THE FIRST AMENDMENT AND THE METAPHOR OF FREE TRADE

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I. INTRODUCTION

Thirteen years ago, Ithiel de Sola Pool, in his landmark book, *Technologies of Freedom*, warned of the danger of discriminating against developing forms of media with respect to the degree of First Amendment protection accorded to speech in those media. Pool asserted that "[t]echnical laymen, such as judges, perceive the new technology in [an] early, clumsy form, which then becomes their image of its nature, possibility, and use. This perception is an incubus on later understanding."[1] In his view, American society has been well served by the reigning principle of governmental noninterference in printed speech. When Pool's book came out, however, speech that would previously have been conveyed by print was increasingly being conveyed by the electronic media. As a result, continued application of the more deferential standard of review for regulation of the latter served to deprive such speech of the appropriate level of First Amendment protection. As the solution to this problem, Pool suggested the adoption of the traditional print standard for the entire media spectrum.[2]

For adherents of Pool's argument for a unified First Amendment standard, the ensuing years have been a mixed blessing. On the one hand, the doctrinal superstructure for discrimination among media remains in place, as demonstrated by the *Turner Broadcasting* Court's refusal to reconsider the application of the Scarcity Doctrine to broadcast media.[3] On the other hand, the substructure supporting that doctrine is crumbling rapidly. Reference to scarcity of speech outlets is becoming ever more meaningless in a media environment that is providing more outlets seemingly every day.[4] As a result, there is little support among commentators for different First Amendment standards. Of those cited in this Article, only Lee Bollinger continues to support different treatment for the broadcast and print media.[5] He nevertheless recognizes that the existing doctrinal bases for that distinction are "illogical" and "embarassing[ly] deficien[t]."[6]

While the controversy over whether to apply a unitary or a divided First Amendment standard may be winding down, the controversy over the nature of the proper unitary standard is heating up. On one side of the controversy are

1. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 7 (1983). The clearest example of such discriminatory treatment by the judiciary remains the validation of the broadcast Fairness Doctrine in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The affirmance of must-carry for cable operators in Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), *opinion on remand*, 910 F. Supp. 734 (D.D.C. 1995), *prob. juris. noted*, 116 S. Ct. 907 (1996), is another example. The effect of these cases is discussed in Sections III and IV, *infra*.

2. POOL, *supra* note 1, at 250–51.

3. *Turner Broadcasting*, 114 S. Ct. at 2457 ("[T]he inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and to impose certain affirmative obligations, on broadcast licensees.").

4. *See infra* notes 279–80 and accompanying text.

5. LEE C. BOLLINGER, IMAGES OF A FREE PRESS 113–20 (1991). Bollinger's thesis is addressed more thoroughly at Section II, *infra*.

6. *Id.* at 88–89.

those who believe that the principle of governmental noninterference applicable to the print media is equally applicable to the electronic media. That principle has been restated by the Supreme Court on several occasions. The following excerpts are a succinct summary:

> "The power of a privately owned newspaper to advance its own political, social and economic views is bounded only by two factors: first, the acceptance of a sufficient number of readers—and, hence, advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers."
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> ...A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.[7]

On the other side of the controversy are those who believe that the government has a right, if not an obligation, under the First Amendment to regulate all media in order to achieve certain socially desirable results. Because proponents of the latter approach favor governmental intervention in the media by means of content-specific regulation,[8] this Article will refer to them as "interventionists."[9] The interventionists discussed in this Article—Cass Sunstein, Owen Fiss, Frederick Schauer, and Lee Bollinger[10]—are far from monolithic in their views, but all have in common the belief that content-specific regulations are fully consistent with the First Amendment. It is therefore an appropriate shorthand to refer to them as a group in that limited sense.

In opposing the principle of governmental noninterference, the interventionists are able to draw on a powerful metaphor: the equation of unregulated speech with laissez faire economics.[11] Use of this metaphor permits

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7. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255, 256 (1974) (quoting Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973)).

8. Because the phrases "content-specificity" and "viewpoint-specificity" arise so often in the debate over the permissible scope of speech regulation, a brief definition of the terms is warranted. A content-specific regulation requires review of the content of the speech in question to be operable. Thus, a regulation mandating that no "violent" programming be aired between 9 a.m. and noon requires the regulation to make a distinction between programming that is violent and programming that is nonviolent. A viewpoint-specific regulation in the same context might distinguish between violent shows that advocate the use of violence and those that oppose such use.

Viewpoint-specific regulations are off limits even to the interventionists. On the other hand, they would permit content-specific regulations that avoid viewpoint discrimination. *See, e.g.*, CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 173 (1993) [hereinafter DEMOCRACY]. *But see Turner Broadcasting*, 114 S. Ct. at 2459 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.... In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny...."). The distinction between the two types of regulation is clear enough in the abstract. However, it tends to break down in practice, as Sunstein's call for regulation on the basis of the "quality" of speech demonstrates. *See infra* notes 269–73 and accompanying text.

9. This understanding of the First Amendment has also been dubbed the "collectivist" theory because it "subordinates individual rights of expression to collective processes of public deliberation." Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993).

10. Although Bollinger's advocacy of a two-tier First Amendment would at first glance appear to disqualify him from inclusion here, the likelihood that the electronic media will eclipse the traditional print media as a means of communication in the future renders his theory, in essence, little more than a call for interventionism.

11. *See, e.g.*, DEMOCRACY, *supra* note 8, at 54–58 (1993); BOLLINGER, *supra* note 5,

them to equate support for unregulated speech under the First Amendment with the thoroughly discredited doctrine, espoused most famously in *Lochner v. New York*,[12] of "liberty of contract" under the Due Process Clause of the Fourteenth Amendment. Sunstein brings the metaphor full circle by calling for a "New Deal" under the First Amendment similar to the original New Deal, which brought an end to the Lochnerist view of the Fourteenth Amendment.[13]

Although the metaphor is powerful, it is misleading. In the first place, it is a straw man. The metaphor's origin is generally attributed to the following portion of Justice Holmes' dissent in *Abrams v. United States*:[14]

> [w]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground on which their wishes safely can be carried out.[15]

It is far from clear, however, that Holmes intended this passage to be anything more than a convenient word picture—using terms that would be readily understandable to the majority of the Court and the contemporary legal and political community.[16] Indeed, in his *Lochner* dissent, Holmes emphatically stated his view that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire."[17] Accordingly, his reference in *Abrams* to a speech "market" can hardly be viewed as a push to enshrine laissez faire economics in the First Amendment.[18]

Moreover, and more fundamentally, the metaphor is flawed because it mixes economic apples with First Amendment oranges. The conclusion that the guiding First Amendment principle of governmental noninterference is invalid for the same basic reasons as the Lochnerist principle of liberty of contract does not follow if speech rights occupy a higher position on the constitutional hierarchy than economic interests. A substantial portion of this Article is devoted to the argument that speech rights do in fact merit a higher position.

The interventionist critique goes well beyond simply equating the governmental noninterference principle with Lochnerism. It also offers a positive concept of the First Amendment. Sunstein calls that concept the "Madisonian" First Amendment because, consistent with the writings of James Madison, it exalts the primacy of political speech as a means to further the ideal of deliberative democracy.[19] Fiss labels it similarly as the "public debate principle." In contrast to "autonomy" (the governing First Amendment regime), which Fiss sees as placing a "zone of noninterference" around

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at 136–41; Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 782–83 (1987).

12. 198 U.S. 45 (1905).

13. DEMOCRACY, *supra* note 8, at 17–51; *see infra* notes 56–70 and accompanying text.

14. 250 U.S. 616 (1919).

15. *Id.* at 630 (Holmes, J., dissenting).

16. *Cf.* Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 981 (1995) ("[T]he 'marketplace of ideas' metaphor may simply be misconceived at its core.").

17. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

18. Holmes' justification for treating speech regulations differently that economic regulations is addressed in Section II, *infra*.

19. DEMOCRACY, *supra* note 8, at xvi–xx.

individuals and nonpublic institutions,[20] he argues for a regime which judges speech regulation

> by its impact on public debate, a social state of affairs, rather than by whether it constrains or otherwise interferes with the autonomy of some individual or institution. The concern is not with the frustration of would-be speakers, but with the quality of public discourse. Autonomy may be protected, but only when it enriches public debate. It might well have to be sacrificed when, for example, the speech of some drowns the voices of others or systematically distorts the public agenda.[21]

This principle, however it is labeled, requires tremendous confidence in the ability of the government to (1) identify the public interest in a given situation; (2) determine which speech enhances, and which speech detracts from, that interest; and (3) fashion narrow regulations censoring only the speech deemed harmful. This Article argues that such confidence is misplaced. The government has been unable to make the necessary choices to sustain such a regime and will be unable to do so in the future.

One other metaphor merits brief discussion at the outset. In the course of constructing a dichotomy between the "Holmesian" free market (i.e., governmental noninterference) model of the First Amendment and the "Madisonian" public deliberation model, Sunstein implies that advocates of the former are required to agree with former FCC Chair Mark Fowler's assertion that a television is a mere "'toaster with pictures'" in order to support their position that the media should be free from regulation.[22] In fact, the reverse is true. Toasters may be regulated under the governing system of economic regulation established in the New Deal of the 1930s; television, because it is different, may not. More precisely, "[t]he First Amendment does not bar most regulations of television as an appliance,"[23] but does bar such regulations to the extent that television conveys speech and ideas. The argument in favor of that position forms the heart of this Article. Put another way, this Article seeks to rebut the proposition that support for the nonintervention principle is the modern-day equivalent of Lochnerism.

Advocacy of the principle of governmental noninterference is not equivalent to burying one's head in the sand. There are many serious deficiencies in the structure and tone of the contemporary media. Section II of this Article addresses the state of that media and the interventionist response thereto. Section III explores the reasons why, notwithstanding the problems with the contemporary media, First Amendment jurisprudence has so consistently favored the noninterference principle. Section IV argues that that result is justified as a matter of communications policy as well as of law.

The current debate over the basic meaning of the First Amendment is especially timely in view of the technological revolution now occurring. The new forms of electronic media promise an unprecedented degree of diverse and decentralized speech, two qualities that marked the press when the First

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20. Fiss, *supra* note 11, at 785.
21. *Id.* at 786.
22. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1760 (1995) [hereinafter *First Amendment in Cyberspace*] (quoting Bernard D. Nossiter, *Licenses to Coin Money: The F.C.C.'s Big Giveaway Show*, 240 NATION 402 (1985) (quoting Mark Fowler)).
23. Sullivan, *supra* note 16, at 980.

Amendment was adopted.[24] Section V explores briefly the contours of this revolution, and concludes that, if anything, continued application of the principle of governmental noninterference is even more justified as a result.

While this Article has as its focus regulation of speech in the electronic media—defined here as including broadcast and cable television, movies, radio, and all media operating in "cyberspace" (for example, the Internet, commercial on-line services and e-mail)—it does not address the proper extent of First Amendment protection for these media *vis a vis* the print media. That issue has been thoroughly and thoughtfully debated elsewhere.[25] It also does not review the proper level of First Amendment scrutiny for regulations directed at developing forms of electronic media, such as cable television and the cyberspace media. That issue, too, is well covered in the existing literature.[26]

Instead, this Article addresses the predicate question of whether the government has the right to regulate the speech of any media outlet for "benign" reasons. This question is equally applicable to all forms of media. After all, if government has the authority under the First Amendment to correct "dysfunction" in the marketplace of ideas in order to promote the "Madisonian" ideal of a well-informed electorate,[27] the fact that the dysfunction occurs in the print media should not hinder the exercise of that authority. Indeed, some of the features that the interventionists have identified in the electronic media as justification for government regulation—reliance on advertising dollars and enjoyment of a de facto "monopoly" in a given community—are equally, if not more, applicable to newspapers.[28]

Nevertheless, this Article's virtually exclusive focus on the electronic media is appropriate for three reasons. First, this Article is in large part a rebuttal to the analyses of Sunstein and other interventionists, and, although those analyses are certainly applicable to the print media, they focus almost solely on the electronic media. Sunstein, for example, devotes a tiny fraction of his analysis in *Democracy and the Problem of Free Speech* to the issue of newspapers, and almost none at all in his subsequent writings. The emphasis on electronic media is perfectly understandable. The electronic media are far more pervasive in the public consciousness than the print media, and their programming is, on balance, more susceptible to criticism. They are therefore a more discussion-worthy subject. Second, there is a well-developed history of "benign" government regulation of electronic media, which is explored here. That history points up the harm done by such regulations.[29] Finally, the new cyberspace media offer an unprecedented opportunity for public discussion and for obtaining information about public affairs without the need for government

24. *See infra* notes 298–304 and accompanying text.

25. *Compare, e.g.*, POOL, *supra* note 1 (arguing that electronic media is as deserving as print media of full First Amendment protection) *with* BOLLINGER, *supra* note 5 (arguing that society is best served by a two-tiered system of First Amendment regulation).

26. *See, e.g.*, Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247 (1994); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993 (1994); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

27. DEMOCRACY, *supra* note 8, ch. 2.

28. *Id.* at 62–63, 107–14. *See also infra* notes 67–69 and accompanying text.

29. *See infra* Section IV.

intervention (and without the attending harm caused by such intervention).[30]

II. THE INTERVENTIONISTS, FREE SPEECH, AND THE STATE

A discussion of the interventionist conception of the First Amendment properly begins with Cass Sunstein, its most persistent and influential champion.

A. The "Madisonian" First Amendment

The power of Sunstein's thesis in support of regulation of electronic media derives from the unassailable nature of his two foundational factual conclusions. The first conclusion is that the content of most programming is bad. Few would disagree in principle with Sunstein's assertion that:

> it would not be an overstatement to say that much of the free speech "market" now consists of scandals, sensationalized anecdotes, and gossip, often about famous movie stars and athletes; deals rarely with serious issues and then almost never in depth; usually offers conclusions without reasons; turns much political discussion into the equivalent of advertisements; treats most candidates and even political commitments as commodities to be "sold"; perpetuates a bland, watered-down version of conventional morality on most issues; often tends to avoid real criticisms of existing practice from any point of view; and reflects an accelerating "race to the bottom" in terms of the quality and quantity of the attention that it requires.[31]

It is fair to say that Sunstein ascribes a substantial share of the blame for this situation to the fact that most media outlets "will allocate the right to speak largely in accordance with the goal of increasing financial returns."[32]

Sunstein's second uncontroversial conclusion is that society would be better served by better-quality programming. In a society premised on a goal of political choices reached through public discussion, "[i]f everyone thinks the same thing, or nearly the same thing, there will be too few alternatives to allow for genuine discussion."[33] The desire to "do something" about these problems follows naturally from Sunstein's presentation of them.

The difficulty with Sunstein's thesis lies in the "something" he proposes. Lay critics are equally capable of reaching devastating conclusions about the state of the electronic media, but are incapable of bringing to bear the full forces of government intervention. Thus, for example, James Fallows, an editor of the *Atlantic Monthly*, writes that "we can ask why reporters spend so much time directing our attention toward...spectacles and diversions—guessing what might or might not happen next month—rather than inquiries that might be useful, such as extracting lessons of success and failure from events that have already occurred."[34] Fallows asserts that the "fundamental purpose" of journalism is "that of making democratic self-government possible."[35] Up to

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30. *See infra* Section V.
31. DEMOCRACY, *supra* note 8, at 23.
32. *Id.* at 17.
33. *Id.* at 22.
34. JAMES FALLOWS, BREAKING THE NEWS 32 (1996). Notably, Fallows' book is subtitled *How the Media Undermine American Democracy.*
35. *Id.* at 267.

this point, Fallows and Sunstein are analytic twins.[36] But Fallows' proposed solution to the problem is devoid of the suggestion that the government should intervene to determine journalistic content. Instead, it is limited to a call for journalists to reform themselves, combined with a suggestion about how to do so.[37]

Constitutional scholars such as Sunstein, on the other hand, have the advantage of characterizing the media, not simply as "bad" or "misguided," but as disserving the "Madisonian" goal of deliberative democracy. Sunstein and like-minded legal scholars are therefore able to construct an argument for a governmental role in determining the content of media speech.

In a nutshell, Sunstein's argument is that: (1) large segments of the American population are unaware of the extent to which they are disserved by most of the content in the contemporary media (and would object if they only were made aware);[38] (2) the government actively promotes the current First Amendment regime through the enforcement of property, contract and tort laws;[39] (3) accordingly, "a claim on behalf of...government efforts to promote greater quality and diversity in broadcasting is a claim for a new regulatory regime, not for 'government intervention' where none existed before";[40] (4) government regulation designed to uphold "Madisonian" principles of government "through broad public deliberation" is consistent with, rather than antithetical to, the principles behind the First Amendment, as properly understood;[41] (5) the government may not regulate according to viewpoint, nor may it regulate political ("top-tier") speech;[42] but (6) otherwise, the government may regulate to promote "Madisonian" goals.

