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The subject of today’s Symposium is “First Amendment Lochnerism?: Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity.” In these opening remarks, I will attempt to describe what that obscure title is intended to convey, and also to tell you a little more about today’s program.

The term “Lochnerism” refers generally to a now-discredited judicial doctrine often associated with the Supreme Court’s 1905 opinion in *Lochner v. New York.* In *Lochner,* the Supreme Court held unconstitutional a New York law that prohibited bakers from working more than ten hours in a day. In striking down this law, the *Lochner* court stated that minimum wage and maximum hour laws tended to interfere arbitrarily with the “liberty of contract” that, according to the Court, inhered in the Fourteenth Amendment’s Due Process Clause. Following *Lochner,* many courts in the early twentieth century applied the judge-made constitutional doctrine of “liberty of contract” to strike down numerous attempts by state and local governments to regulate business and economic affairs.

Dissenting in *Lochner,* Justice Oliver Wendell Holmes rejected the Court’s contention that the Fourteenth Amendment protects any “liberty of contract.” Justice Holmes argued:

2. Id. at 64.
3. See id. at 56-57.
4. See, e.g., Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (striking down state minimum wage law for women and child laborers), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); see also Adkins v. Children’s Hosp., 261 U.S. 525 (1923) (striking down D.C. minimum wage law for women and child laborers), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); see also Coppage v. Kansas, 236 U.S. 1 (1915) (striking down state law that prohibited employers from firing employees for joining labor unions), overruled by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); see also Adair v. United States, 208 U. S. 161 (1908) (striking down federal law that prohibited railroad companies from firing employees for joining labor unions), overruled by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
5. See *Lochner,* 198 U.S. at 75-76 (Holmes, J. dissenting).
But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.6

In 1937, largely in response to the Court’s propensity to strike down progressive economic legislation as unconstitutional, President Franklin Roosevelt threatened to increase the number of Justices on the Supreme Court from 9 to 15.7 Within months of this threat, the *Lochner* era came to an end. In the 1937 case of *West Coast Hotel v Parrish*, the Court belatedly embraced Justice Holmes’s view, and announced that it would no longer rely on the Fourteenth Amendment to interfere with legislative efforts to regulate business and economic affairs.9 The Court’s former “liberty of contract” doctrine, now commonly referred to as “*Lochnerism,*” remains substantially discredited today.

During the same decade that the Court turned away from *Lochnerism*, however, it began for the first time to embrace a role in protecting the “freedom of speech” guaranteed in the First Amendment. In *Palko v. Connecticut*,10 also decided in 1937, Justice Benjamin Cardozo sought to explain why active judicial protection of “freedom of speech” was different from *Lochnerism*. Justice Cardozo wrote:

> We reach a different plane of social and moral values when we pass to the privileges and immunities [of which] . . . neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.11

In elevating protection of freedom of speech to this “higher plane,” the Court drew heavily from a line of dissenting opinions in earlier free speech cases authored by Justices Holmes and Brandeis. In his concurring opinion in the

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6. *Id.*
8. 300 U.S. 379 (1937).
9. *Id.* at 406-407.
11. *Id.* at 326-27.
1927 case of *Whitney v. California*,\(^\text{12}\) for example, Justice Brandeis had identified a number of reasons—both historical and political—why government censorship of speech should be anathema in the United States. Justice Brandeis argued:

> Those who won our independence valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.\(^\text{13}\)

Contemporary constitutional scholars have drawn upon—and extrapolated from—Justice Brandeis’s *Whitney* concurrence to identify the reasons why free speech should be strongly protected. Judicial protection of the right of individuals to speak their minds without suffering reprisals from the government is often characterized as a necessary incident of democracy.\(^\text{14}\) Freedom of speech gives rise to a “marketplace of ideas,” in which citizens are exposed to the widest possible range of information and opinion, and are thereby best equipped to sift good information from bad, and to discover truth.\(^\text{15}\) This process of discovery equips citizens with both the information and the habits of mind

\(^{12}\) 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

\(^{13}\) Id. at 375-76 (Brandeis, J., concurring).

\(^{14}\) For the classic exposition of this view, see generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). For a modern exposition, see generally CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

\(^{15}\) See e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (“[T]he best test of truth is the power of [a] thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution.”). The notion that freedom of speech promotes the discovery of truth is the core of John Stuart Mill’s defense of freedom of speech in *On Liberty*. See generally JOHN STUART MILL, ON LIBERTY (Penguin Books 1975) (1859).
necessary to participate in the political life of the community. Even the continued expression of facts and ideas that society has deemed false has been said to serve the public interest, by promoting reexamination of conventional wisdom, which can have the effect of revitalizing the truth.\textsuperscript{16}

Freedom of speech also contributes to social stability by allowing disgruntled persons to vent their anger verbally, rather than through violent action, and by allowing others to identify and keep tabs on such persons.\textsuperscript{17} In addition, a robust and uncensored press can serve as a watchdog on the government, playing an important role in both exposing and deterring abuses of governmental authority.\textsuperscript{18}

In addition to its structural role in facilitating the exercise of popular sovereignty in our democracy, judicial protection of freedom of speech also protects individual liberty. The United States prides itself on being a “free country.” The right of every person “to think as she will and to speak as she thinks” has been characterized as the very essence of freedom.\textsuperscript{19} To the individual, the freedom of speech can provide an outlet for emotion as well as an opportunity to develop one’s personality, one’s mental and moral faculties, and one’s ideas.\textsuperscript{20} In contrast, government censorship can infringe on the dignity and autonomy of the individual. Censorship that is triggered by governmental disagreement with the ideas being expressed also can undermine the principle of equality under law.\textsuperscript{21}

Citing all of these reasons, the Supreme Court since the 1930s has erected a highly speech-protective framework for deciding First Amendment cases. Under current constitutional doctrine, the government is not permitted to regulate the content of most speech except in minor ways that are narrowly tailored to

\textsuperscript{16} See, e.g., Kent Greenawalt, Speech, Crime, and the Uses of Language 16 (1989) (attributing to John Stuart Mill the proposition that “[e]ven if an idea is wholly false, its challenge to received understanding promotes reexamination which vitalizes truth”).

\textsuperscript{17} See Whitney, 274 U.S. at 375 (Brandeis, J., concurring). The Court endorses the view that: [O]rder cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

\textit{Id.}


\textsuperscript{19} Whitney, 274 U.S. at 375-76 (Brandeis, J., concurring).


\textsuperscript{21} See, e.g., Kent Greenawalt, Speech, Crime, and the Uses of Language 33 (1989) (noting that "the idea that the government should treat people with dignity and equality" provides a secondary justification for free speech).
achieve a compelling government interest. Indeed, even when enforcing general laws that do not directly regulate the content of speech, the government must refrain from incidentally burdening speech or expressive activity, unless imposing such burdens substantially relates to the achievement of an important government interest. Employing these “heightened scrutiny” standards of review, United State courts have rendered the United States one of the most speech-protective societies in the world.

Even while doing so, however, the Supreme Court has largely adhered to Justice Cardozo’s venerable distinction between judicial imposition of particular economic theories (which remains impermissible) versus judicial protection of indispensable human freedoms (which remains indispensable). Based on that distinction—and with a few exceptions—the Court for the past seven decades has largely deferred to governmental efforts to regulate business and economic affairs—particularly through redistributive programs—even while erecting increasingly strong judicial protections against legislation that abridges the freedom of speech.

Since the dawn of the 21st century, however, the Supreme Court and some lower courts have arguably begun to apply stringent First Amendment “free speech” standards when reviewing the constitutionality of a variety of government efforts to regulate business or economic activities—often in cases in which the regulations at issue do not appear directly to implicate traditional First Amendment concerns about government censorship. For example, in 2002, on First Amendment grounds, the Supreme Court struck down a longstanding provision of the Food, Drug, and Cosmetic Act that prohibited manufacturers from marketing drugs for uses that had not been proven safe and effective. In 2003, at the behest of some of the nation’s leading legal scholars, the Court considered whether the First Amendment bars Congress from extending the duration of copyrights in existing works, before those works lapse into the public domain. Professors Farber and Ku today will tell you about that case. In 2001, also on First Amendment grounds, the Court struck down important provisions of a federal statute that sought to protect users of mobile telephones from having the contents of their conversations intercepted, recorded, and

22. See, e.g., United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 813 (2000) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”) (citing Reno v. ACLU, 521 U.S. 844, 874 (1997)).
23. See, e.g., Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997) (“A content neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”).
distributed by nosey neighbors. Professor Wasserman will analyze that decision. 

In addition, over the past few years, several federal circuit courts have considered whether the First Amendment prohibits the government from regulating the number of broadcast stations or cable TV systems a single corporation can own, both nationwide and in a particular local market. As Professor Candeub will tell you, the decisions to date on these issues have been split. At least one federal district court, perhaps encouraged by a law review article written by Professor Ku, has also held that the First Amendment protects cable system operators against being required to offer a choice of Internet service providers to their residential cable modem customers. Professor Farber will discuss this decision, as part of a deeper analysis of the interaction between the First Amendment and the rights of access and exclusion in electronic media. Today, technological innovation continues to cause convergence of the various existing networks that formerly were used to separately deliver telephone service, electricity, cable television service, and the Internet. As policymakers seek to replace outdated category-driven regulatory regimes with a new paradigm of regulatory “net neutrality,” First Amendment concerns will doubtless influence the shape of this new paradigm. Ms. Barbara

31. See Time Warner Entm’t Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001). The court struck down as unconstitutional the FCC’s implementation of a federal statute that prohibited any single cable television system operator from serving more than 36% of the cable subscribers in the United States. Id. 1130-36. But see Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002). In contrast, the same court held that the FCC did not violate the First Amendment when it reaffirmed a longstanding rule prohibiting a single entity from owning enough broadcast television stations to reach more than 35% of U.S. television households. Id. at 1045-47. Even while concluding that the FCC’s national broadcast television station ownership cap was not unconstitutional, however, the Fox Television Stations court found the cap to be arbitrary and capricious, and thus contrary to law under the Administrative Procedure Act and the Telecommunications Act of 1996. Id. at 1047.
33. See Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000); but see AT & T Corp. v. City of Portland, 43 F.Supp.2d 1146, 1154 (D. Or. 1999) (rejecting same First Amendment argument), rev’d in other respects, 216 F.3d 871 (9th Cir. 2000).
Cherry of the FCC’s Office of Strategic Planning & Policy Analysis will discuss the specifics of some of these First Amendment concerns.35

Arguably, perhaps, governmental efforts to regulate business arrangements—and even to redistribute wealth within—the communications, information, and technology industries should logically be subject to First Amendment scrutiny, because such regulation ultimately can affect the content of information provided to the public via facilities controlled by those industries. If so, then the prophylactic extension of First Amendment doctrine into these new areas may be a salutary development, the emergence of which is timely or even overdue.

Alternatively, however, the government actions at issue in these modern cases that I have described might be seen as standard efforts to protect consumers by regulating big business, in ways that do not implicate core First Amendment concerns about censorship of dissent or the establishment of “official truths.” If so, then to paraphrase Justice Holmes, perhaps it is fair to ask whether the Courts have begun to construe the First Amendment as if it embodies one or more “particular economic theories, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.”36 Such a development, if it is occurring, might fairly be called “First Amendment Lochnerism.”

With these remarks, I have attempted to paint in broad strokes a picture of what the phrase “First Amendment Lochnerism” might mean. In today’s exciting program, our five very distinguished speakers will paint in some detail various aspects the broad strokes I have set forth. In particular, in the various papers that you will hear today, our panelists will identify and analyze various specific controversies in which First Amendment arguments have been or might be raised to challenge regulation of business activities in the communications and information industries. From the different panelists, you will hear a variety of different perspectives concerning both the magnitude and desirability of this trend. These speakers include some of the nation’s leading experts on the intersection of the First Amendment with information technology, and it is an honor for the Chase College of Law that each of them has agreed to appear here today.

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36. See Lochner, 198 U.S. at 75-76 (Holmes, J. dissenting).
THE FIRST AMENDMENT AND MEASURING MEDIA DIVERSITY: CONSTITUTIONAL PRINCIPLES AND REGULATORY CHALLENGES

Adam Candeub*

Since the New Deal, the Federal Communications Commission (FCC) has placed limits on the number of media outlets one entity can control in either national and local media markets. The FCC also has promulgated “cross-ownership” restrictions prohibiting, for instance, one entity from owning a television and newspaper station in a particular local market. The FCC has justified its regulations, in significant part, as efforts to promote diversity of viewpoint. While the Supreme Court for decades has upheld these restrictions against First Amendment challenge, the Court’s most recent cases, as well as those from lower courts, suggest growing disagreement over the degree to which these restrictions are exempt from First Amendment scrutiny.

This article will examine the courts’ growing unease with media ownership regulation and whether this judicial shift represents what our symposium calls “First Amendment Lochnerism.” As the other symposium participants have observed, “Lochnerism” has become an epithet with no precise reference, other than being something most judges seemingly wish to avoid at all costs. As symposium participants also point out, however, “Lochnerism,” in a general and imprecise way, refers to the judicial use of constitutional principles to strike down or limit reasonable economic regulation in order to impose some type of unpalatable, laissez-faire economic ideology. “First Amendment Lochnerism,” our symposium’s topic, would therefore refer to using the First Amendment, as opposed to substantive due process, to limit government’s power to impose economic regulation to further ideological goals.

The Article concludes that such an ideological shift might well exist or may be occurring in the future—at least as exemplified by in Turner Broadcasting v. FCC (Turner I). There, the Court applied First Amendment intermediate scrutiny to cable regulation, marking a departure from previous more deferential

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2. See id. at 94-95.
3. Id. at 89.
4. Id. at 175.
5. See id. at 184.
6. Krattenmaker & Powe, Jr., supra note 1, at 188.
scrutiny of media regulation. 8 In addition, the four justice-dissent went further, arguing for strict scrutiny. 9 Viewing this case as shift towards “Lochnerism” is nothing new. Numerous eminent commentators already have concluded explicitly that Lochner-type review is being applied to the media and information industry regulation.10

This article, however, argues that the problems the FCC’s regulations have faced are more complex than a media regulation-allergic Supreme Court. The problems stem from the FCC’s inability or unwillingness to rely on meaningful metrics for media diversity—and reflect, therefore, a regulatory failing as much as a doctrinal shift in the judiciary.11 After all, courts, consisting both of majority Democratic- and Republican-appointed judges, have come down on the intellectual vacuity of the FCC’s decision-making—particularly its inability to describe and measure the object of its regulation: a robust, diverse media market. For instance, the Third Circuit in a panel consisting of Thomas L. Ambro and Julio Fuentes, both Clinton appointees, in Prometheus Radio struck down the FCC’s order deregulating media and did so on grounds that more conservative appellate judges have relied upon: the inconsistency of the FCC’s treatment of diversity.12 In other words, courts on both sides of the ideological spectrum have struck down FCC regulation and deregulation relying on similar grounds—the FCC’s weak definition and quantification of diversity.13

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10. Jim Chen, Conduit-Based Regulation of Speech, 54 DUKE L.J. 1359, 1456 (2005) (“The shield protecting ordinary economic regulation from First Amendment scrutiny has worn thin. The doctrinal distinction may not withstand the sheer amount of money in contemporary communications.”); Michael Burstein, Towards A New Standard For First Amendment Review Of Structural Media Regulation9 N.Y.U. L. REV. 1030 (2004) (arguing that “such Lochner-like scrutiny is inappropriate in media regulation cases”); Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, 47 DUKE L.L. 899, 944-45 (1998) (“the First Amendment has become the first line of challenge for virtually all forms of regulatory initiatives.”); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. REV. 1, 27-28 (2004) (“We are living through a Second Gilded Age, which ... comes complete with its own reconstruction of the meaning of liberty and property. Freedom of speech is becoming a generalized right against economic regulation of the information industries.”); Benkler, supra note 9, at 201-03 (“As the information economy and society have moved to center stage, the First Amendment is increasingly used to impose judicial review on all regulation of this sphere of social and economic life.”); Yochai Benkler, Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, 66 LAW & CONTEMP. PROBS. 173, 201-05 (2003).


Diversity is a central goal of FCC regulation. The Supreme Court repeatedly has stated that the FCC may limit ownership in order to further “viewpoint diversity,” the number of viewpoints and ideas expressed in media coverage and political debate. The FCC, however, does not attempt to quantify or identify the number of viewpoints and ideas in a given media market. Instead, it simply equates viewpoint diversity to diversity of ownership almost as a matter of religious faith—without empirical backing. The Biennial Media Ownership Order, the FCC’s recent and comprehensive statement of its regulatory principle states with shocking, and probably unintended, bluntness, “[a] larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners. We believe this proposition, even without the benefit of conclusive empirical evidence . . .”

Accepting the connection between diversity of ownership and viewpoint as a self-evident truth is tendentious, particularly because a significant body of economic theory suggests the opposite: that concentrated ownership produces greater diversity in programming content. Judge Posner explained this insight in Schurz v. FCC, discussed infra:

It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity. If all the television channels in a particular market were owned by a single firm, its optimal programming strategy would be to put on a sufficiently varied menu of programs in each time slot to appeal to every substantial group of potential television viewers in the market, not just the largest group. For that would be the strategy that maximized the size of the station’s audience. Suppose, as a simple example, that there were only two television broadcast frequencies (and no cable television), and that 90 percent of the viewers in the market wanted to watch comedy from 7 to 8 p.m. and 10 percent wanted to watch ballet. The monopolist would broadcast comedy over one frequency and ballet over the other, and thus gain 100 percent of the potential audience. If the frequencies were licensed to two competing firms, each firm would broadcast comedy in the 7 to 8 p.m. time slot, because its expected audience share would be 45 percent (one half of 90 percent), which is greater than 10 percent. Each primetime slot would be filled with “popular” programming targeted on the median viewer, and minority tastes would go unserved.

15. See id. at 780.
18. A recent analysis suggesting a connection between increased media concentration and increased viewpoint diversity can be found in Simon P. Anderson & Stephen Coate, Market Provision of Broadcasting: A Welfare Analysis, 72 Review of Economic Studies 947 (2005). This insight is quite old, being first applied to broadcast in Peter Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q. J. of Econ. 194 (1952).
network vies to put on the most popular programs and as a result minority tastes are ill served. 19

As with most economic insights, its application is questionable, depending on numerous assumptions that may or may not be appropriate in today’s media markets. 20 Yet, even if one were to dismiss this insight as so much theoretical musing and agree with the D.C. Circuit and the FCC that “ownership is perhaps an aspirational but surely not an irrational proxy” for diversity in programming, 21 this proxy has proven intractable. The FCC has difficulty determining when there are “enough” independently owned media outlets in a given market. Indeed, this inquiry is meaningless when not tethered to a measurement of whether or not more independently owned outlets produce more diversity of media content. Conceptually hobbled, the FCC produces Humpty-Dumpty from Alice in Wonderland-type regulation in which claims about diversity exist without any general standard of empirical justification, i.e., enough diversity is what the FCC says is enough. It also results in the stunning recent record of failure of the FCC’s media ownership rules when reviewed by the courts of appeal. 22

This article proposes two approaches, empirical and normative, to strengthen the regulatory justification for media ownership regulation in times of ever more demanding judicial scrutiny. On the empirical side, the FCC, following the lead of numerous economics and communications scholars, could make a serious effort to measure media diversity and tackle the difficult question of enumerating the number of ideas and concepts expressed within a given media market structure. 23 To date, it has not done so, but has used economic and empirical data in a haphazard, even chaotic manner. 24 Second, it could argue from

20. See id. (stating: “We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity . . . . We believe this proposition, even without the benefit of conclusive empirical evidence remains sound.”).
22. It is hard to remember a major FCC media ownership rule that has been upheld. See Prometheus Radio Project v. FCC, 373 F.3d 372, 403 (3d. Cir. 2004) (remanding the FCC’s “Cross-Media Limits” for justification or further modification); Fox Television v. FCC, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (remanding the FCC’s decision concerning the national television station ownership cap and cable cross-ownership rule); Sinclair Broad. Group v. FCC, 284 F.3d 148, 169 (D.C. Cir. 2002) (holding the FCC failed to justify adequately its local ownership rules even under a deferential standard of review); Time Warner Entm’t Co. v. FCC, 240 F.3d 1126, 1136 (D.C. Cir. 2001) (holding the horizontal ownership cap for cable arbitrary and capricious).
24. See Miller, supra note 18, at 353 (stating that the FCC’s use of its own “Diversity Index” to gauge the degree of media diversity concentration “is the source of widespread opposition to the methods used by the FCC to determine the limits of market saturation.”).
normative grounds the importance of decentralized ownership and maximize it up to the point at which economic data clearly point to inefficiencies.\textsuperscript{25} In this way, firm normative principles would guide regulatory action, and those opposing such action would have to build their case on the shifting sands of economic data and analysis.\textsuperscript{26} Such a move, the Article argues, would result in a de facto shift of the burden of persuasion from the FCC to pro-deregulation parties.\textsuperscript{27}

This article will proceed as follows. First, it will examine the First Amendment challenges to media ownership regulation; most particularly, recent cases, such as \textit{Turner Broadcasting}\textsuperscript{28} and \textit{Time Warner},\textsuperscript{29} that create a higher degree of judicial scrutiny of ownership regulation.\textsuperscript{30} Second, the Article turns to the FCC’s Biennial Media Ownership Order and its judicial review. This comprehensive order concisely exemplifies\textsuperscript{31} the FCC’s use of the First Amendment to limit its scrutiny of the relationship between viewpoint diversity and market structure and deflect attention from the shallowness of its economic and empirical analyses.\textsuperscript{32} Finally, this article describes its two approaches to more firmly justify media ownership regulation in the face of more hostile judicial review.

\section*{I. Media Ownership and Constitutional Limits}

The Federal Communications Commission has been in the business of restricting media ownership almost since the agency’s inception.\textsuperscript{33} Since the

\begin{itemize}
\item \textsuperscript{25}See generally Thomas W. Hazlett, \textit{The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase’s “Big Joke”: An Essay on Airwave Allocation Policy}, 14 HARV. J.L. & TECH. 335, 533 (2001) (stating “[t]he normative goal of spectrum reform should be to enable market allocation of radio spectrum. FCC planning would yield to private, decentralized decisions determining radio wave use.”).
\item \textsuperscript{26}See id. at 534-35 (discussing opposition to FCC reform).
\item \textsuperscript{27}See id. at 535.
\item \textsuperscript{28}\textit{Turner Broad. Sys., Inc. v. FCC (Turner I)}, 512 U.S. 622 (1994).
\item \textsuperscript{29}\textit{Time Warner Entm’t Co., L.P. v. FCC}, 240 F.3d 1126 (D.C. Cir. 2001).
\item \textsuperscript{30}See \textit{Turner Broad. Sys., Inc. v. FCC}, 512 U.S. 622 at 641 (applying “some measure of heightened First Amendment scrutiny . . . .”); \textit{Time Warner Entm’t Co., L.P. v. FCC}, 240 F.3d 1126 at 1130 (applying “intermediate scrutiny.”).
\item \textsuperscript{31}It is difficult to refer to a 400 page order as concise, but for the FCC to put a comprehensive statement of its ownership rules in one document is an achievement of sorts.
\end{itemize}
1930s, the FCC has considered furthering diversity in ownership as a goal in awarding radio licenses and later applied the principle to broadcast licenses.\textsuperscript{34} As discussed in Section III, many have interpreted these efforts as merely veils to conceal presidential pique at certain groups critical of administration policies. Be that as it may, a remarkably complex quilt of rules has developed over the decades that limit ownership in broadcast, radio, cable, and, to some degree, newspaper ownership.\textsuperscript{35} Due to the Third Circuit Court of Appeals’ rebuff in \textit{Prometheus Radio Project v. FCC}\textsuperscript{36} of the FCC’s recent effort to ease these rules, they continue in large measure to be in force.\textsuperscript{37}

These rules have been challenged on First Amendment grounds since these rules’ inception.\textsuperscript{38} The challenge to these rules is straightforward: they limit the number of outlets individuals or corporations may own so as to express and/or set forth their views—and, therefore, constitute federal restrictions on the press.\textsuperscript{39} The Supreme Court traditionally has reviewed the FCC restrictions, however, under the highly deferential rational basis standard—treating them essentially as economic regulation, not free speech regulation.\textsuperscript{40} On the other hand, recent decisions, such as \textit{Turner Broadcasting v. FCC I}\textsuperscript{41} and \textit{II}\textsuperscript{42}; as well as certain lower court rulings, such as \textit{Schurz Communications, Inc. v. FCC},\textsuperscript{43} \textit{Sinclair Broadcast Group, Inc. v. FCC},\textsuperscript{44} and \textit{Time Warner Entertainment Co., L.P. v. FCC}\textsuperscript{45} suggest a retreat from previous, almost axiomatic deference.\textsuperscript{46}

\textsuperscript{34} See Lucas A. Powe Jr., \textit{American Broadcasting and the First Amendment} 167 (1987).
\textsuperscript{36} 373 F.3d 372, 423-25 (3d. Cir. 2004).
\textsuperscript{37} See Baynes, supra note 30, at 200-02 (discussing the effect of the \textit{Prometheus Radio Project} case).
\textsuperscript{38} See, e.g., FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 799-800 (1978) (stating a typical argument that “it is inconsistent with the First Amendment to promote diversification by barring a newspaper owner from owning certain broadcast stations.”).
\textsuperscript{39} See id.
\textsuperscript{40} See, e.g., FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 796 (1978) (stating “[i]t is thus clear that the [FCC] regulations at issue are based on permissible public-interest goals and, so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the [FCC’s] general rulemaking authority . . . .”).
\textsuperscript{41} \textit{Turner Broad. Sys., Inc. v. FCC (Turner I)}, 512 U.S. 622 (1994).
\textsuperscript{42} \textit{Turner Broad. Sys., Inc. v. FCC (Turner II)}, 520 U.S. 180 (1997).
\textsuperscript{43} 982 F.2d 1043 (7th Cir. 1992).
\textsuperscript{44} 284 F.3d 148 (D.C. Cir. 2002).
\textsuperscript{45} 240 F.3d 1126 (D.C. Cir. 2001).
\textsuperscript{46} See \textit{Turner I}, 512 U.S. 622, 639 (1994) (holding that “application of the more relaxed standard of scrutiny adopted in \textit{Red Lion} and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.”); \textit{Turner II}, 520 U.S. 180, 189-90 (1997) (applying the \textit{O’Brien} intermediate test); \textit{Schurz Comm’n, Inc.}, 982 F.2d 1043, 1049-50 (7th Cir.
The following briefly describes the Supreme Court’s treatment of media ownership regulation. It discusses the changes in this treatment that have occurred—changes towards higher levels of scrutiny. This analysis will focus on how courts’ changed views of diversity have led to more rigorous scrutiny.

A. Judicial Deference to the FCC’s Notions of Diversity

Without providing an exhaustive examination of the judicial precedent concerning the FCC’s media ownership rules, a job that others have already done extremely well, the following briefly surveys the major historic features of judicial deference towards the FCC’s media ownership regulation, concentrating on the concept of diversity—how the FCC uses it and courts understand it.

The first challenge of the Federal Communication Commission’s ownership regulation was in 1943, in Nat’l Broadcasting Co. v. United States, which involved to the broadcast industry's First Amendment challenge to the FCC's “Chain Broadcasting Regulations.” These rules prohibited the granting of “licenses . . . to stations or applicants having specified relationships with networks.”

Some of the Chain Broadcasting Regulations were behavioral, setting forth mandates on networks and broadcasters; others were structural, regulating ownership interests and industry organizations. On the behavioral side, the Regulations prohibited contracts between broadcasters and networks that restricted the broadcaster’s ability to use non-affiliated network programming, agreements that forbade networks to sell programs to any other station in the same area, affiliation agreements that extended more than three years, network affiliation contracts that gave networks the power to specify what programs would be aired during certain time slots, and networks’ failure to describe their programming sufficiently in advance so that the broadcaster could decide whether to air it. Finally, the Regulations prohibited a broadcast station from “having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.”

On the structural side, the Regulations forbade the licensing of two stations in the same area to a single network as “basically unsound and contrary to the public interest.” In addition, the rules prohibited any license to be granted to a

1992) (applying a rational basis test but finding that the FCC did not meet rational basis standards); Sinclair Broad. Group, Inc., 284 F.3d 148, 167-68 (applying rational basis review) (D.C. Cir. 2002); Time Warner Entm't Co., 240 F.3d 1126, 1130 (D.C. Cir. 2001) (relying on Turner II and applying the O’Brien intermediate test).

48. See id. at 199-201.
49. Id. at 209.
50. Id. at 207.
network organization, or any entity controlled by a network, if such license involved more than one standard broadcast station where one of the stations covered substantially the service area of the other station.\(^{51}\)

Against First Amendment challenged, the Court upheld these regulations, relying on what became the “scarcity” doctrine — which holds that given the limited amount of broadcast spectrum, the federal government has the power to regulate broadcast in spite of the First Amendment.

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. . . . Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.\(^{52}\)

The next review of an FCC ownership restriction, \textit{United States v. Storer Broad. Co.},\(^{53}\) involved the FCC’s Multiple Ownership Rules, which restricted the number of licenses for FM radio stations that could be granted if the applicant, directly or indirectly, had an interest in AM radio stations. Individuals, such as the respondents, who already owned a number of AM or “standard stations,” could own fewer than they wished to. In a statutory challenge the Court upheld these regulations with little constitutional analysis.\(^{54}\)

The Supreme Court’s next major re-examination of the FCC’s media ownership policy occurred several decades later in \textit{Federal Communications Commission v. National Citizens Committee for Broadcasting}.\(^{55}\) The Court reviewed FCC rules that prohibited cross-ownership between broadcast and newspapers, \textit{i.e.}, forbade entities that owned either radio or television stations from owning a newspaper in the same community.\(^{56}\) Here, the FCC justified its rules explicitly on the “diversity” concept.\(^{57}\) As the Supreme Court stated, “[diversification] of control of the media of mass communications’ has been viewed by the Commission as ‘a factor of primary significance’ in determining

\(^{51}\) Id. at 208.
\(^{52}\) Id. at 226-27.
\(^{53}\) 351 U.S. 192 (1956).
\(^{54}\) Id. at 203. “The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.” Id.
\(^{56}\) Id. at 779.
\(^{57}\) Id. at 794.
who, among competing applicants in a comparative proceeding, should receive the initial license for a particular broadcast facility.58

The Court accepted wholeheartedly the FCC’s diversity justification—arguing (somewhat paradoxically) that by limiting the rights of entities to own media outlets one was, in fact, furthering First Amendment goals.59 Relying on language from Associated Press v. United States, an antitrust case dealing with the exclusive practices of the Associated Press in selling stories to non-affiliated newspapers, the Court stated that “Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission’s diversification policy may properly be considered by the Commission in determining where the public interest lies. [T]he ‘public interest’ standard necessarily invites reference to . . . the First Amendment goal of achieving “the widest possible dissemination of information from diverse and antagonistic sources.”60

In explicitly stating the rather paradoxical notion that restricting ownership of news outlets furthers the First Amendment goals of diversity, the Court showed a remarkable deference to the FCC in defining and measuring diversity.61 The Court stated that the First Amendment seeks diversity of “viewpoint.”62 The Court sometimes appears to equate diversity of viewpoint with diversity of ownership.63 At other times, it simply accepts the Commission’s judgment that diversity of ownership is an acceptable proxy for diversity of viewpoint.64 The Court stated “notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints . . . .[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds. . . .”65

NCCB represents the high tide mark in judicial deference to the FCC’s power to regulate media market structures and its determinations concerning

58. Id. at 781 (citing Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-395 (1965)).


60. Id. (citing Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122 (1973) and Associated Press v. United States, 326 U.S. 1, 20 (1945)).

61. Id. at 796.

62. Id. at 796-97.

63. Id.

64. Compare id. at 797 (“It had thus become both feasible and more urgent for the Commission to take steps to increase diversification of ownership, and a change in the Commission’s policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service.”) with id. at 800-801 (“In the instant case, far from seeking to limit the flow of information, the Commission has acted, in the Court of Appeals’ words, “to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech.”)

65. Id. at 796-97 (citing National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938, 961 (D.C. Cir 1977)).
diversity. It firmly stated that limiting media ownership is, in itself, a First Amendment principle. It further established a standard of considerable deference to the FCC, naming media diversity an “elusive” goal for which judicial second-guessing is inappropriate. Not surprisingly, the FCC liked the descriptor “elusive” as applied to media diversity, for the adjective dubbed it a sort of Delphic expert agency—whose often cryptic pronouncements should be accepted even by robed mortals. Citation to the “elusive” language in NCCB is found in virtually all subsequent FCC decisions concerning ownership and media diversity.

B. Diversity, Scarcity, and Changing Standards: The Supreme Court and the Courts of Appeal

In Turner Broadcasting System, Inc. v. FCC (Turner I) and Turner Broadcasting System, Inc. v. FCC (Turner II), the Court ruled on the constitutionality of a statute that required cable systems to carry local broadcasters’ signals (the “must-carry” statutes). These cases certainly represent a shift from the view that all media regulation is governed by the rational basis standard of NCCB. In these opinions, the Court established the principle that only regulation of broadcast, due to its unique history and the scarcity doctrine, should receive such lax review. Instead, cable regulation, and presumably other, non-broadcast media regulation, should receive intermediate scrutiny as a content-neutral restriction on speech. Given these decisions’ fractured pluralities, the future of media regulation is in doubt. In addition, lower courts, in cases like Time Warner, Sinclair, and Schurz point to the difficulties the FCC may face in the future in getting its regulations upheld. In short, these courts, under the rubric of intermediate scrutiny, demand more precise measurements and a clearer definition of diversity.

72. Turner I, 512 U.S. at 662.
73. Time Warner Entm’t Co. v. United States, 211 F.3d 1313 (D.C. Cir. 1999).
75. Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992).
Many observers (and justices) claimed that the must-carry statutes at issue in *Turner I* and *Turner II* resulted from broadcasters’ fear that over-the-air broadcast television would become obsolete in an age when virtually every household receives its signals through a cable. And, given that the local broadcasters are among the few media outlets that cover the doings of the local representative or senator, Congress is without doubt solicitous towards broadcasters’ needs and responsive to their fears—and thus designed the must-carry law to help broadcasters.\(^7^6\) Regardless of the political motivations that gave rise to the must-carry provisions, requiring cable systems to carry particular programming implicates the First Amendment because it mandates certain speech and restricts the opportunity to air other types of programming. It is on that basis that they were primarily challenged.\(^7^7\)

In *Turner I*, the Supreme Court reviewed the constitutionality of the must-carry regulation, specifically sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act or Act). Section 4 requires carriage of “local commercial television stations,” which is defined to include all full power television broadcasters that operate within the same television market as the cable system.\(^7^8\) According to their size, cable systems must reserve a portion of their available capacity to carry local broadcasts.\(^7^9\) Section 5 of the Act imposes similar carriage requirements regarding local public broadcast television stations.\(^8^0\)

Specifically, in *Turner I*, the Supreme Court reviewed sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act or Act). Section 4 requires carriage of “local commercial television stations,” defined to include all full power television broadcasters, that operate within the same television market as the cable system.\(^8^1\) According to their size, cable systems must reserve a portion of their available capacity to carry local broadcast.\(^8^2\) Section 5 of the Act imposes similar carriage requirements regarding local public broadcast television stations.\(^8^3\)

\(^7^6\) Id. at 676 (O'Connor, J., concurring in part and dissenting in part) (“I cannot avoid the conclusion that [the statutory] preference for broadcasters over cable programmers is justified with reference to content.”); see also id. at 685 (Ginsburg, J., concurring in part and dissenting in part) (“Congress’ ‘must-carry’ regime . . . reflects an unwarranted content-based preference. . . .”); see also Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. Rev. 141, 186 (1995) (“A preference for local broadcasting and community-based speakers [as expressed in the must-carry rules] incorporates, at least to some degree, a vision of the appropriate structure of society that is political at heart, and therefore suspect.”).


\(^8^3\) 47 U.S.C. § 535(a).
The Court in *Turner I* did not apply the rational basis review that the *NCCB* court applied to the broadcast-newspaper cross-ownership distinction and that is applicable to economic regulation in general. That standard was not appropriate, the Court reasoned because, “cable television does not suffer from the inherent limitations that characterize the broadcast medium. . . . Nor is there any danger of physical interference between two cable speakers attempting to share the same channel.”84 Rather it limited its deferential First Amendment review of media ownership solely to the broadcast context, and ruled that intermediate scrutiny, appropriate for content-neutral regulations of speech, should be applied to cable regulation.85

In reaching this conclusion, the Court reasoned that the rules “on their face” were content-neutral because they “impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past.”86 Further, the Court determined that Congress did not intend to favor one type of speech over another, for “our review of the Act and its various findings persuades us that Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.”87

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The Court concluded that the must-carry rules receive intermediate scrutiny, applicable to content-neutral restrictions that impose an incidental burden on speech.90 Under this test, the Court sustains a content-neutral regulation if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.91

85. *Id.* at 662.
86. *Id.* at 644.
87. *Id.* at 646.
88. *Id.* at 644; see also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).
89. *Id.* at 646.
90. *Id.* at 663.
91. *Id.* at 664.
The Court reasoned that the governmental interest in the must-carry statute was sufficient “in the abstract” to withstand intermediate scrutiny.\(^92\) A four-Justice plurality found that genuine issues of material fact remained concerning whether “the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry,”\(^93\) and whether must-carry “burden[s] substantially more speech than is necessary to further the government’s legitimate interests.”\(^94\) To secure a majority of the Court, Justice Stevens, who would have ruled the statute constitutional on the record then before the Court, agreed with the plurality to remand the case to the district court for further proceedings.\(^95\)

When the remand returned to the Supreme Court in *Turner II*, the Court affirmed the must carry statute, again by a fractured majority. The four-member plurality opinion ruled that Congress reasonably concluded that cable television posed an economic threat to the viability of broadcast stations and that Congress could legitimately encourage “diversity in broadcast television service” as a policy goal.\(^96\) Justice Breyer, in concurrence, relied more on the diversity rationale, than on economics or antitrust, concluding, and echoing *NCCB*, that it “has long been a basic tenet of national communications policy . . . that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”\(^97\)

The dissenting justices argued the majority failed to identify true anticompetitive harms that the must carry statute remedied—faulting the plurality and concurrence for citing examples of carriage decision adverse to broadcast, but not examining whether these decisions had appreciable impacts on any particular markets or on viewership rates.\(^98\) Further, “when separated from anticompetitive conduct,” the interest in simply preserving a “multiplicity of broadcast programming sources” for its own sake becomes an untenable policy goal.\(^99\) The dissent stated “[n]either the principal opinion nor the partial concurrence offers any guidance on what might constitute a ‘significant reduction’ in the availability of broadcast programming.”\(^100\)

The “Lochnerism” of *Turner I* and *Turner II* reflects the Court’s demand (or, at least, a significant portion of the Court) for clearer definitions and better evidence from the FCC. While *NCCB* was more than happy to declare diversity “elusive” and accept pretty much any FCC action that created more “voices,” the

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92. *Id.* at 663.
93. *Id.* at 665.
94. *Id.* (quoting *Ward*, 491 U.S. at 799).
95. *Id.* at 673-674 (Stevens, J., concurring).
96. *Turner II*, 520 U.S. at 204.
98. *Id.* at 229-30 (O’Connor, J., dissenting).
99. *Id.* at 232 (O’Connor, J., dissenting).
100. *Id.*
dissent in *Turner II* demanded a clear definition of media diversity and metrics to measure it. While the *Turner* cases established as law a higher standard of First Amendment review, they—particularly the dissent in *Turner II*—also point to a more rigorous approach to establishing factual claims about diversity. Several lower courts presaging and following *Turner* also have required rigorous factual showings—pointing to the same weakness in the FCC’s rulemaking.

In *Schurz Communications, Inc. v. FCC,*

101 the Seventh Circuit, in an opinion authored by Richard Posner, reviewed the FCC’s financial interest and syndication or “FINCEN” rules that prohibited a television network from licensing its own programs for rebroadcast by independent stations or from purchasing syndication rights from independent producers. The regulations required the networks to sell syndication rights to an independent syndicator.

These regulations were revised and re-promulgated in 1991.

The justification for these rules was the fear that the networks would leverage their control of programming distribution into a control of programming production, refusing to purchase non-affiliated programming unless the producers surrendered syndication rights and charging too much for syndication to independent, non-affiliated stations. As Judge Posner explained, “the rules would strengthen the independent stations (and so derivatively the outside producers, for whom the independent stations were an important market along with the networks themselves) by securing them against having to purchase reruns from their competitors the networks.”

This case was decided well before the *Turner* cases and, therefore, rational basis scrutiny applied—a conclusion Posner accepted but reluctantly so. Perhaps not surprisingly, Judge Posner therefore took a highly skeptical look at the rule’s purported goals and stated means. Anticipating later post-*Turner*

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102. *Id.* at 1045.
103. *Id.* The court distinguished between licensing of programming, which would entail ongoing revenues for the network, and were thus prohibited under the regulations, and outright sale of programming, which would not give the network an interest in later revenues, which was permitted. *Id.*
105. *Schurz*, 982 F.2d at 1045. Judge Posner indicated in the opinion that:

The concern behind the rules was that the networks, controlling as they did through their owned and operated stations and their affiliates a large part of the system for distributing television programs to American households, would unless restrained use this control to seize a dominating position in the production of television programs. That is, they would leverage their distribution “monopoly” into a production “monopoly.”

106. *Schurz*, 982 F.2d at 1046.
107. *Id.* at 1049 (“And although as an original matter one might doubt that the First Amendment authorized the government to regulate so important a part of the marketplace in ideas and opinions as television broadcasting, the Supreme Court has consistently taken a different view”).
cases, he questioned the justification for the rules, arguing that, in fact, the rules might weaken independent producers by limiting their bargaining power. He also questioned the justification that diversity in programming was increased by strengthening independent programming. He pointed out, trotting out the famous Hotelling/Steiner economic argument quoted in the Introduction, that more concentrated markets produce greater diversity.

In light of this theoretical possibility—i.e., that monopolistic market structure produces more diversity—and the development of multi-channel cable television, Posner challenged the FCC’s claim that restrictions on network participation in programming promote diversity. Posner points out that the term diversity “is never defined” in the FCC’s order and, therefore, one cannot see how the agency can claim that its restrictions further diversity, particularly in light of the economic theory that would predict that fewer ownership limits would enhance diversity.

In Time Warner Entertainment Co. v. FCC, the D.C. Circuit reviewed the FCC’s national caps of cable ownership. Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, requires the Federal Communications Commission to set (i) “limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest” (the “horizontal limit”) and (ii) “limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.” (the “vertical limit”). Pursuant to the statute, the FCC imposes a 30% “horizontal” limit on the number of subscribers that may be served by a multiple cable system operator and required cable

108. Id. at 1051 (noting that “[t]he new rules . . . appear to harm rather than help . . . by reducing their bargaining options. It is difficult to see how taking away a part of a seller’s market could help the seller.”).
109. Id. at 1054.
110. The Hotelling and Steiner models both address, from varying vantage points, the effect that market concentration has on variety of available choices. For a more detailed discussion of both models, consider Harold Hotelling, Stability in Competition, 39 ECON. J. 41 (1929), and Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. ECON. 194 (1952).
111. Id. at 1055 (“Almost everyone in this country now has or soon will have cable television with 50 or 100 or even 200 different channels to choose among.”).
112. Id.
113. Id. at 1054.
114. Id.; see also supra note 99 and accompanying text.
systems to reserve 60% of their channel capacity for programming by non-affiliated firms.\textsuperscript{120}

The cable companies, Time Warner and AT&T, challenged the horizontal as exceeding statutory authority, unconstitutional infringements of their freedom of speech, and products of arbitrary and capricious decision-making in violation the Administrative Procedure Act.\textsuperscript{121} Time Warner similarly challenged the vertical limit.\textsuperscript{122} The Commission supported its horizontal limit on the grounds that it “maximizes” the number of cable systems so that “[w]ith more MSOs [multivideo system operators, i.e., cable companies] making purchasing decisions, this increases the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public.”\textsuperscript{123}

The court rejected this justification, finding, \textit{inter alia}, the FCC’s understanding of diversity as too flimsy.\textsuperscript{124} Finding the FCC’s understanding of diversity as too flimsy, the court explained:

\begin{quote}
[w]e have some concern how far such a theory [of diversity] may be pressed against First Amendment norms. Everything else being equal, each additional "voice" may be said to enhance diversity. And in this special context, every additional splintering of the cable industry increases the number of combinations of companies whose acceptance would in the aggregate lay the foundations for a programmer's viability. But at some point, surely, the marginal value of such an increment in "diversity" would not qualify as an "important" governmental interest. Is moving from 100 possible combinations to 101 "important"? It is not clear to us how a court could determine the point where gaining such an increment is no longer important.\textsuperscript{125}
\end{quote}

While the court sidestepped this issue of how much value the marginal voice has when weighed against “First Amendment norms,” it did rule that under the Cable Act amendments, diversity means only that a programmer is guaranteed two possible outlets.\textsuperscript{126} The court remanded to the FCC on the grounds that ownership caps could be justified, \textit{inter alia}, on the excess bargaining power they gave cable operators.\textsuperscript{127}

The 1996 Telecommunications Act instructed the Commission to conduct a rulemaking proceeding, “to determine whether to retain, modify, or eliminate its

\begin{footnotesize}
\begin{enumerate}
\item 120. \textit{Time Warner}, 240 F.3d at 1129.
\item 121. \textit{Id.} at 1128.
\item 122. \textit{Id.}
\item 123. \textit{Id.} at 1134 (citing \textit{In the Matter of Implementation of Section 11(C) of the Cable Television Consumer Protection and Competition Act of 1992}, 14 F.C.C.R. 19098, 19119 ¶ 54 (Oct. 20, 1999)) (parenthetical text added).
\item 125. \textit{Id.} (emphasis in original).
\item 126. \textit{Id.}
\item 127. \textit{Id.} at 1144-45.
\end{enumerate}
\end{footnotesize}
limitation on the number of television stations that a person may own in... the
same television market.” Pursuant to the Act, the Commission promulgated
the Local Ownership Order, which relaxed its prohibition on one entity
controlling more than one station in a particular Nielsen designated market area
(DMA) under certain conditions, one being the existence of eight independently
owned full-power television stations. In counting this eight voice exception,
the Commission determined that only broadcast television should count because,
“there remain unresolved questions about the extent to which [non-broadcast
television] alternatives are widely accessible and provide meaningful substitutes
to broadcast stations.” The Commission adopted a different counting
approach in its exception to the radio-televisio
n cross-ownership rule in which it
does count local newspapers and cable television stations. Sinclair
Broadcasting challenged the rule on the grounds that eight was an arbitrary
number of voices and that there was no reason to exclude non-broadcast
voices.

The D.C. Circuit, while reciting the language of deference in NCCB,
remanded on the ground that the Commission irrationally excluded cable from its
eight-voice count. While the Commission stated that broadcast was more
important than cable, it never presented a theory or any data as to why broadcast,
but not cable, should constitute a “voice.” Of course, this should not surprise.
If an agency cannot define “diversity,” then it can have no idea about what might
constitute one “unit” of diversity.

Judge Sentelle, who dissented in part on the grounds that the diversity rules
should be vacated, not simply remanded, attacked the Commission for claiming
that eight voices ensures an appropriate level of diversity but then failing to
provide evidence that its rules will result in diversity. While agreeing that an
agency has broad discretion to draw lines, Sentelle points out that “there are no
meaningful limits to the diversity rationale offered [and]... [t]here is no
suggestion as to how much diversity is enough, how much it too little, or how
much is too much.”

Schurz, Time Warner, and Sinclair as well as the dissent in Turner II,
expressed the same frustration: how can a court determine whether the FCC’s
rules reasonably further diversity, when the FCC, itself, cannot precisely define

§303(c)(2)).
130. Id.
131. Id.
132. Id. at 158-59.
133. Id. at 169.
134. Sinclair Broad. Group, 284 F.3d at 163.
135. Id. at 164-65.
136. Id. at 169-172.
137. Id. at 170.
the term? On one hand, this does not represent “Lochnerism”—an ideological use of constitutional principles to overturn statutes or regulations. It perhaps instead, or also, represents a growing sophistication among the judiciary in economic matters and judicial confidence to rely on economic principles in questioning administrative agencies. This demand for a higher level of justification could reflect frustration at the FCC’s often transparently political accommodations—appellate courts have simply no trust that behind the “elusive” concept of diversity there is nothing but Beltway interest-adjustments.

On the other hand, these cases do represent a sort of Lochnerism in that courts are demanding a much higher level of proof and justification than did the NCCB court and appear to be expressing an ideological aversion to the FCC’s ownership regulation. Arguably, the 4-justice dissent in Turner I, calling for the highest level of First Amendment scrutiny on must-carry, reflects an ideological aversion to media regulation, as much as it does a reasoned application of the notoriously vague content-based/content-neutral distinction. Indeed, as some have pointed out, this higher level of scrutiny may simply represent an indifference to the normative questions media ownership presents.

In any case, against this legal background, the FCC, under the leadership of Chairman Michael Powell, undertook a massive, comprehensive re-examination of virtually all of the media ownership rules concerning broadcast in 2003: the Biennial Media Ownership Order. As discussed below, the FCC’s continued failure to forward a meaningful definition of diversity doomed the Order’s fate on appeal to the Third Circuit in Prometheus Radio. It is to this Order and its appellate review that the next section turns.

II. THE FCC’S BIENNIAL MEDIA OWNERSHIP ORDER AND ITS APPELLATE REVIEW

On July 2, 2003, the FCC released its Biennial Media Order which re-examined the entire spectrum (so to speak) of broadcast ownership regulation. The Order examined the most important media ownership rules including: the

cross ownership rules that prohibited television station ownership from owning newspapers or radio stations within the same market; the local television cap that limited the number of stations one firm could own in a particular market, and the local radio cap that limits ownership concentration in local radio markets. In general, the FCC justified the Biennial Media Ownership Order on the basis that the FCC had long established that its restrictions further the policy goals of “competition, localism, and diversity,” particularly in news coverage. (“Localism” is defined as the goal of local news outlets to be responsive to the needs of the local community and is a type of diversity that the FCC particularly encourages—though arguably this diversity occurs at the expense of other types of media diversity.)

In the Biennial Media Ownership Order, the FCC attempted to put forth a more subtle and complex notion of diversity, combining diversity of ownership with market share. Yet, the FCC continued to rely squarely on the assumption that diversity of outlet ownership implies diversity of viewpoint. It never effectively utilized research that attempted to identify and quantify actual diversity of ideas. The court in Prometheus Radio had little trouble rejecting the FCC’s reasoning.

A. The Two Cross-Ownership Rules.

In the Biennial Media Ownership Order, the FCC abolished both the radio-television and television-newspaper cross ownership rules. In their stead, the FCC created a complicated scheme in which different standards apply to different markets. In effect, the FCC eliminated all cross-ownership restrictions in large media markets. In the smallest media markets, it retained limits. For those markets in between, it created the “Diversity Index” (DI) to determine whether markets were “at risk” for a lack of media diversity. If a market has too low of a DI, such market would potentially be subject to further regulation.

The DI was modeled after the Herfindahl-Hirschman Index (HHI) in antitrust law, which measures the degree of concentration in markets for antitrust

144. Id. at 386-89.
145. Id. at 446.
146. Id. at 447.
147. Id.
148. Id.
149. Id. at 382.
150. 373 F.3d at 387-88.
151. Id. at 388.
152. Id.
153. Id.
154. Id.
155. 373 F.3d at 403-04.
purposes. The higher the HHI, the more concentrated the market, and the more potential there is for market participants to exercise market power. The HHI is a simple calculation that squares each market participant’s share.

Analogously (in a rough way), the DI measures “viewpoint diversity” concentration. It weights various media (newspapers, radio, etc.) by their market share in the total media market. But then, the DI does not weigh the market share of each firm. Rather, within a given media category (newspaper, television, etc.), each outlet counts equally, regardless of its market share.

The DI, however, only really counts the number of participants in a market, not the diversity and dissemination of views. Thus, while HHI is tied to market performance in some general way, it is not clear what the DI measures. It does not measure diversity; it measures market share and the number of market participants. Thus, a market with 50 independent radio stations all saying the same thing would rank higher in the DI than an NPR and FoxNews duopoly. Obviously, this is a limited metric.

The Prometheus Radio court rejected the DI—and the FCC’s elimination of the cross-ownership rules—largely because it failed to coherently count heads in order to provide meaningful estimate of media diversity. Thus, as the court observed, “the Dutchess Community College television and the stations owned by ABC” receive equal weighting. The Court also rejected the Commission’s inclusion of internet news, but exclusion of cable news in its diversity calculation. Again, the FCC was on shaky grounds because it attempted to pick and choose which outlets to “count” rather than observe consumer behavior and the nature of news coverage, i.e., measure real media diversity.

B. Local Television Cap.

The FCC’s order relaxed the local television cap, permitting a single firm to own two or three television stations in certain markets. Specifically, the order permitted triopolies in markets of 18 stations or more and duopolies in markets

156. Id.
157. Id.
158. Id.
159. Id. at 403.
160. 373 F.3d at 404.
161. Id.
162. Id.
163. Id.
164. See id.
165. 373 F.3d at 409.
166. Id. at 408.
167. Id. at 408-09.
of 17 or fewer. The FCC continued to prohibit common ownership among the top four stations in any given market.

This cap, therefore, treated ownership of the fifth, sixth, and seventh most-watched station equivalent to that of the 16th, 17th, and 18th. This was designed to ensure that most markets would have six firms because six equal-sized firms would create an HHI index below 1800—and, therefore, was assumed to present no competitive problems.

The FCC simply presumed that the firms would be equal-sized—and the court had no problem finding this assumption irrational saying, “No evidence supports the Commission’s equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share.”

C. Local Radio Cap.

Existing regulation had a complicated tiered system of local radio ownership limits. In radio markets with 45 or more radio stations, a company could own up to eight stations, only five of which could be in one class, AM or FM. In markets with 30-44 radio stations, a company can own seven stations, only four of which could be in one class. In markets with 15-29 radio stations, a company can own six stations, only four of which may be in one class. In markets with 14 or fewer radio stations, a company can own five stations, only three of which could be in one class, and an owner cannot control more than 50 percent of the stations within these markets.

This rule was designed to guarantee five firms in all markets. The Commission primarily relied on two articles in game theory, 15 and 30 years old respectively, for its claim that five equal-sized competitors would create a competitive market. This was an odd justification, given that these articles were not specifically about local radio, and their application not immediately apparent.

The court found the Commission’s reliance on those articles irrational because the DOJ’s merger guidelines and current policy contradict these articles’ claims. Further, the FCC inconsistently relied on the same DOJ Merger Guidelines in other parts of the order. Finally, in a complaint that by now
should sound tedious, the court also found illogical that the five voices, regardless of market share, contribute meaningfully to diversity.  

III. COHERENT MEDIA OWNERSHIP IN TIMES OF GROWING JUDICIAL SKEPTICISM

It is not clear whether the courts’ growing demand for more convincing evidence and more precise notions of diversity stem from an ideology—or simply a growing awareness of the intellectual vapidity of the FCC’s ownership rulemakings. On one hand, the four-justice dissent in *Turner*, calling for strict scrutiny of media ownership regulation, does seem to constitute an ideological opposition to the regulation—suggesting the existence of a “First Amendment Lochnerism.” On the other hand, the majority in *Prometheus Radio* consisting of judges appointed by Democratic presidents—suggests that courts vacating the FCC’s rulings are just sick of their inconsistencies and analytical shortcomings. To the degree that First Amendment Lochnerism thwarts media ownership regulation, it has aimed its sights—as the preceding analysis suggests—at the FCC’s inability to come up with a coherent approach to defining diversity.

This section suggests that media ownership regulation can be strengthened in the face of a more disapproving judiciary in two ways. First, it can adopt a rigorous understanding of media diversity—one consistent with the more advanced economic and social scientific examinations of media markets. Of course, no approach to diversity-based media caps is a sure-fire—even given the expertise that the large media companies can bring to oppose regulation in court. Further, as a practical matter, the FCC—given the inevitable political compromises that characterize its decisions—probably could not bring itself to be bound by objective, scientific data.

As an alternative approach, therefore, it can change the terms of the analysis—and use the vagaries of economic and social science to its advantage. As discussed above, the reviewing courts that have been so critical of the FCC’s use of diversity have consistently asked how much diversity is enough or required by statute. The FCC has not been able to answer that question because it can hardly even count diversity. What if the set of presumptions were changed?

The FCC could establish as normative matter that widespread ownership is preferable—a position that this Article does not necessarily endorse, but many

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181. Id.
182. See *Turner*, 512 U.S. at 673-74 (dissenting opinion).
183. See *Prometheus Radio Project*, 373 F.3d at 372-480.
184. See *Time Warner Entm’t Co.*, 240 F.3d 1126, 1136; *Fox Television*, 280 F.3d 1027, 144; *Sinclair Broad. Group*, 284 F.3d 148, 159; *Prometheus Radio Project*, 373 F.3d at 372-480.
185. See *Time Warner Entm’t Co.*, 240 F.3d 1126, 1136; *Fox Television*, 280 F.3d 1027, 144; *Sinclair Broad. Group*, 284 F.3d 148, 159; *Prometheus Radio Project*, 373 F.3d at 372-480.
have defended convincingly as discussed below. The question then becomes the familiar issue of how much is required. One could argue that the FCC should require as much diversity of ownership as possible until convincing evidence suggests that significant inefficiencies would be introduced into media markets. Of course, there can be argument about what constitutes “significant inefficiency” and how to measure it. On the other hand, this test is eminently superior to the “counting diversity” approach in that people can disagree about levels of inefficiency, but there is agreement on how to define efficiency—unlike diversity. Further, it provides a point at which policy can aim—rather than the current goal of “maximizing diversity” which is a goal without end. The following examines in greater detail these proposals.

A. All That Elusive? Counting Diversity

Many critics have called for “objective, quantifiable standards” rather than “hopelessly subjective criteria for enforcement” in the FCC’s media ownership orders. Despite the language in NCCB that media diversity is “elusive,” it can be measured. Numerous economists and social scientists have done just that—looking to various media to see how many “ideas” or “viewpoints” are there contained. For instance, Berry & Waldfogel measure diversity in radio formats and relate formats to market structure. In order to determine what constitutes a separate format, they relied on Duncan, a service for radio advertisers. It has 18 formats that it uses to categorize all radio stations nationwide. While not guaranteeing ontological certitude that there are 18 radio formats in Platonic heaven, Duncan does have an economic incentive to correctly identify different types of radio stations that attract different types of viewers. It is hardly a perfect measure, but it is defensible approach to counting

188. Id.
191. Id.
192. Id. at 1009.
193. While not guaranteeing ontological certitude that there are only a limited number of radio formats in Platonic heaven, Duncan does have an economic incentive to correctly identify different types of radio stations that attract different types of viewers.
diversity in media. Peter Alexander has examined the harmonic complexity and diversity of music played on broadcast radio and related that complexity and diversity to certain market structures.

More indirect measures of diversity in media, particularly as it affects the robustness of political participation, include examining the relationship between rates of participation by eligible voters in local elections and media market structure. For instance, George and Waldfogel, Oberholzer-Gee and Waldfogel, and Scheufele show the structure of local media markets affects the nature of political participation.

Even if “counting” diversity in this fashion has intellectual rigor, it may be appropriate in an academic setting, not the politicized FCC. Indeed, the FCC’s unwillingness to rely upon such approaches may stem from the limits they place on FCC discretion. Further, social science can rarely provide the irrefutability that mathematics and physics do. Studies which attempt to classify media by their content would inevitably involve methodological challenges. A court with a penchant towards “First Amendment Lochnerism” could probably find sufficient incompleteness or uncertainty in any set of studies to overturn any FCC order that relied upon them.


197. Id.

198. See generally, Kristen Morse, Relaxing the Rules of Media Ownership: Localism and Competition and Diversity, Oh My! The Frightening Road of Deregulation, 24 J. Nat’l A. Admin. L. Judges 351, 370-75, (Fall 2004) (discussing the political reaction to the Biennial Media Ownership Order including the 3 to 2 vote along party lines and the minority commissioners’ and Congressional reactions.).


201. See e.g., Prometheus Radio, 373 F.3d at 418-20.

202. Id.
B. Changing Presumptions: Stop Counting Diversity

Following the W.H. Auden injunction “Thou shalt not sit/With statisticians
nor commit/A social science,”203 one could re-conceptualize the FCC diversity
inquiry in a way that limits significantly the reliance on economic data and
changes the showings that challengers to FCC regulation must make. The FCC’s
current approach puts it in a position of declaring when there is “enough”
diversity and defining what diversity is.204 It may be impossible for an agency to
do this, particularly in times of a more skeptical judiciary. A different approach
might abandon the pretense of counting diverse viewpoints and state simply that
the FCC aims to further diversity of ownership—a position probably not
incongruent with Supreme Court precedent.205

C. Six Values that Decentralized Ownership

Edwin Baker identifies six values that decentralized ownership furthers.206
First, Baker argues:

[O]wners living in the community where the media product is
distributed and owners closer to journalistic/editorial process are
generally likely to exercise more desirable decisionmaking control and
to be relatively more concerned with quality and less single-mindedly
focused on profit. Their identity is likely more at stake in relation to the
quality of the product, an effect reinforced by being personally close to
the consumers and professionally close to the journalism critics who
evaluate them primarily on the basis of content quality and not merely
the firm’s economic success.207

Second, Baker identifies the “Berlusconi impropriety” of one media interest, allied with a political interest, exercising an excessive control over a
democracy’s civil discourse.208 Third, decentralized ownership, Baker argues, performs a watchdog or checking function—correcting the errors and mistake of any one source of information.209 Fourth, decentralized ownership prevents control of the media by corporate interests outside of media—interests that may

204. See supra notes 116, 128 and accompanying text.
205. Regulations limiting media ownership without regard to viewpoint would be content-neutral and thus subject to intermediate scrutiny. See Turner I, 512 U.S. at 643-44, 652. A strong argument can be made that such regulations would further the important government interest of promoting diversity of ownership. The reasons that diversity of ownership could qualify as an important government interest are explored in the text that follows. See infra notes 200-208 and accompanying text.
207. Id. at 904.
208. Id. at 905-06.
209. Id. at 906-07.
skew reporting. For instance, Baker points to Dupont's threat of withdrawal of advertising that apparently prompted Time, Inc., to pressure its associated Fortune book club to drop the distribution of a book critical of Dupont. Baker also contends that concentrated ownership can lend itself to co-option by one particular approach to the news, such as Rupert Murdoch's, and that concentrated media structures can create unwelcome synergies with other corporate interests.

Starting from the normative position that decentralization of ownership is desirable for its own sake, the FCC could then examine particular media markets with an eye to maximize decentralization of ownership up to the point at which significant economic inefficiencies can be expected. This approach would be immune from the problems that have plagued FCC media ownership regulation as of late—how much diversity is needed. Explicitly accepting diversity of ownership as a goal provides an answer.

While determining when inefficiencies would emerge in markets may be difficult, it is an inquiry with an agreed-upon criterion: economic efficiency—as opposed to the diversity determination that courts have found without criterion. Agencies, in general, receive considerable deference when engaged in line-drawing.

This approach alters the de facto burden of proof. Under its current approach to diversity regulation, the FCC must (i) create a metric for diversity and then (ii) determine whether its limits provide for “enough” diversity. Both steps are conceptually and theoretically tenuous. Under the approach proposed here, the FCC could propose a limit reasonably based upon the evidence in the record—and those who would appeal the order would have to show that efficiency mandated a different limit. The FCC would only have to show that it would be reasonable to expect that its limits would not create grave efficiency losses given the evidence; its opponents would have to show that efficiency losses/gains would be greater or lesser at some other level of concentration. This argument would be based upon a concept, economic efficiency, about

210. Id. at 908.
211. Id.
212. Id. at 909.
213. See supra Part II.
214. See Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 159 (D.C.Cir.2002) (“Where issues involve elusive and not easily defined areas ..., our review is considerably more deferential, according broad leeway to the [agency's] line-drawing determinations.” (citation and internal quotation marks omitted)).
215. See Prometheus Radio, 373 F.3d at 402-03.
216. See id. at 409 ([T]he Commission needs to undergird its predictive judgment . . . with some evidence for that judgment to survive arbitrary and capricious review.”). If there is sufficient evidence in the record to support the agency action and survive arbitrary and capricious review, the burden shifts to the challenger to convince the court that the agency decision should not stand. See id.
217. See sources cited supra notes 52 and 64.
which there can be reasoned analysis. Given the defense to agency line drawing, the FCC’s opponents would have to make the positive, affirmative case that a particular limit was arbitrary and capricious given the economic data, a difficult job given vagaries of economic theory and data. Rather than relying on conclusions about diversity, the FCC’s limit would rely on a normative presumption that decentralized ownership is the preferable default rule. It could then look to economic efficiency as a principle to limit the application of that rule.

IV. CONCLUSION

The future of media ownership regulation in the United States is in flux. The FCC has yet to revise the limits the United States Court of Appeals for the Third Circuit remanded. In the face of increasingly skeptical courts, media regulation will depend in no small measure on the intellectual rigor of the FCC’s analyses. To the degree “First Amendment Lochnerism” controls courts’ behavior, the FCC must do a better job at justifying its regulations. Given the readiness with which courts have struck down its determinations about media diversity, the FCC must re-examine its entire approach to media diversity. This article has suggested several new approaches for a fresh regulatory start.
COPYRIGHT LOCHNERISM

Raymond Shih Ray Ku¹

INTRODUCTION

The idea of First Amendment *Lochnerism* is intriguing. Of course, *Lochnerism* refers to a series of Supreme Court decisions in which the Court interpreted the Fourteenth Amendment and substantive due process to protect a freedom to contract and the Court’s use of that doctrine to strike down federal and state efforts to regulate the economy.² More importantly, *Lochnerism* is understood as a critique of this jurisprudence with Justice Holmes’s dissent in *Lochner v. New York* representing the most cited example.³ In that dissent, Justice Holmes criticized the Court for obstructing the will of democratic majorities based upon the Justices’ personal preference for *laissez faire* economics rather than a limitation found in the text of the constitution or its original understanding.⁴ More generally, because the Supreme Court subsequently rejected its foray into economic substantive due process, *Lochner* is recognized as standing for the proposition that courts should defer to legislative judgments except in cases involving fundamental rights and discrete and insular minorities.⁵

Given this general understanding of *Lochnerism*, First Amendment *Lochnerism* is intriguing because in one sense, it is incoherent. In First Amendment cases, judges arguably cannot be accused of engaging in *Lochnerism* because the First Amendment provides them with the textual basis for judicial review. While the judges may differ and have their own personal views on how to interpret that text, the First Amendment represents a clear textual limit upon majoritarian decision-making. However, when I began to consider the relationship between copyright and the First Amendment in greater detail, an example of First Amendment *Lochnerism* began to take shape.

The Supreme Court’s decision in *Eldred v. Ashcroft* became the starting point.⁶ In *Eldred*, the Court was asked to strike down the Copyright Term Extension Act (CTEA) in which Congress retroactively extended the length of

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4.  Id. at 75.
5.  *See id.* at 75-76.
Among other things, the challengers argued that the extension violated the First Amendment because of its impact upon expression. As such, *Eldred* required the Supreme Court to address a long standing question: what is the relationship between copyright and the freedom of expression protected by the First Amendment? The First Amendment provides that Congress shall make no law abridging freedom of speech and of the press. Yet, the Copyright Act does just that. By creating exclusive rights in expression, copyright constrains the choice and limits the freedom of individuals engaging in expression.

Despite the apparent conflict between copyright and the First Amendment, the Supreme Court in *Eldred* rejected the argument that the CTEA should be subject to First Amendment scrutiny. According to the Court, there was no conflict. Instead, copyright and the First Amendment are complementary. The Court’s approach in *Eldred* is consistent with its only other decision in the area as well as with the seminal scholarship on the subject. The complementary argument is based upon two propositions: 1) the Framers’ intended both copyright and the First Amendment serve the same purpose, promoting free expression, and 2) conflicts between copyright and free speech are resolved within copyright through the idea/expression dichotomy, the fair use doctrine and copyright’s other internal limitations. Herein lies the problem. The argument that there is never a role for the First Amendment in copyright cases, a position taken by the D.C. Circuit in *Eldred* and others, reeks of copyright *Lochnerism*.

As I argue elsewhere, we may readily draw valuable inferences of what the Framers’ intended by adopting both the Copyright Act of 1790 and the First Amendment. And, what I have described as the Framers’ copyright provides a valuable frame of reference for evaluating potential conflicts between copyright and freedom of speech. However, efforts to expand the complementary argument beyond the confines of the Framers’ copyright suffer from the same

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7. Id. at 193.
8. Id.
10. U.S. CONST. amend. I.
12. 537 U.S. at 218-19.
13. Id.
15. Id.
16. Id. at 197.
18. Id.
jurisprudential infirmities as *Lochner*.\(^\text{19}\) Arguments that all copyright cases should be insulated from First Amendment scrutiny are examples of copyright *Lochnerism* because they suffer from baseline problems similar to those in *Lochner*.\(^\text{20}\) The complementary argument assumes that the relationship between copyright and the First Amendment is always consistent even when changes to copyright alter the baseline relationship between them. In turn, this dynamic baseline allows judges to embed a disputed economic vision into the Constitution by expanding copyright at the First Amendment’s expense. In what amounts to *Lochner* in reverse,\(^\text{21}\) those engaged in copyright *Lochnerism* are not reading something into the Constitution that is not there, but rather reading out the express limitations found in the First Amendment, all in the interest of protecting property.\(^\text{22}\)

Part I of this essay outlines the conflict between copyright and the First amendment as well as, the complementary argument for reconciling copyright and free speech, as it has been formulated by scholars and the Supreme Court. Part II discusses what I have referred to as the Framers’ copyright and the extent to which arguments based upon the Framers’ intent in this area may reconcile copyright and free speech. Lastly, Part III argues that reliance upon the complementary argument to deny any role for heightened First Amendment review in copyright cases is subject to two interrelated criticisms of *Lochner*. By relying upon a dynamic baseline between copyright and the First Amendment, broad complementary arguments inject disputed economic theory into the constitution effectively repealing the First Amendment.

I. COPYRIGHT & FREE SPEECH: CONFLICT AND RESOLUTION?

Do copyright and free speech conflict? Article I, section 8 of the U.S. Constitution gives Congress the power, “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors … the exclusive Right to their … Writings.”\(^\text{23}\) For over two hundred years, Congress has chosen to exercise this power though the Copyright Act which grants the copyright owner the exclusive right to reproduce, distribute, publicly perform and display certain works, and the exclusive right to create new works based upon her existing work\(^\text{24}\) for the life of the author plus 70 years.\(^\text{25}\) Violators are subject to civil and criminal penalties including imprisonment.\(^\text{26}\) Based upon these exclusive rights,

\(^{19}\) *Lochner*, 198 U.S. at 74 (1905) (Holmes, J. dissenting).

\(^{20}\) *Id.*

\(^{21}\) See *id.*

\(^{22}\) See U.S. Const. amend. I.

\(^{23}\) U.S. Const. art I, § 8, cl. 8.


copyright owners may prevent others from delivering Martin Luther King’s “I Have a Dream” speech, prevent fans from creating alternative stories based upon their favorite characters, prevent the press from publishing stories incorporating copyrighted materials, and with the assistance of federal marshals, seize and destroy unauthorized works and the machines used to reproduce those works. These legal rights appear contrary to the First Amendment clear command that “Congress shall make no law … abridging the freedom of speech, or of the press.” As Rebecca Tushnet suggests, “If the justification were anything other than copyright, these sweeping powers would be seen as a gaping hole at the heart of free speech rights.”

The heart of the First Amendment’s guarantee of freedom of speech is that the government may not dictate the content of a speaker’s message. Yet, this is exactly what copyright does. Copyright’s array of exclusive rights limit the freedom of subsequent speakers to incorporate copyrighted expression as part of their speech. As such, copyright restricts a speaker’s freedom to determine the content of her message by making it illegal to express oneself with copyrighted expression without the authorization of the copyright owner.

Rather than acknowledge that copyright and the First Amendment may conflict, and thus acknowledge a role for the First Amendment in copyright cases, the principal response has been to deny any conflict. The seminal works on the subject argued that copyright and free speech do not conflict, but are,
instead, complementary. According to this view, there is no conflict because both copyright and the First Amendment promote speech and the free marketplace of ideas. The First Amendment promotes speech by restricting government interference in the marketplace of ideas, and copyright promotes speech by restricting individual acts that make the marketplace of ideas prone to market failure. By creating economic incentives to speak and publish, copyright establishes a robust market for expression independent from the government.

To the extent that occasional conflicts arise, the complementary approach argues that those conflicts are resolved through “definitional balancing.” In other words, copyright’s internal limits, especially those found in the idea/expression dichotomy and fair use, eliminate residual conflicts. Under the Copyright Act, copyright protects only an author’s expression (and original expression at that), and does not extend to the ideas, principles, and concepts in such works. Because copyright does not prohibit others from copying and using the ideas embodied within copyrighted expression, Melvin Nimmer argued that copyright serves, rather than frustrates, the free speech. The fact that copyright limits an individual’s choice of expression is of little significance. Adopting a largely Alexander Meiklejohn, marketplace of ideas interpretation of the First Amendment, Nimmer argued that “It is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions.” Accordingly, whatever is “lost through the copyright prohibition on reproduction of expression, is far out-balanced by the public benefit that accrues through copyright encouragement of creativity.”

39. 537 U.S. 186.
40. Id.
42. Nimmer, supra note 38, at 1184.
45. 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.”).
49. Id. at 1191.
50. Id. at 1192.
Unwilling to dismiss the First Amendment value of adopting someone else’s expression, Robert Denicola added that copyright’s fair use doctrine picked up where the idea/expression dichotomy left off. 51 According to Section 107 of the Copyright Act the use of copyrighted material for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”52 However, in order to determine whether “the use made of a work in any particular case is fair use,” courts must consider at least four factors:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) the nature of the copyright write;
3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) the effect of the use upon the potential market for or value of the copyrighted work.53

Based upon these factors, a court may conclude that an unauthorized use of copyrighted expression that falls within one of the exclusive rights provided by the Act is, nevertheless, non-infringing. Fair use is an affirmative defense with the defendant bearing the burden of proof.54 Citing several decisions in which courts found a defendant’s unauthorized use to be fair including quoting magazine stories for an unauthorized biography of Howard Hughes and the publication of parodies of popular song lyrics Denicola argued that the doctrine was capable of reconciling copyright law with free speech even if the idea/expression dichotomy represented “the basic internal mechanism” to accommodate the two.55 According to Denicola because fair use focuses a court’s attention on “the public interest in the flow of information, it seeks to further many of the same interests as the right of free speech.”56 Taking this line of reasoning to its logical conclusion some have argued that fair use should be considered a constitutional doctrine whose scope is determined by the First Amendment.57

51. Denicola, supra note 38, at 293 (“In some instances, however, the values inherent in the rights of free speech and free press demand more than access to abstract ideas – they require the use of the particular form of expression contained in a copyrighted work.”).
53. Id.
55. Denicola, supra note 38, at 293.
56. Id. at 297.
57. See Harry N. Rosenfeld, The Constitutional Dimensions of Fair Use in Copyright Law, 50 NOTRE DAME L. REV. 790, 796-98 (1975). But see Denicola, supra note 38, at 306-15 (Denicola rejected such an approach arguing instead for the recognition of a limited First Amendment privilege based upon necessity and the public interest.).
In two cases, the Supreme Court refused to subject copyright to any First Amendment scrutiny. In so doing, the Court relied upon a modified version of the complementary approach and definitional balancing. In *Harper & Row, Publishers v. Nation Enterprises*, the Supreme Court upheld a trial court ruling that the publication of quotations from President Ford’s yet to be published memoirs in a magazine story discussing his decision to pardon President Nixon constituted copyright infringement. The Nation argued that the quoting of approximately 300 words from President Ford’s manuscript should be considered fair use or protected by the First Amendment because the publication of story addressing an historical event based upon the President’s own account was newsworthy. In rejecting the Nation’s contentions, Justice O’Connor’s majority opinion emphasized that: “In our haste to disseminate the news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” The Court went on to note that copyright already embodied First Amendment protections, “in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionaily afforded by fair use.” After concluding that the Nation’s use was not fair, the Court rejected the Nation’s argument that the First Amendment required a different rule or result. Under *Harper & Row*, not only is there no conflict between copyright and free speech as Nimmer and others suggested, according to the Court, this lack of conflict was the intent of the Framers.

More recently, the Supreme Court once again rejected efforts to subject copyright to First Amendment scrutiny. In *Eldred v. Ashcroft*, the Court rejected a constitutional challenge to Congress’ decision to extend the term of copyright protection by an additional twenty years under the Copyright Term Extension Act (“CTEA”). Among other things, petitioners argued that the CTEA represented a content-neutral regulation of speech that could not satisfy heightened judicial scrutiny. In rejecting the First Amendment argument, the Court refused to apply heightened scrutiny to a copyright which it characterized as incorporating “its own speech protective purposes and safeguards.” Once

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60. *Id.*
61. *Id.* at 558.
62. *Id.* at 560.
63. *Id.*
64. *Id.* at 558.
66. *Id.* at 193-95.
67. *Id.* at 218-19.
68. *Id.* at 219.
again, copyright’s purpose of promoting speech and its “built-in First Amendment accommodations” – the idea/expression dichotomy and fair use – insulated the law from First Amendment scrutiny. Following Harper & Row, Justice Ginsburg’s majority opinion once again justified this method of reconciling copyright and free speech by relying upon the intent of the Framers. According to Justice Ginsburg, “The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”

II. THE FRAMERS’ INTENT?

Reconciling copyright and free speech by referring to the intent of the Framers of the constitution is an intriguing prospect. Reference to the Framers and first principles are useful starting points in any legal analysis. With respect to the proper relationship between copyright and free speech, and how conflicts between the two should be reconciled, the Supreme Court keeps referring to the Framers’ intent. Yet, to borrow from Inigo Montoya and The Princess Bride, “I do not think [the Framers’ Intent] means what you think it means.” Given the limited scope of copyright in the 18th Century, reference to the Framers’ intent does little to alleviate the First Amendment concerns raised by copyright as it exists today. To the contrary, reference to the Framers’ intent highlights the genuine First Amendment concerns generated by copyright’s expansion beyond its original limits and perhaps beyond its “traditional contours.”

Historically, there is very little evidence regarding the Framers’ intent in this area. While we know a little about what the Framers thought about copyright and why it was adopted and that the Act was patterned after the English Statute of Anne, there is no evidence revealing what they thought about the relationship between copyright and free speech or how to resolve conflicts between the two. Instead, we are left with the approach taken by the Supreme Court in Harper & Row and Eldred. We must infer the Framers’ intent based upon their actions. And, the major piece of evidence from which we can infer

69. Id.
70. Eldred, 537 U.S. at 219.
71. Id.
75. Id.
77. Id.
intent is the fact that the first Congress of the United States adopted both the first Copyright Act and the First Amendment.78

Reliance upon the Framers’ intent provides only a partial solution to the copyright and free speech problem because the Framers’ copyright was extremely limited and did little to threaten free speech even as the First Amendment is interpreted today.79 Following its English predecessor, the Copyright Act of 1790 was entitled “An act for the encouragement of learning” and granted copyright owners the exclusive right to “print, reprint, publish or vend” their works for an initial term of 14 years renewable for another 14 years.80 It applied to books, maps, and charts, and required a copyright owner to comply with various formalities including registering and depositing the work to obtain copyright protection.81 Limited to the right to “print, reprint, publish or vend,” the Act prohibited only a single species of uses: selling copies of the work in competition with the copyright owner.82 This meant that subsequent authors and speakers were free to use copyrighted expression as their own in all other respects. This was true even when that expression “merely” abridged, translated, or performed the original.83 Moreover, the right to “print, reprint, publish or vend” was never understood to apply to non-commercial copying including the personal copying of an entire work by hand.84

Given the extremely limited scope of the Framers’ copyright, it is unlikely that its restrictions in 1790 would trouble the First Amendment even as it is interpreted today. While the First Amendment guarantees individuals the freedom to determine the content of their expression, it does not guarantee a right to profit from expression. As Professor Baker, argues, “Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech.”85 Moreover, to the extent that the Framers’ copyright suppressed expression, courts could readily conclude that such a narrowly defined right would withstand heightened

78. See Act of 1790, ch. 15, 1 Stat. 124 (1790). See also U.S. CONST. amend. I.
80. Id.
81. Id.
82. See Baker, supra note 35, at 901. Cf., BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 9 (Columbia University Press 1967) (1966) (noting that the draftsman of virtually identical language in the Statute of Ann were “the thinking as a printer would – of a book as a physical entity; of rights in it and offenses against it as related to ‘printing and reprinting’ the thing itself; of punishment for illicit reprinting involving the first instance destruction of the very duplicating book.”).
83. See Kaplan, supra note 82, at 9-12. See also Stowe v. Thomas, 23 Fed. Cas. 201 (C.C.Pa. 1853).
First Amendment scrutiny. The Framers’ copyright promoted speech by creating an independent market for expression, and limited to the commercial right to sell copies was narrowly tailored, if not the least restrictive means, to achieve that objective. Consequently, the idea that copyright and free speech did not conflict from the Framers’ perspective is quite convincing. In fact, one can argue that copyright and the First Amendment were “cut from the same bolt of English cloth,” and “recognized and respected the same delicate balance of interests necessary to maintain and enhance the public domain through the vigorous encouragement of a free press.” Unfortunately, today’s copyright bears little resemblance to the Framers’ copyright.

In marked contrast with the Framers’ copyright, today’s copyright restricts virtually all of the expression and uses of copyrighted works permitted by the Framers. Today, copyright prohibits the abridgement, translation, and public performance of copyrighted works without the copyright owner’s permission. Both the reproduction right and derivative work right prohibit the creation of new works that do not literally copy a copyright work, but are “substantially similar” or based upon the original work. And, copyright has been interpreted to apply to personal uses as well. Despite the idea/expression dichotomy, courts have relied upon copyright to protect fictional characters, an artist’s style, “expressive” facts, and the “look and feel” of copyrighted works. Moreover, courts have largely limited fair use to circumstances in which an opportunity to obtain a license is not readily available either because of high transaction costs or because copyright owners are not likely to license such uses, as in the case of a negative review or scathing parody, even when the

86. *Id* at 903-04.
87. *Id*.
88. Patterson & Joyce, *supra* note 74, at 950.
91. 17 U.S.C. § 106 (2) & (4)(2000) (providing copyright owners with the exclusive right to create derivative works and to public perform those works). *See also* 17 U.S.C. § 101 (2000) (“A derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”).
92. *See* Nichols v. Universal Picture Corp., 45 F.2d 119 (2d Cir. 1930).
97. *See* Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc., 150 F.3d 132 (2d Cir. 1998).
expression is for the purposes of the news, education, and scientific research.

What the Framers’ intended, therefore, has only limited applicability. Arguments relying upon the Frames’ intent to reconcile copyright and free speech rest on fundamentally shaky ground if they attempt to extend this line of reasoning beyond the restrictions established in 1790. It is one thing to suggest that the Framers considered copyright as they defined it to be consistent with the First Amendment. It is quite another to suggest that the Framers would consider copyright as it has evolved to be consistent with the First Amendment. The former is supported by the historical record. The latter is purely speculative.

III. COPYRIGHT LOCHNERISM

Despite the fundamental differences between the Framers’ copyright and copyright today, there are those that still argue that the First Amendment should play no role in copyright cases. However, efforts to minimize free speech concerns raised by copyright beyond the context of the Framers’ copyright, represent a modern day version of Lochnerism. This charge is leveled for two reasons. First, arguments rejecting the need for additional constitutional scrutiny when Congress expands copyright beyond its traditional contours, ignore or manipulate the baseline for evaluating the relationship between copyright and free speech. Second, ignoring the baseline problem ultimately allows judges to embed their own disputed vision of property within constitutional law at the First Amendment’s expense. This copyright Lochnerism effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the constitution defines the limits of copyright to one in which copyright defines the limits of the constitution.

Schwartz and Treanor’s work illustrates the problems with efforts to insulate copyright from constitutional scrutiny. While the authors’ critique focuses upon efforts to interpret the exclusive rights clause embodied in Article I, Section 8 as a limit upon Congress’ authority to retroactively extend copyright, their ultimate aim and conclusions are much broader. Schwartz and Treanor argue that the Supreme Court in Eldred adopted the most deferential standard of review for constitutional questions, and that this standard of review should be applied in all intellectual property cases. According to the authors, arguments

101. See Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994).
104. Id. at 2413-14.
105. Id. at 2334.
in favor of greater judicial scrutiny suffer from the same flaws in logic and the same infirmities as *Lochner v. New York* and its progeny. Specifically, they argue that heightened judicial review would elevate a particular economic policy not grounded in either the text of the constitution or its original understanding to constitutional status and prevent legislatures from innovating in response to economic change. By rejecting the so-called IP restrictor’s arguments in *Eldred*, the Supreme Court supposedly avoided creating a *Lochner* for the third millennium. In defense of *Eldred*, Schwartz and Treanor argue that courts should interpret the constitution holistically and apply heightened scrutiny only under circumstances in which the political process cannot be relied upon to protect fundamental rights or discrete and insular minorities. Assuming that this conclusion is appropriate with regard to the Copyright Term Extension Act’s retroactive extension of the copyright term, the argument that such deference should extend to all intellectual property questions is flawed because it fundamentally misconceives the problem and represents a form of Lochnerism of its own.

A.

First, Schwartz and Treanor’s critique of heightened review in copyright cases, entirely ignores the conflict between copyright and the First Amendment. For example, they describe the classic critique of *Lochner* as “the Court should not second-guess legislative judgments and, in the absence of clear constitutional restrictions, it should let majorities govern.” As such, heightened judicial review is inappropriate unless there is an express constitutional limitation such as those embodied in the Bill of Rights or it is necessary to ensure the proper functioning of the democratic process. The latter proposition is based upon John Hart Ely’s representation-reinforcement theory of constitutional interpretation. According to Schwartz and Treanor, copyright is no different than other forms of property, and consistent with economic regulation in general, courts should defer to Congress. While they are concerned with preserving a robust “public domain,” protection of the public domain is left to fair use and more creative mechanisms for the licensing of copyrights.

Constitutional challenges to copyright, however, are fundamentally different than the economic regulations challenged in *Lochner*. This is not a situation in

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106. *Id.* at 2390-96.
107. *Id.* at 2393.
109. *Id.* at 2406-07.
111. Schwartz & Treanor, *supra* note 103, at 2409.
112. *Id.* at 2401.
113. *Id.* at 2334.
114. *Id.* at 2409.
which courts are asked to define the vague contours of substantive due process under the Fourteenth Amendment, but rather to apply, among other things, an express constitutional limitation embodied in the Bill of Rights. Copyright restricts expression and implicates the First Amendment. Presumably, the authors would agree that freedom of speech is a fundamental right, and that the First Amendment is a clear constitutional restriction upon democratic majorities justifying heightened scrutiny even under a representation-reinforcing theory of constitutional interpretation. While the IP restrictors challenged Congress’ authority to adopt the CTEA under the Exclusive Right’s clause, they also challenged term extension under the First Amendment. Yet, Schwartz and Treanor make no effort to distinguish between those two challenges. Their argument entirely ignores copyright’s restrictions upon speech, and make no effort to explain why the First Amendment should not apply in copyright cases. Instead, they simply state that “while the grant (or denial or limitation) of copyright protection has consequences for speech, the petitioners’ argument in Eldred concerning the Copyright Clause is not one that implicates free speech concerns.”¹¹⁵ I do not mean to single out Schwartz and Treanor’s work in this area, or to suggest that the omission is specific to their argument. Rather, Schwartz and Treanor’s position is representative of the dominant school of thought on this subject, and their omission reflects a fundamental failure with efforts to extend the complementary argument beyond the Framers’ copyright.

B.

While there is a rich body of literature discussing and criticizing the Supreme Court’s Lochner era jurisprudence, this essay focuses upon two specific criticisms of Lochner. The first criticizes Lochner for failing to recognize the appropriate analytical baseline for constitutional analysis. The second is represented by Justice Holmes’s criticism that the Supreme Court imported a disputed economic policy into the constitution, and according to Holmes, the constitution “does not enact Mr. Herbert Spencer’s Social Statistics.”¹¹⁶ While the latter is better known, this essay begins with the baseline criticism. Let me emphasize, that these two criticisms are not separate; instead, they are overlapping and interdependent criticisms of arguments denying any role for the First Amendment in copyright cases.

One of the principal criticisms of Lochner is provided by Cass Sunstein, who argues that Lochner’s fundamental flaw was to rely upon common law

¹¹⁵. Id. at 2410. As should be clear from my earlier discussion to the extent that Schwartz and Treanor’s argument is limited to the length of copyright’s protection, I am inclined to agree with their conclusion though for different reasons. My disagreement stems from their effort to expand this argument and apply it to copyright in general. See Raymond Shih Ray Ku, Copyright, Free Speech & the Framers (forthcoming 2006).

entitlements as a natural baseline constitutional analysis. When evaluating the constitutionality of economic regulations, the Supreme Court in the Lochner era based its decision upon status quo neutrality or, in his words, “a particular conception of neutrality, one based on existing distribution of wealth and entitlements.” The maximum hour and wage laws at issue in the Lochner era cases were considered unconstitutional because they altered existing economic rights, which were seen as natural. In other words, the Lochner era decisions adopted a one-sided approach when defining state power in the economic realm, and this approach was fundamentally flawed because it refused to recognize the appropriate analytical baseline. The subsequent rejection of Lochner, therefore, represents the rejection of status quo neutrality and the corresponding recognition that existing property and economics rights are themselves created and maintained by the power of the State and may, therefore, be modified and reallocated by the State.

Dismissing First Amendment concerns in copyright cases based upon the complementary argument suffers from baseline problems as well. In general, arguments that copyright does not violate the First Amendment define away any problems by implicitly relying upon a dynamic baseline. We are told that copyright and free speech are consistent without regard to the actual scope of copyright law even when changes in copyright impose greater restrictions upon expression. In other words, copyright and free speech are consistent even when Congress and the courts change the status quo. That congressional and judicial decisions expanding copyright’s exclusive rights or contracting its exceptions alter the relationship between copyright and the First Amendment is either not recognized or ignored. This is illustrated by the following tables. C1 and C2 represent changes to copyright.

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<thead>
<tr>
<th>Copyright</th>
<th>Free Speech</th>
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<tbody>
<tr>
<td>C1</td>
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118. Sunstein, supra note 118, at 45.


120. Id.

121. Sunstein, supra note 118, at 58 (“We must lay hold of the fact that economic laws are not made by nature. They are made by human beings.”).
Table 2.

<table>
<thead>
<tr>
<th>Copyright</th>
<th>Free Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td>C1</td>
<td>C2</td>
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Despite clear changes in the relationship between copyright and free speech illustrated by the two tables, the complementary argument treats the two as equivalent even though the baseline changed from C1 to C2. Yet, the change in relationship is precisely why First Amendment scrutiny is warranted.

Consider Table 3. Assuming that the scope of copyright under the Act of 1790,122 represented by C1, did not represent what the Framers’ considered the full extent of congressional power, we may assume that there is room for copyright to expand consistently with the First Amendment. This is represented by the shaded area bounded by C1 and C2.

Table 3.

<table>
<thead>
<tr>
<th>Framers ©</th>
<th>Free Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td>C1</td>
<td>C2</td>
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</table>

Nevertheless, a determination that copyright’s expansion is within the permissible zone of expansion cannot be made without reference to the First Amendment. If the problem with *Lochner* was judicial reliance upon the common law as a baseline for evaluating the constitutionality of subsequent economic regulation, copyright Lochnerism occurs when copyright’s constitutionality under the First Amendment is assumed without regard to subsequent changes in the relationship between the two.123

Second, the complementary argument’s denial of any need for independent First Amendment analysis in copyright cases suffers from another fatal flaw. Broadening the complementary approach beyond the historical limits recognized by the Framers’ embeds a disputed vision of property within the constitution.124

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123. Reliance upon the Framers’ copyright avoids this problem by establishing a fixed baseline.
In his famous dissent in *Lochner*, Justice Holmes criticized the majority’s decision to strike down the challenged legislation on the basis that the Court was embedding a policy of *laissez faire* economics into the constitution. According to Holmes:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statistics.

In other words, because the constitution was silent on the question, the Supreme Court’s decision impermissibly limited the people’s right to adopt legislation based upon a different economic theory.

By denying any role for the First Amendment, broad complementary arguments entrench their own disputed economic theory into the constitution. We are currently engaged in a global debate over copyright and its expansion. The two sides in this debate are represented by, what I have described as “property pragmatists” and “property idealists.” The property pragmatist takes the position that:

> [P]roperty rules, like those created by copyright law, serve specific policy goals. When factual circumstances change because of shifting markets or new technology, the property pragmatist accepts that existing property rules may no longer fit the new circumstances, and may require modification or even abandonment. In other words, the property pragmatist acknowledges that the questions, “Should file sharing be prohibited?” and, “If so, what standard for secondary liability should be imposed upon the providers of goods and services that facilitate file sharing?” may require the resolution of complicated empirical and policy questions concerning the goals of copyright and how those goals are best achieved. For the pragmatist, property rights are not absolute, and recognizing a property right or expanding such exclusive rights may not be the best method for achieving the law’s ultimate purpose. Instead, copyright’s goal of stimulating the creation and dissemination of creative works may be better served by allowing certain unauthorized uses to go uncompensated or by compensating authors under a liability regime that might result in compulsory licensing or public funding. Because the pragmatist does not assume that property rights are always the best solution, it should come as no

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125. *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting).
126. *Id.*
127. *See id.* at 75-76.
surprise that the pragmatist questions whether courts may competently and legitimately make such decisions.

In contrast, the property idealist assumes that absolute property rights are always the best solution. Like the pragmatist, the property idealist recognizes that existing property rules may need to be modified to address changed circumstances. However, property rights remain the answer. Those advocating this position with respect to copyright have been described by Professor Julie Cohen as “cybereconomists.” The idealist, or cybereconomist, proceeds under the assumption that “the most efficient legal regime, measured by its success at inducing the creation of digital works and increasing consumers’ access to information, is that which permits copyright owners to maximize control over the terms and conditions of use of their digital property.” According to these individuals, if technology or changing market conditions create new opportunities, property rights should be clarified in favor of granting control over those opportunities to copyright owners.

Unlike property pragmatists, idealists do not question judicial resolution of these questions. To the contrary, property idealists argue that courts are well suited for making such decisions.

Denying any conflict between copyright and the First Amendment, ultimately furthers the property idealist agenda. This is accomplished by eliminating a fundamental constitutional restraint upon legislative and judicial decision-making. As Diane Zimmerman observes:

> What seems to have happened in the course of this conflict is that an ever-expanding array of new or reconstructed property theories is cannibalizing speech values at the margin. In large part, this has occurred not because speech claims are inherently weaker than property claims, but because courts fail to think critically about the justifications for, functions of, and limitations on property rules in the sensitive arena of speech.

By removing the constitution from the equation, Congress and courts are free to expand copyright without limit as advocated by property idealists either by granting new exclusive rights or by contracting fair use by limiting fair uses to transformative uses or uses in which licensing is not likely to occur. Obviously, this benefits property idealists because more property is always better. Under

128. Raymond Shih Ray Ku, Grokking Grokster, 2005 Wis. L. Rev. 1217, 1230-32 (internal citations omitted).

this view, copyright and the policies it represents become the sole point of reference.

In turn, this shifts the terms of the debate. By denying any constitutional restraint upon copyright, broad versions of the complementary argument treat all opposition and challenges to copyright’s expansion as questions of public policy. Schwartz and Treanor engage in this rhetorical slight of hand when they suggest copyright is no different than any other form of economic regulation, and that all arguments for heightened constitutional scrutiny in copyright cases are inconsistent with the lessons of *Lochner*.130 Under this view, because copyright should be treated like all other forms of property, constitutional challenges to copyright represent the effort of “IP restrictors” to read into the constitution “a substantive vision of governance that was not grounded in either the text of the Clause or its original understanding.”131 As such, all disagreements over copyright are disagreements over public policy, and are best left to Congress and copyright.132

At this level, disagreements over copyright are generally confined to copyright’s role in providing authors with financial incentives. This favors the property idealists’ agenda because the primary incentive question is whether increased copyright protection will provide copyright owners with greater financial incentives. As Jessica Litman recognizes, the answer to this question is always yes.133 The potential for greater financial rewards by allowing a copyright owner to maximize their financial return on a copyrighted work will always increase the incentive to create.134 Challenges to copyright are then limited to arguing that existing incentives provide sufficient incentives or for alternatives methods for creating incentives that impose fewer costs than a property regime. Framed in these terms, courts almost automatically defer to Congress.

Again, *Eldred* and the CTEA are illustrative. As a result of the complementary approach, the question of whether Congress may legitimately extend the length of copyright protection retroactively is limited to whether the extension will provide copyright owners’ with greater financial incentives to create new works. Because Congress heard testimony from authors and copyright owners that term extension would provide them with greater incentives to create new works or to improve existing works, the Court concluded that Congress’s decision was reasonable and within its discretion.135 In contrast, Justice Breyer argued that the financial incentives created by the CTEA were small enough to be illusory. According to Justice Breyer, some evidence

130. Schwartz & Treanor, supra note 103, at 2390.
131. Id. at 2393.
132. Id. at 2409-10.
134. Id.
suggested that at best term extension would increase the financial incentives to a handful of authors by seven cents.\textsuperscript{136} “What potential Shakespear, Wharton or Hemingway would be moved by such a sum?”\textsuperscript{137} Even so, the majority concluded that “the CTEA reflects judgments of the kind Congress typically makes, judgments we cannot dismiss as outside the Legislature’s domain.”\textsuperscript{138} So long as there is some reasonable basis for such a conclusion, term extension is permissible even if, as Justice Breyer argued in dissent, such incentives are \textit{de minimis}.

To be clear, I am not suggesting that the constitution prevents Congress or the courts from adopting the property idealist’s position as a guiding or interpretive principle, only that the First Amendment will limit how far those institutions may go towards advancing that agenda. Nevertheless, for all practical purposes, by removing the limits established by the First Amendment, the complementary approach reinterprets the constitution to support the property idealist position. And yet, if the constitution does not enact Herbert Spencer’s Social Statistics, it similarly does not enact the property idealist position.

\textbf{CONCLUSION}

As this essay suggests, the pitfalls of 	extit{Lochner} are contained within efforts to reconcile copyright and free speech. Arguments based upon the claim that copyright and free speech do not conflict, even as copyright expands beyond the Framers’ copyright, implicitly resolve this conflict at the First Amendment’s expense. Under this approach, property rights define the limits of the First Amendment rather than the other way around. In what amounts to \textit{Lochner} in reverse, those engaged in copyright \textit{Lochnerism} are not reading something into the constitution that is not there, but rather reading out the express limitations found in the First Amendment. This copyright \textit{Lochnerism} effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the constitution defines the limits of copyright to one in which copyright defines the limits of the constitution.

When one considers that it took the Great Depression, resolute state and federal legislatures, and a Presidential threat to pack the Supreme Court to achieve the switch in time that saved nine overruling \textit{Lochner} and its progeny. If copyright \textit{Lochnerism} becomes part of the Supreme Court’s jurisprudence, it is doubtful that a similar constitutional moment is likely to occur for copyright. The power wielded by copyright owners and the rhetorical force of the property idealist position have yielded an almost unending string of judicial and legislative victories expanding copyright with little consideration of how that expansion impacts freedom of expression. The fact that on occasion courts are

\begin{itemize}
\item \textsuperscript{136} \textit{Id.} at 254-55.
\item \textsuperscript{137} \textit{Id.} at 255.
\item \textsuperscript{138} \textit{Id.} at 205.
\end{itemize}
willing to find certain unauthorized works to be fair uses, does not leave much
room for optimism. Still, there is a glimmer of hope for those who believe that
this relationship between copyright and the First Amendment deserves greater
attention. In *Eldred*, Justice Ginsburg suggested that there may be a greater role
for the First Amendment when Congress alters “the traditional contours of
copyright protection.”139 However, what the court meant by “the traditional
contours” and what role those contours would play in First Amendment analysis,
remains to be seen.

139. *Id.* at 221.
BARTNICKI AS LOCHNER: SOME THOUGHTS ON FIRST AMENDMENT LOCHNERISM

Howard M. Wasserman*

INTRODUCTION

“First Amendment Lochnerism” sounds like a constitutional oxymoron. On one hand is *Lochner v. New York*, the reviled and discredited member of the constitutional anti-canon, and its derivative, Lochnerism, “one of the worst charges that can be leveled against a doctrine or constitutional interpretation, an unequivocal normative repudiation” of what the court has done. On the other hand is the most favored status of the First Amendment freedom of speech. In fact, there has been increased talk in recent years of the link between the two in particular areas of law. These areas include the law of consumer information, campaign financing, broadcast regulation, and copyright.

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A different approach to understanding First Amendment Lochnerism is to identify and examine one particular case or constitutional rule that creates the potential for courts to behave in the free speech context the way Lochner-era courts were accused of behaving in the realm of liberty of contract and economic substantive due process.\(^\text{10}\) Jed Rubenfeld made this limited inquiry and found United States v. O’Brien,\(^\text{11}\) the draft-card burning case that establishes the standard for evaluating incidental restrictions on symbolic expression and expressive conduct, to “be something like Lochner v. New York all over again.”\(^\text{12}\)

A potentially Lochnerian decision of more recent vintage is Bartnicki v. Vopper.\(^\text{13}\) In Bartnicki, a divided, somewhat confused, and highly ambiguous Supreme Court struck down a provision of the federal wiretap statute\(^\text{14}\) prohibiting the disclosure of the contents of unlawfully intercepted electronic, wire, and voice communications as applied to innocent third party disseminators.\(^\text{15}\) Bartnicki is a worthy candidate for the mantle of First Amendment Lochnerism because it contains several of the distinct and disparate features and characteristics captured by that appellation.\(^\text{16}\)

Applying the Lochnerism tag is not necessarily to condemn Bartnicki. As we attempt to move beyond Lochner as an unthinking pejorative,\(^\text{17}\) there is no consensus as to what we mean, or what we are trying to say in shorthand, when

\(^{6}\) See Richards, supra note 3, at 1212-13 (“[T]here are some fairly strong parallels between the traditional conception of Lochner and the First Amendment critique of data privacy legislation.”).

\(^{7}\) See Cass R. Sunstein, Political Equality and Unintended Consequences, 94 COLUM. L. REV. 1390, 1397 (1994) (arguing that the campaign finance reform decision in Buckley v. Valeo “might well be seen as the modern-day analogue of the infamous and discredited [Lochner]”).


\(^{9}\) See David McGowan, Some Realism About the Free-Speech Critique of Copyright, 74 FORD. L. REV. 435, 448 n.58 (2005).

\(^{10}\) See Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner, 76 N.Y.U. L. REV. 1383, 1387 (2001) (“The proper lesson of Lochner instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.”); Richards, supra note 3, at 1215 (“Even if Lochner was not an illegitimate injection of pro-business libertarian ideology into constitutional decisionmaking by judges, it was widely condemned as such.”).

\(^{11}\) 391 U.S. 367 (1968).


\(^{13}\) 532 U.S. 519 (2001).


\(^{15}\) Bartnicki, 532 U.S. at 518, 525; see also Rodney A. Smolla, Information as Contraband: The First Amendment and Liability for Trafficking in Speech, 96 NW. U. L. REV. 1099, 1100 (2002) (arguing that Bartnicki must be deciphered).

\(^{16}\) See infra Parts I, II.

\(^{17}\) See Richards, supra note 3, at 1213 (describing it as “rhetorically effective to accuse the critics of Lochnerism and move on”).
we speak of *Lochner* and its various derivative verbs, nouns, and adjectives. 18  
Recent scholarship suggests that the longstanding critiques of *Lochner*—that courts improperly substituted their own views, biases, and preferences as to the social and economic good for that of the legislature; 19  
read their personal laissez-faire business views into the Constitution; 20  
second-guessed the wisdom and efficacy of legislative policy choices; 21  
and aimed inappropriately rigorous judicial scrutiny at ordinary economic regulation 22  —do not uniformly or singularly reflect or explain what was going on in *Lochner* or why it is so despised. 23  

Instead, recent efforts to reaccredit *Lochner* (timed, coincidentally, to the target’s centenary) reflect a reinforcement of aggressive rights-based judicial review. 24  
That would include, of course, First Amendment review. To call a decision such as *Bartnicki*—in which the First Amendment claim prevailed when congressional legislation failed elevated judicial scrutiny 25  —*Lochnerian* is to suggest a structural or procedural problem with broad enforcement of individual free speech rights. 26  
The pejorative nature of the term ultimately serves to obscure meaningful substantive constitutional dialogue about the meaning of the freedom of speech and how that freedom should be balanced against competing constitutional, political, and social values. 27  

I will proceed in three steps. First, I examine what, precisely, we mean by the pejorative tag “*Lochner*,” “*Lochnerism*,” or “*Lochnerian*,” focusing on five prominent characteristics or features of that concept and considering how each  

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18. Similarly there is no consensus on which form of the term “*Lochner*” is proper. One may speak of “*Lochnerism*.” One may speak of “*Lochnerian*” or “*Lochneresque*” judging, decision-making, or results. One also may speak of attempts to “*Lochnerize*” the law. I will use all of these terms somewhat interchangeably.  
19. *See* , e.g., Friedman, *supra* note 10, at 1385.  
22. *See* , e.g., Richards, *supra* note 3, at 1213.  
23. *See* Strauss, *Wrong*, *supra* note 3, at 374 (arguing that many explanations have been provided for the wrongness of *Lochner*, but concluding that no single criticism is universally accepted).  
25. *See* *Bartnicki*, 532 U.S. at 535 (concluding that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern”); *but see* Smolla, *supra* note 15, at 1150 (suggesting that *Bartnicki* could turn out to be a backhanded victory for privacy, and thus a backhanded defeat for speech).  
26. Friedman, *supra* note 10, at 1401-02 (describing arguments for stronger liberal jurisprudence in the face of charges of *Lochnerism*); *see* Howard Gillman, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 205 (1993) (arguing that *Lochner* has been used “as a weapon in conservatives’ struggle against the modern Court’s use of fundamental rights as a trump on government power”); Richards, *supra* note 3, at 1213 (describing the *Lochnerism* underlying First Amendment arguments against certain laws regulating privacy in consumer and personal data).  
27. *See* Richards, *supra* note 3, at 1220 (arguing that *Lochnerizing* the First Amendment would require “[e]very regulation that could be classified as restricting ‘speech’ . . . [to] be brought within the scope of First Amendment heightened review”).
translates (or does not translate) into the First Amendment realm. Second, I examine Bartnicki and the Lochneresque characteristics it possesses. To the extent we continue to apply the Lochner label in the First Amendment conversation, Bartnicki remains a good illustration of the phenomenon. Third, I examine one example of how Bartnicki has been applied, or not applied, by a lower court so as to avoid Lochnerian results in a case involving government regulations protecting personal privacy in consumer credit data and information.

I. LOCHNER AND THE FIRST AMENDMENT

The definitional problem is that we do not know what we mean when we speak of “Lochnerism,” “Lochnerian analysis,” or “Lochneresque results.” Obviously, it derives from the Supreme Court’s 1905 decision striking down a state law limiting bakers to 60-hour work weeks. More broadly, Lochnerism refers to the decisions of the constitutional era in which challenges to state and federal economic regulations were evaluated against broad judicial protection for freedom of contract under Fourteenth and Fifth Amendment substantive due process. Plainly, at least in common legal discourse, Lochnerism is a pejorative. As Bruce Ackerman said, “modern judges are more disturbed by the charge of Lochnering than the charge of ignoring the intentions of the Federalists and Republicans who wrote the formal text.”

But that tells us nothing about the content of the attack reflected in the use of the term, a content on which there is no consensus. Lochner is, to paraphrase

28. See infra Part I.
29. See infra Part II.A-B.
30. See infra Part II.C. See also Trans Union Corp. v. FTC, 245 F.3d 809, 813 (D.C. Cir. 2001) [hereinafter Trans Union II]; Trans Union Corp. v. FTC, 267 F.3d 1138, 1140 (D.C. Cir. 2001) [hereinafter Trans Union III]; Richards, supra note 3, at 1213 (“To the extent that the First Amendment critique [of data privacy regulations] is similar to the traditional view of Lochner, then, its elevation of an economic right to first-order constitutional magnitude seems similarly dubious.”);
31. See supra notes 18-23 and accompanying text.
34. See Richards, supra note 3, at 1213; Balkin, Wrong, supra note 2 at 682 (“A sure fire way to attack someone’s views about constitutional theory was to argue that they led to Lochner.”); Ely, supra note 3 at 939-40 (arguing that the fact that a decision is grounded in the same philosophy as Lochner “alone should be enough to damn it”).
35. 2 BRUCE ACKERMANN, WE THE PEOPLE: TRANSFORMATIONS 269 (1998); see also Bernstein, supra note 2, at 1 n.2 (“Even today, Supreme Court Justices across the political spectrum use Lochner as a negative touchstone with which they verbally bludgeon their colleagues.”).
36. See Strauss, Wrong, supra note 3, at 374 (“The striking thing about the disapproval of Lochner, though, is that there is no consensus on why it is wrong.”).
Justice Scalia, “a word of many, too many, meanings.” Or it is a word of no meanings, akin, as Daniel Farber suggested in his oral remarks at the symposium, to “judicial activism.”

We can isolate five non-exhaustive, non-mutually-exclusive features that are most prominent and prevalent in the *Lochner* literature. These features determine how *Lochner* translates into the First Amendment and when and if the First Amendment has, in fact, been Lochnerized.

**A. Enforcing non-textual rights**

Lochnerism could entail an objection to judicial super-protection and enforcement of unenumerated or nontextual rights to strike down popularly enacted legislation. This was the heart of John Hart Ely’s critique of *Roe v. Wade*, and indirectly of *Lochner*, from which *Roe* directly descended. Both cases were grounded on non-textual substantive due process (whether property- or liberty-based), judicially manufactured out of whole cloth and “not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.” The Court in both *Lochner* and *Roe* accorded “unusual protection to those ‘rights’ that somehow seem most pressing, regardless of whether the Constitution suggests any special solicitude for them.”

The non-textual critique is particularly salient in the wake of Footnote Four of *United States v. Carolene Products Co.*, which suggested the propriety of more rigorous judicial review “when legislation appears on its face

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40. *See* Bernstein, *supra* note 2, at 35 (“Critics argued that allowing courts to protect unspecified rights under the Due Process Clause amounted to judicial usurpation.”); Strauss, *Wrong, supra* note 3, at 378-79 (describing the argument “that the Court erred in *Lochner* not by enforcing constitutional rights, but by enforcing a right not found in the Constitution”).

41.  410 U.S. 113 (1973).

42. *See* Ely, *supra* note 3, at 940 (suggesting that “*Lochner* and *Roe* are twins . . . [but] not identical”).

43. *Id.* at 935-36.

44. *Id.* at 939 (emphasis in original); *see also* Bernstein, *supra* note 2, at 56 (“For better or for worse, Griswold [v. Connecticut, 381 U.S. 479 (1965)] and *Roe’s* protection of the unenumerated right to privacy raises many of the same issues as *Lochner’s* protection of the unenumerated right to liberty of contract.”); Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 90 (1999) (arguing that the Court’s mistake in substantive due process cases was its decision to “fragment” liberty between personal and economic activity).
to be within a specific prohibition of the Constitution, such those of the first ten Amendments.\textsuperscript{45}

Application of this feature of \textit{Lochner} to the First Amendment is not readily apparent. After all, there is an obvious textual commitment to the freedom of speech.\textsuperscript{46} For Ely, \textit{Roe} was unique among Warren Court efforts to enforce ideals of liberty, because other areas, including free speech, concerned rights based in the text.\textsuperscript{47}

But what we understand as First Amendment law is tied to the sparse (only 45 words) text and to the Framers only in the barest fashion.\textsuperscript{48} Rather, First Amendment doctrine and vigorous protection for the freedom of speech developed in the evolutionary style of judicial common law lawmaking.\textsuperscript{49} Courts devised rules based on prior precedents (including, and especially, the early dissents of Justices Holmes and Brandeis).\textsuperscript{50} The Court establishes doctrine and rules taking into express account concerns for policy, political morality, and whether particular speech rules are sensible and produce fair results; rules are not based on the text, the Framers, or the experiences of the founding generation.\textsuperscript{51} In other words, First Amendment doctrine is the product of constitutionalized (thus super-protected) common law judicial lawmaking that trumps popular legislative enactments.\textsuperscript{52}

Courts devised the specific content of free expression much as they developed the specific content of the liberty of contract economic due process

\textsuperscript{45} 304 U.S. 144, 153 n.4 (1938); \textit{see also} Bernstein, \textit{supra} note 2, at 52 (arguing that by incorporating most of the rights enumerated in the Bill of Rights, the Court was able to continue enforcement of fundamental rights against the states).

\textsuperscript{46} \textit{See} U.S. CONST. amend. I.

\textsuperscript{47} \textit{See} Ely, \textit{supra} note 3, at 943 (distinguishing \textit{Roe} from other Warren Court decisions because “by and large, it attempted to defend its decisions in terms of inferences from values the Constitution marks as special” (emphasis omitted)).

\textsuperscript{48} Strauss, \textit{Common-Law Constitution}, \textit{supra} note 4, at 36 (“Neither the text nor the original understandings provide much support for the principles of free expression that we today take for granted.”); \textit{see also id.} at 40 (“[T]he text has been incidental and the law has developed through precedent.”).

\textsuperscript{49} \textit{See} Owen M. Fiss, \textit{Free Speech and Social Structure}, 71 IOWA L. REV. 1405, 1405 (1986) (“The principle is rooted in the text of the Constitution itself, but it has been the decisions of the Supreme Court over the last half century or so that have, in my view, nurtured that principle, given it much of its present shape, and accounts for much of its energy and sweep.”).

\textsuperscript{50} Strauss, \textit{Common-Law Constitution}, \textit{supra} note 4, at 47; \textit{see}, e.g., Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

\textsuperscript{51} Strauss, \textit{Common-Law Constitution}, \textit{supra} note 4, at 44-45; \textit{id.} at 47 (“[T]he text has been incidental and the law has developed through precedent.”); \textit{see also} Lee C. Bollinger & Geoffrey R. Stone, \textit{Dialogue, in Eternally Vigilant}, \textit{supra} note 4, at 1, 1 (“Hundreds of judicial decisions—minutely studied, analyzed, and criticized—now constitute a highly intricate body of principles, doctrines, exceptions, and rationales.”).

\textsuperscript{52} This contrasts with ordinary common law, which yields to superseding legislation, so long as the legislature states its intent to override common law. \textit{See} Christopher J. Peters, \textit{Adjudicative Speech and the First Amendment}, 51 UCLA L. REV. 705, 769 (2004) (describing the “fairly obvious fact that the common law can be overridden by legislation,” because “the common law reflects a de facto legislative policy to leave certain fields of the law unplowed by legislation”).
rights at issue in *Lochner.* 53 The fact that the First Amendment contains a textual commitment to the freedom of speech perhaps explains our acceptance of this review, distinguishing it from *Roe* and *Lochner,* 54 but it does not necessarily explain the meaning of the judicially enforced freedom of speech.

**B. Lochner and the Institution of Judicial Review**

The Lochnerian pejorative could challenge the entire institution of individual-rights-based constitutional judicial review and judicial invalidation of legislation duly enacted by the popularly elected branches. 55 The problem with *Lochner,* this argument goes, was not constitutional review using non-textual rights; the problem was constitutional review. 56

*Lochner,* and the conventional distaste for *Lochner,* exemplifies the so-called “counter-majoritarian difficulty,” the problem of reconciling constitutional review by unelected judges with democracy and democratic lawmaking. 57 Critics harped, before and after *Lochner,* on judicial interference with the popular will and failure to defer to majoritarian and legislative findings and judgments. 58 Lochnerian review was not law, but politics, they argued, because judges should defer to legislative determinations when these determinations are within reasonable range. 59 Indeed, 1905 marked the beginning of one of the most vocal periods of criticism “regarding the inconsistency of judicial review with respect to democratic principles.” 60

Recent efforts to rehabilitate *Lochner* spring from a desire to separate doctrinal distaste for economic substantive due process from the structural need for aggressive rights-based judicial review and more aggressive policing of individual rights against infringing legislation. 61 *Lochner* and the decisions of its

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54. See supra notes 40-47 and accompanying text.
55. See Strauss, *Wrong,* supra note 3, at 376 (“The project of identifying and elaborating constitutional rights, and systematically applying them against legislative interference, was, one might have thought, precisely what courts should not do.”).
56. See id. (arguing that “one lesson of the *Lochner* era was that judicial review is unacceptable unless it is confined to exceptional cases of government irrationality or malfeasance”).
57. See Friedman, supra note 10, at 1390; id. at 1402 (“What we have, then, is a fight about legal legitimacy and its supposed consequences for judicial review.”).
58. See id. at 1436-37.
59. See id. at 1454; see also Brown, supra note 44, at 81 (arguing that the government’s reasoning may be legitimately criticized on economic grounds; however, government explanations typically are sufficient to justify limitations on liberty).
60. Friedman, supra note 10, at 1393.
61. Id. at 1400; see Gillman, supra note 26, at 205 (criticizing the use of *Lochner* as weapon “against the modern Court’s use of fundamental rights as a trump on government power”); Gary D. Rowe, *Lochner Revisionism Revisited,* 24 L. & Soc. INQUIRY 221, 242 (1999) (“By freeing us from excessive worries about the legitimacy of judicial review, revisionism promises to direct our
era reached incorrect conclusions, the argument goes, but those decisions were the products of a structurally and procedurally proper and well-established exercise of the judicial role in protecting individual rights against popular legislation.62

Of course, constitutional judicial review has more than survived *Lochner*, thus hostility to such review cannot be the heart of Lochnerism.63 More importantly, there has been the least structural controversy (as opposed to substantive disagreement with particular decisions) over judicial review in the First Amendment context: “Virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech . . . .”64 Commentators and critics rarely, if ever, question or challenge the structural legitimacy of courts invalidating legislation on First Amendment grounds.65 This is so even as to decisions striking down wildly popular regulations of unpopular expression.66

This peculiar tolerance for First Amendment constitutionalism makes sense on Ely’s theory of judicial review, under which free expression must be “strenuously” protected against majoritarian interference precisely “because [free speech] is critical to the functioning of an open and effective democratic society.”67 First Amendment doctrine historically rests on “unrelenting” distrust

attention to more fruitful and creative jurisprudential endeavors.”); see also Strauss, Wrong, supra note 3, at 378 (“[T]he willingness and ability of courts to take an aggressive role in enforcing constitutional rights has become an entrenched aspect of the legal culture . . . .”).

62. See Owen M. Fiss, Troubled Beginnings of the Modern State, 1888-1910, 19 (1993) (“*Lochner* stands for both a distinctive body of constitutional doctrine and a distinctive conception of judicial role: One could reject one facet of *Lochner* and accept the other.”); Brown, supra note 44, at 83-84 (arguing that the departure from *Lochner* was not a departure from recognizing the existence of economic due process, but a departure in applying the liberty principle in the face of government conceptions of the common good); Ely, supra note 3, at 941 (arguing that *Lochner* could be understood as asking the right question—whether the legislative action plausibly furthered a permissible governmental goal—but misapplying the question and reaching the wrong conclusion); Friedman, supra note 10, at 1401 (“[S]cholars argue that while the specific *Lochner*-era holdings themselves were wrong . . . the tradition of upholding rights against popular legislation was an established one.”).

63. See Strauss, Wrong, supra note 3, at 376-77 (calling rigorous constitutional review one of the “signal developments” in the last fifty years of constitutional law); id. at 378 (arguing that “several decades of consensus in favor of much greater activism” means that arguments against *Lochner* cannot rest on skepticism of the legitimacy and efficacy of judicial review).

64. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 105 (1980); id. at 116 (“[T]rig review’ is always appropriate where free expression is in issue.”).

65. See Strauss, Wrong, supra note 3, at 377 (arguing that “no Justice—and seemingly hardly anyone outside of academia—suggests that it is improper for the courts” to exercise rigorous First Amendment review).


67. Ely, supra note 64, at 105; see Alexander Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245, 256-57 (“[T]here are many forms of thought and expression within the range of human communications from which the voter derives [] knowledge . . . These [
of popular government and its ability and willingness to inhibit public debate in service of its majoritarian interests. We accept that it falls to the insulated courts to act as "special guardians of freedom of expression," protecting public discussion from self-interested, self-protecting, and untrustworthy, popular and governmental majorities.

C. Substituting Judicial for Legislative Judgment

Lochnerism is most commonly associated with the criticism that courts have, in the guise of constitutional analysis, inappropriately substituted their own views for the views of the legislature as to the merit, wisdom, efficacy, and worthiness of public policy. Thus did Justice Black attempt to bury Lochner in Ferguson v. Skrupa by insisting that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Courts would no longer "sit as a 'superlegislature to weigh the wisdom of legislation.'"

Rubenfeld emphasized this feature in criticizing the Lochnerian tendencies of United States v. O'Brien. O'Brien involved the prosecution under a federal statute prohibiting the intentional destruction of Selective Service registration...
certificates of an individual who burned his card as a form of political protest. The Supreme Court adopted a four-prong test for evaluating challenges such as this one to laws of general applicability regulating conduct that could, in some circumstances, be expressive or symbolic. The second prong of the O'Brien test requires the court to determine whether the law at issue furthers an important or substantial governmental interest.

The problem, according to Rubenfeld, is that this prong leaves room for a court to decide, in a form of “judicial superlegislative review,” whether a conduct regulation (a law that does not target speech) in fact furthers the stated government interest. He uses the example of an individual ticketed for speeding who argues that he exceeded the speed limit for expressive purposes—to protest and call attention to the stupidity of the new fifty five mile per hour limit. The fact that the driver sought to present a particularized message through his conduct places his case squarely within O'Brien, requiring a “full-blown judicial determination” of whether the lower speed limit does (as the government argued in enacting the law) increase fuel efficiency and highway safety. This inquiry has the effect of “constitutionalizing a policy question of purely legislative dimensions.” If the court agrees with the driver that the lower speed limit does not achieve its intended goals, the speed limit will be found unconstitutional simply because it is bad or ineffective in achieving its policy objectives—precisely what Lochner is thought to be about.

76. O'Brien, 391 U.S. at 369-70.
77. Id. at 377: [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

This is essentially the same test for content-neutral regulations, laws that directly regulate speech (as opposed to conduct that may, or may not, be expressive), but apply regardless of the content or message. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298, 299 n.8 (1984) (stating the constitutional test for content-neutral restriction is “little, if any, different” from the test for regulations of expressive conduct); Rubenfeld, supra note 12, at 785; Smolla, supra note 15, at 1125 (calling O'Brien the “close cousin” of the intermediate scrutiny standard for content-neutral regulations); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. REV. 615, 653 (1991) (“[T]he Court has collapsed the [time, place, and manner] and symbolic speech doctrines into a single, rather weak, standard.”).

79. Rubenfeld, supra note 12, at 771.
80. Id. Rubenfeld further develops the hypothetical by adding the fact that the speeder/speaker’s car bears a sign reading “If you see me driving at 65, it means I’m protesting the 55-mile-per-hour speed limit.” Id. at 774.
81. Id. at 771, 775.
82. Id. at 771.
83. Id. at 775.
This feature of *Lochner* does not get us very far analytically because it really depends on one’s biased perspective whether a court in a given case applied good-faith legal analysis or superimposed its own judgments on the legislature.\(^{84}\) Ultimately, it breaks out into a broader critique of all balancing in constitutional analysis.\(^{85}\) Many *Lochner*-era decisions were derided simply as judicial re-balancing of interests, a re-measuring of the legislature’s conclusion that a particular regulation of business served the public or common good.\(^{86}\) Congress already had struck the balance among competing interests in drafting the law; the Court should not re-do that balance.\(^{87}\) Moreover, *Lochner*-era critics saw judicial balancing as arbitrary, random, unpredictable, and ultimately political, with results varying widely among cases.\(^{88}\)

But such balancing is uniquely prevalent under the First Amendment. Indeed, it seems unavoidable unless the language of the First Amendment—“Congress shall make no law”—is taken as an absolute bar to the regulation of all that could be expressive.\(^{89}\) Such absolutism is precisely where Rubenfeld hopes to go.\(^{90}\) He argues for a new “purposivist” approach to free speech: the First Amendment is, per se, violated when the immediate purpose of a law is to target speech or to punish someone for speaking; it is, per se, not violated if the government’s purpose was to target something other than speech or if the person was not punished for speaking.\(^{91}\) Under this approach, there would be no balancing of interests, means, or ends.\(^{92}\)

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84. See Ely, supra note 3, at 940 (“All the ‘superimposition of the Court’s own value choices’ talk is, of course, the characterization of others and not the language of *Lochner* or its progeny.”).

85. See Rubenfeld, supra note 12, at 786 (arguing that balancing’s inquiry into “how well a law furthers important governmental interests becomes nothing more than superlegislative judicial review of the law’s policy merits”).

86. Compare Bernstein, supra note 2, at 12-13 (discussing conclusions that legislation that merely shifted resources could not be regarded as beneficial to the public) and Brown, supra note 44, at 82 (arguing that the move from *Lochner* reflected “changes in the understanding of what constituted a valid public purpose of government”) with Cushman, supra note 33, at 899 (discussing cases striking down business regulations because the business was not affected with the public interest, thus its regulation could not be in service of the public good).

87. See supra notes 71-74 and accompanying text.

88. See Friedman, supra note 10, at 1406.

89. See Owen M. Fiss, The Irony of Free Speech 5 (1996) [hereinafter Fiss, Irony] (arguing that the Supreme Court has not interpreted the First Amendment as a bar to all state regulation; instead, the Court has interpreted the First Amendment as a mandate to reign in the state’s authority by balancing the value of the speech with the state’s advanced interest in regulating); Martin H. Redish, Freedom of Expression: A Critical Analysis 54 (1984) (“Any general rule of first amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing.”); but see Edmond Cahn, Justice Black and First Amendment “Absolutes”: A Public Interview, 37 N.Y.U. L. Rev. 549, 553 (1962) (interviewing Justice Black, who described his view of the First Amendment as “‘no law’ means no law”).

90. See Rubenfeld, supra note 12, at 776.

91. See id. Rubenfeld distinguishes purpose from motive and focuses only on the former. Id. at 793-94. Purposivism looks to the immediate action of the law and whether it targets speech;
Unless the Court adopts the absolutist interpretation, there must be consideration and balancing of the means and ends employed by government and the tailoring between the two where speech is involved—whether a given law is necessary to serve an interest and whether that interest is, on balance, sufficiently important to justify the disfavored legislative act of restricting speech.93 The charge of First Amendment Lochnerism perhaps derives because the balance so often tilts in favor of protecting expression and against the asserted legislative interests.94 But the alternative is for courts to analyze the threat posed by the particular speech at issue—an approach that places courts in the similarly questionable position of judging the value or worth of particular expression.95 That focus would not guard effectively against courts getting swept up in the concerns that motivated the legislators to act to restrain particular speech in the first instance.96

D. Misallocating Rigorous Judicial Scrutiny

Lochnerian courts allegedly aim (or misaim) rigorous judicial scrutiny at the wrong targets.97 Lochner-era courts reviewed ordinary social, economic, and commercial regulation that should not have warranted heightened (if any) constitutional review, ultimately removing much economic regulation from the legislative purview.98 The defeat of *Lochner* in 1937 through the Supreme Court’s famous “Switch in Time”99 reflected a new constitutional understanding:

...
legislatures should have power in particular regulatory areas and reviewing courts would accord greater deference to political branches and less rigorous review where economic, commercial, and business matters were concerned. As the Carolene Products Court said in the text just before Footnote Four:

the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.101

On this view, the problem with Lochner was the application of rigorous judicial scrutiny to, and potential invalidation of, such economic legislation, even if most in fact survived review.102 Similarly, Rubenfeld recognizes that courts do not use O’Brien to engage in the feared superlegislative review of the wisdom and merits of speed limits or other generally applicable conduct laws absent some indication “of an improper speech-suppressing purpose.”103 For Rubenfeld, however, that simply drives the point that a “profound rethinking” of First Amendment law and a move away from balancing is doctrinally necessary.104

The concept of according more or less constitutional scrutiny to particular categories of laws finds its First Amendment analogue in the content distinction, the differential treatment of content-based and content-neutral laws that is a cornerstone of modern free speech doctrine.105 Content-based regulations restrict speech because of the substance, message, ideas, subject matter, or

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100. See 2 ACKERMAN, supra note 35, at 401 (“When the New Deal Court repudiated Lochner after 1937, it was repudiating market freedom as an ultimate constitutional value, and declaring that, henceforth, economic regulation would be treated as a utilitarian question of social engineering.”); J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 DUKE L.J. 375, 389 (1990) [hereinafter Balkin, Realism] (“[I]t was thought that issues of economic freedom should be left to legislatures and administrative agencies, who could study these matters in their larger social context and determine the allocation of rights and duties that best served the public interest.”); Schauer, supra note 4, at 178 (“Halfway through the New Deal the Supreme Court changed its mind (or at least its tune), and things have never been the same.”).

101. Carolene Prods., 304 U.S. at 152.

102. See Brown, supra note 44, at 86-87 (arguing that far more legislation was upheld in the face of economic due process challenge than was struck down); but see Friedman, supra note 10, at 1449 (arguing that the “small absolute number of overrulings looked like a sea change to observers living at the time”).

103. Rubenfeld, supra note 12, at 787.

104. Id. (“[W]hen the purposivism instinct in First Amendment law is taken seriously—a profound rethinking of a number of First Amendment issues becomes possible.”).

105. See Bollinger & Stone, supra note 51, at 19; Williams, supra note 77, at 617 (describing the “growing focus on content discrimination as the central concern of the first amendment”).
speakers involved, or because of the effect of the expression on the audience.\textsuperscript{106} Content-neutral laws apply to all speech, regardless of subject matter, speaker, or point of view, and are justified or explained without regard to the substance of the speech regulated.\textsuperscript{107} Content-based regulations can be further divided between those that discriminate based on viewpoint—regulating one particular point of view on a subject while leaving other viewpoints on that subject unregulated—and on content or the subject matter of speech—regulating the overall topic, subject, or issue discussed or the category of speakers involved.\textsuperscript{108} The First Amendment also could be implicated by neutral laws of general applicability, laws that do not regulate speech in any sense, instead targeting conduct or other behavior that may involve language or that may be performed for expressive purposes.\textsuperscript{109}

The continuum of content connection leads to a continuum of constitutional scrutiny. Viewpoint-discriminatory laws are virtually per se unconstitutional.\textsuperscript{110} Content-based laws are subject to highly rigorous (and rarely satisfied) strict or exacting scrutiny, requiring that the law be the least restrictive means to serve a compelling government interest.\textsuperscript{111} Content-neutral laws are subject to

\begin{itemize}
  \item\textsuperscript{106} See Bollinger & Stone, supra note 51, at 19 ("A content-based regulation restricts speech because of its message . . ."); Smolla, supra note 15, at 1123 (arguing that law appears content-based when the regulation “must at least to some degree reflect something in the nature of a content-based judgment about the speech”); Williams, supra note 77, at 622-23 ("[A] regulation will qualify as content discriminatory only if the government purpose served by the regulation is related to the content of the speech."); see also, e.g., United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 811-12 (2000); Forsythe County v. Nationalist Movement, 505 U.S. 123, 134 (1992); Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 116 (1991); Boos v. Barry, 485 U.S. 312, 321 (1988).

  \item\textsuperscript{107} See Bollinger & Stone, supra note 51, at 19; Strauss, Common-Law Constitution, supra note 4, at 38 (describing regulations directed at speech but not based on the content of the speech regulated); see also, e.g., Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) [hereinafter Turner I] ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293) (stating that laws are content-neutral when “justified without reference to the content of the regulated speech”); id. at 791 (stating the issue as “whether the government has adopted a regulation of speech because of disagreement with the message it conveys”).

  \item\textsuperscript{108} See Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (calling viewpoint discrimination “an egregious form of content discrimination”); Smolla, supra note 15, at 1121 (“Viewpoint discrimination, at its worst, involves deliberate suppression of particular views . . .”); Williams, supra note 77, at 655 (calling viewpoint discrimination “the most biased end of the continuum . . . where the government singles out and disadvantages one view on a subject while leaving other points of view untouched”); see also Smolla, supra note 15, at 1122 (“While all laws that discriminate on the basis of viewpoint automatically discriminate on the basis of content, not all laws that discriminate on the basis of content go so far as to single out disfavored viewpoints.”).

  \item\textsuperscript{109} See Rubenfeld, supra note 12, at 770-71; Smolla, supra note 15, at 1119-20; Strauss, Common-Law Constitution, supra note 4, at 38.

  \item\textsuperscript{110} See Smolla, supra note 15, at 1122.

  \item\textsuperscript{111} See Playboy Entm’t, 529 U.S. at 813; Rosenberger, 515 U.S. at 828; Simon & Schuster, 502 U.S. at 116; see also Smolla, supra note 15, at 1122 (describing strict scrutiny as “highly
intermediate scrutiny, a less demanding and “more open-ended ‘balancing’” test that weighs a law’s restrictiveness against the government’s important or substantial justifications for the law and overwhelmingly strikes the balance in favor of constitutionality. The difference in the forms of scrutiny, and thus the likely result of the balancing, turns on the degree of exactingness that the court demands in the fit between the law and the legislative goal.

This difference in scrutiny is justified on the theory that the more content (or viewpoint) plays a role in the application of or justification for a law, the more the law looks like governmental censorship or governmental manipulation of public debate, thus the greater the harm to free-speech values. In Smolla’s words, “[i]t is not that content-based regulation of speech is inherently despotic, but that it inherently lends itself to despotism.” The great threat to free-speech values is governmental manipulation or control of debate by controlling messages or points of view or the anticipated effects if the audience hears and is persuaded by some expression.

And the difference functions quite sharply in practice, perhaps (silently) to preempt charges of First Amendment Lochnerism. Few, if any, content-based laws survive the “acid baths” of strict scrutiny. Nearly all content-neutral regulations survive less-rigorous intermediate review.

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113. See id.; Smolla, supra note 15, at 1125; see also Turner I, 512 U.S. at 662 (citing O’Brien, 391 U.S. at 377); Ward, 491 U.S. at 798-800 (requiring that the law be narrowly tailored, although not necessarily the least restrictive means, to serve a significant government interest while leaving open ample alternative channels of communication).
114. See Rubenfeld, supra note 12, at 785.
115. See Smolla, supra note 15, at 1121-22 (describing viewpoint discrimination as “tantamount to thought control”); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 198-99 (1983) (arguing that the community though process is distorted and manipulated when government eliminates particular ideas, viewpoints, or information from the public debate); see also Simon & Schuster, 502 U.S. at 116 (stating that “the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace”); but see REDISH, supra note 89, at 104 (arguing that content-neutral regulations diminish the value of free speech and questioning the differential standards of review).
116. Smolla, supra note 15, at 1122; see City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring) (“[C]ontent-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.”).
117. See Stone, supra note 115, at 198-99; David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334, 355 (1991) (arguing that the First Amendment prohibits government from attempting to control the audience’s mental processes by deliberately denying them information in order to induce certain behavior).
118. Smolla, supra note 15, at 1122; see REDISH, supra note 89, at 118-19; Heidi Kitrosser, From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment, 96 NW. U. L. REV. 1339, 1339 (2002); Stone, supra note 115, at 196. Ironically, the exception is in those areas of First Amendment law that commentators fear may or have become Lochnerized. See, e.g., McConnell v. FEC, 540 U.S. 93 (2003) (upholding, as against strict
E. Lochner as Political Symbol: “Nine Old Men” and “Switch in Time”

Finally, Lochner is a political and ideological morality play. It is the narrative of the Nine Old Men and the Switch in Time. It is the collision between old-guard judges enforcing their outmoded world views as matters of constitutional law and elected officials putting into play popular new progressive ideas then in social ascension, with the latter eventually prevailing. Lochnerian judges imposed their anti-Progressive biases—pro-business, anti-labor, libertarian, laissez-faire economics—to strike down, as unconstitutional, popular attempts to change, and ultimately level, the social and economic playing field. Lochnerism is the last judicial stand of the old constitutional order against new legislative initiatives. Lochner was the old, rigid, formalist regime that had to be slain in order for the progressive, flexible, pragmatic ideals of the New Deal to spread and take hold. The New Deal’s turn from Lochner reflected eventual judicial recognition of changed social and economic conditions that altered the understanding of the common good, the role of government in ensuring the public good, and when constitutional liberty must yield to the common good.


scrutiny, limitations on campaign contributions and expenditures); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1989) (same as to restrictions on corporate expenditures).

119. See Redish, supra note 89, at 99 (describing the Court’s “ambivalence” towards content-neutral restrictions); Kitrosser, supra note 118, at 1393 (describing criticism that courts give a “veritable ‘pass’ to regulations deemed content-neutral”); see also, e.g., Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 189-90 (1997) [hereinafter Turner II]; Ward, 491 U.S. at 796; see infra note 201-209 and accompanying text.

120. See 2 Ackerman, supra note 35, at 290-91 (describing the “switch in time” by two centrist justices to endorse the New Deal); Bernstein, supra note 2, at 4 (describing view of “the heroic Franklin Roosevelt [standing] up to the Nine Old Men” of the Supreme Court in securing the New Deal).

121. See Balkin, Wrong, supra note 2, at 685 (“Following the struggle over the New Deal and the ascendency of the Roosevelt Court, Lochner symbolized the constitutional regime that had just been overthrown.”); see also Bernstein, supra note 2, at 4 (“This morality tale bore only a modest relation to reality. However, it suited the political needs of the Progressive and New Deal era controversialists who initially wove it.”).

122. See 2 Ackerman, supra note 35, at 257 (“Lochner became the symbol of a repudiated era of laissez-faire jurisprudence.”); Bernstein, supra note 2, at 2 (outlining the view that “Lochner era Supreme Court Justices, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity.”); Cushman, supra note 33, at 983 (describing this as the “narrow” view of Lochner); Friedman, supra note 10, at 1452 (discussing the perception of Lochner-era judges motivated by class bias); Richards, supra note 3, at 1212; Schauer, supra note 4, at 178 (arguing that the Court “[c]ast[] aside the view that the Constitution adopted a libertarian or laissez-faire view of economics”).

123. See Balkin, Wrong, supra note 2, at 686.

124. Id.; see 2 Ackerman, supra note 35, at 401 (“When the New Deal Court repudiated Lochner after 1937, it was repudiating market freedom as an ultimate constitutional value . . . .”).

125. See Brown, supra note 44, at 83-84 (“By [1937], the suffering of workers and the changes in the economic and social order had persuaded many that liberty was not protected adequately without regulation . . . .”); id. at 87 (arguing that government sometimes convinced Lochner-era judges that some restriction on economic liberty was in the common good); Strauss, Wrong, supra
The *Lochner*-as-politics critique further entails what Jack Balkin calls “ideological drift” in constitutional principle, through which radical and progressive constitutional ideas gain acceptance, ultimately become orthodoxy, then are adopted (or co-opted, depending on one’s point of view) by the other side of the ideological constitutional divide as arguments for preserving the status quo. The constitutional laissez-faire economic arguments that were the bane of New Deal Democrats and *Lochner*-era Progressives originated as antebellum liberal arguments against the provision of government benefits (such as the advantages of the newly created corporate form) to monied interests; the arguments only later were picked up by big business as a way of fending off government regulation, while the progressive left committed itself to redistributive social and economic regulation.

Ironically, the death of *Lochner* helped create this feature of First Amendment *Lochnerism*. Faced with the loss of viable libertarian economic arguments against government regulation, business and conservative interests turned to the First Amendment and to the historically libertarian free speech tradition of the left. That, in turn, cast the First Amendment ideologically adrift. The political left now holds dear and supports the counter values the legislature often asserts to justify some restrictions on speech—equality, democracy, personal privacy—as uniquely compelling values that at times should outweigh free speech. Moreover, the political left’s substantive commitment to redistributive economics is incompatible with broad libertarian protection for conservative-leaning contrary expression by large, monied corporate and business interests.

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127. See id. at 384 (“Business interests and other conservative groups are finding that arguments for property rights and the status quo can more and more easily be rephrased in the language of the first amendment by using the very same absolutist forms of argument offered by the left in previous generations.”); Schauer, *supra* note 4, at 178 (“Facing the increasing constitutional (or at least doctrinal) weakness of arguments from economic libertarianism, economic libertarians turned their attention to the First Amendment.”).
128. See FISS, IRONY, supra note 89, at 9-10; id. at 83 (“The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, . . . but is rather a means to further the democratic values underlying the Bill of Rights.”); Balkin, *Realism*, supra note 100, at 423 (describing conflicts between egalitarianism and the requirement of governmental content-neutrality in regulating speech).
129. See Martín H. Redish and Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 291 (1998) (“But it is probably accurate often enough to treat corporate speech as the rough equivalent of something approaching more politically conservative free market advocacy. If such is the case, however, then attempts to exclude corporate speech from the First Amendment’s scope are similarly likely to represent the rough equivalent of burdening only one substantive political-economic position.”).
We find ourselves in the First Amendment equivalent of 1936. Both constitutional conflicts arise out of similar social contexts: New Deal legislation and recent speech-restrictive legislation (such as the wiretap law at issue in *Bartnicki*) both are born “of the economic and social dislocations caused by rapid technological change.”

Popular government seeks to deal with these upheavals through legislation and the courts are forced to fit this legislation into existing doctrinal frameworks. *Lochner*-era courts continued to broadly protect economic liberty from government regulation, not yet embracing the “irony” urged from the left that the failure of government to act in the economic sphere was harmful to the public good. Similarly, the Court today (call them the “Eight Middle-Aged-to-Old Men and One Older Woman”) continues to apply broad First Amendment principles created in an earlier era to strike down government regulation, not yet embracing the paradox suggested by many that the state can be “a friend of speech” and can, through regulation of speech, enhance democracy and democratic ideals.

With few exceptions, free speech principles do not yet yield in court to other liberal values that popular government may seek to protect through limits on expression—much as freedom of contract did not yield prior to 1937. Neil Richards argues that to invalidate laws protecting privacy in consumer credit data and information would mark a descent into First Amendment *Lochner*ism. According to Richards, *Lochner* and the First Amendment arguments against information-privacy rules share an unnecessary (and unwanted) “libertarian gloss upon the Constitution,” placing economic regulation beyond the reach of the ordinary legislative process in a way favored by business interests.

Broad protection for free speech may be perceived as the old constitutional order, judicially enforced and resistant to calls for greater protection of privacy and personal dignity as a different, worthy legal value that popular branches of government may proactively protect. And we see a political valence similar to...

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131. See infra notes 132-142 and accompanying text.
132. Richards, supra note 3, at 1213.
133. See Friedman, supra note 10, at 1397 (discussing arguments that *Lochner*-era decisions were grounded in and faithful to existing doctrine).
134. See Brown, supra note 44, at 83-84.
135. Fiss, Irony, supra note 89, at 83; see also Cass R. Sunstein, *The Future of Free Speech*, in *Eternally Vigilant*, supra note 4, 285, 304 (arguing that a belief in the democratic foundations of the free speech principle means that some government regulation of speech is not problematic if it is a reasonable effort to promote democratic goals).
136. See Richards, supra note 3, at 1212-13 (“[T]here are some fairly strong parallels between the traditional conception of *Lochner* and the First Amendment critique of data privacy legislation.”).
137. Id. at 1213; id. at 1215 (“[T]he modern normative commitment against placing social and economic problems beyond the reach of democratic regulatory politics would still counsel against taking the First Amendment critique at face value.”).
the period before Lochner’s demise, with the left seeking to limit the dominant, libertarian constitutional value in the face of these countervailing interests. Initial calls for restrictions on speech as a way to protect and preserve other values, such as equality, individual dignity, and individual self-worth, came from the left. This old regime rests on an assumption that government may not decide what speech is unfair, excessive, intolerable, or in bad taste and that granting government that power necessarily creates the potential for abuse. The new constitutional order hopes government can and will legislate in favor of privacy and other interests, even at the risk of creating new, but justified, free speech restrictions.

II. LOCHNER AND BARTNICKI

A. Bartnicki Considered

In 1968, as part of the Omnibus Crime Control and Safe Streets Act, Congress sought to prohibit and punish particular private conduct: wiretapping and intercepting wire and voice (expanded in 1986 to include electronic) communications. The statute prohibited the willful interception of communications, the use of devices designed to intercept communications, the use of the contents of illegally intercepted communications, and the intentional disclosure of the contents of a communication knowing or having reason to know the information was obtained through an unlawful interception. The law was enforceable through a private civil action for individuals the right to control . . . their personal information”); Smolla, supra note 15, at 1150 (“Upholding a restriction on privacy contraband, however, merely permits the government to come to the aid of a speaker . . . who does not wish to have his views involuntarily exposed from having those views forcibly stolen and disseminated.”).

139. Balkin, Realism, supra note 100, at 376 (“The left in the United States used to be solidly united around the overriding importance of protecting speech from governmental interference . . . It’s not that way anymore.”).

140. See Fiss, Irony, supra note 89, at 10 (arguing that “many liberals find it difficult to choose freedom of speech over the countervales being threatened,” when the state “exercises . . . power on behalf of another of liberalism’s defining goals—equality”).

141. See Volokh, Information Privacy, supra note 67, at 1116; see also Ammori, supra note 68, at 64-65 (arguing that different speech traditions apply to different circumstances, divided by the prevalence of an “unrelenting government distrust”); Smolla, supra note 15, at 1122 (“It is not that content-based regulation of speech is inherently despotic, but that it inherently lends itself to despotism . . .”).

142. See Volokh, Information Privacy, supra note 67, at 1106.


145. Id. § 2511(1)(b).

146. Id. § 2511(1)(d).

147. Id. § 2511(1)(c).
equitable relief, actual, statutory, and punitive damages, and attorneys’ fees.\textsuperscript{148} Congress’ explicit purpose was to protect personal privacy in burgeoning wire and electronic communications against surreptitious eavesdropping.\textsuperscript{149} The law reflects an effort by Congress to get ahead of technology in protecting personal, business, and other privacy interests against unwanted intrusion.\textsuperscript{150} As Rodney Smolla argues:

\begin{quote}
Congress clearly understood that new communications technologies would often supplement, if not largely supplant, many traditional forms of communication . . . forms of communication that historically promised a reasonably strong degree of privacy protection. Congress plainly thought it was important to attempt to secure some rough measure of equivalent privacy for these new modes of communication, and for new forms that would undoubtedly develop in the future, given our modern culture’s ever-accelerating arc of invention.\textsuperscript{151}
\end{quote}

Throughout 1992 and 1993, a high-profile and highly contentious labor dispute raged between the Pennsylvania State Education Association and the school board governing Wyoming Valley West High School in north-central Pennsylvania.\textsuperscript{152} In May 1993, Anthony Kane, a teacher in the district and the president of the local union, had a telephone conversation with Gloria Bartnicki, the union’s chief negotiator; Kane spoke on his land line while Bartnicki spoke from her cellular phone.\textsuperscript{153} The conversation about the labor dispute, the school board, and the current status of negotiations was, in Smolla’s words, “candid, and included some blunt down-and-dirty characterizations of their opponents in the labor controversy, at times getting personal.”\textsuperscript{154} The conversation eventually turned to the school board’s media-reported bargaining position of refusing any pay increase greater than three percent, of which Kane said “If they’re not gonna

\begin{footnotes}
\footnotetext{148}{Id. § 2520(a), (b).}
\footnotetext{149}{See \textit{e.g.}, S. REP. No. 90-1097, at 66 (1968), as reprinted in 1968 U.S.C.C.A.N. 2112, 2153 (describing statutory purpose as “protecting the privacy” of wire and oral communication); \textit{id.} at 67 (“Every spoken word relating to each man’s personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor’s advantage.”); \textit{Oversight on Communications Privacy: Before the Subcomm. on Patents, Copyrights, and Trademarks, Senate Committee on the Judiciary, 98th Cong. 1-2} (1984) (statement of Sen. Leahy) (discussing the impact of new electronic communications “on our lives and our sense of privacy”).}
\footnotetext{150}{Smolla, \textit{supra} note 15, at 1102-03 (“There is indeed a whole lot a scannin’ goin’ [sic] on. People surreptitiously intercept, record, and disclose the usual suspects for the usual reasons, in the perpetuum parade of human perfidy.”).}
\footnotetext{151}{Smolla, \textit{supra} note 15, at 1102-03 (footnotes omitted).}
\footnotetext{152}{Bartnicki, 532 U.S. at 518.}
\footnotetext{153}{\textit{Id.}; Smolla, \textit{supra} note 15, at 1112.}
\footnotetext{154}{Smolla, \textit{supra} note 15, at 1112.}
\end{footnotes}
move for three percent, we’re gonna have to go to their, their homes . . . To blow off their front porches, we’ll have to do some work on some of those guys.”

The telephone call was intercepted by an unknown individual and recorded onto a cassette tape. The tape was passed anonymously to Jack Yocum, president of a local taxpayers’ organization that had actively supported the board and opposed the union’s positions in the dispute. Yocum passed the tape to Frederick Vopper, who hosted a radio talk show under the pseudonym “Fred Williams,” who repeatedly played the tape on the air. Other media outlets, some of which had received anonymous copies of the tape, then similarly published the contents of the cassette.

Bartnicki and Kane sued Vopper and Yocum for actual, statutory, and punitive damages and attorney’s fees under the disclosure provision of the federal wiretap law and a separate state law. Vopper and Yocum argued that the First Amendment precluded their liability under these circumstances and six justices, led by Justice Stevens, agreed. Justice Stevens held that the case was controlled by the principle of *Smith v. Daily Mail Publishing Co.* that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.” The basic elements of that test were satisfied: neither Yocum, Vopper, nor any other media member played a role in the initial unlawful interception of the Kane-Bartnicki call; all obtained the information lawfully; and the subject matter of the conversation—the labor dispute and negotiations and everything surrounding that—was a matter of public concern.

Justice Stevens reaffirmed the Court’s ongoing refusal to declare categorically whether publication of truthful information ever could be punished. Nevertheless, he soundly rejected the government’s asserted interests in stopping interception and in protecting the personal privacy of those engaged in these conversations. While recognizing that the latter interest was

155. *Bartnicki*, 532 U.S. at 518-19; Smolla, *supra note* 15, at 1113; see also id. at 1144 (arguing that “[i]t was The Sopranos talk of blowing off porches and ‘do[ing] some work on some of these guys’ (or ‘dese guys’)” that influenced several justices in the case).

156. *Bartnicki*, 532 U.S. at 519.

157. Id.

158. Id.; Smolla, *supra note* 15, at 1113 n.54.

159. *Bartnicki*, 532 U.S. at 518-19; Smolla, *supra note* 15, at 1113.

160. *Bartnicki*, 532 U.S. at 519-20 n.3.

161. Id. at 520.

162. Id. at 516.


165. *Bartnicki*, 532 U.S. at 525; Smolla, *supra note* 15, at 1116-17; but see id. at 1150 (criticizing the “sweeping version” of public concern used by Justice Stevens).


167. *Bartnicki*, 532 U.S. at 529-34.
strong, Stevens stated that those “concerns gave way when balanced against the interest in publishing matters of public importance,” the sort of truthful information at the core of First Amendment protection. 168

Justices Breyer and O’Connor nominally joined Justice Stevens’ opinion, creating an apparent majority. 169 But Justice Breyer wrote a concurring opinion that, in tone and language, was narrower and appeared to take a distinct path to the conclusion that the expression in the instant case was protected, a path that leaves expression less thoroughly protected in the face of privacy concerns. 170 Justice Breyer emphasized the “special circumstances” inhering in publication of intercepted information “involv[ing] a matter of unusual public concern,” in this case, a genuine true threat of physical harm to person and property. 171 He concluded that Bartnicki and Kane “had little or no legitimate interest in maintaining the privacy” of such threats. 172 Moreover as limited public figures for purposes of the labor dispute, Bartnicki and Kane had forfeited some of their interests in privacy. 173 Justice Breyer took pains to agree with Justice Stevens that § 2511(1)(c) is unconstitutional only as applied to the facts, refusing to extend the ruling beyond present circumstances. 174

B. A Lochnerian Spin on Bartnicki

Bartnicki is Lochner in one sense of the word: the Court reviewed and invalidated federal legislation on constitutional grounds. 175 If one sees Lochnerism in all individual rights-based judicial review, Bartnicki obviously fits the mold – as does every other major First Amendment case. Bartnicki also reflects, in the First Amendment realm, several of the other, more nuanced elements frequently associated with the purported evils of Lochnerism. 176 If we are going to speak of First Amendment Lochnerism, Bartnicki remains a good illustration of the purported problems.

168. See id. at 532-34.
169. Id. at 535.
170. See Smolla, supra note 15, at 1113 (discussing narrower scope of Breyer’s concurring opinion).
171. See Bartnicki, 532 U.S. at 535-36 (Breyer, J., concurring); Eugene Volokh, Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Bartnicki, 40 Hous. L. Rev. 697, 743 (2003) [hereinafter Volokh, Intellectual Property]; see also Smolla, supra note 15, at 1144 (arguing that Breyer “seemed offended by the conversation,” treating it as an authentic discussion of the need to engage in violence, rather than a hyperbolic discussion of anger at the school board’s negotiating intransigence).
172. Bartnicki, 532 U.S. at 539 (Breyer, J., concurring) (emphasis in original).
173. See id. (Breyer, J., concurring).
174. Id. at 541 (Breyer, J., concurring).
175. See supra Part I.B.
176. See supra Parts I.C-E.
1. Rigorous review of inappropriate targets

*Bartnicki* aimed rigorous (and ultimately disqualifying) First Amendment review at what appears to be the type of law that ordinarily should not receive such close scrutiny. “Appears” is the operative word, of course, because the type of law at issue and level of review are the most confused aspects of the main opinion.

Justice Stevens initially described § 2511(1)(c) as a “content-neutral law of general applicability.”177 This description fuses two distinct types of laws—laws of general applicability that do not regulate speech but instead regulate conduct,178 and laws that regulate pure speech without regard to the content of the speech regulated.179 This confused description points to the Court’s uncertainty in characterizing the disclosure provision.180 On one hand, § 2511(1)(c) was not a stand-alone restriction, but a supplement to the broader prohibition on interception, the latter obviously a law of general applicability regulating not speech but conduct.181 Alternatively, an argument could be made that Congress’ decision to prohibit dissemination of intercepted communications was grounded in discomfort with the substance or content of what would be revealed in a private conversation, a somewhat-content-based judgment underlying the law.182

The third, and best, description of § 2511(1)(c) is a content-neutral regulation of expression.183 The law was “fairly characterized as a regulation of pure speech,” since it prohibits the publication of information, but one that applied regardless of the substance or content of the conversation disclosed and was justified by a government interest in protecting the privacy interests of those in the conversation without reference to their content.184 The prohibition turned on the source of the communication, on the fact that the conversation had been

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177. *Bartnicki*, 532 U.S. at 526.
180. See *Bartnicki*, 532 U.S. at 526-27 (finding that § 2511(1)(c) “is fairly characterized as a regulation of pure speech” after concluding that § 2511(1)(c) is a “content-neutral law of general applicability”).
181. See 18 U.S.C. § 2511(1); *infra* notes 210-227 and accompanying text.
182. See Smolla, *supra* note 15, at 1123 (“[T]he widespread repugnance in our society for trafficking in such privacy contraband is at least to some degree bound up in repugnance for the open airing of the content of what was intercepted.”); see also *Bartnicki*, 532 U.S. at 527 n.11 (“[W]hat gave rise to statutory liability in this suit was the information communicated on the tapes.”) (citing Boehner v. McDermott, 191 F.3d 463, 484 (D.C. Cir. 1999) (Sentelle, J., dissenting)).
intercepted and recorded unlawfully, rather than the conversation’s subject
matter.185

Such a content-neutral regulation of pure speech ordinarily should be subject
to intermediate scrutiny.186 Justice Breyer’s concurring opinion insisted that
intermediate scrutiny was necessary and that strict scrutiny was inappropriate.187
Chief Justice Rehnquist similarly emphasized in dissent that intermediate
scrutiny was appropriate.188 One thus could conclude, as Smolla does after
reconstructing the majority opinion in light of the concurring and dissenting
opinions, that a majority of five Justices (the two concurring justices and the
three dissenters) did agree that the law was subject to intermediate review (even
if they disagreed how to apply that scrutiny).189

But Justice Stevens himself never identified the standard of review he was
applying.190 Justice Breyer, who purported to join Justice Stevens’s opinion,
ever disavowed that failure.191 And the dissent’s point of departure is its view
that the majority had, sub silentio, subjected the law to the strict scrutiny not
normally appropriate for such a law.192

Bartnicki took its Lochnerian turn when Justice Stevens avoided content
scrutiny and the standards of review altogether.193 In doing so, he invoked a
freestanding doctrinal line distinct from ordinary content analysis.194 But his
application of Daily Mail nevertheless is unique.

Bartnicki is the first, and thus far only, time that Daily Mail had been
applied to a content-neutral regulation; prior cases had applied the principle to
laws that obviously targeted particular expressive content.195 Daily Mail

185. Bartnicki, 532 U.S. at 526; Smolla, supra note 15, at 1122-23.
186. See Smolla, supra note 15, at 1123 (arguing that intermediate scrutiny exists for a law
such as § 2511(1)(c), which is not sufficiently content-based to warrant strict scrutiny but
sufficiently impacts speech such that rational-basis review is inappropriate).
187. Bartnicki, 532 U.S. at 536 (Breyer, J., concurring); Smolla, supra note 15, at 1118.
188. Bartnicki, 532 U.S. at 545 (Rehnquist, C.J., dissenting).
189. Smolla, supra note 15, at 1119. Compare Bartnicki, 532 U.S. at 541 (Breyer, J.,
concurring) (“I consequently agree with the Court’s holding that the statutes as applied here violate
the Constitution, but I would not extend that holding beyond these present circumstances.”) with
id. at 551 (Rehnquist, C.J., dissenting) (“The same logic applies here and demonstrates that the
incidental restriction on alleged First Amendment freedoms is no greater than essential to further
the interest of protecting the privacy of individual communications.”).
190. See Smolla, supra note 15, at 1118 (“Astonishingly, at no point in Justice Stevens’s
opinion does the Court come right out and say what standard of review or doctrinal test it is
applying to the laws before it.”).
191. See Bartnicki, 532 U.S. at 535 (Breyer, J., concurring).
192. See id. at 544 (Rehnquist, C.J., dissenting).
193. See id. at 527-29.
195. See, e.g., Florida Star, 491 U.S. at 526 (challenging statute prohibiting publication of
names of victims of sex offenses); Daily Mail, 443 U.S. at 98 (challenging statute prohibiting
publication of juveniles charged as offenders); see also Bartnicki, 532 U.S. at 545 (Rehnquist, C.J.,
dissenting) (“Each of the laws at issue in the Daily Mail cases regulated the content or subject
matter of speech.”); Smolla, supra note 15, at 1129.
dictates that government can punish publication only to serve an interest of the “highest order,” seemingly synonymous with the “compelling interest” required as part of strict scrutiny.196 And, although the Court continues to refuse to say categorically that truthful publication never can be punished,197 it has yet to find any government interest of a sufficiently high order to justify punishing the publication of truthful, lawfully obtained information on a matter of public concern.198 Daily Mail analysis smacks of strict scrutiny, demanding the tightest fit between the law and the sought-after interest in order to be the least restrictive means for serving that interest.199 In Florida Star, for example, both Justice Marshall’s majority and Justice Scalia’s concurring opinions made much of the underinclusiveness of the regulation at issue (in terms of the expression it left unregulated), which called into question whether the law could be the least-restrictive means to serve those interests.200

Daily Mail (and thus Bartnicki) marks a theoretical break from the content distinction, perhaps explaining the apparent use of strict-scrutiny-like review of a non-content-based law. A central criticism of the content distinction is that content-neutral regulations severely impair free-speech interests by reducing the sum total of information and opinion that gets disseminated, spoken, and heard in public discourse.201 Whatever value one believes free expression serves and whatever rationale one adopts for protecting expression, it is undermined as much by content-neutral regulations that (even if evenhandedly and equally applied to all speech) reduce the total quantity of available public expression.202 Daily Mail and its progeny rest on a similar impulse that a greater quantum of speech is better for First Amendment purposes. Just as Martin Redish would apply the same heightened scrutiny to content-neutral as content-based laws,203

196. See Smolla, supra note 15, at 1118-19; see also Bartnicki, 532 U.S. at 527-28 (quoting Daily Mail, 443 U.S. at 103); Florida Star, 491 U.S. at 541 (requiring the prohibition to be “narrowly tailored to a state interest of the highest order”); Daily Mail, 443 U.S. at 101-02 (stating that imposing penal sanctions for publishing truthful information “requires the highest form of state interest to sustain its validity”).
197. See Bartnicki, 532 U.S. at 529.
198. See, e.g., Florida Star, 491 U.S. at 532; Daily Mail, 443 U.S. at 104.
199. See Daily Mail, 443 U.S. at 101-02.
200. See Florida Star, 491 U.S. at 540 (“[T]he facial underinclusiveness . . . raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests . . .”); id. at 542 (Scalia, J., concurring in part and concurring in the judgment) (arguing that a law cannot be regarded as serving an interest of the highest order “when it leaves appreciable damage to that supposedly vital interest unprotected”).
201. See REDISH, supra note 89, at 102; Williams, supra note 77, at 664.
202. See REDISH, supra note 89, at 103; see also Clark, 468 U.S. at 313-14 (Marshall, J., dissenting) (“The consistent imposition of silence upon all may fulfill the dictates of an even handed content-neutrality. But it offends our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”) (quoting New York Times Co. v. Sullivan, 376 U.S. 264, 270 (1964)).
203. See REDISH, supra note 89, at 117 (arguing that courts should subject all restrictions on expression to the “same critical scrutiny traditionally reserved for regulations drawn in terms of content”).
Daily Mail imposes strict scrutiny to strike down (thus far) any effort, content-based or (after Bartnicki) content-neutral, that limits the sum total of truthful speech on matters of public concern that will be disseminated. Daily Mail seeks to stop not government skewing of debate by limiting some subjects or viewpoints (the ordinary justification for heightened scrutiny of content-based laws)\textsuperscript{204}, but government keeping of truthful information out of the public debate, regardless of its substance and source.

To the extent that Justice Stevens could be seen as applying intermediate scrutiny to this content-neutral law, as Justice Breyer unquestionably did in agreeing that § 2511(1)(c) was unconstitutional, the case remains unique simply because the Court invalidated the law, an exceedingly rare result under intermediate review.\textsuperscript{205} Justices Stevens and Breyer both found the government’s interest in protecting the personal privacy of telephone conversationalists to be important, but outweighed in the balance, whether generally (Stevens) or on the particular facts and speech at hand (Breyer).\textsuperscript{206} But intermediate-scrutiny balancing almost never tips against laws that regulate without regard to content.\textsuperscript{207} The majority and concurrence obviously demanded more of Congress than courts ordinarily do and found governmental justifications lacking.

\textsuperscript{204} See supra notes 110-117 and accompanying text.

\textsuperscript{205} Since the establishment of the modern content distinction during Burger Court, the Supreme Court has applied intermediate scrutiny to strike down content-neutral statutes in only two cases. See Watchtower Bible and Tract Soc’y v. Village of Stratton, 536 U.S. 150, 164-69 (2002) (striking down village ordinance requiring permits for door-to-door advocacy); Gilleo, 512 U.S. at 54-58 (striking down ordinance prohibiting display of signs on residential property). And both can be seen as involving unusual content-neutral laws. The permit requirement in Watchtower swept up a large amount of speech in its net, requiring a permit before one could speak to her neighbors, “a dramatic departure from our national heritage.” Watchtower Bible, 536 U.S. at 166. The problem with the ordinance in Gilleo was that the communicative medium of one’s own home was unique, affecting the particular and distinct message actually presented, to cut-off that medium was to cut-off that unique message. Gilleo, 512 U.S. at 56-57; see also Timothy Zick, Speech and Spatial Tactics, 84 Tex. L. Rev. 581, 638-39 (2006) (describing regulations on place as “content-correlated” where the regulation of place affects or alters the message). The Court also has struck down portions of two content-neutral injunctions, applying more than intermediate scrutiny (because these were injunctions not statutes) but less than strict scrutiny (because they were content neutral). See Madsen v. Women’s Health Center, Inc., 512 U.S. 753, 764-66 (1994); id. at 757 (holding that some provisions of the injunction satisfy the First Amendment, but not others); see also Schenck v. Pro-Choice Network, 519 U.S. 357, 361 (1997) (same); cf. Madsen, 512 U.S. at 791 (Scalia, J., concurring in the judgment in part and dissenting in part) (deriding the standard as “intermediate-intermediate scrutiny” and complaining that the “difference between it and intermediate scrutiny (which the Court acknowledges is inappropriate for injunctive restrictions on speech) is frankly too subtle for me to describe”).

\textsuperscript{206} See Bartnicki, 532 U.S. at 534 (“[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance.”); id. at 539 (Breyer, J., concurring) (“[T]he speakers had little or no legitimate interests in maintaining the privacy of the particular conversation.” (emphasis in original)); Smolla, supra note 15, at 1145-46.

\textsuperscript{207} See supra notes 110-119, 205 and accompanying text.
Interestingly, this might be the rare case in which a law would fail intermediate scrutiny anyway. Section 2511(1)(c) worked an absolute ban on the disclosure of the lawfully obtained contents of communications of public concern; the law left open no alternative channels of communication for the innocent recipient and no alternative means to publish this important information.208 True intermediate scrutiny here would have looked much like the intermediate scrutiny applied in 

Gilleo: the law entirely cut off a unique mode of communication that carried with it a distinct message, leaving no meaningful alternative communicative outlet, a fatal defect even if the law did not regulate based on content.209

2. Second-guessing Congress

The Bartnicki Court also disregarded legislative context in performing its constitutional analysis.210 Section 2511(1)(c) was not a stand-alone speech restriction and cannot fairly be described as an effort to silence debate or censor information.211 Congress did not seem immediately concerned with prohibiting the disclosure of the information that might be contained in electronic and wire communications; rather, this provision supplemented the broader statutory prohibition on the interception of electronic, wire, and voice communication.212

The anti-disclosure provision was intended to operate on a “drying-up-the-market” theory.213 Congress believed that eliminating any legal downstream outlet for intercepted communications would eliminate the incentive for upstream interception in the first instance.214 A perpetrator with a political, personal, or business axe to grind would be less likely to intercept a communication if there were no legal way that the conversation could be disclosed to the press and thus no legal way to publicly embarrass her adversary; conversely, knowing that an unconnected downstream stranger could publish (widely) with impunity, she may be more willing to intercept and pass the conversation along anonymously by dropping a tape on the media’s doorstep.215

208. See Ward, 491 U.S. at 791; see supra notes 105-114 and accompanying text. I thank Eugene Volokh for pointing this out.
209. See Gilleo, 512 U.S. at 56-57 (holding that there was no substitute for the “important medium of speech that [the city had] closed off”).
210. See Bartnicki, 532 U.S. at 526-27.
211. See Smolla, supra note 15, at 1175 (“Nor are laws that seek to deter trafficking in the contraband of antisocial acts laws passed out of the sinister censorial motives that offend the core of the First Amendment.”).
213. See Smolla, supra note 15, at 1132 (“[L]egislatures routinely make the judgment that it is as important to dry up the market for contraband as it is to attack its initial creation.”).
214. See Bartnicki, 532 U.S. at 529; Smolla, supra note 15, at 1140 (“[T]he presence of a liability-free media ready to publicize the intercept material in the happy comfort of legal immunity may well create an incentive for invasion, and penalizing disclosure may well . . . work effectively to dry up, if not entirely dry out, that high-visibility submarket.”).
Justice Stevens would have none of it and in rejecting Congress’s justification he directly questioned its policy judgments. He insisted that “[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.” If more deterrence becomes necessary, Congress should impose higher penalties on the unlawful conduct itself.

The Court did acknowledge an exception for the rare case in which direct enforcement was too difficult and downstream regulation actually would supplement direct enforcement and effectively deter upstream conduct. But Congress had not attempted to justify § 2511(1)(c) as a response to the difficulties of enforcing the interception provisions. Worse, the Court cited Congress’s failure to provide empirical evidence to support the drying-the-market theory, that is, to show that disincentivizing downstream disclosure would reduce upstream interception. The latter insistence seems unfair; given the number of scanners out there and the small amount of information that gets widely published, it is unlikely that Congress could gather such empirical support.

The dissent explicitly charged Lochnerism in response, accusing the majority of failing to give sufficient deference to Congress’s reasonable legislative judgments as to the necessity and effectiveness of the law. The drying-up-the-market theory was well-established and, as a matter of common sense, perfectly logical. The majority’s rejection of the theory thus “rests upon nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of . . . the United States Congress.” Indeed, Smolla

216. See id. at 1140 (“The Court seemed to have a fundamental difficulty with the drying up argument . . .”).

217. Bartnicki, 532 U.S. at 529; see also Smolla, supra note 15, at 1140 (arguing that the drying up argument “ran afoul of what the Court appeared to regard as the baseline norm: that as law exists to deter transgression, it should punish actual transgressors”).

218. Bartnicki, 532 U.S. at 529.

219. Id. at 530; see Smolla, supra note 15, at 1133 (“One might simply seek to determine whether the exclusion of further dissemination is in fact likely to dry up the market and thereby deter illegal interceptions.”); id. at 1140 (“[T]he Court reasoned that the drying up rationale would be defensible only if one could make a case that for some reason it is especially difficult to find and punish interceptors . . .”).

220. Bartnicki, 532 U.S. at 530.

221. Id. at 530-31 n.17; id. at 531 (“[T]here is no basis for assuming that imposing sanctions upon [defendants] will deter the unidentified scanner from continuing to engage in surreptitious interceptions.”).

222. See Smolla, supra note 15, at 1139; see also Volokh, Intellectual Property, supra note 171, at 743 (questioning Justice Stevens’s assumption that the ban on dissemination would provide little additional deterrent value).

223. See Bartnicki, 532 U.S. at 550 (Rehnquist, C.J., dissenting).

224. Id. at 550-51 (Rehnquist, C.J., dissenting) (“Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection.”).

225. Id. at 552 (Rehnquist, C.J., dissenting).
argues that Justice Stevens’ biggest mistake was that he “barely scratched the surface” in analyzing the drying-up-the-market theory and the enforcement difficulties that the disclosure provision was designed, and reasonably could be expected, to ease.\footnote{226}{See Smolla, supra note 15, at 1140; \textit{id.} at 1139 (“On a nonquantitative level, however, there is something to the ‘drying up’ argument, something tied to the creeping tabloidization of modern American mass culture.”).} In Lochnerian terms, the majority concluded that Congress had made an unwise, unjustified policy choice, one that therefore is unconstitutional.\footnote{227}{See supra Part I.C.}

3. Old-World Constitutional Values and Ideological Drift

The overall prohibition on the interception of electronic, wire, and oral communications represents a congressional effort to protect personal privacy.\footnote{228}{See \textit{Bartnicki}, 532 U.S. at 526; supra notes 143-151.} It was in part a regulation of the economic marketplace: some of the electronic eavesdropping that Congress sought to halt arose in the context of corporate spying and industrial espionage.\footnote{229}{See \textit{Bartnicki}, 532 U.S. at 530 n.16 (citing legislative history).} In striking down such a law, Neil Richards argues, the Court’s analysis risks “the creep of First Amendment analysis into the economic rights and commercial context,” in disregard of “the basic and essential division between civil and economic rights at the core of modern constitutionalism.”\footnote{230}{Richards, supra note 3, at 1152.}

One could view \textit{Bartnicki} as a case in which constitutional rights were pitted directly against one another, to be balanced by the court.\footnote{231}{See \textit{Bartnicki}, 532 U.S. at 533 (“[I]t seems to us that there are important interests to be considered on both sides of the constitutional calculus.” (emphasis in original)); \textit{id.} at 536 (Breyer, J., concurring) (describing this as case in which “important competing constitutional interests are implicated”); Smolla, supra note 15, at 1150 (“From the broadest perspective, \textit{Bartnicki} accepted the premise that the conflict posed between speech and privacy is a conflict between two rights of constitutional stature.”).} Alternatively, and more accurately, the balance is between a constitutional interest in freedom from government-imposed restrictions on expression and a statutorily created privacy right in certain communications as against other private actors that functions as a substantial or compelling government interest in support of the law.\footnote{232}{See Volokh, \textit{Information Privacy}, supra note 67, at 1107 (“[T]he speech vs. privacy . . . tensions are not tensions between constitutional rights on both sides. The Constitution presumptively prohibits government restrictions on speech and perhaps some government revelation of personal information, but it says nothing about interference with speech or revelation of personal information by nongovernmental speakers.”).} However we define those interests, the Court did balance, passing judgment (ultimately negative) on the propriety of the accommodation that Congress struck in the anti-disclosure provision, insisting that “privacy concerns give way when balanced against the interest in publishing matters of public importance.”\footnote{233}{See \textit{Bartnicki}, 532 U.S. at 534.}
What has changed of late—and what arguably puts the Bartnicki majority in the position of retrograde Lochnerian guardian of the old constitutional order—is how it struck that balance compared to recent solicitude for privacy interests in the face of free speech claims. Smolla suggests there was “a lameness to the assertion by Justice Stevens that anytime an otherwise private conversation implicates matters of public concerns, freedom of speech must trump the right to privacy.” The outcome places the Bartnicki Court at odds with recent commentary urging the Court to adjust free speech in the name of protecting personal privacy as a countervailing civil right. Certainly Justice Breyer was far more receptive to the plaintiffs’ claims of privacy in their communications. He rejected the disclosure provision as applied only after characterizing the plaintiffs as public figures and the subject of the conversation at issue as a genuine true threat of violence against persons and property (blowing off porches and doing work on those guys), rather than a hyperbolic discussion of a high-profile policy dispute, in which they had no legitimate expectation of privacy. A different conversation might have yielded a different balance of speech and privacy from Justice Breyer and a different outcome.

The outcome of the speech/privacy balance in Bartnicki also contrasts strikingly with the balance that Justice Stevens himself struck for the Court in Hill v. Colorado. Hill involved a challenge to a state law regulating sidewalk protests outside and around health clinics; the law prohibited speakers from approaching within eight feet of non-consenting clinic patrons “for the purpose of . . . engaging in oral protest, education, or counseling.” Writing for the Court, Justice Stevens held that the law was a content-neutral regulation of the time, place, and manner of speech outside clinics that was justified without

234. See infra notes 235-45 and accompanying text.
235. Smolla, supra note 15, at 1145; see also Strauss, Wrong, supra note 3, at 386 (“[J]udicial review requires courts to recognize the complexity of the issues they confront . . . .”)
236. See Volokh, Information Privacy, supra note 67, at 1106 (“Speech that reveals personal information about others, the argument goes, violates their basic human rights, strips them of their dignity, causes serious emotional distress, interferes with their relations with family, friends, acquaintances, and business associates, and puts them at risk of crime.”); see also Gindin, supra note 138, at 1222 (“The United States needs a comprehensive federal policy guaranteeing individuals the right to control the collection and distribution of their personal information.”); Richards, supra note 3, at 1151 (arguing that “the relationship between privacy and the First Amendment is complex, but . . . not irreconcilable”).
237. See Bartnicki, 532 U.S. at 536 (Breyer, J., concurring).
238. Id. at 539-40 (Breyer, J., concurring); see also Smolla, supra note 15, at 1144 (“Justices Breyer and O’Connor seemed offended by the conversation between Gloria Bartnicki and Anthony Kane, treating it not as angry ‘union-talk’ but as actual authentic discussion of the need to engage in violence against persons and property.”).
239. See Smolla, supra note 15, at 1144 (“Had Bartnicki and Kane been merely expressing their anger at the school board for its negotiating positions, Justices Breyer and O’Connor might not have gone along with Justice[ ] Stevens . . . .”).
241. Id. at 707 n.1. "The law banned such activities at all health care facilities, but was aimed primarily at protests around reproductive health clinics. Id. at 715."
reference to the viewpoint or content of any particular expression that may occur there and that survived intermediate scrutiny.\textsuperscript{242}

Importantly, he accepted the governmental interest in protecting unwilling listeners (women entering the clinics) from being assaulted by unwanted face-to-face speech outside the clinic, a privacy-based right to be let alone that outweighed protesters’ countervailing free speech rights.\textsuperscript{243} Perhaps a woman having to walk a gauntlet of potentially hostile anti-abortion protesters is more vulnerable in her privacy and mental well-being than Bartnicki and Kane and their talk of “getting ‘dose’ guys,” making legal protection from the speech of others more essential.\textsuperscript{244} Alternatively, Justice Scalia explains \textit{Hill} solely in terms of First Amendment ideological drift, another example of the left’s abandonment of free speech in order to protect other rights—here the right to reproductive freedom undeterred by up-close, face-to-face protesters.\textsuperscript{245}

The anti-wiretap law in \textit{Bartnicki} fits the mold of a speech/privacy balance struck amid a First Amendment drifting rightward ideologically.\textsuperscript{246} Political progressivism would seem to favor protecting personal privacy from the probing (electronically enhanced) ears of those with personal, commercial, legal, and political axes to grind.\textsuperscript{247}

\begin{footnotesize}
\textsuperscript{242} Id. at 719-20 (explaining why statute is content-neutral); \textit{id.} at 725-26 (explaining why content-neutral statute survives intermediate scrutiny).

\textsuperscript{243} Id. at 716-17 (“The unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men.’” (quoting \textit{Olmstead v. United States}, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); \textit{id.} at 716 (“The recognizable privacy interest in avoiding unwanted communication varies widely in different settings.”); see also \textit{id.} at 738 (Souter, J., concurring) (“[T]he reason for the [statute’s] restriction on approaches goes to the approaches, not to the content of the speech of those approaching. What is prohibited is a close encounter when the person addressed does not want to get close.”); Kitrosser, \textit{supra} note 118, at 1368 (“The Court also emphasized the importance of the state interest in allowing individuals to shield themselves from overly intrusive communications, especially in situations where such intrusiveness could be traumatic, such as prior to entering a hospital or clinic as a patient.”)).

\textsuperscript{244} See \textit{Hill}, 530 U.S. at 715 (describing “a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests”); Kitrosser, \textit{supra} note 118, at 1339 (describing the range of expression that might confront a woman seeking to enter a clinic); \textit{id.} at 1404-05 (describing the meaning of Court findings that patients entering clinics are in vulnerable states and subject to protection from disturbing face-to-face messages).

\textsuperscript{245} \textit{Hill}, 530 U.S. at 741 (Scalia, J., dissenting) (“What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the ‘ad hoc nullification machine’ that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.” (quoting \textit{Madsen}, 512 U.S. at 785 (Scalia, J., concurring in judgment in part and dissenting in part))); \textit{id.} at 764 (Scalia, J., dissenting) (describing \textit{Hill} as “not an isolated distortion of our traditional constitutional principles, but [ ] one of many aggressively pro-abortion novelties announced by the Court in recent years”).

\textsuperscript{246} See \textit{supra} notes 126-142 and accompanying text.

\textsuperscript{247} See Smolla, \textit{supra} note 15, at 1104-05 (describing areas in which electronic snooping on others’ privacy occurs); see also Boehner v. McDermott, 441 F.3d 1010, 1012-13 (D.C. Cir. 2006)
\end{footnotesize}
disclosure provision enhances private speech, furthering the “more speech” values of the First Amendment; by ensuring that one’s expression remains private if the speaker chooses to keep it private and only becomes public if she makes it public, the law removes a deterrent that might cause individuals to refrain from speaking.248 Similarly, recent proposals for rules protecting privacy in personal and consumer information—from the goods one buys, to one’s hobbies, reading preferences, or pet ownership249—sound in efforts to protect consumers from the objectionable practices of large business and commercial interests, akin to much New Deal legislation.250 Such protections, not grounded in an attempt to censor a speaker from speaking her mind in a public arena, it is argued, are more acceptable in a free-speech regime.251

It remains to be seen whether the speech/privacy collision produces a First Amendment “constitutional moment” akin to 1937.252 As Eugene Volokh argues, “[p]rivacy is a popular word, and government attempts to ‘protect our privacy’ are easy to endorse.”253 Bartnicki on its face does not reflect or implement such a moment.254 But Smolla argues that the case could become a “backhanded victory” for privacy as against speech, given the ambiguities in Justice Stevens’s opinion and the narrower approach in Justice Breyer’s concurrence that might have gone the other way on different facts.255

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248. See Bartnicki, 532 U.S. at 537 (Breyer, J., concurring).
249. See Richards, supra note 3, at 1157-58; Paul M. Schwartz, Privacy and Participation: Personal Information and Public Sector Regulation in the United States, 80 IOWA L. REV. 553, 554 (1995); Volokh, Information Privacy, supra note 67, at 1117.
250. See Richards, supra note 3, at 1158 (“In addition to being intrusive and deeply unsettling to many people, the multibillion dollar profiling industry provides the lifeblood of data on which the direct marketing industry survives.”).
251. See Smolla, supra note 15, at 1150.
252. See 2 ACKERMAN, supra note 35, at 346 (“Constitutional moments must come to an end. The People must be allowed to move on to other things with a sense that all of their passionate political argument and activity hasn’t been in vain . . .”).
254. See supra Part II.B.1.
255. Smolla, supra note 15, at 1149-50; id. at 1144 (discussing possibility that, on different facts, Justices Breyer and O’Connor might have joined the dissent). There is scholarly debate as to how to read both the Stevens and Breyer opinions. Nominally, Justice Stevens wrote for a majority of six (including Justices Breyer and O’Connor) and Justice Breyer’s was a concurring opinion. But Justice Breyer took such a different, narrower analytical approach that Justice Stevens’s opinion may be better understood as a four-justice plurality and Justice Breyer’s opinion as one concurring in the judgment and providing the final two votes for the result, but not the reasoning. See Smolla, supra note 15, at 1113-14; see also Sonja West, Concurring in Part and Concurring in the Confusion, 104 MICH. L. REV. ____, ____ (2006) (manuscript at 4-5) (criticizing the confusion created in lower courts by Supreme Court concurring opinions, using Justice Breyer’s Bartnicki opinion as an example of the uncertainty). As a practical matter, Justice Breyer’s approach—more receptive to privacy rationales and privacy-protecting legislation and less absolutist about free-speech protection—may become the controlling opinion in the lower courts. See Smolla, supra note 15, at 1116. Bartnicki may repeat the history of Branzburg v. Hayes, 408 U.S. 665 (1972), where Justice Powell nominally joined the majority opinion categorically rejecting a constitutional
suggests that Bartnicki “does not shut the door on the prohibition of privacy contraband” and at the very least leaves the constitutional issues “largely in play.” It remains to be seen whether we reach a different tipping point in the doctrinal balance between speech and privacy.

C. Bartnicki’s potential application and non-application

If Bruce Ackerman is correct that judges fear the Lochnerism charge above all else, then it should not be surprising that, five years later, Bartnicki’s impact has been virtually non-existent. Lower courts have limited the decision’s effect by narrowly construing and applying it, perhaps fearing the dreaded charge of Lochnerism. Statutes and other government acts do not fall in the face of Bartnicki analysis because Bartnicki’s basic constitutional rule—government may not punish the dissemination of truthful, lawfully obtained information on a matter of public concern—is held to be inapplicable to the case at hand. This allows courts to avoid even the limited, open-ended, right-against-right balancing that Justice Breyer endorsed and that could go either way depending on the facts.

Consider, for example, the D.C. Circuit’s non-use of Bartnicki as applied to the Fair Credit Reporting Act (FCRA), a consumer protection statute imposing various obligations and restrictions on consumer reporting agencies designed to protect the privacy and accuracy of consumers’ credit information. The statute creates broad privacy rights in consumer credit reports, broadly defined as the communication of information “bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” The law is one of several legal efforts, actual and proposed, to protect privacy in, and prohibit inappropriate uses of, consumers’ personal, economic, and financial information by business interests.

reporter-source privilege, then wrote a concurring opinion suggesting that such a privilege could exist on a balancing approach, an opinion then adopted by many lower courts to recognize a qualified constitutional privilege. Smolla, supra note 15, at 1114-16; id. at 1116 (“If to live by the concurrence is to die by the concurrence, the press’s victory in Bartnicki could over time prove as pyrrhic as its defeat in Branzburg.”).

256. Smolla, supra note 15, at 1150.
257. See 2 ACKERMAN, supra note 35, at 269.
258. See, e.g., Trans Union III, 267 F.3d at 1138.
259. See supra notes 163-168 and accompanying text.
260. See supra notes 169-174 and accompanying text.
262. 15 U.S.C. § 1681a (2000); Trans Union II, 245 F.3d at 813 (stating that this definition is not very demanding because “almost any information about consumers arguably bears on their personal characteristics or mode of living”).
263. See Richards, supra note 3, at 1167-68 (describing range of statutes seeking to protect consumers from inappropriate uses of personal data by businesses); Volokh, Information Privacy,
The Federal Trade Commission found that Trans Union Corporation, a reporting agency, had improperly sold consumer credit reports to target marketers, an unapproved use under the statute,\textsuperscript{264} a conclusion that the D.C. Circuit affirmed in April 2001.\textsuperscript{265} The court then considered a First Amendment challenge to the FCRA and the FTC’s determination, concluding that the speech at issue (disclosure of credit information) was not on a matter of public concern, because the information only was of interest to Trans Union and its direct-marketer customers.\textsuperscript{266} The statute was subject only to intermediate scrutiny, which it easily survived, given the government’s substantial interest in protecting the privacy of consumer information.\textsuperscript{267}

Trans Union then moved for reconsideration in the court of appeals, in part arguing that \textit{Bartnicki} changed the appropriate constitutional analysis.\textsuperscript{268} The court quickly disposed of the argument, stating that \textit{Bartnicki}, and other cases in the \textit{Daily Mail} line, was inapplicable where the speech was not on a matter of public concern.\textsuperscript{269} And, as the court already had found, consumer credit information is a matter of purely private business and commercial interest.\textsuperscript{270} That basic limiting principle meant this straightforward economic regulation was not subject to even potentially Lochnerian heightened constitutional review; nor was Congress required to put forward an interest of the highest order to justify the regulation because the highly protective constitutional rule was inapplicable.

\textit{Bartnicki} was inapplicable, however, only because of a stunted view of what constitutes matters of public concern for purposes of \textit{Daily Mail}.\textsuperscript{271} In part, this is a holdover from the Court’s earlier decision in \textit{Dun & Bradstreet},\textsuperscript{272} holding that statements in a credit report about a company’s bankruptcy were not matters of public concern because only of interest to the company and its customers.\textsuperscript{273} In part this is a built-in limitation on \textit{Bartnicki} itself, where the Court suggested

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\textsuperscript{264}. \textit{Trans Union II}, 245 F. 3d at 812-13.
\textsuperscript{265}. \textit{Id.} at 815-16.
\textsuperscript{266}. \textit{Id.} at 818 (citing \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749, 762 (1985)); \textit{see also Trans Union III}, 267 F.3d at 1140 (reasserting that Trans Union’s speech, as per \textit{Dun & Bradstreet}, “solely interests the speaker (Trans Union) and its ‘specific business audience’ (its customers)”).
\textsuperscript{267}. \textit{Trans Union II}, 245 F. 3d at 818.
\textsuperscript{268}. \textit{Trans Union III}, 267 F. 3d at 1140-41.
\textsuperscript{269}. \textit{Id.}
\textsuperscript{270}. \textit{See id.} at 1141.
\textsuperscript{271}. \textit{See Volokh, Intellectual Property, supra} note 171, at 743 (“Every time the Court has decided that certain speech is not on a matter of public concern, it has erred.”).
\textsuperscript{272}. 472 U.S. 749 (1985).
\textsuperscript{273}. \textit{Id.} at 762; \textit{see also Volokh, Intellectual Property, supra} note 171, at 744 (stating that it would surprise employees, creditors, and customers of the bankrupt company to learn that the bankruptcy was not a matter of public concern).
A different speech/privacy balance would prevail were “trade secrets or domestic gossip or other information of purely private concern” at issue. Justice Stevens seemed to hint that consumer credit information also would not be protected because it did not satisfy the public-concern requirement.

We return to Neil Richards’s argument that the First Amendment critique (grounded in Bartnicki and Bartnicki’s adoption of the Daily Mail rule) of the sort of data-privacy laws at issue in Trans Union devolves into First Amendment Lochnerism. By preempting the broadest reach of Bartnicki, the D.C. Circuit avoided the supposed Lochner trap, applying a more modest (and survivable) balancing test. Relatedly, a court perhaps could limit Bartnicki only to cases involving media defendants reporting on matters of public concern, thus similarly inapplicable to disclosure of private information by a nonpress entity engaged in ordinary commercial activity. Absent such limitations, Richards would argue, the more rigorous balancing of Bartnicki would place the court in the position of behaving like a Lochner-era court, with all the negatives associated with that view.

But a stronger application of Bartnicki means courts would more vigorously protect free speech interests. The D.C. Circuit’s narrow reading of Bartnicki thus becomes problematic. Certainly, consumer credit information is not part of the broad political debate. But that need not be the limit of the concept of public import. Eugene Volokh describes personal information such as consumer credit data as speech on “daily life matters,” a category of expression at least as worthy of protection, in terms of the import of its use to speaker and listener, as art and movies. In fact, because such speech is “related to the real everyday life experiences of ordinary people” and dictates how we deal with others, it arguably is of greater value to individual choices and action than political editorials. The consumer and credit information sold by Trans Union would be useful to direct marketers, individuals, and businesses in determining whom

274. Bartnicki, 532 U.S. at 533.  
275. See id.  
276. See Richards, supra note 3, at 1212-13 (“[T]here are some fairly strong parallels between the traditional conception of Lochner and the First Amendment critique of data privacy legislation.”).  
277. See Trans Union III, 267 F.3d at 1140-41; Trans Union II, 245 F.3d at 818.  
278. See Richards, supra note 3, at 1199.  
279. See id. at 1213.  
280. See infra notes 281-284 and accompanying text.  
281. See Volokh, Information Privacy, supra note 67, at 1092-93; see also Redish, supra note 89, at 50 (“[I]f an individual is given the opportunity to control his or her destiny . . . he or needs all possible information that might aid in making these life-affecting decisions.”).  
282. Volokh, Information Privacy, supra note 67, at 1092-93; see also Redish, supra note 89, at 61 (“[I]nformation and opinion about competing commercial products and services undoubtedly aid the individual in making countless life-affecting decisions . . . ”).
they would like to do business and otherwise relate with, surely a matter of concern to their successful operations. 283

In Trans Union, the analytical impact of this more expansive conception of public concern would have meant some level of balancing (whether Justice Stevens’s weighted, strict-scrutiny-esque or Justice Breyer’s more open-ended) between the government’s asserted interest in protecting consumer privacy and Trans Union’s interest in publishing (and its customers in receiving) truthful information unquestionably lawfully obtained. The circuit court’s approach assured that this balancing never occurred. 284

III. CONCLUSION

I close on some normative points. Bartnicki—specifically the broader, strict-scrutiny-sounding, highly speech-protective approach established in Justice Stevens’s opinion—was correct. The asserted privacy interests did not outweigh the expressive need for publication, particularly where the conversation revealed potential political misfeasance. 285 On the other hand, lower courts have failed to apply the full scope of Bartnicki, as illustrated by two decisions from the D.C. Circuit. One is Trans Union, in which the court took a cramped view of what constitutes a matter of public concern for Daily Mail purposes. 286 The other, more problematic case, is Boehner v. McDermott, 287 where a divided court of appeals held, in a wiretap third-party disclosure case, that Bartnicki did not protect a third-party who knew the identity of the interceptor and knew that the communication had been intercepted unlawfully, even if the third party was uninvolved in the interception. 288 That decision essentially deprives Bartnicki of any bite; it should be obvious to any recipient of a recorded conversation

283. See Volokh, Information Privacy, supra note 67, at 1093-94. Volokh has been the leading critic of information-privacy regulations that raise First Amendment concerns, such that Richards labels the First Amendment arguments “Volokhner”. Richards, supra note 3, at 1210.

284. See Trans Union III, 267 F. 3d at 1140-41.

285. See Bartnicki, 532 U.S. at 518-19 (involving disclosure of intercepted telephone conversation between two union leaders in midst of high-profile labor dispute); Boehner v. McDermott, 441 F.3d 1010, 1012-13 (D.C. Cir. 2006) (involving disclosure of intercepted telephone conversation among Republican members of Congress discussing how to respond to ethics probe of Republican Speaker of the House).

286. See supra notes 261-284 and accompanying text.

287. 441 F.3d 1010 (D.C. Cir. 2006).

288. Id. at 1015 (“[T]o hold that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor’s second violation (the disclosure), or participates in the illegal transaction would be to take the [Bartnicki] Court at its word.”); id. at 1016-17 (emphasizing the difference between someone who discovers a bag containing a stolen diamond ring on the sidewalk and someone who accepts the same bag from the thief knowing the ring inside is stolen); but see id. at 1020 (Sentelle, J., dissenting) (arguing that Bartnicki does not turn on the discloser’s knowledge that a communication was unlawfully intercepted, only on his actual participation in the unlawful interception).
(including Yocum and Vopper)\textsuperscript{289} that the conversation likely had been unlawfully intercepted.

This is not to say necessarily that protecting consumer or other privacy interests ever can or never can be an interest of the highest order.\textsuperscript{290} Nor is it to define a categorical balance between free speech and other constitutional, political, and social values. Rather, a substantive discussion of how to create constitutional doctrine that strikes the best balance among competing interests would be welcome.\textsuperscript{291} Certainly other western liberal democratic societies that share a commitment to freedom of speech draw a quite-different balance between expression and competing values such as privacy and individual dignity.\textsuperscript{292}

The point is that slapping the Lochnerism tag on a decision such as Bartnicki does not advance the discussion. Lochner ends debate, by definition and intention, de-legitimitizing the decision on its own terms.\textsuperscript{293} And it does so with a pejorative term whose meaning we do not know and cannot agree upon and whose assumed meaning runs a broad range.\textsuperscript{294}

It is more beneficial to begin from the premise that the Bartnicki Court acted in a structurally and procedurally legitimate manner in striking down the wiretap disclosure provision or, hypothetically, in using Bartnicki as precedent to strike down other information-privacy rules. Perhaps, although structurally proper, the Court simply failed to understand the complexity of the issues or to recognize that it is possible to protect First Amendment rights while also accommodating

\textsuperscript{289}. See Bartnicki, 532 U.S. at 525 (accepting plaintiffs' assertions that defendants at a minimum had reason to know the interception was unlawful).

\textsuperscript{290}. See id. at 529 (describing the "Court's repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment").

\textsuperscript{291}. See Fiss, IRONY, supra note 89, at 26 ("We should never forget the potential of the state for oppression, never, but at the same time, we must contemplate the possibility that the state will use its considerable powers to promote goals that lie at the core of a democratic society [such as] equality"); compare Richards, supra note 5, at 1222 ("[T]he First Amendment is being used as [a] screen, to infringe upon legitimate modes of government privacy regulation.") and Smolla, supra note 15, at 1175 ("[B]alanced measures are called for, and sometimes there is room in our constitutional system for a measure of balance."); with Volokh, Information Privacy, supra note 67, at 1051 ("We already have a code of 'fair information practices,' and it is the First Amendment . . . .") and Volokh, Intellectual Property, supra note 171, at 748 (arguing that the First Amendment "continues to impose important limits" on several areas of the law).

\textsuperscript{292}. See Schauer, supra note 4, at 192 (discussing fact that "non-American equivalents to the First Amendment] tend, interestingly, not to be used in the same way in other societies"); Frederick Schauer, The Exceptional First Amendment at 3 (unpublished manuscript on file with the author) ("[T]he American understanding of freedom of expression is substantively exceptional compared to international standards because a range of American outcomes and American resolutions of conflicts between freedom of expression and other rights and goals are starkly divergent from the outcomes and resolutions reached in most other liberal democracies.").

\textsuperscript{293}. See Ely, supra note 3, at 939-40 (arguing that the charge that a decision is grounded in the philosophy of Lochner "alone should be enough to damn it"); Richards, supra note 3, at 1213 (describing the ability and temptation "to accuse the critics of Lochnerism and move on").

\textsuperscript{294}. See Strauss, Wrong, supra note 3, at 374; supra Part I.
other constitutional and legislative values that may be in tension with those rights. 295 That is an issue worth considering.

But speaking in terms of *Lochner* and Lochnerism leaves no room to discuss necessary substantive First Amendment questions. It simply leaves us wondering whether, one hundred years from now, the constitutional canon and anti-canon might change again. 296 Perhaps we will have our Ackermanian constitutional moment, after which we will come to think of the freedom of speech (or at least certain applications of the freedom of speech reaching particular political outcomes) the way we now think of liberty of contract and economic substantive due process. 297 But that would not mean that *Bartnicki* was wrong and certainly would not mean it was illegitimate, only that constitutional values had changed. 298

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295. *See* Strauss, *Wrong*, *supra* note 3, at 386 (arguing that the problem with *Lochner* was not protection of freedom of contract, but the Court’s failure to grasp the greater complexity of the social, political, and legal issues).

296. *See* Balkin, *Wrong*, *supra* note 2, at 692 (“Just as some conservative and libertarian scholars could see *Lochner* as less inhospitable, some liberal scholars could find *Lochner* less threatening.”).

297. *See supra* notes 252-56.

298. *See* 2 ACKERMAN, *supra* note 35, at 280 (“*Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930’s, not because the Republican Court was wildly out of line with them before the Great Depression.”).
ACCESS AND EXCLUSION RIGHTS IN ELECTRONIC MEDIA: COMPLEX RULES FOR A COMPLEX WORLD

Daniel A. Farber*

I. INTRODUCTION

Major disputes about electronic media often involve issues of access and exclusion. Owners of physical or intellectual property seek to reinforce their rights to exclude unwanted users, while others seek access for their own purposes. On the one hand, cable operators have struggled against must-carry rules that require them to give broadcasters access to their systems. This struggle has produced two major Supreme Court opinions.1 On the other hand, owners of intellectual property demand the power to exclude users from unauthorized use of their material, such as limiting the use of peer-to-peer (P2P) networks like Grokster. This struggle, too, has already produced two major Supreme Court opinions.2

The rhetoric of these struggles has a curious parallelism.3 Supporters of the cable operators and other media companies invoke a kind of economic libertarianism. They view the First Amendment as protecting their right, as property owners, to exclude others from the use of their facilities. Opponents accuse them of Lochnerism4 – a reference to the now discredited early Twentieth

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2. See MGM Studios, Inc. v. Grokster, 125 S. Ct. 2764 (2005) (sale of peer-to-peer file sharing software may give rise to copyright liability for infringement by users of the software in some circumstances); Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding extension of copyright term for works created decades earlier, preventing those works from falling into the public domain where they would be available to all users).
4. “Lochnerism” describes judicial activism in the sphere of economic legislation. For an example of the use of the term in the present context, consider the following:

Many commentators have recognized the similarities between the Court’s current approach to structural media regulation and its approach to economic and social legislation during the Lochner era. As demonstrated earlier, importing content neutrality and tiered scrutiny into the constitutional analysis of structural regulation has opened the door to deep economic review.

Michael J. Burnstein, Towards a New Standard for First Amendment Review of Structural Media Regulation, 79 N.Y.U. L. REV. 1030, 1057-1058 (2004). See also Yochai Benkler, Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, 66 LAW & CONTEMP. PROBS. 173, 201–205 (2003). Compare the assertion that First Amendment defenses of the right of databases to control access to their contents have “some fairly strong parallels” with
Century decision that subjected routine economic legislation to rigorous judicial scrutiny. In turn, advocates of access to copyrighted content also claim the support of the First Amendment – and they in turn are accused of Lochnerism.

The fundamental question raised by these disputes is the same: To what extent does the First Amendment limit legislation on issues of access or exclusion in electronic media? As we will see, the Supreme Court has found this question troubling. In its rulings in the cable cases, the Court applied content-neutral scrutiny to must-carry regulations that guaranteed broadcasters access to cable channels. In its more recent rulings on public access to copyrighted materials, however, the Court has resisted applying this level of scrutiny, while nonetheless indicating some sensitivity to First Amendment concerns.

The dueling charges of Lochnerism do not seem to be doing much at this point to clarify the debate. Nevertheless, they have a kernel of truth in that access advocates and opponents alike have deployed libertarian rhetoric and have called for greater constitutional scrutiny of certain classes of regulation. Part II of this Essay explores these opposing versions of libertarianism. Part III hones in on the issue of media access, focusing on the constitutional issues raised by must-carry regulations. Part IV examines the flip side of access – the right to exclude – in the context of efforts by IP owners to prevent unauthorized copying of their work. Finally, Part V argues that none of these issues will yield to the beguiling simplicities of libertarianism, whether of the economic or expressive varieties.

A complex world presents complex choices, and those choices are often at the edge (if not beyond) the competence of courts. Rather than enforcing obvious rights, courts may more often find themselves playing a modest role, simply attempting to ensure that regulators can provide reasonable explanations for their choices between conflicting First Amendment interests. Rousing slogans are no substitute for careful thought in dealing with issues of this caliber.

II. TWO KINDS OF LIBERTARIANISM

To argue that complex issues require complex answers may seem trite. Yet, two influential bodies of thought argue otherwise – though each accuses the
other of advocating an inappropriate form of judicial activism. Each body of thought relies on some set of rights to act as trump cards in the otherwise complicated policy disputes over media regulation. One body of thought stresses the right of property owners (whether tangible or intellectual) to control access to their property. The other body of thought stresses the right of speakers to have access to the digital resources needed to communicate effectively. Each approach has an undeniable rhetorical appeal, though the existence of a contesting rhetoric should make us a little suspicious of this rhetorical appeal.

Constitutional doctrines governing economic regulations are quite permissive. But as traditional commodity activities are replaced by informational transfers, those doctrines may be displaced by First Amendment rules. Those rules are far more libertarian; “indeed, an information economy governed by the First Amendment might not look much different from the laissez faire world championed by economic libertarians.”

Defining the appropriate domain of the First Amendment has never been completely straightforward: the line between speech and conduct can prove an elusive one. But the problem is much more pressing today because of the nature of digital media. The most controversial rules often allocate control of digital media. They may constrain ownership of hardware, or give access rights to individuals who do not own the hardware, or allow media owners to prohibit certain kinds of uses. Preventing the government from making such rules would roll back regulatory authority over critical elements of the information economy.

Admittedly, the goal of curtailing the regulatory state is not without its enthusiasts. It is a common belief in some quarters that government regulation has gone too far, that the federal government has become too powerful, and that

10. See, e.g., Schwartz & Treanor, supra note 6, at 2334 (arguing that intellectual property is deserving of equal status as other, more traditional forms of property).
11. See, e.g., Eldred, 537 U.S. at 803 (Breyer, J., dissenting) (noting that “copyright was designed ‘primarily for the benefit of the public,’ for ‘the benefit of the great body of people, in that it will stimulate writing and invention.’”); See also Benkler, supra note 4, at 204 (“This trend in First Amendment law of the information economy—towards protecting corporations broadly, even at the expense of very real and immediate constraints on the expressive autonomy and democratic speech of individuals—is unstable because it represents a moral inversion of the First Amendment.”).
13. See Garrison v. State of Louisiana, 379 U.S. 64, 82 (1964) (Douglas, J., concurring) (“I think it is time to face the fact that the only line drawn by the Constitution is between speech on the one side and conduct or overt acts on the other. The two often do blend.”) (emphasis added); see also John E. Nowak & Rondald D. Rotunda, Constitutional Law 1358-59 (7th ed. 2000) (“Symbolic speech cases really present no issues different from those in other types of speech cases . . . It is this decision—to determine that an activity is speech—that may not always appear easy.”).
14. Indeed, must-carry regulations discussed throughout this article are themselves examples of regulations that constrain traditional notions of property ownership.
15. See Turner Broadcasting (Turner II), 520 U.S. at 185 (upholding must-carry regulation).
16. For example, consider the implementation of “broadcast flag” regulations, discussed infra.
we need to “get the government off peoples’ backs.” For some, this form of economic libertarianism is not only a policy preference but a constitutional imperative. A leading modern Lochnerian, Richard Epstein, has argued that most government regulations violate the Takings Clause of the Constitution, and its companion, the Contracts Clause.\(^{17}\) “An anonymous critic once suggested that what Epstein really wants is to shorten the First Amendment to its initial five words: ‘Congress shall make no law.’\(^{18}\)” Epstein’s vision is explained in *Simple Rules for a Complex World*.\(^{19}\) This vision places heavy emphasis on autonomy,\(^{20}\) as does First Amendment law in the more limited sphere of speech.\(^{21}\)

The conventional wisdom is that the New Deal banished the ghost of *Lochner*. Yet, an intensely libertarian approach to judicial review still reigns in the more limited arena of First Amendment law. The economic and First Amendment realms intersect in the electronic media. The question, then, is the extent to which economic regulation of the media should come under First Amendment scrutiny. There have certainly been strenuous efforts to deploy the First Amendment against media regulations. Indeed, as Glen Robinson has said, “it sometimes appears that the First Amendment has become the first line of challenge for virtually all forms of regulatory initiatives.”\(^{22}\)

Perhaps the most prominent critic of such uses of the First Amendment has been Justice Breyer. He argues against applying strong speech protections that evolved to protect political speech in other areas of speech:

> The kind of strong speech protection needed to guarantee a free democratic governing process, if applied to all governmental efforts to control speech without distinction (e.g. securities or warranties), would limit the public’s economic and social choices well beyond any point that a liberty-protecting framework for democratic government could demand. This, along with a singular lack of modesty, was the failing of *Lochner*.\(^{23}\)

As Justice Breyer points out, in an information economy, regulation often impacts speech, but

\(^{17}\) Epstein makes the case for this vision in his book *Takings: Private Property and the Power of Eminent Domain* (1985).

\(^{18}\) Farber, *supra* note 12, at 794.


the modern, information-based workplace, no less than its more materially based predecessors, requires the application of community standards seeking to assure, for example, the absence of anticompetitive restraints, the accuracy of information, the absence of discrimination, the protection, safety, the environment, and so forth.24

He adds that “[n]o one wants to replay that discredited history in modern First Amendment guise,”25 apparently having forgotten about Epstein and other economic libertarians.

Opponents of economic libertarianism often see private ownership of media as being a threat rather than bulwark of free expression. They fear that eliminating federal regulation of access would “be far more harmful to the First Amendment than maintaining the alternative.”26 In one scholar’s words:

[w]ithout federal regulation or constitutional protections, the marketplace of ideas is left not to the courts or to Congress but rather solely to the economic marketplace for safekeeping. Big government might be problematic, but it is far from clear why Americans ought to completely trust big corporations to safeguard the marketplace of ideas.27

Critics of economic libertarianism not uncommonly champion another libertarian vision of their own. While they would leave the government free to distribute access rights to media, they would sharply restrict its power to give content providers the ability to exclude copying and other uses. In short, they are bullish on access rights but bearish on exclusion rights.

Expressive libertarians perceive an alarming trend toward expanding exclusion rights. For instance, one leading IP theorist remarks on the “continual historical process of a copyright extension to encompass an increasing enclosure of the public domain of expressive content.”28 Another constitutional scholar worries that the digital revolution “presents new dangers for freedom of speech, dangers that will be realized unless we accommodate ourselves properly to the changes the digital age brings in its wake.”29

Similarly, invoking the words of Justice Brandeis, Yochai Benkler insists that “once information is communicated to others it becomes ‘free as the air to

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24.  Id. at 255.
25.  Id. at 256.
27.  Id.
common use.”  He fears that concentrated control of information resources is “likely to exclude challenges to prevailing wisdom” and to “translate unequal distribution of economic power in society into unequal distribution of power to express ideas and engage in public discourse.” Specifically, Benkler warns that the expansion of exclusion rights “is likely to lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owner-information inventory management.”

According to Benkler, the trend toward expanded exclusion rights “conflicts with the First Amendment injunction that government not prevent people from using information or communicating it,” as well as violating the “First Amendment commitment to attain a diverse, decentralized ‘marketplace of ideas.’” In the same vein, Jed Rubenfeld laments the expansion of the concept of copyright infringement. “Today,” he says, “reproducing a minute or two from a film (in a television broadcast) or a few hundred words from a book (in a news article) is unquestionably enough to constitute infringement.” For similar reasons, he denounces restrictions on the use of derivative works (works making creative use of copyrighted material), because such works “always involve a fresh exercise of imagination” and “under the First Amendment, there can be no such thing as a harmful exercise of the imagination.”

Critics have pointed to arguable parallelisms between this form of libertarianism and *Lochner*. In their defense of *Eldred*, which rejected libertarian attacks on copyright restrictions, Schwartz and Treanor invoke the concept of Lochnerism: “More fundamentally, however, the opinion in *Lochner* is similar to the position championed by *Eldred*’s attorneys and the dissents in that both involve aggressive review of economic legislation and both can be seen as reflecting the belief that an active judicial role is necessary to combat rent-seeking in the legislative process.” They also accuse “leading cyberlaw scholars” of “advanc[ing] a substantive vision of the proper scope of government regulation that, in its hostility to regulation and its strong commitment to freedom of contract, resembles the economic vision reflected in *Lochner*.”

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31. *Id.* at 377.
32. *Id.* at 378.
33. *Id.* at 410.
34. *Id.* at 358.
36. *Id.* at 52.
37. *Id.* at 54.
38. Schwartz & Treanor, *supra* note 6, at 2392.
39. *Id.* at 2365.
Economic and expressive libertarians applaud different dimensions of liberty and corresponding differences in the kinds of government regulation that they wish to eliminate. What they have in common is a desire to use the First Amendment as a tool to uproot government regulation. Parts III and IV will examine how these efforts have fared.

III. MEDIA ACCESS RIGHTS

The first area that we will investigate is access to cable channels by broadcasters. In a 1992 statute that built on earlier FCC rules, Congress required cable systems to transmit local commercial and public broadcasting stations, subject to some restrictions. After extraordinarily lengthy and complex litigation, the Supreme Court ultimately upheld the “must carry” provisions. In its first opinion on the issue in 1994, the Court held that the “must carry” rule was content neutral. It remanded the case so the District Court could develop the appropriate record for applying the content-neutral test.

In rejecting strict scrutiny, the Court emphasized that the must-carry rule was not a restriction on editorial decision-making. It was not triggered by the content of the cable operator’s other broadcasting, nor did its application depend on the content of the local broadcasts which would be retransmitted. All that the rule said was that speakers meeting a certain description (cable systems) had to provide space for speakers meeting another description (local broadcasters):

Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech. Although the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators’ programming. The rules impose obligations upon all operators . . . regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations, the cable operator has selected or will select.

41. Turner Broadcasting (Turner II), 520 U.S. at 185.
42. Turner Broadcasting (Turner I), 512 U.S. at 643.
43. Id. at 668.
44. Id. at 653-57.
45. Id. at 655.
46. Id.
47. Turner Broadcasting (Turner I), 512 U.S. at 643-44.
But the purposes of the law were not unrelated to content, as the legislative history made crystal clear. Congress was afraid that the growing market dominance of cable systems would bankrupt television stations lacking cable access. Consequently, Congress believed, the non-cable portion of the population would have considerably less access to broadcasting sources. Because of the local and educational programming provided by potentially excluded stations, the result would be a loss to public discourse. Justice Kennedy’s majority opinion argued that this rationale was subsidiary to Congress’s goal of preventing the destruction of the broadcast industry, rather than an independent reason for must-carry:

By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenues – or, in the case of noncommercial broadcasters, sufficient viewer contributions, see § 2(a)(8)(B) – to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation’s communication system, and to ensure that every individual with a television set can obtain access to free television programming.

This overriding congressional purpose is unrelated to the content of expression disseminated by cable and broadcast speakers. Indeed, our precedents have held that “protecting noncable households from loss of regular television broadcasting service due to competition from cable systems,” is not only a permissible governmental justification, but an “important and substantial federal interest.”

The Court rejected the argument that the congressional purpose was actually based on content, given congressional emphasis on the need to preserve local television as a source of local news and other local broadcasting service: “That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as more valuable than cable programming.” Instead, this legislative history “reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.”

48. Id. at 647.
49. Id.
50. Id.
51. Id.
52. Turner Broadcasting (Turner I), 512 U.S. at 647 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).
53. Id. at 648.
54. Id.
The Court then concluded that the government had the burden of making two showings: (1) that “the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry,” and (2) that the must-carry requirement “does not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”\(^55\) The Court then remanded “[b]ecause of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented,”\(^56\) so as to “permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.”\(^57\)

Justice Stevens, who provided the critical fifth vote, contended that the proper disposition would be to simply uphold the statute.\(^58\) He emphasized that “[e]conomic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effects of legal rules in complex conditions.”\(^59\) In his view, it was not up to the Court to determine whether “Congress might have accomplished its goals more efficiently through other means; whether it correctly interpreted emerging trends in the protean communications industry; and indeed whether must-carry is actually imprudent as a matter of policy . . . .”\(^60\) In contrast, the four dissenters believed that must-carry was “an impermissible restrain on the cable operators’ editorial discretion as well as on the cable programmers’ speech,”\(^61\) and would be invalid even if considered content neutral because they “restrict too much speech.”\(^62\)

On remand, following long and expensive litigation, the District Court found that the must-carry rule was significantly related to achieving its purpose of preserving local broadcasting.\(^63\) The Court affirmed, with roughly the same division of Justices.\(^64\) The majority opinion displayed considerable willingness to defer to Congress’s predictions about the future of the communications industry.\(^65\) The Court made it clear that the question was not about the objective validity of the congressional judgment, but merely whether it was “reasonable and supported by substantial evidence in the record before Congress.”\(^66\) It

\(^{55}\) Id. at 664-65 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

\(^{56}\) Id. at 668.

\(^{57}\) Turner Broadcasting (Turner I), 512 U.S. at 668.

\(^{58}\) Id. at 671 (Stevens, J., concurring).

\(^{59}\) Id. at 670.

\(^{60}\) Id.

\(^{61}\) Id. at 681 (O’Connor, J., dissenting).

\(^{62}\) Turner Broadcasting (Turner I), 512 U.S. at 668 (O’Connor, J., dissenting).


\(^{65}\) Id. at 196.

\(^{66}\) Id. at 211.
rejected demands for more extensive factfinding by the courts as “an improper burden for courts to impose on the Legislative Branch.”

Judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make. Those judgments “cannot be ignored or undervalued simply because [appellants] cast[] [their] claims under the umbrella of the First Amendment.” . . . We cannot displace Congress’ judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.

In a concurring opinion, Justice Breyer found “important First Amendment interests on both sides of the equation,” and he found that Congress had struck “a reasonable balance between potentially speech-restricting and speech-enhancing consequences.”

In the aftermath of the Turner decisions, lower courts have subjected a broad range of media regulations to First Amendment scrutiny. For example, the D.C. Circuit struck down restrictions limiting market share of cable companies and limits on the number of channels that could be assigned to a cable operator’s affiliates. The decision has been criticized from the expressive libertarian perspective for “its truly remarkable nature” in misreading Turner I.

The Turner cases seemed to settle the question of must-carry, but the debate has resurfaced with an interesting new twist because of technological changes under the Digital Television Transition and Public Safety Act of 2005. As of February 17, 2009, all analog broadcasting will cease and will be replaced by

67. Id. at 213.
68. Id. at 224 (citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 103 (1973)).
69. Turner Broadcasting (Turner II), 520 U.S. at 227 (Breyer, J. concurring).
70. Professor Burnstein lists several affected areas:
   Indeed, the variety of regulations found to be . . . subject to heightened scrutiny after Turner I includes: limits on local telephone companies’ provision of video services, surcharges on non-locally produced cable programming, municipalities’ grants of exclusive local cable franchises, open access requirements for cable Internet service provision, limits on cable channel allocation to affiliated programmers (vertical ownership rules), limits on the total number of subscribers that can be served by a single cable provider (horizontal ownership rules), and “must carry” requirements as applied to satellite television providers.
   Burnstein, supra note 4, at 1037. Burnstein also observes that “[l]ower courts applying the Turner decisions often have required a significant showing of economic rationality in order to uphold a structural regulation.” Id. at 1042.
digital broadcast signals. To view broadcasting signals without a digital TV, consumers must use cable or satellite or buy a converter box (which they can obtain with the help of up to two $40 coupons). How common digital TVs will be at that point remains an open question: as of now, about 32 million households have them, but only half have the reception equipment to receive digital signals; analog TVs continue to substantially outsell digital ones. The technologically backward will pay a price, however, because the bill does not authorize cable operators to “down convert” high-definition signals for analog cable customers without the consent of the broadcaster, which may force almost 40 million customers to upgrade to digital cable service. Whether substantial numbers of consumers will move to digital programming or whether this transition is actually in the interests of consumers collectively seems unclear.

The interesting new twist for must-carry comes from an aspect of the technology. Television stations will receive six megahertz of spectrum for digital broadcasting. They can use the spectrum in either of two ways. First, they can use the entire bandwidth to offer high-definition television (HDTV),


76. Id.

77. The legislation does not address this point directly, but the consensus seems to be that additional authorization for down converting may be needed. See Stephen Labaton, Transition to Digital Gets Closer, N.Y. TIMES, Dec. 20, 2005, at C1 (“Analysts and cable company executives said additional legislation might be required to enable cable companies to alter their broadcasting feeds so that more than 50 million customers who subscribe to analog cable services would be unaffected.”).


79. One may sympathize with the observation that “[m]ost of the media and manufacturing interests have been contemplating only how to profit from the high-definition, “pretty pictures” aspect of digital telecasting. Little commercial media and manufacturing industry thought has gone into the question of improved, socially useful content.” Willard D. “Wick” Rowland Jr., Let Analog Sell-Off Benefit Public, ROCKY MOUNTAIN NEWS (Denver, CO), January 1, 2006, available at http://www.rockymountainnews.com/drnm/speak_out/article/0,2777,DRMN_23970_4352890,00.html (last visited Apr. 6, 2006).

80. The New York Times reports that the Act “will raise billions of dollars for the federal Treasury from auctions for spectrum licenses that must be surrendered by broadcasters . . . The government estimates that those auctions, which will begin in 2008, could raise at least $10 billion for the Treasury.” Stephen Labaton, Transition to Digital Gets Closer, N.Y. TIMES, Dec. 20, 2005, at C1.
which provides much sharper pictures and sound quality. There does not seem to be any dispute that, after the transition, stations choosing this option will be entitled to must-carry.

Second, broadcasters can use the spectrum along with digital technology to offer multiple programs in standard-definition television (SDTV), in effect splitting themselves into several different channels. Some options might relate to the main programming, such as multiple camera angles, but the extra channels could also be used for infomercials or other programming. This multicasting would allow a station to broadcast up to five or six channels. The key question is what obligation cable operators would have to carry the additional programming: does must-carry apply only to the main programming stream, to that stream plus related materials (such as multiple camera angles), or to any and all programming? Would a multicasting must-carry requirement violate the First Amendment?

This issue has produced some very odd alignments. Religious broadcasters and social conservatives strongly favor multicast must-carry. Public interest groups fear that the extra channel space will only be used for infomercials, so they oppose multicast. Within the affected industries, the absence of must-carry may have the greatest impact on unaffiliated local TV stations that are not part of media companies such as Disney or Fox TV, while smaller cable companies may be squeezed by negotiations with the more powerful broadcasting stations. In the meantime, niche cable programmers fear that multiplexing will squeeze them out. C-SPAN has been a major opponent of multicast must-carry, arguing that C-SPAN would be forced out by additional programming from local broadcasters.

The 2005 statute does not address the extent to which cable operators are required to carry broadcasters’ additional programming streams. The broadcasting industry and religious organizations are currently pushing for

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82. Id.
83. Id. at 106.
86. Just Another Toaster, National Journal’s CongressDaily, Oct. 3, 2005. The title is a reference to the words of a Reagan-era FCC chair who said that TV is “just another appliance – it’s a toaster with pictures.” Id.
87. See Amobi, supra note 74.
89. See David Lieberman, C-SPAN Chief: Digital TV May Hog Cable Space, USA TODAY, June 2, 1998, at 4B.
90. Todd Shields, NCTA: We’ll Fight vs. Multicast Must-Carry, MEDIAWEEK, Sept. 7, 2005, available at
new must-carry legislation. The FCC’s current (but tentative) position is that the Cable Act provides must-carry only for the primary broadcasting stream. In terms of the related issue of dual must-carry (whether cable must carry the digital and analog versions of broadcast signals during the transition period), the FCC has concluded that such a requirement would not be warranted under the Turner decisions. Cable operators have opposed congressional action on the issue by arguing that multicast must-carry would violate the First Amendment: “The content-neutral purpose found by the Turner Court – protection of free over-the-air broadcast from the predations of a cable bottleneck monopoly – no longer exists, and as a result, any new obligation would likely be subjected to strict scrutiny as a regulation of speech designed to affect content.”

Interestingly enough, it does not seem to have occurred to anyone to wonder whether the digital transition requirement itself is constitutional. And yet, a plausible enough case might be made that it violates the First Amendment under the Turner test. Consider, by analogy, a congressional requirement that all publications have high print definition on high quality paper. The statute would have the following effects. Some people would gladly pay more for the higher quality (but also more expensive) product. Others would pay more but would not have a corresponding desire for the higher print quality – from their point of view, the quality requirement is the equivalent of paying a monopoly price for the product. Finally, others would reduce their purchases or stop buying periodicals entirely, because they do not find the product worth buying at the higher price despite the quality increase. In the meantime, sellers would be differentially affected, depending on their conversion costs and on their market segments. For instance, newspapers would probably go out of business or publish much shorter editions (which is why newspapers are printed on cheap stock in the first place). It seems doubtful that the Court would find that the value of delivering a high quality product to a subset of readers outweighed the harm to publishers and to consumers who could no longer buy affordable reading material.


It is not clear to what extent the digital transition requirement is different. Clearly, it would be technologically possible to allow TV stations to choose whether to go digital or manufacturers to decide what kinds of TV sets or adapters to sell. To that extent, the digital TV requirement is no different than the hypothetical rule requiring high quality printing. If there is a difference, it has to lie in economic factors that make a mixed digital/analog TV world impractical or undesirable. The question under Turner would be whether the asserted interest in forcing the transition (“prettier pictures”) is narrowly tailored to avoid the First Amendment harms to programmers, TV stations, and audience members who are forced out by the changeover.

The First Amendment costs of the digital transition may seem different in kind from those of multicasting. After all, the digital transition merely suppresses some speech, whereas multicasting coopts the cable owner’s facilities for the speech of others. From this point of view, access rights may seem akin to forced expression. Just as the government cannot force the owner of a cable system to allow someone else’s sign in her front lawn, one might argue, it also should not be able to force her to put programming she doesn’t want on her cable system.

The Supreme Court properly rejected this analogy in Turner I. Unlike the homeowner who may feel a sense of personal invasion if required to give space to someone else’s sign, such a psychological impact is unlikely in the case of a cable system owner who is forced to transmit a marginal UHF station instead of an additional shopping channel.

More fundamentally, this argument assumes that in the electronic setting, ownership of hardware is equivalent to ownership of transmission rights. In the cable situation, property rights are something of a mess from the start, since (1) the company can only function thanks to its use of an easement on public property, (2) grant of the easement gives it a virtual monopoly status, leading to the negotiation of complex contracts with municipalities, (3) ownership of content was similarly confused in the early days of cable, given the operator’s power to appropriate broadcast material, (4) must-carry and public access requirements have been in effect almost since the emergence of cable as a mass

95. Opponents of multicasting acknowledge “the fact that the costs of the transition may drive a few broadcasters out of business.” Timmer, supra note 81, at 139.
96. The coupon program softens the blow to consumers, but most likely some will not take advantage of the program (perhaps because of age or disability) and will no longer have functioning TVs after the transition.
97. See e.g. Wooley v. Maynard, 430 U.S. 705 (1973). In Wooley, the Court held that the state of New Hampshire could not require a motorist to carry the slogan “Live Free or Die” on his or her license plate. According to the majority, “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” Id. at 714.
99. See id. at 633.
market. In this setting, it is difficult to say that the “natural” owner of control over content is always the owner of the physical cable.

If we overcome any fixation on the ownership of the physical cable as a decisive First Amendment factor, then the fundamental similarity of the constitutional issues becomes clear. Both must-carry and the digital transition have First Amendment winners and losers. In terms of must-carry, the winners are one set of speakers (broadcasters) who get additional speech opportunities, while the losers are cable programmers who lose some speech opportunities. In terms of the digital transition, the winners are basically the middle and upper end of the market, who will benefit from the technological advantages of the new technology, and the potential losers are the marginal broadcasters and audience members who may forfeit speech opportunities. This does not mean that the constitutional outcome should be the same in both cases. What it does show is ubiquity of potential constitutional claims with respect to any real substantial media regulation.

IV. IP EXCLUSION RIGHTS AND DIGITAL MEDIA

Exclusion and access rights are two ways of talking about the same thing. In the cable cases, broadcasters seek access to cable channels, and cable companies seek to exclude them. In the cases we are about to discuss, users seek freer access to copyrighted materials, and the copyright holders seek to exclude them.

The Supreme Court entered the fray with the _Eldred_ case, which involved the Copyright Term Extension Act (CTEA). The CTEA extended the copyright term by twenty years, so that it is now usually the author’s life plus seventy years. Because the extension was retroactive, copyrights that were about to expire (such as Disney’s copyright on Mickey Mouse) were given a new lease on life. The plaintiffs contended that the retroactive extension exceeded Congress’s power under the copyright clause and violated the First Amendment.

As the two dissenting opinions make clear, the “limited term” argument had some intuitive appeal. The Constitution purportedly only gives Congress the power to grant copyrights for a “limited term.” Yet today, for all practical purposes, the term might as well be forever. Even before CTEA, as Justice Stevens pointed out, “only one year’s worth of creative work – those copyrighted

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101. _Id._ at 192.
103. See Schwartz & Treanor, supra note 6, at 2333 (pointing out that some have even referred to the CTEA as the “Mickey Mouse Protection Act”).
104. _Eldred_, 537 U.S. at 196.
105. U.S. CONST. art. 1, § 8 cl. 8. The full text reads: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”
in 1923 – has fallen into the public domain during the last 80 years.”\textsuperscript{106} The effect of CTEA will be, as Justice Breyer explained, “the transfer of several billion extra royalty dollars to holders of existing copyrights.”\textsuperscript{107} Justice Breyer also observed that CTEA gave the average author 99.8\% of the economic value of a perpetual copyright.\textsuperscript{108} Also, it was no secret that some members of Congress would have preferred a perpetual term; the statute was named in honor of a deceased House member who “wanted the term of copyright protection to last forever.”\textsuperscript{109}

The Court nevertheless rejected the “limited term” argument.\textsuperscript{110} It relied on a history of previous retroactive extensions of the terms of IP protection and viewed Congress’s purported desire to harmonize copyright terms with the European Union as a sufficient justification for the change.\textsuperscript{111} Fundamentally, the majority seemed to be unwilling to second-guess Congress in the inevitably uncertain enterprise of setting the copyright term.\textsuperscript{112}

The plaintiffs also made a First Amendment argument.\textsuperscript{113} The extension had a significant effect on speech, making it impossible to offer cheap editions of early Twentieth Century authors and hampering the ability to establish on-line archives with photos and letters from the same period.\textsuperscript{114} If, as Justice Breyer’s dissent plausibly argued, CTEA had little to offer in the way of countervailing benefit, this burden on speech might seem hard to justify.

Yet the Court also rejected the First Amendment claim, declining the invitation to apply “a heightened form of judicial review” to CTEA.\textsuperscript{115} Tracking language in earlier decisions, the Court relied on the purpose of the copyright law (which is First Amendment-friendly because it is intended to promote speech), and on copyright law’s “built-in First Amendment accommodation.”\textsuperscript{116} By the latter, the Court apparently meant the idea-expression distinction and the “fair use” doctrine,” which the Court characterized as allowing “considerable ‘latitude for scholarship and comment,’ and even for parody.”\textsuperscript{117}

A careful reading of the opinion suggests, however, that the First Amendment continues to have relevance. As the Court explained:

\textsuperscript{106} Eldred, 537 U.S. at 241 (Stevens, J., dissenting).
\textsuperscript{107} Id. at 248 (Breyer, J., dissenting).
\textsuperscript{108} Id. at 255-56.
\textsuperscript{109} Id. at 256 (citing 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono)).
\textsuperscript{110} Id. at 198.
\textsuperscript{111} Eldred, 537 U.S. at 200-204.
\textsuperscript{112} Id. at 208.
\textsuperscript{113} Id. at 218.
\textsuperscript{114} Id. at 249-250 (Breyer, J., dissenting). Even the song “Happy Birthday to You,” first copyrighted in 1935 but with a melody many years older, remains under copyright today. Id. at 261-62.
\textsuperscript{115} Id. at 218-19.
\textsuperscript{116} Eldred, 537 U.S. at 219.
\textsuperscript{117} Id.
The First Amendment securely protects the freedom to make – or decline to make – one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.\textsuperscript{118}

The effect is to immunize traditional copyright doctrine from First Amendment scrutiny, with some possible escape hatches – for example, the Court says that the built-in protections are “generally adequate” but leaves some wiggle room for a future decision to find exceptions.\textsuperscript{119} Moreover, the Court speaks in terms of copying, which suggests that more transformative uses might have different First Amendment status.\textsuperscript{120} Moreover, because the Court restricts its comments to situations where “Congress has not altered the traditional contours of copyright protection,” the implication seems to be that curtailing those traditional protections would raise First Amendment issues.\textsuperscript{121} If so, incursions on these rights should require exceptional justification.\textsuperscript{122}

Unlike \textit{Eldred}, the Supreme Court’s most recent foray into the definition of exclusion rights was statutory rather than constitutional. Although the details of the statutory analysis are not relevant for present purposes, the opinion is relevant because it confirms the Court’s cautious approach to these issues.  

\textit{MGM, Inc. v. Grokster, Ltd.}\textsuperscript{123} involved a peer-to-peer (or P2P) file sharing service, of a kind used to share billions of files monthly, primarily to swap music files. Over 100 million copies of this type of software have been downloaded,\textsuperscript{124} and in the court’s view there was “reason to think that the vast majority of users’ downloads are acts of infringement.”\textsuperscript{125} The question before the Court was whether the distributors of the software were themselves liable for helping to

\begin{footnotesize}
\begin{enumerate}
\item[118.]
\textit{Id.} at 221.
\item[119.]
\textit{Id.}
\item[120.]
\textit{Id.} at 220-21.
\item[121.]
\textit{Eldred}, 537 U.S. at 221.
\item[122.]
\item[123.]
\item[124.]
\textit{Id.} at 2722.
\item[125.]
\textit{Id.}
\end{enumerate}
\end{footnotesize}
promote these massive infringement activities, even though the software also had non-infringing uses.\textsuperscript{126}

The Court emphasized the delicacy of the policy judgment involved in the case:

MGM and many of the amici fault the Court of Appeals' holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incident of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before . . . As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies.\textsuperscript{127}

Bearing in mind these conflicting purposes, the Court's ruling was a narrow one. The Court emphasized that the defendants were not "merely passive recipients of information about infringing use," but instead that each defendant "clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement."\textsuperscript{128} "Here," the Court said, if "liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was."\textsuperscript{129}

There were two concurring opinions, each accounting for three Justices. Both concurrences discussed another issue that the lower courts might reconsider on remand. Justice Ginsburg argued that the lower court should have determined whether there was a "reasonable prospect that substantial or commercially significant non-infringing uses were likely to develop over time."\textsuperscript{130} Justice Breyer's concurrence argued that Justice Ginsburg's approach was too stringent and that in fact the defendant was entitled to summary judgment on the issue.\textsuperscript{131}

Both of these groups of three Justices, however, joined in the majority opinion as well.

\textsuperscript{126} Id. at 2770.
\textsuperscript{127} Id. at 2775.
\textsuperscript{128} MGM, 125 S. Ct. at 2772.
\textsuperscript{129} Id. at 2782. It is unclear whether purely subjective intent is sufficient as a basis for liability under Grokster, or whether it must be linked with some kind of objectionable content. See The Supreme Court, 2004 Term, 119 Harv. L. Rev. 366, 370 (2005).
\textsuperscript{130} MGM, 125 S. Ct. at 2786 (Ginsburg, J., concurring).
\textsuperscript{131} Id. at 2787 (Breyer, J., concurring).
The Grokster Court did not refer to the significant First Amendment aspects of the case; in particular, restrictions on P2P software burden those who use P2P networks for non-infringing uses. For example, the BBC is considering the use of P2P networks to make its television archives available to the public, some universities use P2P to make instructional materials available, and Microsoft has used P2P to disseminate software.

The degree to which non-infringing uses were significant (or could potentially become significant in the future) was subject to dispute in Grokster, as shown by the concurring opinions. Realizing that these uses are protected speech would not necessarily change the result in the case. It does, however, provide an additional argument for the narrowness of the majority’s approach, which targeted a specifically objectionable type of conduct rather than launching a broadside against P2P in general.

A similar effort to protect IP rights through technological limits has been playing itself out in the context of television. In 2003, the FCC adopted regulations to prevent the unauthorized copying of digital programming by requiring digital TVs to be designed to recognize the “broadcast flag.” The broadcast flag is a code in a digital broadcast that “prevents digital television reception equipment from redistributing broadcast content.” Under these regulations, “[o]pen devices that allowed information flows in and out, permitted snippets of content to be mixed with other information and made into a transformative work, and allowed unauthorized access to the result so these transformations were on the way to being forbidden.”

136. It should be noted that P2P file sharing has continued to grow:

Despite the U.S. Supreme Court decision holding Grokster liable for the actions of its copyright-defying users, and despite more than 13,000 lawsuits filed by the Recording Industry Association of America and the Motion Picture Association of America, file swapping is still growing. According to P-to-P research site Big Champagne, some 6.5 million U.S. users share files at any one time—up more than 30 percent from the year before.

The regulations were challenged by several libraries who wanted to use the Internet to make some broadcast materials available to students in a distance learning course.\textsuperscript{140} The D.C. Circuit struck down the regulations on the ground that “the agency’s general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”\textsuperscript{141}

Like a flat ban on P2P, the digital flag had the potential to block lawful communications, to the extent that copying and distribution of digital content would be considered a fair use under the copyright laws.\textsuperscript{142} The broadcast flag would also have meant that prior consent would be required to use copyrighted works. As Randall Picker points out:

While we frequently speak of copyright, patents, and trademarks as “intellectual property,” this is a casual, classificatory short-hand that we think helps us to understand these three distinct bodies of law. But the term itself is quite misleading, as in some basic way, to date, intellectual property has lacked one of the key characteristics of tangible property: absent taking by force, use of tangible property requires prior consent of the owner. This isn’t true for intellectual property: I can sing copyrighted songs in the shower to my heart’s content. Intellectual property has been protected by something more akin to the torts system: a right to sue for the violation – meaning use without consent of course – of a specified right.\textsuperscript{143}

Notwithstanding these criticisms, the broadcasting industry continues to press for legislation that would mandate the broadcast flag.\textsuperscript{144} The Senate has held hearings about whether Congress provide the FCC with authority to put the broadcast flag in place.\textsuperscript{145}

Assuming the broadcast flag went into effect, it would raise interesting First Amendment issues. A key issue is defining the appropriate level of review for congressional grants of exclusion rights. The standard of review question is difficult because copyright is an awkward fit with the content distinction. It does not suffer from the core vices of content-based regulation. Exclusion rights

\begin{itemize}
\item \textsuperscript{140} American Library Ass’n, 406 F.3d at 697.
\item \textsuperscript{141} Id. at 700.
\item \textsuperscript{142} See Cuong Lam Nguyen, Comment, A Postmortem of the Digital Television Broadcast Flag, 42 Hous. L. Rev. 1129, 1160-61 (2005) (“The broadcast flag would have cost the American public an invaluable fraction of the fair use spectrum.”).
\item \textsuperscript{143} Randall C. Picker, From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright, 70 U. Chi. L. Rev. 281, 283 (2003).
\item \textsuperscript{144} Draft Bills Authorize FCC to Proceed with ‘Broadcast Flag-Related Regulations, 71 Patent, Trademark & Copyright J. News (BNA) 33 (2005).
\end{itemize}
normally protect expression indiscriminately, with no favoritism toward particular viewpoints or subjects. Yet, they are not exactly content-neutral either. They are deeply concerned with content, with central purposes that focus on the content of speech (encouraging more and better content). Copyright’s various exemptions also are connected with content (such as the idea/expression distinction). Rather than squeezing copyright within these classifications, *Eldred* seems to view it as *sui generis*. Because the broadcast flag would block even fair use of the material, it does not fall within *Eldred*’s safe harbor for traditional copyright protection. Instead, some form of content neutral scrutiny would be in order, arguably of the kind utilized in the *Turner* decisions.

V. EXCHANGING LIBERTARIAN SIMPLICITY FOR PRAGMATIC COMPLEXITY

We have surveyed a series of media disputes: analog must-carry, multicast must-carry, copyright expiration, P2P networks, and broadcast flags. Libertarians have simple (though conflicting) answers for each of these disputes. Economic libertarians would resolve the must-carry issues in favor of the cable. They would also resolve the copyright expiration, P2P, and broadcast flag issues in favor of the IP owners. Expressive libertarians would reach the opposing results, favoring access for multiple speakers on cable and expansive user rights in the IP-related disputes.

What these two brands of libertarianism have in common is the point on which they are most surely wrong: they both find these disputes simple and straightforward to resolve. This common point of agreement is also the most obvious error on both sides. These disputes are anything but simple.

In each of these cases, competing First Amendment interests are at stake. This is obviously true of the must-carry issues, where channels will either be used by broadcasters or by other cable programmers selected by the cable


147. Perhaps copyright infringement, like obscenity, should just be considered a traditional category of unprotected speech. Just as in the case of obscenity, however, the Court should be careful not to allow the unprotected category to expand beyond its traditional boundaries.

148. *See supra* notes 116-17 and accompanying text.

149. Expressive libertarians, not surprisingly, see hints of intellectual bad faith in this combination of preferred outcomes:

Thus, in the digital age, media corporations have interpreted the free speech principle broadly to combat regulation of digital networks and narrowly in order to protect and expand their intellectual property rights. . . These positions seem inconsistent on their face. In fact, they are not. They reflect a more basic agenda: It is not the promotion and protection of freedom of speech per se, but the promotion and protection of the property rights of media corporations. Both intellectual property and freedom of speech have been reconceptualized to defend capital investments by media corporations.

operator. To a large extent, to favor one speaker is to partially silence the other, and different audiences will have corresponding losses or gains.\textsuperscript{150} Indeed, as we saw, this is also true of a straightforward regulatory intervention like the transition to digital TV, which will have its winners and losers among speakers and audiences.

Similarly, in the copyright cases, there is a conflict between speakers. Failure to protect rights holders against widespread copying will limit their ability to create and disseminate works, interests that fall within the First Amendment. Allowing broad restrictions on user activities limits the ability of users to co-opt existing materials as part of their own expression and disseminate the materials to others. In the copyright cases, some of those user activities may be illegal to begin with, but others – such as using material after the expiration of the copyright term or making fair use of material – would be lawful if not for some regulatory intervention after the creation of the material. Free copying will also allow some audience members to obtain materials that they could not otherwise access. Thus, there are tradeoffs in all of these situations between the First Amendment interests of various speakers and audiences.

Libertarians can only make these issues seem easy by ignoring conflicts or privileging one side of the debate. Expressive libertarians ignore the adverse effect of copying on the production of new speech and the voluntary dissemination of speech by its creators. They also privilege users as First Amendment actors, ignoring the equal status of creators. Users have a collective stake in ensuring that appropriate incentives exist to create new work and disseminate it broadly without fear of completely losing control over it.

Economic libertarians fixate on property issues, acting as if those rights were absolute and dated from time immemorial. One searches Blackstone in vain, however, for guidance about the ownership of digital electronic signals. To say that the owners of the physical cable own the channel capacity is not to announce a fact; it is to state the conclusion of an argument over how management rights should be allocated.\textsuperscript{151} And to say that owners of IP have the

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\textsuperscript{150} Justice Breyer emphasized this in \textit{Turner II}: Congress could reasonably conclude that the statute will help the typical over-the-air viewer (by maintaining an expanded range of choice) more than it will hurts the typical cable scriber (by restricting cable slots otherwise available for preferred programming). The latter’s cable choices are many and varied, and the range of choice is rapidly increasing. The former’s over-the-air choice is more restricted; and as cable becomes more popular, it may well become still more restricted insofar as the over-the-air market shrinks and thereby, by itself, become less profitable. In these circumstances, I do not believe that the First Amendment dictates a result that favors the cable viewers’ interests.
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\begin{flushright}
\textsuperscript{151} This is not to say, however, that arguments for strong property rights cannot be mounted, as in Patricia L. Bellia, \textit{Defending Cyberproperty}, 79 N.Y.U. L. Rev. 2164 (2004). But strong property rights have to be defended, not simply assumed. And of course, there are also powerful
right to limit users is to ignore the equally well-established rights to engage in fair use and access materials in the public domain. Indeed, every creator of IP uses existing IP as the basis for new work – otherwise, every inventor would literally have to reinvent the wheel. In short, economic libertarianism basically begs the question of how control over media transmissions should be assigned by simply assuming that the decision has already been made. Property rhetoric is powerful, but just for that reason we need to be wary of its potential to confuse rather than clarify the issues.

Thus, media access and exclusion cases generally involve multiple First Amendment speakers. The interests of these speakers may partly conflict, but they may also be interdependent. Determining the appropriate outcome in terms of First Amendment interests presents inherent difficulties. These difficulties are compounded by the fact that the cases involve complex industries and rapid technological change. Forecasting what effects a regulation has on speech may depend on difficult economic calculations and risky technological forecasts.

What has been said is enough to explain the inadequacy of libertarianism (economic or expressive) in connection with media access and exclusion issues. We are not confronted with simple conflicts between speakers and overbearing governments. Instead, we see governments attempting to referee disputes between contesting speakers and would-be speakers. Moreover, deciding on the best set of rules involves a complex, difficult determinations that judges are ill-suited to make. We are likely to need complex rules for this complex world, and judges cannot expect to play the lead role in crafting those rules.

Nevertheless, we should not expect judges to withdraw from the fray completely. There are First Amendment interests involved here, which courts are institutionally committed to defending. Moreover, without judicial oversight, regulators may be tempted to design rules in order to favor particular viewpoints or silence speakers with less political power. Thus, we have


152. Indeed, one could also characterize the interest of users in accessing networks as a form of property. See generally Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005) (arguing for recognition of this interest as a property right). In conventional property terms, this interest might be considered an easement – the right to traverse the domain of another.

153. As a leading IP scholar puts it:

My worry is that the rhetoric of property has a clear meaning in the minds of courts, lawyers, and commentators as “things that are owned by persons” and that fixed meaning will make it all too tempting to fall into the trap of treating intellectual property as an absolute right to exclude. Furthermore, it is all too common to assume that because something is property, only private and not public rights are implicated.

Lemley, *supra* note 149, at 1071. The power of property rhetoric to cloud thought is shown by the unthinking equation of a person sampling songs on-line in order to decide what to buy retail with a “thief’s contention that he shoplifted ‘only 30’ compact discs, planning to listen to them at home and pay later for any he liked.” BMG Music v. Gonzalez, 430 F.3d 888, 891 (7th Cir. 2005) (per Easterbrook, J.).
something of a conundrum: judges need to police this process, but they do not have very good tools for doing so.

Attempting to resolve this conundrum is a large task, well beyond the scope of this Essay. Quite possibly, there is no simple resolution, and judges will be forced to negotiate the opposing horns of the dilemma with as much sensitivity and intelligence as possible. Given the difficulties posed by changing technologies and conflicting First Amendment interests, there are limits to what courts can do. They may be able to usefully place some outer boundaries on regulation, by ensuring that regulators strike a “reasonable balance” between the conflicting interests and do not gratuitously ignore “significantly less restrictive ways” to achieve their goals.\textsuperscript{154} Even this task is not free from difficulties and from the temptation to overreach into the domain of policymaking. But it is a good deal more constructive than efforts to establish simple rules for the complex world of digital media.

VI. CONCLUSION

The rhetoric of rights is important and powerful. It often serves as the basis for advancing crucial moral claims. Yet it can also delude us into adopting simple solutions to hard problems. We know from the history of the \textit{Lochner} era that the rhetoric of rights can lead to judicial over-reaching. Property rights do not define themselves, and in the context of new technologies it can be misleading to take those rights as a given. Expressive rights are undoubtedly central to a democratic, free society. Yet expressive rights may conflict with each other in ways that resist easy resolution. Life, in other words, is complicated. Einstein once said that a theory should be as simple as possible, but no simpler.\textsuperscript{155} When considering how to allocate right of access and exclusion with regard to electronic media, this is advice that we would do well to keep in mind.

\begin{footnotes}
\item[154.] Turner Broadcasting (\textit{Turner II}), 520 U.S. at 227 (Breyer, J., concurring).
\item[155.] THE INTERNATIONAL DICTIONARY OF QUOTATIONS 281 (Margaret Miner & Hugh Rawson eds., 1986).
\end{footnotes}
MISUSING NETWORK NEUTRALITY TO ELIMINATE COMMON CARRIAGE THREATENS FREE SPEECH AND THE POSTAL SYSTEM

Barbara A. Cherry*

I. INTRODUCTION

The legal regulatory regimes for communication technologies have and continue to evolve with technological, economic, and social change. Traditionally, in the United States, multiple regulatory frameworks developed that imposed rules differing substantially with the type of communications technology. However, circumstances have changed dramatically in recent years. Due to advancements in communications technology, communications markets that had been economically distinct are now converging. Furthermore, policymakers are actively seeking to encourage competition and to implement deregulatory policies. Given these developments, the task of developing, evaluating, and implementing appropriate modifications to the historical regulatory regimes has grown increasingly complex.

Current debate regarding revisions to the nation’s communications laws includes important issues collectively referred to as network neutrality. As illustrated by the various statements by United States Senators and testimonies of panelists presented at the Senate Commerce, Science and Transportation Committee hearing on February 7, 2006, network neutrality reflects a diversity of concerns. Yet, during a press conference with reporters after the hearing, Committee Chairman Senator Stevens is reported to have said that, although network neutrality ought to be a basic principle of legislation, one of the first challenges facing the Committee is to define network neutrality.

In a prior article, Cherry describes how distinctive legal principles have evolved to address differing types of access problems with regard to an essential

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service or facility. Cherry asserts that “essentiality of access” – the historical alignment of access problems to legal principles – should be used as an organizing principle for examining future policy objectives in communications regulation. This is because “[p]olicy problems that have consistently been handled by distinct legal rules for each distinct technology, must now be addressed simultaneously across competing technology platforms.” Applying an “essentiality of access” typology to issues of broadband access, Cherry demonstrates that differing types of access objectives require reference to distinct legal principles that evolved in response to differing relationships among access recipients to the access providers – as end user customer, competitor, speaker, or audience member. Furthermore, these principles at times conflict and require policymakers to choose certain interests over others.

The present article extends the prior “essentiality of access” analysis of broadband access issues to disentangle the myriad claims embedded in the network neutrality debate and provides an analytical framework for identifying core problems and appropriate legal principles for government intervention. In so doing, this article shows how the lineage of “essentiality of access” legal principles is being misrepresented in the discourse of network neutrality. More specifically, the discourse of network neutrality is mischaracterizing the law of common carriage – mirroring the general discourse of deregulatory policies in telecommunications – in a manner that conflates the legal bases for addressing access problems for end user customers and competitors. As a result, there is an unsubstantiated over-reliance on antitrust principles to address provider-to-customer access problems. Furthermore, the discourse suffers from a lack of analytical integrity in failing to evaluate policy recommendations for network neutrality in terms of policy sustainability.

The article also discusses how this misleading discourse is affecting the evolving interrelationship of common carriage principles and free speech rights under intermodal competition. Telecommunications carriers are intensifying their efforts to reduce economic regulation through substitution of common carriage obligations with antitrust principles. The FCC has recently rewarded such efforts through elimination of common carriage obligations for broadband Internet access, which is also cited by opponents to resist imposition of network neutrality rules. If antitrust principles are insufficient to substitute for the functions that common carriage and public utility obligations have served in providing access to customers, then sustainability problems are created for

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4. Id. at 251.
5. Id. at 262-68.
6. Id. at 251.
7. See Cable Modem Declaratory Ruling, infra note 24; Wireline Broadband Access Order infra note 29; infra note 34.
viewpoint diversity and free speech rights of individuals in order to further economic interests of corporate owners of broadband facilities. For this reason, the evolution of broadband access policy requires deeper inquiry as to the constitutional rights of natural persons as opposed to corporations.

Furthermore, elimination of common carriage principles affecting broadband access to the Internet may adversely affect the postal system. The financial viability of the United States Postal Service is now being seriously threatened by electronic substitution over the Internet; and, to adapt to this competition, the postal system is modifying its operations and business model to become more Internet-dependent. By allowing the deregulatory trend in telecommunications to deviate significantly from that in transportation, through erosion of common carriage regulation in the former but not the latter, unintended consequences may include de facto erosion of common carriage and deterioration of geographic availability of postal service. In this way, the network neutrality debate also needs to address the evolving, layered infrastructure of the postal system.

The article is organized as follows. Section II describes the complexity of the network neutrality debate and the lack of a concise definition as to its meaning. Section III describes the “essentiality of access” typology, and section IV reviews the results of its application to broadband access issues in a prior analysis. Section V applies the “essentiality of access” analysis to the network neutrality debate, describing how: the discourse has become misleading; the discourse is affecting the evolving interrelationship of common carriage principles and free speech rights under intermodal competition; and the sustainability of the postal system is threatened by changes in broadband access regulation.

II. COMPLEXITY OF NETWORK NEUTRALITY DEBATE

Policy debates that focus on encouraging widespread deployment of broadband technology reflect diversity in alleged benefits and forms of government intervention. Thus, a simple statement in support of widespread deployment of broadband infrastructure is hopelessly vague. “Rather, development of broadband policy requires a clear articulation of the purposes for which government intervention is being sought, and an assessment of how that intervention should be designed to accomplish those goals.”8

The issues raised under the rubric of network neutrality likewise embody a diversity of alleged goals, problems, and remedies. Proponents of network neutrality rules vary in their characterizations of the essence of the debate. For example, Jeffrey Citron, President and CEO of the Internet phone provider Vonage, asserts that the network neutrality debate is about who will control

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8. See supra note 3, at 254.
innovation and competition on the Internet. Earl Comstock, President and CEO of the non-profit trade association COMPTEL, claims that the prevention of discrimination is at the heart of network neutrality concerns. Vinton Cerf, Vice President and Chief Internet Evangelist with Google, describes network neutrality as the preservation of “limited elements of openness and non-discrimination that have long been part of our telecommunications law.”

Barbara van Schewick, a Non-Residential Fellow of the Center for Internet and Society at Stanford Law School, states that the “common rationale behind the various proposals is to design rules that explicitly forbid network operators and ISPs to use their power over the transmission technology to negatively affect competition in complementary markets for applications, content and portals.”

Proponents also advocate a variety of network neutrality rules. For example, Larry Lessig, Professor of Law at Stanford Law School, supports Congressional enactment of former FCC Chairman Powell’s four Internet Freedoms and a prohibition on access-tiering. Vinton Cerf favors rules enabling “an environment much like the one that gave birth to the Internet: where end users can engage in activities such as running applications, employing devices, and accessing content, unfettered by the provider of the underlying network connection.” Timothy Wu, Associate Professor of Law at Harvard Law School, proposes a basic principle whereby broadband operators have full

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13. Chairman Powell’s Internet Freedoms, outlined in a speech in 2004, are: (1) consumers should have access to their choice of legal content; (2) consumers should be able to run applications of their choice; (3) consumers should be permitted to attach any devices they choose to the connection in their homes; and (4) consumers should receive meaningful information regarding their service plans. See Net Neutrality: Hearing Before the S. Comm. On Commerce, Sci. & Transp., 109th Cong. (2006) (testimony of Lawrence Lessig, C. Wendell, Professor at Law, Stanford Law School, at 6-7), available at http://commerce.senate.gov/pdf/lessig-020706.pdf (Mar. 25, 2006).

14. Access-tiering refers to a policy whereby network owners condition content or service providers’ right to provide content or service to the network upon the payment of some fee that is independent of basic Internet access fees. See Lessig, supra note 13, at 2 n. 2.

15. See Cerf, supra note 11, at 7. Cerf attributes the success of the Internet to the simple network principles of end-to-end design, layered architecture, and open standards. Id.
freedom to “police what they own” (the local network) while restrictions based on inter-network indicia be viewed with suspicion.\(^{16}\)

Not unexpectedly, opponents of network neutrality rules characterize the debate differently. For example, the Presidents of the United States Telecom Association\(^ {17}\) and the National Cable and Telecommunications Association\(^ {18}\) assert that there is no problem that requires legislation; however, the former says that broadband network operators commit not to block, impair, or degrade content, applications, or services.\(^ {19}\) Kyle Dixon, Senior Fellow and Director of the Federal Institute for Regulatory Law & Economics at the Progress and Freedom Foundation, claims that the touchstone for resolving network neutrality or any other regulatory debate is consumer welfare, and that by this standard network neutrality mandates would do more harm than good in the absence of demonstrated market power abuses by broadband providers.\(^ {20}\) Greg Sidak, Visiting Professor of Law at the Georgetown University Law Center, asserts that network neutrality obligations are incompatible with the economics of telecommunications, imposing harm to economic welfare.\(^ {21}\) Christopher Yoo, Professor of Law at Vanderbilt University Law School, states that the key question in deciding whether to impose a network neutrality mandate is not whether network neutrality provides substantial benefits, but whether deviating from government-mandated network neutrality might yield economic benefits.\(^ {22}\)

In this regard, Yoo argues that network neutrality proponents, in seeking to

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19. See McCormick, supra note 17, at 1.
Sidak lists six economic considerations of telecommunications: substantial sunk investment; economics of scale; economies of scope; differential pricing, such as Ramsey pricing, to increase economic welfare; joint demand; and susceptibility to congestion. See id. at 2-5.
promote competition in applications and content, focus on the wrong policy problem – instead, focus should be on competition in the last mile.23

Policymakers have responded in various ways to issues raised in the network neutrality debate. In its Cable Modem Declaratory Ruling,24 the FCC classified broadband cable Internet service as an information rather than a telecommunications service, and therefore not subject to the mandatory common carrier regulation under Title II of the federal Communications Act of 1934,25 as amended by the Telecommunications Act of 1996.26 Although reversed by the Ninth Circuit Court of Appeals,27 the Cable Modem Declaratory Ruling was ultimately upheld by the United States Supreme Court in Nat. Cable & Telecommunications Ass’n v. Brand X Internet Serv.28

Subsequently, in its Wireline Broadband Access Order,29 the FCC established a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers. To provide regulatory parity with cable modem Internet access, the FCC eliminated the obligation on wireline facilities-based providers to offer the transmission component of wireline broadband Internet access service on a stand-alone common carrier basis.30 Yet, the FCC did not eliminate the wireline carriers’ ability to offer wireline broadband transmission on a Title II common carriage basis, thereby enabling carriers to offer broadband Internet access transmission in alternate ways.31 Furthermore, to address broader network neutrality concerns, on the same day the FCC also adopted a Policy Statement intended “to ensure that broadband

23. See generally supra note 22. Yoo bundles the following proposals under the rubric of network neutrality: (1) requiring network owners to adhere to the nonproprietary protocol currently used on the Internet (TCP/IP); (2) prohibiting network owners from entering into exclusivity arrangements with content and applications providers; and (3) prohibiting network owners from imposing use restrictions on end users. Id. at 1.

24. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities; 67 Fed. Reg. 18,848, 18,907 (Apr. 17, 2002) [hereinafter Cable Modem Declaratory Ruling]. The Cable Modem Declaratory Ruling evolved in response to the cable “forced access” debate. The issues raised in the forced access debate and the subsequent litigation related to the Cable Modem Declaratory Ruling have become a component of – as well as a catalyst for – the network neutrality debate. See, e.g., Timothy Wu, supra note 16, at 145-49 (discussing the fact that network neutrality is a goal, and open access is one kind of remedy); Yoo, supra note 22, at 36-37 (discussing the fact that open access to cable modem systems by unaffiliated ISPs represented the first round in the network neutrality debate).


27. See Brand X Internet Services v. Fed. Communications Comm’n, 345 F.3d 1120 (9th Cir. 2003).


30. Id. at ¶¶ 2, 5, 12, 17.

31. Id. at ¶ 86.
networks are widely deployed, open, affordable, and accessible to all consumers. The Policy Statement sets forth four – albeit legally unenforceable – principles: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.

Opponents of network neutrality rules support the FCC’s approach in the Cable Modem Declaratory Ruling, Wireline Broadband Access Order, and Policy Statement. On the other hand, proponents of network neutrality assert that the “FCC’s new approach will prove catastrophic precisely because the Internet depends on basic common carrier rules to ensure the availability of an essential ingredient, namely the transmission capacity over which Internet applications reach businesses and consumers.” Instead, they assert that network neutrality requires preservation of the original architectural design upon which the Internet evolved, particularly in light of broadband providers’ pursuit of access-tiering as a result of their increasing market concentration.

There is also legislative activity before Congress related to revising the Communications Act. For example, several bills have been introduced or are being drafted in response to various pressures. One source of pressure consists of parties’ efforts to reverse, modify, or preserve – depending upon one’s interests – actions by the FCC, state commissions, or the courts while implementing the Telecommunications Act. Another arises from further technological, economic, and social changes that have exacerbated implementation problems, including developments unforeseen in 1996 such as the importance of the Internet to commercial activities and as a medium for free speech. In addition, the Senate Commerce, Science and Transportation

33. Id.
34. In fact, cable companies and wireline broadband access providers specifically sought the outcomes of the Cable Modem Declaratory Ruling and Wireline Broadband Access Order, respectively. See also Dixon, supra note 20, at 7-8; Yoo, supra note 22, at 20-21.
36. See Cerf, supra note 11, at 7. See also, Lessig, supra note 13, at 4-5. The premise of the open access requirement for ISP’s imposed upon telecom providers was to enable competition in broadband access that would prevent any compromise in end-to-end neutrality. Id.
37. See Lessig, supra note 13, at 8-9.
Committee has announced a series of fourteen hearings to be held on Internet, telecommunications, spectrum, and broadcasting issues during January through March, 2006.39 One of these hearings, specifically devoted to the topic of network neutrality, was held on February 7, 2006.40

The diversity of goals, problems, and remedies raised under the rubric of network neutrality poses difficult challenges for constructive discourse. Yet, through an “essentiality of access” analysis, the myriad claims embedded in the network neutrality debate can be disentangled, providing an analytical framework for identifying the core problems and appropriate legal principles for government intervention.

III. DESCRIBING “ESSENTIALITY OF ACCESS” TYPOLOGY

In the United States, distinctive legal principles have evolved to address differing types of access problems with regard to an essential service or facility.41 These problems arise from varying forms of discrimination or circumstances yielding lack of equal opportunity by individuals to an essential service or facility.42 Distinct legal principles evolved to address these problems, utilizing different forms of government intervention – such as the imposition of ex ante obligations, the creation of ex post remedies, or the provision of economic subsidies.43 They also created different types of legal rights – economic, welfare, and free speech.44 “Essentiality of access” refers to the historical alignment of such access problems to legal principles.45

Table 1 provides a summary of the mapping of access problems to legal principles.46 Each access problem is identified by the reason for which access is deemed necessary, the relationship of the access recipient to the access provider, and the nature of the underlying problem or purpose to be addressed.47 The corresponding legal principle(s) is then provided, briefly describing the associated obligations of the access provider that developed to address the access problem.48

40. See also supra text accompanying notes 1 and 2.
41. See generally Cherry, supra note 3.
42. Id.
43. Id.
44. Id.
45. Id.
46. See Cherry, supra note 3, at 255, Table 1.
47. Id.
48. Id.
Table 1: Legal Principles to Address Different Access Problems

Regarding Essential Services or Facilities

<table>
<thead>
<tr>
<th>Access is Needed to Sustain What</th>
<th>Relationship of Access Recipient to Access Provider</th>
<th>Underlying Purpose or Problem</th>
<th>Legal Principle(s)</th>
<th>Obligations of Access Provider</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provision of essential service, not adequately supplied in a competitive market, throughout the community.</td>
<td>Customer as end users.</td>
<td>Economic coercion; dependence of customer requires protection.</td>
<td>Common carrier; public utility; business affected with a public interest.</td>
<td>Provide access to essential service without discrimination, at reasonable rates, and with adequate skill and care.</td>
</tr>
<tr>
<td>Viable competition in a related market of a monopolist.</td>
<td>Competitors.</td>
<td>Economic characteristics of supply require access to monopolist’s essential facilities.</td>
<td>Prohibit refusal to deal with competitors (e.g. essential facilities doctrine).</td>
<td>Provide access to essential facility (input) under reasonable prices, terms and conditions.</td>
</tr>
<tr>
<td>Equality of access to essential services.</td>
<td>Targeted customers as end users.</td>
<td>High cost of providing service; indigence of customers.</td>
<td>Universal service as a form of welfare benefit.</td>
<td>Contribute funds to and/or provide subsidized essential services.</td>
</tr>
<tr>
<td>Legitimacy of, and citizen’s participation in, democracy.</td>
<td>Speaker as end user or competitor (for benefit of audience).</td>
<td>Viewpoint diversity and channel provider’s potential refusal to deal with speaker.</td>
<td>Free speech rights.</td>
<td>Provide access to channel of communication.</td>
</tr>
</tbody>
</table>

As described in Table 1, distinctive legal principles evolved in response to differing relationships of access recipients – as end user customer, competitor, speaker, or audience member – relative to the access provider.\textsuperscript{49} These legal principles, in turn, created differing rights – economic, welfare, or free speech –

\textsuperscript{49} Id.
for access recipients according to the nature of the relationship with the access provider.\textsuperscript{50}

Legal principles affecting economic rights arose from evolving concepts of economic coercion for which government intervention was deemed necessary to provide access to an essential service or facility.\textsuperscript{51} To protect customers (as end users) from economic coercion or exploitation – not necessarily derived from monopoly power of the access provider – the common law of common carriage imposed \textit{tort} obligations of nondiscrimination, just and reasonable prices, and a standard of adequate skill and care on access providers.\textsuperscript{52} Upon the grant of monopoly franchises by government, the common law of public utilities evolved, supplementing common carriage obligations with entry and exit barriers and an affirmative obligation to serve (often referred to as the carrier of last resort).\textsuperscript{53} The common law regimes were later codified by federal and state statutory regimes, to which additional obligations were added, such as a tariffing system for rates, terms, and conditions of service.

The Sherman Antitrust Act was enacted in 1890 to regulate a broader concept of economic coercion – “to encompass the collective refusal to deal, and . . . the loss of market opportunities that competition would have afforded”\textsuperscript{54} – than had been recognized under the common law.\textsuperscript{55} Under the Sherman Act, some claims have been brought by competitors alleging collective or unilateral refusals to deal.\textsuperscript{56} Over time, with regard to such claims, judicial interpretation of the Sherman Act has led to prohibitions of refusals to deal with a broader set of businesses than recognized under the common law as well as the development of the essential facilities doctrine, which requires a monopolist to share with competitors at a reasonable price an input that is deemed essential for viable competition in a related market.\textsuperscript{57}

Legal principles affecting welfare rights represent government efforts to institutionalize some minimum level of rights with regard to access to essential goods and services.\textsuperscript{58} Examples include the provision of essential services for all citizens such as education, as well as programs established during the New Deal

\begin{itemize}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{See} Cherry, \textit{supra} note 3, at 254-62.
\item \textsuperscript{52} For a discussion of common carrier and public utility regulation to address economic interests of end user customers, see Cherry, \textit{supra} note 3, at 256-58.
\item \textsuperscript{53} \textit{Id.} at 258.
\item \textsuperscript{54} \textit{See generally} Phillip E. Areeda \& Herbert Hovenkamp, \textit{Antitrust Law: An Analysis of Antitrust Principles and Their Application} §§101-03 (2d ed. 2001).
\item \textsuperscript{55} For a discussion of antitrust law to address economic interests of competitors, see Cherry, \textit{supra} note 3, at 258-59.
\item \textsuperscript{56} \textit{See} Cherry, \textit{supra} note 3, at 258-59 \& n.51.
\item \textsuperscript{57} The essential facilities doctrine is a judicial doctrine crafted by lower courts, which the United States Supreme Court has thus far declined to recognize or repudiate. Verizon Communications, Inc. \textit{v.} Trinko, 540 U.S. 398, 410-11 (2004).
\item \textsuperscript{58} For a discussion of government intervention to address welfare interests of individuals, see Cherry, \textit{supra} note 3, at 260-61.
\end{itemize}
era for “needy” individuals. Modern universal service policy with regard to telecommunications services has characteristics of both, providing nondiscriminatory and reasonable rates for all customers of telecommunications services as well as funding mechanisms to subsidize access for targeted groups.

As for free speech rights, the Free Speech Clause of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech,” which has also been held applicable to the states under the Due Process Clause of the Fourteenth Amendment. Judicial interpretation of the Free Speech Clause reflects the dual role of the Clause to protect the interests of individuals and to sustain a constitutional democracy. The courts recognize this dual role when addressing constitutional challenges to governmentally imposed mandates to provide access to channels of communication. First, known as the viewpoint diversity principle, government intervention may be permissible to enable the widest possible dissemination from diverse sources in order to promote free speech in the nation’s constitutional democracy. Second, in determining the constitutionality of a given access mandate, the courts review the impact on the free speech rights of the party bearing obligations to provide access to other speakers. Viewpoint diversity has been the basis for justifying government mandates that owners of channels of mass communication open access to their facilities to certain speakers. Examples include equal time rules for political candidates imposed on broadcasters, and must-carry requirements imposed on cable companies to dedicate some of their channels to local broadcast television stations.

However, there are important differences in the free speech rights of electronic mass media and telecommunications carriers. Telecommunications

59. Id. at 261.
60. See id. See also Barbara A. Cherry, The Political Realities of Telecommunications Policies in the U.S.: How the Legacy of Public Utility Regulation Constrains Adoption of New Regulatory Models, 2003 MICH. ST. DCL. L. REV. 757, 768-71 (2003) (discussing how public utility regulation can also be viewed as an early form of welfare state regulation in providing universalistic, as opposed to residualistic, benefits).
61. U.S. CONST. amend. I.
63. For a more in-depth discussion of the following description of free speech jurisprudence, see Cherry, supra note 3, at 261-62.
64. Id. at 261.
65. Id.
66. Id.
67. Id.
70. Although it is beyond the scope of this article to discuss the complexities of free speech jurisprudence, it is important to recognize that courts apply different tests among forms of mass media when considering the constitutionality of media regulation. In general, strict scrutiny applies to the print media, intermediate scrutiny applies to cable companies, and minimal scrutiny applies
carriers are not considered speakers in their capacity as providers of telecommunications services because – as both common carriers and public utilities – they are required to provide nondiscriminatory access to all customers.\footnote{71} On the other hand, providers of electronic mass media – such as broadcasting and cable companies – are considered speakers entitled to some First Amendment protection.\footnote{72}

IV. “Essentiality of Access” Typology Applied to Broadband Access Issues

The “essentiality of access” typology can be used as an organizing principle for examining future policy objectives in the communications industry in order to better enable the adoption of appropriate government interventions.\footnote{73} As well-established types of access problems recur with technological change and other changes in circumstances, reference to historical legal principles that evolved to address such problems are instructive for future policy design. For example, to the extent that specific legal principles have consistently been applied and deemed successful to address a given type of access problem, policy choices or proposals to address current manifestations of the given type of access problem that deviate from such principles should be closely scrutinized. In this regard, assumptions and arguments underlying such policy choices or proposals to justify deviation from historical legal principles should be rigorously analyzed. Furthermore, potential long-term consequences of deviating from historical legal principles – particularly when assumptions or arguments are unsubstantiated, erroneous, or unconvincing – should be carefully studied.

Cherry has previously applied the “essentiality of access” typology to a sampling of broadband access issues.\footnote{74} Some of these broadband access issues address access problems that are embedded in the network neutrality debate.\footnote{75} Given this commonality, results of the previous analysis are utilized here to identify ways in which some network neutrality issues have been misframed as well as to discuss how deviation from historical legal principles yields potential problems that have thus far been inadequately explored.


\footnote{72}{See supra note 70.}

\footnote{73}{See generally Cherry, supra note 3.}

\footnote{74}{Id.}

\footnote{75}{Id.}
In the prior analysis, broadband access issues were selected to provide examples of the four types of access problems identified in Table 1. In some cases, a given broadband issue may in fact relate to more than one access problem – for example, to both economic and free speech problems. However, to simplify exposition, each issue was analyzed with regard to one, arguably the primary, access problem. The results of this more simplified analysis are reviewed in this section. Some of the effects of broadband access issues simultaneously embracing multiple access problems will be discussed in section V.

The prior “essentiality of access” analysis considered the following four broadband issues: (1) to ensure that all individual end user customers have access to the physical layer of the broadband network; (2) to ensure that all communities have access to the physical infrastructure of the broadband networks; (3) to ensure that competitive ISPs have access to the broadband network through interconnection at the logical layer; and (4) to expand the definition of universal service to include access to broadband service. To provide a foundation for the discussion of network neutrality issues, the structure of the analysis and an overview of the results as to the first three broadband access issues are described here.

For each access issue, it is assumed that the relevant aspect of broadband access is considered an essential service or facility, and that the circumstances are such that the underlying purpose or problem requires some form of government intervention. The analysis proceeds in the following steps. The first step identifies the type of access problem that the given broadband access issue poses, and then maps that issue to the corresponding legal principle that historically evolved to address that type of problem. The second step identifies what government actions have actually been taken, or are pending, to address the given broadband issue. The third step compares the results of the first two steps. Consistencies in the results between steps one and two indicate how current or pending government regulation as to the given broadband issue is similar to historical legal treatment of that type of access problem, whereas inconsistencies in the results between the two steps indicate how current or pending government regulation deviates from the historical legal treatment. The inconsistencies are then examined to identify how current or pending regulation may pose obstacles

76. See id. at 262-68.
77. Modifications to federal universal service policy – such as whether to expand the definition of universal service to include access to broadband services – have tended to be treated separately from network neutrality issues in recent legislative and regulatory proposals and proceedings. For this reason, the fourth issue is not included in the discussion here.
78. The assertion that broadband access should be considered an essential service or facility is less contentious now than at the time this analysis was conducted.
79. This latter point simply means that some government intervention is needed to alter prevailing conditions in order to address the access problem. Such intervention could even include deregulatory actions.
from the perspective of the historical mapping of access problems to legal principles – to achieving the desired form of broadband access, and thereby adversely affect the rights of access recipients. An overview of the results is provided in Table 2.80

Table 2: Applying “Essential of Access” to Broadband Access Issues

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<tr>
<td>1. End user access to physical infrastructure of broadband network</td>
<td>Individual end user customers.</td>
<td>Economic coercion or exploitation due to inequality of bargaining power.</td>
<td>Non-discriminatory access at reasonable rates and with adequate standard of care (common carrier or public utility regulation).</td>
<td>Cable modem access service is not a common carrier service; wireline broadband access service not required to be common carrier service.</td>
<td>Erosion of common carrier regulation for narrowband physical layer; potential unavailability of access to broadband physical layer.</td>
<td>Economic* rights of individuals as end users of narrowband and broadband access.</td>
</tr>
<tr>
<td>2. Physical and/or logical layer infrastructures of broadband network need to be ubiquitously available throughout the community.</td>
<td>Communities of end user customers.</td>
<td>Potential unavailability of essential service in portions of community</td>
<td>Duty to serve (build-out requirement; exit barrier); government subsidization or privilege (e.g. franchise) to address financial burden of requirements.</td>
<td>For narrowband service, carriers have build-out requirements and eligible carriers must serve the entire area; cable companies have build-out requirements for cable service in franchise area.</td>
<td>Some communities, or portions thereof, may not have access to broadband physical infrastructure.</td>
<td>Economic* rights of communities as end users of broadband access.</td>
</tr>
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</table>

80. Table 2 is based on consolidation of Tables 2 and 3 in Cherry, supra note 3, at 264 & 269, with modifications to reflect updates in government actions that transpired since the article’s publication.
As shown in Table 2, the first broadband access issue is to ensure that all individual end user customers have access to the physical layer of the broadband network. The underlying problem that may impede such access is economic coercion arising from inequality of bargaining power between the access provider and the end users. Economic coercion could be exercised by practices such as refusals to deal, excessively high prices, unreasonable terms and conditions, and unreasonable discrimination among similarly situated customers. Referring to Table 1, the historical legal solution to address this type of access problem has been to impose on the provider of the essential service the (common law) obligations of common carriers. By contrast, under the Cable Modem Declaratory Ruling and the Wireline Broadband Order, the FCC has refused to apply or has eliminated common carriage obligations on providers of cable modem Internet access and wireline broadband Internet access, respectively. These FCC actions expressly reject application of the historical legal principles for this type of access problem. Absent compelling justifications for this deviation from basic (common law) common carriage requirements, the FCC’s actions raise the concern that the desired broadband

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81. For the analysis of the first broadband access issue, see Cherry, supra note 3, at 263-65, 268.
82. Id. at 263.
83. Id.
84. Id.
85. See supra notes 24 & 29 and accompanying text.
access may not be available to all end user customers. The FCC’s orders also create intramodal asymmetric regulation between telecommunications carriers’ narrowband and broadband networks – with common carriage required for the former but not the latter. “It is not clear whether such intramodal asymmetric regulation is sustainable[,]” rather, such asymmetry may ultimately lead to the unavailability of any common carriage-provided service, whether narrowband or broadband. Thus, overall, the economic rights of individuals as end user customers of both narrowband and broadband services could be adversely affected.

The second broadband access issue is to ensure that all communities have access to the physical infrastructure of the broadband network. While the first broadband issue was analyzed in terms of access to existing facilities, the second issue assumes that broadband facilities or services may not yet exist for some communities or some areas within a community. The underlying problem for the second issue is that providers may refuse to invest in and serve certain areas. Providers may refuse to invest for reasons such as expected unprofitability or to target more highly profitable areas. This problem is one for which franchises and public utility regulation have historically been used to impose an affirmative duty to serve and exit barriers on the provider. Under current regulation, for narrowband services the telecommunications carriers have build-out requirements and exit restrictions, and eligible carriers for universal service funding purposes are required to serve throughout the entire service area. In addition, cable companies typically have build-out requirements in their franchise agreements with local units of government in order to make cable

86. See Cherry, supra note 3, at 263-65.
88. Id.
89. Id. at 265, 268.
90. Id. at 265.
91. Id.
92. Id.
93. Id.
94. Public utility regulation also includes other legal mechanisms to enable the provider to fulfill its obligations, such as entry barriers or some form of subsidization through the rate structure or funding mechanisms. See generally BARBARA A. CHERRY, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY: HISTORICAL REGULATORY FLAWS AND RECOMMENDED REFORM 52-56 (1999); see also Barbara A. Cherry & Steven S. Wildman, Unilateral and Bilateral Rules: A Framework for Increasing Competition While Meeting Universal Service Goals in Telecommunications, in MAKING UNIVERSAL SERVICE POLICY: ENHANCING THE PROCESS THROUGH MULTIDISCIPLINARY EVALUATION 39-56, at 42-48 (B. Cherry, A. Hammond, & S. Wildman, eds.) (1999).
95. These requirements are often referred to as carrier of last resort obligations and are usually imposed under state law. Id.
96. 47 U.S.C. § 214(e).
service available throughout the franchise area. However, no provider of broadband services is required to build out physical infrastructure and to serve specific communities or areas. The failure, at least thus far, to impose affirmative obligations on any providers to build out broadband facilities is inconsistent with the historical use of public utility-type requirements to address this form of access problem. As with the first issue, in the absence of compelling justifications, this deviation from the historical solution raises the concern that broadband facilities may not be available for some communities or at least some portions thereof. As a result, the economic rights of communities of individuals as end users of broadband services could be adversely affected.

Given that the first two broadband access issues affect the economic rights of individual end user customers, the third issue was selected to address the role of free speech in a democracy. This issue also secondarily addresses economic rights of competitors requiring access to an essential facility. The third broadband issue is to ensure that competitive ISPs have access to the broadband network through interconnection at the logical layer. The primary purpose of seeking to ensure such access is the government’s interest in viewpoint diversity. Viewpoint diversity is furthered by encouraging diversity of applications and content to be available to individuals through broadband access. Diversity in applications and content can be achieved through competition among ISPs. The primary problem is that broadband access providers may refuse to deal with unaffiliated, competitive ISPs. The historical legal principle that evolved to address such refusals to deal is, subject to constitutional limitations, to mandate that access be provided to other speakers who may be competitors. Access mandates have been imposed for both free speech and economic purposes, on owners of channels of communication to other speakers in support of viewpoint diversity and on owners of essential facilities to competitors in a related market, respectively. However, in the *Cable Modem Declaratory Ruling*, the FCC refused to compel cable modem access

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97. See Cherry, supra note 3, at 265.
98. Id.
99. Id.
100. Id.
101. Id. at 265-66.
102. See Cherry, supra note 3, at 266.
103. For the analysis of the third broadband access issue, see generally Cherry, supra note 3, at 265-68.
104. Id. at 265.
105. Id.
106. Id. at 266.
107. Id. at 267.
108. For constitutional limitations on the government’s ability to impose access mandates given the free speech rights of the owners of communication channels, see supra note 70.
providers to provide access to competitive ISPs. Furthermore, in the Wireline Broadband Access Order, the FCC relieved the Bell Operating Companies from the Computer Inquiry requirements to unbundle the transmission component for sale under tariff. Thus, FCC has expressly rejected application of the historical legal principle to mandate access to competitors as alternative speakers. Absent compelling justification for this deviation, the concern is that the goal of viewpoint diversity will be undermined. As a result, the free speech rights of individuals as citizens of a democracy may be adversely affected, as well as the rights of competitive ISPs as speakers.

V. APPLYING “ESSENTIALITY OF ACCESS” ANALYSIS TO THE NETWORK NEUTRALITY DEBATE

The results of the prior “essentaility of access” analysis of broadband access issues reviewed in section IV shows that the FCC has thus far declined to apply to broadband those legal principles that have historically been applied to similar access problems. More specifically, the FCC has declined to impose the following requirements on broadband access providers: common carriage obligations; public utility-type obligations, such as build-out requirements and restrictions on exit; and access to competitive ISPs. As to these broadband issues, the FCC’s decisions are consistent with the arguments of opponents of network neutrality rules described in section II. Furthermore, the potential adverse consequences of the FCC’s actions discussed in section IV are reflected in the concerns raised by the proponents of network neutrality rules. In this way, the prior “essentaility of access” analysis maps nicely onto the network neutrality debate, providing a roadmap for disentangling the myriad claims and assessing appropriate policy design.

A. Misleading Discourse in the Network Neutrality Debate

This section shows how the lineage of legal principles that evolved to address differing forms of access problems is being misrepresented in the network neutrality debate. The law of common carriage has and continues to be mischaracterized, leading to a conflation of the legal bases for addressing access problems for end user customers and competitors. As a result, there is a preoccupation with regulation of the provider-to-provider relationship, and unsubstantiated reliance on antitrust principles to address provider-to-customer access problems. The analytical errors arising from mischaracterizations of the original common carriage legal regime are better understood when policy recommendations are evaluated in terms of their likely sustainability. However,

109. See generally supra note 24.
110. Wireline Broadband Access Order, supra note 29, at ¶ 86. For a discussion of the history of the FCC’s Computer Inquiry proceedings and requirements, see id. at ¶ 21-31.
111. See Cherry, supra note 3, at 265-66.
opponents of network neutrality rules are resisting attempts to frame the debate in policy sustainability terms, so as to steer discourse away from rigorous evaluation of proponents’ claims.

1. Misidentification of the original regulatory regime of common carriage

Mischaracterizations of the law of common carriage and its relationship to other bodies of law are creating a foundational problem for constructive discourse of network neutrality. The common law of common carriers evolved to address problems in the economic relationship between the carrier and customers as end users, but not to address access problems between the carrier and its competitors in complementary markets nor the interconnection among carriers. Statutory obligations were ultimately created to address the problems of access by competitors and for interconnection among carriers. Yet, in the network neutrality debate, common carriage is sometimes characterized as the legal basis for ensuring access for both end users and competitors. Although such a characterization is correct for the statutory version of common carriage under Title II of the Communications Act, it is factually incorrect for the common law of common carriage.

The confusion arises when reference to the statutory version – rather than the common law origins – of common carriage is used as the frame of reference for considering proposed network neutrality rules. By conflating the legal bases of access to end user customers and competitors in terms of the statutory regime, the original common law regime has tended to be ignored, thereby masking its significance for the carrier (provider)-to-customer relationship. The discourse then permits opponents of network neutrality rules to leverage arguments pertaining to the provider-to-competitor relationship to issues related to the provider-to-customer relationship. For example, assertions that common carriage obligations are not required to provide access to competitive ISPs are also unquestioningly applied for access to end users. As a result, analysis of regulation governing the provider-to-customer relationship is inadequately explored and potential adverse consequences are simply ignored.

The misuse of the statutory regime of common carriage as the frame of reference for purposes of evaluating future policy options is not confined to the

112. See James B. Speta, A Common Carrier Approach to Internet Interconnection, 54 FED. COMM. L.J. 225, 258 (2002); see also note 54-55.
113. See Speta, supra note 112, at 260-68.
115. The FCC has contributed to the confusion by the manner in which it discusses why a provider of wireline broadband Internet access service does not have to provide the transmission component on a common carriage basis to ISP’s or end users. See generally Wireline Broadband Access Order, supra note 29, at ¶¶ 102-07. Some opponents of network neutrality rules then cite the Wireline Broadband Access Order in support of their position. See, e.g., Dixon, supra note 20, at 8; Yoo, supra note 22, at 4, 19-20, 44, 47.
network neutrality debate. Cherry explains how this phenomenon is affecting the general discourse of deregulatory policies for communications technologies. For example, the failure to use the original common law regime for common carriage as the basis for evaluating deregulatory policy proposals has led to mischaracterization of the evolution of the transportation deregulatory regimes – claiming that common carriage regulation has been eliminated, when in fact some statutory elements have been modified but the common law elements have been expressly preserved by Congress – and thereby misinforming implications for telecommunications deregulatory policies. In this regard, such analyses have tended to focus primarily on regulation governing the provider-to-provider relationship rather than the provider-to-customer relationship, resulting in misleading conclusions for the former but inadequate exploration of the latter.

As a consequence of this preoccupation with the wholesale relationship, recommendations for deregulatory telecommunications regimes place primary reliance on antitrust principles to address problems of providers’ market power. Nuechterlein and Weiser’s book expresses this bias.

It is therefore not surprising that opponents of network neutrality rules also advocate that regulation, if necessary, be based on antitrust principles. However, whether for purposes of network neutrality or deregulation generally, to advocate primary reliance on antitrust principles ignores important historical facts. Common carriage regulation, both under the common law and statutorily, evolved prior to antitrust regulation. Thus, antitrust law subsequently evolved to augment – that is, to address issues and situations not already encompassed by – common carriage. Furthermore, common carriage regulation evolved into industry-specific regimes (e.g. railroads, telegraph, telephone, airlines) under agency jurisdiction, whereas antitrust law evolved to apply to general businesses. Advocates of a regime based solely on antitrust fail to explain how the issues pertaining to the provider-to-customer relationship, that have been governed by the ex ante rules of industry-specific common carriage regulation, will be adequately addressed by antitrust ex post remedies. This is particularly troublesome given that the evolution of the Internet relied on common carriage regulation of the telecommunications carriers’ physical

117. Id. at 2.
118. Id.
119. Id. at 11.
121. See Sidak, supra note 21; Dixon, supra note 20; Yoo, supra note 22.
122. See Cherry, supra note 3, at 256-58.
123. Id.
124. Id; See Cherry, supra note 116, at 6-9.
infrastructure, and proponents of *network neutrality* have repeatedly stressed this historical reality.125

2. Analytical failure to consider policy sustainability

The preoccupation with antitrust theory is symptomatic of an analytical failure to consider policy change in terms of policy sustainability. In numerous articles and papers, Cherry has stressed in varying ways that sustainable regulatory telecommunications policies require simultaneous satisfaction of economic viability and political feasibility constraints, and that satisfaction of these constraints is particularly challenging for regulatory regimes based on competition rather than monopoly.126 Some articles have examined sustainability of specific regulatory policies, such as universal service,127 rate rebalancing,128 and the effects of detariffing on liability rules.129 Others have broadened the scope of inquiry, looking at sustainability problems arising from fundamental attributes of the U.S. governance structure,130 including — and particularly relevant here — efforts to retrench from public utility regulation131 and to resist extension of common carriage obligations to broadband access.
services.\textsuperscript{132} Although beyond the scope of this article to recount fully here, Cherry explains how the legacy of public utility regulation in the United States constrains the adoptability and retention of new regulatory models for certain essential services, such as telecommunications.\textsuperscript{133} To be able to continuously satisfy the joint conditions of political feasibility and economic viability, deregulatory policy affecting an essential infrastructure, such as telecommunications, will likely require retention of certain attributes of the common law of common carriage and public utilities.\textsuperscript{134} In other words, sustainable deregulatory telecommunications policies will likely require retention of longstanding legal principles that had evolved to address political-economic problems, such as the access problems reflected in the “essentiality of access” typology.\textsuperscript{135} The need to retain elements of common law principles of common carriage and public utilities for policy sustainability is supported by subsequent analysis of the deregulatory regimes for transportation carriers.\textsuperscript{136}

An important implication of sustainability analysis for the network neutrality debate is that, although antitrust regulation does play an important role – as reflected in the Kingsbury Commitment\textsuperscript{137} and the Modified Final Judgment\textsuperscript{138} – it is unlikely to be capable of substituting in whole for the principles embodied in common carriage and public utility law. Unfortunately, opponents of network neutrality regulation seek to deter discussion of policy sustainability problems, thereby masking likely long-term inadequacies of reliance on antitrust-type remedies. In this regard, opponents characterize ex ante network neutrality rules as premature\textsuperscript{139} and as calling for a legislative solution in the absence of a problem.\textsuperscript{140} Such characterizations attempt to truncate discussion of potential long-term consequences, an inquiry that is critical for policy sustainability. Other opponents assert reliance on antitrust remedies based solely on economic

\begin{itemize}
\item \textsuperscript{132} Cherry, \textit{supra} note 3; Cherry, \textit{supra} note 87.
\item \textsuperscript{133} See Cherry, \textit{supra} note 131.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Cherry, \textit{supra} note 116.
\item \textsuperscript{137} In 1912 the U.S. Department of Justice filed an antitrust suit against AT&T, which had refused to interconnect with any other telephone company. AT&T entered into an agreement that, among other things, would allow such interconnection. This agreement became known as the Kingsbury Commitment because of a letter sent to the U.S. Attorney General by Nathan Kingsbury. See Letter from Nathan C. Kingsbury to Attorney General J.C. McReynolds (Dec. 19, 1913) reprinted in 1913 AT&T Annual Report, available at http://www.att.com/history/milestones.html (Mar. 27, 2006).
\item \textsuperscript{139} McCormick, \textit{supra} note 17, at 4; McSlarrow, \textit{supra} note 18, at 2.
\item \textsuperscript{140} McSlarrow, \textit{supra} note 18, at 2.
\end{itemize}
criteria, such as consumer welfare, or economic benefits of deviating from government-mandated rules. These assertions fail to incorporate political feasibility and long-term economic viability constraints into their analyses, which are foundational considerations for policy sustainability.

As discussed in section II, proponents of network neutrality rules have attempted to raise issues of long-term consequences. For example, Cerf stresses that key network principles of the Internet — such as its end-to-end design, layered architecture, and open standards — need to be preserved in order for the Internet to flourish, and that elements of openness and non-discrimination that have long been part of the telecommunications law need to be preserved. Yet, thus far, opponents of network neutrality regulation have declined to engage such proponents’ arguments on the merits. Inertia of the status quo does favor opponents’ political strategy to steer discourse away from rigorous evaluation of proponents claims, because the FCC’s rulings in the Cable Modem Declaratory Ruling and the Wireline Broadband Access Order have already eliminated some common carriage rules that proponents seek.

B. Evolving Interrelationship of Common Carriage and Free Speech

While the communications technology platforms remained distinct, the applicability of common carriage obligations relative to free speech rights of communications providers followed simple rules. Telecommunications carriers, as providers of only transmission facilities, bear the obligations of common carriers but possess no First Amendment rights. Conversely, mass media, as providers of information content over their own facilities, are not common carriers and possess free speech rights. With the elimination of technological entry barriers between telecommunications and mass media, the interrelationship of common carriage and free speech principles is becoming more complex. This section discusses how intermodal competition poses new challenges for maintaining a sustainable balance of common carriage obligations and free speech rights.

141. Sidak, supra note 21.
143. Yoo, supra note 22, at 2.
144. Cerf, supra note 11, at 1.
145. Id. at 7.
146. See generally supra notes 24 & 29.
148. However, the variance in free speech rights across mass media technologies is less clear and still evolving. See supra note 70.
149. See Cherry, supra note 87, at 106-109.
1. Deregulatory Trend May Erode Free Speech Rights of Individuals

The deregulatory era for infrastructure industries in the United States began in the 1970’s, commencing with the transportation sector.\(^{150}\) It reflected a bipartisan political movement favoring deregulation coupled with significant developments, such as containerization, in intermodal transportation competition.\(^{151}\) The deregulatory trend coupled with technological change enabling intermodal competition was later mirrored in the communications sector.\(^{152}\)

One of the consequences of digital convergence is that telecommunications carriers can use their facilities to also provide video programming.\(^ {153}\) As a result, telecommunications carriers acquired free speech rights as providers of content in markets complementary to the traditional common carriage market.\(^ {154}\) This enabled telecommunications carriers to leverage their free speech claims to limit or invalidate economic regulation imposed on them.\(^ {155}\) An early example is the telephone companies’ successful judicial challenges to invalidate the federal telephone-cable cross-ownership ban as a violation of their free speech rights to provide video programming.\(^ {156}\)

Ostensibly consistent with a deregulatory philosophy, the FCC has resisted extension of common carrier obligations to broadband access providers in the *Cable Modem Declaratory Ruling*.\(^ {157}\) Telecommunications carriers have successfully leveraged this result to obtain a “lighter regulatory touch” from the FCC in the *Wireline Broadband Access Order*, which lifted the obligatory common carriage requirements from the provision of wireline broadband Internet access service.\(^ {158}\)

In the *network neutrality* debate, telecommunications carriers are intensifying their efforts to reduce economic regulation. More specifically, telecommunications carriers assert their economic interests – the need to attract investment capital in a competitive broadband market – as the basis for eliminating ex ante rules of common carriage to their broadband service.\(^ {159}\)


\(^{151}\) Id.

\(^{152}\) See id.

\(^{153}\) Id. See also *supra* note 71.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) Id.

\(^{157}\) See generally *supra* note 24.

\(^{158}\) The FCC describes the framework it established for wireline broadband Internet access service as a “lighter regulatory touch.” See *supra*, note 29, at ¶ 3.

\(^{159}\) See McCormick, *supra* note 17, at 3-5; *Online Extra: At SBC, It’s All About “Scale and Scope”*, BUSINESSWEEK (interview with SBC CEO Edward Whitacre) (Nov. 7, 2005), available at http://www.businessweek.com/print/magazine/content/05_45/b3958092.htm?chan=gl. (Mar. 31, 2006); Similar assertions are made by McSlarrow, *supra* note 18, Sidak, *supra* note 21, and Dixon, *supra* note 20.
discussed in section V.A, this strategy is being utilized to justify reliance on antitrust principles rather than forms of ex ante network neutrality rules.

As previously discussed, the elimination of common carrier regulation for the provision of traditional telecommunications services is likely to be unsustainable. The failure to apply common carriage obligations to broadband service poses the question of whether free speech objectives, such as viewpoint diversity, are sustainable. If antitrust principles are insufficient to substitute for the functions that common carriage and public utility obligations have served in providing access, then free speech rights of individuals will be sacrificed to serve economic interests of corporate owners of broadband facilities.

For this reason, Cherry stresses that broadband access issues require deeper inquiry as to the constitutional rights of natural persons as opposed to corporations.160 Given that the constitutional rights of corporations are not coextensive with those of natural persons, it would be permissible for the corporate form to be a factor in weighing the competing interests of broadband providers and access recipients.161 For example, in Austin v. Michigan Chamber of Commerce,162 the United States Supreme Court upheld a Michigan statute that prohibited certain corporations from using corporate treasury funds for independent expenditures in support or opposition of candidates in state elections.163 The Court found that the State had a compelling interest in preventing a specific type of corruption in the political process by corporations due to “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”164 Applying a similar rationale to issues of economic regulation, the free speech rights of individuals as citizens in a democracy could provide the legal basis for government to limit the exercise of economic and political power by corporations to influence broadband policy.

2. Deregulatory Trend May Threaten the Sustainability of the Postal System

To advocate a competitive intermodal communications legal regime based on the elimination or erosion of common carriage obligations and increased reliance on antitrust principles is inconsistent with deregulatory policies in the transportation sector.165 Deregulatory transportation regimes – for railroads, airlines, and motor carriers – still impose common carriage obligations, although in

160. Cherry, supra note 3, at 268-74.
161. See Cherry, supra note 3, at 270.
163. Id. at 668-69.
164. Id. at 660.
varying ways both across and within transportation modes. Furthermore, to serve public utility functions that address provider-to-customer access problems, additional requirements are imposed on carriers and funding programs have been created to support provision of service to targeted customers and serving areas.

The significance of this inconsistency is that deviation in key attributes of economic regulation for communications relative to transportation infrastructure may ultimately lead to devastating, unintended consequences for the United States Postal Service (USPS). The effects of deregulatory broadband policies on the financial sustainability and ubiquitous deployment of the postal system has not been raised in the network neutrality debate, but needs to be included as part of the general evaluation of policy sustainability problems.

“The postal business has always been one of information transportation … [and] throughout history, it has been challenged to adapt to new technologies, from the telegraph, to the telephone, to the fax machine, to the rise of private overnight delivery services and, now, the Internet.” However, the financial viability of the USPS is now being threatened, in large part, by electronic substitution of correspondence over the Internet. “Historically, the Service’s [USPS] business model depended on revenues from increasing mail volumes to cover its expanding infrastructure. This model has proven more difficult to sustain because of the decreasing mail volumes, particularly in First-Class Mail.” Total mail volume has decreased by about 1.8 billion pieces from fiscal year 2000 to 2004. For the first time in history, First-Class Mail volumes have declined for three years in a row. The decline in First-Class Mail revenues – about 5 per cent from fiscal year 2000 to 2004 – is particularly troublesome because First-Class Mail contributes the majority of revenue to institutional costs.

166. The statutory regimes of common carriage were revised and still retained the essential obligations of common carriage under the common law. See Cherry, supra note 116, for an in-depth analysis of the deregulatory regimes for the transportation sector and comparison with evolution of communications deregulatory regimes.

167. The public utility functions are addressed through a combination of modest entry and exit requirements, government ownership of transportation infrastructure and of some carriers (e.g. Amtrak), and universal service subsidy programs for the benefit of targeted groups of customers and geographic areas (e.g. Essential Air Service Program). See id.

168. See notes 169-180, infra and accompanying text.


170. Id. at 6-8.


172. Id. at 3.

173. Id. at 1.

174. Id. at 14.
To address the financial unsustainability of the USPS’s current business model, the President’s Commission Report\textsuperscript{175} recommends that the USPS become a “digital postal network” by taking “full advantage of the Internet and other technological advances to perfect value-added services that will better serve the needs of its customers.”\textsuperscript{176} In this regard, the President’s Commission recommends that the USPS become more Internet-dependent, both for coordinating internal operations and for providing value-added services to customers.\textsuperscript{177} Intelligent Mail would apply a powerful hybrid of leading-edge information technology to the delivery of physical correspondence,\textsuperscript{178} and full-service post offices would be increasingly replaced by the provision of postal services to businesses and homes over the Internet.\textsuperscript{179} The USPS has already made significant changes to its operations and service offerings through increased reliance on electronic network technology and the Internet.\textsuperscript{180}

Given the unprecedented effect of the Internet on the financial viability of the USPS, the implications of broadband access policies for the postal system can be dramatic. Therefore, an appropriate inquiry as to sustainability of policies affecting broadband access to the Internet must include questions related to consequences for the postal system. How will elimination of common carrier obligations in the provision of broadband access to the Internet affect the postal system? Will there be de facto erosion of common carriage of the postal system that adversely affects customers?\textsuperscript{181} Will the geographic availability of postal service significantly deteriorate?\textsuperscript{182} What will be the implications for free speech rights?\textsuperscript{183} How might government interest in viewpoint diversity be adversely impacted – keeping in mind that postal policies have long played a significant role in the evolution of the press and other print media?\textsuperscript{184} How might individuals’ free speech rights as speakers be adversely affected? It certainly seems incongruous to eliminate common carriage obligations for

\textsuperscript{175} See supra note 169.
\textsuperscript{176} Id. at 143.
\textsuperscript{177} Id. at 143-157.
\textsuperscript{178} Id. at 146.
\textsuperscript{179} Id. at 153.
\textsuperscript{181} This question poses the same type of access problem as the first broadband access issue discussed in the essentiality of access analysis in section IV.
\textsuperscript{182} This question poses the same type of access problem as the second broadband access issue discussed in the essentiality of access analysis in section IV.
\textsuperscript{183} This question, as well as the following two questions, poses the same type of access problem as the third broadband access issue discussed in the essentiality of access analysis in section IV.
providers of broadband Internet access while simultaneously increasing the
dependence of the USPS, a common carrier itself, on the Internet. The network
neutrality debate also needs to address implications for the evolving, layered
infrastructure of the postal system.

VI. CONCLUSION

The legal regulatory regimes for communications technologies are evolving
in response to technological, economic, and social change. Current debate
regarding revisions to U.S. communications laws includes issues collectively
referred to as network neutrality. The network neutrality debate is complex, as
the concept of network neutrality is ill-defined and embodies a diversity of goals,
problems, and remedies.

Through the lens of “essentiality of access” – that is, the historical alignment
of access problems to legal principles for an essential service or facility – the
analysis here shows how the discourse of network neutrality is misleading. As
with the general discourse of deregulatory policies in telecommunications,
discourse of network neutrality mischaracterizes the law of common carriage.
The statutory, rather than the original common law, regime for common carriage
is inappropriately used as the frame of reference for considering proposed
network neutrality rules. In so doing, the legal bases for access to end user
customers and competitors have been erroneously conflated, thereby masking the
significance of the common law regime for the carrier (provider)-to-customer
relationship. The discourse then permits opponents of network neutrality rules
to leverage arguments pertaining to the provider-to-competitor relationship to
issues related to the provider-to-customer relationship. As a result, there is an
unsubstantiated over-reliance by opponents on antitrust principles to address
provider-to-customer access problems.

The preoccupation with antitrust theory is also symptomatic of an analytical
failure to consider policy change in terms of policy sustainability. Although
proponents of network neutrality rules have attempted to raise issues of long-
term consequences, opponents have thus far declined to engage such proponents’
arguments on the merits. A skewed discourse that fails to squarely address
corns of policy sustainability has unfortunately been enabled by the FCC’s
rulings in the Cable Modem Declaratory Ruling and the Wireline Broadband
Access Order.185

The misleading discourse and recent FCC rulings also affect the evolving
interrelationship of common carriage principles and free speech rights under
intermodal competition. If antitrust principles are insufficient to substitute for
the functions that common carriage and public utility obligations have
historically served in providing access to customers to an essential service or
facility, then sustainability problems are created for viewpoint diversity and free

185. See supra notes 24 & 29.
speech rights of individuals, all in order to further economic interests of corporate owners of broadband facilities. For this reason, the evolution of broadband access policy requires deeper inquiry as to the constitutional rights of natural persons as opposed to corporations.

Furthermore, the elimination of common carriage obligations for broadband access to the Internet may adversely affect the postal system. The financial viability of the United States Postal Service is now being seriously threatened by electronic substitution over the Internet; and, in order to adapt to this competition, the postal system is becoming increasingly Internet-dependent. It is unclear how common carriage of the postal system can remain sustainable while increasing its dependence on a competing, non-common carriage broadband Internet infrastructure. Instead, unintended consequences may include de facto erosion of common carriage and deterioration of geographic availability of postal service. In this way, the network neutrality debate also needs to address the evolving, layered infrastructure of the postal system.
SPAM ON RYE: HOW WHITE BUFFALO VENTURES V. UNIVERSITY OF TEXAS AT AUSTIN TOOK A BITE OUT OF THE FIRST AMENDMENT

by Anthony H. Handmaker*

I. INTRODUCTION

Do you remember the anticipation that you felt during the law school admission process waiting to hear from schools? Sometimes, you walked slowly to the mailbox. Other times, it was more like a quick dash. You would see the mailbox stuffed with various items, hoping that amongst all of the mail would be an admission packet. As you walked back to the house, you would do a quick sorting of the mail. The trip to the mailbox became more of a burden when you realized how much of the mail was junk. You never ordered the weekly neighborhood circular or the catalogue of upscale designer bed sheets, or a subscription offer to “People” magazine.

As annoying as receiving junk mail can be, the Supreme Court has held that traditional junk mail, even if it is offensive or obscene, is protected by the First Amendment.1 Justice Marshall wrote that the government may not cut off the flow of mail to protect those who might be offended.2 Furthermore, the Court noted that an individual may either throw away the offensive mail,3 or “effectively avoid [looking at the mail] simply by averting [his] eyes.”4 After all, Justice Marshall noted, the “short, though regular, journey from mailbox to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.”5

You probably feel the same frustration when you get emails from people and institutions that you have never communicated with, much less solicited. The author has never thought much about the First Amendment rights of people and corporations who send spam. If you found the information helpful or useful, then you were glad to have received the email, but more often than not, you were annoyed just to be getting the email in the first place. If junk mail is protected by

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2. Id.
5. Id. (citing Lamont, 269 F. Supp at 883).
the First Amendment, then so too should email. Hitting the “delete” button on your computer is probably even less burdensome than having to walk to the garbage can.

Ironically, it was through that form of communication that I first learned of the controversy regarding a case that required courts to determine what First Amendment protections were afforded unsolicited emails, better known as “spam,” that were sent to a public university’s email network. White Buffalo Ventures is a Texas-based corporation that sent out thousands of emails to the University of Texas (“UT”) and was subsequently banned from sending any communication to the University. UT claimed that it was protecting the efficiency of its network and that the Constitution provided the basis for a ban of spam under either the commercial speech doctrine or under public forum analysis. On appeal, the Fifth Circuit affirmed the district court’s decision that, based on the commercial speech doctrine, White Buffalo’s emails should not overshadow the interests of UT.

This casenote considers not only what protection should be afforded spam sent to a public university network, but whether spam should even be treated as commercial speech. It suggests that a public university’s email network should instead be analyzed under the public forum tripartite in light of current First Amendment analysis, rather than focusing on the nature of the email itself. Section II details the development of the commercial speech doctrine, the public fora analysis and presents the difficulties involved with determining whether email is protected by the Freedom of Speech Clause. Section III reviews the court’s decision and the rationale behind its holding that spam is not protected by the First Amendment. Section IV discusses whether summary judgment was appropriate in this case, considers the court’s analysis of the commercial speech doctrine as it relates to a university email network, and suggests that a public university email network should be scrutinized under the public fora analysis. Section V considers the possible ramifications of the Fifth Circuit’s decision.

II. BACKGROUND LAW

The First Amendment provides in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech . . . .” Freedom of speech is such an essential pillar of the United States that the Supreme Court recently noted that

7. See infra note 76.
9. Id. at 378.
11. White Buffalo, 420 F.3d at 378.
12. U.S. CONST. amend. I.
“governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”

In examining whether speech is protected under the First Amendment, the Court has made content-based and non-content based distinctions. Content-based restrictions are subject to strict scrutiny, meaning that such speech will not be banned unless the government can prove that the content to be banned is based on a clear and narrow regulation that was necessary to promote a compelling interest. Strict scrutiny has been applied to categorically ban certain types of speech such as child pornography, defamatory speech of public officials, and obscenity. Additionally, this strict scrutiny standard has been applied to certain types of commercial speech, mostly


14. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring). See also Smolla, supra note 13, at § 2:66. In determining what level of First Amendment protection is available to speech at issue, the authors suggest that “[t]he starting point for bringing order to the contemporary First Amendment language is to subdivide regulation based upon the content of speech from regulation that is not based upon content.” Id. at 2:66.


16. Reno, 521 U.S. at 881-85. The Court struck down the Communications Decency Act (“CDA”) as unconstitutional on the grounds that it would chill speech and reduce all Internet activity to the level “fit for children.” Id. at 875. Although not explicitly stated, the Court applied strict scrutiny analysis because the CDA is a content-based blanket restriction on speech. Id. at 867-68.

17. See New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The Court reasoned that First Amendment protection is essential in furtherance of the debate on public issues and that as a result, public officials may be subjected to “vehement, caustic, and sometimes unpleasantly sharp attacks . . . .” Id. Nevertheless, the New York Times Court created an “actual malice” standard for defamation of a public official in order to protect the fundamental interest of the First Amendment right to free speech. Id. at 283.

18. United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 827 (2000) (holding that because the government did not prove that § 505 of the Telecommunications Act of 1996 was the least restrictive means by which Congress could prevent children from being exposed to “signal bleed,” in which audio and video portions of an otherwise scrambled program could be seen by children, the statute was in violation of the First Amendment). Justice Kennedy, writing for the majority, stated that “[t]he First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.” Id. at 819.
to protect the public from misleading promotion of products or services. More often, however, the Court has allowed government restriction of speech without regard to content. In order to restrict non-content based speech or content-neutral speech, the regulation of speech must be a reasonable restriction of time, place, or manner and must be: 1) content-neutral; 2) narrowly tailored to a significant government interest; and 3) leave open adequate alternative channels of communication.

A. Commercial speech doctrine and the Central Hudson test

Until 1980, commercial speech was not covered by the First Amendment. In *Valentine v. Chrestensen*, the Supreme Court held that the First Amendment imposed no restraint on the government regarding purely commercial advertising and that such speech should be regulated as any other form of business activity. When the primary motive of commercial speech was financial, courts routinely held that such speech was not deserving of First Amendment protection. Commercial speech was not given the same protection as other forms of non-commercial speech, such as political speech or religious speech, perhaps because the courts felt the need to protect consumers from false or misleading advertising. Furthermore, any commercial speech which even suggested a commercial transaction was afforded less protection under the Constitution.

19. See, e.g., Consol. Edison Co. v. Pub. Serv. Comm’n, 447 U.S. 530, 537 (1980) (noting that as a general rule, the government may not restrict expression based on its message or conduct and “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic”).

20. Turner Broad. Sys. v. FCC, 520 U.S. 180, 189 (1997) (recognizing that a content-neutral regulation will be sustained if it advances a substantial government interest and is no more extensive than necessary to further those interests, applying the intermediate scrutiny standard).


23. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that a municipal ordinance that prohibited distribution of printed handbills which advertised the boat and solicited customers, also known as commercial speech, was constitutional because the city has a right to regulate the free use of highways from an undesirable interference by commercial advertising, which might litter the streets or make them unsafe).

24. Id. at 55.

25. See generally Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990) (arguing that the Court’s rationale for providing less protection to commercial speech is not justified).

26. See, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 561-63 (1980) (referring to the commercial speech distinction as “commonsense” because commercial speech not only benefits the economic interest of the speaker, but also provides valuable information to consumers and “furthers the societal interest in the fullest possible dissemination of information”).
The modern commercial speech doctrine was developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, where the Court, openly rejecting *Chrestensen*, offered First Amendment protection to commercial speech. Central Hudson Gas challenged a regulation by the Public Service Commission that banned any advertising which promoted the use of electricity. The Court invalidated the regulation on the grounds that it violated Central Hudson’s right to free commercial speech. The Commission asserted that by promoting the use of electricity, such advertising actually discouraged energy conservation, which was against public policy. Justice Powell, writing for the majority, developed a four part analysis to determine whether commercial speech should be afforded protection under the First Amendment:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The commercial speech doctrine does not provide blanket protection to all speech merely because it is business-related or commercial in nature. Instead, the commercial speech doctrine is primarily used to prohibit or restrict speech, rather than to protect it. At the heart of this test is the balance that courts must strike between permitting the advancement of a substantial government interest

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27. *Central Hudson*, 447 U.S. at 571-72 (holding that a regulation which completely banned an electric company from any advertising that promoted the use of electricity was in violation of the First and Fourteenth Amendments). The Court opined that in no way should their decision be interpreted to mean that conservation of energy is not an important national goal. *Id.* at 571. The Court acknowledged further that regulatory agencies should take the necessary action in furtherance of that goal, but that when this action involves suppression of speech, the action can be “no more extensive than is necessary to serve the state interest” or it will be unconstitutional under the First Amendment. *Id.* at 571-72. Prior to *Central Hudson*, the idea that commercial speech doctrine was deserving of some First Amendment protection was actually recognized by the Supreme Court in *Virginia v. Va. Citizens Consumer Council*, Inc., 425 U.S. 748, 770 (1976).


29. *Id.* at 571 (the court noted that “[i]n the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson’s advertising.”).

30. *Id.* at 560 (“The state agency also thought that promotional advertising would give ‘misleading signals’ to the public by appearing to encourage energy consumption at a time when conservation is needed.”).

31. *Id.* at 566.

32. *Id.* at 563-66; See also NOWAK & ROTUNDA, * supra* note 22, at § 16.30.

33. See, e.g., *Bolger*, 463 U.S. at 64-65; *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 484 (1988) (O’Connor, Rehnquist, and Scalia, JJ., dissenting) (acknowledging that commercial speech is not afforded the same constitutional protection as other forms of speech).
and avoiding unnecessary restrictions on the freedom of speech. If the government interest is not substantial enough to justify a restriction on speech, the regulation will be found to be unconstitutional. Even if there is a legitimate substantial governmental interest, however, if a regulation is not sufficiently tailored, and thus places an unnecessary burden on the commercial speech of a business, it will be found to be unconstitutional. At this point, however, it is unclear whether sufficient “narrow tailoring” requires the regulation at issue to be achieved by the “least restrictive means” to address the governmental interest or can simply be a “reasonable fit” between the government ends and the means by which the government chooses to meet those ends. This distinction will be especially important regarding the level of protection afforded commercial speech in electronic format.

When considering whether commercial speech is deserving of First Amendment protection, one may envision door-to-door magic healers peddling their snake oil from the back of their flat-bed trucks profiting from their gullible audience. Consider the tobacco industry, for example. For years, the tobacco industry blatantly strewn its advertising all over any available media, from television to the sides of busses, proudly touting its products. Upon evidence that tobacco products posed various health risks, the government all but banned tobacco corporations from advertising, despite the First Amendment violations. Commercial speech must be truthful, but it appears that it must also not be harmful to society, in order to survive First Amendment scrutiny. Nevertheless, it is clear that profit-motivated speech is deserving of some protection. Unfortunately, the degree of protection afforded commercial speech is not so clear.

36. *Id.*
37. Board of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 485-86 (1989), *on remand* 764 F. Supp 747 (N.D.N.Y. 1991). The Supreme Court definitively stated that the “least restrictive means” test does not apply to commercial speech. *Id. But see Playboy*, 529 U.S. at 827 (noting that the government must show that it used the least restrictive means to regulate commercial speech or the regulation is unconstitutional); *Bolger*, 463 U.S. at 75 (holding that a statute which is “too sweeping” is generally unconstitutional).
41. *Lorillard Tobacco*, 533 U.S. at 533-34.
42. *Id.* at 553 (“For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment”).
43. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72 n.24 (noting that commercial speech requires a different degree of protection than noncommercial speech, but that commercial speech does fall within the scope of the First Amendment).
B. Fora analysis: Public forum, limited public forum, or nonpublic forum?

Forum analysis only applies to government-owned property and does not apply to private property or media. Fora analysis: Public forum, limited public forum, or nonpublic forum? When the government restricts speech on government-owned property or on a government-owned medium, a court analyzes those restrictions on speech based on the type of forum that is involved in the action. Determining whether government-owned tangible property is a public or nonpublic forum for the purpose of public access to freedom of speech is rooted in the idea that forum analysis is a balancing test between the government’s interest in restricting use of the property and the public’s interest in access to that property.

In Perry Education Assn. v Perry Local Educators’ Assn., the Court divided government-owned property into three kinds of fora: traditional public fora, limited public fora, and nonpublic fora in order to determine the degree of public access available on government-owned property. Public fora consists of traditional public property such as sidewalks, public parks and streets and are generally available for the purposes of assembly, communication between citizens, and open discussion regarding public questions. Limited public fora include public property that is opened for use by the public as a place for expressive use where the state is not required to create the forum in the first place. Finally, nonpublic fora encompass public property that is not by tradition or designation a forum for public communication.

The Perry Court ruled that the State may restrict access to a school’s internal mail system, being a nonpublic forum, as long as the regulation of speech was reasonable and not an attempt to suppress freedom of speech merely because

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46. See id. at 800.

47. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45-46 (1983). In Perry, the Supreme Court created the tripartite forum analysis for determining how much First Amendment protection is afforded on government property. Id. There are three levels of scrutiny that the Court applied with respect to government-owned property. Id. Regulation of speech on traditionally open public property for expressive activity, such as parks and streets, is based on strict scrutiny. Id. Strict scrutiny is also applied to government property that has been specifically designated for public expression. Id. The Court would apply a reasonableness standard to regulation of speech on property that the government has not dedicated its property to speech activity. Id.


49. Perry, 460 U.S. at 45-46.

50. Id. at 46.
public officials did not agree with the speaker’s viewpoint. The Perry tripartite analysis has been applied to determine the level of access available to the sidewalk in front of the post office, the right to appear in a political debate on a state-owned public television channel, and even to license plates.

In order to better assess First Amendment scrutiny, the Court further differentiated between the traditional public forum (streets and parks) and the designated public forum, in which the government opened an otherwise nonpublic forum for discussion on issues of public concern. For example, when a university makes its meeting facilities “generally open” to registered students, it creates a designated public forum, and cannot discriminate among the groups based on content. In order to create a designated public forum, the state must intentionally create a nontraditional public forum open to public discussion with general access to a group of speakers and not specifically limit access to individual speakers.

In International Society for Krishna Consciousness, Inc. v. Lee, the Supreme Court took a “forum based” approach to hold that an airport terminal was a nonpublic forum and that for First Amendment purposes, any regulation on

51. Id. at 46-47 (citing United States Postal Serv. v. Council of Greenburgh Civic Assns, 453 U.S. 114, 131 n.7 (1981) (holding that access to free expression is not guaranteed merely because the property is government-owned and that the State may create time, place, and manner regulations, as well as other restrictions that reserve the forum for its intended purpose, based on a reasonableness standard)).

52. United States v. Kokinda, 497 U.S. 720, 727-28 (1990) (noting that a sidewalk between the parking lot and the post office is not a traditional public forum and that public access to the sidewalk for purposes of expression may be restricted as long as the restriction is reasonable).

53. Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 676 (1998) (holding that a political debate between candidates for a congressional seat on a state-owned public television program was a nonpublic forum and that exclusion of Forbes from the debate was reasonable and viewpoint-based). “The Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.” Id. at 677 (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985)).

54. Perry v. McDonald, 280 F.3d 159, 171-72 (2d Cir. 2001) (holding that an automobile license plate is a nonpublic forum and Vermont has the right to restrict free speech and expression of a vanity plate that is offensive, as long as such restriction is reasonable and viewpoint-neutral).

55. See Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 346-47 (5th Cir. 2001). The court noted that “the level of scrutiny applied to government regulation of speech in a ‘limited public forum’ differs from that applied to regulation of speech in a ‘designated public forum’ . . . .” Id. at 346.

56. Widmar v. Vincent, 454 U.S. 263, 267 (1981) (holding that the University of Missouri at Kansas City, a state university could not prohibit a registered student group from using its facilities for religious worship because the regulation of speech may not be content-based).

57. Ark. Educ. Television Comm’n, 523 U.S. at 677. A designated public forum is not created by government inaction or limited discourse, but rather by the affirmative, intentional opening of a nontraditional public forum to public discourse. Id.
speech must merely be reasonable. The owners of the airport terminal could limit access to only those with legitimate business, but instead the airport authorities opened its terminal to numerous businesses such as restaurants, banks, and cocktail lounges. In a concurring opinion, Justice O’Connor likened an airport terminal to a shopping mall and contended that the restrictions must be reasonably related to maintaining the environment that the airport intentionally created. Justice O’Connor also notes that the forum doctrine must not be restricted based on “historical pedigree,” because to do so would render the doctrine useless in times of “fast changing technology” and lead to a “serious curtailment of our expressive activity.”

Depending on the forum, as a general rule, the state may place restrictions on speech as to time, place, and manner of speech as long as the restrictions are reasonable and content or viewpoint-neutral. Normally, the Court will uphold these restrictions when they are content-neutral and narrowly tailored to serve a significant government interest, as long as the regulation also leaves open ample alternative channels of communication. The Supreme Court has acknowledged that while a public university campus has many characteristics of a public forum, it does not fall within the traditional public forum. Courts have struggled with the distinction between a designated public forum and a limited public forum. Furthermore, the Fifth Circuit has had similar difficulty discerning into which public forum category a university should fall.

C. The Internet and electronic mail

The personal computer and the Internet have forever changed communication. Electronic mail (“e-mail”) has become so common that it has

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59. Id. at 686-88 (O’Connor, J., concurring).
60. Id. at 689 (O’Connor, J., concurring).
61. Id. at 697-98 (Kennedy, J., concurring).
62. Perry, 460 U.S. at 45.
63. Id.
64. Widmar, 454 U.S. at 267 n.5.
65. Id. (“A university differs in significant respects from public forums such as streets or parks or even municipal theaters”).
66. See, e.g., Chiu, 260 F.3d at 345 n.10. The Supreme Court at one time referred to limited public forums as being a subcategory of designated public forums, but more recently referred to limited public forums as a type of nonpublic forum with limited access. Id. Compare Ridley v. Massachusetts Bay Transp. Authority, 390 F.3d 65, 76 n.4 (1st Cir. 2004) (noting that the phrase “limited public forum” has been used synonymously with “designated public forum” and also as a synonym for nonpublic forum).
67. Chiu, 260 F.3d at 346-47.
68. See Reno, 521 U.S. at 849-50. The Supreme Court describes the Internet as an “international network of interconnected computers . . . [that] enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world.” Id.
been recognized by the Uniform Commercial Code as a form of writing that will bind a party to a contract. Furthermore, business use of email has continued to rise, perhaps because of the ease of use. It is possible to send out hundreds of emails faster, cheaper, and more efficiently than using standard mail. A person need only type in the recipients of the email and click the “send” button. Companies are able to send mass mailings to potential customers at little or no cost, compared to the cost of traditional advertising through the post office. “Junk” mail is a phrase often used to describe these unsolicited postal mailings. It is also known as “saturation” mailing because it literally saturates every address in the area with mail.

The Internet has become an effective way for businesses to peddle their wares through “spam” email, the electronic version of junk mail. As of November 2004, it was estimated that 12.4 billion “spam” emails were sent per day. Spammers legally obtain email addresses through either the Freedom of Information Act or a state’s public information act. With an email list, a business may inundate an email user’s “mailbox” with spam. Users might receive tens or hundreds of unsolicited spam emails per day, promoting anything from lower interest rates to debt reconsolidation, legal prescription drugs over the Internet, penile enhancement procedures, or free vacations at the location of

70. K. Robert Bertram, Avoiding Pitfalls in Effective Use of Electronic Mail, 69 Pa. B.A. Q. 11, 11 (1998) (“[T]echnological advances . . . provide for increased productivity, lower cost, and generally the opportunity to increase the bottom line. Many companies . . . have implemented email . . . with or without access to the Internet.”).
74. See, e.g., Morrison v. Hall, 261 F.3d 896, 903 (9th Cir. 2001). Junk mail is described as massive bulk rate third and fourth class mail that is unsolicited, such as catalogues and brochures. Id.
75. United States Postal Service – A Guide to Mailing for Businesses and Organizations – Discount Mailing Services, available at http://pe.usps.gov/text/dmm200/discount.htm (last visited on Sept. 15, 2005). Saturation mailing is one way in which an advertiser may distribute information to potential consumers. Id. The Postal Service provides discounts based on the total number of flyers, sorting process, and whether the mail is to be sent to every address within a zip code. Id.
77. Alan Rowe, Spam: Some facts and figures, Nov. 24, 2004, available at http://www.spamfo.co.uk/component?option=com_content/task,view/id,183/itemid,2/ (last visited Sept. 15, 2005). Of the 31 billion emails sent daily, nearly 40% were thought to be spam emails. Id.
your choice." Spam has “quickly become one of the most pervasive intrusions in the lives of Americans.”

D. Cyberspace: I guess this must be the place

It is unclear whether the public forum doctrine is applicable to electronic networks, such as the Internet. As one court put it, “[n]ews groups are interactive ‘places’ on the Internet into which anyone with access . . . may place graphic or text messages.” The Supreme Court described the Internet and cyberspace as a “unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.” In United States v. American Library Assoc., Inc., the Supreme Court ruled that Internet access in public libraries was neither a traditional nor a designated public forum since Internet access was provided not to encourage public discussion, but to facilitate research, learning, and recreational pursuits by providing Internet access. Regarding regulation of the Internet, it has been said that “[t]he State has absolutely no interest in, and does not regulate, this

81. Id.
83. Loving v. Boren, 956 F. Supp. 953, 954 (W.D. Okla. 1997), aff’d on alternative grounds, 133 F.3d 771 (10th Cir. 1998). Although this case dealt with obscene material on a university server, dicta noted that the Oklahoma server and Internet are not a public forum because they were never open to the general public or open for public communication and are primarily dedicated to academic and research uses. Id. at 955. While this case provides some indication as to whether the Internet is a place, deserving of public forum analysis, it is not applicable to university email, as will be discussed infra.
84. Reno, 521 U.S. at 851. The author acknowledges that this case dealt with the Communications Decency Act of 1996, which made it unlawful to knowingly transmit, over the Internet, obscene or indecent material to anyone under 18 years old and that the Court held that provisions of the Act abridged the First Amendment and were thus unconstitutional; however, the case provides a thorough understanding of cyberspace and the vastness of the Internet. The focus of this paper is limited to First Amendment analysis and is not confronting the statutory aspects of the case at bar, the CAN-SPAM Act.
85. United States v. Am. Library Ass’n, Inc., 539 U.S. 194, 205-06 (2003) (addressing whether the Children’s Internet Protection Act that requires public libraries receiving Federal funding for Internet access to install software which blocks obscene or pornographic material and to prevent access to harmful material to minors). The Supreme Court did not believe that Internet access fell neatly into one of the public forum classifications. Id. at 204-07.
86. Id. at 206-08. The Court noted that public libraries must have broad discretion to determine what information should be available to its patrons and that to require a library to hand-filter each website is overly burdensome. Id. Rather, the Court thought that since a library has the discretion to choose which books to include in its collection, that the library should have similar discretion to block online pornography. Id.
exchange of information between people, institutions, corporations and governments around the world.\textsuperscript{87}

The intersection between First Amendment forum analysis and the vast freedom afforded to electronic networks has continued to be problematic and most courts have avoided the issue altogether.\textsuperscript{88} No court has addressed the application of the public forum doctrine to a public university’s email network.\textsuperscript{89} Although the Fifth Circuit recently had the opportunity, it declined to address this issue, choosing instead to rely upon the \textit{Central Hudson} commercial speech test to determine whether First Amendment protection is available to a company that sends unsolicited emails to a university email network.\textsuperscript{90}

\textbf{III. STATEMENT OF FACTS, PROCEDURAL HISTORY, AND HOLDING}

\textbf{A. The Facts}

White Buffalo Ventures, a limited liability company ("White Buffalo") based in Austin Texas, is a company that designs, operates, and maintains several online dating services.\textsuperscript{91} The University of Texas at Austin is a public college, containing nearly 59,000 students and faculty with "@utexas.edu" email addresses.\textsuperscript{92} In late December 2002, White Buffalo launched LonghornSingles.com, a dating service directed toward those 59,000 students and faculty.\textsuperscript{93}

In April 2003, White Buffalo requested the list of email addresses of students who attend UT, pursuant to the Texas Public Information Act, 552.026, and the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g), which require that directory information, such as email addresses, must be made

\begin{itemize}
\item \textsuperscript{87} Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436, 442 (E.D. Pa. 1996) (mem.). This case involved the dissemination of unsolicited emails over the Internet, but because the forum in question was privately-owned, the public forum analysis was inapplicable. \textit{Id}.
\item \textsuperscript{88} \textit{See Reno}, 521 U.S. at 870 (acknowledging that there are no cases which provide a framework in which to analyze the type of First Amendment protection applicable to the Internet).
\item \textsuperscript{89} \textit{See White Buffalo}, 420 F.3d 366 (5th Cir. 2005). The court stated that because UT’s anti-spam policy is constitutional under the commercial speech test, it is unnecessary to consider what type of forum protection is available to the network. \textit{Id}. at 378.
\item \textsuperscript{90} \textit{White Buffalo}, 420 F.3d at 378. The court held that the University’s information technology policy “survive[d] First Amendment scrutiny despite its failure to justify that policy in relationship to the server efficiency interest . . . [and that] UT’s anti-spam policy is constitutionally permissible under \textit{Central Hudson}. Because we so decide, we need not (emphasis added) address what type of First Amendment forum a public university email network constitutes.” \textit{Id}.
\item \textsuperscript{91} \textit{Id}. at 368.
\item \textsuperscript{92} Brief for Appellant at 8-9, White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366 (5th Cir. 2005) (No. 04-50362).
\item \textsuperscript{93} Brief for Appellant at 7, White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366 (5th Cir. 2005) (No. 04-50362).
\end{itemize}
available upon request. White Buffalo obtained a list of all students with the domain name ending in “@utexas.edu” and sent approximately 55,000 unsolicited emails promoting its online dating service, LonghornSingles.com, to UT students. The email messages were sent to alert UT students about the dating service, in order to make them aware of the site. According to White Buffalo, the free site “is about bringing people together. Not just people who happen to be single, but people who already have something in common: their affiliation with or affinity for the University of Texas.”

UT asserted that its information technology (“IT”) policy is designed to facilitate and encourage communication between students, faculty, and staff (“users”) at UT, as well as to provide a framework to further teaching, research, and public service. UT has a specific anti-spam policy, designed to block access to UT’s server, to promote efficient use of limited resources, and to stop unwanted and other junk email. UT received a number of complaints, and after investigating, the University Information Technology Department (“ITC”) determined that White Buffalo did in fact send nearly 55,000 unsolicited emails to “@utexas.edu” email addresses. UT notified White Buffalo with a cease and desist letter, demanding that White Buffalo stop spamming “@utexas.edu” addresses. When White Buffalo refused to comply with the letter, UT blocked all incoming email from IP address 207.195.226.25 on their network router, which successfully stopped any email originating from White Buffalo from reaching any of UT’s computers.

B. Procedural History

In state court, White Buffalo obtained a temporary restraining order to enjoin UT from blocking its emails. After UT removed the case to federal court on the grounds of federal question jurisdiction, the district court denied the

94. White Buffalo, 420 F.3d at 369. White Buffalo requested all “non-confidential, non-exempt email addresses” which it may lawfully seek under the Public Information Act. Id.
95. Id.
96. Brief for Appellant at 7, White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 320 F.3d 420 (5th Cir. 2005) (No. 04-50362).
99. Id.
101. White Buffalo, 420 F.3d at 369. Note also that spamming refers to the repetition of the same response over and over. See White Buffalo, 2004 WL 1854168 at *1, n.1.
103. White Buffalo, 420 F.3d at 370.
After discovery, both parties moved for summary judgment and the district court entered summary judgment in favor of UT.\textsuperscript{105} White Buffalo argued that UT's anti-spam policies were not only preempted under the CAN-SPAM Act, but that UT violated its First Amendment rights by blocking its emails to the UT servers.\textsuperscript{106} At the time of trial, UT had blocked between 1,500 and 2,000 ISP addresses from sending email to UT.\textsuperscript{107} Nonetheless, the district court did not think that a rational factfinder could find for White Buffalo based on the evidence presented and entered summary judgment in favor of UT.\textsuperscript{108} White Buffalo appealed to the Fifth Circuit Court of Appeals.\textsuperscript{109}

\section*{C. The Holding}

\subsection*{1. Preemption and the CAN-SPAM Act\textsuperscript{110}}

The doctrine of preemption allows federal legislation to override or make ineffective coexisting state law.\textsuperscript{111} The Fifth Circuit held that the preemption provision of the federal anti-spam statute, the CAN-SPAM Act, did not preempt UT's anti-solicitation policy because of an ambiguity in the statute.\textsuperscript{112} The court noted that no court had yet considered the preemption clause of the CAN-SPAM Act and therefore, this was truly an issue of first impression.\textsuperscript{113} White Buffalo argued that because UT is a state entity and that the email is neither false nor fraudulent, the CAN-SPAM Act preempts UT's policy of filtering and blocking

\begin{thebibliography}{99}
\bibitem{104} Id.
\bibitem{105} Id.
\bibitem{106} \textit{White Buffalo}, 2004 WL 1854168, at *2.
\bibitem{107} \textit{White Buffalo}, 420 F.3d at 376.
\bibitem{109} \textit{White Buffalo}, 420 F.3d at 369.
\bibitem{110} Preemption of the CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713) is outside the scope of this casenote and the discussion is being provided merely as another basis upon which the court ruled in favor of UT.
\bibitem{111} \textit{See} Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516-17 (1992) (interpreting the intent or purpose of the federal law to preempt some of the state products liability actions against tobacco manufacturers).
\bibitem{112} \textit{White Buffalo}, 420 F.3d at 372. The preemption clause, §7707(b)(1), provides in pertinent part, that this section “supersedes any statute, regulation, or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages, except to the extent that [such a regulation] prohibits falsity or deception . . . of commercial electronic mail message . . . .” \textit{Id.} at 371. The Fifth Circuit noted that there were two competing interpretations of how much power is afforded a state in blocking commercial spam. \textit{Id.} at 372. Under the first, a state entity may not regulate commercial speech except as relevant to the authenticity of the source and content of the commercial speech. \textit{Id.} Under the second interpretation, a state entity, provided that it is an Internet access provider, may implement more restrictive measures toward commercial speech. \textit{Id.} See also § 7701(c) relating to preemption of a policy that regulates Internet access service. \textit{Id.} at 371.
\bibitem{113} \textit{Id.} at 371.
\end{thebibliography}
White Buffalo’s email. The court determined that because Congress did not expressly state whether a state entity, acting as an Internet service provider, is preempted by the CAN-SPAM Act, UT’s policy of blocking emails through the use of filtering devices was not preempted because of the strong presumption against preemption.  

2. First Amendment protection under the commercial speech doctrine

The Fifth Circuit dismissed any discussion of what type of First Amendment forum a public university email network constitutes since UT’s anti-spam policy met the commercial speech test. The court noted that a state entity may argue that a statute is predicated upon multiple interests and that as long as one of those interests is substantial, the statute is valid. It was therefore unnecessary to discuss whether a university, as an Internet service provider, was a designated public forum or limited public forum and what level of scrutiny would apply to UT’s policy.

After scrutinizing White Buffalo’s emails under the Central Hudson test to determine whether regulation of commercial speech was legal, the Fifth Circuit held that UT’s anti-solicitation policy to block unsolicited e-mails was a permissible regulation of commercial speech and not a violation of White Buffalo’s First Amendment rights. The Circuit Court did not accept UT’s argument that its policy was needed to ensure “server efficiency.” Noting that there was no evidence that lawful “time- and volume-restricted commercial spam” would compromise server efficiency and testimony showed that White Buffalo could have sent a limited number of emails at off-peak times and not hindered server efficiency, the court found that the ITC policy was more extensive than necessary to serve that purpose. It also showed that UT’s list of

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115. White Buffalo, 420 F.3d at 370.
116. Id. at 378. See also White Buffalo, 2004 WL 1854168, at *6, for a general discussion of whether UT’s network is a public forum. The district court concluded that it was unnecessary for it to determine whether the network is a non-public forum because it upheld the validity of UT’s policy under Central Hudson, regardless of the type of applicable forum. Id.
117. Id. The court relied upon its ruling in Bolger, 463 U.S. at 75, where the United States Post Office attempted to prevent a manufacturer from sending unsolicited mail concerning the use of contraceptives. The Bolger Court held that 39 U.S.C. § 3001(e)(2), making it illegal to send unsolicited mail to persons concerning contraception and the use of contraceptives, was unconstitutional because it deprived the senders of their First Amendment right to free speech. Bolger, 463 U.S. at 75. Despite the fact that appellants asserted multiple societal interests in the prevention of unsolicited mail, the Court held that the statute was unconstitutional. Id.
118. White Buffalo, 420 F.3d at 378.
119. Id. at 378 (holding that UT’s anti-spam policy is “constitutionally permissible under Central Hudson”).
120. White Buffalo, 420 F.3d at 377.
121. Id.
blocked IP addresses did not distinguish between IP addresses sufficient to warrant regulation.  

The court was persuaded, however, by UT’s argument that its policy advanced the need for user efficiency. UT has an interest in maintaining its network and protecting its users from the deluge of unwanted commercial email so that users do not have to spend the time to sort through, read and delete spam. ITC policy allows UT to completely block a site when there have been several filed complaints. The court reasoned that the university’s interest in protecting “user efficiency” was not any more extensive than necessary to “keep community members from wasting time identifying, deleting, and blocking unwanted spam . . . as long as the blocks [were] content- and viewpoint-neutral.” Ultimately, for the purposes of summary judgment, the court held that the ITC policy passed First Amendment scrutiny. As a result of this decision, UT could “categorically exclude all unsolicited commercial bulk email” from its network, despite the fact that UT failed to show that its policy was necessary for server efficiency.

IV. ANALYSIS

A. Summary Judgment and Content-based results

1. Summary Judgment analysis

The Fifth Circuit should have ruled that White Buffalo was protected by the First Amendment, or at least denied summary judgment. Summary judgment may be granted if, by a preponderance of evidence, the moving party shows that there is no genuine issue of material fact and is therefore entitled to judgment as a matter of law. In determining whether to grant summary judgment, the Court should view the evidence in the light most favorable to the nonmoving party. The summary judgment standard is whether a reasonable trier of fact could find

122. Id. Note that the distinctions made were between (1) truthful commercial messages and obscene images; (2) commercial emails with an unsubscribe option and those without that option; (3) emails sent during peak hours and those that were not; and (4) email that originates from an authentic source and email that does not. Id.
123. White Buffalo, 420 F.3d at 376.
124. Id. at 374-75.
125. Id. at 369-70.
126. Id. at 376, (emphasis added).
127. Id. at 378.
128. Id. at 377.
129. Id. at 378.
for the nonmoving party, based upon the evidence before the court. The moving party must show that there is no evidence to support the nonmovant’s case and therefore, no genuine issue of material fact. The nonmovant must then prove by affidavits or other court documents that there is a genuine issue for trial.

White Buffalo, as a nonmoving party, need not prove its case in order to overcome summary judgment, but it must at least make a prima facie showing of the essential elements of its claim that UT’s anti-spam policy violated its First Amendment rights.

The Fifth Circuit marched through the *Central Hudson* commercial speech test and concluded that because White Buffalo failed to show that UT’s anti-spam policy was prohibited under First Amendment scrutiny, summary judgment was affirmed. The court noted that there was an insufficient fit between the ITC policy and the asserted interest in server efficiency, but not enough to give rise to a genuine issue of material fact. However, according to the court, UT demonstrated that a reasonable factfinder would have to find that user efficiency was a legitimate government interest and that its policy was reasonably tailored to meet that interest, thus satisfying the *Central Hudson* test. As discussed *infra*, it is questionable whether UT’s policy was too extensive to meet its interest in “user efficiency.” By applying the *Central Hudson* test to spam, the fifth circuit has summarily judged all commercial email outside the full scope of First Amendment protection. Summary judgment should be granted when a

132. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986) (commenting that summary judgment will not be granted when there is a material issue in dispute because a reasonable jury could find in favor of the nonmoving party). The threshold question is whether there are any genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Id.*
134. *Id.* at 322-23.
135. *See* Fed. R. Civ. P. 56(e) A party may not merely rest upon the allegations or denials of the adverse party’s pleading, but must actually set forth “specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment if appropriate, shall be entered against the adverse party.” *Id.*
136. *White Buffalo*, 420 F.3d at 368-69. The author realizes that White Buffalo filed a motion for summary judgment, but because the District Court dismissed the motion, the standard for summary judgment will be reviewed based on UT’s motion, as though White Buffalo is the nonmovant. *Id.*
137. *Celotex*, 477 U.S. at 324 (recognizing that the nonmovant does not have to produce evidence that would be admissible at trial and may use any evidentiary material enumerated in Rule 56(c) to overcome summary judgment).
139. *Id.* at 376-77.
140. *Id.*
141. *Id.* at 374 (“Whether UT has violated White Buffalo’s First Amendment rights turns on the resolution of the four-part commercial speech test in Central Hudson . . . Resolving this issue in favor of UT, we decline to reach the issue of whether UT’s email servers constitute public fora.”).
party fails to meet the essential elements of its case, but not when the judge admits that there may be a material fact in dispute for a reasonable jury to determine.

2. Content-based effects

The Fifth Circuit did not discuss whether blocking White Buffalo from sending any email to UT servers was based on the content of the email or the idea being promoted. The court did not even address whether there was a content-based issue at hand, yet its decision certainly allows for such a conclusion. The court noted that UT “should use [certain types of email filters] rather than categorically exclude all unsolicited commercial bulk email.” Furthermore, the court stated that UT does not use such filters because “legal spammers” are “misusing” the system and not overburdening it. It is as if the court has decided that some spam is good and some is bad, but that this decision is not based on the content of the emails. This is illogical. UT did not block White Buffalo from sending any email because the emails were straining the server, but rather because these emails “have been identified as problematic by complaint, system monitors, or other means.”

If White Buffalo could not send emails to UT because the specific emails were “problematic” and undesirable to a few and the court determined that even though these emails did not overburden the system, then the court has allowed UT to make a content-based decision on the type of emails that it would allow a public university to accept. This is clearly not the message that this case was intended to establish, for if a public university may decide which emails to

143. See supra note 132 and accompanying text.
144. White Buffalo, 420 F.3d at 374 n.15. The court noted that it did not need to determine whether UT was regulating incoming email based on content because the commercial speech doctrine was applicable. Id.
145. Id. at 374-78. Under the Central Hudson test, it is unnecessary for a court to consider whether the regulation on speech is content-based. Id.
146. White Buffalo, 420 F.3d at 377.
147. Id.
148. Id. at 375.
149. For a general discussion of content-based and content-neutral scrutiny and First Amendment protection, see Smolla, supra note 13, at § 2:66. It is clear that content-based restrictions on speech are subject to strict scrutiny. See, e.g., Playboy, 529 U.S. at 814 (2000), where the Court stated:

No one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent. The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny.

It follows then that if the state totally bans email from a specific IP address but not from other IP addresses that the email should be subject to strict scrutiny and the state bears the higher burden of proving that the regulation is narrowly tailored to promote a compelling government interest.
accept, in addition to determining whether email is fit for sending, it would be no stretch to then monitor personal email for its contents as part of a university’s information technology policy.

Nonetheless, the First Amendment protects speech regardless of whether citizens find it offensive, and the White Buffalo court failed to address such ramifications when it entered summary judgment in favor of the University of Texas.

It is arguable that the fourth prong of the Central Hudson commercial speech test, discussed infra, takes into account the “compelling government interest” when it requires that a regulation of speech must be no “more extensive than is necessary to serve that interest.” However, the Fifth Circuit did not find that UT’s policy even met this lower scrutiny standard as it related to server efficiency and summarily closed off First Amendment protection to commercial email speech on the grounds that blocking unsolicited commercial emails promotes user efficiency. The court noted that UT may block spam as long as the blocks are content-neutral, and yet its decision to grant summary judgment has all but ignored its content-based decision.

B. Commercial Speech: Spam under Central Hudson

Initially, commercial speech was afforded no protection under the First Amendment, but by 1976, the Supreme Court began to provide at least some protection from state restrictions. As mentioned previously, out of Central Hudson arose the four prong test to determine if commercial speech is protected by the First Amendment. Justice Powell, writing for the majority, noted that

150. Playboy, 529 U.S. at 826 (“The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.”).

151. White Buffalo, 420 F.3d at 378.

152. Central Hudson, 447 U.S. at 566.

153. White Buffalo, 420 F.3d at 377. The court stated:

Our conclusion that, for summary judgment purposes, there is an insufficient fit between the ITC policy and the asserted interest in server efficiency is of little moment in the spam context. The server efficiency interest is almost always coextensive with the user efficiency interest, and the fit is sufficient for the latter; but declaring server integrity to be a substantial interest without evidentiary substantiation might have unforeseen and undesirable ramifications in other online contexts.

154. Id. at 376.

155. Id. at 376. The court has “little problem” realizing that UT’s interest is no more extensive than necessary. Id. Anyone can see that “to keep community members from wasting time identifying, deleting, and blocking unwanted spam, UT may block otherwise lawful commercial spam.” Id. (emphasis added).

156. Chrestensen, 316 U.S. at 55. In fact, it is surprising to note that in this unanimous decision, Justice Roberts, writing for the majority, did not even cite one authority to cut loose “purely commercial advertising” from the strings of the First Amendment. Id.


158. Central Hudson, 447 U.S. at 566.
commercial speech would not be banned unless it were somehow “flawed,” either because it was misleading or because it was related to unlawful activity, asserting that the First Amendment prohibits content-based regulation of messages and that such regulation must be proportional to the state’s interest, or it is presumptively unconstitutional. It might appear from this four prong analysis that determining whether First Amendment protection is available to commercial speech is simply a matter of plugging in the controversial speech and the regulation, pushing a few buttons, and voila!, out comes the answer. It is not that easy, as the results have been confusing at best.

Under the Central Hudson test, a court must first determine whether speech is unlawful or misleading. In this case, emails were sent to UT students and faculty, providing an opportunity to meet other like-minded singles by signing up for the free dating service. As the first prong is a low threshold, both White Buffalo and UT agreed that the emails promoting LonghornSingles.com were legal and truthful.

Second, a court must discern whether the state’s interests are “substantial,” meaning that the state’s interest in regulating an activity must be sufficient to support restricting otherwise free speech. The Fifth Circuit divided UT’s interest into two main assertions: (1) that email spam slows down efficient communication, by affecting user efficiency; and (2) that email spam affected UT’s server efficiency. UT asserted that it has a substantial interest in managing and blocking unsolicited commercial email to reduce the impact of spam on the university’s servers and on its users, namely faculty, staff, and students. UT also noted that it has a substantial interest in managing its facilities and resources “in a manner that promotes the university’s mission of teaching, research, and service.”

In addition, the district court opined that state universities have a substantial interest in protecting their servers from spam, and since UT is a state university,

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159. Id. at 566, n.9.
160. Id. at 564. Justice Powell notes that the limitation on expression must be carefully crafted to achieve the state’s goal and if a more limited restriction were possible, then the state restriction will not survive First Amendment scrutiny. Id.
161. See R.A.V. v. City of St. Paul, 505 U.S. 377, 427-28 (1992) (Stevens, White, and Blackmun, J.J., concurring) (asserting that the categorical approach including commercial speech and public fora is unworkable and “ultimately futile”). Justice Stevens noted that by categorizing speech, the Court has narrowed unprotected speech so much that the all-or-nothing approach is unworkable. Id.
162. Central Hudson, 477 U.S. at 566.
163. White Buffalo, 420 F.3d at 369.
164. Id. at 374.
165. Central Hudson, 477 U.S. at 566.
166. White Buffalo, 420 F.3d at 374.
167. White Buffalo, 420 F.3d at 374-75.
168. Brief for Appellee at 7, White Buffalo Ventures, LLC v. Univ. of Tex. at Austin, 420 F.3d 366 (5th Cir. 2005) (No. 04-50362).
it therefore had a substantial interest. The Fifth Circuit acknowledged that the substantial user interest has been met because UT has a substantial “gatekeeping interest” in protecting its users from the hassle of having to take the time to delete unwanted emails. UT’s success with its user efficiency argument was critical to the Fifth Circuit’s decision to uphold the grant of summary judgment because the circuit court was not persuaded that the facts proved UT’s “server efficiency” rationale, but the court noted that the “server efficiency” interest is one of the most over-used claims involving Internet litigation and requires more than a mere “judicial rubber-stamp” to survive. Unfortunately, the analyses of both the district and circuit courts were insufficient.

It seems as though both courts overlooked the meaning of substantial as it relates to both user and server efficiency. Rather than being a low threshold, it is as if there is no threshold at all to meet the “substantial interest” requirement. According to both of the White Buffalo courts, if a university determines that it has an interest in preventing unwanted email from clogging its server, then the interest is considered judicially substantial. The UT network, servers, and computers are provided for users to increase communication via email, Internet research, and access to information.

When there are too many people accessing information at the same time, the infrastructure slows. Therefore, UT does have an interest in user and server efficiency; however, this is not limited to spam. As you read this, you are probably aware of how often students use the school’s Internet access to further goals other than education. In nearly every one of my classes, there is at least one disinterested student playing solitaire, reading the news, “instant messaging,” or checking sports scores. If spam affects user and server efficiency, then so does any other activity aside from using the Internet and email network for its intended purpose of furthering education.

Under the third prong of the Central Hudson test, UT’s policy must advance its interests in protecting both user and server efficiency. Because the policy is designed to block unsolicited incoming commercial email, it is clear that it directly advances both interests. An anti-spam policy which is intended to prevent users from having to deal with unwanted emails and to avoid such emails

170. White Buffalo, 420 F.3d at 374-75.
171. Id. at 375.
172. Id. at 374-75.
175. See UT’s acceptable use policy, supra note 173.
176. White Buffalo, 420 F.3d at 375.
from clogging the University’s server is unquestionably a clear strategy for prohibiting spam.177

Turning to the most critical inquiry, the fourth prong of the Central Hudson commercial speech test, UT’s policy must be no more extensive than necessary to further the state’s interest.178 Here, UT must show that its policy is narrowly tailored to block only unsolicited emails that have been identified by complaint or other means, such that it does not unnecessarily prohibit speech.179 The Fifth Circuit found that UT’s policy was properly tailored to block only emails from specifically identified ISP addresses.180 The district court, on the other hand, found that UT’s anti-spam measures, which include the use of commercial filters, would more than likely block some solicited email.181 However, in light of the number of users, the amount of spam and current technology, the district court believed that UT’s policy was no more extensive than necessary to stop unwanted spam.182

The Fifth Circuit, however, took a user efficiency/server efficiency dichotomy approach and required that the ITC policy be no more extensive than necessary to meet at least one of UT’s two substantial interests.183 As to user efficiency, UT’s spam-blocking policy was no more extensive than necessary to prevent users from wasting time by constantly identifying and deleting unwanted commercial emails, as long as the blocking was content- and viewpoint-neutral.184 Regarding server efficiency, the court found that UT’s policy of blocking ISP addresses was more extensive than necessary to meet its desired objective.185 Relying upon record evidence, the court found that UT would routinely exclude spam not because it was overburdening the system, but because the email was a mere misuse of the system.186 Therefore, it would seem that the ITC policy was broader than necessary, but the court rationalized its ruling on the grounds that user efficiency is “almost always” coextensive with server efficiency.187 Although the line between user efficiency and server efficiency is blurry in other Internet contexts, this result produces some troubling consequences for the First Amendment.188

The White Buffalo court, having determined that UT’s policy was more extensive than necessary related to server efficiency,189 still ruled in favor of UT

177. Id. at 375.
178. Central Hudson, 447 U.S. at 566.
179. White Buffalo, 420 F.3d at 375.
180. Id. at 376.
182. Id.
183. White Buffalo, 420 F.3d at 375.
184. Id. at 376.
185. Id. at 377.
186. Id.
187. White Buffalo, 420 F.3d at 377.
188. See id. at 377 n.24.
189. Id. at 376.
because when a state rule serves multiple purposes, only one of those purposes must be substantial in order to withstand First Amendment scrutiny. The court relied on *Bolger v. Youngs Drug Products Corp.*, a case in which the Supreme Court found a statute that limited unsolicited advertisements for contraceptives unconstitutional. In that case, the asserted interests of the statute, which were to protect mail recipients from receiving offensive material and to allow parents to control the way in which their children learned about birth control, both failed to meet First Amendment scrutiny. The second interest was, according to the Court, substantial, but a restriction of this magnitude was more extensive than necessary to achieve its intended purpose of allowing parents to control the information their children receive about birth control.

The asserted interests of the statute, protecting individuals from offensive mail and allowing parents to control children’s exposure to material regarding contraception, were separate and distinct interests, unlike user efficiency and server efficiency. It does not pass muster that the Fifth Circuit relied upon a case in which one asserted interest was substantial to support its finding that UT may block White Buffalo’s email, but the statute in that case was nonetheless found unconstitutional. If *Bolger* had found that one of the asserted interests was substantial enough to allow censorship of the mail, then the Court’s ruling would at least provide an explanation for why UT’s policy was constitutional despite its failure to meet the fourth prong of the *Central Hudson* test. Apparently, the *Bolger* Court seemed to think that the individual’s burden of making “the ‘short, though regular, journey from mailbox to trash can’” was far outweighed by the First Amendment protection afforded commercial speech. The Supreme Court recognized that many people will find certain mail offensive and that people should have a right to decide what mail they want to receive. Under this reasoning, UT’s policy regarding “user efficiency” is even more extensive than is necessary to meet its needs.

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190. *Id.* at 378.
191. *Bolger*, 463 U.S. at 75.
192. *Id.* at 71-73.
193. *Id.* at 73-75.
194. *Id.* at 71. The Court that there are two distinct state interests and proceeds to analyze both interests separately, relying upon different cases and different rationale for determining whether the state’s interests are substantial. *Id.* at 71-75.
The commercial speech doctrine requires that the state interest in banning speech be achieved through the least restrictive means possible. If there were less extensive alternatives to stopping unwanted spam, then UT would be required to apply them. As in Bolger, an email recipient has the right to merely delete unwanted emails, contact UT through a complaint procedure, or apply a filter to prevent such email from reaching one’s system. Under UT’s policy, after receiving several complaints, UT completely blocked White Buffalo’s ISP address from sending any email to UT’s network and White Buffalo had no access whatsoever to any “@utexas.edu” address. This action is unconstitutional, for UT may not shut off the flow of communication merely because some people find it offensive, unless there are no other alternatives. The Internet is not like traditional advertising avenues where a business may promote its products through billboards, television, mail circulars, or other media. Email is a unique medium and there are no alternative methods to contact customers. Either the email is accepted by the system or it is not. Both the Fifth Circuit and the district court noted that there were other means of achieving its goal of prohibiting unsolicited commercial spam besides ISP-specific filters which completely block an ISP from sending any email to UT, regardless of its nature.

198. Bolger, 463 U.S. at 75 (holding that the challenged regulation was too “sweeping” to pass First Amendment scrutiny and was therefore unconstitutional).
199. White Buffalo, 420 F.3d at 377.
200. See supra at 3; Bolger, 463 U.S. at 72 (noting that if a recipient finds mail offensive, the Supreme Court suggests that he may throw it away or notify the post office that they no longer want to receive the information).
201. White Buffalo, 420 F.3d at 369.
202. Bolger, 463 U.S. at 73-74 (noting that it would be unconstitutional for the Court to limit the level of discourse reaching a mailbox “to that which would be suitable for a sandbox.”).
203. Reno, 521 U.S. at 868-70. (noting that the Internet is not as invasive as regular advertising media and that there are no cases which assist the courts in determining how to protect speech on the Internet).
204. Really though, server efficiency is not at issue. Even UT noted that White Buffalo’s spam blasts were not causing server inefficiency. White Buffalo, 420 F.3d at 377. Perhaps unblocking all spam filters would cause server problems, but it was unclear whether White Buffalo could send email at off-peak times and by restrict the number of emails it sent at a time without violating UT policy. