS, LIBERALISM DIVIDED, *supra* note 24, at 18; Fiss, *supra* note 24, at 1223, 1236.

514. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53 (1999) (“We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it.”); *Tulsa Prof. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (“Private use of state-sanctioned private remedies or procedures does not rise to the level of state action.”); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543–44 (1987) (noting that the fact that “[a]ll corporations act under charters granted by a government” does not deprive them of “their essentially private character”); *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 n.10 (1978) (“It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to ‘state action’ even though no process or state officials were ever involved in enforcing that body of law.”). Other decisions have spurned the notion that the receipt of benefits conferred by the government such as licenses or subsidies was sufficient to turn a private actor into a state actor. *See San Francisco*, 483 U.S. at 544; *Blum v. Yaretsky*, 457 U.S. 991, 1005, 1011 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *CBS v. DNC*, 412 U.S. 94, 114–21 (1973) (plurality opinion); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175, 177 (1972).

As an aside, such an interpretation of the state action doctrine would represent a historical anomaly. As noted earlier, the text of the First Amendment is directed only at Congress. The First Amendment was not construed as applying to the states until the Court incorporated it by way of the Fourteenth Amendment in *Gitlow v. New York*, 268 U.S. 652 (1925). Prior to *Gitlow*, it would have been nonsensical to argue that background principles of contract, property, or corporations law were sufficient to support state action because at that time the First Amendment was construed as a limit on the federal government. The incorporation of the First Amendment effected by *Gitlow* was intended to

perform a public function, they are state actors for First Amendment purposes. It is doubtful that such a rule can preserve the bastion of individual freedom envisioned by liberalism. As Fiss himself concedes, this principle would encompass the print media as well as “all corporations, unions, universities, and political organizations.”⁵¹⁵ In addition, any attempt to identify entities that serve public functions would be tantamount to a return to the *Lochner* era’s now discredited attempt to allow governmental greater regulation of industries “affected with a public interest.”⁵¹⁶

Sunstein’s attempts to reconcile his theory with the state action doctrine are similarly unsuccessful. At some points, Sunstein appears to echo Fiss’s suggestion that because broadcasters benefit from the protection conferred by property law and hold licenses issued by the government, they are state actors.⁵¹⁷ At other points, Sunstein candidly concedes that allowing the role of the government in enforcing property, contract, and tort law to render private action into state action would render the doctrine a nullity.⁵¹⁸ The “real question” for Sunstein is whether the action in question “violates . . . any . . . constitutional provision. . . . It is a question about the meaning of the Constitution, not about state action.”⁵¹⁹ Thus, in a First Amendment case, Sunstein argues that whether an action taken by a private entity constituted state action would turn largely on whether the restriction in question was content-neutral or content-based.⁵²⁰ The effect of this proposal is to collapse the state action inquiry into the merits of the underlying constitutional claim, thereby eliminating it as an independent element of jurisprudence. In short, neither Fiss nor Sunstein are able to reconcile their theories with the separation between state and individual envisioned by classical liberalism and embodied in the distinction between state and private action. Their claims of fealty to the state action doctrine notwithstanding, the positions that they advocate would swallow the doctrine whole.

Indeed, an analysis of the role that broadcasters and other media entities play in the democratic process reveals the inherent contradiction in regarding them as state actors. What is perhaps most striking is that the Court has underscored the importance of editorial independence⁵²¹ even when the broadcaster in

enlarge the jurisdictional reach of the First Amendment; it was not intended to expand its substantive scope. Thus, to the extent that general background principles of state private law were insufficient to justify finding state action prior to *Gitlow*, it should similarly be insufficient even after the Court construed the First Amendment as applying against the states.

515. FISS, LIBERALISM DIVIDED, *supra* note 24, at 18.

516. *Jackson*, 419 U.S. at 352–54 (citing *Nebbia v. New York*, 291 U.S. 502, 536 (1934)).

517. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 44–45.

518. *Id.* at 36–37; SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 72, 209.

519. SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 160.

520. *Id.* at 205.

521. *See, e.g.*, *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979); *CBS v. DNC*, 412 U.S. 94, 116–21 (1973) (plurality opinion); *cf.* *Licensee Responsibility to Review Records Before Their Broad.*, 31 F.C.C.2d 377, 379 ¶ 7 (1971) (mem. op. & order); *En Banc Programming Inquiry, Report and Statement of Policy*, 44 F.C.C. 2303, 2308–09 (1960); *FCC, REPORT ON CHAIN BROADCASTING*, *supra* note 2, at 65–66.

question was itself a state agency.⁵²² Without such independence, it is impossible for the media to serve as the check against governmental abuse envisioned by their role as the Fourth Estate.⁵²³ The implication is that the media have an adversarial relationship with the government that is analogous to the role of public defenders, who are not regarded as state actors, although they are in fact government employees.⁵²⁴ As a result, it comes as no surprise that courts have almost invariably concluded that broadcasters are not state actors.⁵²⁵

2. Institutional Guideposts

In the face of such profound implementation problems, the ad hoc, directional advice offered by Fiss and Sunstein appears insufficient. Rather than provide more concrete substantive guidance, both Fiss and Sunstein turn to certain institutional structures to help give content to the mandate to promote robust public debate. First, Fiss suggests that one can draw inspiration from the role of the parliamentarian at a New England town meeting. Second, Fiss suggests that one can gain insights into the needs of the democratic process by comparing the current state of the world to the speech environment of the Jeffersonian era. Lastly, both Fiss and Sunstein suggest that certain features of the federal government provide greater reason to be confident in the government's ability to manage the uncertainties of this process. I will discuss each in turn.

a. Democratic Process as Artifact: The Metaphor of the Town Meeting. Fiss draws on the work of Alexander Meiklejohn⁵²⁶ to suggest that the state may

522. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998); see also FCC v. League of Women Voters, 468 U.S. 364, 378 (1984).

523. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 460–62, 488–93, 524, 533–34 (1983); Blasi, *supra* note 478, at 541–42; Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 633–34 (1975).

524. See Polk v. Dodson, 454 U.S. 312, 324–25 (1981) (holding that a public defender did not act under "color of state law").

525. See, e.g., DeBauche v. Trani, 191 F.3d 499, 506–09 (4th Cir. 1999); Belluso v. Turner Communications Corp., 633 F.2d 393, 398–400 (5th Cir. 1980); Kuzco v. W. Conn. Broad. Co., 566 F.2d 384, 387 (2d Cir. 1977); Mass. Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 501 (1st Cir. 1950) (per curiam); McIntire v. William Penn Broad. Co., 151 F.2d 597, 601 (3rd Cir. 1945); Mehdi v. Boyce, 931 F. Supp. 268, 270 (S.D.N.Y. 1996), *aff'd mem.*, 125 F.3d 844 (2d Cir. 1997); Tilton v. Capital Cities/ABC Inc., 827 F. Supp. 674, 682 (N.D. Okla. 1993); Rokus v. ABC, Inc., 616 F. Supp. 110 (S.D.N.Y. 1984); Levitch v. CBS, Inc., 495 F. Supp. 649, 655–56 (S.D.N.Y. 1980); Cent. N.Y. Right to Life Fed'n v. Radio Station WIBX, 479 F. Supp. 8, 11 (N.D.N.Y. 1979); Moro v. Telemundo Incorporato, 387 F. Supp. 920, 925 (D.P.R. 1974); Smothers v. CBS, Inc., 351 F. Supp. 622, 627 (C.D. Cal. 1972); Post v. Payton, 323 F. Supp 799, 803–04 (E.D.N.Y. 1971). A four-to-two plurality of the Supreme Court took the same position in *CBS v. DNC*. Compare 412 U.S. at 115 n.14, 116, 120–21 (plurality opinion) (Burger, C.J., joined by Rehnquist & Stewart, JJ.) (concluding that broadcasters were not state actors), *id.* at 139–40 (Stewart, J., concurring) (same), and *id.* at 150 (Douglas, J., concurring in the judgment) (same), with *id.* at 174–81 (Brennan, J., joined by Marshall, J., dissenting) (concluding that broadcasters were state actors). Three other Justices reserved the question, thus depriving the Court of a majority opinion on this issue. *Id.* at 147 (White, J., concurring in part); *id.* at 148 (Blackmun, J., joined by Powell, J., concurring in part).