The primary purpose of this Article is to rebut the interventionist thesis generally, rather than to address specifically the writings of Sunstein or any other interventionist. Several of Sunstein's threshold points warrant brief attention, however.

1. How "Madisonian" is the "Madisonian" First Amendment?

Even in the eyes of J.M. Balkin, a generally sympathetic commentator, "Sunstein's 'Madisonian' theory of the First Amendment is about as Madisonian as Madison, Wisconsin."[43] Rather, "in his continual emphasis on the need for society to shape private preferences to serve public and democratic ends,

36. In an eerie (and presumably accidental) echo of Sunstein, Fallows writes that "mainstream journalism has fallen into the habit of portraying public life in America as a race to the bottom...." *Id.* at 7.

37. *Id.* at 265–70.

38. DEMOCRACY, *supra* note 8, at 21–22, 71–74. For an excellent analysis of the elitism inherent in this aspect of Sunstein's argument, see J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995). It is tempting to counter Sunstein's call for "a system of subsidies and incentives" as a method to prod people to watch more public-affairs programming, DEMOCRACY, *supra* note 8, at 70, with the Supreme Court's statement that "no one has a right to press even 'good' ideas on an unwilling recipient." Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970). One can anticipate Sunstein's response, however: The public is ignorant about the "Madisonian" value of such programming rather than unwilling to receive its benefits.

39. DEMOCRACY, *supra* note 8, at 34–48.

40. *Id.* at 37.

41. *Id.* at xvi–xx.

42. *Id.* at 121–65.

43. Balkin, *supra* note 38, at 1955.

Sunstein seems much closer to John Dewey than James Madison."[44] While Dewey may well have equalled Madison in his eminence as a political philosopher, he had absolutely nothing to do with the drafting of (or the reasoning behind) the First Amendment. One can argue that this fact is irrelevant, that Dewey is more persuasive on modern free speech concerns than were the framers of the First Amendment. But that view would ignore one fundamental point. Unlike Dewey, Madison and his colleagues were practical politicians. They could conceive of the ideal conditions for deliberative democracy, but recognized the risks of striving for that state of affairs. Rather than risk state control over ideas, they opted for the imperfect, but workable, principle of governmental noninterference.

2. The Status of Broadcast Speech

A second concern is created by Sunstein's attempt to reconcile his vision of a two-tier First Amendment with his critique of broadcast speech. Drawing on Alexander Meiklejohn,[45] Sunstein makes a categorical distinction between "political" speech, which can only be regulated by the government under the most extraordinary circumstances, and other speech, which "may be regulated only on the basis of a persuasive demonstration that a strong and legitimate government interest is promoted by the regulation at issue."[46] As a result, speech is subject to "Madisonian" regulation only when it is non-political, and only when the regulation is for permissible purposes. According to Sunstein, the government may not regulate speech on the second tier "on the basis of (1) its own disagreement with the ideas that have been expressed, (2) its perception of the government's (as opposed to the public's) self-interest, (3) its fear that people will be persuaded or influenced by ideas, and (4) its desire to ensure that people are not offended by the ideas that speech contains."[47] This definition raises the question, inter alia, whether a legislature or administrative agency is ever capable of distinguishing between its own interests and the interests of the public.

Sunstein defines speech as "political" for First Amendment purposes "*when it is both intended and received as a contribution to public deliberation about some issue.*"[48] All other speech belongs on the second tier. Sunstein offers illustrative examples of such lesser speech: "perjury, attempted bribery, threats, misleading or false commercial advertising, unlicensed medical or legal advice, criminal solicitation, and libel of private persons."[49] He also includes securities fraud, unauthorized disclosure of the names of rape victims, some hate speech, some sexually explicit speech, the exportation of scientific information that may

44. *Id.* at 1956. The unwillingness of the drafters of the First Amendment to interfere with private speech preferences is discussed *infra* Section V.

45. DEMOCRACY, *supra* note 8, at 122 n.1 (1948) ("'The guarantee given by the First Amendment is not...assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.'") (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 94). Sunstein's position modifies Meiklejohn by placing nonpolitical speech on a lower tier rather than off the First Amendment hierarchy altogether. *Id.* at 122 n.2

46. DEMOCRACY, *supra* note 8, at 122–23.

47. *Id.* at 155.

48. *Id.* at 130 (emphasis added).

49. *Id.* at 133.

endanger national security, and nude dancing (except when part of a political protest).[50]

However, the broadcast speech about which Sunstein complains so vehemently elsewhere in his book does not fit within any of these examples, and, in fact, is wholly absent from this aspect of his argument. Indeed, based on Sunstein's own description of that speech,[51] the conclusion that it is political (albeit of inferior quality) is inescapable. Accordingly, under Sunstein's own classification scheme, it is not subject to regulation. But that broadcast speech is precisely what he identifies as so corrosive to the "Madisonian" ideal of deliberative democracy.

Here is a concrete example of the dilemma: assume that NBC News (speaking hypothetically) portrays the 1996 election campaign as a personality contest/horse race, rather than as a serious debate among competing visions for the future government of the country. That approach is certainly a political choice under Sunstein's broad definition; it is certainly possible that the politicians view the campaign that way, and the press should have the right to reflect, or even advance, that view as well. Even if NBC's choice encourages large segments of the public to agree with its opinion, there is no basis, under Sunstein's formulation, for the government to interfere with that choice.

Or consider entertainment programming, which helps to "perpertuate[] a bland, watered-down version of conventional morality."[52] It is not clear whether such televised entertainment would fit within Sunstein's definition of "political" speech even if its creators intended it to be a contribution to public deliberation (for example, the discussion of single motherhood in *Murphy Brown*), and it is received by the audience in that fashion.[53] Sunstein does not raise the question. But even assuming it does not fit, such programming is still beyond the scope of regulation under Sunstein's overall definition. Conventional morality (whether bland or spicy) is an *idea*. Alternatives to conventional morality are other ideas. One can argue with good cause that society would be far better served by greater diversity in entertainment programming, but that is an ideological choice. It is therefore out of bounds even for second-tier regulation.

Sunstein's failure to construct a principled constitutional basis for broad regulation of broadcast programming is perhaps inevitable. Prohibition of, say, securities fraud is one thing. Such speech communicates no legitimate message, exists only to enrich the persons who speak it at the expense of individuals and society, and can be adjudicated as harmful through reasonably objective criteria. News programming that is superficial (or sensationalistic) and entertainment programming that is silly (or violent) have none of these characteristics. Most importantly, regulation of such programming would require subjective and controversial choices about what is "good" or "bad" and, even worse, would require choices that will inevitably come down to official approval or disapproval of the ideas in the subject programming.

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50. *Id.* at 162–65.
51. *Id.* at 23. *See also supra* text accompanying note 31.
52. DEMOCRACY, *supra* note 8, at 23.
53. Clearly, Sunstein does not categorically exclude entertainment from the top tier of speech. *Id.* at 164–65.

3. Free Speech and the New Deal

A third problem with Sunstein's "Madisonian" First Amendment arises from his advocacy of a "New Deal" for speech, similar in form to the New Deal of the 1930s.[54] In constitutional terms, the original New Deal was accompanied by a dramatic shift in the understanding of the permissible activities of government. Until that time, as Sunstein observes, the dominant conception of constitutional law held that the laissez faire economic theory comprised the natural order, and any legislation "interfering" with that order (e.g., a law regulating or banning child labor) was seen as exceeding the permissible scope of governmental activity.[55] But laissez faire, like every other conceivable economic system, relied on an active role for government—specifically, through the enforcement of criminal, property, contract, tort and other laws which had developed to support that system. Part of the eventual acceptance of the New Deal in the courts consisted of the realization that the Roosevelt administration and Congress were simply substituting one politically motivated choice of government involvement in the national economic structure for another.[56]

Our free speech regime also relies on the availability of the enforcement of criminal, property, contract, tort, and other laws. CBS News, for example, could not maintain its editorial voice were the government not potentially available, inter alia, to prevent would-be trespassers entering its studios during broadcasts by arresting them or providing a tort remedy for the trespass. Sunstein deduces from this fact the conclusion that legislation regulating the "quality and diversity" of CBS's news programming is simply the permissible substitution of one government regime for another.[57] That is where his argument breaks down.

During the New Deal, the government was able to enact sweeping regulation affecting the national economy because it had the authority to do so under the Commerce Clause.[58] That grant of authority, and not the existence of a previous government-sponsored economic regime, assured the constitutionality of the New Deal legislation. While the Commerce Clause is a grant of authority to Congress, the First Amendment is a specific check on that authority with respect to freedoms of speech, of the press, of free exercise of religion, and the rights of petition and assembly.[59] Accordingly, there is nothing in Congress' exercise of its Commerce Clause power during the New Deal (or afterwards) which leads inexorably to the conclusion that it has the same sort of power to regulate speech and press rights, a point Sunstein fails fully to address.

The instrumental view of speech advocated by Sunstein and the other interventionists succeeds only if speech is properly reduced to the level of a commodity, regulable solely based on the value it provides to society. But speech is more than that. "[W]hat matters is the saying of something, not just

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54. *Id.* at 23.
55. *Id.* at 29–30.
56. *Id.* at 31–32.
57. *Id.* at 37.
58. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 118–20 (1942). U.S. CONST. art. 1, § 8, cl. 3.
59. U.S. CONST. amend. I.

the fact that somehow it has been said."[60] As a result, the First Amendment carves out free speech from the scope of permissible government regulation. It is "'above and beyond the police power; [it is] not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.'"[61]

Justice Holmes, who anticipated the New Deal constitutional revolution in his *Lochner* dissent, recognized that free speech stood apart from economic interests in this respect. In a dissent joined by Justice Brandeis, he asserted that "[i]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought."[62] In the words of Felix Frankfurter, Holmes "attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements."[63] Precisely because "freedom of speech was basic to any notion of liberty, 'Mr. Justice Holmes was far more ready to find legislative invasion in this field than in any area of debatable economic reform.'"[64]

Turning back to CBS, there is no question that its status as a member of the press does not render it immune from antidiscrimination laws, labor laws, antitrust laws, laws designed to guard against securities fraud, or the rest of the panoply of modern Commerce Clause legislation. To take the issue one step further, there is nothing in the First Amendment which would bar the government from withdrawing from CBS the protection of basic corporate, tort, contract, property and criminal laws, as long as it did so with respect to all corporate entities on a nondiscriminatory basis. The only action off limits to the government in this context is legislation affecting CBS because of what it says—or does not say—in its programming. That is precisely the legislation which Sunstein advocates.

In fact, Sunstein's justification for a "New Deal" for speech logically swallows whole the political speech tier of his two-tier First Amendment. Ostensibly, Sunstein's "Madisonian" regime would place political speech off limits from government regulation.[65] Under Sunstein's theory, however, all media outlets are subject to broad regulation because they owe their existence to government activity. Broadcasters are an easy case for Sunstein because of their licensing by the FCC, but newspapers are not much harder. They, too, owe their speech rights to government actions.[66] Thus, even a mandated right of

60. Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 963 (1995).

61. *Id.* at 963–64 (quoting Beauharnais v. Illinois, 343 U.S. 250, 286 (1952) (Douglas, J., dissenting)).

62. United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting).

63. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 51 (1938), *quoted in* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 223.

64. Schwartz, *supra* note 63, at 223 (quoting FRANKFURTER, *supra* note 63, at 51). Ironically, Frankfurter proved to have a far less exalted view of free speech rights when he later joined the Court. *See, e.g.*,*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 648–49 (1943) (Frankfurter, J., dissenting).

65. DEMOCRACY, *supra* note 8, at 122.

66. *Id.* at 108–10.

reply—a blatantly political interference—is on the table for newspapers.[67] After all, according to Sunstein, while many newspapers produce high-quality reporting, "there can be no doubt, too, that the work of the print media might be substantially improved."[68] This last point, though stated with relative casualness, is truly breathtaking in its potential significance. Any deviance whatsoever from the "Madisonian" ideal is enough to warrant government regulation of political content. In other words, because we live in an imperfect world in which everything can be "improved," every media outlet in the nation should be subject to such regulation.

Clearly, then, there is no principled reason to draw the line at newspapers. Under Sunstein's theory, every piece of printed matter produced in this country depends at bottom on the availability of invoking the mechanisms of government to prevent private interference with its production. Every speech, every political protest, and every rally also depends on the threat that interference with those activities will be punished under the law. Every telephone conversation, fax, and e-mail that addresses political issues owes its existence in some sense to the establishment of phone lines through public rights-of-way. In all of these cases, "[g]overnment confers the relevant rights,"[69] opening the way to regulation of even outright political speech. Sunstein does not call for government regulation of the speech addressed in this paragraph, but the reason cannot be that it is either less political or less entangled with the mechanisms of government than the speech that is the subject of his work. The only remaining distinction is that he finds the content of such speech less objectionable.

B. The Other Interventionists

To the extent other interventionists differ from Sunstein, their analyses are no more persuasive. Owen Fiss is much more forthright than Sunstein in acknowledging that the interventionist approach will require a "radical" restructuring of established First Amendment principles.[70] The depth of that restructuring is highlighted by his statement that far from discouraging (let alone prohibiting) government regulation, the First Amendment "points toward the necessity of the activist state."[71] In other words, the First Amendment's leading clause ("Congress shall make no law"), when properly understood, does not create even a presumption against "state interference with speech."[72]

In contrast to Sunstein, who at least takes the trouble to argue that his theory is consistent with an accepted understanding of the First Amendment, the connection of Fiss' "public debate principle" "with the First Amendment does not reach the proximity of being tenuous."[73] As Powe notes, "the First Amendment was designed to prevent the federal government from regulating

67. *Id.* at 113.
68. *Id.* at 112–13.
69. *Id.* at 109.
70. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1417 (1986). In contrast, Sunstein contends that the "Madisonian" approach "would not require major changes in current law." DEMOCRACY, *supra* note 8, at 159. This point receives fuller attention in Section III, *infra*.
71. Fiss, *supra* note 11, at 783.
72. *Id.* at 786.
73. Lucas A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 182 (1987).

the press as the English monarchs had."[74] Fiss simply ignores that fact. The media, rather than the government, are the negative force in Fiss' world view, and he simply drags the Constitution along to conform to that view. Indeed, a theory that calls for systematic suppression of disfavored speech in support of a notion of a greater public good cannot properly be called a "free speech" principle even in a linguistic sense.

Frederick Schauer's argument that economic or social inequalities in the ability to amplify speech (i.e., a millionaire is more likely to have his or her views disseminated than a factory worker) are as easily regulated as any other economic or social inequality is simply a more subtle restatement of Fiss' argument.[75] The corollary—that speech inequalities are therefore equally subject to government regulation—may make sense as a matter of logic, but has no constitutional support. As noted, there is a significant difference between governmental authority in the economic and speech spheres.

Moreover, it is worth remembering that any effort to "balance" speech due to inequalities will not only be intensely political, but mechanistic as well. Presumably, one of the factors in determining which speech to subsidize would be relative lack of wealth. Conversely, the speech of relatively wealthy persons would have to be partially suppressed. But it is likely, if not certain, even from the interventionist point of view that some speech from a wealthy person will be more useful to society than that of a poor person.[76] Would it be possible to create exceptions to the equalization process in order to preserve beneficial speech? Who would make that decision? Alternatively, is the tool of equalizing speech so valuable as a device for social and economic equalization that deliberate sacrifice of even beneficial speech is worthwhile? Articulating these questions hopefully serves to show how alien the whole concept of speech equalization is from the accepted concept of free speech.

If Fiss and Schauer stand at one end of the interventionist spectrum, Lee Bollinger stands at the other. Bollinger's thesis of "partial regulation" (i.e., in support of regulated broadcast media on the one hand and unregulated print media on the other) has the benefit not only of being achievable, but of actually ratifying the current state of affairs.[77]

The Supreme Court, we should remember, starts out with a presumption that a component of the press may not be regulated, but will create exceptions to that presumption which it deems necessary due to the "unique physical characteristics" of the medium under scrutiny.[78] The Court has singled out the over-the-air broadcast media for such treatment because of the perceived scarcity of frequencies in the electromagnetic spectrum reserved for broadcast signals.[79] The print media are not physically limited in the same sense.

