CONDUIT-BASED REGULATION OF SPEECH

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ABSTRACT

Architecture is destiny. As much as information today determines the contemporary wealth of nations, the physical world retains its relevance. Architecture affects crime rates, arguably even collegiality among professors. The interplay between the physical and the ethereal likewise shapes the constitutional doctrine that facilitates the free flow of ideas. The structure of a communicative medium dictates its performance. Awareness of the structure of information markets improves the calibration of intellectual property and refines legal responses to potential electronic bottlenecks. This Article takes the next logical step: revealing the deep doctrinal structure of legal efforts to influence the design and maintenance of communicative conduits.

This Article's examination of free speech jurisprudence begins by describing how any communicative medium can be visualized as three distinct physical, logical, and content-based layers. End-to-end design, the Internet's operative ideal, also provides a crucial doctrinal metaphor. Like the conduits through which communications pass, free speech jurisprudence can also be analyzed layer by layer. Cases involving the regulation of the time, place, or manner of speech

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Early in my career, William Van Alstyne urged me to plow through legal thickets, thorns be damned, and thereby taught me that shunning risk out of diffidence is the worst gamble a scholar can take. I offer this extended response to William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539 (1978), as an indirect tribute.

comprise the physical layer, in which regulatory prerogative generally prevails. By contrast, most forms of content-based regulation draw strict scrutiny.

In a perverse twist of the end-to-end principle, the intelligence in First Amendment jurisprudence resides at its edges. Though the Supreme Court has achieved doctrinal stability in reviewing content-based restrictions and time-place-manner rules, the Justices have behaved erratically whenever they have examined the intermediate logical layer—cases involving the regulation of specific communicative conduits. The Court has not developed a cogent approach to regulations designed to structure channels of communication that mediate between physical space and eventual expression. A generation ago, decisions affirming comprehensive federal power over broadcasting practically defined conduit-based regulation of speech. Broadcasting cases cannot be squared with strict scrutiny of content-based regulation of speech. Since 1978 the Supreme Court has proved quite uneven in keeping pace with technological changes in communications. After locating the doctrinal baseline established in the broadcasting cases, this Article surveys more recent cases involving cable television and sexually explicit speech in a variety of media.

Four interrelated rationales for conduit-based regulation of speech have emerged: scarcity, regulatory intensity, the government's interest in enhancing voices, and a conduit's pervasiveness. Although each of these rationales is superficially plausible, deeper inspection counsels a skeptical regard for the notion that conduit-based regulation merits distinctive First Amendment treatment. This Article accordingly disavows the strategy of adjusting First Amendment standards of review in response to putative differences among conduits. In reviewing conduit-based restrictions on speech, courts should remain wary of disguised efforts to control content. The end-to-end principle counsels simple standards for reviewing regulation aimed at the logical layer of speech. Real information is ideally transmitted on simple protocols that allow speakers and listeners to control all intelligence within a network. Likewise, a constitutional jurisprudence that minimizes reliance on conduit-based distinctions best protects free speech.

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INTRODUCTION

Architecture is destiny. As much as information today determines the contemporary wealth of nations,[1] the physical world retains its relevance. Even though firms in today's technology-driven economy derive much of their value from information and other "intangible resources,"[2] physical determinants of productivity remain critical.[3] Architecture affects crime rates,[4] arguably even collegiality among law professors.[5] Paradoxically, place may assume greater value in an

1. *See, e.g.*, Andrea Bassanini et al., *Knowledge, Technology and Economic Growth: Recent Evidence from OECD Countries* 3, 14 (Econ. Dep't Working Paper No. 259, 2000) (relating growth and labour productivity to countries' significant technological changes and research and development expenditures); U.S. DEP'T OF COMMERCE, ECONOMICS & STATISTICS ADMIN., DIGITAL ECONOMY 2000, at v (2000) (noting that dramatic reductions in the cost of information technology have spurred growth and labor productivity).

2. Dan L. Burk, *Intellectual Property and the Firm*, 71 U. CHI. L. REV. 3, 7 (2004).

3. *See, e.g.*, Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999) (describing how Silicon Valley eclipsed Massachusetts' Route 128 in the race to dominate the "new economy").

4. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

5. Daniel A. Farber, *The Dead Hand of the Architect*, 19 HARV. J.L. & PUB. POL'Y 245, 246–47 (1996).

information-based economy. "Place has become the central organizing unit of our time, taking on many of the functions that used to be played by firms and other organizations."[6]

The interplay between the physical and the ethereal likewise shapes the constitutional doctrine that facilitates the free flow of ideas. "Physical settings shape expressive practices and expectations."[7] The structure of a communicative medium virtually dictates its performance.[8] Wealth transfers within the new economy prompt "new efforts by the government to intervene in the marketplace to favor a particular outcome," and in due course courts will entertain "new constitutional claims" arising within the political economy of modern communications.[9] Awareness of the structure of information markets improves the calibration of intellectual property and refines legal responses to potential electronic bottlenecks.[10] This Article takes the next logical step: revealing the deep doctrinal structure of legal efforts to influence the design and maintenance of communicative conduits.

To facilitate this Article's examination of free speech jurisprudence, Part I describes how any communicative medium can be visualized as three distinct physical, logical, and content-based layers. End-to-end design, the Internet's operative ideal, illustrates how logical architecture affects network performance and how the law in turn shapes architecture. End-to-end design also provides a crucial doctrinal metaphor. Like the conduits through which communications pass, free speech jurisprudence can also be analyzed layer by layer. Cases involving the regulation of the time, place, or manner of speech comprise the physical layer, in which regulatory prerogative generally

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6. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE 6 (2002).

7. David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515, 1563 (2003).

8. *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (arguing that hardware and software or "code" is a significant form of law); Joel R. Reidenberg, Lex Informatica*: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) ("Principles governing the treatment of digital information must offer stability and predictability" to ensure "trust, confidence, and fairness . . . for citizens, businesses, and governments.").

9. Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 531 (2000).

10. *See* Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930 (2001) ("The tremendous innovation that has occurred on the internet .... depends crucially on its open nature.").

prevails. By contrast, most forms of content-based regulation draw strict scrutiny.

In a perverse twist of the end-to-end principle, the intelligence in First Amendment jurisprudence resides at its edges. Though the Supreme Court has achieved doctrinal stability in reviewing content-based restrictions and time-place-manner rules, the Justices have behaved erratically whenever they have examined the intermediate logical layer—cases involving the regulation of specific communicative *conduits*. The Court has not developed a cogent approach to regulations designed to structure channels of communication that mediate between physical space and eventual expression.

Part II examines this doctrinal "logical layer." A generation ago, decisions affirming comprehensive federal power over broadcasting practically defined conduit-based regulation of speech. In *The Möbius Strip of the First Amendment*, William Van Alstyne argued that the broadcasting cases could not be squared with strict scrutiny of content-based regulation of speech.[11] Since 1978 the Supreme Court has proved quite uneven in keeping pace with technological changes in communications. After locating the doctrinal baseline established in the broadcasting cases, Part II surveys more recent cases involving cable television and sexually explicit speech in a variety of media.

Part III will identify unifying themes in the jurisprudence on conduit-based regulation of speech. Four interrelated rationales have emerged: scarcity, regulatory intensity, the government's interest in enhancing voices, and a conduit's pervasiveness. Although each of these rationales is superficially plausible, deeper inspection counsels a skeptical regard for the notion that conduit-based regulation merits distinctive First Amendment treatment.

Part IV disavows the strategy of adjusting First Amendment standards of review in response to putative differences among conduits. In reviewing conduit-based restrictions on speech, courts should remain wary of disguised efforts to control content. The end-to-end principle counsels simple standards for reviewing regulation aimed at the logical layer of speech. Real information is ideally transmitted on simple protocols that allow speakers and listeners to control all intelligence within a network. Likewise, a constitutional jurisprudence that

11. William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539, 539 (1978).

minimizes reliance on conduit-based distinctions best protects free speech.

I. FREE SPEECH JURISPRUDENCE, END-TO-END

The structure of any communications conduit reflects the tripartite division of human enterprise between production, transmission, and distribution. Implicit in the structure of the Internet, among other conduits, is the end-to-end principle. By simplifying communicative protocols, end-to-end design drives all intelligence within a network toward its edges, where speakers generate ideas and audiences respond. Free speech jurisprudence should be understood as operating within physical, logical, and content layers. Section A elaborates the three-layered structure of the Internet. Section B shows how the law of free speech falls into three corresponding layers.

A. The Internet as Developmental Parable

Industria est omnia divisa en tres partes.[12] Virtually every industry in an age of mass production and consumption, "like ancient Gaul, is divided into three parts": production, wholesale transmission, and retail distribution.[13] What is true of chrysanthemums[14] and "the flow of wheat from the West to the mills and distributing points of the East"[15] applies with greater force to electronic networks.[16]

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12. *Cf.* C. IULI CAESARIS, COMMENTARII CUM A. HIRTI ALIORUMQUE SUPPLEMENTIS RECOGNOVIT BERNARDUS DINTER 1 (1890) ("*Gallia est omnis divisa in partes tres.*").

13. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 691 (1954) (Clark, J., dissenting); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 25–27 (1937) (likening the operation of an integrated steel company "to the heart of a self-contained, highly integrated body") (internal quotations omitted); Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927) (characterizing electricity transmission as an industry "not local to either [the transmitting or the receiving] state, but . . . essentially national in character"); *cf.* Armco Inc. v. Hardesty, 467 U.S. 638, 643 (1984) (observing that manufacturing and wholesaling are not "substantially equivalent" activities).

14. *See* Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1352 (5th Cir. 1976) (describing the three tiers of the chrysanthemum industry—breeders, self-propagators, and retail florists).

15. Bd. of Trade v. Olsen, 262 U.S. 1, 36 (1923); *see also* Lemke v. Farmers Grain Co., 258 U.S. 50, 53–54 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290–91 (1922); Munn v. Illinois, 94 U.S. 113, 130–31 (1877); *cf.* Stafford v. Wallace, 258 U.S. 495, 516 (1922) (describing stockyards as "great national public utilities" dominating "the flow of commerce from the ranges and farms of the West to the consumers in the East").

16. *See* Thomas Reed Powell, *Physics and Law—Commerce in Gas and Electricity—Interstate or Local—*Connecticut Light & Power Co. v. Federal Power Commission, 58 HARV. L. REV. 1072, 1083 (1945):

A similar tripartite model governs the spatial, legal, and social infrastructure of communications. Network architecture dictates how speakers and listeners interact. Every conduit consists of a physical layer, a logical (or code) layer, and a content layer.[17] The physical layer of the Internet consists of network infrastructure. Common logical protocols within a packet-switched, interconnected network transforms the physical Internet into "a unique medium . . . located in no particular geographic location but available to anyone, anywhere in the world."[18] Atop lies a rich content layer, the fertile output of the "most participatory form of mass speech yet developed."[19] Rife with "material about topics ranging from aardvarks to Zoroastrianism,"[20] that content "is as diverse as human thought."[21]

Standard accounts of economic development describe property as the engine of growth.[22] In an information-driven economy, intangible property plays the heroic role of spurring innovation.[23] But closer examination reveals the modest contribution of intellectual property to the Internet's inventive potential, at least relative to the network's open

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> [I]n the use of wires and pipes to get power and light and fuel into the service of ultimate consumers, there is a trinitarian fusing of what in the case of chattels embraces three distinct operations: (1) making; (2) going to market; and (3) selling in packages suitable to the needs of individual customers.

cf. Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 288–89 (2000) (arguing that *Turner Broad. System, Inc. v. FCC* (*Turner I*), 512 U.S. 622 (1994), and *Turner Broad. System, Inc. v. FCC* (*Turner II*), 520 U.S. 180 (1997), would have readily upheld mandatory carriage if those cases involved natural gas rather than video programming).

17. Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562–63 (2000).

18. Reno v. ACLU, 521 U.S. 844, 850–51 (1997).

19. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J., concurring), *aff'd*, 521 U.S. 844 (1997).

20. Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 566 (2002).

21. *ACLU v. Reno*, 929 F. Supp. at 842 (principal opinion).

22. *See generally* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1998) (discussing the ever changing notion of property and its treatment under the Constitution).

23. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (describing intellectual property as designed "to motivate the creative activity of authors and inventors"); Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1024–44 (1989) (listing the incentive to innovate as a leading rationale for patents). *But cf.* Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 IOWA L. REV. 1395, 1440–58 (1996) (urging the restriction of copyright to the subject matter it covered in the preindustrial economy).

architecture.[24] The Internet's most distinctive logical features have arisen from the explicit eschewing of proprietary standards.[25] Most elements of the Internet's logical architecture, such as HTML and the TCP/IP protocol, lie in the public domain.[26] Only on the desktop, the technological frontier at which most users encounter Internet content, do proprietary markers begin to divide the terrain.

At the heart of the Internet lies its operating ideal, the end-to-end principle.[27] End-to-end architecture seeks to accomplish two related goals. First, the higher-level layers, "more specific to an application, are free . . . to organize lower-level network resources to achieve application-specific design goals efficiently."[28] By contrast, "[l]ower-level layers, which support many independent applications, should provide only resources of broad utility across applications," while enabling applications throughout the network to share resources and resolve conflicts over resources.[29]

End-to-end design places a network's "intelligence" at its ends while keeping all intervening protocols as simple and general as possible. Providers and consumers of content may express themselves creatively, whereas the network itself is "stupid."[30] The resemblance to parsimonious computer programming is unmistakable. "By keeping the network simple, and its interaction general, the Internet has facilitated the design of" unanticipated applications such as "Internet telephony,

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24. *See generally* Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163 (1999) (ascribing the Internet's productivity to the application layer as the closest point of contact with the typical user).

25. Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759, 768 (1999).

26. Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 290–91 (1998); Mark A. Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L.J. 745, 752 (1999); Philip J. Weiser, *Internet Governance, Standard Setting, and Self-Regulation*, 28 N. KY. L. REV. 822, 825–826 (2001); *cf.* TIM BERNERS-LEE, WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR 74 (1999) (describing the decision to release HTML into the public domain).

27. *See generally* J.H. Saltzer et al., *End-to-End Arguments in System Design*, CM TRANSACTIONS ON COMPUTER SYS. 277 (1984), *reprinted in* INNOVATION IN NETWORKING 195 (Craig Partridge ed., 1988).

28. David P. Reed et al., *Commentaries on "Active Networking and End-to-End Arguments,"* 12 IEEE NETWORK 66, 70 (1998).

29. *Id.*

30. *See* David S. Isenberg, *The Dawn of the Stupid Network*, 2:1 ACM NETWORKER 24, 26 (Feb.–Mar. 1998) (defining a "Stupid Network" as a network "based on abundant, high-performance elements that emphasize[] transmission over switching, as well as user control of the vast processing power at the network's edges").

digital music transfer, and electronic commerce."[31] End-to-end design also promises neutrality *vis-à-vis* "new uses of the network": "[N]on-discrimination . . . invites innovation. It is a guarantee . . . that innovation will be rewarded if the innovation is one that markets respect."[32] The absence of a "centralized distribution point" makes it difficult for "network operators or government regulators" to "stifle independent information sources."[33] The "abundance generated by . . . an open-access network eliminates one of the key First Amendment diversity difficulties found in mass media."[34]

That the Internet currently strives to maintain the end-to-end ideal does not mean that every conduit naturally achieves this streamlined architecture. The debate over the application *vel non* of real property doctrines to Internet traffic[35] fiercely disputes whether access to websites should be governed by a rule sounding of nuisance within a commons,[36] or, alternatively, whether "a rule of consent supported by judicial injunctions" should constitute the "default rule" for "access to websites and proprietary networks connected to the Internet."[37] Neither end-to-end nor proprietary design arises without deliberate legal

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31. Lemley & Lessig, *supra* note 10, at 932.

32. Lawrence Lessig, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 987, 991 (2000).

33. Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1624 (1995).

34. *Id.*

35. *See, e.g.*, eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1069–72 (N.D. Cal. 2000) (suggesting that the deployment of a software robot could constitute a trespass to chattels); Am. Online, Inc. v. GreatDeals.net, 49 F. Supp. 2d 851, 864 (E.D. Va. 1999) (holding that the transmission of unsolicited commercial e-mail constitutes a trespass to chattels); Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 452 (E.D. Va. 1998) (same); Am. Online, Inc. v. IMS, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998) (same); Intel Corp. v. Hamidi, 114 Cal. Rptr. 2d 244, 246–52 (Cal. Ct. App. 2001) (same), *rev'd*, 71 P.3d 296 (Cal. 2003). *See generally* Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 418–26 (1998) (discussing the application of property law to Internet news sites and e-mail advertisements); Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561 (2001) (concluding that "a systematic evaluation of the policy interests . . . supports more flexible property rules governing access to and use of websites than those rules governing access to traditional real or personal property").

36. *Cf.* Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 48–49 (2000) ("The claim of trespass is to some extent an attempt to avoid a negative externality, that is, the cost imposed by spammers upon network users.").

37. David McGowan, *Website Access: The Case for Consent*, 35 LOY. U. CHI. L.J. 341, 341 (2003).

intermediation.[38] Just as every form of intellectual property is dictated by positive law rather than by nature,[39] the law consciously crafts the architecture of every conduit in order to achieve some set of regulatory goals.[40] No less than interpretation, network architecture is "normative all the way down."[41] By regulating a conduit's operative logic, the government can control its content. That potential in every other setting attracts serious judicial attention. It also warrants a closer look at the logic of free speech jurisprudence.

B. A New Hope for Free Speech Jurisprudence

One can condense American constitutional law into a struggle to reconcile two standards of review articulated in the early years of the Republic.[42] One standard prescribes deference to legislative prerogatives; the other calls for strict scrutiny of suspect laws.[43] The former standard operates as a rubber stamp;[44] the latter is "'strict' in theory" but "fatal in fact."[45] Real confusion arises when the Supreme Court attempts to bridge these extremes.

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38. *See* Lemley & Lessig, *supra* note 10, at 933–34 (contrasting AT&T's network with the Internet).

39. *See* Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1240 (1998) ("[C]opyright is itself an intervention in the market, rather than . . . the 'natural' way of things.").

40. *See* LESSIG, *supra* note 8, at 58–60.

41. Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1094 n.30 (1995) (internal quotation marks omitted).

42. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). *See generally* Daniel A. Farber, *The Story of* McCulloch*: Banking on National Power*, 20 CONST. COMMENT. 679 (2003–04) (placing *McCulloch* in its historical context).

43. *Cf.* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 805 (3d ed. 2000) (distinguishing between *McCulloch*'s "rational relation standard" as "the primary standard for judicial review" and the "more rigorous tests" that legislation in certain contexts "must pass").

44. *E.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 110 (2003); Heller v. Doe, 509 U.S. 312, 319–21 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–91 (1955). *See generally*, *e.g.*, Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999) (noting that "an extremely deferential" standard of review has enabled "the Court [to] reject[] rational basis arguments on one hundred occasions during a 25 year period"); Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 439–43 (1998) (explaining that judges can manipulate "the three-tiered framework" of rational basis review because they define both "the government interests at stake and weigh them on scales of constitutional 'importance' and 'relatedness'").

45. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *accord*, *e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995); Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J.,

Constitutional protection of speech is no exception. Much of free speech jurisprudence represents an exercise in drawing categorical boundaries.[46] The three prevailing categories correspond closely to the three layers of a communicative conduit. On "track one,"[47] content-based regulation triggers strict scrutiny[48] unless the speech at issue is worthless,[49] less valuable[50] or more dangerous[51] than "core" speech, or not really speech at all.[52] These exceptions aside, track one is very protective.[53] On this track, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its

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concurring in the judgment); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362 & n.36 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

46. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59–61 (1992).

47. Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 921 (1993). The "track one"/"track two" nomenclature is Laurence Tribe's. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 791–92 (2d ed. 1988).

48. *See, e.g.*, R.A.V. v. City of Saint Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); Erznoznick v. City of Jacksonville, 422 U.S. 205, 209 (1975) ("[W]hen the government . . . undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power.").

49. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

50. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (commercial speech); N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (libel).

51. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (express advocacy of violence).

52. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (expressive conduct); *cf.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 288 (1984) (upholding a National Park Service regulation prohibiting demonstrators from sleeping on the Washington Mall). *But see* United States v. Eichman, 496 U.S. 310, 317–19 (1990) (invalidating as applied a federal law that criminalized flag burning); Texas v. Johnson, 491 U.S. 397, 417–20 (1989) (holding that burning an American flag is expressive conduct within the protection of the First Amendment); Spence v. Washington, 418 U.S. 405, 412–15 (1974) (finding that the upside-down display of the flag is protected by the First Amendment). Some speakers are constitutional peons insofar as their status denigrates their expressive freedoms. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (students); Turner v. Safley, 482 U.S. 78, 84–91 (1987) (prisoners); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (students); Bell v. Wolfish, 441 U.S. 520 (1979) (prisoners); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) (prisoners); Parker v. Levy, 417 U.S. 733, 758–59 (1974) (soldiers); Pell v. Procunier, 417 U.S. 817 (1974) (prisoners).

53. *See generally* Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) ("explor[ing] the merits and limitations of the content-based/content-neutral distinction"); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991) (criticizing the "broad content neutrality rule").

content."[54] "[S]ubject only to narrow and well-understood exceptions," track one forswears "governmental control over the content of messages expressed by private individuals" in favor of "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[55] Giving "government the choice of permissible subjects for public debate" would concede an unthinkable official monopoly "over the search for political truth."[56] Track one's dedication to the proposition that "one [person's] vulgarity is another's lyric"[57] vindicates the axiom "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[58]

At the other extreme, "time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication,"[59] unless the government has dedicated its own property for use by private speakers[60] or the public at large has

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54. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); *accord* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 573 (2002); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983).

55. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 641 (1994).

56. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980); *accord* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 515 (1981).

57. Cohen v. California, 403 U.S. 15, 25 (1971).

58. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

59. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); *see also, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions on time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a governmental interest, and that they leave open ample alternative channels for communication . . . .'"); City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984) (same); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) ("It is an extravagant extension of the process to say that because of [the right of free speech] a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone."). *See generally* William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 (1986) (criticizing the Court's "cursory" scrutiny of "time, place, and manner regulations"); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (identifying the "time, place, and manner test" as a vehicle for "highly deferential review").

60. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) ("The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum . . . ."); Widmar v. Vincent, 454 U.S. 263, 269–70 (1981) ("In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

acquired some sort of speech-related easement.[61] Weak scrutiny in most physical layer cases typifies "track two" controversies in which "government is concerned with the noncommunicative impact of speech, not the message that is being conveyed."[62] Courts sometimes apply no meaningful scrutiny at all. For instance, when government shuts an adult bookstore to ban prostitution on the premises, the government's valid interest in fighting the sex trade drains all constitutional relevance from the incidental closure of the bookstore.[63]

First Amendment doctrine contemplates a third track. Government endeavors at times to speak in its own right, either by operating its own communicative institutions[64] or by subsidizing private parties who propagate officially sanctioned ideas.[65] "Track one and one-half [blends] track one's concern with government's control of messages [with] track two's concern with government's allocation of resources."[66] Expressive conduct cases epitomize this track. The aesthetic and legal

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61. *See, e.g.*, United States v. Grace, 461 U.S. 171, 177 (1983):

> "Public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." In such places, . . . the government may enforce reasonable time, place, and manner regulations as long as the restrictions are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

(quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); Schneider v. New Jersey, 308 U.S. 147, 160 (1939) ("So long as legislation . . . does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets." (citation omitted)); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . communicating thoughts between citizens, and discussing public questions."). *See generally* Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

62. Alexander, *supra* note 47, at 923; *see also* Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments*, 52 RUTGERS L. REV. 123, 183 (1999) (distinguishing efforts "to manipulate the marketplace of ideas" from actions with "a nonspeech purpose [that] incidentally compel[] expression").

63. *See City of Renton*, 475 U.S. at 50 (upholding zoning restrictions imposed to minimize the "secondary effects" associated with adult theaters); Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986); *cf.* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 441–42 (2002) (repelling an effort to reformulate *Renton*).

64. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (public school libraries); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater).

65. *See, e.g.*, Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) (university activity fees); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (federal funding for artists); Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (university newspaper); Rust v. Sullivan, 500 U.S. 173 (1991) (medical programs receiving Title X funds).

66. Alexander, *supra* note 47, at 927.

significance of clothing[67] illustrates how "a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."[68] By the same token, if a message hinges on the expressive value of "sleeping [in] . . . symbolic tents" on public parkland,[69] the government may assert a countervailing "interest in conserving park property" through "measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties."[70] Given that the expressive conduct test of *United States v. O'Brien*[71] "asks so little in principle, it should not be surprising that it means so little in practice."[72]

Public forum cases likewise typify track one and one-half.[73] In theory, public forum doctrine represents a departure from minimal scrutiny of burdens on the time, place, and manner of speech.[74] Yet the doctrine settles far less than it promises. It resolves nothing to assert, as public forum doctrine does, that the government may regulate the time, place, and manner of speech in order to advance significant objectives unrelated to the message being conveyed, as long as the government neither bars speech altogether nor extinguishes adequate alternative channels of communication.[75] Because alternative channels are *never*

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67. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) ("[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment."); *see also* Gil Grantmore, *Lex and the City*, 91 GEO. L.J. 913, 913 (2003) ("[H]ow you dress expresses who you are. Or, in terms more familiar to my audience, fashion is speech.") (footnote omitted).

68. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).

69. *Id.*

70. *Id.* at 299.

71. 391 U.S. 367, 377 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

72. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204 (1996).

73. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 37–38 (1983); *see also* G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 950 (discussing the Court's narrowing "of speaker access to fora controlled by government").

74. *See* Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 788 (1985) ("The [public forum] cases support the view that even incidental restrictions on speech must meet more exacting standards when the 'public forum' label properly attaches.").