526. E.g., MEIKLEJOHN, *FREE SPEECH*, *supra* note 373, at 22–27; MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 373, at 24–27; Meiklejohn, *supra* note 373, at 259–61; see also Harry Kalven, Jr., *The*

play the role of the parliamentarian in a classic New England town meeting by simply ordering the agenda and metering the extent to which people participate in the dialogue.⁵²⁷ Fiss believes that this agenda will evolve “organically” in a manner external to the public debate itself.⁵²⁸ He further suggests that in its role as parliamentarian, the government would do more than just apply a neutral procedural principle, like temporal priority. This role requires the state be “sensitive to the excesses of advocacy and the impact of such excesses on the fullness of debate.”⁵²⁹ As a result, Fiss envisions the state guarding against repetitious speech by saying, in effect, “We have heard that point several times now,” or “Let’s hear from the other side.”⁵³⁰ In addition, Fiss argues that the state can limit “[u]gly, hateful speech” that may silence others.⁵³¹ Thus, the state as parliamentarian will have to exercise content-based judgments in setting its agenda. The First Amendment, in Fiss’s view, only bars the government from making content-based judgments that are intended to affect substantive outcomes; it does not extend to content-based judgments made to “protect the integrity of the deliberative process.”⁵³²

There is reason to doubt the validity of the rigid division between agenda setting and substantive outcomes upon which Fiss’s theory depends. Agenda setting and procedure are as much part of self-determination as is the substance of the debate. In other words, “Just what is a political issue is itself a political issue.”⁵³³ Consider what Fiss regards as the easiest example: repetitious speech. What is strange about this position is that Fiss himself recognizes that mainstream entertainment-oriented speech is highly political, in that it shapes political values by reinforcing messages.⁵³⁴ It thus follows that orthodox and repetitive speech can be as much a part of a robust public discourse as dissident speech.⁵³⁵

Concept of the Public Forum, 1965 SUP. CT. REV. 1, 23–25 (emphasizing the distinction between parliamentary rules and rules governing content and arguing that “concessions on [the parliamentary] front should not be taken as relevant to . . . questions of control of content”).

527. FISS, IRONY OF FREE SPEECH, *supra* note 24, at 21–24; FISS, LIBERALISM DIVIDED, *supra* note 24, at 85, 101, 118–19, 153.

528. FISS, LIBERALISM DIVIDED, *supra* note 24, at 118.

529. *Id.* at 118.

530. *Id.* at 153; *see also id.* at 85 (arguing that a parliamentarian may “requir[e] some to shut up so others can speak” without engaging in censorship).

531. *Id.* at 118.

532. *Id.* at 153.

533. Post, *supra* note 409, at 1539 (internal quotation marks omitted).

534. FISS, LIBERALISM DIVIDED, *supra* note 24, at 15 (noting that even such shows as “The Love Boat” project “a view of the world . . . which in turn tends to define and order our options and choices”).

535. As Kenneth Karst has noted, “even the repetition of speech conveys the distinctive message that an opinion is widely shared,” which is of “great importance in an ‘other-directed society’ where opinion polls are self-fulfilling prophecies.” As a result, it is impossible for the state to know when “‘everything worth saying’ has been said.” Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975); *see also* Bhagwat, *supra* note 26, at 182–83 (arguing that “mass media plays an essential role in inculcating, or perhaps reinforcing, basic political values through sheer repetition of the message that the basic American political institutions are flawless and ideal”).

Even more troubling is the problem of “ugly, hateful speech.” As noted earlier, the Court has repeatedly disparaged its usefulness as a constitutional category.⁵³⁶ For example, in *Hustler Magazine v. Falwell*,⁵³⁷ the Court expressed doubt as to the existence of a “principled standard” to distinguish between speech that enhances the public discourse and “outrageous” speech that does not.⁵³⁸ Similarly, as the Court observed in *Cohen v. California*,⁵³⁹ true political speech “may often appear to be only verbal tumult, discord, and even offensive utterance.”⁵⁴⁰ Indeed, some degree of “verbal cacophony” is a “necessary side effect[]” of “a society as diverse and populous as ours” and “is, in this sense not a sign of weakness but of strength.”⁵⁴¹ In fact, as the Court noted in *Texas v. Johnson*,⁵⁴² “a principal ‘function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’”⁵⁴³ That is why Holmes warned that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.”⁵⁴⁴

b. Jeffersonian Democracy as a Baseline. Fiss further suggests that the Jeffersonian era can provide an appropriate benchmark for measuring the quality of the current level of public discourse. His assumption is that “[i]n a Jeffersonian democracy, . . . where the dominant social unit is the individual and power is distributed equally, autonomy might well enhance public debate and thus promote collective self-determination.”⁵⁴⁵ If true, the diffuse nature of Jeffersonian society can provide a basis for evaluating the efficacy of the current speech environment. The farther the present deviates from that baseline, the more justifiable is greater government control over speech.

The problem is that the baseline that Fiss invokes does not support the type of speech universe that he apparently envisions. Fiss’s ideal is a balanced exploration of the issues. The public discourse in Jefferson’s era was anything but. Fairness and responsibility did not emerge as journalistic values until well into twentieth century. In Jefferson’s day, the printers placed the greatest import on passionate commitment to ideological debate. As a result, the press was highly

536. See *supra* notes 76–77, 265 and accompanying text.

537. 485 U.S. 46 (1988).

538. *Id.* at 55.

539. 403 U.S. 15 (1971).

540. *Id.* at 24–25.

541. *Id.* at 25.

542. 491 U.S. 397 (1989).

543. *Id.* at 408–09 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

544. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *supra* notes 76–77, 265 and accompanying text (citing cases holding that the fact that speech often excites anger is typically a reason to protect it, not restrict it).

545. FISS, LIBERALISM DIVIDED, *supra* note 24, at 37–38; see also *id.* at 12–14, 18, 49–50 (noting the shift in paradigmatic speaker envisioned by the First Amendment from the street corner speaker to CBS).

partisan and highly dependent on political patronage for their economic survival.⁵⁴⁶ To the extent that the sober reflection commonly associated with the Constitutional Convention and the Federalist Papers existed at all, it was a product of the homogeneity of the Founders' backgrounds as well as the disenfranchisement of blacks, women, and landless males.⁵⁴⁷ It thus seems far from clear that Jeffersonian democracy represents a normatively attractive baseline for measuring the quality of current speech.

It is also possible to dispute Fiss's dismal assessment of the current environment. A review of the television listings reveals that more news and information programming is available than ever before. Not only are CNN and a growing cohort of competitors providing news programming around the clock, news magazines such as "Dateline" and "20/20" dot the primetime lineups of the major broadcast networks as well. Documentaries on a wide variety of subjects are available twenty-four hours a day on cable television, and cable is spawning a growing number of local news channels. The radio dial crackles with political speech, as talk radio has come to dominate the AM band. Indeed, the experience with talk radio provides some evidence that attempts to promote balanced reporting may in fact be inconsistent with the quest for robust political speech. An empirical study by Thomas Hazlett and David Sosa suggests that the repeal of the Fairness Doctrine was the trigger that led to the talk radio explosion.⁵⁴⁸

The Jeffersonian world that Fiss would use as his baseline thus has more in common with the modern, discordant world of talk radio and sound bites than it does with the world of balanced reporting that he envisions. In addition, it is hard to see how those dissatisfied with the current speech environment can base their complaints on the total quantity of political speech being uttered. More qualitative complaints ultimately must be based on a more fine-tuned assessment of what constitutes good and bad political speech. As the foregoing discussion demonstrates, the mere invocation of Jeffersonian democracy cannot substitute for Fiss's failure to articulate a basis for drawing such a distinction.

c. Institutional Faith in the FCC. Finally, both Fiss and Sunstein draw comfort from the past history of broadcast regulation. Fiss acknowledges that the same social forces that are controlling private media entities will exert a similar influence over the government as well. If so, government intervention may be more likely to reinforce the existing distortions to the public discourse than to ameliorate them.⁵⁴⁹ Nonetheless, Fiss chooses to be optimistic, arguing that

546. See David L. Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 12–14 (1973–1974).

547. See L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 183 (1987).

548. Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"?* *Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997).

549. FISS, LIBERALISM DIVIDED, *supra* note 24, at 23–26, 43; see also Fiss, *supra* note 24, at 1218 (describing Richard Nixon's attempt to use the broadcast licensing process to suppress criticism of his Administration).

