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# The First Amendment in Cyberspace

Cass R. Sunstein<sup>†</sup>

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.<sup>1</sup>

[T]he right of electing the members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.<sup>2</sup>

“[T]elevision is just another appliance. It’s a toaster with pictures.”<sup>3</sup>

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1. James Madison, *Remarks to the Virginia Convention* (June 20, 1788), in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 536–37 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1836).

2. James Madison, Report on the Virginia Resolutions, Feb. 7, 1777, in 6 *WRITINGS OF JAMES MADISON* 341, 397 (Gaillard Hunt ed., 1906) In his report, Madison objects to the Sedition Act on First Amendment grounds.

3. Bernard D. Nossiter, *Licenses To Coin Money: The F.C.C.'s Big Giveaway Show*, 240 *NATION* 402 (1985) (quoting Mark Fowler, former FCC Chair).

## I. THE FUTURE

Imagine you had a device that combined a telephone, a TV, a camcorder, and a personal computer. No matter where you went or what time it was, your child could see you and talk to you, you could watch a replay of your team's last game, you could browse the latest additions to the library, or you could find the best prices in town on groceries, furniture, clothes—whatever you needed.

Imagine further the dramatic changes in your life if:

- The best schools, teachers, and courses were available to all students, without regard to geography, distance, resources, or disability;

- The vast resources of art, literature, and science were available everywhere, not just in large institutions or big-city libraries and museums;

- Services that improve America's health care system and respond to other important social needs were available on-line, without waiting in line, when and where you needed them;

- You could live in many places without foregoing opportunities for useful and fulfilling employment, by "telecommuting" to your office through an electronic highway . . . ;

. . . .

- You could see the latest movies, play the hottest video games, or bank and shop from the comfort of your home whenever you chose;

- You could obtain government information directly or through local organizations like libraries, apply for and receive government benefits electronically, and get in touch with government officials easily . . . .<sup>4</sup>

Thus wrote the Department of Commerce on September 15, 1993, when the federal government announced an "Agenda for Action" with respect to "the National Information Infrastructure."<sup>5</sup> The statement may seem weirdly futuristic, but the nation is not at all far from what it prophesies, and in ways that have already altered social and legal relations and categories.

Consider the extraordinarily rapid development of the institution of electronic mail, which lies somewhere between ordinary conversation ("voice mail") and ordinary written communication ("snail mail" or "hard mail"), or which perhaps should be described as something else altogether. E-mail has its own characteristic norms and constraints. Those norms and constraints are an important part of the informal, unwritten law of cyberspace. The norms and constraints are a form of customary law, determining how and when people

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4. Administration Policy Statement, 58 Fed. Reg. 49,026 (1993).

5. *Id.*

communicate with one another.<sup>6</sup> Perhaps there will be a formal codification movement before too long; certainly the norms and constraints are codified in the sense that, without government assistance, they are easily accessible by people who want to know what they are.<sup>7</sup>

The Commerce Department's claims about location have started to come true. What it meant to "live in California" became altogether different, after the invention of the airplane, from what it meant in (say) 1910. With the advent of new communications technologies, the meaning of the statement, "I live in California" has changed at least as dramatically. If people can have instant access to all libraries and all movies, and if they can communicate with a wide range of public officials, pharmacists, educators, doctors, and lawyers by touching a few buttons, they may as well (for most purposes) live anywhere.

In any case, the existence of technological change promises to test the system of free expression in dramatic ways. What should be expected with respect to the First Amendment?

## II. THE PRESENT: MARKETS AND MADISON

There are two free speech traditions in the United States, not simply one.<sup>8</sup> There have been two models of the First Amendment, corresponding to the two free speech traditions. The first emphasizes well-functioning speech markets. It can be traced to Justice Holmes' great *Abrams* dissent,<sup>9</sup> where the notion of a "market in ideas" received its preeminent exposition. The market model emerges as well from *Miami Herald Publishing Co. v. Tornillo*,<sup>10</sup> invalidating a "right of reply" law as applied to candidates for elected office. It finds its most recent defining statement not in judicial decisions, but in an FCC opinion rejecting the fairness doctrine.<sup>11</sup>

The second tradition, and the second model, focuses on public deliberation. The second model can be traced from its origins in the work of James Madison,<sup>12</sup> with his attack on the idea of seditious libel, to Justice Louis Brandeis, with his suggestion that "the greatest menace to freedom is an inert

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6. See HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY* 38–64 (1993). The area thus fortifies the analysis in ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991), of how social norms can develop lawlike constraints in the absence of actual law.

7. LEXIS Counsel Connect has posted a statement of recommended online etiquette, which, following customary usage, it calls "netiquette." LEXIS Counsel Connect, *Netiquette*, Aug. 13, 1994, available online at LEXIS Counsel Connect, Discuss Menu, Browse: About the Discussion Groups Forum.

8. The distinction is elided in the best general treatment, HARRY KALVEN JR., *A WORTHY TRADITION* (1992).

9. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

10. 418 U.S. 241 (1974).

11. *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5054–55 (1987).

12. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* at xvi–xvii (1993).

people,"<sup>13</sup> through the work of Alexander Meiklejohn, who associated the free speech principle not with laissez-faire economics, but with ideals of democratic deliberation.<sup>14</sup> The Madisonian tradition culminated in *New York Times v. Sullivan*<sup>15</sup> and the reaffirmation of the fairness doctrine in the *Red Lion* case,<sup>16</sup> with the Supreme Court's suggestion that governmental efforts to encourage diverse views and attention to public issues are compatible with the free speech principle—even if they result in regulatory controls on the owners of speech sources.

Under the marketplace metaphor, the First Amendment requires—at least as a presumption—a free speech market, or in other words a system of unrestricted economic markets in speech. Government must respect the forces of supply and demand. At the very least, it may not regulate the content of speech so as to push the speech market in its preferred directions. Certainly it must be neutral with respect to viewpoint. A key point for marketplace advocates is that great distrust of government is especially appropriate when speech is at issue. Illicit motives are far too likely to underlie regulatory initiatives. For the marketplace model, *Tornillo*<sup>17</sup> is perhaps the central case. The FCC has at times come close to endorsing the market model, above all in its decision abandoning the fairness doctrine.<sup>18</sup> When the FCC did this, it referred to the operation of the forces of supply and demand, and suggested that those forces would produce an optimal mix of entertainment options.<sup>19</sup> Hence former FCC Chair Mark Fowler described television as “just another appliance. It’s a toaster with pictures.”<sup>20</sup> Undoubtedly, the rise of new communications technologies will be taken to fortify this claim.<sup>21</sup>

Those who endorse the marketplace model do not claim that government may not do anything at all. Of course government may set up the basic rules of property and contract; it is these rules that make markets feasible. Without such rules, markets cannot exist at all.<sup>22</sup> Government is also permitted to

13. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

14. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

15. 376 U.S. 254 (1964).

16. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

17. 418 U.S. 241 (1978).

18. *See Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5055 (1987).

19. *See id.*

20. Nossiter, *supra* note 3, at 402.

21. *See* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995).

22. Thus wrote the greatest critic of socialism in the 20th century:

It is regrettable, though not difficult to explain, that in the past much less attention has been given to the positive requirements of a successful working of the competitive system than to these [previously discussed] negative points. The functioning of a competition not only requires adequate organization of certain institutions like money, markets, and channels of information—some of which can never be adequately provided by private enterprise—but it depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible. . . .

. . . .

protect against market failures, especially by preventing monopolies and monopolistic practices. Structural regulation is acceptable so long as it is a content-neutral attempt to ensure competition. It is therefore important to note that advocates of marketplaces and democracy might work together in seeking to curtail monopoly. Of course, the prevention of monopoly is a precondition for well-functioning information markets.

Government has a final authority, though this authority does not easily fall within the marketplace model itself. Most people who accept the marketplace model acknowledge that government is permitted to regulate the various well-defined categories of controllable speech, such as obscenity, false or misleading commercial speech, and libel.<sup>23</sup> This acknowledgment will have large and not yet explored consequences for government controls on new information technologies. Perhaps the government's power to control obscene, threatening, or libelous speech will justify special rules for cyberspace.<sup>24</sup> But with these qualifications, the commitment to free economic markets is the basic constitutional creed.

Many people think that there is now nothing distinctive about the electronic media or about modern communications technologies that justifies an additional governmental role.<sup>25</sup> If such a role was ever justified, they would argue, it was because of problems of scarcity. When only three television networks exhausted the available options, a market failure may have called for regulation designed to ensure that significant numbers of people were not left without their preferred programming.<sup>26</sup> But this is no longer a problem. With so dramatic a proliferation of stations, most people can obtain the programming they want, or will be able to soon.<sup>27</sup> With cyberspace, people will be able to make or to participate in their own preferred programming in their own preferred "locations" on the Internet. With new technologies, perhaps there are no real problems calling for governmental controls, except for those designed to establish the basic framework.

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In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.

FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 38–39 (1944).

23. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Miller v. California*, 413 U.S. 15 (1973).

24. See *infra* part V.C.7.

25. See, e.g., *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043 (1987); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 277 (1994); Krattenmaker & Powe, *supra* note 21.

26. See BRUCE M. OWEN & STEVEN S. WILDMAN, *VIDEO ECONOMICS* (1992).

27. Of course, significant numbers of Americans do not have cable television—now about 38% of households that have television—and many citizens are without access to the Internet. *NRTC Executive: DirecTv a Big Hit in the Country*, MULTICHANNEL NEWS, Dec. 15, 1994, at 32 [hereinafter *DirecTv a Big Hit*]; see *infra* text accompanying notes 145–51.

The second model, receiving its most sustained attention in the writings of Alexander Meiklejohn,<sup>28</sup> emphasizes that our constitutional system is one of deliberative democracy. This system prizes both political (not economic) equality and a shared civic culture. It seeks to promote, as a central democratic goal, reflective and deliberative debate about possible courses of action. The Madisonian model sees the right of free expression as a key part of the system of public deliberation.

On this view, even a well-functioning information market<sup>29</sup> is not immune from government controls. Government is certainly not permitted to regulate speech however it wants; it may not restrict speech on the basis of viewpoint. But it may regulate the electronic media or even cyberspace to promote, in a sufficiently neutral way, a well-functioning democratic regime. It may attempt to promote attention to public issues. It may try to ensure diversity of view. It may promote political speech at the expense of other forms of speech. In particular, educational and public-affairs programming, on the Madisonian view, has a special place.

I cannot attempt in this space to defend fully the proposition that the Madisonian conception is superior to the marketplace alternative as a matter of constitutional law;<sup>30</sup> a few brief notes will have to suffice. The argument for the Madisonian conception is partly historical; the American free speech tradition owes much of its origin and shape to a conception of democratic self-government. The marketplace conception is a creation of the twentieth century, not of the eighteenth. As a matter of history, it confuses modern notions of consumer sovereignty in the marketplace with democratic understandings of sovereignty, symbolized by the transfer of sovereignty from the King to "We the People." The American free speech tradition finds its origin in that conception of sovereignty, which, in Madison's view, doomed the Sedition Act on constitutional grounds.<sup>31</sup>

But the argument for Madisonianism does not rest only on history; it is partly evaluative as well. We are unlikely to be able to make sense of our considered judgments about free speech problems without insisting that the free speech principle is centrally (though certainly not exclusively) connected with democratic goals,<sup>32</sup> and without acknowledging that marketplace thinking is inadequately connected with the point and function of a system of free expression. A well-functioning democracy requires a degree of citizen participation, which requires a degree of information;<sup>33</sup> and large disparities

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28. See MEIKLEJOHN, *supra* note 14.

29. See the futuristic picture in Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995), on the risks posed by such a system.

30. I try to do this in SUNSTEIN, *supra* note 12.

31. *Id.* at xvii.

32. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN*, 136-38 (1994).

33. See *supra* text accompanying notes 1-2.

in political (as opposed to economic) equality are damaging to democratic aspirations.<sup>34</sup> To the extent that the Madisonian view prizes education, democratic deliberation, and political equality, it is connected, as the marketplace conception is not, with the highest ideals of American constitutionalism.

Some people think that the distinction between marketplace and Madisonian models is now an anachronism.<sup>35</sup> Perhaps the two models conflicted at an earlier stage in history; but in one view, Madison has no place in an era of limitless broadcasting options and cyberspace. Perhaps new technologies now mean that Madisonian goals can best be satisfied in a system of free markets. Now that so many channels, e-mail options, and discussion "places" are available, cannot everyone read or see what they wish? If people want to spend their time on public issues, are there not countless available opportunities? Is this not especially true with the emergence of the Internet? Is it not hopelessly paternalistic, or anachronistic, for government to regulate for Madisonian reasons?