74. *Id.* at 183 (citations omitted).

75. Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 949–55 (1993).

76. *Cf.* Nicholas Wolfson, *Equality in First Amendment Theory*, 38 ST. LOUIS U. L.J. 379, 396–400 (1993).

77. BOLLINGER, *supra* note 5, at 109–16. *See also* Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

78. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456–58 (1994).

79. *See, e.g., id.* at 2456–57 (presenting an overview of relevant case law); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an

Regulations affecting content are therefore invalid.[80]

Even to the interventionists, the spectrum scarcity rationale is a chimera.[81] Bollinger, though, contends that, while the Supreme Court may have relied on the wrong rationale for divergent treatment of media, it nevertheless reached the right result. Partial regulation is essential, according to Bollinger precisely because of the "very similarity of the two major branches of the mass media."[82] It provides the benefits of regulation (i.e., access to media outlets by persons who otherwise would not have access) while reducing the risk that regulation will run amok.[83]

Bollinger's thesis is open to criticism as being theoretically inconsistent; logically, the First Amendment either permits regulation of all media or none at all.[84] More germane to this Article, however, is the fact that the structure of media is less and less bipolar. New forms of electronic media are coming "on-line" (literally) seemingly every day. At the same time, people are relying less on newspapers as a significant source of information.[85] As newspapers decline in relative significance, their ability to serve as the unregulated safety valve envisioned by Bollinger will decline as well.[86]

It might be possible to solve that problem by designating a sector of the electronic media to supplement the role of the print media, but the effort to achieve a solution will raise new problems. The current state of affairs as described by Bollinger was created by accident. An attempt to recreate it deliberately will lead to controversy over which sectors should be designated (undoubtedly, all will fight to be unregulated), what criteria will be used to make the choices, and the implications of a congressional failure to leave sufficient media outlets unregulated. The insolubility of these problems suggests that the theory of partial regulation, whatever its merits for the circumstances of the last fifty years, will be unworkable in the media landscape of the future.

In the end, all of the interventionists fail to grapple with the central flaw in their theses: there is no way to assure a sufficiently neutral, nonpolitical system of regulation. In response to this concern, the interventionists say, in essence, "don't worry." We have experienced a regulatory regime already through the FCC's jurisdiction over the broadcast media, and the FCC "has, on the whole, been extraordinarily circumspect in the exercise of its powers."[87] Circumspect or not, though, the FCC has committed enough abuses in its

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unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

80. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

81. DEMOCRACY, *supra* note 8, at 110; BOLLINGER, *supra* note 5, at 93–94.

82. BOLLINGER, *supra* note 5, at 116. Bollinger argues that cable television, while not scarce in the broadcast sense, should be regulated as a natural monopoly. *Id.* at 143–44. That argument is quite close to the subsequent holding of the Court in *Turner Broadcasting*, 114 S. Ct. at 2466–68, which is addressed in Section III, *infra*.

83. BOLLINGER, *supra* note 5, at 109–16.

84. *But see id.* at 115–19 (arguing that such criticism exalts theoretical fastidiousness over practical concerns).

85. *See, e.g.*, *Time Pinch Controls How Americans Use Media*, CHI. TRIB., Nov. 7, 1994, at Business 1 (reporting that all of the largest metropolitan daily newspapers have shown consistent declines in circulation).

86. De Sola Pool anticipated the onset of that precise problem. POOL, *supra* note 1, at 21–22.

87. BOLLINGER, *supra* note 5, at 115. *See also* DEMOCRACY, *supra* note 8, at 89.

history to permit Scot Powe to fill an entire book with examples.[88] If the government strays by showing bias or other impermissible motivations, the interventionists insist, we can count on the courts to set things right.[89] But, like the economic New Deal of the 1930s, a "New Deal" for speech will depend on lenient judicial review of regulations, at least in the absence of blatant abuse. The assurances thus ring somewhat hollow.

III. THE MEMPHIS BLUES (OR THE INCONSISTENCY BETWEEN INTERVENTIONISM AND THE FIRST AMENDMENT)

Sunstein asserts that "a Madisonian approach would not require major changes in current law."[90] This section is devoted to demonstrating the falsity of that assertion.

The "Madisonian" approach is, in essence, a sort of Fairness Doctrine[91] applied across the board to all media. This is perhaps an oversimplification, but a fair one. Under such a regime, the government would determine categories of speech (e.g., the abortion controversy) which it deems sufficiently important to have placed before the public, but which have received insufficient volume and/or quantity of coverage. The deficient media will be induced to cover these categories in a properly serious manner. The fact that such coverage is available outside the mass media is irrelevant. Large segments of the population rely exclusively on the mass media, and so must be educated to want that serious coverage of issues.

A. The Current State of the Law

One does not have to look very hard to find that the First Amendment, at least as interpreted consistently by the Supreme Court, would not permit imposition of that type of regime. Perhaps the best-articulated doctrinal statement of the Court's view came in *San Antonio Independent School District*

88. LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987). A few of Powe's examples, including the Whitehead speech, and the drug lyric and WHDH incidents, are addressed in detail later in this article.

89. Fiss, *supra* note 70, at 1420–21.

90. DEMOCRACY, *supra* note 8, at 159.

91. The Fairness Doctrine, as defined by the FCC, required broadcast radio and television licensees "to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." *In re* Inquiry into Section 73.1910 Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142, 146 (1985) [hereinafter 1985 Inquiry]. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388–91 (1969), the Supreme Court affirmed the constitutionality of the Fairness Doctrine. In FCC v. League of Women Voters of Cal., 468 U.S. 364, 376–77 n.11 (1984), however, the Court indicated that its holding in *Red Lion* was subject to revision if the FCC determined that such revision was warranted by technological developments. In the 1985 Inquiry, the Commission found that changed conditions in the electronic media had indeed rendered the doctrine unconstitutional. At the time of the 1985 Inquiry, the Commission was unsure whether the doctrine was mandated by statute or by its own regulations, and accordingly declined to repeal the doctrine. 1985 Inquiry, 102 F.C.C.2d at 148. The following year, the D.C. Circuit held that the doctrine was a creature of administrative rulemaking. Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 517–18 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). The Commission responded by repealing the doctrine. Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

v. Rodriguez,[92] which ironically, concerned the right to equal school funding under the Equal Protection Clause rather than the First Amendment. In the course of rejecting the contention that education was a fundamental right guaranteed by the federal Constitution because of the close connection between a good education and the ability to speak and vote effectively, the Court stated:

> In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.... We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. *Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.* That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.[93]

Apart from the need to substitute "private" for "state" in the final sentence, the cited passage is a complete rebuttal of the "Madisonian" approach.

Putting aside the broadcast media and possibly cable television, which have been treated differently because of their special physical characteristics, the Court has acted consistently with the cited philosophical statement. The clearest example is *Miami Herald Publishing Co. v. Tornillo*.[94] At issue in *Miami Herald* was a Florida statute providing that

> "[i]f any newspaper...assails the personal character of any candidate [for elective office], or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record...such newspaper shall upon the request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply...."[95]

In short, the statute embodied "Madisonian" goals.[96] Moreover, the Court appeared to accept arguendo the assertion that the *Herald* and other large urban newspapers were de facto monopolies in their respective regions, with disproportionate "power to inform the American people and shape public opinion."[97]

There is little question, too, that the Court believed that the public would be well served by a press that gives fair space to opposing views. While "[a]

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92. 411 U.S. 1 (1973).
93. *Id.* at 35–36 (emphasis added) (citations omitted).
94. 418 U.S. 241 (1974).
95. *Id.* at 244 n.2 (citation omitted).
96. *Cf.* DEMOCRACY, *supra* note 8, at 113 (deeming "a right of reply" with respect to print media, "combined with an incentive to attend to controversial questions" as a "Madisonian" goal).
97. *Miami Herald*, 418 U.S. at 250. The Court accordingly has read *Miami Herald* as applying to cases involving "dysfunction or failure in a speech market." Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994).

responsible press is an undoubtedly desirable goal," the Court held that "press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[98] "[A]n enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[99] In other words, the Court recognized that altering First Amendment means is not always a proper method of achieving even desirable ends.

There is something strange—Bollinger calls it "schizophrenic"[100]—in the way the *Miami Herald* Court reached its result. The bulk of the opinion is devoted to recitation (and implicit acceptance) of the interventionist critique of newspapers. Then, almost as a rhetorical afterthought, the Court rather cursorily rejects the legal argument in favor of the right-of-reply statute. The outcome is thus open to criticism as being the product of unthinking devotion to what Fiss calls the misguided "Free Speech Tradition."[101] Similarly, the Court's assertion in other cases that First Amendment protection is equally available to speech that is motivated by profit[102] or that is categorized as entertainment[103] may seem at first glance to be a product of reflexive analysis. In reality, however, the Court's jurisprudence in this context is not the blind acceptance of a quasi-religious tradition. Rather, it is a result of the hard lessons learned by the Court from its own past mistakes—especially, its sanction of outright censorship of motion pictures.

B. The Mutual Film *Era and Its Lessons for the Future*

Motion pictures were the first significant form of electronic media. They were also the first to be subject to censorship. Ohio, for example, established a state-sanctioned board of censors, and barred the exhibition of films that were not "'in the judgment and discretion of the board of censors, of a moral, educational, or amusing and harmless character.'"[104] By 1915, at least three states and numerous cities had similar censorship regimes.[105] That year, in *Mutual Film Corp. v. Industrial Commission of Ohio*,[106] the Supreme Court upheld the Ohio regime.[107]

The most remarkable aspect of the *Mutual Film* Court's analysis for present purposes is the extent to which it mirrored the complaints about the electronic media by the current-day interventionists and their ideological

98. *Miami Herald*, 418 U.S. at 256.
99. *Id.* at 254 (footnotes omitted).
100. BOLLINGER, *supra* note 5, at 53–54.
101. Fiss, *supra* note 70, at 1422–25.
102. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).
103. *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic [free press] right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.").
104. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 240 (1915) (quoting 1913 Ohio Laws 103, 399, § 4).
105. Comment, *Censorship of Motion Pictures*, 49 YALE L.J. 87, 91 (1939) [hereinafter Yale Comment].
106. 236 U.S. 230 (1915).
107. In a companion case, Mutual Film Corp. v. Hodges, 236 U.S. 248 (1915), the Court upheld a similar regime enacted by the Kansas state government.

predecessors.[108]

1. The Historical Continuum in Criticism of the Electronic Media

Beyond the general grievance that the electronic media disserve public deliberation, there are two notable lines of criticism by the interventionists: the non-serious nature of the vast majority of the content of programming (even content that is ostensibly "news") and the fact that that programming is largely motivated by considerations of profit. These criticisms are nothing new; they date back almost to the inception of the electronic media.

As for the first line of criticism, Lee de Forest, who was instrumental in transforming early wireless technology into radio for mass consumption, complained near the end of his life in 1946 that radio had become "'a stench in the nostril of the gods of the ionosphere.'"[109] According to de Forest, "broadcasters had sent his child into the street 'in rags of ragtime, tatters of jive and boogie woogie, to collect money from all and sundry, for hubba hubba and audio jitterbug.'"[110]

On a less florid note, Alexander Meiklejohn asserted around the same time that radio speech was not entitled to First Amendment protection because it had "'failed' in its promise to assist in our national education; it was engaged in making money, not in 'enlarging and enriching human communication.'"[111]

It is a small step from these historic observations to the contemporary one that: "'Television teaches you to know through what you see and feel [rather than think].' Its epistemology begins and largely ends in the viscera.' The aesthetic and emotional experience is unquestionably television's standard fare and modus operandi."[112]

In the same vein, in upholding the right of states to censor the content of movies consistent the First Amendment, the Supreme Court reasoned that they were "mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."[113]

Movies, the Court added, "may be mediums of thought, but so are many things. So is the theater, the circus, and all other show and spectacles...." The *Mutual Film* Court was unwilling to afford any of these media meaningful First

108. There is a significant irony in the fact that the Court that handed down the *Mutual Film* opinion was notoriously hostile to most forms of government regulation, even the most benign in the modern view, see, e.g., Coppage v. Kansas, 236 U.S. 1 (1915) (declaring unconstitutional a state law banning "yellow dog" labor contracts), but was willing to grant the government carte blanche to regulate speech. The contemporary Court, by and large, has a directly converse view of these categories of regulation.

109. TOM LEWIS, EMPIRE OF THE AIR 242 (paperback ed. 1993) (quoting Lee de Forest).

110. *Id.*

111. POWE, *supra* note 88, at 30 (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 78–89 (1948)).

112. Ronald K.L. Collins & David M. Skover, *The First Amendment in the Age of Paratroopers*, 68 TEX. L. REV. 1087, 1096 (1990) (quoting NEIL POSTMAN, TEACHING AS A CONSERVING ACTIVITY 58–59 (1979)). *See also* DEMOCRACY, *supra* note 8, at 23.

113. Mutual Film Corp. v. Hodges, 236 U.S. at 244.

Amendment protection.[114]

The other fundamental criticism of the content of electronic media is that it serves as the means for the owners of those media to make a profit.[115] Some media (for example, motion pictures and commercial on-line services) make money from direct sales to consumers. Others (for example, radio and broadcast television) make money through sales of advertising. In either case, the programming is the means by which the media owners seek to maximize their profits.[116] This fact automatically renders commercial programming suspect in the eyes of the interventionists.[117]

Like the criticism that programming in the electronic media is inherently frivolous, the criticism that electronic media is driven by commercial motives has a long history. In 1947, for example, the Commission on Freedom of the Press, chaired by Robert M. Hutchins (the "Hutchins Commission") determined that "[r]adio cannot become a responsible agency of communication as long as its programming is controlled by advertisers."[118] Likewise, in *Mutual Film*, the Supreme Court found justification for state censorship in the observation that "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit."[119] As such, the Court concluded, they were "like other spectacles, not to be regarded...as part of the press of our country, or as organs of public opinion."[120]

2. Censorship and the Movies, 1915–1952[121]

By the late 1930s, nine states and more than fifty cities had established

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114. *Id.* at 243.

115. *See, e.g.*, Cass A. Sunstein, *A New Deal For Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 151–54 (1994) (citing examples of influence of advertisers over television programming).

116. Logically, there is no meaningful distinction between these two methods of making money. The media owner will tailor its programming to be most attractive to its target audience under either regime. Sunstein, however, sees a distinction in the fact that advertisers can supplant viewer choice in determining the content of controversial programming. *First Amendment in Cyberspace*, *supra* note 22, at 1789. Theoretically, a film dealing with a controversial subject such as abortion may have a better chance of airing on HBO (a subscriber-sponsored channel) or in theaters than on an advertiser-sponsored channel. A movie studio may be willing to risk alienating a larger percentage of the viewing public than an advertiser. *Cf. id.* (citing factors that may cause advertisers to withdraw support from certain programs). But that argument only goes so far. The sensitivity level of a movie studio may be somewhat different from that of an advertiser, but the former is equally concerned that its product will find a profitable niche. *See, e.g.*, Richard W. Stevenson, *In Hollywood, Big Just Gets Bigger*, N.Y. TIMES, Oct. 14, 1990, 3:12, ("[W]riters and directors say there is little opportunity to make films that do not have an obvious appeal to a mass audience.").