“our historical experience with the activist state in the sixties” justifies “believ[ing] that the elements of independence possessed by the state are real and substantial.”⁵⁵⁰ In addition, institutional arrangements, such as the use of independent agencies like the FCC, should help ensure that government intervention is not the product of political manipulation.⁵⁵¹ Fiss finds that the FCC has avoided these pitfalls for the most part, noting that “[a]lthough regulators have looked at the content of programs when awarding broadcast licenses, they have only done so to make certain that there is sufficient coverage of public issues and to enforce well-defined boundaries regarding depictions of sexuality.”⁵⁵² And on those occasions when the FCC fails to promote robust public debate, the courts act as the ultimate guarantor of constitutional rights.⁵⁵³

Sunstein similarly acknowledges that “a central principle of American constitutionalism is that the most serious risks to liberty come from government.”⁵⁵⁴ At the same time, “a sensible view of government’s incentives” suggests that there is no reason to be “especially suspicious of government regulation of nonpolitical speech.”⁵⁵⁵ And even with respect to political speech, Sunstein similarly suggests that the success of past regulatory efforts makes it “plausible to think that government decisions can be made in a relatively nonpartisan way.”⁵⁵⁶ In particular, he joins Fiss in lauding the government’s role in fostering the creation of local news, children’s television, and public television,⁵⁵⁷ although he parts company with Fiss in questioning the propriety of involving the federal courts in this enterprise.⁵⁵⁸ In light of this track record, Sunstein suggests that “[w]e have no basis for doubting that much larger improvements could be brought about in the future.”⁵⁵⁹

What is missing from these observations is anything more than a token appearance of the First Amendment’s traditional suspicion of governmental interference with speech. Such suspicion is deeply rooted in the history of the Founding and has been buttressed by the struggles with communist and anti-war speech that led to many of the seminal decisions in the First Amendment canon.⁵⁶⁰ As noted earlier, there is also an equally substantial body of scholarship that regards the institutional press as a “Fourth Estate” charged with

550. FISS, LIBERALISM DIVIDED, *supra* note 24, at 43.

551. *Id.* at 153.

552. Fiss, *supra* note 24, at 1223.

553. FISS, LIBERALISM DIVIDED, *supra* note 24, at 25–26, 44.

554. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 36.

555. *Id.* at 134–35, 146.

556. *Id.* at 89.

557. *Id.*

558. *Id.* at 92, 104–05.

559. *Id.* at 89; *see also* SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 222 (same).

560. *See, e.g.*, SCHAUER, *supra* note 391, at 81; MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 51–66, 179–99 (1983); Blasi, *supra* note 478, at 527–44; Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1426–27 (1987); Redish & Kaludis, *supra* note 99, at 1110–11; Stone, *supra* note 391, at 1173–75.

checking the excesses of the government.⁵⁶¹ The existence of these alternative traditions indicates that any instrumental vision of speech cannot simply assert the benevolence of the state a priori. Such an approach begs the equally important question “[w]hether government intervention would make the unfair market better or worse than it already is.”⁵⁶²

The ambiguity as to whether governmental intervention will promote or hinder democracy is well illustrated by the work of Vincent Blasi. A comparison of his approach with the approach taken by Fiss and Sunstein reveals many similarities. Blasi accepts viewing speech almost entirely in instrumental terms and concurs that the primary value to be promoted is the proper functioning of the democratic process.⁵⁶³ He nonetheless provides a powerful theoretical argument opposing the type of remedies that Fiss and Sunstein propose. Specifically, Blasi argues that state power is not simply one of many forces shaping speech, but rather that it poses a more serious threat to speech than the abuse of private power.⁵⁶⁴ Drawing on themes advanced by Holmes,⁵⁶⁵ Blasi argues that the state is unique in its intrusive investigatory powers, its monopoly over legitimized violence, and the ease with which its resources can be mobilized.⁵⁶⁶ In addition, official power carries with it a moral and symbolic significance that makes it more menacing than private power.⁵⁶⁷ As a result, Blasi argues that exercises of state power raise particularly significant reasons for concern.⁵⁶⁸ The reality of this threat causes Blasi to search for a competing institution that can serve as a counterweight to the Leviathan. And the private actor that he sees best situated to offset the power of the government is the “well-organized, well-financed, professional critics” in the institutional press.⁵⁶⁹ Allowing the government to curb what it perceives as the excesses of the private media, however, would compromise the latter’s ability to serve as this institutional check.

Blasi’s work demonstrates the ease with which one can draw different conclusions from the same premises advanced by Fiss and Sunstein. In particular, Blasi’s analysis underscores the danger of simply assuming a priori that governmental intervention will be an improvement. Fiss and Sunstein present

561. See *supra* note 523 and accompanying text.

562. Shiffrin, *supra* note 509, at 714; see also Neuborne, *supra* note 459, at 439 (claiming that “although Prof. Sunstein vests the government with powerful discretionary tools to regulate speech, he cannot assure that those tools would be any less subject to the harmful influences that he claims currently distort the laissez-faire speech market”). Shiffrin appears to have distanced himself from this conclusion in his more recent work. See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 115–20 (1999).

563. Blasi, *supra* note 478, at 558.

564. *Id.* at 538.

565. See OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920).

566. Blasi, *supra* note 478, at 538–39.

567. *Id.* at 540.

568. *Id.* at 538–41.

569. *Id.* at 541–42.

little analytical justification for their faith in the innocuousness of governmental action. For the most part, they are content to draw comfort from what they perceive as the success of past regulatory efforts.⁵⁷⁰ Their enthusiasm for the past is hard to reconcile with the actual performance of the FCC, however. The works of Louis Jaffe, Bernard Schwartz, Henry Friendly, Glen Robinson, Ithiel de Sola Pool, Scot Powe, Matthew Spitzer, and Thomas Hazlett, among others, have documented countless examples of political abuse in the regulatory process.⁵⁷¹ Although contrary voices have occasionally arisen,⁵⁷² the weight of the empirical record underscores the constitutional hazards surrounding Fiss's and Sunstein's positions.

Consider the Fairness Doctrine,⁵⁷³ which has talismanic significance for both Fiss and Sunstein. The historical evidence now suggests that the Fairness Doctrine has been widely manipulated for political ends.⁵⁷⁴ Perhaps most ironic are the revelations about the circumstances giving rise to *Red Lion*, which sustained the constitutionality of the Fairness Doctrine and represents perhaps the central precedent supporting Fiss's and Sunstein's positions. It is now acknowledged that *Red Lion* arose out of a campaign orchestrated by the Kennedy and Johnson Administrations to use the Fairness Doctrine to suppress political criticism from the right.⁵⁷⁵ Thus, the prime example of the type of regulatory measures that Fiss and Sunstein support demonstrates the political corruption that can occur when the government interferes with private speech.

Indeed, there is something quite puzzling about Fiss's and Sunstein's willingness to rely on the FCC. Both have candidly recognized the imperfections of the administrative process.⁵⁷⁶ Sunstein's faith in the FCC is even more ironic when he defends his two-tiered vision of the First Amendment because "the premise of distrust of government is strongest when politics is at issue."⁵⁷⁷ In light of this recognition, it is difficult to see how he can rely on the FCC as an appropriate mechanism for effecting the increases in the amount and quality of

570. See *supra* notes 549–61 and accompanying text.

571. See FRIENDLY, *supra* note 41, at 72; POOL, *supra* note 51, at 119–28, 135; POWE, *supra* note 51, at 69–74, 83–84, 112–16, 121–29, 131–41; Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 933–34 (1997); Jaffe, *supra* note 44, at 79; Robinson, *supra* note 46, at 238; Schwartz, *supra* note 44, at 694; Spitzer, *supra* note 208, at 1048–52.

572. See BOLLINGER, *supra* note 11, at 115 ("[O]ne of the more interesting features of the broadcast regulation experience has been the absence of egregious abuses by the FCC. The commission has, on the whole, been extraordinarily circumspect in the exercise of its powers.")

573. See *supra* notes 92, 209–14 and accompanying text (describing the Fairness Doctrine and its repeal).

574. See KRATTENMAKER & POWE, *supra* note 72, at 248–49; Hazlett, *supra* note 115, at 168–69.

575. See FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 6–34 (1975); POWE, *supra* note 51, at 112–16; Hazlett, *supra* note 571, at 933–34; Jaffe, *supra* note 50, at 1700; Spitzer, *supra* note 208, at 1051–52.

