TECHNOLOGIES OF CONTROL AND THE FUTURE OF THE FIRST AMENDMENT

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INTRODUCTION

The Supreme Court's landmark decision in *FCC v. Pacifica Foundation* has long served as the jurisprudential basis for holding that restrictions on broadcast indecency do not violate the First Amendment.[1] The technological context in which *Pacifica* arose allowed the Court to gloss over the tension between two rather disparate rationales. Those who take a civil libertarian view of free speech could support the decision on the grounds that viewers' and listeners' inability to filter out unwanted speech exposed them to content that they did not wish to see or hear.[2] At the same time, *Pacifica* also found support from those who more paternalistically regard indecency as low value (if not socially harmful) speech that is unworthy of full First Amendment protection.[3] The lack of any effective means through which audiences could exercise control over the content to which they were exposed obviated the need for courts and commentators to resolve the tension between these two disparate perspectives.

More recently, technological developments have given audiences greater control over the content that they see and hear. Innovations such as the V-chip allow parents to exercise effective control over indecent speech transmitted over the airwaves.[4] Filtering technologies, deployed at the edge and in the core of the network, are enhancing end users' ability to keep out threats and unwanted content on the Internet.[5] The fact that audiences are now in a better position to exercise control over the content to which they are exposed has introduced a wedge between those who supported the constitutionality of indecency regulations out of a desire to enhance individual autonomy and more conservative voices who wish to restrict speech in the name of promoting the public good. At the same time, commentators on the political left have begun to question

1. FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978); *see* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009) ("[W]e have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expression may not be forbidden.").

2. *See infra* text accompanying notes 9-14.

3. *See infra* note 21 and accompanying text.

4. *See infra* text accompanying note 169.

5. *See infra* text accompanying note 166.

whether continued support for the classic liberal vision of free speech may be interfering with the advancement of progressive values.[6]

The return of *FCC v. Fox Television Stations, Inc.* to the Supreme Court of the United States for a second time may provide the opportunity to resolve this long-standing controversy. When the case first appeared before the Court, the Justices upheld the Federal Communications Commission's (FCC) decision to abandon its previous policy of enforcing broadcast indecency restrictions only against deliberate and repetitive uses of profanity purely as a matter of administrative law and remanded the case to the Second Circuit so that it could address the underlying constitutional issues.[7] Now that the Supreme Court has granted certiorari in the case for a second time, the Court will finally be in a position to address the underlying First Amendment issues.[8]

This Article offers a qualified defense of the libertarian vision of free speech associated with classical liberal theory. Not only would deviating from the traditional view require a revolution in doctrine; it would also bring the First Amendment into conflict with fundamental tenets of liberal and democratic theory to a greater extent than is generally recognized.

I. THE CLASSICAL LIBERAL VISION OF FREE SPEECH

The traditional conception of free speech embodied in the First Amendment doctrine articulated by the Supreme Court is best understood as being founded in classical liberal theory. At the risk of oversimplifying, classical liberal theory posits that individuals are independent moral agents capable of making up their own minds.[9] In terms of free speech, this commitment to independent moral agency entails that the state must respect individuals' decisions

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6. *See, e.g.*, J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 394-414.

7. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).

8. FCC v. Fox Television Stations, Inc., 131 S. Ct. 3065 (2011).

9. *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 35 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785); JOHN STUART MILL, *On Liberty*, *in* THREE ESSAYS 5, 17-18, 124-26 (Robert Wollheim ed., Oxford Univ. Press 1975) (1859).

about what to say[10] as well as their choices about the speech to which they wish to be exposed.[11]

Many commentators similarly view this liberty-oriented commitment to free speech as inherent in our society's commitment to democracy. Like liberalism more generally, democracy is premised on the belief that individuals are capable of making judgments that affect their own lives.[12] Rejecting people's ability to make their own decisions about the speech to which they wish to be exposed thus contradicts the very premise on which democratic systems of government are based.[13] Indeed, if individuals' judgments were not worthy of respect, there would be little reason to respect the results of elections.[14]

As such, independent moral agency is more properly regarded as a foundational postulate than as an empirical claim. In other words, it is more properly regarded as a quality theoretically ascribed to individuals under liberal and democratic theory as a necessary concomitant of their status as repositories of liberty than as a descriptive quality that may or may not exist empirically.[15]

In addition, classical liberalism reflects an inherent distrust of state authority.[16] As an initial matter, classical liberalism necessarily presupposes the existence of a sphere of purely private action into which the government cannot intrude.[17] Classical liberalism also regards the individual as being logically prior to the state and

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10. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 991-92 (1978).

11. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 620-21 (1982).

12. *See* ROBERT POST, CONSTITUTIONAL DOMAINS 277-78, 281-82 (1995).

13. *See, e.g.*, *id.*; MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 19-29 (1984).

14. *See* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 324 (2003).

15. *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878, 890-93 (1994); *see also* POST, *supra* note 12, at 284 ("[T]he autonomy *vel non* of the subject of legal regulation is presupposed in the very structure of law by which that subject is regulated. From the point of view of the designer of the structure, therefore, the presence or absence of autonomy functions as an axiomatic and foundational principle.").

16. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 20-21 (1960); JOSEPH RAZ, THE MORALITY OF FREEDOM 410, 418-19 (1986); *see also* TOM L. BEAUCHAMP, PHILOSOPHICAL ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY 268 (3d ed. 2001) ("Liberalism embodies an attitude of distrust toward use of the coercive power of the state.").

17. POST, *supra* note 12, at 280; ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 124 (1969).

assumes that individuals constitute the state through some type of social contract.[18] In other words, classical liberalism dictates that the individuals are the subjects and the government the object, not the other way around.

The academic literature has launched two principal lines of attack on the classical liberal vision of free speech. One prong criticizes the continued reliance on individual preferences.[19] The other argues that private actors pose a greater threat to free speech than the government.[20]

II. THE CRITIQUE OF PREFERENCES

Under the classical liberal view, end users' enhanced ability to exclude content they do not wish to see or hear weakens arguments that restrictions of particular types of speech are constitutional. The development of effective filters increases individuals' ability to ensure that they are exposed only to the content to which they wish to be exposed. Some scholars have suggested, however, that technologies that give individuals greater control over media content are not necessarily a cause for celebration. For example, Cass Sunstein has argued that the mix of speech individuals should see ought to reflect public values and not just their personal choices and that low-value speech such as pornography should receive a lesser degree of First Amendment protection.[21] Sunstein further warned that allowing individuals to personalize the content they receive risks limiting the information that they receive to what Nicholas Negroponte called the "Daily Me," comprised exclusively of subjects in which they are already interested and opinions with which they are already inclined to agree.[22] Lawrence Lessig raised the related concern that the ability to limit people's exposure to speech that accords with their preferences will fragment audiences and expose

18. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52-55 (C.B. Macpherson ed., 1980) (1690).