I do not believe that these questions are rhetorical. We know enough to know that even in a period of limitless options, our communications system may fail to promote an educated citizenry and political equality. Madisonian goals may be severely compromised even under technologically extraordinary conditions. There is no logical or *a priori* connection between a well-functioning system of free expression and limitless broadcasting or Internet options. We could well imagine a science fiction story in which a wide range of options coexisted with little or no high-quality fare for children, with widespread political apathy or ignorance, and with social balkanization in which most people's consumption choices simply reinforced their own prejudices and platitudes, or even worse.

Quite outside of science fiction, it is foreseeable that free markets in communications will be a mixed blessing. They could create a kind of accelerating "race to the bottom," in which many or most people see low-quality programming involving trumped-up scandals or sensationalistic anecdotes calling for little in terms of quality or quantity of attention. It is easily imaginable that well-functioning markets in communications will bring about a situation in which many of those interested in politics merely fortify their own unreflective judgments, and are exposed to little or nothing in the way of competing views.<sup>36</sup> It is easily imaginable that the content of the most

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34. See the discussion of the fair value of political liberties in JOHN RAWLS, *POLITICAL LIBERALISM* 356-63 (1993).

35. See generally KRATTENMAKER & POWE, *supra* note 25.

36. Note in this regard *The Wall Street Journal's* recently released *Personal Journal*, which is available online. Each subscriber receives only the portion of the *Journal* that is "relevant" to him, which includes major headlines and news stories on the 10 corporations he has chosen to follow. See Michael Putzel, *A Personal Journal from Dow Jones*, *BOSTON GLOBE*, Feb. 6, 1995, at 19; *Morning Edition*. "Personal Journal" *Delivers News Based on Need* (NPR radio broadcast, Mar. 11, 1995).



widely viewed programming will be affected by the desires of advertisers, in such a way as to produce shows that represent a bland, watered-down version of conventional morality, and that do not engage serious issues in a serious way for fear of offending some group in the audience.<sup>37</sup>

Consider, by way of summary of existing fare, the suggestion that

TV favors a mentality in which certain things no longer matter particularly: skills like the ability to enjoy a complex argument, for instance, or to perceive nuances, or to keep in mind large amounts of significant information, or to remember today what someone said last month, or to consider strong and carefully argued opinions in defiance of what is conventionally called "balance." Its content lurches between violence of action, emotional hyperbole, and blandness of opinion. . . . Commercial TV . . . has come to present society as a pagan circus of freaks, pseudo-heroes, and wild morons, struggles on the sand of a Colosseum without walls. It thus helps immeasurably to worsen the defects of American public education and of tabloid news in print.<sup>38</sup>

From the standpoint of the present, it is easily imaginable that the television—or the personal computer carrying out communications functions—will indeed become "just another appliance . . . a toaster with pictures," and that the educative or aspirational goals of the First Amendment will be lost or even forgotten.

I shall say more about these points below.<sup>39</sup> For now it is safe to say that the law of free speech will ultimately have to make some hard choices about the marketplace and democratic models. It is also safe to say that the changing nature of the information market will test the two models in new ways. In fact, the Supreme Court has recently offered an important discussion of the topic, *Turner Broadcasting System, Inc. v. FCC*.<sup>40</sup> *Turner* is also the most sustained exploration of the relationship between conventional legal categories and the new information technologies. The decision contains a range of lessons for the future.

My principal purpose here is to discuss the role of the First Amendment and Madisonianism in cyberspace—or, more simply, the nature of constitutional constraints on government regulation of electronic broadcasting, especially in the aftermath of *Turner*. In so doing, I will cover a good deal of ground, and a number of issues of law and policy, in a relatively short space. I do, however, offer three relatively simple goals to help organize the discussion. Most important, I attempt to make a defense of Madisonian

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37. See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 44–70 (1994).

38. Robert Hughes, *Why Watch It, Anyway?*, N.Y. REV. BOOKS, Feb. 16, 1995, at 38.

39. See *infra* part V.B.2.

40. 114 S. Ct. 2445 (1994).

conceptions of free speech, even in a period in which scarcity is no longer a serious problem. The defense stresses the risks of sensationalism, ignorance, failure of deliberation, and balkanization—risks that are in some ways heightened by new developments. In the process I discuss some of the questions that are likely to arise in the next generation of free speech law.

I have two other goals as well. I attempt to identify an intriguing and new model of the First Amendment and to ask whether that model—the *Turner* model—is well adapted to the future of the speech market. A relatively detailed and somewhat technical discussion of *Turner* should prove useful, because the case raises the larger issues in a concrete setting.

I also urge that, for the most part, the emerging technologies do not raise new questions about basic principle but instead produce new areas for applying or perhaps testing old principles. The existing analogies are often very good, and this means that the new law can begin by building fairly comfortably on the old. The principal problem with the old law is not so much that it is poorly adapted for current issues—though in some cases it may be—but that it does not depend on a clear sense of the purpose or point of the system of free expression. In building law for an age of cyberspace, government officials—within the judiciary and elsewhere—should be particularly careful not to treat doctrinal categories as ends in themselves. Much less should they act as if the First Amendment is a purposeless abstraction unconnected to ascertainable social goals. Instead they should keep in mind that the free speech principle has a point, or a set of points. Among its points is the commitment to democratic self-government.

### III. *TURNER*: A NEW DEPARTURE?

The *Turner* case is by far the most important judicial discussion of new media technologies, and it has a range of implications for the future. I therefore begin with that case, turning to broader issues of law and policy in Part V. It is important, however, to say that *Turner* involved two highly distinctive problems: (a) the peculiar “bottleneck” produced by the current system of cable television, in which cable owners can control access to programming; and (b) the possible risk to free television programming created by the rise of pay television. These problems turned out to be central to the outcome in the case. For this reason, *Turner* is quite different from imaginable future cases involving new information technologies, including the Internet, which includes no bottleneck problem. Significantly, the Internet is owned by no one and controlled by no organization. But at least potentially, the principles in *Turner* will extend quite broadly. This is especially true insofar as the Court adopted ingredients of an entirely new model of the First Amendment and insofar as the Court set out principles governing content

discrimination, viewer access, speaker access, and regulation of owners of speech sources.

### A. *The Background*

In the last decade, it has become clear that cable television will be in potential competition with free broadcasting. In 1992, motivated in large part by concerns about this form of competition, Congress enacted the Cable Television Consumer Protection and Competition Act (the Act).<sup>41</sup> The Act contains a range of provisions designed to protect broadcasting and local producers, and also at least nominally designed to protect certain consumers from practices by the cable industry. The relevant provisions include rate regulations for cable operators, a prohibition on exclusive franchise agreements between cable operators and municipalities, and restrictions on affiliations between cable programmers and cable operators.<sup>42</sup>

A major part of the Act was motivated by the fear that cable television's success could damage broadcast television.<sup>43</sup> If cable flourishes, perhaps broadcasters will fail? The scenario seems at least plausible in light of important differences in relevant technologies. Broadcast television comes, of course, from transmitting antennae. It is available for free, though in its current form, it cannot provide more than a few stations. By contrast, cable systems make use of a physical connection between television sets and a transmission facility, and through this route cable operators can provide a large number of stations. Cable operators are of course in a position to decide which stations, and which station owners, will be available on cable television; cable operators could thus refuse to carry local broadcasters. To be sure, cable operators must respond to forces of supply and demand, and perhaps they would do poorly if they failed to carry local broadcasters. But because they have "bottleneck control" over the stations that they will carry, they are in one sense monopolists, or at least so Congress appears to have thought.

For purposes of policymaking, an important consideration is that about forty percent of Americans lack a cable connection, and must therefore rely on broadcast stations.<sup>44</sup> (This is a point of general importance in light of the possibility that access to communications technology will in the future be unequally distributed.) In the Act, the potential conflict between cable and broadcast television led Congress to set out two crucial, hotly disputed provisions. Both provisions required cable operators to carry the signals of

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41. 47 U.S.C. §§ 534–535 (Supp. V 1993).

42. See the outline in *Turner*, 114 S. Ct. at 2452–53.

43. See S. REP. NO. 92, 102d Cong., 1st Sess. 3–4 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1135–36.

44. 114 S. Ct. at 2451.

local broadcast television stations. These “must-carry” rules were the focus of the *Turner* case.

The first provision, section 4, imposes must-carry rules for “local commercial television stations.”<sup>45</sup> Under the Act, cable systems with more than twelve active channels and more than three hundred available channels must set aside as many as one-third of their channels for commercial broadcast stations requesting carriage.<sup>46</sup> These stations are defined to include all full-power television broadcasters except those that qualify as “noncommercial educational” stations.<sup>47</sup>

Section 5 adds a different requirement.<sup>48</sup> It governs “noncommercial educational television stations,” defined to include (a) stations that are owned and operated by a municipality and that transmit “predominantly noncommercial programs for educational purposes”<sup>49</sup> or (b) stations that are licensed by the FCC as such stations and that are eligible to receive grants from the Corporation for Public Broadcasting.<sup>50</sup> Section 5 imposes separate must-carry rules on noncommercial educational stations. A cable system with more than thirty-six channels must carry each local public broadcast station requesting carriage,<sup>51</sup> a station having between thirteen and thirty-six must carry between one and three,<sup>52</sup> and a station with twelve or fewer channels must carry at least one.<sup>53</sup>

What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable. This is a quite reasonable suggestion, for it is unlikely that market arrangements would lead to a situation in which significant numbers of Americans are entirely without access to television broadcasting. The scenario that Congress apparently feared—a victory of cable television over the broadcasting industry, with the result that forty percent of Americans would lack television at all—seems wildly unrealistic. Insofar as Congress was responding to the interests of local broadcasters, it may well have been catering to interest-power rather than attempting to protect otherwise deprived consumers.

Here there is a large lesson for the future. New regulations, ostensibly defended as public-interested or as helping viewers and consumers, will often

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45. 47 U.S.C. § 534 (Supp. V 1993)

46. *Id.* § 534(b)(1).

47. *Id.* § 534(b)(1)(A)–(B).

48. *Id.* § 535.

49. *Id.* § 535(l)(1)(B).

50. *Id.* § 535(l)(1)(A)(ii).

51. *Id.* § 535(b)(1).

52. *Id.* § 535(b)(3).

53. *Id.* § 535(b)(2).

be a product of private self-interest, and not good for the public at all. It is undoubtedly true that industries will often seek government help against the marketplace, invoking public-spirited justifications for self-interested ends.<sup>54</sup> Whether and to what extent this is a constitutional (as opposed to a political) problem may be disputed.<sup>55</sup> But it points to a distinctive and legitimate concern about governmental regulation of the communications industry.

The interest-group account therefore has considerable plausibility. On the other hand, some people might reasonably think that the must-carry rules were a good-faith effort to protect local broadcasters, not because of their political power, but because their speech is valuable. Their speech is valuable because it ensures that viewers will be able to see discussion of local political issues. Perhaps the must-carry rules—especially section 5, but perhaps section 4 as well—had powerful Madisonian justifications insofar as cable operators might choose stations that failed to offer adequate discussion of issues of public concern, especially to the local community. Other observers might invoke a different justification, also with Madisonian overtones. Perhaps the effort to protect broadcasters was a legitimate effort to safeguard the broadcasting industry, not because of the political power of the broadcasters, and not because of the content of broadcast service, but because millions of Americans must rely on broadcasters for their programming. Perhaps Congress wanted to ensure universal viewer access to the television market. On this view, the key goal behind the must-carry rules was to ensure viewer access.

Let us put these possibilities to one side and take up the constitutional issue. In *Turner*, the cable operators challenged sections 4 and 5 as inconsistent with the First Amendment. They did not make a distinction between section 4 and section 5; to the cable companies, both provisions were illegitimate interferences with their right to choose such programming as they wished. For obvious reasons, the government also made no such distinctions. The government wanted to defend both provisions, and a defense of section 5, by itself, would produce only a partial victory. The key aspects of the case lay in the operators' contention that both sections amounted to a form of content regulation, and that even if they should be seen as content-neutral, they were unconstitutional because inadequately justified.

#### B. *The Genesis of the Turner Model*

In its response, the Court created something very much like a new model for understanding the relationship between new technologies and the First

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54. This is a simple insight of public choice theory. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

55. See *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 65 (D.D.C. 1993) (Williams, J., dissenting) (treating interest-group feature of case as relevant to constitutional issue), *vacated and remanded*, 114 S. Ct. 2445 (1994).

Amendment. This model is a competitor to the marketplace and Madisonian alternatives. And while it is somewhat unruly, it is not difficult to describe. It comes from the five basic components of the Court's response to the cable operators' challenge.

First, the Court held that cable television would not be subject to the more lenient free speech limitations applied to broadcasters.<sup>56</sup> On the Court's view, the key to the old broadcast cases was scarcity, and scarcity is not a problem for cable stations. To be sure, there are possible "market dysfunctions" for cable television; as noted, cable operators may in a sense be a monopoly by virtue of their "bottleneck control." But this structural fact did not, in the Court's view, dictate a more lenient approach in the cable context. In the Court's view, the key point in the past cases had to do with scarcity.