576. See FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 44; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985).

577. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 134.

information regarding political campaigns that represent one of the central elements of his program for reform.

There thus seems to be little theoretical or historical reason to draw comfort from the federal government's ability to regulate the broadcast industry. In the end, Fiss embraces government intervention simply because he sees no other alternative. Fiss turns to the state "because it is the only hope, the only means to correct the distorting influence of social structure on public debate."⁵⁷⁸ Although Fiss acknowledges the risk of serious governmental misconduct, "[t]he hope against hope is that in the final analysis we will be better off than under a regime of autonomy."⁵⁷⁹ Sunstein similarly defends his theory simply by arguing that the current state of affairs is so unacceptable that something must be done. According to Sunstein, the remedies he proposes are justified simply because "the current system is worse than imperfect; it creates extremely serious obstacles to a well-functioning system of free expression."⁵⁸⁰ If the Constitution bars such experimentation, then it seems clear to Sunstein that something is wrong with the Constitution: "[W]hy should the Constitution bar a democratic decision to experiment with new methods for achieving their Madisonian goals?"⁵⁸¹ The question suggests an approach in which the exigencies of the democratic process provide their own constitutional justification. Such a vision turns the First Amendment into simply the residuum after the basic regulatory questions are answered and would eliminate it as an independent check on the government.

In sum, Fiss and Sunstein have no substantive answer to concerns about governmental abuse. Their proposals are driven entirely by an acute sense of the existing problems. The narrowness of their focus leads them to stop short of offering any serious analysis of whether the solutions that they propose will in fact redress the problems that they perceive. In the absence of a more principled justification for believing why state intervention may create a better state of affairs, placing speech within governmental control is little better than a "riverboat gamble."⁵⁸² Indeed, the concerns about governmental abuse that underlie the creation and development of the First Amendment and the demonstrated track record of the FCC and Congress in broadcast regulation suggest that as gambles go, Fiss's and Sunstein's face particularly long odds.

578. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 25.

579. *Id.*

580. SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 23, at 222; *see also* SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 89 ("The absence of continuous government supervision should not obscure the point. With respect to attention to public issues, the present system badly deserves Madisonian goals.").

581. SUNSTEIN, *PARTIAL CONSTITUTION*, *supra* note 23, at 220; *see also* SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 81 ("The most important point is that the First Amendment should not operate as a talismanic or reflexive obstacle to our efforts to experiment with different strategies for achieving free speech goals.").

582. Shiffrin, *supra* note 509, at 717.

C. CRITIQUES OF FISS'S AND SUNSTEIN'S EMPIRICAL
AND TECHNOLOGICAL FOUNDATIONS

Even if the theoretical and practical objections detailed above were somehow overcome, Fiss and Sunstein must address certain empirical and technological obstacles that stand in the way of the outcome that they seek. Specifically, they do not provide an adequate foundation for their empirical assumptions about the role that television plays in democratic self-governance or explain how their theories can accommodate the convergent technological environment that characterizes modern communications.

1. Empirical Assumptions About Television's Role in Democracy

Fiss and Sunstein argue that the unique role that television plays in the public discourse justifies regulations designed to ensure that all households continue to have access to free, over-the-air programming.⁵⁸³ Concluding that television currently represents the communications medium with the greatest influence on democratic self-governance as a descriptive matter, however, says nothing about whether that state of affairs is normatively desirable. Indeed, there appears to be good reason to be skeptical of claims that television is the medium best suited to fostering democratic discourse because television by its nature does not lend itself to deep and penetrating attention to public issues.⁵⁸⁴ Some would even argue that efforts to encourage greater availability of programming that enhances democratic deliberation are fundamentally misguided and that the best way to promote self-governance would be for viewers to turn their televisions off.⁵⁸⁵ Indeed, Sunstein's willingness to take as given the public's existing preference for television *as a medium* stands in stark contrast to his refusal to respect individual preferences for *particular types of programming*. If Sunstein were correct that preferences for particular types of programs are simply socially constructed misperceptions, it is hard to see how preferences for the medium as a whole would be entitled to any greater respect.

In fact, there is a danger that the policy outcomes that Fiss and Sunstein promote will reify television's role in the political process and give it unjustified permanence. For example, the central role that broadcast television currently

583. See SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 20; Fiss, *supra* note 24, at 1217–18.

584. Sunstein does raise the question whether the democratic process may be better enhanced by policies affecting the print media, but ultimately calls it an as yet unanswerable empirical question. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 112–13.

585. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1727 (1999); Rev. Jesse Jackson, *Reclaiming Our Youth from Violence*, 36 B.C. L. REV. 913, 921 (1995); James G. Wilson, *Noam Chomsky and Judicial Review*, 44 CLEV. ST. L. REV. 439, 469 (1996). As one congressional candidate put it, “[T]he single most important step we need to take right now is to turn off the darn television . . . a device that spews meaningless garbage. We have a generation that has been trained not to think critically about the information that bombards them.” Quoted in Daniel M. Warner, *To Hell on the Railroads: Why Our Technology and Law Encourage a Degrading Culture*, 26 TRANSP. L.J. 361, 409 n.145 (1999).

plays in the political process leads both Fiss and Sunstein to offer their support for the longstanding policy known as “must-carry,” which requires all local cable operators to include all full-power local broadcast stations in their basic cable packages.⁵⁸⁶ Thus, although other cable programmers must typically pay for carriage, must-carry allows broadcasters to receive carriage for free. Must-carry essentially represents a large cross-subsidy from the cable industry to the broadcasting industry. In such a situation, it is difficult to determine whether the privileged position that broadcasters enjoy is the cause or the consequence of must-carry. In other words, positing that free, over-the-air television occupies a special place in the political process in turn justifies regulations that cement the role of broadcasting. At the same time, must-carry stifles the development of alternative media by placing a drag on the revenues earned by broadcasting’s primary competitors.

This same dynamic is currently being replayed with respect to direct broadcast satellite (DBS) systems. One would think that policymakers would welcome DBS as the solution to a range of policy problems. The natural monopoly characteristics of local cable service have long been a major focus of Congress and the FCC. Other technologies had vied with cable in the market for multichannel video program distribution, but all of them came up short.⁵⁸⁷ DBS thus represents the first technology capable of breaking local cable monopolies. In addition, DBS represents the first video technology with a national footprint. As a result, it is in a better position than any other technology to exploit the cost efficiencies that accompany national distribution.⁵⁸⁸ Rather than embrace DBS, however, policymakers have opted to regulate it to preserve free, over-the-air broadcasting.⁵⁸⁹ As of the beginning of 2002, DBS companies that wish to carry programming from the major networks are subject to the must-carry requirements that are quite similar to those imposed on local cable operators.⁵⁹⁰ This result not only frustrates DBS’s ability to realize the efficiencies associated with national distribution, but it also further entrenches broadcasting’s role in our society.

The deployment of digital television appears to have fallen into the same pattern.⁵⁹¹ Concerns about the need to preserve free, over-the-air television have led Congress and the FCC to deploy digital television by doubling the amount of spectrum given to each incumbent broadcast station.⁵⁹² This has the inevi-

586. See SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 260–71; Fiss, *supra* note 24, at 1228–31.

587. For a review of these alternative technologies, see Annual Assessment of Status of Competition in Mkt. for Delivery of Video Programming, Eighth Annual Report, 17 F.C.C.R. 1244, 1277–82 ¶¶ 68–77, 1291–92 ¶¶ 99–102 (2002).

588. See *supra* notes 153–54 and accompanying text.

589. See Yoo, *supra* note 153, at 18–21, 48, 102–03, 113–14.

590. 17 U.S.C. § 122 (2000); 47 U.S.C. § 338(a)(1) (2000).

591. See Yoo, *supra* note 153, at 22–27, 49–50, 103, 115–20.

592. See *Advanced Television Sys. & Their Impact Upon Existing Television Broad. Serv.*, Fifth Report and Order, 12 F.C.C.R. 12809, 12811–12 ¶ 5, 12820–21 ¶¶ 27–29 (1997).

table effect of further cementing in place the role that broadcasting plays in the democratic process.