19. *See infra* Part II.

20. *See infra* Part III.

21. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 73-74, 210-26 (1st paperback ed. 1995); Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 31-32 (1991).

22. *See* CASS R. SUNSTEIN, REPUBLIC.COM 2.0, at 3-4 (2007).

them only to speech that reinforces their preexisting views of the world.[23]

The argument for disregarding or disempowering individual preferences is based on the claim that preferences are not simply the exclusive product of each individual's autonomy. Instead, they are as much the product of the speech that already exists and the social structure that created that speech.[24] From this point of view, forcing people to deviate from what they believe are their preferences is not a violation of individual autonomy because those preferences derive more from the media to which people have been exposed than the "freely produced desire" that would exist if "more and better choices [were] made available."[25] Conversely, honoring existing preferences that are largely shaped by the nature of the content that already exists would amount to nothing more than a circular perpetuation of the status quo.

Critiquing preferences in this manner leads to a fairly illiberal transformation in the justification for governmental intervention.[26] From this perspective, the problem is not that individuals are unable to see only what they want; rather, the problem is that they want the wrong things.[27] Put another way, regulation is no longer about market failure; it is about audience failure.

Overriding individual preferences in this manner is flatly inconsistent with classical liberal theory. Forcing audiences to experience content that they would not willingly choose contradicts the premise inherent in liberalism and democratic theory that individuals are able to make their own decisions about the content they consume.

A. Idealized Preferences

How then can one justify forcing individuals to deviate from their preferences? The classic solution is to argue that the coerced outcome accords with the preferences that the individual would have

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23. *See* LAWRENCE LESSIG, CODE: VERSION 2.0, at 260-61 (2006).

24. SUNSTEIN, *supra* note 21, at 73-74.

25. *Id.* at 74; *see also* LESSIG, *supra* note 23, at 260 (noting that Sunstein "rejects the notion that the mix of speech we see should solely be a function of individual choice" and "would reject any architecture that makes consumer choice trump").

26. *See* Yoo, *supra* note 14, at 322-24.

27. *Id.* at 323-24.

held had she existed in a more idealized state of the world.[28] Distilling such idealized preferences is precisely the purpose of Rawls's "veil of ignorance," which provides a mechanism for reconciling more intrusive government policies with the central commitments associated with liberalism.[29]

The challenge is identifying a coherent set of substantive principles and an institutional setting by which this idealized set of preferences can be identified and defined. The normative attractiveness of any such regime thus depends on how clearly articulated and analytically well-defended is any particular method for ascertaining what people would have wanted had they been exposed to a richer set of stimuli. To date, however, the mechanisms proffered for identifying idealized preferences have been frustratingly thin. The lack of specificity runs the risk of providing the intellectual cover for the imposition of naked normative preferences. And as Isaiah Berlin noted, any error in determining what people ought to want can lead to the decidedly illiberal result of coercing them to act in accordance with what some third party asserts are their true best interests.[30] The result comes chillingly close to the Rousseauian notion of being "forced to be free."[31]

The question, then, is not whether the critique of preferences is true, but rather whether obeying preferences that are actually held is normatively more or less attractive than the proffered alternative. Although it is theoretically possible that such a normative argument might be compelling, thus far no one has articulated an approach for determining ideal preferences.

B. Supreme Court Doctrine

Consistent with classical liberal theory, the Supreme Court has consistently overturned governmental attempts to override individual preferences and to restrict access to speech that many regard as

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28. *See* JOHN STUART MILL, UTILITARIANISM 8-17 (George Sher ed., Hackett Publ'g Co. 1979) (1861) (defining liberty as the realization of the desires that a person would have held if she had been exposed to a more complete range of experiences).

29. *See* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

30. BERLIN, *supra* note 17, at 131-34.

31. JEAN-JACQUES ROUSSEAU, *The Social Contract*, *in* THE SOCIAL CONTRACT AND DISCOURSES 163, 177 (G. D. H. Cole trans., 1973) (1762).

low value. The most recent example is *Brown v. Entertainment Merchants Ass'n*, decided on June 27, 2011, in which the Court struck down a California statute requiring the labeling of violent video games and preventing their sale to minors.[32] The Court began by noting that "[u]nder our Constitution, 'esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree even with the mandate or approval of a majority.'"[33] The constitutionality of the statute was further undermined by the existence of a voluntary rating system that enabled parents to filter out any content.[34] In so reasoning, the Court flatly rejected the position that the government can override individual preferences and embraced the classical liberal vision of free speech focusing on individual control.

Just the previous year, in *United States v. Stevens*, the Court similarly rejected a federal statute designed to criminalize "crush videos," which typically depict killing animals by stepping on them.[35] In so holding, the Court rejected arguments that the First Amendment permitted restricting such speech because the legislature concluded that it lacked expressive value. The First Amendment presumptively protects all speech, not just that speech that the Court determines is sufficiently worthwhile under an ad hoc balancing test.[36]

Similarly, in *Ashcroft v. Free Speech Coalition*, the Court declared unconstitutional an attempt to criminalize virtual child pornography, that is, child pornography generated through the use of computer imaging rather than actual models.[37] The fact that such depictions are widely regarded as low value speech did not justify the restriction. The Court noted, "the First Amendment bars the government from dictating what we see or read or speak or hear."[38] Moreover, the fact that society may regard some speech as offensive

32. 131 S. Ct. 2729 (2011).

33. *Id.* at 2733 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000)).

34. *Id.* at 2740-41.

35. 130 S. Ct. 1577 (2010).

36. *Id.* at 1585.

37. 535 U.S. 234, 250 (2002).

38. *Id.* at 245.

does not justify restricting it.[39] Although the Court had previously upheld a ban on child pornography produced by photographing actual children, it did so not because of its assessment of the value of the images but rather because of the adverse impact that producing child pornography can have on children. The restrictions were constitutional because "the production of the work, not its content, was the target of the statute."[40] This reasoning, however, did not extend to justify prohibiting virtual child pornography, which "records no crime and creates no victims by its production."[41]

The Supreme Court's recent First Amendment decisions thus betray little willingness to uphold restrictions that seek to override individuals' preferences. Consistent with liberal theory, whenever the government has attempted to displace individual control and substitute its judgment in the name of some greater good, the Court has held the government's action unconstitutional. The line of authority culminating in *Brown v. Entertainment Merchants Ass'n* and the additional decisions discussed below[42] has taken a particularly dim view of such regulations when filtering technologies existed that enabled individuals to determine for themselves the speech to which they are exposed. The overall run of Supreme Court decisions thus appears to be consistent with classical liberal theory and to contradict any vision of the First Amendment that would permit the government to override individuals' actual preferences in the name of furthering some externally determined conception of which speech is worthwhile.