This is an especially significant holding.<sup>57</sup> It suggests that new technologies will generally be subject to ordinary free speech standards, not to the more lenient standards applied to broadcasters. Scarcity is rarely a problem for new technologies.

Second, the Court said that the Act was content-neutral, and therefore subject to the more lenient standards governing content-neutral restrictions on speech. For the Court, the central point is that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech."<sup>58</sup> This is because "the extent of the interference does not depend upon the content of the cable operators' programming."<sup>59</sup> In the Court's view, the regulations are certainly *speaker-based*, since we have to know who the speaker is to know whether the regulations apply; but they are not content-based, since they do not punish or require speech of a particular content.

This holding is also quite important. It means that Congress will be permitted to regulate particular technologies in particular ways, so long as the regulation is not transparently a subterfuge for a legislative desire to promote particular points of view. It means that Congress can give special benefits to special sources, or impose special burdens on disfavored industries.

Third, the Court said that there was insufficient reason to believe that a content-based "purpose" underlay the content-neutral must-carry law.<sup>60</sup> Hence the content neutrality of the law could not be impeached by an investigation of the factors that led to its enactment. The Court explored the relevant

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

57. It is also quite vulnerable. All goods are scarce, in a sense, and hence the scarcity rationale has never been a secure one. See Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14, 20 (1959). Perhaps market failures of a certain sort justified special controls on local broadcasting. See OWEN & WILDMAN, *supra* note 26, at 275–76. But if this is true, the question becomes whether there are market failures, and of what sorts, rather than whether there is "scarcity." Hence the Court's crisp distinction between scarce sources and nonscarce sources is quite crude.

58. 114 S. Ct. at 2460.

59. *Id.*

60. *Id.* at 2461–62.

legislative findings, which showed not only a (by hypothesis questionable<sup>61</sup>) congressional interest in encouraging the sorts of programming offered by local broadcasters, but also a distinctive and legitimate concern that cable operators have a strong financial interest in favoring their own affiliated programmers, and in doing so at the expense of broadcast stations. The findings therefore suggested that the cable operators have an economic incentive not to carry local signals.

This fact led to the important problem supporting the Act: Without the must-carry provision, Congress concluded, there would be a threat to the continued availability of free local broadcast television.<sup>62</sup> The elimination of broadcast television would in turn be undesirable not because broadcasters deserve protection as such—they do not—but because (a) broadcast television is free and (b) there is a substantial government interest in assuring access to free programming, especially for people who cannot afford to pay for television. As Congress had it, the must-carry rules would ensure that the broadcast stations would stay in business.

The Court said that this purpose—the protection of access to free programming through the protection of broadcast stations—was unrelated to the content of broadcast expression and was therefore legitimate. It was significant in this regard that for Congress to seek to protect broadcasters, Congress did not have to favor any particular kind or speech or any particular point of view. To be sure, and importantly, Congress' description of the purposes of the Act also referred to a content-based concern—to the effect that broadcast programming is “an important source of local news[,] public-affairs programming and other local broadcast services critical to an informed electorate,” and also to the judgment that noncommercial television in particular “provides educational and informational programming to the Nation's citizens.”<sup>63</sup> On the Court's view, however, these statements did not show that the law was content-based. The acknowledgment of certain virtues of broadcast programming did not mean that Congress enacted the legislation because it regarded broadcast programming as substantively preferable to cable programming.

Fourth, the Court said that strict judicial scrutiny was not required by the fact that the provisions (a) compel speech by cable operators, (b) favor broadcast programmers over cable programmers, and (c) single out certain members of the press for disfavored treatment.<sup>64</sup> The fact that speech was mandated was irrelevant because the mandate was content-neutral and because

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61. It is questionable because it is content-discriminatory. In the end, content discrimination of this sort might be legitimate, *see infra* text accompanying notes 77–82 (discussing Justice O'Connor's analysis), but there is of course a presumption against it.

62. 114 S. Ct. at 2455.

63. *Id.*

64. *Id.* at 2464.

cable operators would not be forced to alter their own messages to respond to the broadcast signals. So too, the Court said that a speaker-based regulation would not face special judicial hostility so long as it was content-neutral. It was important in this regard that the regulation of this particular industry was based on the special characteristics of that industry—in short, “the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.”<sup>65</sup> In such a case, the Court concluded, legislative selectivity would be acceptable.

These conclusions are also of special importance for the future. They reinforce the point that Congress may favor some industries over others. They also suggest that Congress may compel companies to give access to speakers, at least so long as (a) the companies themselves are permitted to offer the messages they favor and (b) the access rights are given out on a content-neutral basis. The *Turner* Court stressed the governmental goal of ensuring access to free programming for *viewers*; but in upholding the Act, it also said that it was legitimate to require access for *speakers*, so long as the requirement of content neutrality was met.

Finally, the Court explored the question whether the must-carry rules would be acceptable as content-neutral regulations of speech. Content-neutral regulations may well be invalid if they fail a kind of balancing test.<sup>66</sup> The Court concluded that “intermediate scrutiny” would be applied.<sup>67</sup> The Court said the appropriate test, drawing on familiar cases,<sup>68</sup> would involve an exploration whether the regulation furthers an important or substantial government interest and whether the restriction on First Amendment freedoms is no greater than necessary to promote that government interest. The Court had no difficulty in finding three substantial interests: (a) preserving free local television, (b) promoting the widespread dissemination of information from a multiplicity of sources, and (c) promoting fair competition in the market for television programming.<sup>69</sup> On the Court’s view, each of these was both important and legitimate.

What is of particular interest is the fact that interests (a) and (b) are connected with Madisonian aspirations. Thus in an especially significant step, the Court suggested that a content-neutral effort to promote diversity may well be justified. In its most straightforward endorsement of the Madisonian view, the Court said that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it

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65. *Id.* at 2468.

66. *See, e.g.,* *United States v. O’Brien*, 391 U.S. 367 (1968) (requiring that speech regulation serve important government interest and be narrowly tailored to achieve that interest).

67. 114 S. Ct. at 2469.

68. *See, e.g., O’Brien*, 391 U.S. at 377.

69. 114 S. Ct. at 2469.



promotes values central to the First Amendment.”<sup>70</sup> Hence the Court expressed special concern, in a perhaps self-conscious echo of *Red Lion*, over the cable operator’s “gatekeeper[] control over most (if not all) of the television programming that is channeled into the subscriber’s home.”<sup>71</sup> The Court also emphasized “[t]he potential for abuse of this private power over a central avenue of communication.”<sup>72</sup> It stressed that the First Amendment “does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.”<sup>73</sup>

On the other hand, the Court thought that it was impossible to decide the case without a better factual record than had been developed thus far.<sup>74</sup> As it stood, the record was insufficient to show whether the must-carry rules would serve these legitimate interests. Would local broadcasters actually be jeopardized without the must-carry rules? Here we should return to the possibility, of which the Court was surely aware, that the rules were really an effort to favor the broadcasting industry, not to help viewers.

The Court suggested that courts should maintain a basic posture of deference to Congress’ predictive judgments.<sup>75</sup> In its view, judges should not second-guess those judgments even if they distrust them. On the other hand, Congress’ judgments would face a form of independent judicial review, designed to ensure that Congress had made “reasonable inferences based on substantial evidence.”<sup>76</sup> The Court therefore remanded the case to the lower court for factual findings on (a) the question whether cable operators would refuse significant numbers of broadcast stations without the must-carry rules and (b) the question whether broadcast stations, if denied carriage, would deteriorate to a substantial degree or fail altogether.

Justice O’Connor’s dissenting opinion, joined by three other Justices, also deserves some discussion, since the opinion may have considerable future importance in view of the obvious internal fragmentation of the Court on these questions. Justice O’Connor insisted above all that the must-carry rules were based on content.<sup>77</sup> To reach this conclusion, she investigated the Act and its history to show that the nominally neutral measures were in fact designed to promote local programming. In her view, the existence of content discrimination was not decisive against the must-carry rules. It was still necessary to see whether the government could bring forward a strong interest,

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70. *Id.* at 2470.

71. *Id.* at 2466.

72. *Id.*

73. *Id.*

74. *Id.* at 2472.

75. *Id.* at 2471. This was Justice Stevens’ major point; he would have affirmed rather than remanded for this reason. *See id.* at 2473.

76. *Id.* at 2471.

77. *Id.* at 2479.

and show that the regulation promoted that interest. But Justice O'Connor found that the government could not meet its burden.

In Justice O'Connor's view, the interest in "localism" was insufficient justification.<sup>78</sup> In words that have considerable bearing on what government may do with any information superhighway:

It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one. And the same is true of the interest in diversity of viewpoints: While the government may subsidize speakers that it thinks provide novel points of view, it may not restrict other speakers on the theory that what they say is more conventional.<sup>79</sup>

Justice O'Connor referred independently to the interests in public-affairs programming and educational programming, finding that these interests are "somewhat weightier" than the interest in localism. But in her view, "it is a difficult question whether they are compelling enough to justify restricting other sorts of speech."<sup>80</sup> Because of the difficulty of that question, Justice O'Connor did not say whether "the Government could set some channels aside for educational or news programming."<sup>81</sup> (This is of course a central issue for the future.)

In her view, the Act was too crudely tailored to be justified as an educational or public-affairs measure. The Act did not neutrally favor educational or public-affairs programming, since it burdened equally "CNN, C-Span, the Discovery Channel, the New Inspirational Network, and other channels with as much claim as PBS to being educational or related to public affairs."<sup>82</sup> Whether or not a neutral law favoring educational and public-affairs programming could survive constitutional scrutiny, this Act could not, for it was insufficiently neutral.

#### IV. THE *TURNER* MODEL

##### A. *Description*

I have noted that there have been two free speech traditions and two principal models of free speech. The marketplace model eschews content regulation; it is animated by the notion of consumer sovereignty. The Madisonian model may permit and even welcome content regulation; it is

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78. *Id.* at 2478.

79. *Id.*

80. *Id.*

81. *Id.* at 2479.

82. *Id.*

rooted in an understanding of political sovereignty. There is now a third model—the *Turner* model—of what government may do. An interesting question, not fully resolved by *Turner* itself, has to do with the extent to which the *Turner* model will incorporate features of its predecessors.

The new model has four simple components. Under *Turner*, (a) government may regulate (not merely subsidize) new speech sources so as to ensure *access for viewers* who would otherwise be without free programming and (b) government may require owners of speech sources to provide access to *speakers*, at least if the owners are not conventional speakers too; *but* (c) government must do all this on a content-neutral basis (at least as a general rule); *but* (d) government may support its regulation not only by reference to the provision of “access to free television programming” but also by invoking such democratic goals as the need to ensure “an outlet for exchange on matters of local concern” and “access to a multiplicity of information sources.”<sup>83</sup>

Remarkably, every Justice on the Court appeared to accept (a), (b), and (c) and parts of (d) (with minor qualifications). Perhaps the most notable feature of the Court’s opinion is its emphasis on the legitimacy and the importance of ensuring general public (viewer) access to free programming. In this way, the Court accepted at least a modest aspect of the Madisonian ideal, connected with both political equality and broad dissemination of information. This general goal is likely to have continuing importance in governmental efforts to control the information superhighway so as to ensure viewer and listener access. The *Turner* Court has put its stamp of approval on that goal. Recall in particular that the government justified the must-carry rules on the theory that without those rules, ordinary broadcasters would be unable to survive. The consequence would be that people without cable would be without broadcasting at all. The Court enthusiastically accepted this claim. It said that “to preserve access to free television programming for the 40 percent of Americans without cable” was a legitimate interest.<sup>84</sup> This holding suggests that the government may provide access not only through subsidies, but also through regulation.

On the other hand, the Court’s quite odd refusal<sup>85</sup> to distinguish between sections 4 and 5 and its use of the presumption against content discrimination seem to support the marketplace model. Certainly the Court did not say that it would be receptive to content discrimination if the discrimination were an effort to promote attention to public affairs and exposure to diverse sources. The Court did not claim or in any way imply that educational and public-affairs programming could be required consistently with the First Amendment. On the contrary, it suggested that it would view any content discrimination,

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83. *Id.* at 2469–70.

84. *Id.* at 2479.

85. *See infra* text accompanying notes 86–87.

including content discrimination having these goals, with considerable skepticism. The result is a large degree of confusion with respect to whether and how government may promote Madisonian aspirations. I will return to this point.

B. *A Problem: Commerce vs. Public Affairs*

The Court's major internal dispute involved the question whether the content neutrality of the must-carry rules was impeached by the history suggesting that Congress was particularly enthusiastic about local programming. This is an issue on which reasonable people may disagree; it turns largely on the extent to which statements in the legislative history will be used to cast light on legislative goals. But the issue of content discrimination seems, on inspection, to rest on a matter not discussed by anyone on the Court; it is principally that matter, not the legislative history, that raises special issues about content discrimination.