In the long run, Fiss's and Sunstein's position on promoting access to television may be tautological. Positing the role that free, over-the-air television plays in the democratic process justifies certain regulatory steps to preserve the broadcast industry, and those regulations in turn become the primary means by which the role that broadcasting plays is created and preserved. Although answering why television represents the best medium for fostering democratic discourse may render such a result defensible, Fiss and Sunstein leave this question unaddressed.

2. Technological Change and the Limits of Civic Republicanism

Fiss and Sunstein recognize that it is not enough for broadcasters simply to provide greater quantities of the types of programming that they believe promote good citizenship. To promote the deliberative process in the manner Fiss and Sunstein envision, people actually have to watch that programming. In Sunstein's words: "It is also important to ensure not merely that diversity is available, but also that a significant part of the citizenry is actually exposed to diverse views about public issues."⁵⁹³ Fiss is even more succinct: "The issue is not market failure but market reach."⁵⁹⁴ In Fiss's view, an unwatched program is no better than an unread book buried in a library.⁵⁹⁵ In other words, Fiss and Sunstein's real concern is audience failure, not market failure. The problem is not that viewers cannot get what they want, but rather that they do not want the right things. Their policy prescription thus goes far beyond ensuring that better programming options are available. Steps must be taken to ensure that individuals actually avail themselves of those options.

In the end, however, even this concern may not be able to withstand the mounting tide of technological change. Notwithstanding Fiss's and Sunstein's stated belief that television will retain its unique social role for the foreseeable future,⁵⁹⁶ a recent study suggests that more than thirty percent of U.S. citizens no longer regard television as their primary source of news and information.⁵⁹⁷ In fact, this possibility has forced Sunstein to revise his views by adding a new

593. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 22; *see also id.* at 20 ("Indeed, mere availability of [serious coverage of public issues] may not be enough if few citizens take advantage of it, and if most viewers and readers are content with programming and news accounts that do not deal well or in depth with public issues.").

594. FISS, *LIBERALISM DIVIDED*, *supra* note 24, at 40.

595. *Id.* at 151. Fiss also notes that this explains why cable public access channels are an insufficient response to the needs of robust public debate. *Id.*

596. *See* Fiss, *supra* note 24, at 1217; Sunstein, *supra* note 23, at 527–31. *But see* Owen Fiss, *In Search of a New Paradigm*, 104 *YALE L.J.* 1613, 1614–15 (1995) (acknowledging that his television-based paradigm may already be obsolete).

597. PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, *INTERNET SAPPING BROADCAST NEWS AUDIENCE*, 1, 5–6, 12–13 (2000) (reporting a 50% drop in consumption of broadcast network news and a corresponding growth in importance of the internet as a source of news between 1993 and 2000). The most recent Biennial News Consumption Survey indicates that these trends have begun to level off.

section to the paperback version of his book *republic.com* acknowledging that the emergence of the Internet and its accompanying ability to allow individuals to tailor their information environment may in fact be promoting rather than impeding democracy.⁵⁹⁸

In addition, Fiss and Sunstein do not adequately confront the growth of cable television and other alternative means of delivering television programming. As noted earlier, the average U.S. household receives thirteen over-the-air channels, and approximately eighty percent of all U.S. households subscribe to cable television or some other MVPD.⁵⁹⁹ Although this increase in channel capacity (rendered all the more accessible by the ubiquitous presence of the remote control⁶⁰⁰) has unquestionably increased the diversity of the programming available, it has simultaneously reduced television's ability to play the transformative role that Fiss and Sunstein envision.

Sunstein responds to this possibility with abject horror. The possibility that an individual could "design his own communications universe" in which that person "could see those things that he wanted to see, and only those things" and could "screen out ideas, facts, or accounts that [that person] find[s] disturbing"⁶⁰¹ could lead to the "elimination of a shared civic culture, which contemplates a degree of commonality among the citizenry."⁶⁰² His reaction underscores the "complex, indeed, ambivalent, attitude towards diversity of opinions" reflected in most civic republican and communitarian conceptions of politics.⁶⁰³ He loathes the homogenizing effects of large media institutions, and yet his theory depends on large, centralized conduits through which to reach the market. Indeed, it is this ambivalence that underlies the regulatory outcry surrounding the initial decision by NBC and Fox not to air the first presidential debate during the 2000 election cycle.⁶⁰⁴ One might think that in an era of supposed scarcity and limited diversity, it would be anathema to dedicate one of the few major networks to programming that was completely duplicative of what was on the other major networks.⁶⁰⁵ And yet that is precisely what the FCC pressured NBC and Fox to do.

PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, PUBLIC'S NEWS HABITS LITTLE CHANGED BY SEPT. 11, at 2-3, 6-7 (2002).

598. CASS SUNSTEIN, *REPUBLIC.COM* 203-12 (paperback ed. 2002).

599. See *supra* notes 175, 178 and accompanying text.

600. For a humorous (but accurate) description of channel surfing, see Balkin, *supra* note 432, at 1935-42.

601. Cass Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1786 (1995).

602. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 76; see also SUNSTEIN, *supra* note 598, at 3-22 (criticizing growth of "daily me," in which people receive customized news via Internet).

603. Gardbaum, *supra* note 441, at 383-84.

604. See Kennard, Remarks at the Museum of Television and Radio, *supra* note 97; Press Release, FCC, FCC Commissioner Susan Ness Decries Decisions of NBC and Fox Networks Not to Air the First Presidential Debate (Sept. 29, 2000), available at <http://www.fcc.gov/Speeches/Ness/States/2000/stsn032.html>.

605. Press Release, FCC, Furchtgott-Roth Seeks to Clarify and Separate Big Government's Interest from the Public Interest in the Debate Over the Debates, at http://ftp.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr057.doc (last visited Feb. 10, 2003).

Sunstein concedes that people cannot be compelled to watch public affairs programming,⁶⁰⁶ but suggests that “careful judgments at the level of implementation” can prevent unwilling viewers from turning off their televisions.⁶⁰⁷ He hopes some members of the general public will become accidentally exposed to higher-quality programming and thereby acquire a greater taste for it.⁶⁰⁸ Given the ease with which channels can be changed, it is hard to see how any degree of care in implementation could ensure that audiences receive sufficient exposure to the type of programming that Fiss and Sunstein believe is essential. The impending arrival of video-on-demand promises to exacerbate the problem by giving individuals still greater control over their viewing environment.⁶⁰⁹ Nothing prevents unwilling viewers from switching to alternative programming or simply tuning out altogether.⁶¹⁰ Thus, even if Fiss and Sunstein were able to convince Congress, the FCC, and the courts to sanction their proposals, technological developments will likely make it impossible for television to serve Fiss’s and Sunstein’s purposes.

V. POSSIBLE EXPLANATIONS FOR THE PERSISTENCE OF BROADCAST-STYLE REGULATION

The collapse of the traditional bases for according a lower level of First Amendment scrutiny to broadcasting and the inability of civic republican theories to offer a revisionist justification for doing so raises the question why the current jurisprudential state of affairs has persisted. In this Part, I will sketch out some possible explanations.

A. THE NASCENT STATE OF FIRST AMENDMENT DOCTRINE

One possible explanation for the rise of the technology-specific First Amendment is the embryonic state of First Amendment doctrine at the time *NBC v.*

606. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 22, 70.

607. *Id.* at 76–77.

608. *Id.* at 89–90.

609. *See supra* note 332 and accompanying text.

610. Sunstein contradictorily notes that to the extent that the programming is of low quality and does not promote democratic values, little would be lost if viewers simply tuned out. SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 89; *see also id.* at 77 (suggesting it “would not necessarily be bad” if attempts to promote democratically-oriented programming caused people to turn off their televisions). This observation conflicts with Sunstein’s acknowledgement that, for his system to work, there must be some means for generating a shared civic culture. It is also vulnerable to charges of elitism and paternalism, aptly captured in Burt Neuborne’s rendering of Sunstein’s argument:

So what if the less-educated members of the public don’t want to view the highbrow material? It will be an uplifting, educational experience. They might even learn to like it. After all, mass taste is just a matter of socialized preference. And, if the less educated turn off the set, that’s OK, too. Perhaps they watch too much TV anyway.

Neuborne, *supra* note 459, at 440.