III. THE THREAT OF "PRIVATE CENSORSHIP" AND THE CRITIQUE OF THE STATE ACTION DOCTRINE

Other scholars have taken a somewhat different tack. Instead of attacking audiences' preferences, they argued that censorship by private intermediaries can be as dangerous to free speech as censorship by the government. In making such arguments, these scholars

39. *Id.* Indeed, the Court recognized that "some works in this category might have significant value." *Id.* at 251 (citing New York v. Ferber, 458 U.S. 747, 761 (1982)).

40. *Id.* at 249.

41. *Id.* at 250.

42. *See infra* notes 149-75 and accompanying text.

tapped into the long tradition, most closely associated with the Legal Realist movement of the 1920s and 1930s,[43] critiquing the public-private distinction and arguing that private power can be an even greater threat to liberty than public power.[44]

The key doctrinal obstacle to these arguments is the state action doctrine. The state action doctrine has long been regarded as a central tenet of classical liberal thought, which postulates the existence of an area of individual freedom that is logically prior to the state and into which the state cannot intrude.[45] In this way, the state action doctrine protects the individual from the coercive power of the state while ensuring at the same time that the private autonomy implicit in liberal theory is not subjected to the exercise of public power.[46] The public-private distinction inherent in the state action doctrine is also implicit in democracy, which presupposes the existence of a realm within which each individual can engage in self-determination.[47] It is for this reason that even proponents of abandoning the state action doctrine recognize that doing so would represent nothing less than a revolution.[48]

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43. *See* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

44. LESSIG, *supra* note 23, at 233, 261, 317-19; TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 300-03 (2010). The first edition of Lessig's book explicitly based this argument on the work of media scholars Owen Fiss and Cass Sunstein. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 275 n.1 (1999).

45. *See* BERLIN, *supra* note 17, at 124.

46. *See* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 3-4 (2004) ("[T]he state action requirement preserves the public-private dichotomy that is central to liberal democratic theory by assuring that the constitutional constraints imposed on public power do not spill over into and restrict the scope of free choice within the core private sphere."); *see also* Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the* Batson *Principle*, 38 GA. L. REV. 1145, 1163 (2004) ("The state action doctrine is important because it assures the maintenance of the public/private dichotomy that lies at the very heart of liberal democratic theory.").

47. POST, *supra* note 12, at 280-82; *see also* STEPHEN HOLMES, THE ANATOMY OF ANTILIBERALISM 209 (1993) ("[T]he liberal distinction between public and private ... may be a necessary precondition for the democratization of public life"); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 242 (1996) (arguing that "the public/private distinction" and "some separation between the governors and the governed" is necessary to democracy).

48. LESSIG, *supra* note 23, at 319.

More fundamentally, the attack on the state action doctrine ignores the long-standing First Amendment tradition, present in the work of John Austin[49] and John Milton,[50] recognizing that restrictions imposed by government actors represent a greater threat to liberty than restrictions imposed by private actors. The Court offered its most ringing statement of this tradition in *CBS v. Democratic National Committee*, which represented a key turning point in the Court's decision not to abandon the state action doctrine.[51] The Court explicitly weighed the relative dangers of public and private censorship and concluded that the former represented the greater evil. As the Court noted, "Congress appears to have concluded ... that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided."[52] The fact that private censorship was a potential threat did not alter the Court's conclusion:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy.[53]

Justice Douglas's concurring opinion similarly called government control "the greater of two evils," noting, "Of course there is private censorship in the newspaper field. But if the Government is the censor, administrative fiat, not freedom of choice, carries the day."[54]

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49. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (Library of Ideas ed. 1954) (1832).

50. *See* JOHN MILTON, AREOPAGITICA (Adament Media Corp. 2006) (1644).

51. 412 U.S. 94 (1973). For an insightful analysis of the Supreme Court's state action jurisprudence, see Sophia Z. Lee, "Almost Revolutionary": The Constitution's Strange Career in the Workplace, 1935-1980 (2010) (unpublished Ph.D. dissertation, Yale University) (on file with Yale University Library).

52. *CBS*, 412 U.S. at 105.

53. *Id.* at 124-25.

54. *Id.* at 153 (Douglas, J., concurring).

Classical liberal theory has thus long held that governmental control over content poses greater risks to liberty than control over content exercised by private individuals. The failure to appreciate the distinction between public and private exercises of editorial control has been a persistent source of confusion. Consider, for example, the reaction to Hillary Clinton's recent criticism of China's policy of suppressing certain Internet content. Some advocates attempted to characterize her speech as an endorsement of a regulatory initiative known as "network neutrality," which focuses on limiting broadband access providers' ability to exercise control over the traffic flowing through their networks.[55] It would be a mistake to equate calls for the end of state-sponsored censorship with advocacy of restrictions on private exercises of editorial control. Saying that governments should not interfere with content is a far cry from saying that governments should be able to limit private actors' ability to do so. The former position is consistent with classical liberal theory, whereas the latter position is not.

Stated somewhat more generally, early predictions that the Internet would allow speakers to communicate directly with their audiences never came to fruition. Simply put, end users cannot be expected to crawl the entire Internet every morning to see what new content has appeared overnight. Instead, they rely on some third party, such as a blogger, e-mail newsletter, or search engine, to help them identify and facilitate access to desired content. In short, it is inevitable that private actors will exercise some degree of editorial control over the content that is available over the Internet. The question is not *if* someone will serve that role. The proper question is *who*.

A. Exception: Scarcity in Broadcasting

Despite the fact that classical liberal theory typically does not support governmental restrictions on private editorial choices, the Supreme Court has upheld some content regulations imposed out of concern that private actors might wield their editorial discretion in a way that impedes some other person's ability to speak. The

55. *See, e.g.*, Press Release, Public Knowledge, Public Knowledge Commends Hillary Clinton on Internet Freedom (Jan. 21, 2010), http://www.publicknowledge.org/node/2867.

leading case in this line of authority is the Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*, in which the Court upheld an FCC regulation requiring broadcasters that endorse political candidates to give their opponents a right of reply.[56] The Court noted that before the government began licensing broadcast stations in 1927, "the allocation of frequencies was left entirely to the private sector, and the result was chaos."[57] The only solution was for the government to regulate and rationalize this "scarce resource," because "[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."[58]

Had the government simply assigned frequencies to particular users and then ensured that others did not trespass on their usage, its actions would have raised no serious First Amendment concerns. The next step in the Court's analysis, however, made its conclusion quite controversial. The Court concluded that because more people wanted to use broadcast channels than there were available, the government could require anyone who received channels "to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[59] The alternative would create "unlimited private censorship" in which "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."[60] In the words of the Supreme Court decision first enunciating this rationale, the government was no mere "traffic officer, policing the wave lengths to prevent stations from interfering with each other."[61] The government also bore "the burden of determining the composition of that traffic."[62] Justice Stewart's concurrence in *CBS* put the matter succinctly:

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56. 395 U.S. 367, 374-75, 378, 391-92 (1969).
57. *Id.* at 375.
58. *Id.* at 376; *see also id.* at 388.
59. *Id.* at 389.
60. *Id.* at 392.
61. NBC v. United States, 319 U.S. 190, 215 (1943).
62. *Id.* at 216.