75. *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288, 294 (1984); *cf.* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,

fully adequate, *all* regulations of public forums "will entirely suppress speech with respect to some potential audience and with a particular cognitive and emotive impact."[76] To describe the central problem of public forum doctrine as "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time" is emphatically not to answer this "crucial question."[77] The same conflict between space and expression pervades "captive audience" and "no place like home" cases, which attempt to reconcile speech-related uses of circumscribed spaces with nonspeakers' interests in privacy, peace, and quiet.[78]

Situated between the physical and content layers, the logical layer lies squarely on track one and one-half. Insofar as the logical layer in communications intercedes between physical infrastructure and ultimate expression, regulation of that layer combines an official interest in resource allocation with an interest in content. Logical layer cases oscillate between the relatively skeptical attitude toward content-based regulation and the comparatively deferential approach to laws affecting the time, place, or manner of speech.

This facile jurisprudential taxonomy begs a critical question: which decisions comprise the logical layer? Contemporary communications analysis treats "code" as synonymous with the logical layer. And "code" in real space consists of the "constitutions, statutes, and other legal" prescriptions that shape human conduct.[79] Any expressive "medium" consists of the "set of social conventions and practices shared by speakers and audience."[80] The *logical layer of free speech jurisprudence* comprises controversies in which the law structures the use of a

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452 U.S. 640, 648 (1981) (addressing whether a state fair can require individuals "to confine their distribution, sales, and solicitation activities to a fixed location").

76. Alexander, *supra* note 47, at 924; *see also* Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1408 (2002) ("[H]aving the Court assess whether sufficient communicative alternatives exist is antithetical to the very theory of communicative manner, because such theory is based upon the notion that the individual speaker must determine substantive manner of expression for herself.").

77. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

78. *E.g.*, Frisby v. Schultz, 487 U.S. 474, 474–75 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980); Lehman v. City of Shaker Heights, 418 U.S. 298, 298 (1974); Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970); *cf.* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) ("Precisely because of their location, [residential] signs provide information about the identity of the 'speaker.'").

79. LESSIG, *supra* note 8, at 6.

80. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253 (1995).

communicative conduit in putatively content-neutral fashion and in ways beyond those dictated by the conduit's physical characteristics. The logical layer transcends strictly physical constraints and addresses regulatory interests independent of content. Correspondingly, official responses to a conduit's logical characteristics, as opposed to its physical or expressive traits, represent *conduit-based regulation of speech*. I will treat the "logical layer" and "conduit-based regulation" as synonymous.

Consider conventional broadcasting. Yochai Benkler describes "radio frequency spectrum" as part of the "physical infrastructure level" of "the information environment."[81] This is not quite right. Spectrum "is not a thing but a force (or more precisely a 'disturbance in the force,' to employ *Star Wars* terminology)."[82] A spectrum license grants the right to transmit information, for a fixed period, at a stipulated frequency, and in or to a particular location.[83] Spectrum does not exist of its own accord; it gains legal life once the FCC "determines the quantity and location of frequencies to allocate for a given service," decides how to divide "the frequencies allocated for a given service," and ultimately "assigns licenses to particular entities" by comparative hearings, auctions, or lotteries.[84] Rights in spectrum are not "purely a natural phenomenon, because the number of broadcast stations is more a function of regulatory policy choices than a function of radio frequency constraints."[85] Official decisions to divide wavelengths "into discrete parcels and [to] licens[e] them for use so that interference is minimized" effectively "create" spectrum.[86] In a notorious instance of the interplay between legal policy and spectrum's physical characteristics, the FCC's relentless pursuit of localism[87] fixed the number of national television

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81. Benkler, *supra* note 17, at 562.

82. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 912 (1998).

83. *See* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 24–34 (2001).

84. Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 8 (2002).

85. Robinson, *supra* note 82, at 910 n.40. *See generally* Harvey J. Levin, *Federal Control of Entry in the Broadcast Industry*, 5 J.L. & ECON. 49 (1962).

86. Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1060 (2004).

87. *See, e.g.*, FCC v. Allentown Broad. Corp., 349 U.S. 358, 362 (1955) (holding that the Commission could foster "local competition for originating and broadcasting programs of local interest"); Amendment of Section 3.606 of the Commission's Rules & Regulations, 41 F.C.C. 148, 167 (1952) ("In attempting to carry out these objectives, the Commission set forth certain principles, in terms of priorities. . . . These principles were: . . . To provide each community with at least one television broadcast station."); THOMAS K. MCCRAW, PROPHETS OF REGULATION 307

networks at three for decades.[88] Only the FCC's decision to relax its restrictions on television networks' programming options broke the grip of CBS, NBC, and ABC.[89]

The problem of crafting a First Amendment approach to the logical layer transcends broadcasting. Whenever courts ponder whether to adjust First Amendment analysis by conduit—FM radio, cable television, the Internet, or direct broadcast satellite—the interplay between regulation and the conduit's physical attributes engages the free speech jurisprudence of the logical layer. *Content*-based restrictions that would receive withering scrutiny in any other setting (especially in print media) suddenly enjoy greater vitality if portrayed as *conduit*-based regulation. To the extent that the entire First Amendment corpus can be recharacterized either as content-based or as content-neutral—after all, laws assertedly directed to "values unrelated to communication, such as noise, congestion, property, aesthetics, or privacy," ultimately "have information effects" insofar as they "affect what gets said, by whom, to whom, and with what effect"[90]—the concept of conduit-based regulation provides merely another channel by which

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(1984) ("The lawmakers reasoned that if too many stations used the [spectrum] at once, radio signals would become garbled and communication would be impossible."). For a study of the FCC's preferences for free over pay television, incumbents over entrants, and single-channel over multichannel technologies, see Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579 (2003). *Compare* Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233, 237 (2004) (predicting that better economic theory will not improve policy and advocating better "institutionalized incentives" for policymakers), *with* Christopher S. Yoo, *The Role of Politics and Policy in Television Regulation*, 53 EMORY L.J. 255, 255–56 (2004) (replying that economic sophistication enables politically motivated regulators to find policy-based justifications for their decisions).

88. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 676–77 (1994) (O'Connor, J., concurring in part and dissenting in part); *see also* STANLEY M. BESEN ET AL., MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC 14 (1984) ("The interaction of the [FCC's] choices . . . produced an overall national assignment plan for commercial television stations adopted in 1952, that virtually guaranteed that no more than three full-scale, nation-wide commercial networks could arise . . . ."); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 88, 284 (1994) ("[O]ne dominant purpose and effect of federal regulation of telecommunications technologies has been to retard the growth of broadcasting . . . especially by limiting the number of broadcast outlets."). *See generally* 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 (1981) (examining how policies before 1981 prevented the emergence of a fourth national television network).

89. *See In re* Fox Broad. Co., 5 F.C.C.R. 3211, 3212 (1990) (granting a "limited, temporary, and conditional" waiver of regulating constraints on the operation of a broadcast network).

90. Alexander, *supra* note 47, at 929 (emphasis omitted).

courts may switch between track one's libertarian jurisprudence and track two's pro-governmental stance.[91]

At least two-thirds of free speech jurisprudence is as cogent as any other constitutional doctrine. "[D]espite its difficulty, complexity, and controversiality," track one is reasonably stable.[92] By and large, content-layer decisions are quite protective of speech. Regulations targeting the time, place, or manner of speech face a different fate. Intermediate scrutiny in the physical layer purportedly differs from "the rule of rationality which will sustain legislation against other constitutional challenges,"[93] but the results suggest otherwise. "The sole consistency" within track two "is that . . . the Government [almost] always wins."[94]

Everything else defies description. Track one and one-half follows no predictable, normatively defensible set of doctrines. Cases on speech subsidies[95] offer all the theoretical satisfaction of any body of law involving potentially unconstitutional conditions.[96] The logical layer cases similarly confound ordinary comprehension. By failing to incorporate awareness of any communicative system's layers, the Supreme Court's free speech jurisprudence has ironically come to

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91. *See also* United States v United Foods, Inc., 533 U.S. 405, 424 (2001) (Breyer, J., dissenting) ("Nearly every human action . . . , and virtually all governmental activity, involves speech.").

92. Alexander, *supra* note 47, at 922.

93. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986).

94. United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). As of April 1993, Larry Alexander counted only "two clear and two less clear exceptions" to the proposition that "[t]he government has always won track two cases." Alexander, *supra* note 47, at 925. The two clear exceptions were *Schneider v. New Jersey*, 308 U.S. 147 (1939), which invalidated anti-littering ordinances as applied to pamphlets, and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), which upheld literature distribution in an airport. The less clear exceptions were *Hague v. Comm. for Indus. Orgs.*, 307 U.S. 496 (1939), which recognized a speech easement over streets and sidewalks, and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which struck down an absolute ban on live entertainment. I can think of only one further addition: *Bartnicki v. Vopper*, 532 U.S 514 (2001), established the "novel and narrow" right to "speech that discloses the contents of an illegally intercepted communication," at least when the disclosure involves a matter of public concern. *Id.* at 517.

95. *See generally* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

96. *E.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 6–16 (1993); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 11 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1340–47 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 594 (1990).

resemble an end-to-end network: intelligent edges connected by a dumb pipe oblivious to the content being transmitted within it.[97]

Free speech jurisprudence can also be understood in terms of the *Star Wars* movies. Content layer cases decidedly favor individual speakers, as though Luke Skywalker were the protagonist in every controversy.[98] Luke offers good company to the war protesters whose tribulations gave birth to contemporary free speech law.[99] If only the Rebel Alliance would trade its lightsabers for gavels, this mythically grandiose body of law, filled with valiant nonconformists, iconoclasts, and dissenters,[100] could be called "The Hero with a Thousand Cases." Track one has completed the cosmic cycle of "a separation from the world, a penetration to some source of power, and a life-enhancing return."[101]

Other cases consistently uphold the government's regulatory interests. Darth Vader best personifies the physical layer decisions. Especially when the government controls physical terrain cloaked in emblems of sovereignty, rebellious uses such as protests harbor no hope.[102] All other cases are so outlandishly cryptic and so corpulent and ugly that they might as well have been rendered by Jabba the Hutt. There is another way to characterize the Court's least satisfying decisions. Their reasoning can be deciphered, but only after great strain, and what the Court has to say is trivial and ultimately quite annoying.[103]

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97. *See* Dale N. Hatfield, *Preface*, 8 COMMLAW CONSPECTUS 2 (2000) ("[T]he routers in the internet perform what is basically a dumb function of forwarding data packets. . . . [C]ontrol is shifted to increasingly powerful computers residing at the edge of the network.").

98. *Cf.* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986) (connecting the street corner creativity celebrated in constitutional law with the romantic tradition in art, literature, and music).

99. *E.g.*, Gitlow v. New York, 268 U.S. 652, 670 (1925); Abrams v. United States, 250 U.S. 616, 623–24 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919). *Compare* Daniel A. Farber, Book Review, 15 CONST. COMMENT. 571, 571 (1998) (reviewing DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997)) (arguing that full understanding of contemporary free speech jurisprudence depends on a grasp of "the generally repressive years from the end of Reconstruction through World War I"), *with* Katzenbach v. Morgan, 384 U.S. 641, 654 n.14 (1966) (describing the "period from 1915 to 1921" as "not one of the enlightened eras of our history").

100. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 78 (1990).

101. JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 35 (2d ed. 1968).

102. *See generally* United States v. Kokinda, 497 U.S. 720 (1990) (post offices); Greer v. Spock, 424 U.S. 828 (1976) (military bases); Adderley v. Florida, 385 U.S. 39 (1966) (jails); Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979).

103. *Cf.* Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 340 (1984) (arguing that free speech jurisprudence has made speech "seem trivial, foreign, and unnecessarily costly"); Post, *supra* note 80, at 1250 (criticizing current doctrine "for its

Perhaps Jar Jar Binks would be a better mascot. Alas, either of these George Lucas creations would aptly symbolize the logical layer cases. In addressing these logical layer cases, this Article will tackle the daunting task of translating from Hutt or Jar Jar Speaks into English.

II. THE LOGICAL LAYER OF FREE SPEECH JURISPRUDENCE

Cases contesting conduit-based regulation of speech have varied, as one might expect, by conduit. As of 1978, when William Van Alstyne wrote *The Möbius Strip of the First Amendment*, this jurisprudential "logical layer" consisted almost entirely of cases involving broadcasting. The intervening quarter-century has confounded the Supreme Court's views of conduit-based regulation. This Article will now examine the logical layer cases in three conduits: broadcasting, cable, and the Internet.

A. Broadcasting's Special Constitutional Status

Courts routinely use technological changes to dilute constitutional protection for speech in a new conduit. At a minimum, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[104] Justice Jackson proclaimed that each conduit "is a law unto itself": "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers."[105] Justice Kennedy has advocated analyzing laws affecting new conduits "by reference to existing elaborations of constant First Amendment principles."[106] This habit has proved surprisingly durable. In conduit-based controversies, courts often try to derive "the operative metaphor for freedom of speech" from "an appropriate analogy for the

superficiality, its internal incoherence, [and] its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues").

104. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969); *cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

105. Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

106. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 781 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

technology."[107] Rooted in broadcasting, this analogical technique eventually yielded a comprehensive "Broadcast Model."[108]

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[109] Conventional wisdom traces broadcasting's diminished constitutional status to *Red Lion Broadcasting Co. v. FCC*,[110] the 1969 decision that upheld a federal right-of-reply regime within broadcasting. To begin an examination of broadcasting's special status with *Red Lion*, however, is to neglect more than a quarter-century of constitutional history. In the 1940s, the FCC recognized that an increasing amount of programming was not locally produced, but "transmitted by wire . . . from their point of origination" by a national syndicate "to each station in the network for simultaneous broadcast."[111] The FCC's "chain broadcasting" rules[112] eventually evolved into longstanding rules regarding network affiliation[113] and station ownership,[114] territorial exclusivity,[115] the division of the broadcast day,[116] and network influence over programming and advertising.[117]

In *National Broadcasting Co. v. United States*,[118] the Supreme Court upheld the chain broadcasting rules.[119] Much of *NBC* has fallen to the

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107. Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press, and Freedom of Speech*, 20 SEATTLE U. L. REV. 711, 712 (1997).

108. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 254–66 (2003).

109. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

110. 395 U.S. 367 (1969).

111. NBC v. United States, 319 U.S. 190, 194 n.1 (1943).

112. *See* 47 U.S.C. §153(9) (2000) (defining chain broadcasting as the "simultaneous broadcasting of an identical program by two or more connected stations"); *see also id.* § 303(i) (authorizing the FCC to issue "special regulations applicable to radio stations engaged in chain broadcasting").

113. *See* 47 C.F.R. § 73.658(a) (2005) (exclusive affiliation of stations).

114. The FCC once banned cross-ownership of a broadcast network and a cable system, but the Telecommunications Act of 1996 lifted that bar. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(f), 110 Stat. 56, 111 (1996).

115. *See* 47 C.F.R. §§ 73.132 (2005) (AM radio), 73.232 (FM radio), 73.658(b) (television); *cf. id.* § 73.3555(a) (duopoly rule).

116. *See* 47 C.F.R. § 73.658(d) (2005) (station commitment of broadcast time); *cf. id.* § 73.658(k) (1995) (prime-time access rule), *repealed*, Radio Broadcast Servs.; Television Program Practices, 60 Fed. Reg. 44,773, 44,773, 44,780 (Aug. 29, 1995).

117. *See* 47 C.F.R. § 73.658(e) (2005) (right to reject programs); *id.* § 73.658(h) (control by networks of station rates). On the enduring impact of the chain broadcasting rules, see Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 182–87 (2002).

118. 319 U.S. 190 (1943).

deregulatory axe.[120] Even that decision's most dramatic consequence, the divestiture of NBC's "Blue" network into ABC, probably would not happen today.[121] *NBC*'s constitutional legacy, however, is considerably greater. In rejecting the network's First Amendment challenge, Justice Frankfurter reasoned: "Freedom of utterance is abridged to many who use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[122] Characterizing "[t]he facilities of radio [as] limited and therefore precious," *NBC* concluded that spectrum "cannot be left to wasteful use without detriment to the public interest."[123] If any decision deserves credit as the origin of conduit-based regulation's "scarcity" rationale, it is *NBC* and not *Red Lion*.

In strictly doctrinal terms, *Red Lion* represents a modest extension of *NBC*. Yet *Red Lion*'s greater prominence *vis-à-vis NBC* is readily understood. Whereas *NBC* involved the degree of vertical integration and coordination in which a network could engage with local affiliates, *Red Lion* targeted expressive, editorial decisions by broadcasters. The rules in *Red Lion* subjected broadcasters to "broad rights of access for

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119. *Id.* at 226.

120. The rule against dual network operation, 47 C.F.R. § 73.658(g) (2004), was relaxed under the Telecommunications Act of 1996, Pub. L. No. 104-104, §202(e), 110 Stat. 56, 110, which required the FCC to amend that rule. *See also* Joint Explanatory Statement of the Committee of Conference, 142 Cong. Rec. 1107, 1121 (Jan. 31, 1996) (explaining that the dual network rule still bans the simultaneous or geographically coordinated operation of "(1) two or more of the four existing networks (ABC, CBS, NBC, FOX) or, (2) any of the four existing networks and one of the two emerging networks[] (WBTN, UPN)"). Supervision of the broadcast day effectively ended with the abandonment of the "prime-time access rule" (PTAR) as "an imprecise, indiscriminate response" to network dominance of local affiliates. Radio Broadcast Services; Television Program Practices, 60 Fed. Reg. 44,773, 44,773, 44,778–79 (Aug. 29, 1995). In its heyday, PTAR inspired a perverse "kind of Gresham's law" that enabled "game shows and animal shows" to dominate the half-hour between network news and the rest of the prime-time schedule "by default." Nat'l Ass'n of Indep. Television Producers & Distribs. v. FCC, 516 F.2d 526, 529, 533 (2d Cir. 1975); *see id.* at 533 n.16 (observing that game shows were "the liveliest viewing available" (quoting *The Quiz Biz*, FORBES MAG., Apr. 1, 1975, at 48)); *cf.* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476–79 (2d Cir. 1971) (upholding PTAR against a First Amendment challenge).

121. *See* NBC v. United States, 319 U.S. 190, 208 (1943) (observing that divestiture of NBC's Blue network eliminated any "immediate threat of . . . enforcement" of the dual network rule); NBC v. United States, 44 F. Supp. 688, 691 (S.D.N.Y. 1942) (L. Hand, J.) (noting the Blue network's divestiture), *rev'd*, 316 U.S. 447 (1942); STERLING QUINLAN, INSIDE ABC: AMERICAN BROADCASTING COMPANY'S RISE TO POWER 19–20 (1979) (discussing the divesture of the Blue network); LEONARD H. GOLDENSON & MARVIN J. WOLF, BEATING THE ODDS: THE UNTOLD STORY BEHIND THE RISE OF ABC 96–97 (1991) (same).

122. *NBC*, 319 U.S. at 226.

123. *Id.* at 216.

outside speakers" that, in almost any other setting, would be "antithetical . . . to the discretion" that the Constitution guarantees to publishers.[124] The Supreme Court evaluated "the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."[125] The personal attack rule provided that "[w]hen a personal attack has been made on a figure involved in a public issue . . . the individual attacked himself [must] be offered an opportunity to respond."[126] The political editorializing rule required a broadcaster who endorsed or opposed a political candidate to offer all disfavored "candidates . . . reply time to use personally or through a spokesman."[127] Unlike "the general fairness requirement," the personal attack rule and the editorializing rule gave a broadcaster "the option of presenting the attacked party's side himself or choosing a third party to represent that side."[128]

Red Lion upheld the fairness doctrine. Because of spectrum's physical limits, the Court surmised, "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time."[129] Thereupon the Court recited the classic formulation of the scarcity rationale: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[130] Although the FCC abandoned the personal attack and political editorializing rules in the late 1980s,[131] the scarcity rationale endures. The broader interest in a pluralistic media market of numerous independent voices likewise survives.[132]

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124. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673 (1998).

125. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969).

126. *Id.* at 378.

127. *Id.*

128. *Id.*

129. *Id.* at 388.

130. *Id.*; *accord, e.g.*, Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 637 (1994); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799 (1978).

131. *In re* Syracuse Peace Council, 2 F.C.C.R. 5043 (1987); Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 60 (1987). These rules made a brief but abortive comeback in the late 1990s. *See* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (ordering the FCC to repeal the personal attack and political editorializing rules).

132. *See* 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, 367 & n.56 (1999) (noting the Court's

A mere five years after *Red Lion*, *Miami Herald Publishing Co. v. Tornillo*[133] invalidated a state right-of-reply law practically identical to the fairness doctrine. That law unacceptably compromised a newspaper publisher's "exercise of editorial control and judgment."[134] *Tornillo* also condemned the compulsory access law's compliance costs, measured not only "in terms of the cost [of] printing" but also in terms of the opportunity cost of forgoing "material [that] the newspaper may have preferred to print."[135] The Court endorsed Zechariah Chafee's warning that "[l]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper."[136] The "kind of forced response" at issue in *Tornillo*—or, for that matter, in *Red Lion*—is "antithetical to the free discussion that the First Amendment seeks to foster."[137] The dissonance between *Tornillo* and *Red Lion* suggests that many of the rules imposed on broadcasters would be unconstitutional if they were applied to print journalists.[138] Attempting to square both cases "with a single view of the first amendment" has proved "a terrific academic strain."[139] Rather notoriously, however, *Tornillo* never even cited *Red Lion*.[140] It is *Tornillo*, and emphatically not *Red Lion*, that expresses Othello's attitude toward intrusions on exclusivity and

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concern that a "small group of powerful commercial organizations" might dominate "the marketplace of ideas").

133. 418 U.S. 241 (1974).

134. *Id.* at 258.

135. *Id.* at 256.

136. *Id.* at 258 n.24 (quoting 2 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS 633 (1947)).

137. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 16 (1986) (plurality opinion); *see also* Riley v. Nat'l Fed'n of the Blind, Inc., 487 U.S. 781, 797, 803 (1988) (relying on *Tornillo* to invalidate a statute mandating certain disclosures triggered by the solicitation of charitable contributions).

138. Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1006 (1989).

139. Van Alstyne, *supra* note 11, at 544.

140. Roland F.L. Hall, *The Fairness Doctrine and the First Amendment: Phoenix Rising*, 45 MERCER L. REV. 705, 760–61 (1994); Jeffrey S. Hops, Red Lion *in Winter: First Amendment and Equal Protection Concerns in the Allocation of Direct Broadcast Satellite Public Interest Channels*, 6 COMMLAW CONSPECTUS 185, 190 (1998); *see also* FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING 198 (1975) ("The Supreme Court's inability to cope with *Red Lion* and *Tornillo* in the same opinion suggests that it recognizes the inherent contradiction of the two cases.").

control: "I had rather be a toad / And live upon the vapour of a dungeon, / Than keep a corner in the thing I love / For others' uses."[141]

Red Lion did not claim that the fairness doctrine or broadcast regulation in general has no impact on broadcast content. *NBC* acknowledged that the chain broadcasting rules transcended mere "supervision of [broadcast] traffic"; they effectively "determin[ed] the composition of that traffic."[142] Altering broadcast content, however coarsely or subtly, is the *raison d'être* of structural regulation. For example, expected differences in content were the only justifications for the affirmative action policies in *Metro Broadcasting, Inc. v. FCC*[143] and *Lamprecht v. FCC*.[144] *Metro Broadcasting* upheld race-conscious comparative licensing and distress sale policies on the assumption that a "broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group."[145] *Lamprecht* struck down comparable rules designed to increase female ownership and participation.[146] *Red Lion*, by contrast, involved a far more direct restraint on editorial freedom.

In the abstract, it is hard to gauge whether *NBC* or *Red Lion* upheld the more aggressive program. Although comprehensive structural restraints are arguably more confining than an overtly content-based set of rules targeting an isolated set of editorial practices, *NBC* suggested that structural regulation warrants less concern. That case, and not *Red Lion*, established the federal government's greater discretion to regulate horizontal and vertical integration in broadcasting, relative to the same economic phenomena in other media markets. *NBC* so thoroughly sanctified the federal government's

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141. WILLIAM SHAKESPEARE, *Othello*, act III, sc. iii, *ll.* 274–77, *in* THE OXFORD SHAKESPEARE: THE COMPLETE WORKS 819, 837 (Stanley Wells & Gary Taylor eds., 1988); *accord* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 77 (1984).

142. NBC v. United States, 319 U.S. 190, 216 (1943); *see also id.* at 235–36 (Murphy, J., dissenting) (decrying the growth of the chain broadcasting rules beyond their original purpose of curing "a problem of technical interference").

143. 497 U.S. 547 (1990).

144. 958 F.2d 382 (D.C. Cir. 1992) (Thomas, Circuit Justice).

145. 497 U.S. at 579. *See generally* Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. CAL. L. REV. 841 (1995) (presenting econometric evidence on the link between minority ownership and minority-oriented programming); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 294 (1991) (examining the "purported connection between a broadcast station owner's race or sex and the owner's programming decisions").

146. *See* 958 F.2d at 398.

presumptive power to structure broadcasting that a major 1956 challenge to the FCC's multiple ownership limits in radio passed with nary a hint of constitutional infirmity.[147]

The 1978 decision in *FCC v. National Citizens Committee for Broadcasting* (*NCCB*)[148] embraced *NBC*'s deferential posture toward structural regulation of broadcasting. *NCCB* upheld the FCC's ban on "common ownership of a radio or television broadcast station and a daily newspaper located in the same community."[149] After extolling the need to regulate a market whose "finite . . . frequencies" are "far exceeded by the number of persons wishing to broadcast," the Supreme Court blessed the allocation of "licenses so as to promote the 'public interest' in diversification of the mass communications media."[150] The Court cited both *NBC* and *Red Lion*,[151] even though *NCCB*'s cross-ownership rule much more closely resembled *NBC*'s chain broadcasting rules than *Red Lion*'s fairness doctrine.