United States and the other seminal broadcasting decisions were issued.⁶¹¹ During the 1930s and early 1940s, neither the FRC nor the courts believed that commercially oriented entertainment merited any First Amendment protection. For example, the Supreme Court in 1915 held that film fell outside the ambit of the First Amendment on the ground that “the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion.”⁶¹² The FRC sounded a similar theme in declaring that “[e]ntertainment such as music is not ‘speech’ in the sense in which it is used in the [F]irst [A]mendment to the Federal Constitution.”⁶¹³ Indeed, the FRC denigrated all forms of direct advertising as “usually offensive to the listening public.”⁶¹⁴ Formal recognition that motion pictures fell within the ambit of the First Amendment did not occur until 1948.⁶¹⁵ Commercial speech did not receive recognition until 1976.⁶¹⁶

In addition, the courts’ appreciation for the particular dangers of licensing was not fully formed during the 1930s and 1940s. Although the Supreme Court had recognized the dangers of licensing when it acted as a prior restraint,⁶¹⁷ it had only begun to acknowledge the manner in which subsequent punishment can also suppress speech.⁶¹⁸ Indeed, it is telling that in a decision roughly contemporaneous with the Court’s landmark decision in *Near v. Minnesota ex rel. Olson*, the D.C. Circuit upheld the FRC’s decision to refuse to renew a license on the grounds that the First Amendment represented nothing more than a prohibition of prior restraints and did not prevent the FRC from exercising its “undoubted right to take note of appellant’s past conduct” when deciding whether to renew a license.⁶¹⁹ And the content distinction and compelled speech

611. See *NBC v. United States*, 319 U.S. 190 (1943); *Trinity Methodist Church, S. v. FRC*, 62 F.2d 850 (D.C. Cir. 1932); *KFKB Broad. Ass’n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

612. *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 244 (1915).

613. FRC SECOND ANNUAL REPORT, *supra* note 70, at 161; see also *id.* at 168 (criticizing playing of phonograph records over the air in part because practice was driven solely by business motive of facilitating advertising); *Hazlett*, *supra* note 115, at 152 (quoting Herbert Hoover’s statement at the Fourth National Radio Conference in 1925 as saying that “no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose”).

614. FRC SECOND ANNUAL REPORT, *supra* note 70, at 168.

615. See *United States v. Paramount Pictures, Inc.* 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”); see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (formally overruling *Mutual Film*).

616. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

617. See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325, 328 n.* (1788).

618. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–16 (1931); *Weinberg*, *supra* note 26, at 1137.

619. *KFKB Broad. Ass’n v. FRC*, 47 F.2d 670, 672 (D.C. Cir. 1931); accord *Trinity Methodist Church, S. v. FRC*, 62 F.2d 850, 851, 853 (D.C. Cir. 1932).

did not emerge as major First Amendment concerns until much later in the century.⁶²⁰

Although it is plausible that these early courts failed to appreciate the First Amendment dangers posed by the broadcast approach to regulation, such an argument faces its share of problems. Contemporaneous commentators were quick to point out the obvious dangers of the courts' decisions.⁶²¹ The Supreme Court's opinion in *NBC* signaled its recognition of the problem when it acknowledged that First Amendment concerns might arise if the FCC were "to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."⁶²² In any event, even assuming that the courts' failure to appreciate the dangers to free speech imposed by the broadcast regime was justified in the 1930s and 1940s, there is little justification for continuing that ignorance into the present day. Regardless whether the early judicial decisions were justified when they were rendered, it should be clear that the state of the doctrine at that time can no longer justify adhering to them now.

B. THE EMERGENCE OF THE ECONOMICS OF PROPERTY RIGHTS

Another possibility is that Congress thought that it had no choice but to adopt the type of administrative licensing scheme associated with broadcast regulation. Indeed, many scholars have suggested that Congress's decision to adopt the Broadcast Model followed from its belief that administrative licensing represented the only viable alternative to abandoning the spectrum as a resource.⁶²³

In many ways, the claim seems plausible. Coase's seminal work on the ability of a property rights regime to resolve many matters that were previously thought to require regulation and Garret Hardin's pathbreaking article, *The Tragedy of the Commons*, did not appear until several decades after these basic principles had been established.⁶²⁴ The skeptical reaction that greeted Coase's proposal confirms its perceived novelty at the time.⁶²⁵ It would arguably be somewhat anachronistic therefore to expect regulatory authorities that were taking the first steps to regulate broadcasting to have appreciated the possibility of nonadministrative allocation. At the same time, there are those who would

620. See Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 123–25 (1981); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 218–27 (1982).

621. See Note, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967, 968 (1931) (noting that "the power to revoke or refuse the renewal of a license is in many cases so effective a means of censorship as to make unconvincing any legalistic distinction between 'previous restraint' and a refusal to renew a license because of the character of past program").

622. *NBC v. United States*, 319 U.S. 190, 226 (1943).

623. See, e.g., *id.* at 216–17; BRUCE M. OWEN, TELEVISION ECONOMICS 139 (1975); POOL, *supra* note 51, at 142, 146; POWE, *supra* note 51, at 201;

624. See Coase, *Social Cost*, *supra* note 118; Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

625. See *supra* notes 116–19 and accompanying text.

disagree with this assessment. Thomas Hazlett's careful history of the circumstances surrounding the enactment of the Radio Act of 1927 suggests that Congress was well aware of the possibility that a system of property rights could obviate the need for governmental allocation and that just such a regime was in fact in the process of evolving.⁶²⁶

Subsequent developments have rendered this debate moot. The FCC's recent success with auctions and the longstanding existence of a robust market for broadcast stations has since validated the idea that spectrum licenses can be allocated effectively through nonadministrative means. No matter how the debate over the state of economic thinking at the time of the enactment of the Communications Act of 1934 is resolved, continued adherence to the technology-specific approach to the First Amendment can no longer be defended based on the lack of alternatives to administrative licensing.

C. PROGRESSIVE FAITH IN AGENCY EXPERTISE

The New Deal era's faith in administrative discretion provides another possible explanation for the courts' willingness to condone broadcast-style regulation. Contemporary faith in technocracy is perhaps best reflected in the Supreme Court's decision in *FCC v. Pottsville Broadcasting Co.*,⁶²⁷ which was authored by Landis protégé and former New Dealer Felix Frankfurter. According to Frankfurter, modern administrative agencies like the FCC are "a response to the felt need of governmental supervision over economic enterprise."⁶²⁸ The dynamism of modern industrial society left both Congress and the courts poorly situated to undertake such a task.⁶²⁹ As a result, rather than being subject to stringent legal constraints, agencies should be given broad mandates like the public interest standard, which Frankfurter regarded "as concrete as the complicated factors for judgment in such a field of delegated authority permit."⁶³⁰ It provided "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."⁶³¹

Frankfurter offered similar arguments in his landmark opinion in *NBC*.⁶³² When faced with "a field of regulation which was both new and dynamic," Congress found it best to give the FCC "not niggardly but expansive powers" to promote radio communications.⁶³³ As Congress had learned in areas "far less fluid and dynamic than radio," the best course was "to define broad areas for regulation and to establish standards for judgment adequately related in their

626. Hazlett, *supra* note 115, at 143–45, 149–52, 160, 162–63.

627. 309 U.S. 134 (1940).

628. *Id.* at 142.

629. *Id.*

630. *Id.* at 138.

631. *Id.*

632. *NBC v. United States*, 319 U.S. 190 (1943).

633. *Id.* at 219.

application to the problems to be solved.”⁶³⁴ Although Congress did not give the FCC “unfettered discretion,” it also did not attempt to offer an itemized catalogue of statutory directions. Instead, Congress left it to the FCC to design the appropriate measures.⁶³⁵ When the FCC’s decision was submitted for review, the Court declined to second-guess the FCC’s determinations so long as the agency acted within its statutory authority and supported its findings with evidence.⁶³⁶ To the extent that litigants wished to challenge the policy of a particular regulation, the Court declared that it had “neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.”⁶³⁷ Any such arguments were more properly directed to the FCC itself.⁶³⁸

Such a conclusion may be unsurprising as a matter of contemporary administrative law, but what is more surprising is the Court’s willingness to incorporate such administrative deference into constitutional law. In a brief passage near the end of the opinion, the *NBC* Court equated satisfaction of the public interest standard with First Amendment compliance. The Court stated, “The standard [the Communications Act of 1934] provided for the licensing of stations was the ‘public interest, convenience, or necessity.’ *Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.*”⁶³⁹ The implication is clear: Proof of compliance with the statutory mandate by definition necessarily constituted proof of constitutionality. In effect, the First Amendment disappeared as an independent source of judicial review.⁶⁴⁰

Coming during the highpoint of jurisprudential faith in administrative expertise, this holding reflects its time. Such administrative control of speech was once quite common.⁶⁴¹ To modern commentators, however, it should seem inappropriate for a court to regard compliance with the requirements of administrative law as necessarily constituting compliance with the mandates of the First Amendment. Experience with the administrative process and growing concerns about agency capture have shattered faith in technocracy that characterized the Progressive era.⁶⁴² In addition, although the Court has continued to defer to the

634. *Id.* at 219–20.