> Scarcity meant more than a need to limit access. Because access was to be limited, it was thought necessary for the regulatory apparatus to take into account the public interest in obtaining "the best practicable service to the community reached by his [the licensee's] broadcasts." Public regulation has not, then, been merely a matter of electromagnetic engineering for the sake of keeping signals clear. It has also included some regulation of programming.[63]

Characterizing broadcast channels as scarce "turn[s] speech into a zero-sum game" in which enabling any one person to speak inevitably crowds out another's ability to do so.[64] This in turn serves two purposes. First, by suggesting that the total amount of speech is strictly limited, this characterization attempts to foreclose the classic argument that the solution to low-value or dangerous speech is more speech, not government regulation.[65] Indeed, it was used as a justification to take licenses away from WEVD (a socialist-oriented station named after Eugene V. Debs) and WCFL (a labor-oriented station named after the Chicago Federation of Labor) on the grounds that limited airwaves could not be used solely for "propaganda."[66] Second, the zero-sum aspect permits the Court to take what would otherwise be regarded as private actors to whom the First Amendment did not apply and recharacterize them as public functionaries acting as agents in the service of larger public objectives.[67]

The scarcity doctrine has been subjected to an extensive analytical critique.[68] As Ronald Coase noted in his 1959 article that provided the impetus for his landmark 1960 article laying out the

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63. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 135 (1973) (Stewart, J., concurring) (citation omitted).

64. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 730 (2010) [hereinafter Yoo, *Free Speech*]; *see also* Christopher S. Yoo, *The Role of Politics and Policy in Television Regulation*, 53 EMORY L.J. 255, 261 (2004).

65. For the classic statement of this principle, see Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

66. *See* Yoo, *Free Speech*, *supra* note 64, at 763-65.

67. *See* POST, *supra* note 12, at 280-82.

68. For a review, see Yoo, *supra* note 14, at 267-69; Yoo, *Free Speech*, *supra* note 64, at 729-37.

Coase theorem, the fact that a spectrum is economically scarce fails to distinguish it from any other commodity.[69] The problem is really one of interference between inconsistent uses, and that problem can be resolved simply by creating property rights and a market through which those rights can be exchanged.[70] To conclude that interference requires direct government allocation and reallocation is, in the words of one of the scarcity doctrine's leading critics, a "public policy non sequitur."[71]

On a more fundamental level, allowing scarcity to turn private actors into state actors who do not enjoy the freedom from state coercion associated with the First Amendment could have drastic implications. It would justify direct government regulation of the speech of any communications entity with a dominant market share.

Perhaps concerned by this possibility, the Supreme Court soon began to back away from the scarcity doctrine, beginning with its 1974 decision in *Miami Herald Publishing Co. v. Tornillo*.[72] *Tornillo* involved a challenge to a state statute that required newspapers that endorsed political candidates to give their opponents a right of reply, a mandate almost directly analogous to the right of reply upheld in *Red Lion*. In contrast to *Red Lion*, however, the *Tornillo* Court struck down the restrictions as an impermissible intrusion into the newspaper's editorial discretion.[73] It did so even though the economics had changed so that each city could support only a single newspaper.[74]

Tornillo clearly signaled that mere economic scarcity, even natural monopoly, did not justify abrogating a media conduit's First Amendment rights. What was missing was how to reconcile this outcome with the Court's *Red Lion* decision, issued just five years before. Indeed, given the similarity of the issues, many observers were quite surprised that the *Tornillo* opinion did not mention *Red*

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69. R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) ("Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation.").

70. *Id.* at 25-35.

71. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 138 (1990).

72. 418 U.S. 241 (1974).

73. *Id.* at 258.

74. *Id.* at 249, 251.

Lion at all.[75] Although subsequent decisions cited both decisions, they did so simply to state the black letter proposition that rights of reply are constitutional with respect to broadcasting, but not with respect to newspapers, without engaging in any serious attempt to reconcile their rationales.[76]

The Court finally began to shed light on the tension between *Red Lion* and *Tornillo* in *Turner Broadcasting System, Inc. v. FCC* (*Turner I*).[77] At issue was a statutory provision known as "must carry," which required all cable operators to provide free carriage to all full-power local television broadcast stations.[78] The Court began by noting that in enacting this statute, "Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience."[79] In particular, for 60 percent of American households, cable had become the exclusive source of television programming.[80] Moreover, "local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic

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75. *See, e.g.*, Floyd Abrams, *In Defense of* Tornillo, 86 YALE L.J. 361, 364 (1976); Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 870 (1998); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 371 (1999); Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1382 (2005); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 465 n.144 (1996); Thomas G. Krattenmaker & L. A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 156; Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 910-11 (1998). An attempt to search the Blackmun papers for an explanation as to why *Tornillo* did not cite *Red Lion* failed to yield any fruit. Angela J. Campbell, *A Historical Perspective on the Public's Right of Access to Media*, 35 HOFSTRA L. REV. 1027, 1086, 1091-94 (2007).

76. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 557 n.1 (1981) (Burger, C.J., dissenting); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.30 (1978).

77. 512 U.S. 622 (1994); Yoo, *Free Speech*, *supra* note 64, at 745.

78. *Turner I*, 512 U.S. at 630.

79. *Id.* at 632-33. For an earlier analysis of the implications of *Turner I*, see Yoo, *Free Speech*, *supra* note 64, at 744-50.

80. *Turner I*, 512 U.S. at 633 (citing Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(a)(3), (17), 106 Stat. 1460, 1460).

area" dictated that the overwhelming majority of cities were served by a single cable operator.[81]

Notwithstanding this high level of local concentration in the cable industry, the Court began its First Amendment analysis by refusing to extend the scarcity doctrine to cable television.[82] Not only had the scarcity doctrine been heavily criticized with respect to broadcasting,[83] but "cable television [did] not suffer from the inherent limitations that characterize[d] the broadcast medium."[84] Compared with broadcasting, cable enjoyed far greater channel capacity and did not suffer from the same danger of physical interference between speakers.[85]

Even more telling is the manner in which *Turner I* distinguished *Tornillo*. After laying out two considerations that were not expressly technological,[86] the Court focused on "an important technological difference between newspapers and cable television."[87] Even though

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81. *Id.* (quoting § 2(a)(2)).

82. *Id.* at 637.

83. *Id.* at 638 & n.5. In this regard, *Turner I* represents one interesting episode in the scarcity doctrine's interesting history. Some have taken the language in *Turner I*—declining to question the scarcity doctrine's validity with respect to broadcasting—as an implicit endorsement of the scarcity doctrine. *See, e.g.*, Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002) (adhering to the scarcity doctrine in part because "[t]he Supreme Court has already heard the empirical case against that rationale and still 'declined to question its continuing validity'" (quoting *Turner I*, 512 U.S. at 638)). Others regard *Turner I* as signaling the Court's dissatisfaction with the scarcity doctrine by focusing on the language noting the longstanding criticism of the doctrine and the Court's refusal to extend the doctrine to cable. *See, e.g.*, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1769 (1995). Even more interesting is the extent to which the scarcity doctrine may have become embroiled in judicial politics. One commentator suggests that the reason *Tornillo* made no mention of *Red Lion* is because any attempt to reconcile *Tornillo* with *Red Lion* would have validated the distinction between broadcast and nonbroadcast media, and Justice Douglas did not want to provide any support for *Red Lion*. *See* FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING 195 (1976). In contrast, the Court went out of its way to endorse *Red Lion* in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990), in order to obtain Justice White's vote in a key affirmative action case. *See* Neal E. Devins, Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 n.21 (1990); Charles Fried, Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 HARV. L. REV. 107, 126 (1990).

84. *Turner I*, 512 U.S. at 639.

85. *See id.*

86. Specifically, the Court found *Tornillo* distinguishable because the restriction at issue was content neutral and would not force cable operators to alter their own messages as a result of the additional programming they were required to carry. *Id.* at 655-56.

87. *Id.* at 656.

newspapers often enjoy natural monopolies in their cities, they cannot prevent rival publications from attempting to offer competing content.[88] Cable television, in contrast, employs a physical connection that gives cable operators "bottleneck, or gatekeeper, control" over all content entering subscribers' homes.[89] "A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[90] It is cable operators' ability to "restrict, through physical control of a critical pathway of communication, the free flow of information and ideas" that distinguished must carry from the right of reply at issue in *Tornillo*.[91] Under these circumstances, the First Amendment did not prevent the government from taking steps to ensure that private interests did not restrict other private speakers from expressing themselves.[92]

Turner I established two points relevant for present purposes. First, the Court indicated its reluctance to extend the scarcity doctrine to any other technology.[93] The opinion demonstrated this principle explicitly with its quotation from an earlier decision stating, "[o]ur decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."[94] The decision thus falls comfortably into a long line of rulings refusing to extend the scarcity doctrine to other media, such as the Internet and direct mail.[95]

Second, *Turner I* made clear that mere economic scarcity did not justify restricting a media outlet's editorial discretion even if that outlet enjoyed a natural monopoly.[96] Indeed, any other conclusion

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88. *Id.*

89. *Id.*

90. *Id.* at 639.

91. *Id.* at 657.

92. *Id.*

93. *Id.* at 639.

94. *Id.* (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983)) (internal quotation marks omitted).

95. Yoo, *supra* note 14, at 288-90. For the decision refusing to extend the scarcity doctrine to the Internet, see *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997). For decisions refusing to extend scarcity to direct mail, see *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 10 n.6 (1986) (plurality opinion); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 542-43 (1980); and *Bolger*, 463 U.S. at 74.

96. *Turner I*, 512 U.S. at 656.

would indicate that *Tornillo* was wrongly decided. The existence of bottleneck control over an exclusive physical connection, rather than any economic condition, was what justified deviating from established First Amendment principles.[97] This second point, in turn, makes clearer the precise relationship between changes in technology and free speech. The clear implication is that if a media outlet does not control an exclusive physical connection, the *Turner I* gatekeeper rationale does not apply.[98]

Technological changes have now largely eroded the empirical foundation needed to apply the gatekeeper rationale to cable television.[99] Cable television providers now face fierce competition from direct broadcast satellite (DBS) providers Dish Network and DirecTV, which serve the entire country.[100] As of December 2010, DBS now controls more than 31 percent of all multichannel video subscribers, with DirecTV capturing 18 percent and Dish Network capturing 13 percent.[101] Together, these providers more than double the 15 percent threshold established by Congress for determining whether cable faced effective competition for the purposes of eliminating rate regulation.[102] The national numbers largely reflect market shares on a city-by-city basis. As of mid-2009, DirecTV's share of video subscribers exceeded 15 percent in 181 out of 211 designated marketing areas (DMAs), whereas the Dish Network's share exceeded 15 percent in 132 out of 211 DMAs.[103]

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97. *Id.*

98. Yoo, *Free Speech*, *supra* note 64, at 747-50.

99. *Id.*

100. Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 708 n.184 (2005).

101. For the number of subscribers for DirecTV and the Dish Network, see *Top 25 Multichannel Video Programming Distributors as of Dec. 2010*, NAT'L CABLE & TELECOMMUNICATIONS ASSOCIATION, http://www.ncta.com/Stats/TopMSOs.aspx (last visited Oct. 12, 2011). For the total number of multichannel video subscribers, see *Industry Data,* NATIONAL CABLE & TELECOMMS. ASS'N, http://www.ncta.com/Statistics.aspx (last visited Oct. 12, 2011) (reporting data as of the end of 2010). The number of subscribers served by non-top twenty-five cable operators aligns with data collected by the FCC. Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Thirteenth Annual Report, 24 FCC Rcd. 542, 684 tbl.B-1 (2009).

102. 47 U.S.C. § 543(*l*)(1)(B)(ii) (2006).

103. Comments of Christopher S. Yoo at 13, Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses, 25 FCC Rcd. 2651 (Mar. 18, 2010) (MB Docket 10-56), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020472619.