117. For an implicit rebuttal to this viewpoint, see New York Times Co. v. United States, 403 U.S. 713 (1971), which addressed the publication of the Pentagon Papers by the advertiser-sponsored *New York Times* and *Washington Post.*

118. COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS, 95 (1947) [hereinafter Hutchins Report].

119. Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230, 244 (1915)

120. *Id.*

121. The examples cited in this paper are only a small sample of the "unbridled censorship of movies in America" during the 37 years between the *Mutual Film* and *Joseph Burstyn* opinions. John Wertheimer, Mutual Film *Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 186 (1993). For a more comprehensive treatment of the issue, see EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS 177–240 (1982) (detailing efforts to censor 35 films during the "*Mutual Film* period"); RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES 18–25 (1968).

censorship regimes for motion pictures.[122] Many of their activities seem extremely troublesome in light of present-day understanding of the First Amendment.[123] One of the most offensive applications of governmental authority under *Mutual Film* was censorship designed to preserve the racial status quo. For example, the Memphis, Tennessee Board of Censors refused in the late 1940s to license the film *Curley* (a knock-off of the *Our Gang Comedies*), because it featured an interracial cast of child actors enrolled in the same school classes. In a letter to the film's distributor, the chairman explained that the Board "'is unable to approve your 'Curley' picture with the little negroes as the south does not permit negroes in white schools nor recognize social equality between the races even in children.'"[124] The Tennessee Supreme Court refused to disturb the Board's action.[125]

Lost Boundaries, which depicted a black family attempting to "pass for white," failed to pass muster with the Atlanta Board of Censors on the grounds that its exhibition would "'adversely affect the peace, morals and good order'" in the city.[126] Despite recognizing the blatantly racist and political nature of the Board's action, the federal district court reviewing the enabling ordinance felt compelled under *Mutual Film* to sustain its constitutionality.[127]

Racially motivated censorship under the *Mutual Film* regime was not limited to the South, however. Kupferman and O'Brien described the following incident from Chicago concerning the film *No Way Out*, which was

> a melodrama dealing with the prejudices met by a Negro doctor in practicing his profession and "the ever-present tensions between whites and Negroes in the slums of a big city, which can explode into a race riot." Chicago's Police censor board refused a permit for the motion picture because it would "create unrest among the colored people", did not "show a true picturization of the white-colored situation" in Chicago, and offered no solution to the problem. When the National Association for the Advancement of Colored People and other groups protested the ban, the Mayor appointed a special committee to view the picture. They recommended that the scene showing the population arming for the race riot be deleted, and with that change the picture was approved by the censor division of the Police Department.[128]

In addition to race, political ideology was a common basis for censorship. Boards in Ohio and Pennsylvania, for example, banned newsreels in the early 1920s that they considered to be "pro-labor."[129] *Professor Mamlock*, a Russian-made, anti-Nazi film from the mid-1930s, was banned in Rhode Island and

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122. Yale Comment, *supra* note 105, at 91, 97–98.

123. Donald Lively has aptly described the regulatory regime instituted by *Mutual Film* as "fear-based" in that it manifested judicial anxiety over the communicative powers of the new medium. Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1078–80 (1985). He further argues that such fear has been the overriding theme of judicial review of regulation of each new form of electronic media since. *Id.* at 1081–91.

124. United Artists Corp. v. Board of Censors, 225 S.W.2d 550, 551–52 (1949), *cert. denied*, 339 U.S. 952 (1950). *See generally* Theodore J. Kupferman & Philip O'Brien, Jr., *Motion Picture Censorship: The Memphis Blues*, 36 CORNELL L.Q. 273, 276 (1951).

125. *United Artists Corp.*, 225 S.W.2d at 556.

126. RD–DR Corp. v. Smith, 89 F. Supp. 596, 597 (N.D. Ga.) (citation omitted), *aff'd*, 183 F.2d 562 (5th Cir.), *cert. denied*, 340 U.S. 853 (1950). *See generally* Kupferman & O'Brien, *supra* note 124, at 284–86.

127. *RD-DR Corp.*, 89 F. Supp. at 598.

128. Kupferman & O'Brien, *supra* note 124, at 287 (citations omitted).

129. Yale Comment, *supra* note 105, at 94–95.

Chicago.[130] *Blockade*, a fictional treatment of the Spanish Civil War which discussed the murder of women and children by Franco's troops, was banned in Somerville, Massachusetts and Providence, Rhode Island.[131] A pro-Loyalist documentary, *Spain in Flames*, was banned by the Ohio Board of Censors. The order was accompanied by the comment: "'We suggest that narrators, in reporting on [the Spanish Civil War], keep their remarks neutral, or we will find it necessary to make eliminations.'"[132]

Issues of contraception and reproduction also proved to be fertile grounds for censorship. The ban by the Chicago Police Superintendent of the film *Margaret Sanger in Birth Control* was sustained on the reasoning that "its suggestions to one, including the young and unmarried, might lead to immoral conditions."[133] The film fared no better in New York City. The reviewing court held that the censor acted within his discretion to ban a film that, in his view, tended "to ridicule the public authorities and the provisions of section 1142 of the Penal Law forbidding the dissemination of contraceptive knowledge...."[134] Curiously, the movie did not actually disseminate any information about how to practice contraception, "but that there are such means known to Mrs. Sanger is clearly represented."[135]

The grounds for the ban on exhibition of *Tomorrow's Children* by the New York State Department of Education were more complex. The message of the film was that compelled sterilization of persons described as "feeble-minded" was morally wrong. At the time the film was released, New York had repealed the statute authorizing such sterilizations.[136] At first glance, therefore, the film was simply supporting the status quo in the state. The State Education Commissioner saw the matter differently, however. Although the film opposed sterilization, it nevertheless "publicize[d] and elucidate[d] sterilization as a means to prevent the conception of children" and accordingly ran afoul of the same statute that had permitted the censorship of *Birth Control*.[137]

The third case in the New York "procreation trilogy" is *American Committee on Maternal Welfare, Inc. v. Mangan*,[138] which upheld the ban on *Birth of a Baby*, a somewhat graphic depiction of the childbirth process. Although the court could discern nothing immoral about the fact that a married woman bore children, it refused to disturb the Education Department's findings that acknowledgement of that fact in a film intended for a general audience was "indecent," "immoral," and "would tend to corrupt morals."[139] The procreation cases are particularly apt today, in light of the provision in the federal Telecommunications Act of 1996 which criminalizes all information on

130. *Id.* at 98–100. The Chicago board later lifted the ban. *Id.* at 100.
131. *Id.* at 99–100.
132. *Id.* at 95 (quoting *Literary Digest*, May 1, 1937, at 3).
133. People *ex rel.* Konzack v. Schuettler, 209 Ill. App. 588, 590 (1918).
134. Message Photo-Play Co. v. Bell, 166 N.Y.S. 338, 340 (App. Div. 1917).
135. *Id.* at 341.
136. Foy Prods., Ltd. v. Graves, 3 N.Y.S.2d 573, 578 (App. Div.) (Hill, P.J., dissenting), *aff'd*, 15 N.E.2d 435 (1938). Other states, though, did have such statutes. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding Virginia's forced sterilization statute).
137. *Foy Prods.*, 3 N.Y.S.2d at 577. The court was clearly also bothered by the film's portrayal of the judge with the power to order sterilizations as "venal and corrupt." *Id.* at 574, 577.
138. 14 N.Y.S.2d 39 (App. Div. 1939).
139. *Id.*

"interactive computer services" which pertain to abortion.[140] More generally, the examples following *Mutual Film* demonstrate that even powerful private media are no match for true governmental censorship.[141]

3. The Fallout from the Mutual Film *Era*

Thirty-seven years after it was issued, *Mutual Film* was overruled by *Joseph Burstyn, Inc. v. Wilson.*[142] At issue in *Joseph Burstyn* was the film *The Miracle*, by Roberto Rosselini, which depicted the fictional story of an Italian peasant woman who believed she had been impregnated by a saint.[143] The film was initially granted a license by the Motion Picture Division of the New York State Education Department, and was exhibited in New York City. That exhibition outraged many religious officials. For example, Francis Cardinal Spellman, the Catholic Archbishop of New York, ordered all priests in the diocese to condemn the film at a Sunday Mass. Just over one month later, the state Board of Regents ordered that the license to exhibit *The Miracle* be rescinded, on the grounds that the film was "sacrilegious." "Sacrilege" was one of the enumerated statutory bases for refusal to issue a license.

In the course of striking down the New York censorship statute under the First Amendment, the Supreme Court went out of its way, not only to explicitly overrule *Mutual Film*,[144] but to emphasize that *Mutual Film*'s justifications for refusing to treat motion pictures as a full-fledged First Amendment medium were invalid. With respect to the "entertainment" rationale, the Court stated that "It cannot be doubted that motion pictures are a significant medium for the communication of ideas.... The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."[145]

With respect to the "profit motive" rationale, the Court stated that:

> It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.[146]

Thus, the *Joseph Burstyn* Court explicitly rejected a First Amendment regulatory regime premised on institutional mistrust of commercially oriented entertainment media, and did so with knowledge of the effects of such a regime.

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140. Telecommunications Act of 1996 Pub. L. No. 104–104, § 507, 110 Stat. 56, 137 (to be codified as amended at 18 U.S.C. §§ 1462, 1465). The Clinton administration has pledged not to enforce this provision. Peter H. Lewis, *Judge Blocks Law Intended to Regulate On-Line Smut*, N.Y. TIMES, Feb. 16, 1996, at D1. As of the date of this writing, though, the provision remains on the books to be enforced by an administration hostile to abortion rights.

141. *But see* Fiss, *supra* note 70, at 1415 (The state makes "an enormous contribution to public discourse, and should enjoy the very same privileges that we afford those institutions that rest on private capital....").

142. 343 U.S. 495 (1952).

143. All of the facts in this paragraph are drawn from Justice Frankfurter's concurring opinion in *Joseph Burstyn*, 343 U.S. at 507–17.

144. *Id.* at 502.

145. *Id.* at 501.

146. *Id.* at 501–02 (footnote omitted).

But while *Mutual Film* itself was overruled, its effects linger on. Its reasoning was incorporated into the early case law on broadcasting.[147] For example, in affirming the denial of a license renewal to a radio station controlled by the preacher "Fighting Bob" Shuler[148], the D.C. Circuit held that radio, as an instrument of interstate commerce, could not be used, inter alia "to offend the religious susceptibilities of thousands, inspire political distrust and civil discord, or offend youth and innocence by the free use of words suggestive of sexual immorality...."[149] Otherwise, "this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests."[150] As a result, denying Shuler the opportunity to speak on the air was "neither censorship nor previous restraint, nor...a whittling away of the rights guaranteed by the First Amendment...."[151] The law of broadcast regulation, as derived from these principles, continues largely unchanged down to the present day.[152]

C. Mutual Film *and the "Madisonian" First Amendment*

While the *Mutual Film* Court had the same general complaints about the commercial and frivolous nature of the motion picture industry that today's interventionists have about the electronic media generally, it does not automatically follow that the "New Deal for Speech" would result in similarly "unbridled censorship." "Madisonian" principles or their equivalent were apparently absent from the censorship of movies during the *Mutual Film* era. Although experience shows that it would be naive to assume that contemporary legislators and administrators will always act consistently with "Madisonian" goals, perhaps we can rely on the courts to strike down all regulations that do not further those goals, while upholding those that do.

Experience, however, teaches that confidence in the efficacy of judicial review can be overstated. In the *Curley* case discussed above, for example, the Tennessee Supreme Court recognized that "there is no authority in the law '[t]o use race or color as the sole legal basis for censorship of talking-motion

147. For discussion of this point, see, e.g., Brandywine–Main Line Radio, Inc. v. FCC, 473 F.2d 16, 72 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 180–82 (1994). The history of broadcast regulation is addressed in more detail in Section IV, *infra*.

148. Shuler had gotten himself into trouble by making disparaging remarks about Catholics and Jews and by charging in blistering terms that the mayor and senior officials in Los Angeles were corrupt and tolerated various illegal activities including gambling, prostitution and alcohol consumption (during Prohibition), and even covered up a murder of a person who sought to expose those activities. POWE, *supra* note 88, at 14–15. "Interestingly, in many cases, Shuler's side of the story was compelling. The chief of police resigned, and the mayor had chosen not to run for reelection. Shuler's story of the murder cover-up was corroborated and uncontradicted." *Id.* at 15.

149. Trinity Methodist Church, S. v. Federal Radio Comm'n, 62 F.2d 850, 853 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). While Shuler uttered the words "pimps" and "prostitutes" on the air, it is clear that he did so only to attack the practices of persons engaged in those activities. *Id.* at 852.

150. *Id.* at 853.

151. *Id.*

152. *See, e.g.* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456–57 (1994) (affirming viability of *Red Lion*); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 41–42 (D.C. Cir. 1972) *cert. denied*, 412 U.S. 922 (1973) (observing that *Red Lion* was part of a continuing line of broadcasting jurisprudence that "has not seriously been questioned in over fifty years").

pictures.'"[153] It nevertheless left the Board's action intact by dismissing the case on procedural grounds.[154] That example makes the point that judicial review is, at best, an imperfect tool, subject to all sorts of procedural obstacles. Moreover, even patently bad regulations require a significant outlay of time and money by those seeking judicial reversal of such regulations. These endemic problems can only be exacerbated by the fact that a "Madisonian" regime will necessarily invest legislators with a great deal of discretion in deciding what "Madisonian" means in practical terms, and in how to advance the goals of the regime through legislation. Thirty-nine years after *Roth v. United States*,[155] this country is still sorting out the meaning of "obscenity." Bearing that experience and the experience of the abuses of the *Mutual Film* period in mind, it is not surprising that the Supreme Court has not shown the slightest interest in importing the concept of "Madisonianism" into First Amendment jurisprudence.

D. The Impact of Turner Broadcasting

Moving from the past to the present, Sunstein argues that aspects of the Court's analysis in *Turner Broadcasting Systems, Inc. v. FCC*[156] are "connected with Madisonian aspirations."[157] In order to assess the correctness of that assertion, a brief review of *Turner Broadcasting* is warranted.

Turner Broadcasting held that sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992—the "must-carry" provisions[158]—were constitutional. The opinion rested on two basic points. The first was the determination that the must-carry provisions were "content-neutral" in that they did not "impose[] a restriction, penalty, or burden by reason of the views, programs or stations the cable operator has selected or will select."[159] The second was the finding that "[a] cable operator, unlike speakers in other media, can...silence the voice of competing speakers [i.e., broadcast stations] with a mere flick of the switch."[160] The Court reached the latter finding based on the conclusion that "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."[161]

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153. United Artists Corp. v. Board of Censors, 225 S.W.2d 550, 553 (1949) (citation omitted), *cert. denied*, 339 U.S. 952 (1950).

154. *Id.* at 554–55.

155. 354 U.S. 476 (1957) (holding that obscenity was not speech within the meaning of the First Amendment).

156. 114 S. Ct. 2445 (1994).

157. *First Amendment in Cyberspace*, *supra* note 22, at 1771.

158. The must-carry provisions of the Act are codified at 47 U.S.C. §§ 534, 535 (1995). Section 534 requires cable systems with more than 12 channels and 300 subscribers to set aside up to one-third of their channels for a defined class of "local commercial television stations." *Turner Broadcasting*, 114 S. Ct. at 2453. Section 535 requires carriage of local "noncommercial educational television stations" on a sliding scale. Cable systems with 12 or fewer channels must carry at least one such station; systems with 13 to 36 channels must carry up to three; systems with more than 36 channels must carry all stations requesting carriage. *Id.* at 2453–54.

159. *Id.* at 2460.

160. *Id.* at 2466.

161. *Id.* In view of the centrality of that finding to the Court's opinion, it is remarkable that it was not supported by a single legal or factual citation. Ronald W. Adelman, *Turner Broadcasting and the Bottleneck Analogy: Are Cable Television Operators Gatekeepers of*

The second point is especially significant because, whether or not must-carry discriminates on the basis of content, it unquestionably discriminates on the basis of the identity of the speaker. It favors broadcast television over cable television. Such discrimination is generally inconsistent with the First Amendment[162] unless "the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[163] The "bottleneck monopoly power exercised by cable operators" supplied the requisite special characteristic.[164] In addition, the desire to check that perceived power supplied the "'important or substantial governmental interest'"[165] necessary to sustain must-carry under the "intermediate level of scrutiny applicable to content-neutral regulations."[166]

Congress divided the interest in combatting the bottleneck power of cable operators into three subparts: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[167] Sunstein identifies subparts (1) and (2) as being "connected with Madisonian aspirations." Indeed, he goes so far as to identify a "Turner model," which would permit the government to regulate speech sources by, inter alia, "invoking such democratic goals" as access to a multiplicity of information sources and promoting dissemination of matters of local concern.[168]

As a threshold matter, it is questionable whether either subpart is really connected with "Madisonian" aspirations. Congress and the Court identified an interest in access to a multiplicity of *sources*, not a multiplicity of *viewpoints*.

Speech?, 49 SMU L. REV. 1549 (1996).

162. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 584, 591–92 (1983). *See also infra* notes 230–32 and accompanying text.

163. *Turner Broadcasting*, 114 S. Ct. at 2468 (quoting *Minneapolis Star*, 460 U.S. at 585).

164. *Id.*

165. *Id.* at 2469 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

166. *Id.* Although the Court found that must-carry met the first prong of the intermediate scrutiny test, it held that the government failed to meet its burden (or at least failed to do so in a manner sufficient to warrant the summary judgment in its favor that the district court had granted) with respect to the second prong: the requirement that the regulation not "'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 2470 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). Accordingly, it remanded the case to the district court. Despite the Supreme Court's instructions, the three-judge district court panel once again granted summary judgment in the government's favor on the same record by a 2–1 majority. *Turner Broadcasting Sys., Inc. v. FCC*, 910 F. Supp. 734, 751 (D.D.C. 1995). The Supreme Court reacted by noting probable jurisdiction to reconsider the case. 116 S. Ct. 907 (1996). It is premature to speculate about whether the Court acted out of displeasure with the district court's stubborn refusal to try the case, or whether it perceived the need to reconsider its earlier holding. Adelman, *supra* note 161, at 1551. *But see* Linda Greenhouse, *Justices Reconsider Law Requiring Cable TV to Carry Local Stations' Signals*, N.Y. TIMES, Feb. 21, 1996, at A16 ("The very fact that the Court decided on a second, full-dress review of the case suggests that the Justices were not satisfied with their 1994 ruling as the last word.").

167. *Turner Broadcasting*, 114 S. Ct. at 2469.

168. *First Amendment in Cyberspace*, *supra* note 22, at 1774. *See also* BOLLINGER, *supra* note 5, at 140 (Concerns about the role of electronic media in promoting deliberative democracy "exist independently of the amount of information available in the marketplace of ideas."). Indeed, from an interventionist perspective, "even if we have the opportunity to acquire all relevant points of view, in the absence of agreed-upon structures or methods for deciding questions we may end up with poorer decisions." *Id.* at 141.

As Sunstein recognizes, only the latter is truly "Madisonian."[169] And must-carry seeks to preserve free broadcast television in its existing form, which Sunstein has described (accurately) as reflecting "an accelerating 'race to the bottom' in terms of the quality and quantity of the attention it requires."[170]

The more fundamental problem with Sunstein's contention is that *Turner Broadcasting* is self-consciously a discrete analysis applied to the unique problem of gatekeeper control by cable operators. A central feature of interventionism is the right—if not the obligation—of the government to correct failures in speech markets.[171] But, according to the *Turner Broadcasting* Court, "dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media."[172] In other words, there is a presumption that the electronic media are entitled to the same stringent limitations on regulation that newspapers received in *Miami Herald*.[173] The "something more" that justifies must-carry is the gatekeeper control by cable operators. The "something more" with respect to broadcast television and radio was "the special physical characteristics of broadcast transmission."[174] In both instances, the Court has focused on the physical limitations of the medium under scrutiny. As Sunstein acknowledges, the "new information technologies" will have no such physical limitations.[175] Accordingly, the "*Turner* model" and the *Red Lion* model—which is the strongest endorsement of "Madisonian" aspirations issued by the Court—are already legal relics, based on the physical limitations of old technology.[176]

Justice O'Connor's dissent, on behalf of three other Justices, seems at once both more and less hostile to "Madisonian" aspirations than the majority. On the one hand, she recognized that must-carry was both content-specific and discriminatory on the basis of speaker identity, and left no doubt that she would subject "Madisonian"-type legislation—which would share one or both characteristics—to the strictest First Amendment scrutiny.[177] Moreover, unlike the majority, she would leave no room for sneaking "Madisonian" aspirations through the back door of a medium's physical characteristics.

On the other hand, she left some room for the hope that she would consider those aspirations sufficiently compelling to pass First Amendment muster. Although she would foreclose all regulations premised on providing a diversity of viewpoints,[178] she considered "[t]he interests in public affairs

169. *First Amendment in Cyberspace*, *supra* note 22, at 1785–86.

170. DEMOCRACY, *supra* note 8, at 23. The fact that the must-carry regulations are unconcerned with enhancing the quality of broadcast television should come as little surprise, given that its enactment was due at least in part to "a giant lobbying effort" by "television stations and the broadcast networks." Edmund L. Andrews, *Re-Regulation of Cable Is Likely to Pass House*, N.Y. TIMES, July 23, 1992, at D1.

171. *See* Section II, *supra*. *See, e.g.*, DEMOCRACY, *supra* note 8, at 17–23.

172. *Turner Broadcasting*, 114 S. Ct. at 2458.

173. *Id.*

174. *Id.*

175. *First Amendment in Cyberspace*, *supra* note 23, at 1765.

176. Although the Telecommunications Act of 1996 retains must-carry, it will hasten the demise of the legal justification for its retention. Adelman, *supra* note 161, at 1557–58.

177. *Turner Broadcasting Sys., Inc.*, 114 S. Ct. 2445, 2476–78 ("Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest.").

178. *Id.* at 2478 ("While the government may subsidize speakers that it thinks provide

programming and educational programs [to] seem somewhat weightier...."[179] Although any conclusions on the significance of that passage at this point require subjective parsing of Justice O'Connor's musings (hopefully, the Court's reconsideration of the case will provide more insight), the context of the passage in the dissenting opinion as a whole should provide little comfort to the interventionists. While conceding that an interest in providing access to public affairs and educational programming had some weight, Justice O'Connor went on to note that: "We have never held that the Government could impose educational content requirements on, say, newsstands, bookstores, or movie theaters; and it is not clear that such requirements would in any event appreciably further the goals of public education."[180]

More fundamentally, she observed that

> the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals.[181]

Turner Broadcasting thus is no more "Madisonian" than any case before it, and does not point the way to a "Madisonian" regime.

Indeed, it is impossible to conceive of a "Madisonian" regime as being anything but a legislative and judicial nightmare. A hypothetical example not addressed by Sunstein—the treatment of homosexuals in American society—demonstrates the point. It is simple enough to state that the electronic media by and large present only a caricature of gays and lesbians, to the extent it does not ignore them entirely, and that all of us, whatever our sexual preference, would be better served by a more nuanced and comprehensive discussion about gay and lesbian issues. But what is the "Madisonian" solution to this problem? An influential segment of the population believes that homosexuality is inspired by Satan.[182] Will every portrayal of a gay or lesbian in a positive light and every argument in favor of equal rights in the electronic media need to be "balanced" by the view that homosexuality is Satanic? Is that "view" even entitled to be part of the public debate? Putting aside the concern that governmental control of the terms of the debate will tend to favor the most intolerant, strident voices in this context as elsewhere, how will it be possible for the legislature or the courts to balance deeply held moral belief on both sides? A "Madisonian" approach would inevitably leave these questions to a political and legal process that has in the past shown no indication of being well-equipped to handle them. The principle of governmental noninterference, then, is not the result of a blind

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novel points of view, it may not restrict other speakers on the theory that what they say is more conventional.").

179. *Id.*

180. *Id.* In her reference to movie theaters, Justice O'Connor clearly overlooked *Mutual Film* and its progeny.

181. *Id.* at 2480.

182. Frank Rich, *Bashing to Victory*, N.Y. TIMES, Feb. 14, 1996, at A21 ("At the First Federated Church in Des Moines, the Christian Coalition and seven other national religious-right organizations came together to demonize homosexuals and the prospect of 'same-sex marriage' as the source of all ills in America urging a national C-Span audience to 'send this evil life style back to Satan where it came from!' And every G.O.P. Presidential candidate with the single honorable exception of Richard Lugar endorsed the event—by either showing up on stage or distributing a public letter of support.").

worship of free markets. It arises from the realization that speech issues lie outside the sphere of governmental competence.

IV. THE CAMEL IN THE TENT: THE FCC AS LICENSOR OF SPEECH

The noninterference principle is not only good law, however. It is good policy as well. The previous section of this Article highlighted one of the less-explored examples of the abuses that can ensue from giving broad discretion to government regulators in the realm of speech. The history of regulation by the FCC and the federal government of broadcast (and more recently, cable) speech has been much more thoroughly explored. The conclusions that have been drawn from that history have been controversial, to say the least. The evidence that the executive and legislative branches, acting directly or through the FCC, have regulated electronic speech to serve illegitimate ends is well documented.[183] The dispute arises over the lessons to be learned from that evidence.[184] Recent governmental assertion of regulatory authority over speech in cyberspace, most notably in the Telecommunications Act of 1996,[185] can only heighten the significance of the dispute.

In the final analysis, the systematic regulation of electronic speech can only be detrimental to the goals of free speech. The history of regulatory abuse plays a significant part in this conclusion, but is not dispositive. After all, one logical response to past regulatory abuse is a reformation of the system that will curb the abuses, but leave the benefits of the regulations intact. If, however, the abuses are endemic to the very existence of regulation, then the whole regime is suspect. The lessons learned from the history of regulatory abuse lead precisely to that conclusion.

A. The Nixon Administration's Use of Diversity as an Ideological Weapon

As one study of the FCC aptly stated, "[r]ealistically, there is no such thing as 'government regulation'; there is only regulation by governmental officials."[186] Indeed, even commentators who generally support the work of the Commission have noted its intensely political nature.[187] This mix of politics and regulation has led on numerous occasions to undesirable consequences.

Historically, the worst offender in applying political pressure to achieve illicit results, as in many other aspects of American government, may have been the Nixon administration. It did not hesitate to use its power over licensing to attack its ideological enemies. The clearest examples were the efforts in 1970 and 1972 to deny renewal of a license for a Miami television station owned by the *Washington Post* as punishment for the *Post*'s "transgressions," including

183. *See infra* notes 187–98 and accompanying text.
184. *See infra* notes 256–72 and accompanying text.
185. Pub. L. No. 104–104, 110 Stat. 56. Title V of the Act, entitled the Communications Decency Act of 1996, 110 Stat. at 133–43, is particularly significant in this context.
186. ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 9 (3d ed. 1982) (citation omitted).
187. *See id.* at 87–121; WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 32–67 (1990).

coverage of the Watergate break-in.[188] Although both efforts eventually failed, that result could not have appeared inevitable at the time. Only a couple of years before, the D.C. Circuit had affirmed the FCC's refusal to renew a license by the wholly owned subsidiary of the *Boston Herald–Traveler* to operate television station WHDH in Boston, despite a finding by the Commission's hearing examiner that the station had a "proven past record of good performance."[189] The full Commission deemed the station's performance "average", but ruled that the interest in diverse media ownership sufficed to justify denying the renewal.[190] WHDH was the first station deemed at least "average" ever to have had its license pulled, but, as the revoking court opined, "[i]n the evolution of the law of remedies some things are bound to happen for the 'first time.'"[191] In other words, a licensee lost, for the first time in FCC history, "simply and solely because it was owned by a newspaper and its challengers were not."[192] Accordingly, the *Post*'s ownership of the Miami station was, by itself, a sufficient basis to encourage the Nixon administration in pursuing its threat.

One other factor was apparently behind the Commission's decision in the WHDH case. The *Herald–Traveler* was a staunchly Republican newspaper, and the FCC's action came at the tail end of the Johnson administration. Thus, even Louis Jaffe, a Harvard law professor who had opposed the original licensing of WHDH in the 50s, viewed the refusal to renew the license as a "spasmodic lurch to 'the left.'"[193] In the wake of the WHDH proceedings, therefore, the Nixon administration's threat to the *Post* must have seemed quite real.

The *Washington Post* incident, however, demonstrates more than simply that a power-hungry administration can use communications regulations to serve its own illegitimate ends. It also demonstrates the ease with which a "Madisonian" aspiration—here, diversity—can be applied in an illegitimate manner.

The Nixon administration also used diversity as an ideological weapon in another context. Although it was bothered primarily about news coverage by the networks, it could only punish the networks indirectly, through the FCC's jurisdiction over licensing of local stations. Accordingly, it devised a strategy to hold local affiliates accountable for the content of network news. The strategy was articulated most clearly in a speech by Clay T. Whitehead, the head of the Nixon administration's Office of Telecommunications Policy. Whitehead complained about the state of television by asking rhetorically: "[H]ow many times do you see the rich variety, diversity, and creativity of America represented on the TV screen? Where is the evidence of broadcasters doing their best to serve their audiences, rather than serving those audiences up to sell

188. POWE, *supra* note 88, at 131–32. On both occasions, close associates of President Nixon filed the challenges. *Id.* Nixon gave the *Post*'s broadcast renewals his personal attention, stating that the newspaper would have "damnable, damnable problems" as a result of its reporting. *Id.*

189. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 846 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). When the Commission revoked the *Herald–Traveler*'s license, the newspaper had operated the station for almost 15 years. *Id.* at 844.

190. *Id.* at 847.

191. *Id.* at 859.

192. POWE, *supra* note 88, at 100.

193. Louis Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1700 (1969).

to advertisers?"[194] The cause, he added, was the "tendency for broadcasters and the networks to be self-indulgent and myopic in viewing the First Amendment as protecting only their rights as speakers. They forget that its primary purpose is to assure a free flow and wide range of information to the public."[195]

The solution, Whitehead asserted, was in greater responsibility by local broadcasters over the content of programming, "including the programs that come from the network."[196] The most important aspect of this proposed affiliate oversight of the networks was to be news programming, in particular the "ideological plugola" that Whitehead believed to be an epidemic in network news.[197] To paraphrase Whitehead's boss, he made the result of the failure of affiliates to exercise the requisite oversight perfectly clear. "Station managers and network officials who fail to act to correct imbalance or consistent bias from the networks—or who acquiesce by silence—can only be considered willing participants, to be held fully accountable by the broadcaster's community at license renewal time."[198]

The foreshadowing in Whitehead's speech of more recent "Madisonian" arguments is obvious. Why, then, is the content of the Nixon administration's policy as articulated by Whitehead so much more chilling to the reader than the arguments of, say, Sunstein? Perhaps it is because Nixon's vendetta against the news media is so well documented.[199] More likely, though, it is because the next time around, an administration that asserts similarly "Madisonian" principles will be more circumspect in revealing its true aims, and therefore better able to achieve those aims. In any event, whatever the merits of "Madisonianism" as an abstract exercise in media criticism, it has proven to be a scary principle in the hands of a government eager to carry it out.

B. Regulation by Raised Eyebrow

While the blatant abuses of the Nixon administration are not unique in the history of broadcast regulation,[200] neither are they definitive of that history. On the whole, the people charged with regulating the broadcast industry have acted in what they sincerely believed to be in the "public convenience, interest, or necessity."[201] In one sense, it is even fair to say that the FCC "has, on the whole, been extraordinarily circumspect in the exercise of its powers."[202] In theory, for example, the Commission could refuse to renew a license every time it finds even the slightest deviation from what it considers in the public

194. Speech by Clay T. Whitehead, Director of the Office of Telecommunications Policy (Dec. 18, 1972), *reprinted in* WILLIAM E. PORTER, ASSAULT ON THE MEDIA: THE NIXON YEARS 300 (1976).

195. *Id.* at 302.

196. *Id.* at 301.

197. *Id.* at 303.

198. *Id.* at 304.

199. *See generally* JOSEPH C. SPEAR, PRESIDENTS AND THE PRESS: THE NIXON LEGACY (1984); POWE, *supra* note 88, at 121–41, 144–53.

200. *See, e.g.*, POWE, *supra* note 88, at 68–84 (describing the efforts of the Roosevelt and Eisenhower administrations to use the FCC licensing power to reward friends and punish enemies).

201. 47 U.S.C. §§ 303, 307 (1990). Of course, the Nixon administration officials who used the regulatory power to serve their own ends no doubt could have come up with an explanation for their action consistent with those terms.

202. BOLLINGER, *supra* note 5, at 115.

interest, convenience or necessity.[203] In fact, there have only been a handful of such denials.[204]

Bollinger's benign view of the Commission's exercise of its potential power is, at best, incomplete, however. Throughout its history, the FCC has influenced the media it controls as much—if not more—through the "raised eyebrow" as through positive rulemaking and administrative adjudication.[205] In addition to being effective,[206] "raised eyebrow" controls are, in a very real sense, far more dangerous than positive actions, since they are not subject to effective judicial oversight.

The Commission's reaction to the increased airplay of songs with "drug-oriented" lyrics in the early 1970s is a perfect example of its ability to eat its cake and have it, too. On March 5, 1971, the Commission issued a Notice stating that a radio station's failure to ascertain in advance whether the songs it played "promote[d]...illegal drugs" would be a breach of its duties as a licensee.[207] A concurring statement made explicit the hope that the Notice would "discourage, if not eliminate the playing of records which tend to promote and/or glorify the use of illegal drugs."[208] Not surprisingly, the Commission's action was perceived as a ban on songs "promoting" drug use, a perception that was enhanced when a Commission employee released a "do-not-play" list of twenty-two songs.[209]

The Commission responded to that perception by issuing an amended Memorandum Opinion and Order on April 16, 1971. This Order disclaimed

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203. The Commission's actions touching on speech are, of course, subject to constitutional restraints. The courts, however, have proven remarkably deferential to the Commission in that regard. The only significant rules promulgated by the Commission ever to have been struck down on constitutional grounds were the "anti-siphoning" rules directed at cable television. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The Commission itself deemed the Fairness Doctrine unconstitutional in the course of deciding that it would no longer enforce the Doctrine. Syracuse Peace Council v. Television Station WTVH Syracuse, 2 F.C.C.R. 5043 (1987), *review denied*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

204. BOLLINGER, supra note 5, at 142.

205. David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 215–18 (citing examples of "raised eyebrow" regulations).

206. In the words of Clay T. Whitehead, "[t]he value of the sword of Damocles is that it hangs, not falls." *Quoted in* POWE, *supra* note 88, at 120. An even more telling metaphor is that of the licensees as Pavlovian dogs, conditioned by the FCC to grovel when their food supplies (license renewals) are threatened.

207. *In re* Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409, 409 (1971). The obvious, though implicit, assumption was that songs portraying drug use in a positive or neutral light would tend to promote actual use by listeners. The fact that the Commission could base an coercive mandate (albeit by "raised eyebrow") on such a conclusory finding points up the deeply subordinate nature of broadcast in the First Amendment pantheon. In a nonbroadcast context, the Supreme Court has rejected regulations that similarly "'posit the existence of the disease sought to be cured.'" Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2470 (1994) (citation omitted). Indeed, even a demonstrable connection between "disease" and "cure" is arguably insufficient in a standard First Amendment case. In American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), the court accepted arguendo the findings of the Indianapolis anti-pornography statute that pornography tended to promote the subordination of women through such evils as lower pay, sexual abuse and rape. The court nevertheless held that, because "these unhappy effects depend on mental intermediation," pornography was nevertheless permissible First Amendment speech. *Id.* at 329.

208. 28 F.C.C.2d at 410 (concurring statement of Commissioner Robert E. Lee).

209. POWE, *supra* note 88, at 179.

any interest by the Commission in telling a radio station what songs it could play. Indeed, the Order added, "[a]ny attempt to review or condemn a licensee's judgment to play a particular record is...beyond the scope of federal regulatory authority with perhaps the exception of the so-called 'clear and present danger' test."[210] The Commission explained that it was simply trying to remind radio stations of their preexisting responsibility as licensees to be aware of the content of their programming.[211] As Scot Powe asked rhetorically, "[w]ho could object to that?"[212] Certainly not the D.C. Circuit, which upheld the Commission's actions as a mere "reminder" of a broadcaster's responsibilities.[213] The court demonstrated its disregard for the broadcasters' case with its gratuitous suggestion that they "commit [their] energies to the simple task of understanding what the Commission has already clearly said, rather than instituting more colorful but far less fruitful actions before already heavily burdened federal courts."[214]

But what exactly had the Commission said? More to the point, what was the public perception of what the Commission had said? The most concise answer came in the form of congressional testimony by the Commission Chairman Dean Burch. Chairman Burch explained that the Commission "'did not ban drug lyrics.'"[215] When asked immediately thereafter what the Commission would do if it learned that a licensee was playing songs that promoted the use of drugs, he replied: "'I know what I would do, I probably would vote to take the license away.'"[216] The message was perfectly clear to many radio stations, which banned indefinitely the songs on the "do-not-play" list, and many others besides.[217]

This incident, although well known, does not appear in Bollinger's work. Perhaps that is because he, like the D.C. Circuit, took at face value the FCC's assertion that it had not actually "done" anything to censor the airplay of certain lyrics. That conclusion is untenable, however. Radio stations pulled songs in response to the reasonable fear that, otherwise, the FCC would punish them by refusing to renew their licenses. The Commission thus used its licensing authority to affirmatively censor a class of its licensees. Even worse, it tried to disguise what it had done. Still worse, the courts blessed the Commission's actions.

C. Broken Promises: *The Raised Eyebrow Made Effective*

Of course regulation by "raised eyebrow" is effective only if there is a realistic threat that the regulator is willing to follow up on the raised eyebrow if compliance is not forthcoming. Such follow-up need not occur in the majority of cases, or even in a substantial minority. As long as the Commission

210. *In re* Licensee Responsibility to Review Records Before Their Broadcast, 31 F.C.C.2d 377, 378 (1971) (citation omitted).
211. *Id.* at 379–80.
212. POWE, *supra* note 88, at 180.
213. Yale Broadcasting Co. v. FCC, 478 F.2d 594, 600 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).
214. *Id.* at 602.
215. *Id.* at 604 (Bazelon, C.J., dissenting from denial of rehearing en banc).
216. *Id.*
217. POWE, *supra* note 88, at 179. Ironically, the fear of angering the Commission caused many stations to ban all songs that discussed drug use, including those that were overtly hostile to use. *Id.*

creates the perception that it is serious about its willingness to punish noncompliance, the message is understood. With respect to the drug lyrics incident, it may seem particularly odd today, twenty-five years later, that radio stations would have feared retaliation for even airing songs that criticized drug use. In context, though, it was a rational response to the Commission's behavior, as the roughly contemporaneous *Pensions* case demonstrates.

On September 12, 1972, NBC televised a documentary called *Pensions: The Broken Promise*. Although the show acknowledged that some pension plans were well run, the overall thrust was that the national pension system was "deplorable." The show argued that federal legislation was needed to correct the problems.[218] A conservative media watchdog group, Accuracy In Media, filed a complaint with the FCC, alleging that NBC had not met its obligations under the Fairness Doctrine by failing to present both sides of the "pensions controversy."[219] The Commission agreed. While it "commended" NBC for presenting the controversy, it could not "sanction [NBC's] reluctance to afford a reasonable opportunity for opposing viewpoints to be heard."[220] It accordingly ordered NBC to come up with a corrective measure to fulfill its Fairness Doctrine obligations.

In the end, the Commission's order was not enforced. A three-judge panel of the D.C. Circuit overturned the order.[221] That decision was vacated by the court en banc pending a rehearing on the merits.[222] Before deciding the merits, though, the full court remanded the case back to the original panel for consideration of whether it was mooted by the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA")[223]. The panel decided that it was mooted by ERISA because part of the "controversy" addressed by the show was its advocacy of legislation.[224] Accordingly, it can be argued that the case is another example of much ado about nothing; NBC was never officially sanctioned for the show.[225] That argument, however, requires ignoring the fact that NBC was forced to spend three years, over $100,000, and thousands of man-hours defending a show which both won a Peabody Award for excellence in broadcast journalism and unquestionably added to the ongoing debate about the pension system.[226]

The *Pensions* case also points up a broader problem with the Fairness Doctrine and similar "balancing" regulations. First, in the words of Krattenmaker and Powe, it demonstrated that "the Fairness Doctrine and

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218. *See* National Broadcasting Co. v. FCC, 516 F.2d 1101, 1134–46 (D.C. Cir. 1974) (annexing a full transcript of the program), *cert. denied*, 424 U.S. 910 (1976).

219. *In re* Complaint of Accuracy In Media, Inc., Against National Broadcasting Co., 44 F.C.C.2d 1027, 1032–33 (1973). In addition to complaining to the FCC, Accuracy In Media also wrote to all of NBC's affiliates to inform them that it would seek to hold them responsible at license renewal time for having aired the show. *Id.* at 1030.

220. *Id.* at 1041.

221. *National Broadcasting Co.*, 516 F.2d at 1132–34.

222. *Id.* at 1155.

223. Pub. L. No. 93–406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (1985 & Supp. 1996)).

224. *National Broadcasting Co.*, at 1180–84 (opinion of Fahy, J.).

225. BOLLINGER, *supra* note 5, at 115 (arguing that the outcome of *Pensions* was influenced by the First Amendment freedoms enjoyed by the print media).

226. RICHARD E. LABUNSKI, THE FIRST AMENDMENT UNDER SIEGE 76–81, 138 n.25 (1981).

aggressive broadcast journalism could not mix."[227] Moreover, opinions on certain issues can be so fundamental that requiring a "balancing" opposing viewpoint would eviscerate the message the speaker is trying to convey. The existence of the Holocaust is one example that comes to mind. Evolution is another. Both of these subjects are "controversial" in the sense that there are sizeable numbers of people with deeply held views who depart from the general consensus by arguing that the Holocaust and evolutionary science are factually incorrect. The Commission's opinion in *Pensions* would therefore prevent coverage of these subjects without airing the opposing viewpoint in a satisfactory manner. Pensions are not quite so visceral an issue. On the other hand, the consensus in favor of pension reform in the early 1970s is confirmed by the fact that ERISA was passed with only two dissenting votes in the House, and passed unanimously in the Senate.[228] Accordingly, presentation of *Pensions* as a debate between pro and con would arguably have missed the real story: the existence of the consensus in favor of reform of the national pension system. In any event, the application by the FCC of a mechanical Fairness Doctrine foreclosed NBC's discretion in making that choice.

D. The FCC and Media Discrimination

Some commentators have viewed the FCC as being subject to "capture" by the broadcast industry.[229] This view is probably an overstatement. The foregoing examples show that the industry has often failed to get its way with the Commission. On the other hand, there is no question that the industry has repeatedly turned to the Commission (and Congress) to protect it from unwanted competition from other media, and that its efforts have proven quite successful.

Before addressing the specifics of the campaign by the Commission and the broadcast industry against cable television, the constitutional context of that campaign merits brief attention. Like regulations that disfavor particular speech, regulations that disfavor particular First Amendment speakers are presumptively unconstitutional.[230] Thus, a Minnesota state "use tax" on newsprint and ink directed toward newspapers, but which exempted the first $100,000 spent on such items, was found to "single out" large newspapers and, as a result, to present "such a potential for abuse that no interest suggested by Minnesota can justify the scheme."[231] The Court deemed irrelevant the fact that the legislature's only demonstrated intent was to raise revenue rather than to single out First Amendment speakers on the basis of content.[232] By implication,

227. KRATTENMAKER & POWE, *supra* note 147, at 265.

228. Richard Lyons, *Pension Reform Is Signed by Ford*, N.Y. TIMES, Sept. 3, 1974, at A1.

229. *See, e.g.*, JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 146 (1991); Wendy M. Rogovin, *The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard*, 42 CATH. U. L. REV. 51, 70–71 & n.68 (1992); Ralph Nader & Claire Riley, *Oh, Say Can You See: A Broadcast Network for the Audience*, 5 J.L. & POL. 1, 66–67 (1988).

230. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229–31 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 591–92 (1983).

231. *Minneapolis Star*, 460 U.S. at 592. In *Arkansas Writers' Project*, the unconstitutional tax applied to the press generally, and exempted only newspapers and "religious, professional, trade, and sports journals." 481 U.S. at 223.

232. *Minneapolis Star*, 460 U.S. at 592–93.

regulations that *are* motivated by the desire to favor one speaker over another have even less constitutional justification. Until the last few years, however, application of that principle has been absent from the oversight of the regulation of cable television.

As early as the late 1950s and early 1960s, when cable (then known as community antenna television or CATV) had less than two million subscribers,[233] broadcasters were already claiming that the new medium was threatening their economic security.[234] Accordingly, "[t]he powerful broadcaster lobby in Washington took steps to slow down this rival upstart."[235] The Commission responded vigorously. By the mid-1960s, it required cable systems both to carry all broadcast signals that originated in the local service area and, for systems operating in one of the hundred largest television markets, to carry *no* broadcast signals originating outside of that area.[236] In its first major cable ruling, the Supreme Court upheld this regulatory straitjacket as being within the Commission's statutory authority,[237] but did not address any of the constitutional issues raised thereby.

The next perceived threat to the existence of broadcast television was the rise of premium cable channels, which carried primarily entertainment and sports programming. The industry mounted a lobbying "blitz" of the FCC to institute and maintain regulations which would hamper the ability of such channels to compete with broadcast fare.[238] The result was a set of detailed rules that barred pay cable channels, inter alia, from: (a) showing feature films originally in English that were between three and ten years old at the time of the proposed showing; (b) showing live all existing sports events that were aired live on broadcast television; (c) devoting more than 90% of programming hours to feature films and/or sports events; and (d) carrying commercial advertisements during feature films or sports events.[239] At the time the rule was adopted, only 500,000 households, out of 70.1 million households with television sets, even had access to pay cable channels.[240]

These "anti-siphoning" rules finally pushed the D.C. Circuit to the limit of its tolerance for regulations affecting speech. Applying the *O'Brien* test applicable to ostensibly content-neutral regulations which nevertheless impact

233. This figure is derived from United States v. Southwestern Cable Co., 392 U.S. 157, 162 (1968).

234. Daniel Brenner & Monroe Price, *The 1984 Cable Act: Prologue and Precedents*, 4 CARDOZO ARTS & ENT. L.J. 19, 24 (1985).

235. Lionel Van Deerlin, *That Was the Cable Fight That Wasn't*, SAN DIEGO UNION-TRIB., Oct. 8, 1993, at B5 (Van Deerlin was a Congressman specializing in telecommunications issues during the period in question). *See also* Paul Farhi, *Reregulating Cable: A Political Response to a Wired Nation*, WASH. POST, Jan. 22, 1992, at A1 ("broadcasters stymied the spread of cable in the 1950s and 1960s..."); Bollinger, Jr., *supra* note 77, at 40 ("There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.").

236. *Southwestern Cable Co.*, 392 U.S. at 166–67.

237. *Id.* at 172–73.

238. Harry F. Waters, *'Pay Cable'*, NEWSWEEK, Mar. 31, 1975, at 73.

239. Home Box Office, Inc. v. FCC, 567 F.2d 9, 19 & n.8 (D.C. Cir.) (citing 47 C.F.R. § 76.225 (1975)), *cert. denied*, 434 U.S. 829 (1977). The Commission also had a separate rule barring pay channels from airing almost all series programming. *Id.* at 21–22.

240. *Id.* at 24.

speech,[241] it held that the Commission had neither demonstrated that the rules served an important governmental interest nor, assuming such an interest even existed, established that the rules were narrowly tailored to serve that interest.[242]

While the Commission and the broadcast industry lost on the anti-siphoning rule, they still had must-carry, i.e., the authority to dictate to cable operators a substantial percentage of their programming mix. The campaign to maintain must-carry is remarkable in its persistence. The D.C. Circuit declared the existing rules—requiring cable operators to carry indefinitely every broadcast signal that was "'significantly viewed in the community'"—unconstitutional in 1985.[243] A year later, the Commission, in response to comments "submitted primarily...by broadcasting interests,"[244] instituted must-carry rules that were more limited in both scope and duration.[245] These, too, were found to be unconstitutional.[246]

The next time around, the broadcasters tried a different strategy. Instead of relying on the Commission, they went straight to Congress in order to have must-carry enshrined in statutory form.[247] Their efforts bore fruit in the form of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[248] The former requires most cable systems to set aside up to one-third of their channel capacity for a defined class of "local commercial television stations."[249] The latter requires carriage of local "noncommercial educational television stations" on a sliding scale. Cable systems with twelve or fewer channels must carry at least one such station; systems with thirteen to thirty-six channels must carry up to three; systems with more than thirty-six channels must carry all stations requesting carriage.[250]

The broadcasters' real coup, however, was the section of the 1992 Act divesting the D.C. Circuit of jurisdiction to review the constitutionality of the Act's provisions. Instead, the Act directed constitutional challenges to a special three-judge panel of the district court, with direct review by the Supreme Court.[251] The broadcast industry thus gained one more chance to locate a forum

241. In order to satisfy *O'Brien* scrutiny, a regulation must further an important governmental interest and be narrowly tailored to advance that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).

242. *Home Box Office*, 567 F.2d at 50. The court did not consider whether the anti-siphoning rules were also invalid as a form of speaker discrimination.

243. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438 (D.C. Cir. 1985) (quoting 47 C.F.R. §§ 76.57–76.61 (1984)), *cert. denied*, 476 U.S. 1169 (1986).

244. Century Communications Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

245. *Id.* at 296–97. Specifically, the new regulations required no more than 25% of a cable system's capacity to be devoted to must-carry signals, and were to terminate after five years. By then, the Commission believed, consumers would have grown accustomed to using an "A/B switch" to toggle between cable and broadcast signals. *Id.*

246. *Id.* at 300–01.

247. *See, e.g.*, Edmund L. Andrews, *Re-Regulation of Cable Is Likely to Pass House*, N.Y. TIMES, July 23, 1992, at D1 (describing the "giant lobbying effort" by "television stations and the broadcast networks" to have must-carry reinstituted).

248. Pub. L. No. 102–385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

249. *Id.* § 534.

250. *Id.* § 535.

251. *Id.* § 555.

sympathetic to its tale of woe. This time around, it finally found one.[252] As a result, must-carry is once again in effect.[253]

It is also worth noting that the cable industry also has not shied away from using regulation to reduce competition. Although cable operators were aggrieved by the must-carry and rate regulation provisions of the 1992 Act, they fought hard for, and won, the maintenance of the legal bar on the entry of their strongest potential competitors—local telephone companies—into the cable business.[254] Although that bar was repealed by the Telecommunications Act of 1996,[255] the cable industry's hands were tied by the fact that it was probably doomed on constitutional grounds in any event.[256]

The broadcast industry's historic interest in keeping the cable industry legally subordinate is self-evident. The Commission's interest in doing so, which, as noted, continued for many years, is not. One plausible conclusion is that the Commission's actions over the years demonstrated capture by the broadcast industry. But that conclusion is probably incorrect. The Commission is charged with assuring "'fair, efficient and equitable' distribution" of television services.[257] Although that statutory charge does not mandate one type of television, the Commission was conditioned by experience over several decades to equate over-the-air broadcast television with television generally. When cable became a viable competitor to broadcast television, the Commission's reflexive response was fear for the demise of the latter, and thus, of its carefully constructed regulatory universe. In other words, the Commission came to be equally concerned with preserving the "economic viability of broadcast television"[258] as with assuring that television generally served the "public interest, convenience and necessity." It approached cable primarily as a threat to its regulatory medium of choice, rather than in terms of cable's potential benefits to the viewing public.

The Commission's actions highlight a potential problem common to all regulation. Even when justified, regulation should serve as a means to a socially beneficial end rather than as the end itself. However, a regulatory body can

252. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (upholding must-carry rules), *vacated and remanded on other grounds*, 114 S. Ct. 2445 (1994), *opinion on remand*, 910 F. Supp. 734 (D.D.C. 1995), *prob. juris. noted*, 116 S. Ct. 907 (1996).

253. However, the district court panel has proven so willing to accept uncritically the assertions of the broadcast industry, as adopted by Congress, that the Supreme Court may yet strike down must-carry. *See* Adelman, *supra* note 161, at 1551.

254. Edmund L. Andrews, *'Baby Bell' Fights Cable Law, Citing Right to Free Speech*, N.Y. TIMES, Dec. 18, 1992, at D1.

255. Pub. L. No. 104–104, § 302(b)(1), 110 Stat. 124 (repealing 47 U.S.C. § 533(b) (1994)).

256. Every court that considered the merits of the cross-ownership bar found it to be unconstitutional. US West, Inc. v. United States, 48 F.3d 1092, 1105–06 (9th Cir. 1994); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 202 (4th Cir. 1994); Southern New Eng. Tel. Co. v. United States, 886 F. Supp. 211, 219 (D. Conn. 1995); NYNEX Corp. v. United States, 1994 WL 779761 (D. Me. Dec. 8, 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335, 1343 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721, 736 (N.D. Ill 1994). *See generally* Adelman, *supra* note 161, at 1557–58. The Supreme Court granted certiorari on the *Chesapeake & Potomac* case from the Fourth Circuit to decide the issue on the merits, 115 S. Ct. 2608 (1995), but subsequently vacated the judgment for consideration of mootness in view of Congress' action. 116 S. Ct. 1036 (1996).

257. Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1439 (quoting 47 U.S.C. § 307(b) (1982)).

258. *Id.*

come to identify so closely with a particular scheme that preservation of the scheme becomes the overriding goal. The problem is exacerbated when such preservation is also in the interest of the primary industry subject to regulation. Unfortunately, the regulation at issue here has not served merely to favor one industry over another, but also has effectively limited the speech rights of a significant First Amendment speaker.

E. Does the Past Predict the Future?

The existence of past regulatory abuses with respect to electronic media, even if widespread, does not, by itself, justify ending all such regulation in the future. This observation has been perhaps best articulated by Bollinger. He offers several well-reasoned points about why regulation in a First Amendment context might still be justified despite past abuses.[259] For present purposes, three of those points warrant particular attention. First, as cited above, he believes that the FCC "has, on the whole, been extraordinarily circumspect in the exercise of its powers."[260] Second, he contends that the occurrence of an egregious abuse in, say, 1932 has little probative weight because "broadcast regulation has become much more sensitive to First Amendment values."[261] Third, he notes that "even after one has identified relevant instances of abuse, we ought to consider first whether changes in the structure of regulation might eliminate the risk of future repetition."[262]

The main problem with each of the first two points, for purposes of this Article at least, is that they fail to address the true implications of the interventionist theory. First, whether the FCC was or was not circumspect in the exercise of its powers in the past (a point that is highly debatable when its raised eyebrow activities are taken into account), the interventionists are not happy with the product of that limited exercise. In Sunstein's view, lax regulation is at least partly responsible for the "race to the bottom" that he sees as typifying most television programming.[263] Bollinger does not go as far in his criticism of the state of the electronic media, but his general unhappiness with the state of the electronic media implies a call for a more vigorous regulatory stance. Although the Commission has, in fact, been more reluctant to oversee programming content over the past decade, following the repeal of the Fairness Doctrine in 1987, the interventionist complaint about lax regulation existed before that period. For example, Owen Fiss was calling for stepped-up content regulation in 1986, while the Fairness Doctrine was still in force.[264] Newton Minow's threat to broadcasters of more regulatory activity if they did not act to counter the "vast wasteland" of television occurred in 1961, when the Commission's activity was at or near its peak.[265] Accordingly, there is little comfort to be had from past circumspection when those who use it to justify

259. BOLLINGER, *supra* note 5, at 115, 129–31. In contrast, Owen Fiss asserts simply that "there is no reason for *presuming* that the state will be more likely to exercise its power to distort public debate than would any other institution." Fiss, *supra* note 11, at 787.

260. BOLLINGER, *supra* note 5, at 115.

261. *Id.* at 130.

262. *Id.* at 131.

263. DEMOCRACY, *supra* note 8, at 81–88.

264. Fiss, *supra* note 70, at 1415–21.

265. Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961), *reprinted in* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 185–96 (1995).

future FCC activity are advocating, in effect, less circumspection. In fact, the largest concentration of abuses by the FCC since the end of World War II occurred when the Commission was most active in regulating conduct: the mid-1960s through the early 1970s.[266]

Similarly, Bollinger's assertion that broadcast regulators are more sensitive to First Amendment issues now than in the past, while correct, does not support the interventionists' plea for more regulation. The recent trend toward sensitivity, which resulted in, inter alia, the repeal of the Fairness Doctrine, is precisely what the interventionists seek to reverse. But the interventionists are not simply seeking increased regulatory activity. Even more fundamentally, they are calling for a new understanding by the government of the meaning of the First Amendment—one which would encourage content-specific intervention to support "Madisonian" aspirations.[267] Thus, the very sensitivity identified by Bollinger is, from the interventionist viewpoint, evidence of governmental misunderstanding of the principles of the First Amendment.

F. Can Regulatory Reform Succeed?

Bollinger's challenge to opponents of content regulation to consider regulatory reform rather than outright abolition is intriguing. To restate the argument: (1) the defects in the media's coverage of serious issues are not seriously in dispute; (2) the media affects the nation's social structure (to borrow Fiss' phrase); and (3) there is a general consensus that the government may intercede to correct defects in the social structure. What justifies a special exception for the media? Naturally, any regulation must be especially sensitive to avoid regulation that discriminates on the basis of viewpoint. But that should be attainable through systematic checks. Isn't an activist, viewpoint-neutral regulatory system, therefore, the best way to balance these various concerns?

One answer, of course, is the First Amendment itself. If the Speech and Press clauses are properly understood to prevent regulation on the basis of content rather than on the basis of viewpoint or ideology, then even a utopian regulatory system on the model proposed by the interventionists is invalid. But opposition to Bollinger's advocacy of regulatory reform need not rest only on that theoretical basis. It can also rest on evidence that such reform is unworkable in practice.

Bollinger's one concrete suggestion is the depoliticization of the appointment process for commissioners by lengthening their terms.[268] Such reform, perhaps combined with a prohibition on subsequent terms of service, might well have alleviated some of the more blatant abuses in the Commission's history. On the other hand, the clear thrust of the interventionist approach is to require speech regulators to be *more* responsive to the (properly exercised) collective political will.[269] Supporters of that approach cannot have been pleased by the Commission's failure to bend to the popular will with respect to

266. *See generally* POWE, *supra* note 88.
267. *See* Section II, *supra*.
268. BOLLINGER, *supra* note 5, at 131.
269. *See, e.g.*, DEMOCRACY, *supra* note 8, at 72–73 ("[I]f the public favors ...requirements designed to promote Madisonian goals, the First Amendment of the Constitution should not stand in the way.").

the Fairness Doctrine, as demonstrated by the 59–31 and 302–102 votes in favor of codifying the doctrine in the Senate and House of Representatives, respectively.[270]

In the end, though, the fundamental problem with content-specific speech regulation of the type proposed by the interventionists is its reliance on censorship power (i.e., the power to invoke civil or criminal sanction in order to induce a speaker protected by the First Amendment either to speak in a certain manner or to refrain from speaking in its preferred way) in the hands of political appointees in a manner that requires the regulators to decide whether the speech in question is "good" or "valuable" or "high-quality" (or the reverse) in some objective sense.[271] This proposed system requires "'moderators' who can be trusted to know when 'everything worth saying' has been said."[272] However, "[t]he state lacks such moderators because the very standards necessary to distinguish "relevant" from "irrelevant" speech (or "original" from "repetitious" speech, or "orderly" from "disorderly" speech, or even "rational" from "irrational" speech) are themselves matters of potential dispute."[273]

No institutional reform of the Commission will solve *this* problem. Indeed, objective determinations of what is "good" or "valuable" or "high-quality" speech (or the reverse) are logically beyond the competence even of the life-tenured federal judiciary.

In the course of justifying content regulation based on these criteria, Sunstein implicitly likens "low-quality" speech (whatever that means) to a "familiar catalogue" of types of speech that, the consensus holds, can be regulated: "bribes, threats, perjury, conspiracies, criminal solicitation, unlicensed medical and legal advice, [and] false commercial speech."[274] The taxonomy of this "catalogue," however, demonstrates precisely why these types of speech can be regulated safely. In contrast to determinations about "quality," they can be defined by objective standards.

To Sunstein, however, determinations of the "quality" and "value" of speech are not a problem. In fact, they are so clear to him as to require no analysis. For him, the concern over "elitism" (which he subsequently discounts) is over whether "high-quality" programming can be foisted on an apparently indifferent public.[275] The antecedent question of the location of authority to decide what is "high-quality" is not even raised. For those of us who are less certain of our own ability—or that of others—to make such determinations on behalf of society, government regulation of speech on the basis of the "value" and "quality" remains properly off-limits.

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270. Kenneth B. Noble, *Reagan Vetoes Measure to Affirm Fairness Policy for Broadcasters*, N.Y. TIMES, June 27, 1987, 1:1.

271. The Supreme Court addressed this precise concern in striking down unanimously the right-of-reply statute in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254–56 (1974).

272. Kenneth Karst, *Equality and the First Amendment*, 43 U. CHI. L. REV. 20, 40 (1975) (citation omitted).

273. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117–18 (1993).

274. DEMOCRACY, *supra* note 8, at 141. Elsewhere, he refers to securities regulations and food and drug labeling. *Id.* at 33.

275. *Id.* at 90–91.

V. CYBERSPACE AND THE AFFIRMATION OF THE NONINTERFERENCE PRINCIPLE

The interventionists have used the pathological nature of the contemporary electronic media to support their call for content-specific regulation. Power is concentrated in the hands of a few; the names of Ted Turner, Rupert Murdoch, John Malone, Michael Eisner, and several other men (there are no women or minorities in this elite circle) surface over and over again. Audiences appear to be viewed by the media companies as little more than commodities. News programs generally emphasize the sensational over the serious, and entertainment programs are generally mediocre at best. Even worse, the distinction between the two categories is becoming increasingly tenuous in many instances. In this environment, a call for content-specific regulation of speech markets designed to insure access to high-quality programming looks like simple common sense. After all, the government is probably the only feasible counterweight to the media titans mentioned above. Moreover, because today's media look so different than the press known to the framers of the First Amendment, it is relatively easy to argue that James Madison et al. would be disgusted were they able to see the results of modern free speech jurisprudence. As a result, there is an instrumentalist element to interventionism which holds that, while a "hands-off" First Amendment may have been appropriate for the late-eighteenth century press, it is inappropriate today.[276]

This Article, of course, asserts that, while the media are "diseased" under any reasonable standard, the regulatory "cure" would be even worse. While it recognizes the appeal of the interventionists' approach in view of the accuracy of their critique of the media, it nevertheless argues that the interventionist concept of the First Amendment is both unworkable in practice and hopelessly at odds with established doctrine.

Based on character of today's dominant media, it might nevertheless be possible to argue that, whether the interventionist concept is a correct view of the First Amendment, it is not revolutionary. There is a long line of thought which holds that dysfunctional media so disserve the public interest as to warrant government intervention.[277] That argument, however, is foreclosed by the interventionists' proposed treatment of speech in cyberspace.

In contrast to today's highly centralized media, the next generation of electronic media in cyberspace—universal e-mail, electronic bulletin boards and the like—offer a potential return to the decentralized press of early American history.[278] Assuming that this potential is realized, it follows that the

276. *See, e.g.*, Fiss, *supra* note 11, at 786.

277. Hutchins Report, *supra* note 118, at 80–81; MEIKLEJOHN, *supra* note 111, at 25–27.

278. 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, 1627–29 (1995). Because these forms of cyberspace communication are so new, any discussion of their impact necessarily falls into the realm of speculation. That fact notwithstanding, there are several good predictive studies on the impact these forms of communication will have on speech subject to the First Amendment. *See, e.g.*, M. ETHAN KATSH, LAW IN A DIGITAL WORLD (1995); ROBERT H. ANDERSON ET AL., UNIVERSAL ACCESS TO E-MAIL: FEASIBILITY AND SOCIAL IMPLICATIONS (RAND Institute 1995) [hereinafter UNIVERSAL E-MAIL]; M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681 (1995) [hereinafter *Rights, Camera, Action*]; Eugene Volokh, *Cheap Speech and What It*

interventionists' quest for regulation should end. If Madison was satisfied with the press of his day, at least to the extent of believing that it should be free of government regulation, shouldn't the present-day "Madisonians" be satisfied with the electronic equivalent to the same extent? The fact that they are not satisfied demonstrates like nothing else that the interventionists seek nothing less than to rewrite the First Amendment.

A. The Possible Contours of Media in Cyberspace

The doctrine of spectrum scarcity, upon which the Supreme Court has relied for so long to sustain regulation of the broadcast industry, is dying.[279] Whether or not it was ever valid,[280] it is no longer so. "Technological innovations have steadily increased the capacity of the spectrum. In addition, the total number of channels available for programming has vastly increased due to greater competition from other video providers, especially cable television."[281] The predicted (and predictable) growth of "video-on-demand" over the World Wide Web or another yet-to-be-developed digital network will soon make today's relative abundance of video look like the Dark Ages.[282] On-line text, both professional and amateur, is also growing increasingly abundant.

Standing alone, however, abundance is the least significant characteristic of cyberspace-based media. The ability to watch 500 channels becomes less exciting when the last 450 channels look just like the first fifty. A more significant, and unprecedented, development will be the rise of interactivity. Users of media will have the ability to be active participants in the creation of content instead of being merely passive recipients of content. The open access networks of the future will be able to

> accommodate a virtually unlimited number of information providers as well as information users. This is the case because the architecture of the network makes no distinction between users who are information providers and those who are information users. In fact, most users play both roles from time to time. All who obtain access have the option of making information available to all other users on the network; thus, the sources of information available are limited only by the number of users who seek access. Cable television or satellite networks, in contrast, are designed to add users relatively easily, but those users have no ability to send information to others on the network.[283]

Viewed pessimistically, interactivity may prove no more meaningful than, say, existing on-line polls which permit a user to vote on his or her

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Will Do, 104 YALE L.J. 1805 (1995).

279. The more interesting question is whether the doctrine will die a quick or a slow death. It is possible to read the Court's acknowledgment in Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994), of the widespread criticism of the doctrine as an indication that it will inter the doctrine when it is properly presented. On the other hand, the decreasing relevance of broadcast radio and television in the overall communications mix may portend the end of regulation directed solely at those media.

280. Laurence H. Winer, *The Signal Cable Sends—Part I: Why Can't Cable Be More Like Broadcasting?*, 46 MD. L. REV. 212, 215 (1987) ("[T]here is not and never has been a true lack of broadcast frequencies.").

281. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1073 (1994) (footnotes omitted).

282. Volokh, *supra* note 278, at 1831–32; Joshua Quittner, *Radio Free Cyberspace*, TIME, May 1, 1995, at 91.

283. Berman & Weitzner, *supra* note 278, at 1623–24 (footnote omitted).

favorite pop star.[284] However, this view is probably unwarranted. There is substantial evidence indicating that the "use of electronic mail is valuable for individuals, for communities, for the practice and spread of democracy, and for the general development of a viable national information infrastructure."[285]

That conclusion was drawn by the RAND report, *Universal Access to E-Mail*, cited above. The report reached its findings based on the sample study of five existing community-based electronic networks. It found four basic categories of benefits associated with participation in such networks.

1. Community Building and Social Integration

With e-mail serving as the initial catalyst, participants in electronic networks took advantage of a variety of available features, including electronic conferences, electronic bulletin boards, and chat rooms.[286] These activities led to an increased awareness of and participation in civic affairs. Sunstein, among others, has expressed concern that "[a] system of individually designed communications options could...result in a high degree of balkanization, in which people are not presented with new or contrary perspectives."[287] The RAND report found, to the contrary, that participation in networks did not increase balkanization. Indeed, for several segments of the population, including the elderly, disabled and homeless, participation in electronic networks significantly decreased such balkanization. "[I]n the context of electronic interactions, 'the only basis for discrimination is your typing speed.'"[288] In short, "[c]oncerns that boundary-spanning networks might facilitate a breakdown of community affiliation, or disinterest in local affairs, appear unfounded."[289]

2. Improved Access to Information

The fact that the ability to go online provides unprecedented access to information is so obvious that it hardly bears mention. All of the resources of the Internet are available with the click of a mouse. The civic networks, however, go a step further by "encourag[ing] local businesses, universities, and social service organizations to post information on the network that is directly relevant to the community."[290] One network, for example, has established an online "health care center," that permits users to post e-mail questions concerning prescription drugs to a local doctor, to access medical databases, and to communicate with hospitals, health service organizations and medical support groups.[291] Although the area also accepts advertisements from local merchants, that seems a small price to pay in exchange for access to such valuable information.

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284. *Cf.* New Kids on the Block v. News America Pub., Inc., 971 F.2d 302 (9th Cir. 1992) (upholding on First Amendment grounds the right of newspapers to conduct "900 number" telephone polls enabling readers to vote for their favorite member of the New Kids on the Block).

285. UNIVERSAL E-MAIL, *supra* note 278, ch. 7, at 169.

286. *Id.*, ch. 5, at 127–28.

287. *First Amendment in Cyberspace*, *supra* note 22, at 1787.

288. UNIVERSAL E-MAIL, *supra* note 278, ch. 5, at 131 (citation omitted).

289. *Id.* at 146–47.

290. *Id.* at 134.

291. *Id.*

3. Enhancement of Nonprofit and Community-Based Organizations

Computer networks offer nonprofit organizations a relatively cheap opportunity to approximate the access to resources and efficiencies enjoyed by large for-profit corporations. For example, participants in some networks studied in the RAND report found that "[o]n-line access facilitates collaborative idea generation and problem-solving. Since administrators of nonprofit organizations typically face similar challenges—often associated with resource constraints—the ability to learn from others' experiences and practices can save valuable time and money."[292]

4. Delivery of Government Services and Political Participation

Interaction between government and citizens in cyberspace appears to be divided into two distinct categories. The first is government services. Interactive systems are being used at the national level to permit convenient filing of tax returns, and at the local level to renew licenses, pay bills, and review schedules.[293] Perhaps the ultimate online government service will be the ability to cast a ballot. The state of Oregon recently held a special election to replace Bob Packwood in the Senate by means of a mail-in ballot. The process resulted in a record high turnout for a special election in Oregon and saved the state's taxpayers about $1 million.[294] That election used "snail" (i.e., ordinary) mail, but it is easy enough to conceive of a similar election by e-mail once the technological barriers are overcome.

The more interesting use of computers in this context, however, is the ability of citizens to hold electronic discussions with their elected officials. Sunstein argues that there is a "serious risk that low-cost or costless communication [via cyberspace] will increase government's responsiveness to myopic or poorly considered public outcries, or to sensationalistic or sentimental anecdotes that are a poor basis for governance."[295] It is certainly too early to make a final response to that argument one way or the other, but there is nothing in the experience of the five networks studied in the RAND report which demonstrate that Sunstein's concerns have been realized.[296]

Notwithstanding the success of the networks in the RAND report, there are many obstacles to the realization of universal access to e-mail. Most significantly, as might be expected, access both to computers and to the necessary training are skewed on the basis of income, education level, and race. The solution to these obstacles, however, no more requires imposition of content-specific regulations on communications in cyberspace than the solution of the problem of illiteracy in an earlier era (or, for that matter, the present era) required mandating specific content in printed materials. The very fact that something approaching the equalization of the power to communicate one's ideas will be possible without resort to content-specific regulation is reason alone to refrain from enacting such regulation in the foreseeable future.[297]

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292. *Id.* at 136.
293. *Id.* at 137–38.
294. Timothy Egan, *Oregon's Mail-In Election Brings Cheer for Clinton and Democrats*, N.Y. TIMES, Feb. 1, 1996, at A1, A19.
295. *First Amendment in Cyberspace*, *supra* note 22, at 1785.
296. UNIVERSAL E-MAIL, *supra* note 278, ch. 5, at 137.
297. *Cf.* Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752–55 (1995)

B. Back to the Future for the First Amendment

According to James Madison, governmental noninterference with the press represented the "'American idea of [speech].'"[298] In advocating that "idea," Madison, like the rest of the Framers, was well aware that the contemporary press "had in practice become free."[299]

> Press criticism of government policies and politicians, on both the state and national levels, during the war and in the peaceful years of the 1780s and 1790s, raged as contemptuously and scorchingly as it had against Great Britain in the period between the Stamp Act and the battle of Lexington. Some states gave written constitutional protection to freedom of the press after Independence; others did not. Whether they did or did not, their presses operated as if the law of seditious libel did not exist.... [T]o one who looks at newspaper judgments on public men and measures, the revolutionary controversy spurred an expanding legacy of liberty.[300]

Similarly, Powe describes a "free, critical, and often partisan press," recently liberated from dependence on governmental largess, and full of biting criticism both immediately before and after the Revolution.[301] Moreover, the press at the time was highly decentralized.[302] The notion of mass media dominated by centralized voices was impossible before the utilization of the rotary press in the mid-nineteenth century.[303] Because of that decentralized environment, any person with access to a printing press had at least the potential to compete in the marketplace of ideas.

From a First Amendment perspective, the most interesting feature of the likely structure of the new electronic media is its resemblance to the press that existed in the late-eighteenth and early-nineteenth centuries. Decentralization will again be the rule.

> [The] new information technologies...will dramatically reduce the costs of distributing speech [and] the new media order that these technologies will bring will be much more democratic and diverse than the environment we see now. Cheap speech will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all.[304]

Indeed, the media relying on the new interactive technology will probably be more democratic than the revolutionary-era press. Every person who will be able to receive information over the new networks will also be able

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(arguing that legislative and judicial lawmakers should give cyberspace a chance to develop before imposing a regulatory regime).

298. William T. Mayton, *From a Legacy of Suppression to the 'Metaphor of the Fourth Estate'*, 39 STAN. L. REV. 139, 141–42 (1986) (quoting J. Madison, Report Accompanying the Virginia Resolution, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569 (J. Elliot ed. 1866) [hereinafter ELLIOT'S DEBATES]). Madison made that statement with respect to the unamended Constitution. In his view, "'no power whatever over the press was supposed to be delegated by the [unamended] Constitution, [and] the [First] amendment was intended as a positive and absolute reservation of it.'" *Id.* at 145 (quoting ELLIOT'S DEBATES, *supra*, at 572).

299. *Id.* at 142.

300. LEONARD LEVY, EMERGENCE OF A FREE PRESS x (1985).

301. LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 28–29 (1991).

302. Berman & Weitzner, *supra* note 278, at 1627.

303. POOL, *supra* note 1, at 18–19.

304. Volokh, *supra* note 278, at 1806–07.

to transmit information.[305] In the late-eighteenth century, only a small percentage of even the literate population had access to a printing press.

To be sure, no one will confuse the new media regime, even if it achieves its potential, with a communications utopia. We will be faced with a bewildering variety of information sources, both textual and visual, that will be far more than we will have the capacity (or desire) to process. Today, the creators of mass media programming—still the primary source of the information we receive—are generally trained, paid professionals. That is at least a minimal, albeit haphazard, assurance of quality control. In the future, even that minimal assurance may disappear.

The cacophony of voices may well lead to a revival of "brand name" media as a means to provide such assurance. Anyone with a video camera will be able to put a movie or news program online but, without Tom Cruise or Peter Jennings, how many people will want to watch it? In addition, one can easily see browsing services such as today's Netscape Navigator becoming ever more significant as intermediaries between content and audience if they take on the screening functions that audience members may not want to do themselves.

The national tolerance for the dissemination of extremist speech, often not very high, will be even more severely tested in the decades to come. To cite one early example, the ability of young, computer-savvy white supremacists to disseminate their message online has led to fear of the production of "a mass hate movement in the United States."[306] To date, the *Brandenburg* test, which permits the penalization of speech only when such speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,"[307] has worked quite well in protecting the twin imperatives of free speech and social order. Moreover, it is far from clear that significant segments of the population are so malleable as to join hate groups simply because their propaganda is more easily available now than in the past. Nevertheless, the increased prominence of these voices may well lead to renewed calls for "beneficial" censorship.

The governmental noninterference principle behind the First Amendment, however, was not created in utopia, and was not intended to require a utopia for its application. Benjamin Franklin wrote that "'when Truth and Error have fair play, the former is always an overmatch for the latter.'"[308] "Fair play" in this sense means that the noninterference principle is satisfied, at a minimum, when all persons who wish to express their thoughts have the reasonable ability to do so. The authors of this principle no doubt hoped and believed that public deliberation would flow from a free press, but they did not intend the First Amendment to be used as a content-specific means of inducing a certain type of speech deemed instrumental in achieving a regime of public deliberation. Their tolerance of the hotheaded press of that era demonstrates as much.[309]

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305. Berman & Weitzner, *supra* note 278, at 1623–24.

306. Keith Schneider, *Hate Groups Use Tools of the Electronic Trade*, N.Y. TIMES, Mar. 13, 1995, at A12.

307. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

308. Mayton, *supra* note 298, at 159 (quoting 2 THE WRITINGS OF BENJAMIN FRANKLIN 173–74 (A. Smyth ed. 1905–07)).

309. *See supra* notes 298–302 and accompanying text.

An environment in which such "fair play" does not exist gives rise to the argument that regulation in a manner unforeseen by the Framers is necessary to preserve the values of the First Amendment. That is essentially the argument behind the broadcast Scarcity Doctrine. That argument is open to serious question in view of the dangers of even "benign" speech regulation.[310] In any event, though, it will lose all force in the foreseeable future when "all information providers [will] have the opportunity to speak on an open-access network."[311] An argument for a continuing regulatory regime under such conditions is therefore inconsistent with the founding understanding of the First Amendment.

C. The Interventionist View of Cyberspace

Sunstein provides the most comprehensive discussion to date of the justification for interventionism in cyberspace.[312] He fully recognizes the potential shape of the new electronic media, and finds much that is attractive about it, including the likelihood that people will have an unprecedented opportunity to voice their opinions in a meaningful fashion.[313] In the end, however, he concludes that, if anything, cyberspace will need even more "Madisonian" regulation than the existing mass media.

Sunstein quotes with approval the statement of Justice Louis Brandeis (whom Sunstein considers a prototypical "Madisonian") that "'the greatest menace to freedom is an inert people.'"[314] He seems to agree with the consensus that cyberspace will provide the means to overcome inertia. At first glance, therefore, one might assume that he would consider the new medium an answer to "Madisonian" prayers. However, Sunstein considers an active population as dangerous from a "Madisonian" perspective as an inert one.

Sunstein breaks the perceived danger up into two basic categories. He terms the first danger an "absence of deliberation," that is, a danger that the ill-considered desires of the population will have an undue influence on the actions of government:

> Although the apparent presence of diverse public voices is often celebrated, electoral campaigns and treatment of public issues already suffer from myopia and sensationalism, and in a way that compromises founding ideals. On this count it is hardly clear that new technologies will improve matters. They may even make things worse.... It is surely desirable to provide forums in which citizens can speak with one another, especially on public issues. But it is not desirable if government officials are reacting to immediate reactions to misleading or sensationalistic presentations of issues.[315]

In other words, a vocally active population is beneficial only if it says the "right" things, or at least if the government is capable of ignoring complaints about the "wrong" things.

The second danger is "balkanization." Elsewhere, Sunstein described the

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310. *See supra* Sections III.–IV.
311. Berman & Weitzner, *supra* note 278, at 1624.
312. *First Amendment in Cyberspace, supra* note 22.
313. *Id.* at 1781–84.
314. *Id* at 1759–60 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).
315. *Id.* at 1785–86.

current system of mass media as promoting a "race to the bottom."[316] In the present context, however, he credits it with "confront[ing people] with ideas and facts that they find uncongenial."[317] Because it is all but impossible to escape the influence of the mass media in today's environment, he implies, people have no choice but to listen to these uncongenial ideas and facts. In contrast, the new technology is dangerous because it will permit people to speak and listen to whomever they choose.

Sunstein's concerns are well taken with respect to both categories, although the research gathered in the RAND report indicates that, at this early stage of a networked environment, they may be overstated.[318] But the identification of a problem does not necessarily justify the proposed solution. The framers of the First Amendment were well acquainted with shrill and ill-conceived speech, but recognized that it would be unwise to permit the government to favor "good" speech over "bad," at least when both had "fair play." The risks of government intervention in the characterization of speech as "good" or "bad" were simply too great.

Today, as in 1791, there are objective standards for assessing whether speech is obscene, libelous, violent and/or harassing. Censorship on these and other objectively harmful grounds is therefore permissible. There is no such basis for assessing whether someone has spoken without sufficient deliberation or has chosen to communicate with an unduly narrow segment of the population. Such regulation is therefore impermissible. It is also practically inconceivable in the context of cyberspace. While reading *The First Amendment in Cyberspace*, one envisions a device that will block (or merely discourage) transmission of an online communication until the sender considers his or her opinion more carefully, or a device that will compel (or merely encourage) a Star Trek chat group to consider the pros and cons of a piece of proposed legislation.

Of course, Sunstein does not actually suggest such devices. Indeed, he does not propose any concrete solutions to the problems of lack of deliberation and balkanization other than to suggest that "government should seek to promote deliberation and reflection as part of the process of eliciting popular opinion."[319] The electorate, he suggests, should be free to accept or reject such regulations through the democratic process.[320] But remember that, to Sunstein, "Madisonian goals are not mere preferences,"[321] and notions of electoral autonomy may have to give way if large segments of the electorate are insufficiently knowledgeable about their choices.[322] So perhaps the electorate does not have a choice, after all. Since it is understandably difficult to imagine that the electorate will be willing to give up a portion of their rights to listen and speak to whomever they choose, regulation by government fiat may be the only alternative for the interventionists. It would be unfortunate if the First

316. DEMOCRACY, *supra* note 8, at 22.
317. *First Amendment in Cyberspace*, *supra* note 22, at 1786.
318. *See supra* notes 285–96 and accompanying text.
319. *First Amendment in Cyberspace*, *supra* note 22, at 1787.
320. *Id.* at 1788.
321. DEMOCRACY, *supra* note 8, at 91.
322. *Id.* at 137–39. *Cf.* Fiss, *supra* note 70, at 1415 ("A commitment to rich public debate will allow, and sometimes even require the state to [adopt content-specific regulations], however elemental and repressive they might at first seem.").

Amendment were read to permit such regulation.

VI. CONCLUSION

A television is not a toaster with pictures, and speech is not a widget. Accordingly, the use of the free market metaphor as a means to justify a New Deal for speech is improper. It threatens to become as much of an incubus on the understanding of the First Amendment as the technological misperception Pool referred to thirteen years ago.[323]

Instead, the First Amendment should be viewed as embodying a principle of governmental noninterference specific to the speech and press rights contained in the Amendment. As such, that principle is not a neo-Lochnerist economic docrine, but a time-tested method of balancing democracy and liberty in an imperfect world.

323. *See supra* note 1 and accompanying text.