635. *Id.* at 219.

636. *Id.* at 224.

637. *Id.*

638. *Id.* at 224.

639. *Id.* at 227 (emphasis added).

640. *See also* *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94, 102–03 (1973) (plurality opinion) (arguing that, although stopping short of true deference, “in evaluating the First Amendment claims of respondents, we must afford great weight to . . . the experience of the Commission”).

641. Schiller, *supra* note 35, at 2–3, 21–51.

642. *See generally* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 *CHI.-KENT L. REV.* 1039 (1997); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 *VAND. L. REV.* 1389 (2000); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669 (1975); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 *ADMIN. L. REV.* 567 (1992).

FCC's judgments about how best to promote the public interest,⁶⁴³ courts now recognize the impropriety of deferring to agencies on matters of constitutional law.⁶⁴⁴

D. STARE DECISIS

Another possible justification for the courts' continued willingness to uphold the constitutionality of the Broadcast Model is stare decisis. Although not an "inexorable command,"⁶⁴⁵ stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."⁶⁴⁶ As a result, the Court has stated that "any departure from the doctrine of stare decisis demands special justification."⁶⁴⁷ In addition, the Court has recognized that stare decisis is particularly strong when a precedent has "engendered substantial reliance and has become part of the basic framework of a sizable industry."⁶⁴⁸ In light of these considerations, it is understandable why the Court would be loath to disturb its prior holdings in this area. Not only would overruling cases detract from the integrity of the rule of law, it would also disrupt a sizable industry erected in reliance on the Court's prior decisions.

At the same time, other considerations diminish stare decisis as a justification for the Court's refusal to overrule its broadcast precedents. For example, the Court has recognized that stare decisis is at its "weakest" in matters of constitutional law because only constitutional amendment can correct interpretive errors.⁶⁴⁹ In addition, the Court has found it appropriate to overrule cases when

643. *See, e.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 810 (1978).

644. *See* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (declining to defer when agency interpretation of statute raised serious First Amendment concerns); *see also* *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173–74 (2001) (5-4 decision) (declining to defer when agency interpretation of a statute raised serious constitutional questions).

645. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

646. *Id.* at 827.

647. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *accord* *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); *Welch v. Texas Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987).

648. *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992); *accord* *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785–86 (1992); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *United States v. Mason*, 412 U.S. 391, 399–400 (1971); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *see also* *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (dicta) ("Stare decisis has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" (quoting *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991))).

649. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996); *Payne*, 501 U.S. at 828; *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980) (plurality opinion); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); *Smith v. Allwright*, 321 U.S. 649,

the “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”⁶⁵⁰ The constitutional basis of the precedents in question, combined with the dramatic technological transformation the broadcast industry, thus leaves the Court’s key broadcasting decisions open to reconsideration. Thus, concerns about stare decisis are not likely to be the reason preventing the Court from revisiting these precedents. Even if stare decisis did explain the persistence of the current broadcasting regime, it would not justify extending such an erroneous regime to other media.

E. PUBLIC CHOICE THEORY

Perhaps the most persuasive explanation for the Broadcast Model’s persistence has its roots in public choice theory. A growing body of scholarship has argued that the current structure of broadcast regulation is the product of rent seeking.⁶⁵¹ Unlike other users of spectrum-based technologies, broadcasters receive their licenses for free. In addition, as noted earlier, the FCC has adopted policies that have restricted entry in a manner that has enhanced the value of those licenses still further.⁶⁵² By creating such rents, Congress was able to protect politicians against any adverse impact that television might have over elections. This scheme also allowed policymakers to manipulate the regulatory process to distribute benefits to favored constituencies. The tremendous benefits that broadcasters receive from this arrangement led them not to challenge the imposition of such regulations in most cases. Broadcasters are all too aware that the elimination of such public interest obligations would destroy any justification for continuing to receive such benefits.⁶⁵³

The events surrounding the allocation of additional spectrum for digital television demonstrates the rent-seeking behavior surrounding broadcast regulation. During the early 1990s, the broadcast industry engaged in an extensive lobbying campaign to persuade policymakers to implement the transition to digital broadcasting by giving a second free channel to all existing television stations. This arrangement was placed in jeopardy when a bipartisan coalition of senators, led by then-Majority Leader Bob Dole, condemned the “license giveaway” as “corporate welfare” and held up passage of the Telecommunica-

665 & n.10 (1944); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 93 (1936) (Stone and Cardozo, JJ., concurring in result); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–10 (1932) (Brandeis, J., dissenting).

650. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (citing *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting)); see also *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (recognizing propriety of overruling cases in light of newly ascertained facts and experience).

651. See generally Matthew Spitzer, *Dean Krattenmaker’s Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996*, 29 CONN. L. REV. 353, 370–71 (1996); Hazlett, *supra* note 571, at 941–42; Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 235–36 (1996); Robinson, *supra* note 249, at 919.

652. See *supra* notes 136–49 and accompanying text.

653. Rubin, *supra* note 28, at 691–97.

tions Act of 1996 until it was agreed that the FCC would not issue any digital television licenses before Congress enacted spectrum reform.⁶⁵⁴ In the words of one FCC official, broadcasters then began “tripping all over themselves to give up their First Amendment rights.”⁶⁵⁵ In exchange for the cancellation of the Dole agreement, the broadcast industry immediately capitulated on two issues that it had long resisted: the imposition of quantitative guidelines for children’s television and the creation of a rating system.⁶⁵⁶ Since then, governmental actors have continued to pressure broadcasters to offer free air time to political candidates and to adopt a “voluntary” code of conduct reinforcing their commitment to public interest broadcasting.⁶⁵⁷ Indeed, both Reed Hundt and William Kennard were quite outspoken during their tenures as Chairmen of the FCC in demanding a greater commitment to the public interest in return for the spectrum given away in the 1996 Act.⁶⁵⁸ Responding to such pressure, two of the major networks and many local broadcasters provided candidates with free airtime during the last election.⁶⁵⁹

To say that public choice theory can explain the persistence of the Broadcast Model is not to say that it can justify it. Simply put, the decision to give a second television channel to all incumbent broadcasters was a public policy disaster. The traditional justification for doing so is to preserve the benefits of free, over-the-air television to those households that cannot afford to pay for television. Sunstein offers a particularly strident version of this argument when he ridicules systems that base the ability to speak on people’s willingness to pay as “a bizarre parody of democratic aspirations” and “the stuff of science fiction rather than self-government.”⁶⁶⁰ Although the rhetoric of Sunstein’s declaration is alluring, the issue is not as simple as he suggests. In fact, it is quite common for our society to allocate any number of goods that are essential to democratic citizenship, including other media such as newspapers, employment, shelter,

654. See Hazlett, *supra* note 571, at 939–40.

655. Quoted in *id.* at 942 (internal quotation marks omitted).

656. See Policies & Rules Concerning Children’s Television Programming, Report and Order, 11 F.C.C.R. 10660, 10718–23 ¶¶ 120–29 (1996); Christopher Stern, *TV Makes History at the White House*, BROAD. & CABLE, Mar. 4, 1996, at 5.

657. See GORE COMMISSION REPORT, *supra* note 17, at 46–47, 56–59; REPORT TO CONGRESS, *supra* note 18, at 24–26.

658. See Kennard, Remarks at the Museum of Television and Radio, *supra* note 97; Hundt, *supra* note 36, at 1096 (calling for strengthening broadcasters obligations to provide children’s programming and free air time for political candidates as well as additional restrictions on indecent and violent programming).

659. See Pub. Interest Obligations of TV Broad. Licensees, Notice of Inquiry, 14 F.C.C.R. 21633, 21648 ¶ 35 (1999); Kennard, Remarks at the Museum of Television and Radio, *supra* note 97; see also Statement by FCC Chairman William Kennard on EchoStar Announcement of Political Candidate Airtime (F.C.C. Oct. 2, 2000), available at <http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek079.html>.

660. SUNSTEIN, DEMOCRACY AND FREE SPEECH, *supra* note 23, at 58; see also SUNSTEIN, PARTIAL CONSTITUTION, *supra* note 23, at 215 (same).

and even basic sustenance, through a price mechanism.⁶⁶¹

Even if one were to accept that all households should have access to television, the untargeted nature of the particular subsidy chosen renders it singularly cost ineffective. The basic problem is that giving away broadcast spectrum for free effectively subsidizes all viewers, not just those who need the subsidy to obtain access. Such untargeted programs are thus unnecessarily wasteful. By way of comparison, the FCC has addressed similar concerns with respect to telephone service through direct subsidy programs.⁶⁶² A recent empirical study of these programs concluded that targeted subsidies are up to five times more effective than untargeted subsidies in increasing household access.⁶⁶³ Indeed, given the comparability in cost of local telephone service and cable service, the telephone subsidy programs provide a useful benchmark for estimating the cost of an analogous subsidy for television. Even under conservative assumptions, the cost of a similarly targeted program for television would be considerably less than the costs associated with giving spectrum away to digital broadcasters.⁶⁶⁴

In addition, the use of untargeted subsidies unnecessarily distorts secondary markets. On the supply side, the decision to give away broadcast spectrum for free inevitably raises the cost of spectrum for other uses. In short, there is nothing “free” about free over-the-air television. The public bears the costs by paying higher fees for cellular telephony, 3G wireless, and other spectrum-based technologies.⁶⁶⁵ On the demand side, altering the relative prices of the various spectrum-based services makes broadcasting artificially appealing from an economic standpoint. Because these prices do not reflect the true costs of these goods, these differences will inevitably cause consumers to deviate from

661. Indeed, Sunstein’s sweeping statement can be appropriately regarded as calling for the same reordering of the relationship between the individual and the state sought by Fiss, in which the state is seen as having an affirmative obligation to provide all individuals with the minimum requirements of personhood. *See supra* notes 415–21 and accompanying text. Although Sunstein recognizes the problem, SUNSTEIN, *DEMOCRACY AND FREE SPEECH*, *supra* note 23, at 269–70, aside from the *ipse dixit* quoted above, he fails to offer an explanation as to why this issue should be resolved any differently with respect to free speech than it was with respect to equal protection and due process.

662. The Lifeline program subsidizes individual households’ ability to pay for their monthly telephone bills. The Link-Up program helps defray the one-time costs associated with obtaining initial phone service. *See* Ross C. Ericksson et al., *Targeted and Untargeted Subsidy Schemes: Evidence from Postdivestiture Efforts to Promote Universal Telephone Service*, 41 J.L. & ECON. 477, 481–82 (1998).

663. *Id.* at 498.

664. *See* Ellen P. Goodman, *Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation*, 59 FED. COMM. L.J. 517, 533 (1997) (reporting estimates placing value of spectrum given away for digital broadcasting as being between \$11 billion and \$70 billion as well as placing estimates of value of analog channels projected to be returned as being between \$20 billion and \$132 billion). By way of comparison, the high-cost and low-income support programs for telephony cost approximately \$3.2 billion in 2001. FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, *UNIVERSAL SERVICE MONITORING REPORT 1-38 tbl. 1.11* (2002) available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Monitor/mrs02-0.pdf. Applying the risk-free discount rate of roughly 5%, the net present value of such a program is approximately \$67 billion, which compares favorably with the \$31–\$202 billion in spectrum currently given to the broadcast industry for free.

665. *See* Yoo, *supra* note 153, at 72–76.

the most efficient product mix.⁶⁶⁶ This effect is exacerbated by other regulatory features, such as must-carry, that are designed to promote free, over-the-air television at the expense of cable and other forms of pay television. By reducing the revenue generated by cable systems, must-carry causes the price of cable access to rise. The untargeted nature of the cross subsidy implicit in must-carry thus has the counterproductive effect of thwarting the very desire to increase access to television that underlies the subsidy program's origins.⁶⁶⁷

Finally, giving away spectrum is also singularly ineffective as a means for promoting particular types of programming. It would have been more cost effective for the government to auction the spectrum and use the revenue gathered to purchase a major television network and devote its entire output to children's television and high-quality political speech.⁶⁶⁸ To make matters worse, by giving licenses only to incumbent licensees, the government doubled the amount of spectrum dedicated to television without increasing the level of competition in the industry or diversifying the ownership base of broadcast stations.⁶⁶⁹ Thus, although public choice theory may explain why such an arrangement represents a good deal for broadcasters, it fails to provide a reason for courts or policymakers to maintain the existing system of regulation.

CONCLUSION

The same forces collapsing the technological distinctions embodied in current media policy are achieving the same effect on the technology-specific approach to the First Amendment. Not only do we now have a better understanding of the conceptual shortcomings of the rationales traditionally cited as supporting the constitutionality of the Broadcast Model, we must also candidly acknowledge the potentially transformative impact of technological innovations such as digital television, the V-chip, PVRs, spread spectrum, and video-on-demand. Furthermore, technological convergence is making it increasingly possible to convey virtually any type of communication through virtually any means of transmission. Indeed, once television networks complete the conversion to data packet switching, a single communication may be transmitted through several media simultaneously. As a result, the collapse of the technology-driven approach to the First Amendment appears inevitable. The Supreme Court's appar-

666. See Ericksson et al., *supra* note 662, at 478 (summarizing basic criticisms of untargeted subsidies).

667. See *id.* at 499. Cross subsidies that penalize one subsector of an industry to benefit another are also somewhat problematic from the standpoint of fairness, in that rarely is the penalized subsector responsible for creating the problem being redressed. Doing so makes about as much as sense as taxing cable operators to pay for the construction of new public schools. To the extent that general concerns of public welfare form the basis for the subsidy program, those subsidies should be financed out of general revenues.

668. Robinson, *supra* note 249, at 922 & n.83 (noting that in 1995 CBS was sold for \$5.4 billion and in 1996 Turner Broadcasting was sold for \$6.7 billion).

669. Spitzer, *supra* note 651, at 365–66; Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 163–64 (1996).

ent reluctance to rely on the traditional rationales for applying a lower First Amendment standard to broadcasting may well signal their growing appreciation of this reality.

The attempts by Fiss and Sunstein to employ civic republican theory to provide revisionist rationales for the Broadcast Model in the end fail to justify upholding its constitutionality. Not only do they fail to come to grips with the First Amendment's traditional respect for individual autonomy and traditional suspicion of government intervention, they also fail to offer a sufficient articulation of how their theories will work in practice or how they will overcome the technological realities surrounding television. It is thus difficult, if not impossible, to see how their theories would lead to the world that they envision.

The Broadcast Model is a regulatory scheme in search of its own justification. As such, it can properly be regarded as an example of the tendency for regulation to persist long after the reasons underlying its creation have since fallen away.⁶⁷⁰ I do not mean to suggest, however, that theoretical inelegance represents the only problem with the technology-specific approach to the First Amendment. On the contrary, as the decades-long ordeal to settle the First Amendment standard to govern cable television and the current uncertainty surrounding the constitutional framework that will be applied to digital television demonstrate, the problems resulting from the uncertainty created by the technology-specific First Amendment are real.

Even more sinister than the costs associated with this uncertainty is the novel way that I have identified in which regulation can serve as a constitutional justification for additional regulation.⁶⁷¹ Thus, the persistence of the Broadcast Model creates more than just transitional ambiguity; it also threatens to fundamentally alter constitutional outcomes in ways that tend to reinforce an overriding culture of regulation for its own sake. There would thus appear to be no valid basis for continuing to adhere to the technology-specific vision of the First Amendment inspired by the Broadcast Model. On the contrary, the analysis contained in this Article suggests that little would be lost and much would be gained from abandoning it.

670. See STEPHEN BREYER, REGULATION AND ITS REFORM 286–87 (1982); 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 126–27 (1971); Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 611–15 (1969).

671. See *supra* subsection I.A.2.