In addition, new multichannel video offerings from traditional telephone companies, such as Verizon FiOS and AT&T U-verse, have captured roughly 6 percent of the market.[104] Moreover, an increasing number of households are abandoning multichannel video altogether and relying exclusively on over-the-air broadcasting and Internet-based video services.[105] The effect has been dramatic. In the second quarter of 2010, the cable industry lost subscribers compared to the same period the year before, which marked the first such instance in the history of the cable industry.[106] These losses accelerated during the third quarter of 2010, during which the industry lost nearly 750,000 subscribers.[107] Industry observers expect these trends to continue.[108]

Although the market for Internet service is not as competitive as many would like, it has not devolved into the type of exclusivity that would bring it within the ambit of *Turner I*.[109] Indeed, the Supreme Court has recognized, "the market for high-speed Internet service is now quite competitive," with "DSL providers fac[ing] stiff competition from cable companies and wireless and satellite providers."[110] More recently, cable modem and DSL have faced increasingly fierce competition from new technologies such as fiber-to-the-home and wireless broadband.[111] The most recent data indicate that wireless broadband is growing rapidly and by some measures has now eclipsed both cable modem and DSL as the leading broadband access technology.[112]

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104. This calculation is based on the sources cited *supra* note 101.

105. *See* Rob Pegoraro, *Joy of Free TV*, WASH. POST, Feb. 6, 2011, at G4.

106. *See* David Lieberman, *Is It Time To Cut the Cord on Cable TV?: Web, Other Options Begin To Shake Up Home Viewing*, USA TODAY, Jan. 4, 2001, at 1A (examining data from the second and third quarters of 2010).

107. *See* Andy Vuong, *The Coming Battle for Your Television*, DENV. POST, Dec. 5, 2010, at K1 (reporting that cable operators lost 741,000 basic cable subscribers during the third quarter of 2010).

108. *See* Lieberman, *supra* note 106 (reporting SNL Kagan predictions that by 2014, 46.3 million households will have at least one television attached to an Internet connection and that 7 percent of households will get their video exclusively from the web).

109. Yoo, *Free Speech*, *supra* note 64, at 747-50.

110. Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 448 n.2 (2009).

111. *See* Daniel F. Spulber & Christopher S. Yoo, *Rethinking Broadband Internet Access*, 22 HARV. J.L. & TECH. 1, 9-10 (2008).

112. FED. COMMC'NS COMM'N, INTERNET ACCESS SERVICES: STATUS AS OF DECEMBER 31, 2009, at 23 tbl.7, 29-30 tbls.11 & 12 (Dec. 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303405A1.pdf.

The presence of intermodal competition between broadband access providers has led courts to hold the gatekeeper rationale articulated in *Turner I* inapplicable to the Internet.[113] The increase in intermodal competition has, however, led courts and agencies to remove access requirements from Internet providers in a wide variety of other contexts.[114] Indeed, even commentators sympathetic toward imposing access requirements recognize that the rationale established by *Turner I* cannot justify directly imposing such requirements on the Internet.[115]

In short, the scarcity and physical bottleneck doctrines, long invoked to justify imposing regulations to limit broadcasters' and cable operators' ability to serve as gatekeepers, are weakening with respect to those technologies. They also have no purchase on new technologies, such as the Internet.

B. Exception: Broadcasting as Intruder

The Supreme Court has recognized another exception to broadcasters' unfettered right to speak freely. The seminal case in this line of jurisprudence is *FCC v. Pacifica Foundation*, in which the Court upheld an FCC order disapproving of an avant garde radio station's decision to air George Carlin's *Filthy Words* monologue using seven words that had supposedly been banned from the public airwaves.[116]

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113. Comcast Cablevision of Broward Cnty., Inc. v. Broward Cnty., 124 F. Supp. 2d 685, 696 (S.D. Fla. 2000).

114. *See linkLine*, 555 U.S. at 447-48 (noting that intermodal competition obviated any duty by the telephone company under the antitrust laws to provide access to its competitors); U.S. Telecom Ass'n v. FCC, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (holding that "the robust competition ... in the broadband market" between DSL, cable modems, wireless broadband, and other technologies undercut the rationale for subjecting the DSL-capable portions of telephone loops to the unbundled access regime created by the Telecommunications Act of 1996); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report, Order, and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853, 14,883–87 ¶¶ 55–64 (2005) (ruling that competition in the market for broadband access justified removing all DSL-related elements from the unbundling requirements established by the 1996 Act), *petition for rev. denied sub nom.* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

115. *See* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1765 (1995) ("*Turner* is quite different from imaginable future cases involving new information technologies, including the Internet, which includes no bottleneck problem.").

116. 438 U.S. 726, 730, 741 (1978). The FCC elected not to impose formal sanctions on Pacifica but indicated that it could have done so and that it would note the violation in Pacifica's file for consideration should repeat violations occur. *Id.* at 730.

The Court acknowledged that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[117]

The Court nonetheless invoked two reasons for upholding the FCC's authority to restrict indecent broadcasts. The first was not technologically specific: the Court concluded that the speech was of such slight social value that it did not merit protection, although this portion of Justice Stevens's opinion did not command a majority of the Court.[118]

In the second and more important rationale, the Court began by noting that "each medium of expression presents special First Amendment problems," further noting that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[119] In particular, the lower level of First Amendment protection is derived from two considerations directly tied to individuals' inability to assert control over the media they receive: (1) broadcasting's "uniquely pervasive presence in the lives of all Americans" and (2) the fact that broadcasting is "uniquely accessible to children."[120] In each case, individuals' inability to limit their and their children's exposure to unwanted content justified the restriction.[121] With regard to pervasiveness, the Court characterized broadcast indecency as an "intruder" that "confronts the citizen ... in the privacy of the home" without warning.[122] With respect to accessibility to children, the existing technology did not allow indecent content to "be withheld from the young without restricting the expression at its source."[123]

As I have discussed at some length elsewhere, commentators have heavily criticized these rationales.[124] Contrary to the majority's suggestion, the fact that people buy radios and television sets and activate them of their own volition makes it difficult, if not impossible, to characterize broadcasting as any more of an intruder than

117. *Id.* at 745.
118. *Id.* at 746-48 (plurality opinion).
119. *Id.* at 748.
120. *Id.* at 748, 749.
121. *Id.*
122. *Id.* at 748.
123. *Id.* at 749.
124. *See* Yoo, *supra* note 14, at 293-98.

any other medium.[125] Although a line of Supreme Court decisions recognizes an exception for radio broadcasts on street cars,[126] the Court has explicitly recognized that broadcast audiences in other contexts do not constitute the type of captive audience that falls within these precedents because "[t]he radio can be turned off, but not so the billboard or street car placard."[127] Or as Frederick Schauer so trenchantly observed, "[t]urning off a radio is much easier than averting your eyes from someone who is in the same room. Just try it sometime."[128]

Moreover, allowing the fact that some people may be offended by some broadcast speech to justify limiting that speech would allow the sensibilities of the most sensitive person in the audience to determine the level of the discourse. Instead, people confronting offensive material are supposed to change the channel,[129] turn off the set,[130] or (in the case of visual media) "avoid further bombardment of their sensibilities simply by averting their eyes."[131] Such

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125. *Id.* at 294. As Scot Powe drily noted:

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

LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 210 (1987).

126. *See* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 465 (1952).

127. Packer Corp. v. Utah, 285 U.S. 105, 110 (1932); *see also* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1975) (plurality opinion) (distinguishing *Pollak*); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (quoting the same language from *Packer* with approval).

128. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 294 (1981).

129. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970) (noting that giving individuals the right to block junk mail is no more problematic than "a radio or television viewer twist[ing] the dial to cut off an offensive or boring communication and thus bar its entering his home").

130. *Packer Corp.*, 285 U.S. at 110 (noting that unlike a billboard on a street car, "[t]he radio can be turned off").

131. Cohen v. California, 403 U.S. 15, 21 (1971). The Court later quoted this language with approval. *See* Hill v. Colorado, 530 U.S. 703, 716 (2000); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); Fla. Bar v. Went for It, Inc., 515 U.S. 618, 630 (1995); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983); Consol. Edison Co. v. Pub. Serv. Comm'n,

burdens are the price paid for living in a robust society. In addition, broadcasting is no more accessible to children than other media such as books and newspapers that clearly receive First Amendment protection.[132] Moreover, allowing the possibility that some children might be exposed to indecent speech to justify banning it altogether would impermissibly "reduce the adult population ... to reading only what is fit for children."[133]

These standard First Amendment principles were reflected in Justice Brennan's dissent in *FCC v. Pacifica Foundation*, which noted that turning on a radio represents the decision "to take part ... in an ongoing public discourse."[134] Those encountering something they find distasteful should simply turn the radio off.[135] Any contrary rule risks limiting adults to what is "fit for children" and takes judgments about content out of the hands of individuals and gives it instead to the government.[136]

Following this reasoning, the Supreme Court has repeatedly declined to extend *Pacifica* to any other medium.[137] Subsequent developments have raised doubts as to its continuing vitality even with respect to broadcasting.[138] The most salient recent development was *FCC v. Fox Television Stations, Inc.*, which arose from the FCC's decision to abandon its "fleeting expletives" policy, which had previously indicated that uses of profanity would not be actionable unless used repeatedly.[139] In invalidating the change in policy as arbitrary and capricious, the Court of Appeals had indicated that it was "skeptical" that any justification for the policy "would pass

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447 U.S. 530, 542 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975).

132. Yoo, *supra* note 14, at 293-94.

133. Butler v. Michigan, 352 U.S. 380, 383 (1957). The Court has frequently quoted this language with approval. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 252 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001); Reno v. ACLU, 521 U.S. 844, 875 (1997); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989); *Bolger*, 463 U.S. at 73; Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

134. 438 U.S. 726, 764-65 (1978) (Brennan, J., dissenting).

135. *Id.* at 765.

136. *Butler*, 352 U.S. at 383; *Pacifica*, 438 U.S. at 766, 769.

137. Yoo, *supra* note 14, at 298-301 (noting the Court's refusal to extend *Pacifica* to junk mail, telephone, cable television, and the Internet). Since then, lower courts have refused to extend *Pacifica* to other media. *E.g.*, Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646, 650 (7th Cir. 2006) (dealing with video games).

138. *See* Yoo, *supra* note 14, at 301-03.

139. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1805-07 (2009).

constitutional muster."[140] The Supreme Court reversed without addressing the First Amendment issues on the grounds that the change in policy did not violate the Administrative Procedure Act.[141] The two Justices who discussed the First Amendment in their separate opinions both expressed their doubts. Justice Ginsburg was rather restrained in her criticism, simply noting "that there is no way to hide the long shadow the First Amendment casts over what the Commission has done."[142] Justice Thomas was more explicit, challenging *Pacifica*'s analytical coherence as well as its empirical foundations.[143]

A close reading of this line of precedent reveals that the outcome in each case turned upon empirical assessments of the available technologies of control.[144] In *Sable Communications*, the Court ruled *Pacifica* inapplicable to dial-a-porn in part because the would-be recipient had to take affirmative steps before receiving the communication.[145] Moreover, the existence of reasonably effective filtering technologies that could prevent minors from obtaining access to indecent speech rendered the restriction unconstitutional.[146]

Similarly, when assessing the constitutionality of restrictions on Internet indecency in *Reno v. ACLU*, the fact that Internet communications require affirmative steps before they appear and are typically preceded by warnings brought the Internet within the ambit of *Sable* instead of *Pacifica*.[147] The existence of reasonably effective end-user filtering software that enabled parents to prevent children from accessing sexually explicit Internet content rendered government imposed restrictions unconstitutional.[148]

In *United States v. Playboy Entertainment Group, Inc.*, the Court recognized that its precedents acknowledged that "the feasibility of a technological approach to controlling minors' access to [indecent]

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140. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

141. *Fox Television Stations, Inc.*, 129 S. Ct. at 1819.

142. *Id.* at 1828 (Ginsburg, J., dissenting).

143. *Id.* at 1820-22 & n.* (Thomas, J., concurring).

144. Yoo, *supra* note 14, at 303-06; Yoo, *Free Speech*, *supra* note 64, at 737-39.

145. 492 U.S. 115, 127-28 (1989).

146. *Id.* at 128-31.

147. 521 U.S. 844, 869-70 (1997).

148. *Id.* at 877, 879.

messages" rendered blanket bans unconstitutional.[149] In addition, the fact that access to sexually explicit material required affirmative steps also tended to undercut the government's authority to restrict access to indecent material through that medium.[150] The existence of a potentially effective means by which indecent material could be blocked on request on a house-by-house basis represented a less restrictive means sufficient to render a blanket ban unconstitutional.[151]

The Court's emphasis on end-user control is also underscored by a comparison of two older Supreme Court cases involving junk mail advertisements for contraceptives. In *Rowan v. U.S. Post Office Department*, the Court upheld a statute giving households the power to require that their names be taken off mailing lists used by companies advertising products the householder regarded as erotically arousing or sexually provocative.[152] In so doing, the Court embraced a vision in which each "householder [is] the exclusive and final judge of what will cross his threshold."[153] The Court later reaffirmed the constitutionality of technologies that enhance end-user choice in other cases.[154]

The Court came to a very different conclusion in *Bolger v. Youngs Drug Products Corp.* when, instead of trying to promote filtering in a way that enhanced individual choice, the government tried to ban unsolicited direct mail contraceptive advertisements altogether.[155] The fact that some recipients may regard such advertisements as offensive was not sufficient to justify suppressing them.[156] Those who are offended can simply avert their eyes or discard their mail. As the Court noted, "the 'short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned.'"[157]

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149. 529 U.S. 803, 814 (2000).

150. *Id.* at 815.

151. *Id.* at 816-26.

152. 397 U.S. 728 (1970).

153. *Id.* at 736.

154. *See, e.g.*, Meese v. Keene, 481 U.S. 465, 480 (1987) (upholding a statute requiring that certain materials be labeled as "political propaganda" because measures that "better enable the public to evaluate the import of the propaganda" promote First Amendment values).

155. 463 U.S. 60 (1983); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 700-02 (1977) (declaring unconstitutional a ban on advertisement of contraceptives).

156. *Bolger*, 463 U.S. at 71.

157. *Id.* at 72 (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883

With respect to protecting children, the presence of reasonably effective technologies of control rendered an outright ban impermissible. Because parents can easily pick up the mail before their children do, "[w]e can reasonably assume that parents already exercise substantial control" over whether their children are exposed to such advertisements.[158] In addition, the filtering procedure upheld in *Rowan* represented a less restrictive means for accomplishing the same thing. The fact that *Rowan* upheld a statute enhancing end-user control to keep out such mailings did not mean that the government could ban the mailings outright.[159] On the contrary, the presence of such a regime made such a ban more problematic. Any other restriction would "reduce the adult population ... to reading only what is fit for children"[160] and would relegate "[t]he level of discourse reaching a mailbox ... to that which would be suitable for a sandbox."[161]

In the process, the *Bolger* Court explicitly distinguished *Pacifica*, noting that the *Pacifica* Court "'emphasize[d] the narrowness of our holding'" and reasoning that "[t]he receipt of mail is far less intrusive and uncontrollable" than the receipt of broadcast programming.[162]

Together these decisions provide a roadmap for determining how technologies of control affect the constitutional analysis. When the medium permits indecent speech to appear unbidden and without warning, and technologies enabling individuals to filter out unwanted content do not exist, it is at least arguable that restrictions on indecent speech might be constitutional,[163] although the growing questions about the vitality of *Pacifica* raises serious doubts as to this conclusion.[164] What is clear is that *Pacifica* has no colorable application when end users must take affirmative steps to access

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(S.D.N.Y.), *aff'd summarily*, 386 F.2d 449 (2d Cir. 1967)); *accord* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 631 (1995) (quoting *Bolger* with approval).

158. *Bolger*, 463 U.S. at 73.

159. *Id.* at 72.

160. *Id.* at 73 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)). As noted *supra* note 131, the Court has often quoted this phrase from *Butler* with approval.

161. *Id.* at 74; *see also* Ashcroft v. ACLU, 535 U.S. 564, 604 (2002) (quoting this language with approval); Reno v. ACLU, 521 U.S. 844, 875 (1997) (same).

162. *Bolger*, 463 U.S. at 74 (quoting *Pacifica*, 438 U.S. at 750) (alteration in original).

163. *See supra* notes 119-23 and accompanying text.

164. *See supra* notes 124-33 and accompanying text.

content and when effective filters exist. As such, this line of authority represents a strong reaffirmation of the Court's commitment to the classical liberal vision of free speech.

These considerations make it extremely unlikely that courts will extend *Pacifica* to new media. As noted earlier, the courts have been reluctant to hold *Pacifica* applicable to other transmission technologies.[165] In particular, *Reno v. ACLU* squarely held *Pacifica* inapplicable to the Internet, in part because of the availability of effective filtering technologies and in part because the Internet has historically been a "pull" technology that requires affirmative steps in order to receive content rather than a "push" technology whereby the content is determined by a third party.[166] Of course, the *Reno* decision was necessarily contingent on the nature of the Internet in 1997. The web-dominated Internet of the mid-1990s is giving way to one dominated by more sophisticated applications that proactively retrieve content without actions taken by end users and may require new filtering technologies.[167] The ultimate disposition will depend on the state of technology at the time of decision.

Significant doubts exist as to whether *Pacifica* remains good law even with respect to broadcasting.[168] As Justice Thomas noted in his *Fox Television* concurrence, modern broadcasting is no more pervasive than other media, and the existence of the V-chip now gives parents who wish to screen out indecent content the ability to do so.[169] On remand, the Second Circuit echoed both of these concerns, even going so far as to opine that the existence of effective filtering technologies rendered restrictions on broadcast indecency unconstitutional.[170] In addition, as noted elsewhere, *Pacifica* provides little purchase in a world increasingly dominated by video on demand, in which receiving content requires the type of affirmative steps sufficient to render indecency restrictions unconstitutional.[171]

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165. *See supra* note 137 and accompanying text.

166. 521 U.S. 844, 866-67, 869 n.33 (1997).

167. For a wide-ranging discussion of the ways that the Internet has changed since the mid-1990s, see CHRISTOPHER S. YOO, THE DYNAMIC INTERNET (forthcoming 2012).

168. Yoo, *supra* note 14, at 303-06.

169. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1822 & n.* (2009) (Thomas, J., concurring).

170. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326-27 (2d Cir. 2010).

171. Yoo, *supra* note 14, at 305-06.

That said, the Second Circuit remains obligated to continue to follow *Pacifica* until it is overruled by the Supreme Court.[172] As a result, the Second Circuit invalidated the FCC's actions on the alternative ground that the FCC's indecency policy was unconstitutionally vague.[173] On June 27, 2011, the Supreme Court granted certiorari in the case for a second time, explicitly limited to whether the FCC's ban on indecent broadcast speech violates the First and Fifth Amendments.[174] The existence of the V-chip means that the second grant of certiorari in this case should provide the Supreme Court with another opportunity to reaffirm the classical liberal vision of free speech. The presence of this alternative rationale should allow the Supreme Court to resolve this case without having to overrule *Pacifica* if it so chooses. In the meantime, lower courts that are all too aware of *Pacifica*'s infirmities remain bound to follow it until the Supreme Court declares otherwise.[175]

CONCLUSION

The advent of control is changing the face of the First Amendment. Recent technological changes have raised serious doubts as to the continuing constitutionality of many long-standing aspects of the regulatory regime. On a more fundamental level, these developments are forcing courts and commentators to rethink the relationship between free speech and liberal and democratic theory, providing an eloquent example of how technological change can give new salience to theoretical debates that have long remained fallow. Until those who advocate deviating from the traditional conception of the First Amendment advance a theory strong enough to justify overriding individual preferences and argue that private power poses a greater threat than public power, strong reasons remain for adhering to the classical liberal commitments implicit in the traditional approach to the First Amendment.

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172. *Fox Television Stations*, 613 F.3d at 327.
173. *Id.* at 327-35.
174. FCC v. Fox Television Stations, Inc., 131 S. Ct. 3065 (2011).
175. *See, e.g.*, *Fox Television Stations*, 613 F.3d at 327.