NCCB emphasized that its deferential approach would insulate efforts to "'enhanc[e] the volume and quality of coverage' of public issues" in broadcasting, but not necessarily "similar efforts to regulate the print media."[152] Despite conceding that "'the issue . . . would be wholly different' if 'the Commission [were] to choose among applicants upon the basis of their political, economic or social views,'" *NCCB* flatly denied that the cross-ownership ban was "content related."[153] Averring that the cross-ownership restrictions would "promote free speech, not . . . restrict it,"[154] the Court asserted that the ban and broadcast licensing at large "preserve[] the interests of the 'people as a whole . . . in free speech.'"[155] *NCCB* even praised structural regulation as a noncensorial means for "'enhanc[ing] the diversity of information heard

147. *See* United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956) (citing *NBC* in support of the denial of licenses to applicants already holding five or more licenses without conducting comparative hearings otherwise required by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

148. 436 U.S. 775 (1978).

149. *Id.* at 779.

150. *Id.* at 799.

151. *See id.* (citing, *inter alia*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–77, 387–88 (1969); NBC v. United States, 319 U.S. 190, 210–18 (1943)).

152. *Id.* at 800 (quoting Buckley v. Valeo, 424 U.S. 1, 50 n.55 (1976) (per curiam).

153. *Id.* at 801 (quoting *NBC*, 319 U.S. at 226).

154. *Id.*

155. *Id.* at 800 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

by the public without on-going government surveillance of . . . content.'"[156]

By comparison, *Red Lion* set firm limits on scarcity as a defining characteristic of broadcasting. *Red Lion* recognized the technologically volatile nature of scarcity. Well before *Red Lion*, the Supreme Court had identified the "rapidly fluctuating" and "dynamic [field] of radio transmission"[157] as "a field of enterprise [whose] dominant characteristic" has been "the rapid pace of its unfolding."[158] "Advances in technology," *Red Lion* acknowledged, "have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace."[159] Improvements in consumer electronics substitute for spectrum by allowing stations to operate at closer frequencies and lower power.[160] Today the average household can receive thirteen conventional television signals.[161] Mindful of "[t]he rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other," *Red Lion* thought it "unwise to speculate on the future allocation of that space."[162] The past four decades have fulfilled Justice Douglas's interrelated prophecies that "television viewers" would enjoy at least "400 channels through the advances of cable television" and that scarcity would become a "constraint of the past."[163]

Red Lion apparently tried to confine its analysis to the technological context of broadcasting circa 1969. Minimizing doctrinal damage, after all, is one of the languid virtues of deciding one case at a time.[164] The modest protection of these dicta, however, yielded to the

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156. *Id.* at 801–02 (quoting Nat'l Citizens Comm. for Broad. v. FCC, 555 F.2d 938, 954 (D.C. Cir. 1977)); *accord, e.g.*, LeFlore Broad. Co. v. FCC, 636 F.2d 454, 458 n.26 (D.C. Cir. 1980).

157. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).

158. *NBC*, 319 U.S. at 219.

159. *Red Lion*, 395 U.S. at 396–97.

160. J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1230 (1993) (review essay); Yoo, *supra* note 108, at 272–73.

161. Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 F.C.C.R. 11,058, 11,064 (2000).

162. *Red Lion*, 395 U.S. at 399.

163. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring in the judgment); *see also id.* at 102 (observing that "the broadcast industry is dynamic in terms of technological change").

164. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999) ("[M]ore fundamentally, minimalism is likely to make judicial errors less frequent and (above all) less damaging.").

greater force of *Red Lion*'s holding. The most enduring statement in *Red Lion* is not its formulation of the scarcity rationale, but the assertion that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[165] After *Red Lion*, courts assess "[e]ach medium of expression . . . by standards suited to it."[166]

B. Cable as Broadcasting's Economic and Legal Rival

In *Red Lion*'s immediate wake, the jurisprudence of conduit-based regulation focused on cable television. Despite its origins as a technology for extending broadcast television into "remote or mountainous communities," cable became a formidable competitive threat.[167] In the late 1960s, the FCC asserted jurisdiction over cable in order to stem the flow of viewers and revenues away from UHF and educational stations. Failing to anticipate that much UHF bandwidth would "sit[] around for years collecting electromagnetic dust,"[168] Congress buttressed the FCC's localism policy by entertaining its own proposals to curb cable's "'unregulated explosive growth.'"[169]

These policies clashed in the 1968 case of *United States v. Southwestern Cable Co.*[170] Decided one year before *Red Lion*, *Southwestern Cable* held that statutory jurisdiction over "'all interstate and foreign communication by wire or radio'" permitted the FCC to regulate cable.[171] The Court openly endorsed the Commission's objective of preserving UHF and educational stations as the

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165. *Red Lion*, 395 U.S. at 386.

166. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975); *see also* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes.").

167. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 627 (1994). *See generally* RALPH LEE SMITH, THE WIRED NATION (1972) (reporting on the rise of cable as an economically viable alternative to conventional broadcasting).

168. IRA BRODSKY, WIRELESS: THE REVOLUTION IN PERSONAL COMMUNICATIONS 17 (1995); *see also* Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 37–38 (1995) (noting that broadcasters resisted removal to UHF). On the eventual failure of the UHF policy, see Henry Geller, *A Modest Proposal for Modest Reform of the Federal Communications Commission*, 63 GEO. L.J. 705, 707–09 (1975); Note, *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578 (1962).

169. H.R. Rep. No. 89-1635, at 7 (1966); *accord* United States v. Southwestern Cable Co., 392 U.S. 157, 175 (1968).

170. 392 U.S. 157 (1968).

171. *Id.* at 181 (White, J., concurring in the result) (quoting 47 U.S.C. § 152(a)).

foundations of "an appropriate system of local broadcasting."[172] Having rested exclusively on a reading of the Communications Act of 1934,[173] *Southwestern Cable* implicated but did not determine the appropriate First Amendment standard of review for regulations aimed at cable. It remained unclear whether cable operators might enjoy the rights enjoyed by print publishers under *Tornillo*, as opposed to broadcasters' more restricted rights under *Red Lion*. In theory, the Supreme Court could have elevated both broadcasters and cable operators to *Tornillo*'s more generous level of protection. The Court acknowledged in 1979 that "[c]able operators . . . share with broadcasters a significant amount of editorial discretion" over programming.[174] In 1986 the Court conceded that cable "plainly implicate[s] First Amendment interests" and that the production of "original programming" and the exercise of "editorial discretion over . . . stations or programs" enable a cable operator "to communicate messages on a wide variety of topics and in a wide variety of formats."[175] The Court nevertheless declined to embrace any specific standard of review.[176]

A contemporaneous trilogy of tax cases, however, had already unleashed *Red Lion* in cable's realm. The 1983 case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*[177] invalidated an ink-and-paper tax aimed at the print media, as distinct from other businesses.[178] The Court condemned exemptions that placed the onus of this tax on the state's largest newspapers.[179] Four years later, *Arkansas Writers' Project, Inc. v. Ragland*[180] struck a sales tax that covered general-interest magazines while exempting religious, professional,

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172. *Id.* at 174. On the role of UHF and educational stations as bulwarks of the FCC's broadcasting policy, see Benjamin, *supra* note 84, at 18.

173. Pub. L. No. 73-416, 48 Stat. 1064.

174. FCC v. Midwest Video Corp., 440 US. 689, 707 (1979).

175. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

176. *See id.* at 495 ("We do not think . . . it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised . . . without a fuller development of the disputed issues in the case.").

177. 460 U.S. 575 (1983).

178. *See id.* at 585 ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.").

179. *See id.* at 591–92 & n.15 (nixing a tax "because it targets a small group of newspapers" resulting in "only a handful of publishers pay[ing] any tax at all, and even fewer pay[ing] any significant amount of tax"); *see also* Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (nixing a tax that hit thirteen daily newspapers but exempted four other dailies and 120 weeklies).

180. 481 U.S. 221 (1987).

trade, and sports journals. *Ragland* "involve[d] a more disturbing use of selective taxation than *Minneapolis Star*": a magazine's tax status in *Ragland* depended "entirely on its content."[181]

Minneapolis Star and *Ragland* established two principles protecting the press. Singling out the press from other businesses and distinguishing among speakers within a class are both objectionable, even absent "evidence of an improper censorial motive."[182] *Minneapolis Star* plainly spoke in "the language of strict, not intermediate, scrutiny."[183] *Ragland*, however, did "not decide whether a distinction between different types of periodicals presents an additional basis for invalidating" a discriminatory tax as applied to the press.[184] *Minneapolis Star*, for its part, suggested that preferential taxation of the press might be unconstitutional.[185] If preferential taxation of the press indeed offends the Constitution, then those four words in the First Amendment, "or of the press," may lose all significance.[186] Perhaps "the freedom of speech, or of the press" lacks the elasticity of such constitutional phrases as "unreasonable searches and seizures,"[187] "cruel

181. *Id.* at 229 (emphasis omitted).

182. *Id.* at 228; *see also Minneapolis Star*, 460 U.S. at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

183. Benjamin, *supra* note 84, at 29; *see also* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 659–60 (1994) (characterizing the level of review in *Minneapolis Star* as "strict scrutiny").

184. *Ragland*, 481 U.S. at 233.

185. *See Minneapolis Star*, 460 U.S. at 590 n.13 (noting that "differential methods of taxation are not automatically permissible if less burdensome").

186. *Compare* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975) ("The publishing business is . . . the only organized private business that is given explicit constitutional protection."), *with* First Nat'l Bank v. Bellotti, 435 U.S. 765, 797–802 (1978) (Burger, C.J., concurring) (countering the view that "the Press Clause . . . somehow confer[s] special and extraordinary privileges or status on the 'institutional press'" by asserting instead that the First Amendment belongs simply "to all who exercise its freedoms"). *See generally* L.A. Powe, Jr., *"Or of the [Broadcast] Press,"* 55 TEX. L. REV. 39 (1976) (condemning the distinction between print and broadcast media); Spitzer, *supra* note 138, at 1000–06 (reviewing various restrictions unique to broadcast media); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977) (describing the detrimental effects that could result if the press were to succeed in claiming special First Amendment protections not available to all).

187. *See* Kyllo v. United States, 533 U.S. 27, 33–34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

and unusual punishments,"[188] and "[C]ommerce among the several States."[189]

The Court completed its tax trilogy in 1991. In *Leathers v. Medlock*,[190] Arkansas taxed cable services while exempting "newspapers, magazines, and satellite broadcast services."[191] The Court rejected a cable operator's claim of "intermedia and intramedia discrimination,"[192] having found no evidence that "the tax [was] directed at, or present[ed] the danger of suppressing, particular ideas."[193] By failing to distinguish "the *information service* provided by cable . . . from the information services provided by Arkansas' newspapers, magazines, television broadcasters, and radio stations,"[194] *Leathers* invited the very distinction that separated broadcasters in *Red Lion* from print journalists in *Tornillo*.

By the 1990s, cable television emerged as "UHF's savior rather than its scourge" by finally giving UHF stations "technical parity with VHF stations."[195] As a legal matter, however, the Supreme Court stopped short of equating cable with broadcasting. In the first of two cases named *Turner Broadcasting System, Inc. v. FCC*,[196] both involving a requirement that cable operators transmit the signals of broadcasters requesting carriage, the Court reasoned that its "distinct approach" to broadcasting rests on that medium's "unique physical limitations."[197] *Turner I* distinguished *Red Lion* and other broadcasting cases because cable "does not suffer from the inherent limitations that characterize

188. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (describing the Eighth Amendment as responsive to "evolving standards of decency").

189. *See generally* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) ("[C]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse"); William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355 (1994) (reviewing the history of commerce clause jurisprudence).

190. 499 U.S. 439 (1991).

191. *Id.* at 443.

192. *Id.* at 449.

193. *Id.* at 453.

194. *Id.* at 457 (Marshall, J., dissenting).

195. Yoo, *supra* note 108, at 278; *see also* 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, 419–20 (2001) ("Interestingly, UHF-TV did not collapse. UHF's signal transmission inferiority relative to VHF faded due to a rising tide of cable subscribership.").

196. 512 U.S. 622 (1994) (*Turner I*).

197. *Id.* at 637.

the broadcast medium."[198] Recognizing "rapid advances in fiber optics and digital compression technology," the Court predicted the quick elimination of "practical limitation[s] on the number of speakers who may use the cable medium."[199] The Court also downplayed "any danger of physical interference between two cable speakers attempting to share the same channel."[200] *Turner I* rejected the suggestion that the Court's broadcast jurisprudence rests not on "the physical limitations of the electromagnetic spectrum, but rather the 'market dysfunction' that characterizes the broadcast market."[201] The "mere assertion of dysfunction or failure in a speech market, without more," the Court held, "is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media."[202]

Turner I nevertheless rejected strict scrutiny. "Given cable's long history of serving as a conduit for broadcast signals," the Court observed, "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[203] The Court placed even greater weight on "an important technological difference": whereas a "daily newspaper . . . does not possess the power to obstruct readers' access to other competing publications," the "physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[204]

In 1997 the Supreme Court reconsidered must-carry.[205] Whereas "the state of the record" in *Turner I* confined the Court to assessing the government's interests solely "'in the abstract,'" an "expanded record" enabled *Turner II* "to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way."[206] The Court found that Congress had garnered "specific support for its conclusion that cable operators had

198. *Id.* at 638–39; *see also id.* at 639 ("This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech. They should not.").

199. *Id.* at 639.

200. *Id.*

201. *Id.*

202. *Id.* at 640.

203. *Id.* at 655.

204. *Id.* at 656.

205. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

206. *Id.* at 195 (quoting *Turner I*, 512 U.S. at 663).

considerable and growing market power over local video programming markets."[207] "Must-carry," the Court concluded, "ensures that a number of local broadcasters retain cable carriage, with the concomitant audience access and advertising revenues needed to support a multiplicity of stations."[208] Justice Breyer's partial concurrence noted cable's "physical[] dependen[ce] upon the availability of space along city streets," which imposes "a kind of bottleneck that controls the range of viewer choice" and which therefore justifies "at least a limited degree . . . of governmental intervention."[209]

The *Turner* decisions' narrow consensus dissolved in the chaotic 1996 case of *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[210] No fewer than five opinions advocated distinct approaches to First Amendment review within a new conduit. None commanded a majority. Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992[211] permitted a cable operator to prohibit sexually explicit programming on leased access channels.[212] Section 10(c) granted an operator the same power over public access channels.[213] Section 10(b) required operators to segregate sexual explicit programming on leased access channels, block it presumptively, and unblock it upon subscriber request.[214] Six Justices agreed that section 10(b)'s "segregate and block" requirements failed strict scrutiny in light of less speech-restrictive means for filtering sexually oriented programming. Three Justices, led by Justice Breyer, voted to uphold section 10(a) under *Turner I*'s intermediate scrutiny standard; a coalition led by Justice Thomas supplied three additional votes under a strict scrutiny approach. Justice Breyer, joined by two other Justices, also used *Turner I*'s intermediate scrutiny test to invalidate section 10(c). Of the five Justices who agreed to strike down section 10(c), only two—Justices Kennedy and Ginsburg—invoked strict scrutiny under the designated public forum doctrine of *International Society for Krishna Consciousness, Inc. v. Lee*.[215]

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207. *Id.* at 197.

208. *Id.* at 213.

209. *Id.* at 227–28 (Breyer, J., concurring in part); *see also id.* at 228 (asserting that must-carry's "limited" burden "will diminish as typical cable system capacity grows over time").

210. 518 U.S. 727 (1996).

211. Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934).

212. *Id.* § 10(a) (codified at 47 U.S.C. § 532(h) (2000)).

213. *Id.* § 10(c) (codified at 47 U.S.C. § 531 note (2000)).

214. *Id.* § 10(b) (codified at 47 U.S.C. § 532(j) (2000)).

215. 505 U.S. 672 (1992).

Justice Breyer's plurality opinion declared that "no definitive choice among competing analogies (broadcast, common carrier, bookstore)" could justify "a rigid single standard, good for now and for all future media and purposes."[216] Justice Breyer hesitated to allow "a partial analogy in one context" to "compel a full range of decisions in [another] new and changing area."[217] Justice Stevens's concurrence likewise declared it "unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this."[218] He echoed his previously expressed sentiment that Congress should enjoy the flexibility to craft policies governing the "unusually dynamic" telecommunications industry.[219]

Justice Souter, also writing in support of Justice Breyer's plurality, noted that "[a]ll of the relevant characteristics of cable are presently in a state of technological and regulatory flux."[220] As broadcast, cable, and online technologies converge toward "a common receiver," Justice Souter surmised, "we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others."[221] Combining skepticism that "it will continue to make sense to distinguish cable from other technologies" with faith that "changes in these regulated technologies will enormously alter the structure of regulation itself," Justice Souter confessed "that 'if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'"[222]

Justice Kennedy excoriated the plurality's refusal to anchor its analysis to existing First Amendment models. "When confronted with a threat to free speech in the context of an emerging technology," he urged, the Court should "analyze the case by reference to existing elaborations of constant First Amendment principles."[223] He described "the creation of standards and adherence to them" as "the central

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216. *Denver*, 518 U.S. at 741–42 (plurality opinion).

217. *Id.* at 749; *accord* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 207 n.3 (2003) (plurality opinion).

218. *Denver*, 518 U.S. at 768 (Stevens, J., concurring).

219. MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 235 (1994) (Stevens, J., dissenting).

220. *Denver*, 518 U.S. at 776 (Souter, J., concurring).

221. *Id.* at 776–77.

222. *Id.* at 777 (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995)).

223. *Id.* at 781 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

achievement of . . . First Amendment jurisprudence."[224] Despite disagreeing on the disposition of the disputed rules, Justice Thomas endorsed Justice Kennedy's adherence to established First Amendment models. Condemning the "doctrinal wasteland" to which the Court had consigned cable operators, Justice Thomas suggested "that cable operators should enjoy the same First Amendment rights as the nonbroadcast media."[225] He throttled *Red Lion*'s dictum that "'[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'"[226] Concluding that *Turner I* had undermined *Red Lion*'s emphasis on "the rights of viewers," Justice Thomas declared that "[i]t is the [cable] operator's right that is preeminent."[227]

C. The Naked and the Lewd: Content-Based Regulation Online

The *Turner* cases and *Denver* plunged free speech doctrine into chaos. Yet the resulting "clash of doctrines is not a disaster—it is an opportunity."[228] Indeed, subsequent cases have hinted at a promising solution. The key lies in the contrast between conduit-based and content-based regulation. Recent cases adjust First Amendment review according to whether the law targets content, focuses solely on the physical context of speech, or straddles these worlds by controlling the legal operations of a particular conduit.[229] The direction of policy "in electronic media cases" is arguably "driven by a renewed concern for access interests, rather than indecency issues."[230] As a matter of doctrinal development, though, the reverse is true.

Almost all of the decisions regarding conduit-based regulation of the Internet have involved sexually explicit but nonobscene speech. Speech of this sort warrants constitutional protection.[231] As a "great and

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224. *Id.* at 785 ("Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day.").

225. *Id.* at 813–14 (Thomas, J., concurring in part and dissenting in part).

226. *Id.* at 816 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

227. *Id.* On the notion that the ownership of property constitutes speech, see Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1 (1997) and John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996).

228. ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD 266 (1929).

229. *Cf.* LESSIG, *supra* note 8, at 6 (defining "code" in real space as consisting of the "constitutions, statutes, and other legal" prescriptions that shape human conduct, akin to the "code" that enables electronic communication).

230. Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 825 (1998).

231. *See, e.g.*, Erznoznick v. City of Jacksonville, 422 U.S. 205, 209 (1975).

mysterious motive force in human life,"[232] and as the most "intimate and personal" of acts at the core of "one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[233] *sex* runs through *United States Reports* as if "emblazoned on the very heavens in skywriting."[234] Due process entitles "two adults" to engage in "private sexual conduct" with "full and mutual consent."[235] The First Amendment protects an adult's "right to read or observe what he pleases" and "to satisfy his intellectual and emotional needs in the privacy of his own home."[236] At least when it portrays consensual adult sexuality with some artistic flair,[237] pornography has provided a constitutionally sanctioned outlet for those who suffer "the tragic feeling of being endowed with a larger-than-usual capacity for love, without a single person on earth to offer it to."[238]

What enhances pornography's impact on the Internet, as opposed to any other conduit, is creeping discomfort about *parents'* technological incompetence relative to their children. Ever since 1984, when home television viewers won a *de facto* privilege to record programs and heightened their interest in the ability to program VCRs,[239] the Supreme Court has entertained a parade of controversies in which children's grasp of communications technology has exceeded their parents'. An embarrassing proliferation of media now eclipses what was once broadcasting's distinctive trait of being both "uniquely pervasive" and "uniquely accessible to children."[240] The Internet's ubiquity and user-friendliness—even Supreme Court Justices believe that "[n]avigating the Web is relatively straightforward"[241]—make it a fearsome means by which "children may discover . . . pornographic material."[242] Congress tries to prevent "the widespread availability of the Internet" from providing "opportunities for minors to access

232. Roth v. United States, 354 U.S. 476, 487 (1957).

233. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

234. EDNA FERBER, GIANT 11 (1952).

235. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

236. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

237. *See generally* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (summarizing the Supreme Court's approach to child pornography).

238. SALMAN RUSHDIE, THE SATANIC VERSES 24 (1988).

239. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (holding it lawful under the Copyright Act to "copy a program for later viewing at home" or sell "machines that make such copying possible").

240. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

241. Reno v. ACLU, 521 U.S. 844, 852 (1997).

242. Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 567 (2002).

materials . . . in a manner that can frustrate parental supervision or control."[243] Justice Breyer has doubted not only the willingness of parents to monitor what children watch and where they watch it, but also the ability of parents to enforce the decisions they do make.[244] By contrast, Justice Stevens "would place the burden on parents to 'take the simple step of utilizing a medium that enables' them to avoid [sexually explicit] material."[245] This preference reflects a "growing sense of unease" with "the interest in protecting children from prurient materials . . . as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits."[246] These cases thus hinge on judicial instincts regarding parental supervision in a technological environment that emphatically favors the young.

Contemporaneously with *Denver*, Congress delivered fresh legislation that would enable the Supreme Court to reformulate its approach to conduit-based regulation. The Telecommunications Act of 1996,[247] widely condemned for hobbling "a crucial segment of the economy worth tens of billions of dollars" with statutory "ambiguity" and "self-contradiction,"[248] notoriously ignored the Internet except as a transmission vector for porn.[249] Title V of the Act, better known as the Communications Decency Act of 1996 (CDA),[250] addressed the online

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243. Child Online Protection Act of 1998, Pub. L. No. 105-277, § 1402(1), 112 Stat. 2681, 2681–736 (2000), (*codified at* 47 U.S.C. § 231); *accord* Ashcroft v. ACLU (*Ashcroft II*), 124 S. Ct. 2783, 2793 (2004).

244. *See Ashcroft II*, 124 S. Ct. at 2802 (Breyer, J., dissenting) ("[F]iltering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility.").

245. *Ashcroft I*, 535 U.S. at 606 n.2 (Stevens, J., dissenting) (quoting 535 U.S. at 583 (plurality opinion)).

246. *Ashcroft II*, 124 S. Ct. at 2797 (Stevens, J., concurring); *cf. id.* at 2792 (majority opinion of Kennedy, J.) ("Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.").

247. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

248. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999); *accord, e.g.*, Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc., 323 F.3d 348, 352 (6th Cir. 2003) (quoting *AT&T Corp.*, 525 U.S. at 397); Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 449 (5th Cir. 1999).

249. *See* Barbara Esbin, *Internet over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 55 (1999) (noting that Congress paid more attention to the Internet's pornographic potential than any other aspect of that medium); John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093, 1109 (1996) ("[W]ith the rather major exception of censorship, Congress simply legislated as if the Net were not there.").

250. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133, 133–36, *partially invalidated in* Reno v. ACLU, 521 U.S. 844 (1997).

transmission of sexually explicit speech. The passage of the CDA sparked a collision between the strategy of adjusting First Amendment review by conduit and the imperative of applying strict scrutiny to content-based regulation of speech.

Reno v. ACLU,[251] the first of the Supreme Court's Internet-specific free speech controversies, not only invalidated the CDA as a transparent assault on speech but also reinstated *Red Lion*'s multifaceted approach. *Reno* held that the Internet lacked three key features that justified broadcasting's deferential First Amendment standard: "the history of extensive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and [broadcasting's] 'invasive' nature."[252] Justice Stevens observed that "the vast democratic forums of the Internet" have never "been subject to the type of government supervision and regulation that has attended the broadcast industry."[253] In light of this medium's relative freedom from regulation, he detected no risk that users "might infer some sort of official or societal approval of" online content.[254] He also noted that "the Internet is not as 'invasive' as radio or television."[255] "Finally," Justice Stevens added, "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity."[256]

In 2000, the Court got a chance to reconcile *Reno* with *Denver* and the *Turner* cases. *United States v. Playboy Entertainment Group, Inc.*,[257] treated restrictions targeting "signal bleed" from imperfectly scrambled cable channels offering sexually explicit programming as a transparent instance of content-based regulation: "The speech in question is defined by its content; and the statute which seeks to restrict it is content based."[258] Even Justice Breyer, writing in dissent, agreed that "[t]his case involve[d] the application, not the elucidation, of First Amendment principles."[259]

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251. 521 U.S. 844 (1997).

252. *Id.* at 868 (citations omitted) (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989)).

253. *Id.* at 868–69.

254. *Id.* at 869 n.33.

255. *Id.* at 869 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989)).

256. *Id.* at 870.

257. 529 U.S. 803 (2000).

258. *Id.* at 811; *see also id.* at 812 ("This is the essence of content-based regulation.").

259. *Id.* at 835 (Breyer, J., dissenting).

Playboy did continue the habit of drawing comparisons to broadcasting: "Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts."[260] The Court, however, used "a key difference" between cable and broadcasting to reinforce rather than dilute strict scrutiny.[261] Observing that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis," the Court held that Congress had unconstitutionally favored broad-gauged measures against signal bleed over the feasible, effective, and less speech-restrictive strategy of "targeted blocking."[262] Technology in private rather than official hands, the Court concluded, enables "esthetic and moral judgments about art and literature, [to] be formed, tested, and expressed."[263]

In two cases styled *Ashcroft v. ACLU*,[264] the Supreme Court reviewed the statutory successor to the CDA. In response to *Reno*, Congress passed the Child Online Protection Act of 1998 (COPA).[265] *Ashcroft I*, decided in 2002, deflected a facial challenge to COPA's overt use of the three-part obscenity test of *Miller v. California*,[266] particularly that decision's reliance on "contemporary community standards" in defining a work's appeal to the prurient interest.[267] The challengers argued that COPA would subject online work, otherwise globally available, to the suffocating standards of America's least tolerant community.[268] A three-Justice plurality led by Justice Thomas concluded "that COPA's reliance on community standards . . . does not

260. 529 U.S. at 813.

261. *Id.* at 815.

262. *Id.*

263. *Id.* at 818.

264. 535 U.S. 564 (2002) (*Ashcroft I*); 124 S. Ct. 2783 (2004) (*Ashcroft II*).

265. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (2000)); *see generally* H.R. REP. NO. 105-775, at 5, 12 (1998) (response to *Reno*); S. REP. NO. 105-225, at 2 (1998) (same).

266. 413 U.S. 15 (1973).

267. *Id.* at 24.

268. *See Ashcroft I*, 535 U.S. at 573:

> Because 'Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users,' the Court of Appeals reasoned that COPA would require 'any material that might be deemed harmful by the most puritan of communities in any state' . . . [to] lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.

(quoting ACLU v. Reno, 217 F.3d 162, 174–75 (3d Cir. 2000)).

by itself render the statute substantially overbroad for purposes of the First Amendment."[269]

Justice Thomas rejected the contention that the Internet's "'unique characteristics'" justify an approach distinct from prevailing doctrine on obscene and indecent speech.[270] *Hamling v. United States*[271] upheld a federal ban on obscene materials delivered via United States mail. *Sable Communications of California, Inc. v. FCC*[272] upheld a similar federal statute as applied to obscene telephone calls but invalidated the statute as applied to indecent, nonobscene communications. Justice Thomas concluded that Congress could place "'the burden of complying with [its] prohibition on obscene messages'" upon a producer of online speech reaching "different communities with different local standards."[273]

Concurring in the judgment, Justice Kennedy again insisted that the "unique characteristics" and "distinct attributes" of "each mode of expression" should guide First Amendment analysis.[274] In a stark departure from *Turner I*, however, Justice Kennedy emphasized factors beyond physical scarcity. "The economics and the technology of each medium," he wrote, "affect both the burden of a speech restriction and the Government's interest in maintaining it."[275] Rejecting Justice Thomas's reliance on *Hamling* and *Sable*, Justice Kennedy stressed that "[t]he economics and technology of Internet communication differ in important ways from those of telephones and mail."[276] "Paradoxically," he observed, "it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset."[277] Unlike mail and telephony, regulating Internet speech without regard to "national variation in community standards" would impose an unacceptable burden.[278]

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269. *Id.* at 585 (plurality opinion).

270. *Id.* at 583 (quoting *id.* at 594–95 (Kennedy, J., concurring in the judgment)).

271. 418 U.S. 87 (1974).

272. 492 U.S. 115 (1989).

273. *Ashcroft I*, 535 U.S. at 581 (plurality opinion) (quoting Sable Communications of Cal. v. FCC, 492 U.S. 115, 125–26 (1989)).

274. *Ashcroft I*, 535 U.S. at 594–95 (Kennedy, J., concurring in the judgment) (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969)).

275. *Id.* at 595.

276. *Id.*

277. *Id.* (citation omitted).

278. *Id.* at 597.

Justice O'Connor likewise disputed the plurality's use of *Hamling* and *Sable*. Concurring in the judgment, she endorsed Justice Kennedy's position that "Internet speakers' inability to control the geographic location of their audience" warranted a departure from standards on mail and phone communications.[279] Also concurring in the judgment, Justice Breyer urged the Court to interpret "the statutory word 'community' to refer to the Nation's adult community taken as a whole"[280] in order to avoid "the serious First Amendment problem that would otherwise" arise if the statute were construed to "provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation."[281]

Alone in dissent, Justice Stevens stressed the technological aspects of the Internet as "a medium in which speech cannot be segregated to avoid [specific] communities" and in which a speaker, having spoken "everywhere on the network at once," can neither "control access based on the location of the listener, nor . . . choose the [precise] pathways" of transmission.[282] Justice Stevens argued that the "fundamental difference in technologies," which enables a single law effectively to prohibit transmission of a message to every American with Internet access, should preclude the analogical use of constitutional "rules applicable to the mass mailing of an obscene montage or to obscene dial-a-porn."[283]

Whether *Ashcroft I* supports a conduit-specific approach to Internet speech depends on the tenuous process of deciphering decisions so "fragmented" that "no single rationale explaining the result enjoys the assent of five Justices."[284] What passes as "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds.'"[285] Counting to five in *Ashcroft I* yields unsatisfactory results. Justice Thomas's plurality of three effectively equated the Internet with the Postal Service and the public switched telephone network as transmission vectors for sexually explicit speech. Four of the Justices concurring in the judgment—Justices O'Connor, Kennedy, Souter, and Ginsburg—did favor a

279. *See id.* at 587 (O'Connor, J., concurring in part and concurring in the judgment).

280. *Id.* at 589 (Breyer, J., concurring in part and concurring in the judgment).

281. *Id.* at 590 (noting "[t]he technical difficulties associated with efforts to confine Internet material to particular geographic areas").

282. *Id.* at 605 (Stevens, J., dissenting).

283. *Id.* at 606.

284. Marks v. United States, 430 U.S. 188, 193 (1977).

285. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).

conduit-specific approach reminiscent of *Red Lion*. Justice Breyer, though sympathetic, adopted a statutory resolution that kept him from addressing COPA's constitutionality. Justice Stevens would likewise have supplied a fifth vote for Justice Kennedy's technologically sensitive methodology, but he stood alone in dissent.

On remand, the lower courts reinstated the preliminary injunction against COPA.[286] In a second case styled *Ashcroft v. ACLU*,[287] the Supreme Court sustained the injunction. The shift between *Ashcroft I* and *II* from a facial attack to a preliminary injunction markedly favored COPA's foes. Characterizing COPA as overtly content-based regulation, *Ashcroft II* readily imposed strict scrutiny.[288] Because the government bore "the burden of proof on the ultimate question of COPA's constitutionality," the injunction would stand as long as COPA's challengers could establish at least one "plausible, less restrictive alternative[]."[289] Writing for the same coalition of five that decided *Playboy*,[290] Justice Kennedy concluded that "[b]locking and filtering software is . . . less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access."[291] Justice Kennedy praised filters for imposing "selective restrictions on speech at the receiving end, not universal restrictions at the source."[292] He speculated that filters might be "more effective than COPA," insofar as filters operate without regard to geography and cover "all forms of Internet communication, including e-mail."[293]

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286. *See* ACLU v. Ashcroft, 322 F.3d 240, 266–71 (3d Cir. 2003), *aff'd*, 124 S. Ct. 2783 (2004) ("Because the ACLU will likely succeed on the merits in establishing that COPA is unconstitutional because it fails strict scrutiny and is overbroad, we will affirm the issuance of a preliminary injunction.").

287. 124 S. Ct. 2783 (2004) (*Ashcroft II*).

288. *See id.* at 2788 ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality." (citation omitted)).

289. *Id.* at 2791–92.

290. Justice Kennedy wrote the majority opinion in both *Playboy* and *Ashcroft II*; Justices Stevens, Souter, Thomas, and Ginsburg joined Justice Kennedy's majority opinion in each case.

291. *Ashcroft II*, 124 S. Ct. at 2792.

292. *Id.*

293. *Id.* Justice Stevens's concurrence succinctly summarized the majority's case against COPA:

> [E]ncouraging deployment of user-based controls, such as filtering software, would serve Congress' interest in protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values.

Id. at 2796 (Stevens, J., concurring).

Justice Kennedy drew an explicit comparison to *Playboy*. Both *Playboy* and *Ashcroft II*, he wrote, "involved a content-based restriction designed to protect minors from viewing harmful materials."[294] In each instance, Congress had to choose "between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it."[295] The record in *Playboy* was "silent as to the comparative effectiveness" of the anti-signal bleed statute and the alternative of consumer-initiated requests to block specific cable channels.[296] In *Ashcroft II*, the government likewise "failed to introduce specific evidence proving that existing technologies," such as filtering software, are less effective than COPA.[297] In both cases, the availability of technological alternatives defeated content-based regulation.[298] The Supreme Court has consistently preferred consumer-level controls, even if imperfect, over categorical restrictions on speech at its source. For example, the ratings system mandated by the Telecommunications Act of 1996[299] undermines any comprehensive ban on indecency within any conduit able to exploit the V-chip.[300] Indeed, the development and diffusion of "[u]ser-control technologies" should have the effect of invalidating *all* "intrusive government restrictions."[301]

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294. 124 S. Ct. at 2793.

295. *Id.* at 2794.

296. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826 (2000).

297. *Ashcroft II*, 124 S. Ct. at 2793.

298. *Cf., e.g.*, Reno v. ACLU, 521 U.S. 844, 876–77 (1997) ("[T]he District Court found that '[d]espite 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.'" (alteration in original) (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127–34 (1989) ("The Court of Appeals, after careful consideration, agreed that . . . rules ['involving access codes, scrambling, and credit card payment'] represented a 'feasible and effective' way to serve the Government's compelling interest in protecting children.") (quoting Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988)).

299. *See* 47 U.S.C. § 303(x) (2000) (requiring the installation of the V-chip in all new TV sets); *id.* § 303(w) (directing the broadcast industry to implement a "voluntary" ratings system); Implementation of Section 551 of the Telecommunications Act of 1996, 13 F.C.C.R. 8232 (1998) (reporting the implementation of a ratings system).

300. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 756 (1996) ("The provision [requiring segregation and blocking of certain sex-related broadcast material] before us does not reveal the caution and care that [our] standards . . . impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions.").

301. Berman & Weitzner, *supra* note 33, at 1634; *see also* Yoo, *supra* note 108, at 305 ("[A]t least with respect to television, widescale deployment of the V-chip will render all attempts to restrict the broadcast of indecent programming unconstitutional."). *See generally* J.M. Balkin,

Judicial assessments of technology are contestable, to say the least. In his *Ashcroft II* dissent, Justice Breyer berated filtering software's "serious inadequacies."[302] He preferred COPA over filtering "that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision."[303] In *United States v. American Library Association, Inc.*,[304] Justice Stevens similarly observed that software based "on key words and phrases" cannot exclude a precisely defined category of images.[305] In *Ashcroft II*, however, Justice Stevens endorsed "filtering software" as a "user-based" alternative to COPA.[306] Greater judicial receptiveness to consumer-level technology will yield further outcomes similar to *Playboy* and *Ashcroft II*. In light of the government's burden to overcome strict scrutiny of content-based restrictions, evidentiary deadlock favors the challenger. "The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government."[307]

III. THE IMPLICIT LOGIC OF CONDUIT-BASED REGULATION

Having defined the Supreme Court's approach to conduit-based regulation of speech, this Article will now criticize that jurisprudence. Section A will reexamine *Red Lion*, which remains the quintessential statement of this body of law. Contrary to its caricature as the origin of a senseless "scarcity" rationale, *Red Lion* in fact articulates almost all of the rationales invoked in examinations of legislative efforts to structure a specific conduit. Section B will dissect *Red Lion*'s three interrelated rationales: scarcity, enhancement of underrepresented voices, and overall regulatory context. Section C will examine a factor added by later decisions: the social meaning that emerges from a conduit's pervasiveness.

Comment, *Media Filters, the V-Chip and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996) ("In the Information Age, the informational filter, not information itself, is king."); Matthew L. Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L.J. 429 (1997) (defending the V-chip scheme).

302. *Ashcroft II*, 124 S. Ct. at 2802 (Breyer, J., dissenting).

303. *Id.* at 2803 (Breyer, J., dissenting).

304. 539 U.S. 194 (2003).

305. *Id.* at 221 (Stevens, J., dissenting); *accord Ashcroft II*, 124 S. Ct. at 2802 (Breyer, J., dissenting) (quoting *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 221 (2003)) (Stevens, J., dissenting).

306. *Ashcroft II*, 124 S. Ct. at 2796 (Stevens, J., concurring).

307. *Playboy*, 529 U.S. at 830 (Thomas, J., concurring); *accord Ashcroft II*, 124 S. Ct. at 2794.

A. Red Lion *Reconsidered*

"A science which hesitates to forget its founders is lost."[308] By this standard, constitutional law fares poorly. The jurisprudence of conduit-based regulation has not yet transcended its origins in broadcasting. This entire body of law "ha[s] a musty odor" even though *Red Lion*, "its chief source of constitutional authority," has not yet reached its fortieth anniversary.[309] No one besides the Supreme Court actually believes the scarcity rationale. Dissatisfaction with *Red Lion* has spawned an academic cottage industry.[310] Lower courts have urged the Supreme Court to overrule *Red Lion*.[311] Even the FCC repudiated *Red Lion*[312] (though the Commission later renounced this heretical stance).[313] Yet

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308. ALFRED NORTH WHITEHEAD, THE AIMS OF EDUCATION & OTHER ESSAYS 162 (1929); *cf.* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 199 (1998) ("[P]rogress in a scientific discipline can be measured by how quickly its founders are forgotten.").

309. Robinson, *supra* note 82, at 903–04.

310. Exemplary sources, all of which indict *Red Lion*'s scarcity rationale to some degree, include LEE C. BOLLINGER, IMAGES OF A FREE PRESS 87–90 (1991); LUCAS A. SCOT POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197–209 (1987); MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 7–18 (1986); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221–26 (1982); Hall, *supra* note 140, at 708–14; Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 908, 926–30 (1997); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 49 (1975); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 151–52; Daniel D. Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 257–58; Spitzer, *supra* note 138, at 991; Van Alstyne, *supra* note 11, at 574; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1106 (1993); Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More like Broadcasting?*, 46 MD. L. REV. 212, 221–22 (1987). A decade before *Red Lion*, Ronald Coase's attack on the scarcity rationale, R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12–17 (1959), presaged what eventually would be called the "Coase theorem," first propounded in GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 75–80 (1988); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

311. *See, e.g.*, Time Warner Entm't Co. v. FCC, 105 F.3d 723, 724–26 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing) (arguing that *Red Lion* should not be extended even if it cannot simply be pronounced dead); Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 509 (D.C. Cir. 1986) ("Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the *Red Lion* distinction . . . or announce a new distinction that is more useable than the present one.").

312. *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043 (1987).

313. *Compare* Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 887–88 (D.C. Cir. 1999) (declining to abrogate the personal attack and political editorializing rules at issue in *Red Lion* solely on the strength of the repeal of the fairness doctrine in *Syracuse Peace Council*), *with* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 308 (D.C. Cir. 2000) (issuing a writ of mandamus ordering the Commission to repeal the personal attack and political editorializing rules).

Red Lion still matters because the Supreme Court says it does.[314] Lower courts inclined to declare that *Red Lion* "no longer makes sense" acknowledge, as they must, that they are "not in a position to reject the scarcity rationale."[315] The high court consistently invokes *Red Lion* when it dilutes First Amendment review of laws having some connection to broadcasting.[316]

Though much of the criticism of *Red Lion* has focused on the scarcity rationale, the decision's treatment of technological innovation looms much larger. In many settings, technological innovation demands reinterpretation of the Constitution. Even originalist theories accommodate "technological changes."[317] Mindful of the government's ability to exploit "[s]ubtler and more far-reaching" technologies,[318] the Supreme Court monitors how "the advance of technology" may affect "the degree of privacy secured to citizens by the Fourth Amendment."[319] Wary of "leav[ing] the homeowner at the mercy of advancing technology," the Court considers not only "relatively crude" technology in use, but also "more sophisticated systems . . . in development."[320]

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314. The high court, after all, retains "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); *accord* State Oil Co. v. Kahn, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 237 (1997); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 180 (1990) (plurality opinion).

315. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002); *see also* Prometheus Radio Project v. FCC, 373 F.3d 372, 402 (3d Cir. 2004) (observing that the "abundance of non-broadcast media does not render the broadcast spectrum any less scarce").

316. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 370–71, 380 (1984); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978); First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 n.30 (1978); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); *cf.* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("[T]he 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.") (footnote omitted).

317. Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring); *see also* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 440 (1995) (arguing that no variant of originalism has ever insisted that constitutional cases be decided as if relevant "changes in . . . technology" had never occurred). *But cf.* Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring) (advocating the unhesitating application of "old values to new circumstances," ranging from "changes in technology" to "new understanding[s] of a social situation").

318. Olmstead v. United States, 277 U.S. 438, 472–73 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347, 353 (1967).

319. Kyllo v. United States, 533 U.S. 27, 33–34 (2001).

320. *Id.* at 35–36; *cf. Ollman*, 750 F.2d at 1038 n.2 (Scalia, J., dissenting) (analogizing the Fourth Amendment's accommodation of "modern electronic surveillance" to the Commerce Clause's accommodation of trucks and the First Amendment's accommodation of broadcasting).

Fear of technological erosion of rights should trigger a similar alarm in free speech jurisprudence. What Chief Justice Warren observed with respect to "the television camera" applies equally to Fourth and First Amendment liberties: "technological innovations [are] not entitled to pervade the lives of everyone in disregard of constitutionally protected rights."[321] The special status of technological innovation as "a singularly uncontroversial justification for modifying established doctrine" warrants heightened vigilance.[322] Far from embracing new channels of expression, lawmakers routinely respond to unfamiliar technologies by suppressing them. Putative "technologies of freedom"[323] could in fact represent the First Amendment's "Trojan horse."[324]

Armed with *Red Lion*'s declaration that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them,"[325] courts routinely exploit technological differences between older and newer modes of communication in calibrating constitutional protection within the newer medium.[326] It is unclear whether systematic reliance "on reference points provided by older, established technologies" has advanced the constitutional understanding of conduit-based regulation.[327] A jurisprudential engine fueled so heavily by "principles operating at a low or intermediate level of abstraction" is bound to yield "incompletely theorized judgments."[328]

See generally Susan Bandes, *Power, Privacy, and Thermal Imaging*, 86 MINN. L. REV. 1379 (2002) (criticizing the overuse of technology-based arguments in contemporary Fourth Amendment jurisprudence); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349 (2004) (questioning why the law should require a search warrant before a traditional search can be conducted, but not when a search relies upon video surveillance).

321. Estes v. Texas, 381 U.S. 532, 585 (1965) (Warren, C.J., concurring).

322. Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 1008 (1997).

323. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983).

324. Robinson, *supra* note 82, at 902.

325. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

326. *Cf.* Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062 (1994) ("Courts often succumb to the temptation to analogize new electronic media to existing technologies for which they have already developed First Amendment models.").

327. Joseph W. Rand, *What Would Learned Hand Do?: Adapting to Technological Change and Protecting the Attorney-Client Privilege on the Internet*, 66 BROOK. L. REV. 361, 372–73 (2000).

328. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) (emphasis omitted); *cf.* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 964 (1996) ("[A]rgument by analogy works

Worse still, these controversies' factual records rarely "reflect current technological reality—a serious flaw in any case involving the Internet" or any other emerging technology.[329]

Nor is there anything doctrinally neutral about the exercise of paying obligatory homage to *Red Lion.* Given the doctrinal baseline for content-based regulation—strict scrutiny absent affirmative debasement of the speech at issue—*Red Lion*'s invitation to examine "the characteristics of new media" represents a one-way, downward ratchet.[330] As *Red Lion* itself illustrated, invoking a conduit-specific approach to the First Amendment tends, perhaps inexorably, to degrade constitutional protection for speech. Throughout the logical layer of free speech jurisprudence, judicial consideration of a conduit's traits rarely if ever enhances constitutional protection. In *United States v. American Library Association, Inc.*,[331] for instance, parties challenged the Children's Internet Protection Act's requirement that libraries install filtering software on Internet access terminals as a condition of federal funding.[332] A plurality of Justices rejected the argument that Internet access converts a public library into "a 'designated public forum'" enjoying heightened protection against governmental restrictions on the time, place, and manner of speech.[333] According to Chief Justice Rehnquist, a library "provides Internet access, not to 'encourage a diversity of views from private speakers,' but . . . to facilitate research, learning and recreational pursuits by furnishing materials of requisite and appropriate quality."[334] The Chief Justice echoed the Senate's sentiment that the Internet was nothing "'more than a technological extension of the book stack.'"[335]

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by comparing two items and by inferring from the fact that these items share some properties that they share some further property.").

329. Ashcroft v. ACLU (*Ashcroft II*), 124 S. Ct. 2783, 2794 (2004). *See generally* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 290–96 (1999) (describing the perils of reviewing statutes such as COPA and the CDA on the basis of a technologically volatile appellate record).

330. *Red Lion*, 395 U.S. at 386. *But see* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (discussing the inability of statutes to dilute equal protection and due process rights).

331. 539 U.S. 194 (2003).

332. 20 U.S.C. § 9134(f) (2000); 47 U.S.C. § 254(h)(6) (2000); Pub. L. No. 106-554, 114 Stat. 2763 (2000).

333. *Am. Library Ass'n*, 539 U.S. at 206 (plurality opinion) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802–03 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

334. *Id.* (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995)).

335. *Id.* at 207 (quoting S. REP. NO. 106-141, at 7 (1999)).

An accurate assessment of the free speech jurisprudence of conduit-based regulation begins with a proper refutation of *Red Lion*'s mythically implausible scarcity rationale. The opinion's concluding paragraph and footnote identify three interrelated rationales. In addition to "the scarcity of broadcast frequencies," the Court cited two distinct factors counseling judicial acquiescence in the regulation of broadcasting: "the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views."[336] *Red Lion* also presented two intriguing "related argument[s]" beyond the admittedly temporary "technological scarcity of frequencies."[337] First, the Court acknowledged that legally induced "economic scarcity" arising from actual or potential "limit[s] [on] entry to the broadcasting market" might justify "the fairness doctrine or its equivalent" on behalf "of those excluded" from the airwaves.[338] Other passages plainly reveal the Court's awareness that scarcity in broadcasting was a technologically volatile phenomenon. *Red Lion* took pains to confine its holding to the state of communications technology as of 1969.[339] Second, the Court hinted that it might uphold "legislation [that] directly or indirectly multipl[ies] the voices and views presented to the public through . . . devices which limit or dissipate the power of those who sit astride the channels of communication with the general public."[340]

Careful exegesis of *Red Lion* therefore reveals no fewer than three distinct justifications for tailoring First Amendment protection by conduit. First, a nuanced understanding of scarcity and its technological context might justify governmental intervention. Second, the history and thoroughness of regulation may warrant greater deference to the legislative structuring of a conduit. Third, a conduit's vulnerability to monopolization may merit official efforts to mute louder voices so that softer ones might be heard. Cases after *Red Lion* supplied a fourth rationale: some media are "uniquely pervasive," able without warning

336. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400 (1969).

337. *Id.* at 401 n.28.

338. *Id.*

339. *See id.* at 396–97 ("Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace."); *id.* at 399 ("The rapidity with which technological advances succeed one another to create more efficient use of spectrum space . . . makes it unwise to speculate on [its] future allocation . . . ."). *See generally supra* text accompanying notes 157–62.

340. *Red Lion*, 395 U.S. at 401 n.28.

to shatter privacy even at home, and "uniquely accessible to children, even those too young to read."[341] The leading authority for the pervasiveness rationale, *FCC v. Pacifica Foundation*,[342] upheld the FCC's power over the timing of potentially offensive broadcasts such as George Carlin's "Filthy Words" routine without relying "on the notion of 'spectrum scarcity.'"[343]

Red Lion, as it turns out, came dangerously close to articulating a comprehensive (if not altogether coherent or credible) theory on conduit-based regulation of speech. Aside from an inchoate expression of enhancement theory and a failure to anticipate pervasiveness, its justifications conform quite closely to the multifaceted approach that the Supreme Court would eventually summarize in 1997: "the history of extensive Government regulation," "the scarcity of available" avenues for expression, and the contested medium's "'invasive' nature."[344] The First Amendment jurisprudence of conduit-based regulation therefore hinges on four interrelated rationales: scarcity, regulatory context, enhancement, and pervasiveness. The remaining sections of Part III will assess these rationales in turn. Section B will address scarcity, regulation, and enhancement as interrelated phenomena. Section C will examine pervasiveness.

B. Enhancing the Legal Understanding of Rivalrousness and Regulation

1. *Enhancement theory*. Among the rationales marshaled in defense of conduit-based regulation, the so-called "enhancement theory" is the easiest to dismiss. First Amendment jurisprudence has struggled mightily with the urge to enhance the voices of the "many people who have ideas . . . but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places."[345] Congressman Charles E. Bennett

341. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978); *accord* Reno v. ACLU, 521 U.S. 844, 866 (1997); Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996) (plurality opinion); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989).

342. 438 U.S. 726 (1978).

343. *Id.* at 770 n.4 (Brennan, J., dissenting); *see also* Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 FORDHAM L. REV. 606, 621 (1983) (noting that scarcity justifies "diversity" in the sense of "offbeat or unusual . . . programming" rather than censorship).

344. Reno v. ACLU, 521 U.S. 844, 868 (1997).

345. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

argued in 1949 that the antitrust laws were "one of the greatest bulwarks against Communism" because they protected ordinary Americans "from domination by business interests so large and monopolistic that the voices of average people cannot be heard in their thunder."[346] Some analysts today advocate overtly content-based regulation, arguing that the failure to engage an imperfect "marketplace of ideas" favors the privileged.[347] These critics fear that deregulation of access to the most lucrative conduits—whether through a retreat from the regulatory status quo or by vigorous First Amendment review—could winnow "the field of otherwise eligible applicants strictly according to their ability to pay" and eliminate "those who lack dollars to put in an effective bid."[348]

Enhancement theory assumes that an unregulated speech market will fall victim to "biases that skew, distort, and corrupt" public discourse.[349] Regulating speech in the public sphere, from this perspective, is no less objectionable or necessary than applying the law of evidence in criminal cases.[350] Wealth may be the most dreaded influence: accelerating "the age-old human drive for self-gratification" through "exploitation of highly advanced electronic technology" allegedly "trivialize[s] public expression and . . . undermine[s] the traditional aims of the First Amendment."[351] From this perspective, "the right prize" at stake in making "regulatory choices" for "the Internet and the digitally networked environment" is "not the Great Shopping

346. 95 CONG. REC. 11,506 (1949) (statement of Rep. Bennett), *quoted in* Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 25 (1982).

347. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 49–50, 57–58 (1993); *see, e.g.*, Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (arguing that "real world conditions," such as expensive access costs and control of the media by the elite, "interfere with the effective operation of the marketplace of ideas"); *cf.* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995) (conceding that it is "easier for the rich to speak than it is for the poor," but advocating market-based responses to the disparity in favor of solutions smacking of command-and-control regulation).

348. Van Alstyne, *supra* note 11, at 562; *e.g.*, CASS R. SUNSTEIN, REPUBLIC.COM (2001); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983); 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; Weinberg, *supra* note 310, at 1193–203.

349. BOLLINGER, *supra* note 310, at 139.

350. *Id.* at 140; *see* Geoffrey R. Stone, *Imagining a Free Press*, 90 MICH. L. REV. 1246, 1262 (1992) (asserting that society has the right to limit the press's reporting of "information [that] has a greater potential to distract and distort than to inform our better judgment," similar to its right to make prejudicial evidence inadmissible).

351. RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 3–4 (1996).

Mall in Cyberspace," but rather "the Great Agora—the unmediated conversation of the many with the many."[352]

No matter how badly scholars want enhancement, though, courts disagree.[353] Most free speech cases spurn "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others."[354] Favoring one speaker over another is "wildly at odds with the normal First Amendment belief that more speech is better."[355] The instinctive rejection of the enhancement theory grows from the suspicion that "government intervention is as likely to suppress diversity as to promote it."[356]

One of the exceptional areas of First Amendment jurisprudence that does accommodate the enhancement theory is conduit-based regulation. The Supreme Court's frequent observation that "the broadcast media pose unique and special problems not present in the traditional free speech case"[357] allows the enhancement theory to flourish within broadcast regulation. The limited nature of spectrum putatively justifies an aggressive federal role in "secur[ing] a reasonable equality of opportunity in radio."[358] In the clearest endorsement of enhancement theory, *NCCB* declared that "'"efforts to enhance the volume and quality of coverage" of public issues' through regulation of broadcasting may be permissible where similar efforts to regulate the

352. Benkler, *supra* note 17, at 565. Professor Benkler's attempt to distinguish "the Great Shopping Mall in Cyberspace" from "the Great Agora" is ironic. The Greek agora was an open marketplace and is thus a forerunner of today's shopping malls.

353. *Cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (noting that a law may be unconstitutional even if "supported by all the law professors in the land").

354. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam); *accord* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting); Meyer v. Grant, 486 U.S. 414, 426 n.7 (1988); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773 n.4 (1985) (White, J., concurring in the judgment); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790–91 (1978).

355. L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 269; *cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) ("[T]he First Amendment presumes that some accurate information is better than no information at all."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

356. David L. Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 FED. COMM. L.J. 201, 212 (1979).

357. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973); *accord Buckley*, 424 U.S. at 49 n.55.

358. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933).

print media would not be."[359] This dictum has never proved dispositive in any subsequent Supreme Court case; as with the scarcity rationale, broadcasting law's exceptional treatment of the enhancement theory has never dictated the resolution of other conduit-based disputes. As Part IV.A shows, lower court decisions involving structural regulation of communications have consistently confined *NCCB* to broadcasting. Cases involving must-carry obligations and ownership restrictions in nonbroadcast media have applied a tougher brand of scrutiny. *NCCB* therefore provides no firm support for the proposition that enhancement theory pervades the jurisprudence of conduit-based regulation. Confining this deviant theory to a single, historically circumscribed setting merely isolates the law of broadcasting as an aberrant branch of First Amendment jurisprudence.

Rejecting enhancement theory does not resolve the yearning for greater competition in the marketplace of ideas. The "great fear" that motivates the jurisprudence of conduit-based regulation is "a fear not of one but of many."[360] This body of law embodies a concern that uncoordinated speech markets would drown in a "cacophony of competing voices, none of which [can] be clearly and predictably heard."[361] The challenge lies in reconciling this anxiety with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[362] with "the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[363]

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359. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 (1978) (quoting *Buckley*, 424 U.S. at 50–51 n.55 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969))).

360. T.S. ELIOT, MURDER IN THE CATHEDRAL 19 (1935).

361. *Red Lion*, 395 U.S. at 376; *accord* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 542 (1980); *see also* NBC v. United States, 319 U.S. 190, 212 (1943) (describing the early experience with unregulated radio as "confusion and chaos").

362. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see also* FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (describing the First Amendment as designed "'to preserve an uninhibited marketplace of ideas'" and "'the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas'" (quoting *Red Lion*, 395 U.S. at 390)); Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972) (noting the First Amendment interest in the freedom of listeners to "receive information and ideas").

363. Associated Press v. United States, 326 U.S. 1, 20 (1945); *accord, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 785 (1978); Citizen Publishing Co. v. United States, 394 U.S. 131, 139–40 (1969). *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Lawbook Exch., Ltd. 2001) (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

Enhancement theory's putative justification, scarcity, simply does not distinguish broadcasting from any other conduit. First Amendment doctrine presumptively rejects enhancement as antithetical to self-governance through the free flow of ideas. That presumption has historically been reversed, or at least suspended, in the context of broadcasting facilities whose peculiar scarcity supposedly warrants a deviant approach. If the scarcity rationale collapses, either with respect to broadcasting or across a diverse range of conduits, its fall similarly dooms enhancement theory.

2. *Scarcity as rivalrousness and the government's regulatory response.* The contradictions of enhancement theory therefore demand a more careful definition of "scarcity." Scarcity in the sense of rivalrousness is not equivalent to the economic definition of scarcity as a constraint on consumer choice. The latter notion of scarcity, as "a universal fact, . . . can hardly explain regulation in one context and not another," let alone "justif[y] content regulation of broadcasting in a way that would be intolerable if applied to . . . the print media."[364] Because "[a]ll economic goods are scarce," not "everyone who wishes to publish a newspaper . . . may do so."[365] Invoking scarcity in this sense represents at best an exercise in spurious market definition. Not only is scarcity universal; it is marvelously contingent and elastic. Any technologically driven expansion in available channels of communication can defeat a claim of scarcity. Absent a convincing demonstration of "*physical* interference," the government lacks "an essential precondition" that might otherwise justify "an umpiring role."[366]

Clarifying the scarcity rationale begins with a careful distinction between *rivalrous* and *nonrivalrous* resources.[367] In stark contrast with the *rivalrous* nature of most tangible goods, whereby gainful use by one party leads directly to another party's loss, use of a *nonrivalrous* good "by one entity does not necessarily diminish the use and enjoyment of

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364. Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (arguing that "analytical confusion" necessarily arises from any "attempt to use a universal fact as a distinguishing principle"); *accord* Time Warner Entm't Co. v. FCC, 105 F.3d 723, 724 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc); Action for Children's Television v. FCC, 58 F.3d 654, 675 (D.C. Cir. 1995) (en banc) (Edwards, C.J., dissenting).

365. *Telecommunications Research & Action Ctr.*, 801 F.2d at 508.

366. Home Box Office, Inc. v. FCC, 567 F.2d 9, 45 (D.C. Cir. 1977) (per curiam) (emphasis added).

367. LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 21 (2001).

others."[368] Although ideas are as "free as the air to common use,"[369] the frequencies on which ideas may be transmitted are not free from physical conflict. "*[E]very* transmitter creates some interference": whenever a consumer "uses a cordless telephone, or even turns on a light," the resulting emission of energy creates some "interference for nearby users of nearby frequencies."[370] Because simultaneous use of spectrum is inescapably rivalrous, "organizing that resource within a system of control makes good sense."[371] Within broadcasting, that system consists of a "regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters."[372]

The constitutional significance of the "limited" availability of "radio facilities" cannot be distinguished from the regulatory interest in preventing "the confusion that would result from interferences" among competing uses of spectrum.[373] What the jurisprudence of conduit-based regulation has called scarcity is better understood as rivalrousness, which justifies governmental efforts to dismantle barriers to competition and freedom of movement within the marketplace of ideas. So rehabilitated, the scarcity rationale even restores a hint of enhancement theory: "The logic of the scarcity rationale is that there are not enough opportunities for speakers to express themselves, and that the government has a role to play in ensuring that these limited opportunities be put to the most valuable uses for society."[374] If nothing else, broadcast licensing's awareness of rivalrousness boasts a long legal pedigree. The Supreme Court has characterized any "attempt by a broadcaster to use a given frequency in disregard of its prior use by

368. Ala. Power Co. v. FCC, 311 F.3d 1357, 1369 (11th Cir. 2002).

369. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

370. Benjamin, *supra* note 84, at 11 (emphasis added). *See generally* Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007, 2021–24 (2003) (addressing "the importance of interference" and the "tragedy of the commons" that occurs "if constraints are not placed on communications").

371. LESSIG, *supra* note 367, at 115.

372. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 638 (1994); *cf.* Brief for Appellant NBC at 31, NBC v. United States, 319 U.S. 190 (1943) (Nos. 554, 555) (observing that no broadcaster has ever contested "the sheer physical necessity of preventing destructive electrical interference between stations").

373. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 282 (1933).

374. Benjamin, *supra* note 84, at 44; *cf.* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 41–57 (2001) (arguing that decisions to exclude noninterfering users from the radio spectrum should be subject to withering First Amendment scrutiny).

others, thus creating confusion and interference," as a dastardly act that "deprives the public of the full benefit of radio audition."[375] Broadcast "pirates" enjoy no meaningful right to free speech.[376]

Indeed, rivalrousness effectively defines the law of broadcast licensing. The *Ashbacker* right to comparative licensing proceedings eases a conflict created by the law itself:[377] the decision to award any license precludes another broadcaster from using the same frequency in the same locality.[378] Although alternatives to licensing, such as auctions[379] or common law resolution of claims by "spectrum squatters,"[380] would offer different solutions to rivalrousness, they could never cure the mutual exclusivity of competing uses. Conducting an

375. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940).

376. *See* Ruggiero v. FCC, 317 F.3d 239, 245 (D.C. Cir. 2003) (upholding an FCC regulation banning broadcast pirates from obtaining a low-power FM radio license despite the petitioner's First Amendment challenge); *cf.* United States v. Szoka, 260 F.3d 516, 526 (6th Cir. 2001) ("[T]here is no constitutional right to broadcast without a license.").

377. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 333 (1945) (holding "that where two bona fide applications are mutually exclusive," the FCC must conduct hearings to avoid depriving either party of "the opportunity which Congress chose to give him"). *But cf.* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) (entitling an applicant who met the statutory requirements of the Radio Act of 1927 to be licensed even if the Federal Radio Commission had neither heard nor considered later applications).

378. *See Ashbacker*, 326 U.S. at 330, 332–33; *cf.* FCC v. NBC, 319 U.S. 239, 243–44, 247 (1943) (granting an incumbent licensee the right to intervene in another licensee's application to increase its transmission power and expand its hours of operation if such regulatory changes would cause "electrical interference").

379. *See, e.g.*, Ellen P. Goodman, *Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation*, 49 FED. COMM. L.J. 517, 518 (1997) (discussing controversies over the FCC's use of auctions to allocate spectrum); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 171–72 (1990) (discussing how the "early history of broadcasting" prevented frequencies from being auctioned to "the highest bidder"); Eli Noam, *Spectrum Auction: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism—Taking the Next Step to Open Spectrum Access*, 41 J.L. & ECON. 765, 778–80 (1998) (discussing a theoretical auction format using access code "tokens"); Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53, 69 (1999) (assessing the value of a "right-of-use doctrine" over "traditional licensing regimes"); Richard W. Stevens, *Anarchy in the Skip Zone: A Proposal for Market Allocation of High Frequency Spectrum*, 41 FED. COMM. L.J. 43, 43 (188) (proposing a market allocation system in which "primary" users can sell or lease a subset of their spectrum rights).

380. *See* PETER W. HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 74–76 (1997); Tom W. Bell, *The Common Law in Cyberspace*, 97 MICH. L. REV. 1746, 1764–67 (1999) (book review) (criticizing Huber's "rush to paint the spectrum in the image of real property" and advocating the use of trademark law as "a model for defining a common law right to use the spectrum"); Hazlett, *supra* note 379, at 148–52 (describing the resolution of "the classic interference problem" through the application of the common law's "homesteading principle").

auction, as the law now often demands,[381] would still require the FCC to set power limits and frequency ranges, which in turn would affect the number of licenses and their uses. Reliance on the common law would require nonexpert, generalist courts to perform the same task, *ex post* rather than *ex ante*. This choice between a liability rule and a property rule, though justifiable on other economic grounds,[382] does not settle or eliminate rivalrousness. The heated debate over licensing and its alternatives thus hinges solely on a question of remedies, even as underlying conflicts among uses of spectrum remain unresolved.

Licensing as a remedy does carry constitutional consequences. Approval of broadcast licensing represents a significant departure from the Supreme Court's deep and historically validated suspicion of licensing as the quintessential prior restraint.[383] "The struggle for the freedom of the press was primarily directed against the power of the licensor."[384] Early in constitutional history, "a law requiring the licensing of printers" was recognized as the "archetypical censorship statute."[385] The sixteenth and seventeenth century "licensing laws" that the Bill of Rights targeted as a "core abuse" have a contemporary analogue in broadcast licensing.[386] Even when courts allow licensing schemes, they impose stringent conditions,[387] lest the unscrupulous licensor achieve censorial objectives through "post hoc rationalizations" and "shifting or illegitimate criteria."[388] In another instance in which "equal protection" considerations are "closely intertwined" with free speech,[389] constraints on licensing consider the "specific sequence of events leading up to the

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381. 47 U.S.C. § 309(i), (j) (2000).

382. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972).

383. Yoo, *supra* note 108, at 255–56.

384. Lovell v. City of Griffin, 303 U.S. 444, 451 (1938); *see also* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931) (describing early efforts to curb "the legislative power of the licenser resulting in renunciation of the censorship of the press").

385. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760 (1988).

386. Thomas v. Chi. Park Dist., 534 U.S. 316, 320 (2002).

387. *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225–26 (1990) (allowing petitioners to challenge a city's "'general' inspection scheme" on First Amendment grounds), *overruled in part by* City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); *City of Lakewood*, 486 U.S. at 757–58 (advocating standards to ensure that the "difficulties of proof and the case-by-case nature of 'as applied' challenges" do not allow licensors to exercise unfettered discretion); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988).

388. *City of Lakewood*, 486 U.S. at 758.

389. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); *see also* Karst, *supra* note 310, at 21 ("The principle of equality . . . is not just a peripheral support for the freedom of expression, but [is] part of the 'central meaning of the First Amendment.'").

challenged decision," especially departures from procedural or substantive norms.[390]

Not even extensive tailoring, however, can excuse most licensing schemes. "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."[391] In speech as in other endeavors, "[t]he main value of the sword of Damocles is that it hangs, not that it drops."[392] "Measured against [the] criteria" prescribed for prior restraints, "the broadcasting regime clearly fails."[393]

Moreover, the longstanding practice of using comparative licensing to resolve spectrum conflicts effectively merges the scarcity rationale with solicitude for regulatory schemes. The Supreme Court "has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."[394] Although broadcasters have been regulated on terms distinct from those imposed on common carriers,[395] what matters is that the government does restrict entry into and exit from these industries, and does so tightly. Though neither "owned by the federal government" nor subjected by it to rate regulation, "spectrum is subject to strict governmental regulation."[396] Regulation of entry, even if not of rates, gives the government freer rein over an entire conduit.[397] The Court has distinguished laws targeting

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390. Village of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 267 (1977).

391. Thornhill v. Alabama, 310 U.S. 88, 97 (1940); *see also id.* ("The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern.").

392. Yale Broad. Co. v. FCC, 478 F.2d 594, 605 n.22 (D.C. Cir. 1973) (per curiam) (Bazelon, C.J., dissenting from the denial of rehearing *en banc*) (quoting Lou Cannon, *Nixon Aide Explains TV License Challenges*, WASH. POST, Mar. 9, 1973, at A17); *accord* Yoo, *supra* note 108, at 258.

393. Yoo, *supra* note 108, at 256.

394. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982); *accord* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 225 (1997) (Stevens, J., concurring); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 428 n.12 (1990).

395. *See* United States v. RCA, 358 U.S. 334, 348–49 & n.17 (1959) (excluding broadcasters from "the extensive controls, including rate regulation, of Title II of the Communications Act"); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940) ("In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail[roads] . . . , the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.").

396. *In re* NextWave Pers. Communications, Inc., 200 F.3d 43, 50 (2d Cir. 1999).

397. *Cf.* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1691, 1725 (1997) (arguing that the historic practice of giving licenses to broadcasters warrants giving the government a wide

"the structure of market" from laws "regulat[ing] the content of speech."[398] To the extent that they can be characterized as structural rather than content-based, conduit-based regulations escape searching scrutiny. Just as neither half of "the Commerce Clause protects the particular structure or methods of operation in a . . . market,"[399] the Supreme Court "see[s] nothing in the First Amendment to prevent" measures that "promote the 'public interest' in diversification of the mass communications media."[400]

Accommodation of existing regulation gives wide berth to broadcast licensing and kindred schemes for structuring communications markets. In many other settings, the grant of a license may injure other competitors but does not perforce exclude them from the market. In those circumstances, regulation creates no entitlement to a comparative hearing.[401] Regulatory law distinguishes between programs that confer licenses on all "fit, willing, and able" applicants[402] and schemes such as broadcast licensing or cable franchising, which

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constitutional berth). Other sources endorsing this "quid pro quo" justification include Reed Hundt & Karen Kornbluth, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 17 (1996), and Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 GEO. WASH. L. REV. 686, 687–90 (1998).

398. *Turner II*, 520 U.S. at 225 (Stevens, J., concurring) (acknowledging that the Court's "task would [have been] quite different" had the statute targeted content rather than market conduits); *see also* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 669 n.2 (1994) (Stevens, J., concurring in part and concurring in the judgment) ("[F]actual findings accompanying economic measures . . . merit greater deference than those supporting content-based restrictions on speech.").

399. Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978); *accord* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93–94 (1987).

400. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799 (1978); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969) ("[T]o deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" (quoting NBC v. United States, 319 U.S. 190, 227 (1943))).

401. *Compare* Fed. Home Loan Bank Bd. v. Rowe, 284 F.2d 274, 279 (D.C. Cir. 1960) (sustaining a federal savings and loan charter granted without a comparative hearing, on the reasoning that such a charter did not exclude the competitor from the home lending business), *with* Pa. R.R. Co. v. Dillon, 335 F.2d 292, 294–97 (D.C. Cir. 1964) (using similar reasoning in railroad regulation).

402. *Cf., e.g.*, 49 U.S.C. § 10922(a)(1)–(2) (1994) (requiring the ICC to issue a certificate to a motor carrier if it finds that the carrier is "fit, willing, and able" to perform transportation services "required by the present or future public convenience and necessity") *repealed by* ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 804; Schaffer Transp. Co. v. United States, 355 U.S. 83, 85 n.1 (1957) (noting that an applicant for additional authority under section 207(a) of the Motor Carrier Act of 1935 must be "fit, willing, and able" to provide the service that it proposes). *See generally* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920*, 79 COLUM. L. REV. 426 (1979).

follow the public interest, convenience, and necessity standard articulated in statutes such as the Communications Act of 1934.[403] Although licensing presumes that "the broadcasting field is open to anyone" who "shows his competency, the adequacy of his equipment, and financial ability to make good use of [an] assigned channel," this nominally open opportunity is constrained by a crucial contingency.[404] There must "be an available frequency over which" the would-be entrant "can broadcast without interference to others."[405] What broadcasting law calls scarcity is merely the recognition that every license precludes all other contemporaneous uses of spectrum. Cable franchising likewise guarantees that a single operator will serve a particular locality. Physical restraints do govern both settings—as spectrum limits the number and strength of distinct signals, so will cable operators encounter some limit on their ability to lay wire. In both settings, however, the more important constraint is legal rather than physical.

To repeat: scarcity as rivalrousness is not equivalent to the economic definition of scarcity as a constraint on consumption. Before *Ashbacker*, the Supreme Court held that "economic injury to an existing station is not a separate and independent" consideration in broadcast licensing.[406] It takes but a small sleight of hand, though, to transform injury to rival broadcasters into a relevant element of the public interest: "economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service."[407]

If anything, treating scarcity as synonymous with economic injury yields perverse broadcasting policy. Incumbent protection, once anathema in broadcast regulation, has become the *raison d'être* of licensing in the public interest. Incumbent licensees eventually secured a presumption favoring renewal,[408] ultimately codified in 1996.[409]

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403. Act of June 19, 1934, Pub. L. No. 416, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

404. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

405. *Id.*

406. *Id.* at 476; *accord* Southeastern Enterprises, 22 F.C.C. 605, 610–12 (1957); *see also* H.R. REP. NO. 85-1297, at 64–99 (1957) (discussing the consideration of competitive factors in broadcast regulation).

407. Carroll Broad. Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958).

408. Cent. Fla. Enterprises, Inc. v. FCC, 683 F.2d 503, 505 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). For a thumbnail history of this policy, see FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 782–83 & n.5, 805–07 (1978).

"[P]reserving the effective over-air use of the radio spectrum had been the basis of regulatory policy, but once the policy was established it became an end in itself, to be preserved even against a new medium that eliminated the need for the policy in the first place."[410] Like holders of taxicab medallions,[411] incumbent broadcasters seek to limit the number of licenses.[412] They usually succeed. Efforts by the broadcasting industry to protect its interests at cable's expense demonstrate that "[n]ew regulations, ostensibly defended as public-interested or as helping viewers and consumers, will often be a product of private self-interest, and not good for the public at all."[413] What is bad for broadcast is good for America.

3. *Divergent regulatory approaches to different communications conduits.* The communications industry reflects many of the traits that justify regulation of other failed or flawed markets. In media markets, speakers deviate substantially from the romantic, "Luke Skywalker" vision of speakers as boardwalk painters, soapbox orators, and subway guitarists. "Speakers are not numerous, nor are they fungible."[414] Regulating communicative conduits in pursuit of perfect competition—a model based on numerous small firms freely entering and exiting a market for fungible goods and competing solely on the basis of

409. Telecommunications Act of 1996, Pub. L. No. 104-104, § 204(a), 110 Stat. 56, 112–13. *See generally* Lili Levi, *Not with a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243, 247 (1996) (arguing that "considerations of policy and freedom of speech substantively support" the Telecommunications Act of 1996).

410. Robinson, *supra* note 82, at 904–05.

411. *See, e.g.*, Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 710–11 & n.159 (2001) (describing the regulation of taxicabs as "[t]he best analogy to the likely outcome of a regime with substantial numbers of false convictions"); Robert M. Hardaway, *Taxi and Limousines: The Last Bastion of Economic Regulation*, 21 HAMLINE J. PUB. L. & POL'Y 319, 367 (2000) (explaining how a medallion system for licensing New York City's taxis and limousines harms the average driver and the public while benefiting investors); *see also* Michael E. Beesley, *Regulation of Taxis*, 83 ECON. J. 150, 151 n.2 (1973) (observing that the "taxi industry" absent regulation "would approximate the characteristics of perfect competition").

412. *See, e.g.*, Charles D. Ferris & Terence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 CATH. U. L. REV. 299, 322–23 (1989) ("[It] serves the interest of those who have gained access to a frequency to restrict as much as possible its availability to potential competing users.").

413. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1767–68 (1995).

414. 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, 174 (1995).

price[415]—is neither possible nor desirable. Substantial economies of scale preclude a communications market of atomistic, independent actors. Because an "industry with a larger number of owners may well be less efficient than a more concentrated industry," contrary efforts to structure communications markets may sacrifice "[b]oth consumer satisfaction and potential operating cost savings."[416] Competition among communicative conduits thus presents yet another instance in which competition among the few provides "a standard of structure and performance that is more pertinent than pure competition given the character of modern technology," a regulatory norm superior to perfect competition.[417] In this setting as elsewhere, "perfect competition is not only impossible but inferior."[418]

Competition within and among conduits often lacks two of the conditions of perfect competition: an atomistic market and the absence of legal restraints on entry and exit. The former condition is static and structural; the latter, dynamic and legally contingent. The dynamic factor carries greater constitutional significance. Economies of scale and network effects constrain the number of competitors within any media market.[419] Traditional newspapers, which often enjoy geographic monopolies,[420] merit full First Amendment protection.[421] Fear of media

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415. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 9–12 (3d ed. 1990) (defining *perfect* competition as demanding a homogeneous product, a small number of sellers and buyers relative to the size of the market, no barriers to entry, and the mobility of resources).

416. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1047 (D.C. Cir. 2002).

417. Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 119 (1984); *see also* WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982); Elizabeth E. Bailey, *Contestability and the Design of Regulatory and Antitrust Policy*, 71 AM. ECON. REV. 178, 178 (1981) (advocating policies that "permit[] toleration of factors that make for natural monopoly while . . . lessening the need for public intervention"); Elizabeth E. Bailey & John C. Panzar, *The Contestability of Airline Markets During the Transition to Deregulation*, 44 LAW & CONTEMP. PROBS. 125, 125 (1981) (arguing that "contestable markets, even if actually served by only one firm, [may] exhibit many of the desirable properties of competitive markets").

418. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 106 (1942).

419. On network effects, formally defined as changes in one consumer's benefit when others consume the same good or service, see generally DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 208–12 (1994) (discussing "collective action problems" such as "excess momentum" and "excess inertia" created by network externalities); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998) (addressing "the role of network economic theory in the legal enterprise").

420. *See, e.g.*, Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 n.4 (D.C. Cir. 1986) (observing that "the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines" (quoting Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir.

domination is not limited to the electronic domain; the triumph not only of radio over "the soap box" but also of "the monopoly newspaper" over "the political pamphlet" animates the fear that "comparatively few private hands are in a position to determine not only the content of information but its very availability."[422] Monopolistic market structure cannot distinguish print from broadcast media. The sharp constitutional divide between these two industries hinges on some other factor.

What separates print journalism from broadcasting is that newspaper monopolies are not the products of comprehensive, conscious regulatory policy. Nor could they be, given the constitutional tradition opposing the licensure and regulation of print journalists. Though newspapers and broadcasters may be equally capable of squelching public debate,[423] print and broadcast journalists are different if only because the law says they are. The mere presence of command-and-control regulation, to say nothing of discretionary choices in its implementation, plainly restricts freedom of movement into, within, or out of any market. If only by historical accident, print journalists have been spared the chore of complying with official constraints on their economic decisions. Ever since the government intervened in radio, broadcasters have not enjoyed comparable freedom.

The substantive content of regulatory law is not the sole source of constitutional distortion. The very presence of an agency and its accompanying regulatory apparatus reduces a reviewing court's marginal propensity to protect speech.[424] In his *Ashcroft I* dissent, Justice Stevens characterized his earlier opinion in *FCC v. Pacifica Foundation*[425] as influenced not only "by the distinctive characteristics of the broadcast medium" but also by faith in "*the expertise of the*

1983))); Eli M. Noam & Robert N. Freeman, *The Media Monopoly and Other Myths*, 29 TELEVISION Q. 18, 22 (1997) (reporting that more than 98% of American cities have only one daily newspaper); *cf.* Powe, *supra* note 186, at 55–56 (observing, more than a quarter-century ago, that radio and television stations outnumbered daily newspapers).

421. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 253–58 (1974).

422. Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1643 (1967).

423. *See* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 154–55 (1996) (noting that newspapers, television stations, and radio stations all compete in a market that "is not neutral as to consent"); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787–90 (1987) (arguing that the mass-media market is "far from perfect" and "constrains the presentation of matters of public interest").

424. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 16–34 (2000).

425. 438 U.S. 726 (1978).

agency."[426] Greater deference to an agency reduces the legal space in which private parties can assert constitutional claims. Courts have historically regarded communications law as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[427] Consistent with the practice of "substantial judicial deference" to administrative "judgment[s] regarding how the public interest is best served,"[428] First Amendment scrutiny reaches its nadir when lawmakers structure "industr[ies] so regulated and so largely closed" that competition is presumptively disfavored.[429]

Broadcasting meets this definition of an intrinsically flawed industry. In passing the Radio Act of 1927[430] and the Communications Act of 1934,[431] "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."[432] Multichannel video programming delivery, by cable or satellite, likewise qualifies by statute and constitutional tradition as an industry cloaked with a public interest.[433] Federal law authorizes states to franchise cable operators, tax their revenues, and set their rates.[434] Once a cable system has selected its programming, that "system functions, in essence, as a

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426. Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 603–04 (2002) (Stevens, J., dissenting) (emphasis added).

427. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940); *accord* MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 245 (1994) (Stevens, J., dissenting).

428. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981); *see also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 814 (1978) ("[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency" (quoting FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 29 (1961))).

429. FCC v. RCA Communications, Inc., 346 U.S. 86, 97 (1953); *accord*, *e.g.*, Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 776 (D.C. Cir. 1974).

430. Ch. 169, 44 Stat. 1162, *amended by* 46 Stat. 844 (1930); *cf.* Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 274–87 (1933) (discussing the Radio Commission's authority). *See generally* Fed. Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464, 466–67 (1930) (describing the purpose and the content of the Radio Act of 1927); Jora Minasian, *The Political Economy of Broadcasting in the 1920s*, 12 J.L. & ECON. 391 (1969) (addressing "the economic implications of the laws and regulations" made during the period of "cut throat competition" and chaos before the passage of the Radio Act of 1927).

431. Act of June 19, 1934, ch. 652, 48 Stat. 1064.

432. Pottsville Broad. Co., 309 U.S. at 137; *accord, e.g.*, NBC v. United States, 319 U.S. 190, 219 (1943).

433. *See generally* Munn v. Illinois, 94 U.S. 113, 126 (1877) (upholding the power to regulate industries "clothed with a public interest").

434. 47 U.S.C. §§ 541–547 (2000); *see also* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 655 (1994) (noting "cable's long history of serving as a conduit for broadcast signals").

conduit for the speech of others."[435] "Satellite carriers [also] function primarily as conduits for the speech of others."[436] The statutory pledge that a cable operator shall not be regulated as a common carrier[437] sheds little to no light on First Amendment questions in that industry.[438] "[R]adio broadcasting" has long enjoyed an identical promise that its licensees "shall not . . . be deemed . . . common carrier[s]."[439] Neither this guarantee nor the ban on censorship of broadcast content[440] has enhanced rather than reduced broadcasters' First Amendment rights.

Whether a conduit fits this "public interest" model is more a question of legal discretion than of natural definition. Broadcasting fell under public control not because the physics of spectrum demanded it, but rather because the government so decreed. One technological successor to VHF television, direct broadcast satellite (DBS), vividly depicts how conscious policy and path-dependent circumstance can override the physical characteristics of a conduit. The first judicial opinion to examine DBS equated this novel conduit with broadcasting. In the 1996 case of *Time Warner Entertainment Co. v. FCC*,[441] the D.C. Circuit dutifully assumed that DBS was subject to "inherent physical limitation[s]"[442] that enable "only a tiny fraction of those with resources and intelligence" to exploit that medium.[443] Mindful of the Supreme Court's approval of "reasonable means of promoting the public interest in diversified mass communications,"[444] *Time Warner* upheld a demand that DBS operators set aside four to seven percent of their channel capacity for noncommercial educational and informational programming.[445]

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435. *Turner I*, 512 U.S. at 629.

436. Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 352 (4th Cir. 2001).

437. 47 U.S.C. § 541(c) (2000).

438. *See* FCC v. Midwest Video Corp., 440 US. 689, 695 (1979) (affirming the Eighth Circuit's belief that "the Commission's access, channel capacity, and facilities rules" presented First Amendment concerns).

439. 47 U.S.C. §153(h) (2000). *See generally* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 107–09 (1973) (chronicling the discussion surrounding radio broadcasters as common carriers during the passage of the Communications Act of 1934).

440. 47 U.S.C. §326 (2000); *see* FCC v. WNCN Listeners Guild, 450 U.S. 582, 597–98 (1981) (discussing the prohibition of censorship in the Radio Act of 1927 and the Communications Act).

441. 93 F.3d 957 (D.C. Cir. 1996).

442. *Id.* at 975 (quoting Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 637 (1994)).

443. *Id.* (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969)).

444. FCC v. National Citizens Comm. for Broad, 436 U.S. 775, 802 (1978); *accord Time Warner*, 93 F.3d at 976.

445. *See Time Warner*, 93 F.3d at 976 (describing this imposition as "hardly onerous").

Nothing about DBS as technological wonder dictated this result. If anything, DBS promises to ease scarcity problems on multiple levels. DBS boasts larger channel capacity. From the even more important perspective of the geographically constrained consumer, DBS facilitates intermodal competition for multichannel video programming delivery. As the "first video technology with a national footprint" and the corresponding opportunity "to exploit the cost efficiencies that accompany national distribution" of programming, DBS "represents the first technology capable of breaking" the grip of "local cable monopolies."[446]

In the name of preserving free, over-the-air broadcast television, Congress has imposed must-carry obligations on DBS,[447] similar to those borne by cable operators.[448] DBS's must-carry regime is called "carry one, carry all."[449] In *Satellite Broadcasting & Communications Association v. FCC*,[450] the Fourth Circuit resolved a constitutional challenge to "carry one, carry all" under the intermediate scrutiny standard of *O'Brien* and the *Turner* litigation[451] rather than the extreme

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446. Yoo, *supra* note 108, at 343; *see also* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 901 & n.37 (2003) (contrasting satellite's nationwide reach with cable's local footprint and describing satellite as "uniquely well suited to take advantage of the economies inherent in national distribution of video programming").

447. *See* 17 U.S.C. § 122 (2000) (regulating "secondary transmissions by satellite carriers within local markets"); 47 U.S.C. §338(a)(1) (2000) (prescribing when satellite carriers providing secondary transmissions under 17 U.S.C. § 122 must carry the signals of local broadcast stations).

448. The doubling of the amount of spectrum given to each incumbent broadcast station "further cement[s] in place the role [of] broadcasting" in the market for video programming delivery. Yoo, *supra* note 108, at 344; *see also In re* Advanced Television Sys. & Their Impact upon the Existing Television Broad. Serv., 12 F.C.C.R. 12,809, 12,820–21 (1997) (requiring broadcasters to provide a "free digital video programming service" to the over-the-air services "on which the public has come to rely").

449. The Satellite Home Viewer Improvement Act requires a satellite carrier to carry all broadcast signals within a market once it carries any one broadcast signal within that market. Pub. L. No. 106-113, 113 Stat. 1051A-523 (1999); Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 343 (4th Cir. 2001).

450. Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 352 (4th Cir. 2001).

451. *See* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 645 (1994) (describing the distinction between broadcasters and cable operators as one based "upon the manner in which speakers transmit their messages . . . and not upon the messages they carry"); United States v. O'Brien, 391 U.S. 367, 377 (1968):

> [R]egulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the restriction . . . is no greater than is essential to the furtherance of that interest.

deference of *NBC* and *NCCB*.[452] The Fourth Circuit's unsurprising conclusion—that "carry one, carry all" was narrowly tailored to advance the putatively content-neutral goal of sustaining "independent [over-the-air] stations needed to provide . . . a rich mix of broadcast programming from multiple sources"[453]—admittedly foreclosed more lenient scrutiny under *NBC* and *NCCB*. At the very least, *Time Warner*'s contrary approach, which would have subjected structural regulation of DBS to broadcasting's deferential standard, no longer gives unequivocal support for treating DBS like broadcasting rather than cable. But these decisions also provide no plausible reason for analogizing DBS to conventional broadcasting (the better technological analogue) or to cable (a closer functional or economic substitute).

The free-wheeling Internet provides a striking contrast. Unlike broadcast and cable, the Internet's logical architecture continues to adhere, more or less, to the end-to-end principle.[454] The true strength of any end-to-end network lies in its stupidity. As befits a "stupid" network[455] or a "dumb pipe,"[456] the logical layer of the Internet is oblivious to content. By keeping intervening protocols as simple and general as possible, end-to-end design drives a network's "intelligence" to its ends, where users load information and launch applications.[457] Simple design and common protocols enable users to develop applications ranging from peer-to-peer file sharing to e-commerce and voice over Internet protocol.[458] The resulting communications environment is as fecund as it is diverse. The Internet thus harvests the legacy of this country's longstanding treatment of free speech as a "transcendent value" based on a "robust exchange of ideas which

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452. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799–802 (1978) (emphasizing that there is no "'unabridgeable First Amendment right to broadcast'" and holding that the FCC may regulate "to promote the 'public interest'"); FCC v. NBC, 319 U.S. 190, 210–18 (1943) (explaining the FCC's broad discretion to determine which uses of radio maximize the "public interest, convenience, or necessity").

453. *Satellite Broad. & Communications Ass'n*, 275 F.3d at 357.

454. *See generally supra* text accompanying notes 27–34 and sources cited therein.

455. *See* Isenberg, *supra* note 30, at 24.

456. Hatfield, *supra* note 97, at 1.

457. *See* Saltzer et al., *supra* note 27, at 277 (examining the "end-to-end argument" against "low-level function implementation").

458. *See* Lemley & Lessig, *supra* note 10, at 932 (noting that "keeping the network simple, and its interaction general" will "keep[] the cost of innovation low . . . [and] continue to facilitate innovation").

discovers truth 'out of a multitude of tongues.'"[459] Perhaps more than any other aspect of contemporary communications, the end-to-end principle's commitment to structural openness animates the admonition against applying "the regulatory frameworks established over the past sixty years for telecommunications, radio and television [to] the Internet."[460]

The Internet resists partitioning, by speakers and would-be regulators alike. As Justice Kennedy has recognized, "it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset."[461] "Whereas traditional scarcity of money and space require [*sic*] a library to make choices about what to acquire," observed Justice Souter in his dissent in *United States v. American Library Association, Inc.*,[462] "blocking is the subject of a choice made after the money for Internet access has been spent or committed."[463] By contrast, because access to the Internet is acquired in one swoop, blocking "is not necessitated by scarcity of either money or space."[464]

In the electronic domain, to be sure, current technological assumptions are unusually treacherous. "Experience has made it axiomatic to eschew dogmatism in predicting the impossibility of important developments in the realms of science and technology. Especially when the incentive is great, invention can rapidly upset prevailing opinions of feasibility."[465] "[S]olutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[466] The Internet's current reliance on "unified set[s] of code made available to everyone" may "change in the future"; this fragile *modus operandi* can shift abruptly toward a proprietary model.[467] Under the jurisprudence of conduit-based

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459. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

460. INFORMATION INFRASTRUCTURE TASK FORCE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 5 (1997).

461. Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 595 (2002) (Kennedy, J., concurring) (citation omitted).

462. 539 U.S. 194 (2003).

463. *Id.* at 236 (Souter, J., dissenting).

464. *Id.* (describing "the choice to block [as] a choice to limit access that has already been acquired").

465. RCA v. United States, 341 U.S. 412, 427 (1951) (Frankfurter, J., concurring dubitante).

466. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973).

467. Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1288 (1998).

regulation of speech, further privatization of the Internet carries constitutional implications. *Reno v. ACLU*[468] observed that the Internet's historic freedom from regulation warranted closer scrutiny of the CDA *vis-à-vis* similar laws governing broadcast.[469] In the event of constitutional conflict, a change in the Internet's regulatory status will change judicial attitudes. First Amendment protection shrinks as messages and audiences become more private and therefore more remote from public discourse.[470] If private parties do partition the Internet, First Amendment doctrine would almost surely grant the speech-regulating "machinery of government" greater "play in its joints."[471]

A technologically savvy jurisprudence of conduit-based regulation would classify DBS and the Internet according to their real-world performance. But it is clear that these conduits' *legislative* status is driving their *constitutional* status. Such treatment effectively creates "one long [legal] bootstrap."[472] Longstanding regulatory provisions have now "become part of the constitutional baseline used to determine whether a particular regulation violate[s] the First Amendment."[473] The notion that the social meaning of a thoroughly regulated conduit justifies further regulation not only engages in the circular illogic of "[b]asing government control on government control"; it also "fail[s] to distinguish spectrum from forms of property" beyond the government's reach.[474] Rights in other scarce resources, most saliently land, are determined by "a mode which neither necessitates nor tolerates a regime like that of the FCC."[475] In a constitutional tradition that tempers many rights accorded to owners of property but protects

468. 521 U.S. 844 (1997).

469. *See id.* at 868–69 (noting that the Internet does share some of the factors that affect the constitutionality of broadcast regulation, such as a "history of . . . regulation," a "scarcity of available frequencies," and an "'invasive' nature").

470. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603, 676–78 (1990) (describing judicial consideration of "the intent of the speaker, the size of [the] speaker's audience, and the identity of the speaker" in crafting First Amendment protection for "the flow of information to the public").

471. Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931); *accord, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 540 (1942).

472. Van Alstyne, *supra* note 11, at 548; *see also id.* at 554 (comparing the FCC's licensing system to allocation systems for scarce land resources).

473. Yoo, *supra* note 108, at 269–70.

474. Benjamin, *supra* note 84, at 51.

475. Van Alstyne, *supra* note 11, at 554.

speech forthrightly,[476] certain communicative conduits are regulated more stringently than land. In a polity where "[g]overnment control is not a justification for government control, but a response to some other justification," regulatory disparities should rest on legitimate factual differences.[477] The jurisprudence of conduit-based regulation reflects no such rationality; it rests exclusively on historic path-dependency. Even though land and spectrum present identical issues of scarcity and rivalrousness, "it is only because the legal devices used in respect to land have been so vastly different from those represented by the FCC that we unthinkingly suppose that there must be some intrinsic differences."[478]

Over time, conduit-based regulation's bootstrap becomes even longer and more pernicious. Any explicit inclusion of regulatory intensity in a constitutional test "creates a somewhat perverse incentive for legislatures—regulate a medium in its infancy or lose your chance to regulate at all."[479] Try as the law might in an industry's embryonic stage to avoid "an all or nothing-at-all choice,"[480] any solicitude for ongoing regulation, however modest, will favor preemptive regulation. From the perspective of a legislator or regulator who can rationally anticipate constitutional jurisprudence, "all other things will not be equal if waiting means forfeiting the right to regulate."[481] In dynamic terms, this "sinister" jurisprudence allows "regulation [to] serve as a constitutional justification for more regulation" and to "reinforce an overriding culture of regulation for its own sake."[482]

4. *Compelled speech as an illustration of a regulation's constitutional significance.* Perhaps the most vivid illustration of the interplay between regulation and free speech jurisprudence comes from the seemingly distant doctrine that concerns compelled speech through cooperative marketing. The First Amendment bars the government

476. *Compare* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."), *with id.* amend. V ("No person shall be . . . deprived of . . . property, *without due process of law*; nor shall private property be taken for public use, *without just compensation*." (emphases added)).

477. Benjamin, *supra* note 84, at 51.

478. Van Alstyne, *supra* note 11, at 555.

479. Benjamin, *supra* note 16, at 320.

480. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 769 (1996) (Stevens, J., concurring).

481. Benjamin, *supra* note 16, at 320.

482. Yoo, *supra* note 108, at 356.

from compelling individuals to express views contrary to their beliefs.[483] The government may not coerce individuals to subsidize speech to which they object,[484] or even to be saddled with unwanted associates.[485] Notwithstanding the compelled speech doctrine, the 1997 Supreme Court case of *Glickman v. Wileman Bros. & Elliot, Inc.*[486] rejected a First Amendment challenge to marketing orders that required producers of tree fruit to pay assessments for generic advertising. *Wileman* stressed "the importance of the statutory context";[487] nectarines, plums, and peaches are marketed under the Agricultural Marketing Agreement Act of 1937,[488] which "displaced many aspects of independent business activity."[489] The tree fruit program forced producers to contribute funds to cooperative advertising "as part of a broader collective enterprise in which their freedom to act independently [was] already constrained by the regulatory scheme."[490] Indeed, the Agricultural Marketing Agreement Act "displaced competition" so thoroughly that tree fruit marketing orders issued under that statute's authority and actions pursuant to those orders were "expressly exempted from the antitrust laws."[491]

Four years after *Wileman*, the Court again revisited the constitutionality of compulsory cooperative advertising. The 2001 case of *United States v. United Foods, Inc.*,[492] contested a cooperative marketing program for mushrooms. Unlike the marketing scheme in *Wileman*, the Mushroom Promotion, Research, and Consumer

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483. Wooley v. Maynard, 430 U.S. 706, 714 (1977) ("[T]he right of freedom of thought . . . includes both the right to speak freely and the right to refrain from speaking at all."); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

484. *E.g.*, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991); Keller v. State Bar, 496 U.S. 1, 9–10 (1990); Ellis v. Ry. Clerks, 466 U.S. 435, 444 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

485. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 581 (1995) (holding that a sponsor of a parade could not be compelled to include unwanted marchers).

486. 521 U.S. 457 (1997).

487. *Id.* at 469.

488. 7 U.S.C. §§ 601–624, 671–674 (2000).

489. *Wileman*, 521 U.S. at 469.

490. *Id.*

491. *Id.* at 461. Absent contrary congressional instruction, "a detailed regulatory scheme" such as the Marketing Agreement Act "ordinarily" suspends "antitrust scrutiny altogether." Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 406 (2004); *accord* United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 697 (1975); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 682 (1975).

492. 533 U.S. 405 (2001).

Information Act[493] imposed "no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions."[494] Indeed, the Mushroom Act dedicated "almost all the funds collected under [its] . . . mandatory assessments" to the exclusive purpose of "generic advertising."[495]

The regulatory gap between the Agricultural Marketing Agreement Act and the Mushroom Act proved constitutionally decisive. Because the tree fruit program in *Wileman* "to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation," it enabled the government to demand and collect "compelled contributions for germane advertising . . . in furtherance of an otherwise legitimate program."[496] In *United Foods*, by contrast, the principal objective of the Mushroom Act was "speech itself."[497] All that was at stake was "a compelled subsidy" designed to "mak[e] one entrepreneur finance advertising for the benefit of his competitors."[498] The Agricultural Marketing Agreement Act subjects the tree fruit industry to such comprehensive regulation that compulsory advertising assessments represent at most a modest marginal imposition on producers' liberty. The Mushroom Act imposed no such constraints, and as a result its advertising program fell before the First Amendment's razor.[499]

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493. 7 U.S.C. §§ 6101–6112 (2000).

494. *United Foods*, 533 U.S. at 412.

495. *Id.*

496. *Id.* at 414–15.

497. *Id.* at 415.

498. *Id.* at 418 (Stevens, J., concurring).

499. In the doctrinal contest between *Wileman* and *United Foods*, the newer, more speech-protective decision appears to be prevailing. In the wake of *United Foods*, objecting farmers successfully challenged other federal "checkoff" programs supporting generic advertisements. *See, e.g.*, Cochran v. Veneman, 359 F.3d 263, 280 (3d Cir. 2004) (dairy products), *vacated sub nom.* Lovell v. Cochran, 125 S. Ct. 2511 (2005); Livestock Mktg. Ass'n v. USDA, 335 F.3d 711, 713 (8th Cir. 2003) (beef), *vacated sub nom.* Mich. Pork Producers Ass'n v. Campaign for Family Farms, 125 S. Ct. 2511 (2005); Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003) (pork), *vacated on other grounds sub nom.* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005); *cf.* Orleans Int'l, Inc. v. United States, 334 F.3d 1375, 1380 (Fed. Cir. 2003) (allowing an importer to challenge the constitutionality of the Beef Promotion and Research Act, 7 U.S.C. §§ 2901–2911 (2000), in the Court of International Trade). Comparable state programs for generic advertising of table grapes, Delano Farms Co. v. Cal. Table Grape Comm'n, 318 F.3d 895, 899 (9th Cir. 2003), and alligator products, Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 425 (5th Cir. 2004), *vacated*, 125 S. Ct. 2511 (2005), have also fallen. Only the dairy program appears to fall on *Wileman*'s side of the line, insofar as dairy products have been subject for decades to the Agricultural Marketing Agreement Act. *See generally* Block v. Cmty. Nutrition Inst., 467 U.S. 340

The contrast between *Wileman* and *United Foods* parallels the contrast between the public interest model and less intrusive forms of regulation. The less comprehensive the regulatory scheme, the greater the scope of speech rights within the industry. The subtle slide from *Wileman* toward *United Foods* signals a larger jurisprudential shift. The argument that regulation of its own accord justifies more intrusive conduit-based restraints on speech cannot be squared with the First Amendment's commitment to expressive liberty. Chief Justice Rehnquist has suggested that comprehensive "regulation of [an] industry . . . might well" sanction speech-restrictive regulation in that industry.[500] This posture is reminiscent of Justice Holmes's argument that the greater power to extinguish "the dedication" of public places "to public uses" subsumes "the less [sic] step of limiting the public use to certain purposes."[501] Under Justice Holmes's approach, every public forum case would follow the adage that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[502] Chief Justice Rehnquist's suggestion also echoes his opinion in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[503] which held that "the

(1984) (applying the Agricultural Marketing Agreement Act to dairy products); Zuber v. Allen, 396 U.S. 168 (1969) (same); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939) (same); Neil Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 GEO. WASH. L. REV. 181 (1958) (discussing the regulation of milk prices under federal law); Reuben A. Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J.L. & ECON. 51 (1967) (same). In Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005), the Supreme Court dismissed a First Amendment challenge to the beef program by characterizing generic beef advertisements as government speech immune from constitutional scrutiny, *see id.* at 2062. *Johanns's* resolution of this dispute left intact the essential holdings of *Wileman* and *United Foods*. *See id.* at 2058; *cf. id.* at 2066 (Thomas, J. concurring) (reaffirming Justice Thomas's belief "that '[a]ny regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny'" (quoting United States v. United States Foods Inc., 533 U.S. 405, 419 (2001) (Thomas, J. concurring))). Under any approach, *Wileman* has no application to the beef program. The original Agricultural Adjustment Act of 1933 omitted beef from its list of "basic agricultural commodities," *see* Act of May 12, 1933, ch. 25, § 11, 48 Stat. 31, 38 (designating wheat, cotton, field corn, hogs, rice, tobacco, milk, and dairy products); United States v. Butler, 297 U.S. 1, 54 & n.2 (1937) (same), and the federal government exerts far less influence over beef than milk or tree fruit. *Johanns* explicitly observed that the absence of a "'broader regulatory system in place' that collectivizes aspects of the beef market unrelated to speech" rendered *Wileman* inapplicable to the beef program. *Johanns*, 125 S. Ct. at 2061 n.3 (quoting *United Foods*, 533 U.S. at 415).

500. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 196 (1999) (Rehnquist, C.J., concurring).

501. Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

502. Adderley v. Florida, 385 U.S. 39, 47 (1966).

503. 478 U.S. 328 (1986).

greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[504] This aspect of *Posadas*, however, has been overruled in all but name; a later coalition of four Justices, articulating what is arguably prevailing doctrine on commercial speech, explicitly rejected *Posadas*' "'greater-includes-the-lesser' reasoning."[505] From public forum doctrine to commercial speech, free speech jurisprudence has transcended simplistic lesser-included-power arguments. To the extent that it rests on the presumptive police power over private use of a conduit, the jurisprudence of conduit-based regulation is comparably suspect.

C. Push, Pull, and Pervasiveness: Of Saturation and Social Meaning

One final factor remains: the pervasiveness and social meaning of particular conduits of speech.[506] "Physical settings" in which speech occurs "are not significant in the abstract"; they draw meaning from "the social expectations and understandings associated with different settings, the practices such spaces foster, and the relationships of those practices to First Amendment values."[507] Speech does not take place in "some abstract world uncontaminated by concrete social practices," and constitutionally meaningful "communicative acts" must be distinguished from "social practices that do not carry any constitutional value."[508]

Courts fret over potential public inferences of official endorsement from the government's legal presence within a conduit. Societal awareness of broadcast regulation supposedly invites the audience to presume official endorsement of messages in that medium,[509] whereas

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504. *Id.* at 345–46.

505. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510–11 (1996) (plurality opinion); *cf.* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001) (curbing limits on advertising insofar as "the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information"); Rubin v. Coors Brewing Co., 514 U.S. 476, 483 n.2 (1995) (reconciling the "greater-includes-the-lesser" aspect of *Posadas* with the multifactor approach of Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).

506. *See generally, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEG. STUD. 725 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

507. McGowan, *supra* note 7, at 1564.

508. Post, *supra* note 80, at 1274.

509. *See* Reno v. ACLU, 521 U.S. 844, 869 n.33 (1997) (acknowledging Judge Levanthal's concern over implicit approval of radio messages by the federal government); Pacifica Found. v.

the corresponding regimes governing cable and the Internet do not. *Turner I* cited "cable's long history of serving as a conduit for broadcast signals" in playing down the "risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[510] *Reno* observed that the Internet, having remained free of the intense "government supervision and regulation that has attended the broadcast industry," would not lead its users to "infer some sort of official or societal approval" within that medium's "vast democratic fora."[511] *Denver* similarly distinguished between (traditionally regulated) public access channels and (traditionally unregulated) leased access channels. Because cable operators have historically enjoyed fewer "editorial rights" over public access channels, "the countervailing First Amendment interest is nonexistent, or at least much diminished."[512]

The logical layer of free speech jurisprudence often invokes another factor closely related to social meaning: the conduit's putative "pervasiveness." This factor most profoundly affects indecency cases. The "uniquely pervasive" nature of broadcasting justifies temporal restrictions on sexual or scatological humor.[513] By contrast, the FCC may not restrict nonobscene "dial-a-porn" that enters the home only when "a caller seeks and is willing to pay for the communication."[514] Justice Stevens's observation that "the Internet is not as 'invasive' as radio or television" virtually doomed the Communications Decency Act.[515] At least in the realm of indecency regulation, constitutionality apparently hinges on the line between "push" and "pull" technologies, between media that deliver information passively and those that await

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FCC, 556 F.2d 9, 37 & n.18 (D.C. Cir. 1977) (Levanthal, J., dissenting) (suggesting that exposing children to pornography or obscenity will suggest approval by parents or society), *rev'd*, 438 U.S. 726 (1978).

510. Turner Broad Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 655 (1994).

511. *Reno*, 521 U.S. at 868–69 & n.33.

512. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 761 (1996) (Breyer, J., plurality opinion); *see also* Yoo, *supra* note 108, at 270–71 (quoting same). *Compare* Horton v. City of Houston, 179 F.3d 188, 189–90 & n.1 (5th Cir. 1999) (describing the definition of public, educational, and government access channels under 47 U.S.C. §531), *and* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 971–73 (D.C. Cir. 1996) (same), *with Time Warner*, 93 F.3d at 967–71 (describing the regime governing leased access channels).

513. *See Pacifica*, 438 U.S. at 748–49 (recognizing the need to shield children from potentially harmful material).

514. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989).

515. *Reno*, 521 U.S. at 869.

user intervention.[516] For instance, *Sable Communications of California, Inc. v. FCC*[517] invalidated restrictions on phone calls whose sexually explicit content, though worthy of protection, lay much further from core First Amendment concerns than did George Carlin's ribald political commentary.[518] The most cogent distinction between *Pacifica* and *Sable* lies in the nature of the two conduits: whereas broadcasting provides "push" communications, the telephone is the ultimate "pull" tool.

Many distinctions within the jurisprudence of conduit-based regulation evidently hinge on the line between push and pull. That line is becoming harder to draw, and its blurriness undermines the distinction's usefulness as a constitutional test. Technological flux undermines legal assumptions about the passive or interactive nature of any conduit. Indeed, to the extent that end-user technology is expanding the domain of pull, government's sphere of influence over expression correlatively shrinks. The growing ability of "customers (in particular, parents) to limit access" to entire categories in "interactive media" should impair *all* types of content-based regulation, "whether it is regulation of sexual expression, violence, commercial speech, or other controversial materials."[519]

Pervasiveness does not divide, but rather unites all forms of passive communication—audio and video, wireline and wireless, analog and digital. What Guglielmo Marconi envisioned as a "wireless telegraph,"[520] an airborne twist on an older pull technology, eventually built radio's empire of the air.[521] Cable is at least as pervasive as over-the-air TV, and probably more so, because the presence of more channels enables subscribers to watch more and to "surf" longer before settling on a program.[522] Video-on-demand "promises to transform television from a 'push' technology" at least partially into "a 'pull'

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516. *See generally* ETHAN CERAMI, DELIVERING PUSH (1998) (surveying the use of the Internet and other broadcast media as "push" technology); Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage,"* 97 COLUM. L. REV. 1048 (1997).

517. 492 U.S. 115 (1989).

518. *Id.* at 128.

519. Berman & Weitzner, *supra* note 33, at 1634.

520. *See* EDWARD A. DOERING, FEDERAL CONTROL OF BROADCASTING VERSUS FREEDOM OF THE AIR 4 (1939) (noting how Marconi thought of radio as a ship-to-shore messaging system).

521. *See* THOMAS S.W. LEWIS, THE EMPIRE OF THE AIR: THE MEN WHO MADE RADIO (1991) (chronicling the development of radio from telegraph).

522. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 745 (1996) (plurality opinion) ([C]able subscribers tended to sample more channels before settling on a program . . . .").

technology."[523] Now that Congress permits satellite retransmission of local broadcast signals,[524] cable and DBS are nearly perfect substitutes.[525]

To be sure, the biggest divide in communications law separates information viewed at twenty inches (typically a computer) from information viewed at twenty feet (typically a television). "[T]he receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial."[526] Nevertheless, anyone who has been "mousetrapped" by pop-ups while browsing the Web or whose e-mailbox has been "spammed" into submission is likely to dispute the Internet's characterization as a "pull" technology. Wireless devices, once broadly deployed, will complete the transformation of the Internet into a medium equally at home with passive push as with active pull.[527]

If anything, telephony's status as the consummate pull technology hangs by a slender legal thread. The telephone remains a pull technology in significant part because the law so decrees. The technological trifle of sending unsolicited faxes converts fax machines into passive receptacles for information. The Telephone Consumer Protection Act of 1991 (TCPA),[528] however, makes it "unlawful . . . to send an unsolicited advertisement to a telephone facsimile machine."[529] More recently, the TCPA and the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (as amended in 2003)[530] have

523. Yoo, *supra* note 108, at 305.

524. Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-523 to 1051A-544; Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 349 (4th Cir. 2001).

525. Admittedly, there may be significant *supply-side* differences between wireline and wireless modes of transmission. *Cf.* FCC v. Beach Communications, Inc., 508 U.S. 307, 319–20 (1993) (discussing the supply-side advantages that first-generation satellite providers enjoy).

526. Reno v. ACLU, 521 U.S. 844, 854 (1997); *accord* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 604 n.1 (2002) (Stevens, J., dissenting) (quoting same).

527. *See generally, e.g.*, Hazlett, *supra* note 195 (discussing the transformation of communications technology into a combination of push and pull technology).

528. Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. §227).

529. 47 U.S.C. §227(b)(1) (2000); *see also* Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1994) (upholding the TCPA against a constitutional challenge).

530. Pub. L. No. 103-297, 108 Stat. 1545 (codified as amended at 7 U.S.C. § 9b and 15 U.S.C. §§ 6101–6108), *amended by* Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 *and* Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. No. 108-82, 117 Stat. 1006 (2003).

authorized a national do-not-call registry.[531] States are rushing to establish their own registries or to ride piggyback on the federal campaign against unsolicited sales calls.[532] Unwanted faxes and sales calls combine some of the most despised traits of push technology (unsolicited communication) with the most annoying aspect of pull (the user's need to interact—in this instance, by answering a ringing telephone).

Nor does technology inherently shield the traditional telephone from push uses. "Copper twisted pair" permits both push and pull; it enables digital subscriber line (DSL) service as readily as voice messages. Broadband access via DSL is "always on," a typical push trait.[533] Legislative classification of cable broadband and voice over Internet protocol as "information" services, "telecommunications" services, or both may further blur the already illusory distinctions between wireline telephony, broadband, and multichannel video programming delivery.[534] In any event, legislative definitions do not control the factual underpinnings of a First Amendment claim.[535]

Even if it did establish a bright line among conduits, however, the distinction between push and pull can carry only so much constitutional weight. Other push technologies routinely intrude upon sensitive eyes

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531. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (2005) (forbidding calls to people on the Do Not Call List); 47 C.F.R. § 64.1200(c)(2) (2005) (same). *See generally* Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1233 (10th Cir. 2004) (dismissing statutory and constitutional challenges to the Do Not Call List), *cert. denied*, 125 S. Ct. 47 (2004).

532. *See, e.g.*, 2004 La. Sess. Law Serv. 857 (West) (establishing a Do Not Call List in Louisiana); ME. REV. STAT. ANN. tit. 32, § 14716 (West Supp. 2003). *See generally* Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin' On!*, 3 WYO. L. REV. 167 (2003) (discussing recent legislation regulating the telemarketing industry).

533. *See In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable & Timely Fashion, 14 F.C.C.R. 2398, 2406 (1999) (distinguishing between broadband and narrowband in terms not only of transmission speed, but also of a medium's ability to remain "always on"); *cf.* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (characterizing "the broadcast audience" as one that "is constantly tuning in and out" and therefore one whom "prior warnings cannot completely protect . . . from unexpected program content").

534. *See, e.g.*, Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1128–29 (9th Cir. 2003) (treating cable broadband as an information service *and* as a telecommunications service, contrary to *In re* Inquiry Concerning High-Speed Access to the Internet over Cable & Other Facilities, 17 F.C.C.R. 4798, 4802 (2002), which defined it solely as an information service), *rev'd*, 125 S. Ct. 2688 (2005). *But see* Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 1000–01 (D. Minn. 2003) (defining voice over Internet protocol solely as an information service).

535. *Cf.* Bose Corp. v. Consumers Union, Inc. 466 U.S. 489, 505 (1984) (observing that independent judicial determination of constitutionally significant acts helps "ensure that protected expression will not be inhibited").

and ears.[536] In almost any setting besides broadcasting, the usual response to unwanted "bombardment of [one's] sensibilities" is an admonition to "avert[] [one's] eyes"[537] or to escort junk on the "short, though regular, journey from mailbox to trash can."[538] Electronic conduits equally enable an annoyed individual to "twist the dial" or push a button "to cut off an offensive or boring communications."[539] There may be "captive audiences" worth protecting from "offensive and intrusive" messages, even at the price of invasive speakers' expressive freedom,[540] but neither broadcast audiences nor Internet users rank among them. Although drivers and mass transit passengers may have no "choice or volition" to absorb such messages as are "thrust upon them by all the arts and devices" of the dark science of marketing, the "radio can be turned off."[541] *Pacifica* acerbically refused to ask aggrieved listeners to "avoid further offense by turning off the radio," regarding such an instruction as a facetious pronouncement "that the remedy for an assault is to run away after the first blow."[542] *Pacifica* vastly overestimated the difficulty of avoiding unwanted broadcasts. "Turning off a radio is much easier than averting your eyes from someone who is in the same room. Just try it sometime."[543] Efforts to "reduce the adult population to reading only what is fit for children"[544] are eviscerated by admonishing offended viewers to avert their eyes. Invoking "the governmental interest in protecting children from harmful materials. . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[545] We should not limit the

536. *See* Yoo, *supra* note 108, at 294–96 (discussing several examples of intrusive push communications).

537. Cohen v. California, 403 U.S. 15, 21 (1971); *accord* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (finding no justification for a speech restriction when a sensitive viewer can avert his or her eyes).

538. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 68, 72 (1983) (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp 880, 883 (S.D.N.Y. 1967)).

539. Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970).

540. Lehman v. City of Shaker Heights, 418 U.S. 298, 308 (1974) (Douglas, J., concurring in the judgment); *see also id.* at 302, 304 (plurality opinion of Blackmun, J.) (distinguishing captive audiences from those free to avoid undesired communications); Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.").

541. Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (Brandeis, J.).

542. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

543. Schauer, *supra* note 46, at 294.

544. Butler v. Michigan, 352 U.S. 380, 383 (1957).

545. Reno v. ACLU, 521 U.S. 844, 875 (1997) (citations omitted); *accord* Lorillard Tobacco Co. v. Reilly, 533 U.S 525, 564 (2001).

"level of discourse reaching a mailbox . . . to that which would be suitable for a sandbox."[546]

IV. AGAINST A DISTINCT JURISPRUDENCE OF CONDUIT-BASED REGULATION

This Article rejects a distinct jurisprudence of conduit-based regulation. At best, distinguishing speech cases by conduit fails to solve basic doctrinal tensions. At worst, adopting a conduit-based approach invites unduly speech-restrictive regulation. After describing how First Amendment jurisprudence might look if stripped of this doctrine, I advocate a unitary theory that respects no categorical distinctions based on the conduit through which speech passes.

A. A Truly Transparent, "End-to-End" Approach to Conduit-Based Regulation

A separate jurisprudence on conduit-based regulation is unnecessary. A truly transparent, "end-to-end" approach that gives no weight to conduit-specific regulation would perform better. The real problem stems from the longstanding strategy of inspecting every novel conduit before fixing the appropriate level of First Amendment review. This practice, whose pedigree runs from *NBC* and *Red Lion* through *Reno v. ACLU*, typifies the extensive but imperfectly limned jurisprudence of conduit-based regulation. Somewhere between the extremes of presumptive strict scrutiny for content-based regulation and the radically weaker review devoted to restrictions on the time, place, or manner of speech, the Court has sustained putatively economic regulations of communicative conduits that also affect, as they must, those conduits' underlying content. Separating conduit-based regulation's concern with legitimate economic interests from its censorial potential represents another variation on the fundamental challenge of First Amendment doctrine within track one-and-one-half.

Two of the most recent cases in this sequence, *United States v. Playboy Entertainment Group, Inc.*,[547] and the second case styled *Ashcroft v. ACLU*,[548] illustrate an underemphasized doctrinal theme. *Pacifica*, *Sable*, *Denver*, *Reno*, *Playboy*, and *Ashcroft II* have all shown that the Supreme Court is perfectly capable of detecting—and perhaps

546. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983).

547. 529 U.S. 803 (2000).

548. 542 U.S. 656 (2004).

even denouncing—content-based regulation of speech without regard to conduit. "Regulation of content is not required to solve the technical commons problem in airwave usage"[549] or any other aspect of the physical or logical infrastructure of communications. Physical challenges do demand some degree of regulation. "Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering with each other."[550] Courts, however, must not transmogrify this narrow justification into a bootstrap by which the government can leverage licensing into unfettered content-based regulation. "[C]ensorship or editing or the screening by Government of what licensees may broadcast goes against the grain of the First Amendment."[551] Though it superficially honors *Red Lion*'s admonition to focus on conduit, the Supreme Court has never duplicated *Red Lion*'s feat of weakening scrutiny of content-based regulation in any nonbroadcast conduit.[552]

Even within broadcasting, courts readily condemn overt, ham-fisted control of content. *Columbia Broadcasting System, Inc. v. Democratic National Committee*[553] rescued broadcasters from being forced to accept paid editorial advertisements, reasoning that mandatory carriage would degrade "the journalistic discretion of broadcasters in the coverage of public issues."[554] Concurring in the judgment, Justice Douglas drew a cogent distinction between legitimate and censorial regulation: "The Commission has an important role to play in curbing monopolistic practices, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship."[555] *FCC v. League of Women Voters*[556] likewise invalidated an attempt to condition federal funding of public television on broadcasters' abjuring of editorializing.[557] Its reasoning

549. Hazlett, *supra* note 310, at 910–11.

550. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 157 (1973) (Douglas, J., concurring in the judgment) (citation omitted).

551. *Id.* at 158 (citation omitted).

552. *See* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 146 (noting that the broadcasting cases have "little gravitational force").

553. 412 U.S. 94 (1973).

554. *Id.* at 124.

555. *Id.* at 162 (Douglas, J., concurring in the judgment).

556. 468 U.S. 364 (1984).

557. *Id.* at 402.

was simple: "scarcity of air time does not justify viewpoint-based exclusion."[558]

Courts have long exhibited the ability to pierce the veneer of conduit-based regulation. The 1952 case of *Joseph Burstyn, Inc. v. Wilson*[559] invalidated a ban on "sacrilegious" motion pictures.[560] *Burstyn* merits notice for its adroit handling of First Amendment claims unique to a communicative conduit. *Burstyn* confronted a technological phenomenon whose constitutional implications had previously confounded the Supreme Court. In its first look at the movies, the Court held in 1915 that "the exhibition of moving pictures is a business pure and simple, . . . not to be regarded . . . as part of the press of the country or as organs of public opinion."[561] By 1952, however, the Court had not only accumulated extensive experience with the movie industry's stormy relationship with antitrust,[562] but also had come to treat "moving pictures, like newspapers and radio" as part of "the press whose freedom is guaranteed by the First Amendment."[563] The Court proceeded to extend full constitutional protection. Although each "particular method of expression" does "tend[] to present its own peculiar problems," *Burstyn* reasoned, "the basic principles of freedom of speech and the press . . . do not vary."[564] In an era not known for its dedication to expressive freedom,[565] the Court acknowledged that core First Amendment principles "make freedom of expression the rule."[566]

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558. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 615 (1998) (Souter, J., dissenting) (citing Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (1998)).

559. 343 U.S. 495 (1952).

560. *Id.* at 506; *cf.* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 685 (1959) (invalidating a ban on nonobscene portrayals of "sexual immorality [as] desirable, acceptable, or proper . . . behavior").

561. Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 244 (1915). This sentiment echoed a contemporaneous proclamation that the "exhibitions of base ball . . . are purely state affairs" and that transportation enabling games "between clubs from different cities and States" is "a mere incident" to interstate commerce. Fed. Baseball Club of Baltimore, Inc., v. Nat'l League of Professional Baseball Clubs, 259 U.S. 200, 208–09 (1922).

562. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 231 (1939) (holding that contracts effecting a "drastic suppression of competition and an oppressive price maintenance" violate the Sherman Act).

563. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

564. *Burstyn*, 343 U.S. at 503.

565. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 115 (1961) ("The Constitution does not prohibit the requirement that the Communist Party register with the Attorney General as a Communist-action organization . . . ."); Barenblatt v. United States, 360 U.S. 109, 118 (1959) ("[I]n the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country."); Dennis v. United States, 341 U.S. 494, 508 (1951) ("To those who would paralyze

Red Lion and *Pacifica* later cited *Burstyn* for the proposition that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[567] Unlike either *Red Lion* or *Pacifica*, though, *Burstyn* found "no justification . . . for making an exception" to the rule of free expression.[568] *Burstyn* thereby established a doctrinal model worth emulating. However nuanced the judicial approach to the physical, legal, and social vagaries of each conduit, courts should apply as much scrutiny as needed to "smoke out" official efforts to control communicative impact.[569] At a minimum, courts should pay closer attention to the prospect that seemingly neutral restrictions will perniciously affect content.[570]

On other occasions, the Supreme Court has dispatched content-based restrictions with nary a glance at conduit. For instance, *Sable Communications of California, Inc. v. FCC*[571] bypassed the trivial ritual of determining the proper level of First Amendment scrutiny for restrictions on speech via telephone. Decided in 1989, *Sable* coincided with the cable sequence that began in 1986 with *Preferred Communications*[572] and ended in 1997 with *Turner II*.[573] Those cases, unlike *Sable*, pondered the extent to which a new conduit should be analogized to broadcasting. Indeed, telephony has largely eluded the conduit-based strategy. The "extraordinary antitrust case" in which long-distance upstart MCI sought interconnection with AT&T's local telephone networks[574] raised no First Amendment issues besides those implicit in the *Noerr-Pennington* antitrust defense.[575] The legally mediated "economic structure" of telephone companies as common

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our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.").

566. *Burstyn*, 343 U.S. at 503.

567. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969); *accord* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

568. *Burstyn*, 343 U.S. at 503.

569. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate [classifications] by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

570. Alexander, *supra* note 47, at 930; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 296 (1992).

571. 492 U.S. 115 (1989).

572. City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

573. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

574. MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1092 (7th Cir. 1983).

575. *See id.* at 1153–60 ("The [Noerr-Pennington] doctrine arose from the need to construe the antitrust laws . . . to avoid a conflict . . . [with] the First Amendment.").

carriers "has resulted in a vast regime of rate regulation" and has correlatively reduced telephone companies' First Amendment rights in content transmitted over their networks.[576] Congress might be able to subject even cable operators to common carrier obligations with respect to "some of their channels," if only because common carriage escapes the constitutional "defect of preferring one speaker to another."[577]

Truly neutral, generally applicable economic regulation typically survives First Amendment review, even when it targets media businesses. The First Amendment has never shielded media businesses from labor and antitrust laws.[578] Nor may cable operators escape franchising requirements and rate regulation.[579] Indeed, no serious free speech challenge involving the structural regulation of telephony arose until the Bell operating companies sought to deliver video programming.[580] Traditional telephony and its regulation raise no

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576. Burstein, *supra* note 86, at 1046. *But cf.* C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 94–96 (arguing that telephone companies could have asserted control as "publishers" before they were subjected to common carriage).

577. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 684 (1994) (O'Connor, J., dissenting); *accord* Burstein, *supra* note 86, at 1043.

578. *See* Associated Press v. NLRB, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. . . . He is subject to the anti-trust laws."); *see, e.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) ("The restraints imposed by these private arrangements have no support from the First Amendment . . . ."); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) ("Injunctive relief under . . . the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others."); Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."); *see also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978) ("[A]pplication of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment."). *But cf.* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001) (urging antitrust analysis to take account of the societal impact of media concentration on expressive freedom). *See generally* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) (advocating the aggressive application of antitrust laws to private press monopolies insofar as threats to freedom of the press come from private as well as governmental sources); C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002) (arguing that the positive "political externalities" such as public service ideals resulting from greater competition provide additional reasons to regulate media outlets).

579. *See* Time Warner Entm't Co. v. FCC, 56 F.3d 151, 179 (D.C. Cir. 1995) (opinion of Randolph, J.) ("Almost from its inception in the 1950s, the cable industry has been subject to some form of rate regulation.").

580. *E.g.*, US West, Inc. v. United States, 48 F.3d 1092, 1106 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); Pac. Telesis Group v. United States, 48 F.3d 1106, 1107 (9th Cir. 1994), *vacated*, 516 U.S. 1155, 1155–56 (1996); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 185 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996); GTE Cal., Inc. v. FCC, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (describing the statutory bar to Bell company entry into video

serious First Amendment concerns because issues such as an incumbent carrier's ability to provide long-distance service to local customers have no expressive significance. Sometimes a medium is just a medium.[581]

The shield protecting ordinary economic regulation from First Amendment scrutiny has worn thin. The doctrinal distinction may not withstand the sheer amount of money in contemporary communications. Partisans are determined to contest the economic structuring of communications in constitutional terms, the better to secure a legal arena for rehashing settled legislative battles.[582] Some of the most outlandish claims have arisen in the very market whose immunity from First Amendment scrutiny seems most secure: lingering disputes over the Bell breakup decree.[583] In 1998 the Fifth Circuit had to spike the fatuous argument that the Bell companies had somehow become the victims of an unconstitutional bill of attainder.[584] In 2002 the Supreme Court dispelled "serious constitutional question[s]" over whether any ratemaking "methodology [consciously] divorced from investment actually made will lead to a taking of property."[585] This proclamation effectively forecloses prominent arguments that mandatory interconnection, unbundling, and resale violate incumbent carriers' constitutional rights.[586]

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programming as "an irrational obstruction to the exercise of free speech"). The Telecommunications Act of 1996 resolved this dispute by setting the terms under which the Bell companies could battle cable operators through "open video systems." *See* 47 U.S.C. §§ 571–573 (2000). *See generally* Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016 (1997).

581. *Contra* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) ("The medium is the message.").

582. *Cf.* NAACP v. Button, 371 U.S. 415, 429 (1963) ("Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.").

583. United States v. W. Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983), *aff'd mem. sub nom.* California v. United States, 464 U.S. 1013 (1983); United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983), *terminated by* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143, *reprinted in* 47 U.S.C. § 152 note (2000); United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981). *See generally* Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 850–59 (1997) (reviewing the history of the AT&T litigation); Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395 (1999) (reviewing the history of telecommunications regulation from 1984 to 1996).

584. SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998).

585. Verizon Communications Inc. v. FCC, 535 U.S. 467, 523 (2002).

586. *See* J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 308 (1997) (arguing that the Telecommunications Act of 1996 "could pose

The weakness of strategies rooted in the contracts and takings clauses encourages partisans in high-stakes media markets to promote a distinct and robust First Amendment jurisprudence on conduit-based regulation. First Amendment arguments tend to be more respectable than other constitutional strategies, if only because free speech represents the final redoubt of an extensive libertarian tradition that once justified vigorous judicial vindication of economic due process.[587] If anything, the First Amendment has apparently "become the first line of challenge for virtually all forms of regulatory initiatives."[588] Critics warn that "[f]reedom of speech is becoming a generalized right against economic regulation of the information industry."[589] The real trick is to preserve freedom of speech without succumbing to the First Amendment's *Lochnerian* potential.

In an effort to curb the First Amendment's critical power, Justice Breyer has distinguished between "pure economic regulation" and "regulation of expression": "what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture."[590] The

takings questions"); Spulber & Yoo, *supra* note 446, at 938–42 (attempting to locate incumbent carriers' constitutional complaints within the physical takings doctrine of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

587. *See* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 952 (1995) ("[C]onstitutional liberties might be interpreted to mandate deregulation in both the economic marketplace and the marketplace of ideas. In this . . . libertarian view, contemporary First Amendment law rests on better political theory than does the law of the Fifth and Fourteenth Amendments.").

588. Robinson, *supra* note 82, at 944.

589. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 27–28 (2004); *see also* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 201 (2003) ("As the information economy and society have moved to center stage, the First Amendment is increasingly used to impose judicial review on all regulation of this sphere of social and economic life."); Burstein, *supra* note 86, at 1032 ("*Lochner*-like scrutiny is inappropriate in media regulation cases, where there are legitimate speech interests on both sides of the dispute."); Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998) ("[T]he economic vision embodied in *Lochner* is alive and well on the digital frontier."); *cf.* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 771–72 (2001) (arguing that the intermediate scrutiny test of United States v. O'Brien, 391 U.S. 367 (1968), is malleable enough to *Lochnerize* even the speed limit).

590. Eldred v. Ashcroft, 537 U.S. 186, 244–45 (2003) (Breyer, J., dissenting); *see also* United States v. United Foods, Inc., 533 U.S. 405, 429 (2001) (Breyer, J., dissenting) ("I do not believe the First Amendment seeks to limit the Government's economic regulatory choices . . . any more than does the Due Process Clause."); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV.

Supreme Court "has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."[591] Such laws are supposedly "not content related" insofar as they seek "to promote free speech, not to restrict it."[592] By contrast, allowing government to sort would-be speakers "on the basis of their political, economic or social views" would present a "wholly different" issue.[593] Justice Stevens has distinguished between "policy judgments . . . intended to forestall the abuse of monopoly power" and laws that "regulate[] the content of speech rather than the structure of the market."[594] Many commentators likewise rely on the distinction between structural and content-based regulation.[595] One commentator would toss "[b]roadcasting, insofar as it deals with entertainment," into "the same boat as lipstick," subject to market-driven tides determining which "brand and shade will prevail."[596] Yet the prospect that "a majority vote" might determine public access "to information and news" is greeted with horror.[597]

Sentiments favoring aggressive conduit-based regulation find their most powerful expression in *FCC v. National Citizens Committee for*

245, 255–56 (2002) (condemning the potential restoration of Lochner v. New York, 198 U.S. 45 (1905), in "modern First Amendment guise").

591. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982); *accord* FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 428 n.12 (1990).

592. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 801 (1978).

593. NBC v. United States, 319 U.S. 190, 226 (1943).

594. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 225 (1997) (Stevens, J., concurring); *see also* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 671 n.2 (1994) (Stevens, J., concurring in part and concurring in the judgment) ("[M]easures that . . . have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech.").

595. *See, e.g.*, Bhagwat, *supra* note 414, at 163–64 (noting that "the critical, first inquiry" upon which the Court has often focused is "whether a particular regulation is content-based"); Krotoszynski & Blaiklock, *supra* note 348, at 873 (arguing that structural regulation is inherently different from content-based regulation); Burstein, *supra* note 86, at 1032–33, 1057 (maintaining that while "courts ought to be generally deferential to legislative judgments about the economic structure of speech delivery," they must simultaneously "guard vigilantly against encroachment on media entities' expressive choices").

596. CHARLES H. TILLINGHAST, AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK 145 (2000).

597. *Id.*; *cf.* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 99–113 (1985) (lamenting popular reliance on television as a primary source of news); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 514–15 (2000) (lamenting how reliance on advertising as the media's primary financial mechanism has compelled the "commodification of eyeballs").

Broadcasting (*NCCB*),[598] the 1978 case that upheld a ban on broadcast/newspaper cross-ownership in the name of "the 'public interest' in diversification of the mass communications media."[599] *NCCB*'s standard of review is not perceptibly tougher than the minimal scrutiny directed at "the prohibitions imposed by the antitrust laws" as applied to media businesses.[600] In declaring that "'"efforts to enhance the volume and quality of coverage" of public issues' through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be," *NCCB* also marked the apogee of the enhancement theory.[601] Lower courts routinely describe *NCCB* as subjecting "'structural' regulation of the broadcast industry" to "[m]inimal scrutiny."[602] At most, constitutional scrutiny in broadcasting ranges from "purely content-based" to "purely structural," while scrutiny tightens "with the extent to which a challenged provision relies on the identity of the speaker or the content of the covered speech."[603]

Since 2002, several federal courts have invoked *NCCB* in cases involving restrictions on broadcast ownership. The FCC's rules on local television station ownership,[604] national television station ownership,[605] and broadcast media cross-ownership[606] have all survived First Amendment attacks. For instance, the ban on "any entity from controlling television stations the combined potential audience reach of which exceeds 35%" of television-viewing households nationwide[607] "is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*, and like the network ownership

598. 436 U.S. 775 (1978).

599. *Id.* at 799.

600. *Id.* at 800 n.18; *e.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131, 139–40 (1969); United States v. RCA, 358 U.S. 334, 351–52 (1959); Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

601. *NCCB*, 436 U.S. at 800 (quoting Buckley v. Valeo, 424 U.S. 1, 50–51 & n.55 (1976) (per curiam) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 393 (1969))).

602. Ruggiero v. FCC, 317 F.3d 239, 244 (D.C. Cir. 2003).

603. *Id.* at 255 (Tatel, J., dissenting); *see also* News Am. Publishing, Inc. v. FCC, 844 F.2d 800, 810–814 (D.C. Cir. 1988) (reviewing the full range of potentially applicable constitutional standards).

604. Sinclair Broad. Group v. FCC, 284 F.3d 148, 168–69 (D.C. Cir. 2002).

605. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

606. Prometheus Radio Project v. FCC, 373 F.3d 372, 402 (3d Cir. 2004).

607. 47 C.F.R. § 73.3555(e) (2004).

restriction upheld in *NBC*."[608] In upholding the local television ownership rules, the D.C. Circuit asked solely whether a structural rule of this nature is "rationally connected to [the] goals of ensuring a diversity of voices and adequate competition in television broadcasting."[609]

Courts do not apply *NCCB* and *NBC*, however, when reviewing similar structural rules in other media industries. In a 2001 challenge to FCC rules on horizontal and vertical aspects of cable television ownership and operation,[610] the D.C. Circuit eschewed *NBC* and *NCCB* in favor of the intermediate scrutiny standard articulated in *United States v. O'Brien*.[611] These cable rules, no less comprehensive in their reach than corresponding rules in broadcasting, failed to pass the tougher test. In striking the 30 percent horizontal limit on subscribers nationwide that any set of commonly owned and operated cable systems may reach, the D.C. Circuit found "nothing in the record supporting a non-conjectural risk of anticompetitive behavior" among affiliated cable systems.[612] The court likewise struck down vertical limits on the number of channels that any cable operator may assign to programmers in which the operator holds an attributable interest.[613]

To like effect, the Fifth Circuit in 1999 invalidated a municipal fee for non-locally produced programming on a public/educational/ governmental (PEG) cable channel.[614] The appeals court described the fee as "a content-neutral regulation which implement[ed] a significant governmental interest in promoting localism."[615] This is the deferential rhetoric of *NBC* and *NCCB*. The court compared the fee to *Turner* litigation's must-carry rule, reasoning that a fee that "subsidizes" a PEG channel "and substitutes for the local resources that could otherwise be utilized to produce programs" rests on "an independent economic basis more closely analogous to the content-neutral must-carry rule than a

608. *Fox*, 280 F.3d at 1046; *see also id.* ("[T]he deferential review undertaken by the Supreme Court in *NCCB* and *NBC* is also appropriate here.").

609. *Sinclair*, 284 F.3d at 168.

610. *See* 47 U.S.C. §533(f)(1) (2000) (ordering the FCC to promulgate such rules and regulations).

611. Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130 (D.C. Cir. 2001).

612. *Id.* at 1136.

613. *Id.* at 1139 ("[T]he FCC has failed to justify its vertical limit as not burdening substantially more speech than necessary.").

614. Horton v. City of Houston, 179 F.3d 188, 195–96 (5th Cir. 1999).

615. *Id.* at 189.

purely [sic] content-related localism preference."[616] As in the D.C. Circuit's cable case, however, this decision's invocation of *O'Brien* proved fatal. Given no evidence regarding "the amount of revenue generated from the fee, the number of providers who have been charged the fee, or whether the fees have actually" advanced local programming,[617] the Fifth Circuit invalidated the fee for failure to satisfy *O'Brien*'s narrow tailoring prong.[618]

The contrast between *NCCB*'s controlling effect in broadcasting cases and its inapplicability in cable cases exposes the flaw in Justice Breyer's proposed distinction between structural and expressive regulation. *NCCB* does nothing more than parrot *Red Lion*'s assertion that broadcasting alone may be lawfully subjected to structural regulation whose censorial potential is unacceptable in any other setting. Unexamined categorical distinctions between conduits offer a wholly unsatisfying alternative to the standing First Amendment trick of vacillating between strict scrutiny on track one and judicial deference on track two. "[T]he issue would be totally different" if regulators were to rest their decisions "upon the basis of [would-be speakers'] political, economic or social views."[619] Yet *NCCB*'s endorsement of enhancement theory gives the lie to the idea that structural regulation is inherently content-neutral.[620] To the extent that government structures media markets to affect content, courts should apply strict scrutiny.

Even absent lower court elaboration, the weaknesses in the jurisprudence of conduit-based regulation are evident from Supreme Court cases. *Turner* provides the leading illustration. Although *Turner I* endorsed *Red Lion*'s methodology in searching for a conduit-specific approach to cable, the *Turner* cases placed exclusive emphasis on cable's physical characteristics. This method stands in stark contrast with *Red Lion*'s more nuanced technique. In concert, the *Turner* decisions represent the most emphatic rejection of *Red Lion*'s analogical approach. Alone among the Supreme Court's decisions, *Turner I* insisted that *Red Lion* involved nothing but physical scarcity, as though the physical characteristics of spectrum alone justified the

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616. *Id.* at 194.

617. *Id.* at 195.

618. *See id.* at 195 ("Access has failed to demonstrate narrow tailoring of the fee rule as a matter of law.").

619. NBC v. United States, 319 U.S. 190, 226 (1943); *accord* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 801 (1978).

620. *See NCCB*, 436 U.S. at 799–800 (maintaining that the physical limitations of the broadcast spectrum demand structural regulation).

fairness doctrine. That assertion does not withstand a careful reading of *Red Lion* and its successor cases. Although *Turner I* declined to hinge First Amendment analysis solely on the presence of a monopoly,[621] it also ignored the impact of the law on cable's economic structure and expressive performance. By contrast, *Red Lion* counseled consideration of rivalrousness and of regulatory intensity in every First Amendment review of official efforts to structure a conduit's operative logic.

Turner I's deepest pitfall, however, lay in its rendering of the balance between legislative discretion and judicial supervision. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."[622] *Ceteris paribus*, the Supreme Court gives far less weight to legislative fiat than to individual conduits' functional peculiarities. At a minimum, *Turner II* evidently sought to reverse this presumption through its application of intermediate scrutiny to must-carry.[623]

To be sure, the Supreme Court had already conceded its otherwise plenary command over the factual foundations of First Amendment disputes in *FCC v. League of Women Voters*,[624] which declined to overrule *Red Lion* "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."[625] But the *Turner* cases extended judicial abdication to settings beyond broadcasting. If anything, *Turner* calibrated judicial independence in inverse proportion to the innovative potential of the disputed technology. What *Turner I* had called "substantial deference to the predictive judgments of Congress"[626] acquires "special significance in cases . . . involving congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries

621. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 640 (1994).

622. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978); *accord* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989); *see also* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 505 (1984) (prescribing independent judicial review of factual determinations underlying a First Amendment claim); *cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 509 (1996) (plurality opinion) (refusing to defer to legislative prerogative in "choos[ing] suppression over a less speech-restrictive policy"); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (withholding deference from an agency interpretation that raised serious First Amendment questions).

623. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 195–213 (1997).

624. 468 U.S. 364 (1984).

625. *Id.* at 376 n.11.

626. *Turner I*, 512 U.S. at 665.

undergoing rapid economic and technological change."[627] Of course, *Red Lion* also fell into the same trap. But *Turner I* aggravated the problem through unilateral judicial disarmament.

Worse still, *Turner I* insisted that "Congress granted must-carry privileges to broadcast stations [solely] on the belief that the broadcast television industry [was] in economic peril due to the physical characteristics of cable transmission."[628] Having forsworn the portion of *Red Lion* which would have counseled attention to "the Government's role in allocating [broadcast] frequencies,"[629] the Court ignored how "Congress preferred broadcasters over cable programmers based on the content of programming each group offers."[630] Despite its centrality to this dispute, broadcasting and cable's shared regulatory past contributed almost nothing to *Turner*.

If *Turner I*'s shortcomings concerned nothing besides must-carry, the resulting misalignment of cable and broadcasting would only modestly affect communications law at large. Cable's greatest competitors today are local telephone companies (in the broadband market) and satellite broadcasters (in the multichannel video programming delivery market). But *Turner*'s missteps matter in the same way that the larger body of broadcasting law still matters. *Turner* erred in two significant ways: first by stressing solely the physical differences between cable and broadcast, and second by ignoring the content-based motivation underlying must-carry. Both of these failings grew from the failure to perceive how the law structures conduit in ways beyond those dictated by strictly physical characteristics.

Conduit-based regulation of speech is a constitutional mirage. It represents no genuinely distinct category of First Amendment doctrine. Conduit-based regulation raises precisely the same issues as all other decisions reviewable under the First Amendment. Treating conduit-based regulation as a distinct category does almost nothing to resolve the First Amendment's considerable doctrinal difficulties. Discrimination on the basis of content does not and should not acquire sudden immunity merely because speech passes through a less privileged conduit. To be sure, distinct conduits raise distinct regulatory

627. *Turner II*, 520 U.S. at 196.

628. *Turner I*, 512 U.S. at 659.

629. Red Lion Broad. Co. v. FCC, 397 U.S. 367, 400 (1969).

630. *Turner I*, 512 U.S. at 658–59. *See generally* Lawrence H. Winer, *The* Red Lion *of Cable, and Beyond—Turner Broadcasting v. FCC*, 15 CARDOZO ARTS & ENT. L.J. 1, 25–45 (1997) (documenting the case for treating must-carry as content-based regulation).

concerns, ranging from strictly physical characteristics to economic predictions regarding markets that exploit that conduit. Persuasive free speech jurisprudence considers differences of this sort. Condensing these nuances into deceptively convenient categories such as "broadcasting," however, blunts judicial initiative to engage in contextual analysis. Over time, the factors that once might have justified more aggressive intervention in broadcasting may have changed or even evaporated. The mere invocation of cases such as *Red Lion*, *NBC*, and *NCCB*, however, effectively ends any reasoned discussion of whether structural regulation of broadcasting deserves closer scrutiny or, for that matter, whether comparable efforts to structure nonbroadcast markets warrant the deference heretofore reserved for broadcasting. Treating conduit-based regulation as a distinct First Amendment concept invites the application of *per se* rules, in both directions, when what is truly needed is a constitutional rule of reason.

Controversies over conduit-based regulation of speech have made two doctrinal contributions. First, these cases have instructed courts to study the conduit in which speech is transmitted, being prepared if necessary to dilute constitutional protection for the expression of ideas. Second, these cases have concluded that one conduit among many—broadcasting—has historically merited less rigorous review on account of rivalrousness in the use of spectrum, the industry's regulatory history, and the public's interest in access to this unique but highly controlled conduit.

Almost all objections to *Red Lion* and the broadcast model have addressed the second aspect of the conduit-based cases. Whether *Red Lion* erred in its initial assessment of broadcasting and whether that analysis is obsolete today are both beside the point. It is *Red Lion*'s apology for a separate jurisprudence on conduit-based regulation of speech whose time has passed. Technology evolves, but the irreconcilable imperative of protecting expressive freedom while accommodating the regulation of noncommunicative concerns will endure forever.

B. Toward a Unitary Theory of Free Speech

"It would be convenient if there were some principle demarcating the line between those activities and resources" that directly facilitate speech "and those that do not."[631] In reality, there is no clean division

631. Williams, *supra* note 53, at 723.

between content and conduit. The "almost metaphysical" distinctions on the continuum from the purely physical to the purely expressive provide "no clear dividing line between facilitative aspects of speech and other activities."[632] "[I]t is both theoretically difficult and practically impossible to separate the uniqueness of a particular message from the uniqueness of a particular audience at a particular time and place . . . . The facilitative and the expressive, the media and the message, are ultimately inseparable."[633]

The impossibility of coherent First Amendment doctrine is emerging as one of those truths susceptible of mathematical proof. "Deriving a consistent theory of the First Amendment from the myriad opinions of the Supreme Court represents a task similar to defining the inside and outside of a Möbius strip; that which appears logical at one point evaporates from another perspective."[634] To its credit, the jurisprudence of conduit-based regulation acknowledges the intractability of its own quest. Static technological limits, the economic rivalrousness of competing uses, the history and nature of governmental regulation, the pervasiveness and social meaning of a conduit—all of these factors inform this absurdly convoluted constitutional project. And this is to say nothing of predicting the tortuous path of technological change. As much as the broadcast model has crippled the market for video programming and delivery, the dynamic effect of the conduit-based strategy on legal evolution and the pace of technological innovation may be even more dramatic.[635]

"[F]ully to comprehend" the vast field of contemporary communications "would require an almost universal knowledge ranging from" engineering and economics "to the niceties of the legislative, judicial, and administrative processes of government."[636] Foundationalist responses cannot encompass the full "web of values,

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632. *Id.* at 724.

633. Alexander, *supra* note 47, at 928.

634. VAN ALSTYNE, *supra* note 141, at 68; Van Alstyne, *supra* note 11, at 548. Professor Van Alstyne credited a student of his, William Parker, as the author of this perfect metaphor. So do I.

635. *Cf.* Ha-Joon Chang, *The Economics and Politics of Regulation*, 21 CAMBRIDGE J. ECON. 703, 721 (1997) (lamenting that "current discussions on regulatory reform" fail to "give adequate attention to considerations of dynamic efficiency"); Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1449, 1484 (Richard Schmalensee & Robert D. Willig eds., 1989) (lamenting how "little effort has been devoted to measuring the effects of regulation on innovation and productivity growth").

636. Queensboro Farm Prods., Inc. v. Wickard, 137 F.2d 969, 972 (2d Cir. 1943) (directing these observations toward governmental regulation of the dairy industry).

collectively comprising our understanding of how people should live."[637] Yet the core of this task is simple enough to be expressed in a single sentence. Our First Amendment rests squarely on "[o]ur profound national commitment to the free exchange of ideas."[638] What is true in popular music is equally true in constitutional law: "The hardest to learn" really is "the least complicated."[639]

Controversies over conduit-based regulation of speech cannot be resolved by traditional constitutional tools. "The Framers of the First Amendment surely did not foresee the advances in science" underlying contemporary conduit-based controversies.[640] Courts enjoy enormous freedom to engage in highly contextual, *ad hoc* judgments that hinge more on evanescent technology than on immanent and durable verities. Like any other social institution, the law must adapt to technological change. A single human generation typically provides ample time for the Supreme Court to complete a constitutional hiccough. Yet assurances that legal change will come in a quarter-century buy nothing in this land.[641] A polity whose modern prophet decreed that justice delayed is justice denied does not count patience among its national virtues.

Law "must ultimately dissolve into a study of aesthetics and morals."[642] We could seek cheap refuge in "[n]ew technology," invariably "the easy answer to everything."[643] Technological

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637. Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1641 (1987); *see also* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 VAND. L. REV. 533, 553–54 (1992) ("Formalism errs when it seeks to convert context-specific practical considerations . . . into a noncontextual interpretive method.").

638. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 686 (1989); *accord* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 573 (2002).

639. INDIGO GIRLS, *Least Complicated*, *on* SWAMP OPHELIA (Sony 1994); *see also* Jim Chen, *Rock 'n' Roll Law School*, 12 CONST. COMMENT. 315, 319 (1995) ("There are rock rules in free speech—so much so that rock rules in free speech.").

640. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

641. *Compare* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary . . . ."), *with id.* at 375 (Thomas, J., concurring in part and dissenting in part) ("While I agree that in 25 years the practices of the Law School will be illegal, they are [also] . . . illegal now.").

642. Coase, *The Problem of Social Cost*, *supra* note 310, at 43.

643. Thomas W. Hazlett, *Predation in Local Cable TV Markets*, 40 ANTITRUST BULL. 609, 643 (1995); *see also* Fred H. Cate, *Telephone Companies, the First Amendment, and Technological Convergence*, 45 DEPAUL L. REV. 1035, 1065 (1996) ("[T]he Supreme Court has repeatedly assumed that technological differences among media involved may justify diminished application of the First Amendment."); Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV.

convergence among "terrestrial broadcasting, satellite broadcasting, coaxial cable," wireline telephony's "twisted pair," and other media still being refined or invented will render meaningless not only "any remaining distinctions between . . . various media technologies" but also "any continued effort to draw [legal] distinctions among media."[644] In times of technological upheaval through "[c]onstant revolutionizing of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation," all "fixed, fast, frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away."[645]

Architecture, it bears repeating, is destiny. The architecture of our greatest conduit teaches a vital constitutional lesson. "The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[646] The end-to-end concept animating the versatile and volatile Internet should inform First Amendment doctrine. End-to-end wisdom drives all intelligence in free speech jurisprudence to the ends—equally to speakers and to their audiences—at the expense of governmental efforts to modulate the logic of the conduit through which ideas are transmitted.

Red Lion and Justice Thomas are each half-correct. *Red Lion* insisted that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[647] Justice Thomas has declared to the contrary that "[i]t is the operator's right that is preeminent."[648] These dueling propositions express a joint truth: guaranteeing expressive freedom among producers as well as consumers of

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976, 976 (1997) ("In recent years, both the Supreme Court and the Congress have made much of the rapid pace of technological change within the telecommunications industry.").

644. Yoo, *supra* note 108, at 283; *see also* Yoo, *supra* note 117, at 289 ("The impending shift of all networks to packet-switched technologies promises to cause all . . . distinctions based on the means of conveyance . . . to collapse entirely.").

645. KARL MARX & FRIEDRICH ENGELS, COMMUNIST MANIFESTO 54 (Signet Classics ed. 1998) (1848).

646. 47 U.S.C. § 230(a)(3) (2000); *accord* Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564, 566 (2002).

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

648. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in part and dissenting in part); *see also id.* at 813 (condemning *Red Lion* and its successors as beacons on a "doctrinal wasteland"); *cf.* Newton N. Minow, *Address to National Association of Broadcasters* (1961) (describing television as a "vast wasteland"), *quoted in* JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 198 (1991), *and* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 188 (1995).

information depends on minimizing the government's role in encumbering conduits with embedded expressions of official "intelligence." "Our Constitution does not permit the official *suppression* of ideas."[649] The Constitution provides scarcely more room for the official *expression* of ideas, especially when governmental preferences effectively marginalize private expression. First Amendment jurisprudence has allowed certain expressive conduits to drown in a thick layer of government-initiated "code," in the stultifying structural "logic" of broadcast licensing in the "public interest." Allowing the government too much power to "tell[] us what to say or hear for our own good" threatens to "deform[] the entire democratic process."[650]

Not for naught has the Supreme Court described the "right to speak freely and to promote diversity of ideas and programs" as "one of the chief distinctions that sets us apart from totalitarian regimes."[651] Speech, "often provocative and challenging" and invariably free by law, is intended "to invite dispute," particularly "when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[652] Free speech "may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[653]

Within a guarantee of free speech spanning the communicative experience, from its roots in the physical world to its transformation within the mind of the perceiver, "only a unitary First Amendment for all media will do."[654] The principles that have kept print media free throughout the history of the Republic should apply equally to new media.[655] A unitary free speech jurisprudence leaves no room for a distinct logical layer, for the clumsy cluster of existing doctrines on conduit-based regulation. The very presence of a free speech jurisprudence of conduit-based regulation invites government to shape

649. Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion of Brennan, J.) (emphasis added and omitted).

650. Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 651 (2004).

651. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

652. *Id.*

653. *Id.*

654. Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1740 (1995).

655. *See id.* ("[T]he general principles of law and regulation underlying all nonbroadcast mass media would be just as workable, and should be fully applied, to the broadcast media.").

speech according to its own vision of the good life. Normatively speaking, however, courts should stop endorsing conduit-based regulation. Resistance to official control of the means and manifestations of imaginative expression represents the brightest of "fixed star[s] in our constitutional constellation."[656]

Adopting a unitary First Amendment would admittedly force us to gamble in matters of public governance. All law is an experiment, as "all life is an experiment."[657] First Amendment jurisprudence should err in favor of and not against the right to speak. Such is the lesson taught by the basic structure of First Amendment doctrine: we begin with presumptive strict scrutiny and then find reasons to ratchet down. From that list of excuses, conduit-based regulation should be struck. Many governmental efforts to regulate conduits and media markets would run afoul of the First Amendment. The First Amendment's commitment to "free trade in ideas" rests on the belief that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[658] In this marketplace of ideas, the "forum where ideas and information flourish," it is "the speaker and the audience, not the government, [who] assess the value of the information presented."[659]

CONCLUSION

"Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[660] Under a Constitution that runs as a covenant across the ages, "[e]ach generation" must reject "anew . . . ideas and aspirations" not fit to "survive more ages than one."[661] A separate First Amendment jurisprudence on conduit-based regulation deserves to wither away. A generation ago, William Van Alstyne presciently "repudiat[ed] the doleful view that we are helpless captives of night riders on the air or that we need protection from every political charlatan who may seek to corrupt us with 1,000 watts of radio power."[662] Today and tomorrow,

656. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

657. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

658. *Id.*

659. Edenfield v. Fane, 507 U.S. 761, 767 (1993); *accord* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195 (1999).

660. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

661. Planned Parenthood v. Casey, 505 U.S. 833, 901 (1992).

662. Van Alstyne, *supra* note 11, at 575.

"[i]f we would guide by the light of reason, we must let our minds be bold."[663]

663. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).