More concretely: From the standpoint of traditional free speech argument, there is an obvious problem with the analysis offered by the *Turner* Court. Section 4 and section 5 are quite different; they appear to have different justifications. In any case, different carriage requirements in the two sections, targeted to two different kinds of broadcasting, plainly reveal content discrimination. The two sections explicitly define their correlative obligations in terms of the nature, or content, of the programming. This is proof of content discrimination.

How should that discrimination be handled? Under the Madisonian view, there is all the difference in the world between section 4 and section 5. As I have noted, section 5 imposes certain carriage requirements for educational and public-affairs stations, whereas section 4 imposes different carriage requirements for commercial stations. For Madisonians, section 5 stands on far stronger ground, since it is apparently an effort to ensure education and attention to public issues. It seems to serve straightforward democratic functions. This does not mean that it is necessarily legitimate. Perhaps Justice O'Connor's response—to the effect that section 5 does not adequately promote that goal—is decisive as against a Madisonian defense of section 5. But section 4 appears to stand on far weaker ground from the Madisonian standpoint. Thus Madisonians would distinguish between the two provisions and would be far more hospitable toward section 5.<sup>86</sup>

In fact, the Court should have analyzed the two sections differently. The validity of section 4 turned on whether the factual record could support the

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86. See Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 91–95 (1994), for an argument that on remand, the district court should uphold section 5 even if it finds section 4 unconstitutional.

idea that the section was necessary to ensure the continued availability of free public television. On this score the Court's basic solution—a remand—was quite reasonable, even if the statute was treated as content-based. On remand, the question would be whether content regulation of this sort was sufficiently justified as a means of saving free public television.

The analysis for section 5 should be quite different. The provision of educational and public-affairs programming is entirely legitimate, certainly if there is no substantial intrusion on speakers who want to provide another kind of programming.<sup>87</sup> The validity of section 5 thus should have turned on whether it was sufficiently tailored to the provision of educational and public-affairs programming. Perhaps Justice O'Connor was right in doubting whether adequate tailoring could be shown; in any case this is the issue to be decided. In short, both provisions are content-based, but this phrase should not be used as a talisman. The question was whether the content-based restrictions were sufficiently connected with legitimate goals. An approach of this kind would have been the most reasonable one to take.

On the other hand, within the marketplace model, the very existence of two separate sections is problematic. Why should the government concern itself with whether stations are commercial or noncommercial? Marketplace advocates would find the Act objectionable simply by virtue of the fact that it distinguishes between commercial and noncommercial stations. To them, the fact that two different sections impose different carriage requirements shows that there is content discrimination in the Act.

Under the two prevailing free speech models, then, it would make sense either to treat section 5 along a different track from section 4 (the better approach), or to question them both as content-discriminatory on their face. Both of these approaches would have been quite plausible. Remarkably, however, no Justice in *Turner* took either approach. Indeed, no Justice drew any distinction at all between section 4 and section 5, and no Justice urged that the existence of two different sections showed that there was content discrimination.

This is a genuine puzzle. Why did no Justice invoke Madisonian goals to treat section 5 more generously? Why did no Justice invoke content neutrality to complain about the existence of two separate sections? As we have seen, none of the parties raised the issue, and perhaps the question was not squarely presented, permitting the Court to decide the case on a narrower and less controversial ground. Under the approach of both the majority and the dissent, it may not have been necessary to answer the hard questions of whether and how government might promote educational and public-affairs programming.

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87. Thus it could be imagined that a serious question would be raised if Congress said that a humor magazine had to educate too, or that speakers on a comedy show had to have serious bits as well.

But why did no Justice suggest that the two sections embodied content discrimination? This question is much harder to answer.

Perhaps the Court had something like the following in mind. The two sections involve speakers rather than speech; they point to the nature of the station, not to the nature of the programming. Thus the Act may perhaps be understood as imposing a speaker-based restriction of the sort that the Court found legitimate insofar as the Act applied only to cable television.

On reflection, however, this response seems implausible. The kind of speaker-based restriction reflected in the two sections has everything to do with content. The definition of section 5 stations is inextricably intertwined with the speech offered by such stations. So too with the definition of section 4 stations. The Court therefore appears to have blundered in failing to find content discrimination in the existence of two separate sections. Perhaps the content discrimination could have been justified if the Court had attended to separate justifications for the two provisions, or at least the Court might have upheld section 5 if it could have met Justice O'Connor's concerns. I return to this point below.

### C. *A Paradox and a Provisional Solution: Madisonians and Marketeers vs. Turner?*

Now let us proceed to a larger matter. As I have noted, the *Turner* Court did not accept a Madisonian model of free speech. The distinction between content-based and content-neutral restrictions was crucial to the opinion, and that distinction hardly emerges from a Madisonian model, which would carve up the free speech universe in a different way. But the Court certainly did not accept the marketplace model in its entirety. In addition to emphasizing the legitimacy of ensuring access to free programming—and of doing so through regulation rather than subsidy—the Court stressed more or less democratic justifications for the must-carry rules, including broad exposure to programming on public issues, and to a multiplicity of sources of information. It might be argued both that *Turner* is insufficiently responsive to marketplace concerns and that *Turner* is a Madisonian failure insofar as the *Turner* model appears to do nothing about the problem of low-quality programming and insufficient exposure to public debate.

#### 1. *The Paradox*

An especially distinctive feature of the Court's opinion is its ambivalence about the legitimacy of governmental efforts to promote diversity. There is ambivalence on this score because while the Court invoked diversity as a goal, it also made its skepticism about content-based regulation quite clear, and many imaginable efforts to promote diversity are content-based. Consider the

fairness doctrine as well as many European initiatives to promote diversity in the media.<sup>88</sup> The Court found it necessary to insist that Congress was not trying, through the must-carry rules, to ensure exposure to local news sources.

On the other hand, the Court suggested that a content-neutral effort to promote diversity may well be justified. Hence the Court offered a number of justifications for regulation of cable technology. As we have seen, the Court expressed concern over the cable operator's "gatekeeper[] control over most (if not all) of the television programming that is channeled into the subscriber's home."<sup>89</sup> The Court emphasized "[t]he potential for abuse of this private power over a central avenue of communication."<sup>90</sup> The Court stressed that the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."<sup>91</sup> And thus the Court emphasized "the importance of local broadcasting units" in promoting attention to public issues.<sup>92</sup> In these ways, the *Turner* opinion contains an echo, albeit a faint one, of the highly Madisonian analysis in *Red Lion*.

There is therefore an important paradox at the heart of the *Turner* model. The paradox emerges from (a) the presumptive invalidity of content-based restrictions, accompanied by (b) the insistence by the Court on the legitimacy of the goals of providing access to a multiplicity of sources and outlets for exchanges on issues of local concern. This is a paradox because if these goals are legitimate, content-based regulation designed to promote them might well be thought legitimate too. If government may engage in content-neutral restrictions designed self-consciously to provide access to many sources, why may it not favor certain speech directly? The most natural way to provide certain kinds of programming is through content-based regulation.<sup>93</sup>

## 2. *Substantive Doctrine and Institutional Constraints*

The question then arises: If diversity is a legitimate goal, why might the *Turner* model be superior to the Madisonian model? One possible view is that the *Turner* model is not superior, but that it should be regarded instead as a cautious and incompletely theorized step<sup>94</sup> that appropriately leaves gaps for

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88. See SUNSTEIN, *supra* note 12, at 77–81 (noting that several European high courts have found that governments were not merely permitted to promote diversity in the media, but were constitutionally obliged to do so); see also ELI NOAM, TELECOMMUNICATIONS IN EUROPE (1992).

89. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2466 (1994).

90. *Id.*

91. *Id.*

92. *Id.* at 2469.

93. *Cf. Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (upholding affirmative action for minority owners on theory that this indirect, content-neutral approach would provide broadcasting of certain content—even though nondiscriminatory alternative, pursuing that very same goal directly, would probably be unconstitutional).

94. We might even see the outcome as an incompletely theorized agreement, a distinctive kind of

future refinement. Perhaps the *Turner* model will have to be elaborated, as it clearly can be, to make clear that well-tailored efforts to promote diversity and broader democratic goals are legitimate even if they are content-based.

For reasons to be suggested, this would indeed be a sensible step. But there is another point. Despite appearances, there is good reason for the *Turner* Court's skepticism toward content-based regulation, and the reason operates by reference to institutional considerations involving the distinctive characteristics of judge-made doctrine. Those considerations have everything to do with the potential superiority of (not entirely accurate) rules of law over highly individuated, case-by-case judgments. This defense of *Turner* says not that the case reflects the best understanding of the substantive content of the free speech principle, but that it may be the best way for the Supreme Court to police that principle in light of its institutional limits.

In brief: In light of the nature of the current electronic media, in which scarcity is a decreasing problem, a presumptive requirement of content neutrality may well be the best way for judges to police objectionable governmental purposes, especially in the form of viewpoint discrimination.<sup>95</sup> If government favors speech of certain kinds through content regulation, there is always a risk that it is actually trying to favor certain views. For example, a regulatory requirement of discussion of abortion, or race relations, or feminism would raise serious fears to the effect that government is seeking to promote certain positions. Through insisting on content neutrality—again, at least as a presumption—courts can minimize the risk of impermissibly motivated legislation, and they can do so while limiting the institutional burden faced by judges making more individualized judgments. The presumption in favor of content neutrality has the fortunate consequence of making it unnecessary for courts to answer hard case-by-case questions about the legitimacy of diverse initiatives, many of which will, predictably, be based on illegitimate motivations.

We might thus offer a cautious defense of the *Turner* model over the Madisonian model. The defense would depend on the view that the *Turner* model may well best combine the virtues of (a) judicial administrability (a real problem for Madisonians<sup>96</sup>), (b) appreciation of the risk of viewpoint discrimination (a real problem for Madisonians too), and (c) an understanding of the hazards of relying on markets alone (addressed by *Turner* insofar as the Court allows Congress considerable room to maneuver). For this reason, the

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judicial judgment. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. (forthcoming May 1995).

95. See the valuable analysis in Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine* (unpublished manuscript, on file with author), on which I draw for this and the preceding paragraph.

96. See Krattenmaker & Powe, *supra* note 21.



*Turner* model may well be better, at least in broad outline, than the Madisonian and marketplace alternatives.

### 3. *Countervailing Considerations*

There are important countervailing considerations. As indicated above,<sup>97</sup> the application of the *Turner* model to technologies other than cable raises serious problems, for cable presents the special question of “bottleneck control.” Many of the other new technologies raise questions not involving anything like “bottleneck control,” which was central to the resolution in *Turner*. In general, regulation of the Internet raises no such problem. In *Turner*, moreover, the principal access issue was the right to hear; in other cases, the central issue, also one of access, will involve the right to speak. Sometimes the principal question will be whether certain speakers can have access to certain audiences. In other contexts, regulatory efforts may involve educational goals more straightforwardly, as in guarantees of free media time to candidates or in provisions to ensure public-affairs programming or programming for children.

As I have argued, moreover, speech should not be treated as a simple commodity, especially in a period dominated by attention to sensationalistic scandals and low-quality fare.<sup>98</sup> In light of the cultural consequences of broadcasting—through, for example, its effects on democratic processes and children’s education—we should not think of electronic media as “just . . . appliance[s],” or as “toaster[s] with pictures.”<sup>99</sup> At least part of the First Amendment inquiry should turn on the relationship between what broadcasters provide and what a well-functioning democracy requires. If we have any sympathy for Brandeis’ judgment—shared by Madison<sup>100</sup>—that “the greatest menace to freedom is an inert people,” we will acknowledge that the marketplace model may not perform an adequate educative role, and that a system of free markets may well disserve democratic ideals.

Of course there are hard issues about which bodies are authorized to decide what programming ought to be offered.<sup>101</sup> But the *Turner* model is vulnerable insofar as it brackets the deeper issues and addresses Madisonian concerns with the useful but crude doctrinal categories “content-based” and “content-neutral.” Those categories are crude because they are not tightly

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97. See the introduction to Part III *supra*.

98. There is of course a large and insufficiently analyzed problem: defining the relevant market. Perhaps those interested in Madisonian goals should focus on the entirety of the free speech market, seeing magazines, broadcasting, and even books as aspects of a single market, to be taken as a whole. I cannot address this issue here.

99. See Nossiter, *supra* note 3.

100. See *supra* text accompanying note 1.

101. See KRATTENMAKER & POWE, *supra* note 25 (stressing this problem).

connected with any plausible conception of the basic point or points of a system of free speech.

Some qualifications of the *Turner* model, pointing in Madisonian directions, are therefore desirable. The majority does not foreclose such qualifications, and Justice O'Connor's dissenting opinion actually makes some space for arguments of this sort. I will suggest some important qualifications that are nonetheless consistent with the general spirit of *Turner* itself.

## V. SPEECH, EMERGING MEDIA, AND CYBERSPACE

### A. *New Possibilities and New Problems: Referenda in Cyberspace and Related Issues*

It should be unnecessary to emphasize that the explosion of new technologies opens up extraordinary new possibilities. As the Department of Commerce's predictions suggest, ordinary people might ultimately participate in a communications network in which hundreds of millions of people, or more, can communicate with each other and indeed with all sorts of service providers—libraries, doctors, accountants, lawyers, legislators, shopkeepers, pharmacies, grocery stores, museums, Internal Revenue Service employees, restaurants, and more. If you need an answer to a medical question, you may be able to push a few buttons and receive a reliable answer. If you want to order food for delivery, you would be able to do so in a matter of seconds. If you have a question about sports or music or clothing, or about the eighteenth century, you could get an instant answer. People can now purchase many goods on their credit cards without leaving home. It may soon be possible to receive a college education without leaving home.<sup>102</sup> As I have suggested, the very notions of "location" and "home" will change in extraordinary ways.

Many of the relevant changes have already occurred. Consider the fact that in 1989, there were about 47.5 million cable television subscribers, accounting for 52.5% of television households—whereas by 1995, there were 59 million subscribers, accounting for 61.8% of television households.<sup>103</sup> Consider the following chart.<sup>104</sup>

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102. See *In 2050, Computers May Be Collegian's "Campus"*, CHI. TRIB., Nov. 7, 1994, at 4. It is revealing that many of the footnotes in this Essay come from newspapers and weekly news magazines. With respect to communications technologies, development is occurring so rapidly that other sources are often obsolete upon publication.

103. See  *DirecTv a Big Hit*, *supra* note 27.

104. *Id.*

Year	Millions of TV Households	Millions of Homes Passed by Cable	Homes Passed as a % of TV Homes	Millions of Cable Households	Cable Subscribers as a % of Homes Passed	Cable Penetration of TV Households (%)
1989	90.4	80.0	88.5	47.5	59.4	52.5
1990	92.1	84.4	91.6	50.5	59.8	54.8
1991	93.1	87.2	93.7	52.6	60.3	56.5
1992	92.1 <sup>105</sup>	88.9	96.5	54.3	61.1	59.0
1993	93.1	90.1	96.8	56.2	62.4	60.4
1994	94.2	91.3	96.9	57.2	62.7	60.7
1995	95.4	92.5	97.0	59.0	63.8	61.8

TABLE 1.

The number of subscribers to major online services is also increasing rapidly, with 6.3 million American subscribers.<sup>106</sup> Consider also the following chart:<sup>107</sup>

Technology	Number of Users
Internet	30-40 million
CompuServe	2,700,000
America Online	2,300,000
Prodigy	2,000,000
The WELL	11,000
Women's Wire	1300

TABLE 2.

The forerunners of the "information superhighway" are thus increasingly available to large numbers of people. In this Section, I discuss some large and general questions about communications in a democracy; I turn to more specific policy issues in Sections B and C.

105. Revised downward based on 1990 census.

106. *On-Line Computer Services Had Another Boom Year, Survey Says*, L.A. TIMES, Jan. 14, 1995, at D2.

107. This chart was compiled on the basis of data in John Flinn, *The Line on On-Line Services*, S.F. EXAMINER, Mar. 1, 1995, at B1, and Philip Elmer-DeWitt, *Welcome to Cyberspace*, TIME, Spring 1995 (Special Issue), at 9. In some countries the number of Internet users has grown more than 1000% in the past three years. *Id.*

## 1. *Economics and Democracy*

Technological developments enjoyed by so many people bring with them extraordinary promise and opportunities from the standpoints of both Madisonianism and the marketplace. From nearly<sup>108</sup> any point of view, nostalgia for preexisting speech markets makes little sense.

The economic point is obvious, for the costs of transacting—of obtaining information and entering into mutually beneficial deals—will decrease enormously, and hence it will be much easier for consumers to get what they want, whatever it is that they want. To say the least, a shopping trip—for groceries, books, medicines, housing, trial transcripts, clothing—will be much simpler than it now is; it may well be significantly simpler now than it was when this Essay was first written.<sup>109</sup> In these ways the new information technologies are a great boon.

At the same time, and equally important, there are potential democratic gains, since communication among citizens and between citizens and their representatives will be far easier. Citizens may be able to express their views to public officials and to receive answers more effectively. To state a view or ask a question on the issue of the day, no town meeting need be arranged. High-quality, substantive discussions may well be possible among large numbers of people; town meetings that are genuinely deliberative may become commonplace. Voting may occur through the Internet. This is one of the most intriguing features of cyberspace.<sup>110</sup> It will be possible to obtain a great deal of information about candidates and their positions.

In fact much of this has already occurred. The practice of journalism has changed in the sense that reporters communicate regularly with readers.<sup>111</sup> Before the 1994 elections, public library computers delivered considerable information about the candidates via the World Wide Web of the Internet.<sup>112</sup> The Web also allows people to see photographs of candidates and to have access to dozens of pages of information about them and their positions. The Web may be used nationally for these purposes as early as 1996. A number of elected officials—in the White House, the Senate, and the House—now have e-mail addresses and communicate with their constituents in cyberspace.

In Minnesota, five candidates for governor and three candidates for the senate participated in debates on electronic mail.<sup>113</sup> In 1993, President

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108. The qualification is necessary because of threats posed by the new technologies to the possibility of commonly shared experience and to exposure to positions contrary to one's own. See *infra* text accompanying notes 121–28.

109. See Barrett Seaman, *The Future Is Already Here*, TIME, Spring 1995 (Special Issue), at 30–33

110. See generally RHEINGOLD, *supra* note 6.

111. See David S. Jackson, *Extra! Readers Talk Back!*, TIME, Spring 1995 (Special Issue), at 60.

112. Peter H. Lewis, *Voters and Candidates Meet on Information Superhighway*, N.Y. TIMES, Nov 6, 1994, at 30.

113. *Id.*

Clinton established connections with millions of e-mail users, putting his address into their system and inviting them to give reactions on public issues. Candidates generally are obtaining and publicizing e-mail addresses.<sup>114</sup> Thus presidential candidate Lamar Alexander launched his campaign with a forum via America Online, in which he spoke to all those who chose to join the forum.<sup>115</sup> The Madisonian framework was based partly on the assumption that large-scale substantive discussions would not be practicable.<sup>116</sup> Technology may well render that assumption anachronistic.

The result may be of particular benefit for people of moderate or low income. People without substantial means may nonetheless make their views heard. So too relatively poor candidates may be able to communicate more cheaply.<sup>117</sup> In this way the new communications technologies may relieve some of the pressure for campaign finance restrictions by promoting the Madisonian goal of political equality.<sup>118</sup> In the midst of economic inequality, perhaps technological advances can make political equality a more realistic goal.<sup>119</sup>

Moreover, education about public issues will be much simpler and cheaper. The government, and relevant interest groups, will be able to state their cases far more easily. And after touching a few buttons, people will be able to have access to substantial information about policy dilemmas—possible wars, environmental risks and regulations, legal developments, trials, medical reform, and a good deal more. Consider as simply one example, the astonishing service LEXIS Counsel Connect. With this service a lawyer can have access to essentially all proposed laws. A lawyer can also join substantive “discussion groups,” dealing with, for example, the Simpson trial, recent tax developments, risk regulation, securities arbitration, affirmative action, LEXIS Counsel Connect, cyberspace, the First Amendment in cyberspace, and much more. The proliferation of law-related discussion groups on law-related topics is one tiny illustration of a remarkable cultural development. Thus the Usenet includes more than 10,000 discussion groups, dealing with particle physics, ring-tailed lemurs, and Rush Limbaugh, among countless others.<sup>120</sup>

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114. See Howard Fineman with Stephen A. Tuttle, *The Brave New World of Cybertribes*, NEWSWEEK, Feb. 27, 1995, at 30–33.

115. See *id.* at 30.

116. See THE FEDERALIST No. 70 (Alexander Hamilton).

117. See Lewis, *supra* note 112.

118. Thus Madison listed “establishing a political equality among all” as the first means of combatting the “evil” of parties. See James Madison, *Parties*, NAT’L GAZETTE, Jan. 23, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 197–98 (Robert A. Rutland et al. eds., 1983). On the risks of government by referendum, see DAVID B. MAGLEBY, DIRECT LEGISLATION (1984).

119. See the discussion of Vice President Gore’s proposals in RHEINGOLD, *supra* note 6, at 304, which calls for avoiding “information haves” and “have-nots.”

120. Elmer-DeWitt, *supra* note 107, at 4, 9–10. A special advantage of the Internet is its grassroots, “bottom-up” quality. In contrast to the mass media, in which a large broadcaster speaks to millions, the Internet allows individual citizens to spread news or commentary to one person, or to hundreds, or to thousands, or to millions. The problem of access to the media is in this respect greatly reduced. A

## 2. *Dangers*

At least from the standpoint of the founding era, and from the standpoint of democratic theory, the new technology also carries with it significant risks. There are two major problems. The first is an absence of deliberation. The second is an increase in social balkanization.

### a. *Absence of Deliberation*

The Madisonian view of course places a high premium on public deliberation, and it disfavors immediate and inadequately considered governmental reactions to pressures from the citizenry.<sup>121</sup> The American polity is a republic, not a direct democracy, and for legitimate reasons; direct democracy is unlikely to provide successful governance, for it is too likely to be free from deliberation and unduly subject to short-time reactions and sheer manipulation. From the inception of the American system a large point of the system of republicanism has been to “refine and enlarge the public view” through the system of representation.<sup>122</sup>

This process of refinement and enlargement is endangered by decreased costs of communication. As I have noted, discussions in cyberspace may well be both substantive and deliberative; electronic mail and the Internet in particular hold out considerable promise on this score.<sup>123</sup> But communications between citizens and their representatives may also be reactive to short-term impulses, and may consist of simple referenda results insufficiently filtered by reflection and discussion.

In the current period, there is thus a serious risk that low-cost or costless communication 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. Although the apparent presence of diverse public voices is often celebrated, electoral campaigns and treatment of public issues already suffer from myopia and sensationalism,<sup>124</sup> 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. The phenomenon of “talk radio” has achieved considerable attention in this regard. It is surely desirable to provide forums in which citizens can speak with one

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decentralized system has the distinct virtue of promoting Jeffersonian aspirations to citizenship

121. See THE FEDERALIST No. 10 (James Madison); see also JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON* (1994).

122. THE FEDERALIST No. 10 (James Madison).

123. See *supra* text accompanying note 120 (discussing LEXIS Counsel Connect); see also RHEINGOLD, *supra* note 6.

124. See generally SHANTO IYENGAR, *IS ANYONE RESPONSIBLE?* (1992); SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS* (1987); PHYLLIS KANISS, *MAKING LOCAL NEWS* (1989). See also STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 33–51 (1993).

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.

Ross Perot's conception of an "electronic town meeting" is hardly consistent with founding aspirations, at least if the meeting has the power to make decisions all by itself. Democracy by soundbite is hardly a perfect ideal. New technologies may make democracy by soundbite far more likely. Everything depends on how those technologies are deployed in communicating to public officials.

We can make these points more vivid with a thought experiment. Imagine that through the new technologies, the communications options were truly limitless. Each person could design his own communications universe. Each person could see those things that he wanted to see, and only those things. Insulation from unwelcome material would be costless. Choice of particular subjects and points of view would be costless too. Would such a system be a communications utopia? Would it fulfill First Amendment aspirations?<sup>125</sup>

The answer is by no means simple. Of course a system of this kind would have advantages. It might well overcome some of the problems produced by extremes of wealth and poverty, at least insofar as poor people could both speak and hear far more cheaply. But the aspiration to an informed citizenry may not be well served. Under the hypothesized system, perhaps most people would be rarely or poorly informed. Perhaps their consumption choices would disserve democratic ideals.<sup>126</sup> If the system of free expression is designed to ensure against an "inert people," we cannot know, *a priori*, whether a system of well-functioning free markets would be desirable.

#### b. *Balkanization and Self-Insulation*

The hypothesized system would have another problem: It would allow people to screen out ideas, facts, or accounts of facts that they find disturbing. In the current system, people are often confronted with ideas and facts that they find uncongenial. This is an important democratic good; it promotes education and discussion. A well-functioning system of free expression is one in which people are exposed to ideas that compete with their own, so that they can test their own views and understand other perspectives even when they disagree. This process can produce a capacity for empathy and understanding, so that other people are not dehumanized even across sharp differences in judgment and perspective. Important forms of commonality and respect might emerge simply by virtue of presenting the perspectives of others from others' points of view.

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125. For a description of the possibility of such a system, see Volokh, *supra* note 29.

126. On the issue of choice, see *infra* part V.B.2.

A system of individually designed communications options could, by contrast, result in a high degree of balkanization, in which people are not presented with new or contrary perspectives. Such a nation could not easily satisfy democratic and deliberative goals. In such a nation, communication among people with different perspectives might be far more difficult than it now is; mutual intelligibility may become difficult or even impossible. In such a nation, there may be little commonality among people with diverse commitments, as one group caricatures another or understands it by means of simple slogans that debase reality and eliminate mutual understanding.

These suggestions are far from hypothetical. They capture a significant part of the reality of current communications in America. They create serious political risks.

### 3. *A Caution About Responses*

It is far from clear how government can or should overcome these various problems. Certainly government should not be permitted to censor citizen efforts to communicate with representatives, even if such communications carry risks to deliberative ideals. It does seem clear, however, that government should be cautious about spurring on its own the use of new technologies to promote immediate, massive public reactions to popular issues. Government by referendum is at best a mixed blessing, with possible unfortunate consequences wherever it is tried.<sup>127</sup> The electronic media should not be used to create a form of government by referendum. Regulatory efforts to facilitate communication need not be transformed into an effort to abandon republican goals.

Rather than spurring referenda in cyberspace, or referenda by soundbite, government should seek to promote deliberation and reflection as part of the process of eliciting popular opinion.<sup>128</sup> Any such efforts might well be made part of a general strategy for turning new communications technologies to constitutional ends. As we have seen, electronic mail has considerable promise on this score.

### B. *Some Policy Dilemmas*

A large question for both constitutional law and public policy has yet to receive a full democratic or a judicial answer: To what extent, if any, do Madisonian ideals have a place in the world of new technologies, or in cyberspace? Some people think that the absence of scarcity eliminates the

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127. See generally MAGLEBY, *supra* note 118.

128. See the discussion of the deliberative opinion poll in JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 1-2, 84 (1991).



argument for governmental regulation, at least if it is designed to promote attention to public issues, to increase diversity, or to raise the quality of public debate.<sup>129</sup> If outlets are unlimited, why is regulation of any value? In the future, people will be able to listen to whatever they want, perhaps to speak to whomever they choose. Ought this not to be a constitutional ideal?

The question is meant to answer itself, but perhaps enough has been said to show that it hardly does that. Recall first that structural regulation, assigning property rights and making agreements possible, is a precondition for well-functioning markets. *Laissez-faire* is a hopeless misdescription of free markets. A large government role, with coercive features, is required to maintain markets. Part of the role also requires steps to prevent monopoly and monopolistic practices.

Moreover, Madisonian goals need not be thought anachronistic in a period of infinite outlets. In a system of infinite outlets, the goal of consumer sovereignty may well be adequately promoted. That goal has a distinguished place in both law and public policy. But it should not be identified with the Constitution's free speech guarantee. The Constitution does not require consumer sovereignty; for the most part, the decision whether to qualify or replace that goal with Madisonian aspirations should be made democratically rather than judicially. A democratic citizenry armed with a constitutional guarantee of free speech need not see consumer sovereignty as its fundamental aspiration.<sup>130</sup> Certainly it may choose consumer sovereignty if it likes. But it may seek instead to ensure high-quality fare for children, even if this approach departs from consumer satisfaction. It may seek more generally to promote educational and public-affairs programming.

The choice between these alternatives should be made through the political branches rather than as a matter of constitutional law. In this Section, I try to support this basic conclusion, and to do so in a way that is attuned to many of the pathologies of "command-and-control" regulation. The goal for the future is to incorporate Madisonian aspirations in a regulatory framework that is alert to the difficulty of anticipating future tastes and developments, that sees that incentives are better than commands, and that attempts to structure future change rather than to dictate its content.

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129. See KRATTENMAKER & POWE, *supra* note 25.

130. It is revealing in this regard that many European nations do not identify their free speech principle with consumer sovereignty. See SUNSTEIN, *supra* note 12, at 77-81. The experience of the *Bundesverfassungsgericht* (German Constitutional Court) is of special interest, for the Court has self-consciously decided that democratic aspirations require the government to regulate the broadcast media to create a forum for speakers with a broad range of interests and opinions. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 227-33 (1994); CASS R. SUNSTEIN, *supra* note 12, at 77-79 (discussing recent *Bundesverfassungsgericht* cases).

### 1. *Advertising*

It is commonly thought that viewers and listeners purchase a communications product, and that their purchase decisions should be respected; but this picture is not altogether right. The decisions of viewers and listeners are different from most consumption decisions, in the sense that viewers and listeners often pay nothing for programming, and often they are, in a sense, the product that is being sold. For much commercial programming, a key source of revenues is advertisers, and programmers deliver viewers to advertisers in return for money. For this reason the broadcasting market is not a conventional one in which people purchase their preferred products. People's viewing and listening time is bought and sold.

There is an important consequence for the substantive content of broadcasting: What is provided in a communications market is not the same as what viewers would like to see. Advertisers have some power over the content of communication, for they may withdraw their support from disfavored programming. They may withdraw their support not simply because the programming does not attract viewers, but also because (a) the programming is critical of the particular advertisers, (b) it is critical of commerce in general, (c) it stirs up a controversial reaction from some part of the audience, or (d) it is "depressing" or creates "an unfavorable buying atmosphere." There is a great deal of evidence that advertiser control does affect the content of programming.<sup>131</sup> Controversial programs have been punished; presentations of contested issues, such as abortion, have been affected by advertisers' goals.<sup>132</sup>

In an era of numerous options, the influence of advertising over programming content should be less troublesome, since controversial points of view should find an outlet. Certainly there is no such problem on the Internet. But there will nonetheless continue to be a structural problem in broadcasting markets, since viewers' demand for programs will not be fully responsible for the programs that are actually provided. Many imaginable proposals could help counter this problem. Such proposals should not be found unconstitutional even if consumer sovereignty is the overriding policy goal.<sup>133</sup>

### 2. *"Choice" and Culture*

If we put the questions raised by advertisers to one side, we might urge that there is a decisive argument in favor of the marketplace model and against Madisonianism. The marketplace ideal values "choice," whereas the

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131. See the extensive discussion in BAKER, *supra* note 37, at 44–70; see also SUNSTEIN, *supra* note 12, at 62–66.

132. See BAKER, *supra* note 37, at 55–65.

133. See *id.* at 83–117.

Madisonian alternative can be seen to reflect a form of dangerous paternalism, or disrespect for people's diverse judgments about entertainment options.<sup>134</sup> Perhaps Madisonianism is illiberal insofar as it does not respect the widely divergent conceptions of the good that are reflected in consumption choices.

The argument is certainly plausible. In most arenas, consumers are allowed to choose as they wish, and governmental interference requires special justification. But in this context, at least, the argument from choice is quite unconvincing, for it wrongly takes people's consumption choices as definitive or exhaustive of "choice." In fact the notion of "choice" is a complex one that admits of no such simple understanding.<sup>135</sup> In a democratic society, people make choices as citizens too. They make choices in democratic arenas as well as in stores and before their computers. What those choices are depends on the context in which they are made.

For this reason, the insistence on respect for "choice," as a defense of the marketplace model, sets up the legal problem in a question-begging way. People do make choices as consumers, and these choices should perhaps be respected. But those choices are heavily geared to the particular setting in which they are made—programming consumption. They do not represent some acontextual entity called "choice." In fact there is no such acontextual entity.<sup>136</sup>

The question is not whether or not to respect "choice," but what sorts of choices to respect. More particularly, the question is whether to allow democratic choices to make inroads on consumption choices. In a free society, consumption choices should usually be respected. But the Constitution does not require this result, and in some settings democratic judgments contrary to consumption choices are legitimate. For example, a requirement that broadcasters provide free media time for candidates might well receive broad public support, even if viewers would, at the relevant time, opt for commercial programming.<sup>137</sup> There should be no constitutional barrier to such a requirement.

The central point is that in their capacity as citizens assessing the speech market, people may well make choices, or offer considered judgments, that diverge from their choices as consumers.<sup>138</sup> Acting through their elected representatives, the public may well seek to promote (for example) educational

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134. See, e.g., *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5052 (1987); KRATTENMAKER & POWE, *supra* note 25.

135. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 190–216 (1993).

136. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 78–79 (1995); Amartya Sen, *Internal Consistency of Choice*, 61 *ECONOMETRICA* 495 (1993).

137. Of course it is possible that any regulatory requirements would be futile, since people might simply change the channel, or cease watching at all. This may be a good objection, as a matter of policy, to any particular initiative. The important point is that it is an objection of policy, not of constitutional law.

138. See HOWARD MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY* (1987); Cass R. Sunstein, *Preferences and Politics*, 20 *PHIL. & PUB. AFF.* 3 (1991).

programming, attention to public issues, and diverse views. Perhaps the public—or a majority acting in its democratic capacity—believes that education and discussion of public issues are both individual and collective goods. Any system of expression has cultural consequences; it helps create and sustain a certain kind of culture. Perhaps the public wants to ensure a culture of a certain sort, notwithstanding consumption choices.<sup>139</sup> Perhaps it seeks to protect children and adolescents, and sees regulation of broadcasting as a way of accomplishing that goal. Perhaps people believe that their own consumption choices are less than ideal, and that for justice-regarding or altruistic reasons, or because of their basic commitments and judgments, regulations should force broadcasters or cable operators to improve on existing low-quality fare.

Perhaps people seek and hence choose to ensure something like a political community, not in the sense of a place where everyone believes the same thing, but in the sense of a polity in which people are generally aware of the issues that are important to the future of the polity. Perhaps people think that the broadcasting media should have a degree of continuity with the educational system, in the sense that broad dissemination of knowledge and exposure to different views are part of what citizens in a democratic polity deserve. Perhaps people believe that many citizens do not value certain high-quality programming partly because they have not been exposed to it, and perhaps experiments are designed to see if tastes for such programming can be fueled through exposure.<sup>140</sup>

Would measures stimulated by such thoughts be objectionable, illegitimate, or even unconstitutional? Would they interfere in an impermissible way with something called “choice”? I do not believe so. Surely any such efforts should be policed by courts, so as to ensure that government is not discriminating against or in favor of certain viewpoints. The mere fact that the democratic majority seeks to overcome consumption choices is not legitimating by itself; the democratic judgment may be unacceptable if it involves viewpoint discrimination or content discrimination suggestive of viewpoint bias. But rightly conceived, our constitutional heritage does not disable the public, acting through the constitutional channels, from improving the operation of the speech market in the ways that I have suggested. Whether it should do so is a question to be answered democratically rather than judicially.

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139. Compare the discussion of the right to free speech in RAZ, *supra* note 32, at 131–54.

If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.

*Id.* at 39.

140. Cf. JON ELSTER, *SOUR GRAPES* (1983) (discussing adaptive preferences); Sushil Bikhchandani et al., *A Theory of Fads Fashion, Custom and Culture Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992) (theorizing that because decisions based upon limited information are fragile, relatively unimportant new information may radically shift social equilibria).

### 3. Analogies

An important issue for the future involves the use of old analogies in novel settings. The new technologies will greatly increase the opportunities for intrusive, fraudulent, harassing, threatening, libelous, or obscene speech.<sup>141</sup> With a few brief touches of a finger, a speaker is now be able to communicate to thousands or even millions of people—or to pinpoint a message, perhaps a commercial, harassing, threatening invasive message, to a particular person. A libelous message, or grotesque invasions of privacy, can be sent almost costlessly. Perhaps reputations and lives will be easily ruined or at least damaged. There are difficult questions about the extent to which an owner of a computer service might be held liable for what appears on that service.<sup>142</sup>

At this stage, it remains unclear whether the conventional legal standards should be altered to meet such problems. For the most part, those standards generally seem an adequate start and must simply be adapted to new settings. For purposes of assessing cyberspace, there are often apt analogies on which to draw. In fact the legal culture has no way to think about the new problems except via analogies. The analogies are built into our very language: e-mail, electronic bulletin boards, cyberspace, cyberspaces,<sup>143</sup> and much more.<sup>144</sup>

Thus, for example, ordinary mail provides a promising foundation on which to build the assessment of legal issues associated with electronic mail. It is far from clear that the standards for libelous or fraudulent communication must shift with the new technologies. To be sure, there will be new and somewhat vexing occasions for evaluating the old standards. Judges may not understand the novel situations, especially those involving the Internet. In particular, the low cost of sending and receiving electronic mail, and of sending it to thousands or millions of people, may produce some new developments and put high pressure on old categories. Certainly it is likely that new and unanticipated problems will arise and a degree of judicial caution is therefore desirable in invoking the First Amendment. But it is by no means clear that the basic principles will themselves have to be much changed.

### 4. Access

I have noted that the government has said that “universal access” is one of its goals for the information superhighway. The question of access has

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141. See, e.g., Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995); Volokh, *supra* note 29.

142. See *infra* note 169, discussing S. 314, the proposed Communications Decency Act of 1995.

143. See Branscomb, *supra* note 141.

144. See Lessig, *supra* note 141, at 1744; see also Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Cass R. Sunstein, *Political Conflict and Legal Judgment*, 1996 THE TANNER LECTURES IN HUMAN VALUES (forthcoming).

several dimensions. To some extent it is designed to ensure access to broadcasting options for viewers and listeners—the central problem in *Turner*. Here a particular concern is that poor people should not be deprived of access to a valuable good. Currently the expense of Internet connections is prohibitively high for many families. This may entail a form of disenfranchisement and to some extent the problem is to ensure access for certain speakers who want to reach part of the viewing or listening public. In cyberspace, of course, people are both listeners and speakers.

Perhaps the goal of universal viewer or listener access should be viewed with skepticism. The government does not guarantee universal access to cars, or housing, or food, or even health care. It may seem puzzling to suggest that universal access to information technologies is an important social goal. But the suggestion can be shown to be less puzzling than it appears. Suppose, for example, that a certain network becomes a principal means by which people communicate with their elected representatives; suppose that such communications become a principal part of public deliberation and in that way ancillary to the right to vote. Suppose too that companies engage in a form of “electronic redlining,” in which they bypass poorer areas, both rural and in the inner city.<sup>145</sup> We know that a poll tax is unconstitutional because of its harmful effects on political equality.<sup>146</sup> On a broadly similar principle, universal access to the network might be thought desirable. To be sure, such access would be most unlikely to be constitutionally mandated, since the right to vote is technically not involved. But universal access could be seen to be part of the goal of political equality. More generally, universal access might be necessary if the network is to serve its intended function of promoting broad discussion between citizens and representatives. It is notable that at least seven million Americans, most of whom are poor, lack telephones, and hence are without basic access.<sup>147</sup>

The point might be generalized. For any particular speaker, part of the advantage of having access to a certain means of communication is that everyone, or almost everyone, or a wide range of people, can be reached. The Postal Service, for example, is justified in part on the ground that a national system of mail is necessary or at least helpful for those who send mail; we can be assured that any letter can reach everyone. The claim is controversial. But perhaps a requirement of universal access can be justified not as an inefficient<sup>148</sup> effort to subsidize people who would be without service, but on the quite different ground that universal service is a way of promoting the

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145. Suneel Ratan, *A New Divide Between Haves and Have-Nots?*, TIME, Spring 1995 (Special Issue), at 25, 26.

146. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966).

147. See Ratan, *supra* note 145, at 26.

148. It is likely to be inefficient when compared with subsidies for people who are unable to afford access.

communicative interests of those who already have service. The interests of the latter group may well be promoted by ensuring that they can reach everyone, or nearly everyone.

Arguments of this kind have been used throughout the history of telecommunications regulation. For most of the twentieth century, there have been cross-subsidies, as local companies with local monopolies have charged high prices to certain customers (usually businesses) with which they subsidized less profitable services. Perhaps a similar model would make sense for modern technologies. The issue is already receiving considerable public attention.<sup>149</sup>

There are, however, significant inefficiencies in this model of cross-subsidization,<sup>150</sup> and a system of open-ended competition may well be better than one based on universal access. It may be that open-ended competition will provide universal access in any case, or something very close to it. Or it may be that open-ended competition, combined with selective subsidies, would be better than the regulatory approach. This question cannot easily be answered in the abstract. Certainly debate over universal access should not be resolved by constitutional fiat. This is an area for public debate and a large degree of experimentation.

##### 5. *Incentives Rather than Command-and-Control*

In general, any regulatory controls should take the form of flexible incentives rather than rigid commands. Command-and-control systems are usually ineffective in achieving their own goals; they tend to promote interest-group power, in which well-organized private groups are able to use governmental authority to redistribute wealth or opportunities in their favor; they also tend to be inefficient.<sup>151</sup>

I cannot discuss this issue in detail here, but the explosion of new technologies reinforces the point. It is predictable that owners of some services will attempt to obtain governmental aid to disadvantage actual or potential competitors.<sup>152</sup> Especially in an era of rapid and only partly foreseeable technological change, the government's basic duty is to provide a framework for competitive development,<sup>153</sup> rather than specification of end-states. Any

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149. See Vice President Gore's suggestions, outlined in RHEINGOLD, *supra* note 6, at 11.

150. See STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

151. See generally Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 13 *COLUM. J. ENVTL. L.* 171 (1988). A vigorous popular treatment is PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1994). FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960), can well be read as a sustained attack on command-and-control regulation, and what Hayek says bears directly on efforts to regulate emerging technologies.

152. See, e.g., *The Cable Act*, 47 U.S.C. §§ 534–535 (Supp. V 1993); *supra* text accompanying notes 54–55.

153. This is a Hayekian point connected with the difficulty of foreseeing the future. See HAYEK, *supra* note 151.

such specifications will likely prove counterproductive in light of developments that cannot now be predicted.

This is not to say that government regulation has no place, or even that government should restrict itself to the task of ensuring well-functioning markets. But even good Madisonians should insist that rigid dictates ought to be avoided. Regulation will do far better if it takes the form of incentives rather than mandates. Consider, as possible forerunners of future approaches, the FCC's use of auction systems accompanied by the grant of "points" toward licensing<sup>154</sup> for preferred licensees. Consider too the use of government subsidies to public broadcasting or to certain high-quality programs, or the transfer of resources from commercial broadcasters for the benefit of noncommercial, educational, or public-affairs programming. Initiatives of this sort would not mandate particular results but instead would create pressures to improve the speech market.

### C. *Law*

The ultimate shape of constitutional constraints on regulation of the electronic media cannot be foreseen. Too many new possibilities will come into view. Too many distinctions will become relevant. Consider, for example, the fact that for many dozens of years, there has been a clear difference between two different kinds of communication. The first is ordinary broadcasting or publishing, in which an owner makes available a certain range of communications; offers that range of communications as an indivisible package for hundreds, thousands, or millions of subscribers; and sells advertising time for commercial interests. The second involves the mail, in which one person typically sends a message to another, or in which one person might send a message to a group of people; in any case mail involves highly differentiated, rather than indivisible, communication, in the sense that no single "package" is made available to wide ranges of people. Moreover, no advertisers need be involved. Many of the complexities in free speech law have arisen from this distinction, though the implications of the distinction are of course sharply contested.

New technologies may weaken or even undo the distinction between these two categories. In the long-term future, the "mail" analogy may become the more apposite one, as it becomes simpler and cheaper for a person to send communications to any particular person, or to a large group of people, on such terms as he chooses. Communications may decreasingly come in an indivisible package, and increasingly take the particular form that the particular actors choose. Perhaps in the future, "broadcasting" will increasingly have this

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154. Consider the FCC's quite promising auction system, in which points are granted to minority and women applicants. See John McMillan, *Selling Spectrum Rights*, J. ECON. PERSP., Summer 1994, at 145.



characteristic. Often the purchaser of the relevant information will pay for it without the intermediation of advertisers.<sup>155</sup> In such a future, the constitutional issues will take on different dimensions. A key question will be the extent to which the owner or manager of the "mail" may be held liable for injuries that occur as a result of use of some service. It will be plausible to say that just as the United States and Federal Express are not liable for harms caused by packages they carry, so too the owner of an electronic service ought not to pay damages for harms that owners cannot reasonably be expected to prevent or control. But it is far too soon to offer particular judgments on the issues that will arise.

It is nonetheless possible to describe certain categories of regulation and to set out some general guidelines about how they might be approached. I have suggested that existing law provides principles and analogies on which it makes sense to draw. An exploration of new problems confirms this suggestion. It shows that current categories can be invoked fairly straightforwardly to make sense of likely future dilemmas.

A large lesson may emerge from the discussion. Often participants in legal disputes, and especially in constitutional disputes, disagree sharply with respect to high-level, abstract issues; the debate between Madisonians and marketplace advocates is an obvious illustration. But sometimes such disputants can converge, or narrow their disagreement a great deal, by grappling with highly particular problems. In other words, debate over abstractions may conceal a potential for productive discussion and even agreement over particulars.<sup>156</sup> Perhaps this is a strategy through which we might make much progress in the next generation of free speech law.

### 1. *Requiring Competition*

Many actual and imaginable legislative efforts are designed to ensure competition in the new communications markets. There is no constitutional problem with such efforts.<sup>157</sup> The only qualification is that some such efforts might be seen as subterfuge for content regulation, disguised by a claimed need to promote monopoly; but this should be a relatively rare event. If government is genuinely attempting to prevent monopolistic practices, and to offer a structure in which competition can take place, there is no basis for constitutional complaint. Here First Amendment theorists of widely divergent views might be brought into agreement.

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155. It is now impossible to know exactly what sorts of communications packages will be provided.

156. See Sunstein, *supra* note 94.

157. See also KRATTENMAKER & POWE, *supra* note 25 (favoring legal efforts to encourage competition).

## 2. *Subsidizing New Media*

It is predictable that government might seek to assist certain technologies that offer great promise for the future. Some such efforts may in fact be a result of interest-group pressure. But in general, there is no constitutional obstacle to government efforts to subsidize preferred communications sources. Perhaps government believes that some technological innovations are especially likely to do well, or that they could receive particularly valuable benefits from national assistance. At least so long as there is no reason to believe that government is favoring speech of a certain content, efforts of this kind are unobjectionable as a matter of law.<sup>158</sup> They may be objectionable as a matter of policy, since government may make bad judgments reflecting confusion or factional influence; but that is a different issue.

## 3. *Subsidizing Particular Programming or Particular Broadcasters*

In her dissenting opinion in *Turner*, Justice O'Connor suggested that the appropriate response to government desire for programming of a certain content is not regulation but instead subsidization.<sup>159</sup> This idea fits well with the basic model for campaign finance regulation, set out in *Buckley v. Valeo*.<sup>160</sup> It also fits with the idea, found in *Rust v. Sullivan*,<sup>161</sup> that the government is unconstrained in its power to subsidize such speech as it prefers. Hence there should be no constitutional objection to government efforts to fund public broadcasting, to pay for high-quality fare for children, or to support programming that deals with public affairs.<sup>162</sup> Perhaps government might do this for certain uses of the Internet.

To be sure, it is doubtful that *Rust* would be taken to its logical extreme. Could the government fund the Democratic Convention but not the Republican Convention? Could the government announce that it would fund only those public-affairs programs that spoke approvingly of current government policy? If we take the First Amendment to ban viewpoint discrimination, funding of this kind should be held to be improperly motivated. On the other hand, government subsidies of educational and public-affairs programming need not

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158. This follows from *Rust v. Sullivan*, 500 U.S. 173 (1991).

159. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2478 (1994) (O'Connor, J., dissenting).

160. 424 U.S. 1 (1976)

161. 500 U.S. 173 (1991).

162. There is a question of policy in the background, made highly visible by controversy over government funding of the Corporation for Public Broadcasting and the National Endowment for the Humanities. In principle, such funding is justified in light of the "public good" features of the relevant products and in light of the possibility that the funded sources can increase opportunities for preference formation by providing greater exposure to high-quality material. See ANDERSON, *supra* note 135, at 149. But the ultimate value of funding depends on a range of more practical and empirical issues that cannot be decided *a priori*, including the actual products that result, the opportunities to provide private funding instead, and the alternative use of government money.

raise serious risks of viewpoint discrimination. It therefore seems unexceptionable for government, short of viewpoint discrimination, to subsidize those broadcasters whose programming it prefers, even if any such preference embodies content discrimination. So too, government might promote “conversations” or fora on e-mail that involve issues of public importance, or that attempt to promote educational goals for children or even adults.<sup>163</sup>

4. *Leaving Admittedly “Open” Channels Available to Others Who Would Not Otherwise Get Carriage*

Suppose that a particular communications carrier has room for five hundred channels; suppose that four hundred channels are filled, but that one hundred are left open. Would it be legitimate for government to say that the one hundred must be filled by stations that would otherwise be unable to pay for carriage? Let us suppose that the stations would be chosen through a content-neutral system, such as a lottery. From the First Amendment point of view, this approach seems acceptable. The government would be attempting to ensure access for speakers who would otherwise be unable to reach the audience. It is possible that as a matter of policy, government should have to provide some payment to the carrier in return for the access requirement. But there does not seem to be a First Amendment problem.

5. *Requiring Carriers To Be Common Carriers for a Certain Number of Stations, Filling Vacancies with a Lottery System or Timesharing*

In her dissenting opinion in *Turner*, Justice O'Connor suggested the possibility that carriers could be required to set aside certain channels to be filled by a random method.<sup>164</sup> The advantage of this approach is that it would promote access for people who would otherwise be denied carriage, but without involving government in decisions about preferred content. This approach should raise no First Amendment difficulties.

6. *Imposing Structural Regulation Designed Not To Prevent a Conventional Market Failure, But To Ensure Universal or Near-Universal Consumer Access to Networks*

The protection of broadcasters in *Turner* was specifically designed to ensure continued viewer access to free programming. Notably, the Court permitted government to achieve this goal through regulation rather than

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163. See *supra* text accompanying notes 112–15 (discussing role of new technologies in connection with elections).

164. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2480 (O'Connor, J., dissenting).

through subsidy. Of course subsidy is the simpler and ordinarily more efficient route. If government wants to make sure that all consumers have access to communications networks, why should government not be required to pay to allow such access, on a kind of analogue to the food stamp program? The ordinary response to a problem of access is not to fix prices but instead to subsidize people who would otherwise be without access. The *Turner* Court apparently believed that it is constitutionally acceptable for the government to ensure that industry (and subscribers), rather than taxpayers, provide the funding for those who would otherwise lack access.

The precise implications of this holding remain to be seen. It is impossible to foresee the range of structural regulations that might be proposed in an effort to ensure that all or almost all citizens have access to free programming or to some communications network, including any parts of the "informational superhighway." Some such regulations might in fact be based on other, more invidious motives, such as favoritism toward a particular set of suppliers; as we have seen, this may well be true of the measure in *Turner* itself. The *Turner* decision means that courts should review with some care any governmental claim that regulation is actually based on an effort to promote free access. But the key point here is that if the claim can be made out on the facts, structural regulation should be found acceptable.

#### 7. *Protecting Against Obscene, Libelous, Violent, Commercial, or Harassing Broadcasting or Messages*

New technologies have greatly expanded the opportunity to communicate obscene, libelous, violent, or harassing messages—perhaps to general groups via stations on (for example) cable television, perhaps to particular people via electronic mail.<sup>165</sup> Invasions of privacy are far more likely. The Internet poses special problems on these counts. As a general rule, any restrictions should be treated like those governing ordinary speech, with ordinary mail providing the best analogy. If restrictions are narrowly tailored, and supported by a sufficiently strong record, they should be upheld.

Consider in this regard the highly publicized case involving "cyberporn" at the University of Michigan.<sup>166</sup> A student is alleged to have distributed a fictional story involving a fellow student, explicitly named, who was, in the story, raped, tortured, and finally killed. The first question raised here is whether state or federal law provides a cause of action for conduct of this sort. Perhaps the story amounts to a threat, or a form of libel, or perhaps the most plausible state law claim would be based on intentional infliction of emotional

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165. See Branscomb, *supra* note 141.

166. See Stephen Levy, *TechnoMania*, NEWSWEEK, Feb. 27, 1995, at 24, 29; Peter H. Lewis, *Writer Arrested After Sending Violent Fiction over Internet*, N.Y. TIMES, Feb. 11, 1995, at A10.

distress. The next question is whether, if a state law claim is available, the award of damages would violate the First Amendment. At first glance it seems that the question should be resolved in the same way as any case in which a writer uses a real person's name in fiction of this sort. And it certainly does not seem clear that the First Amendment should prohibit states from awarding damages for conduct of this kind, so long as no political issue is involved.<sup>167</sup> Perhaps the ease of massive distribution of such materials, which can be sent to much of the world with the touch of a button, argues in favor of loosening the constitutional constraints on compensatory damages.

What of a regulatory regime designed to prevent invasion of privacy, libel, unwanted commercial messages, and obscenity,<sup>168</sup> harassment, or infliction of emotional distress? Some such regulatory regime will ultimately make a great deal of sense. The principal obstacles are that the regulations should be both clear and narrow. It is easy to imagine a broad or vague regulation, one that would seize upon the sexually explicit or violent nature of communication to justify regulation that is far broader than necessary. Moreover, it is possible to imagine a situation in which liability was extended to any owner or operator who could have no knowledge of the particular materials being sent.<sup>169</sup> The underlying question, having to do with efficient risk allocation, involves the extent to which a carrier might be expected to find and to stop unlawful messages; that question depends upon the relevant technology.

Consider more particularly possible efforts to control the distribution of sexually explicit materials on the Internet. Insofar as the government seeks to ban materials that are technically obscene, and imposes civil or criminal liability on someone with specific intent to distribute such materials, there should be no constitutional problem. By hypothesis, these materials lack constitutional protection, and materials lacking constitutional protection can be banned in cyberspace as everywhere else. On the other hand, many actual and imaginable bills would extend beyond the technically obscene, to include (for example) materials that are "indecent," or "lewd," or "filthy."<sup>170</sup> Terms of this sort create a serious risk of unconstitutional vagueness or overbreadth.<sup>171</sup> At least at first glance, they appear unconstitutional for that reason.

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167. See *Hustler v. Falwell*, 485 U.S. 46, 51–52 (1988).

168. See S. 314, 104th Cong., 1st Sess. § 2(a) (1995), which would have extended liability to telecommunications providers of obscene materials.

169. In January 1995, for example, Senator Jim Exon (D-Neb.) introduced S. 314, the Communications Decency Act of 1995, in the U.S. Senate. In an effort to control digital pornography, it originally would have made all telecommunications providers doing business in the United States (from the telephone companies, all the way down to offices that use local area networks) liable for the content of anything sent over their networks. As it emerged from committee, S. 314 exempted carriers from liability. *Id.*; see also Peter H. Lewis, *Despite a New Plan for Cooling It Off, Cybersex Stays Hot*, N.Y. TIMES, Mar. 26, 1995, at 1, 34 (discussing S. 314 and its potential unconstitutionality).

170. See, e.g., S. 314, 104th Cong., 1st Sess. (1995).

171. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126–31 (1989); *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

The best justification for expansive terms of this kind would be to protect children from harmful materials. It is true that the Internet contains pornography accessible to children, some of it coming from adults explicitly seeking sexual relations with children. There is in fact material on the Internet containing requests to children for their home addresses.<sup>172</sup> Solicitations to engage in unlawful activity are unprotected by the First Amendment, whether they occur on the Internet or anywhere else. For this reason, regulation designed to prevent these sorts of requests should not be held unconstitutional.

But when government goes beyond solicitation, and bans "indecent" or "filthy" material in general, the question is quite different. Here a central issue is whether the government has chosen the least restrictive means of preventing the relevant harms to children. In a case involving "dial-a-porn," for example, the Court struck down a ban on "indecent" materials on the ground that children could be protected in other ways.<sup>173</sup> On the Madisonian view, this outcome is questionable, since "dial-a-porn" ranks low on the First Amendment hierarchy. But under existing law, it seems clear that in order to support an extension beyond obscenity, Congress would have to show that less restrictive alternatives would be ineffectual. The question then becomes a factual one: What sorts of technological options exist by which parents or others can provide the relevant protection? To answer this question, it would be necessary to explore the possibility of creating "locks" within the Internet, for use by parents, or perhaps for use by those who write certain sorts of materials.<sup>174</sup>

Different questions would be raised by the imposition of civil or criminal liability not on the distributors having specific intent to distribute, but on carriers who have no knowledge of the specific materials at issue, and could not obtain such knowledge without considerable difficulty and expense. It might be thought that the carrier should be treated like a publisher, and a publisher can of course be held liable for obscene or libelous materials even if the publisher has no specific knowledge of the offending material. But in light of the relatively low costs of search in the world of magazine and book publishing, it is reasonable to think that a publisher should be charged with having control over the content of its publications. Perhaps the same cannot be said for the owner of an electronic mail service. Here the proper analogy might instead be the carriage of mail, in which owners of services are not held criminally or civilly liable for obscene or libelous materials. The underlying theory is that it would be unreasonable to expect such owners to inspect all the materials they transport, and the imposition of criminal liability, at least, would have an unacceptably harmful effect upon a desirable service involving the

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172. James Coates, *Access to Answers*, CHI. TRIB., Mar. 27, 1995, § 4, at 1, 4.

173. *Sable Communications*, 492 U.S. at 128-31.

174. See 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, 1632-34 (1995).

distribution of a great deal of protected speech. If carriers were held liable for distributing unprotected speech, there would inevitably be an adverse effect on the dissemination of protected speech too. In other words, the problem with carrier liability, in this context, is that it would interfere with protected as well as unprotected speech.

How do these points bear on the First Amendment issue with respect to the Internet? Some of the services that provide access to the Internet should not themselves be treated as speakers; they are providers of speech, but their own speech is not at issue. This point is closely related to the debate in *Turner* about the speech status of cable carriers. But whether or not a carrier or provider is a speaker, a harmful effect on speech would raise First Amendment issues. We can see this point with an analogy. Certainly it would not be constitutional to say that truck owners will be criminally liable for carrying newspapers containing articles critical of the President. Such a measure would be unconstitutional in its purposes and in its effects, even if the truck owners are not speakers. From this we can see that a criminal penalty on carriers of material that is independently protected by the First Amendment should be unconstitutional. Thus a criminal penalty could not be imposed for providing "filthy" speech, at least if "filthy" speech is otherwise protected.

But a penalty imposed on otherwise unprotected materials raises a different question. Suppose that the government imposes criminal liability on carriers or providers of admittedly obscene material on the Internet. The adverse effect on unprotected speech should not by itself be found to offend the Constitution, even if there would be a harmful economic effect, and even unfairness, for the provider of the service. Instead the constitutional question should turn on the extent of the adverse effects on the dissemination of materials that are protected by the Constitution. If, for example, the imposition of criminal liability for the distribution of unprotected speech had serious harmful effects for the distribution of protected speech, the First Amendment issue would be quite severe. But that question cannot be answered in the abstract; it depends on what the relevant record shows with respect to any such adverse effects.

To answer that question, we need to know whether carrier liability, for unprotected speech, has a significant adverse effect on protected speech as well. We need to know, in short, whether the proper analogy is to a publisher or instead to a carrier of mail. It is therefore important to know whether a carrier could, at relatively low expense, filter out constitutionally unprotected material, or whether, on the contrary, the imposition of criminal liability for unprotected material would drive legitimate carriers out of business, or force them to try to undertake impossible or unrealistically expensive "searches." The answer to this question will depend in large part on the state of technology.

8. *Imposing Content-Based Regulation Designed To Ensure Public-Affairs and Educational Programming*

It can readily be imagined that Congress might seek to promote education via regulation or subsidy of new media. It might try to ensure attention to public affairs. Suppose, for example, that Congress sets aside a number of channels for public-affairs and educational programming, on the theory that the marketplace provides too much commercial programming. This notion has in fact been under active consideration in Congress. Thus a recent bill would have required all telecommunications carriers to provide access at preferential rates to educational and health care institutions, state and local governments, public broadcast stations, libraries and other public entities, community newspapers, and broadcasters in the smallest markets.<sup>175</sup>

*Turner* certainly does not stand for the proposition that such efforts are constitutional. By hypothesis, any such regulation would be content-based. It would therefore meet with a high level of judicial skepticism. On the other hand, *Turner* does not authoritatively suggest that such efforts are unconstitutional. The Court did not itself say whether it would accept content discrimination designed to promote Madisonian goals. Certainly the opinion suggests that the government's burden would be a significant one. But it does not resolve the question.

It is notable that Justice O'Connor's opinion appears quite sensible on this point, and she leaves the issue open.<sup>176</sup> As I have noted, her principal argument is that the "must-carry" rules are too crude. Certainly crudely tailored measures give reason to believe that interest-group pressures, rather than a legitimate effort to improve educational and public-affairs programming, are at work. But if the relevant measures actually promote Madisonian goals, they should be upheld. There is of course reason to fear that any such measures have less legitimate purposes and functions, and hence a degree of judicial skepticism is appropriate. But narrow measures, actually promoting those purposes, are constitutionally legitimate.

## VI. MADISON IN CYBERSPACE?

Do Madisonian ideals have an enduring role in American thought about freedom of speech? The Supreme Court has not said for certain; its signals are quite mixed; and the existence of new technologies makes the question different and far more complex than it once was. It is conceivable that in a world of newly emerging and countless options, the market will prove literally

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175. S. 1822, 103d Cong., 2d Sess. § 103(a) (1994) (Communications Act of 1994).

176. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2478 (O'Connor, J., dissenting).



unstoppable, as novel possibilities outstrip even well-motivated government controls.

If so, this result should not be entirely lamented. It would be an understatement to say that a world in which consumers can choose from limitless choices has many advantages, not least from the Madisonian point of view. If choices are limitless, people interested in politics can see and listen to politics; perhaps they can even participate in politics, and in ways that were impossible just a decade ago. But that world would be far from perfect. It may increase social balkanization. It may not promote deliberation, but foster instead a series of referenda in cyberspace that betray constitutional goals.

My central point here has been that the system of free expression is not an aimless abstraction. Far from being an outgrowth of neoclassical economics, the First Amendment has independent and identifiable purposes. Free speech doctrine, with its proliferating tests, distinctions, and subparts, should not lose touch with those purposes. Rooted in a remarkable conception of political sovereignty, the goals of the First Amendment are closely connected with the founding commitment to a particular kind of polity: a deliberative democracy among informed citizens who are political equals. It follows that instead of allowing new technologies to use democratic processes for their own purposes, constitutional law should be concerned with harnessing those technologies for democratic ends—including the founding aspirations to public deliberation, citizenship, political equality, and even a certain kind of virtue. If the new technologies offer risks on these scores, they hold out enormous promise as well. I have argued here that whether that promise will be realized depends in significant part on judgments of law, including judgments about the point of the First Amendment.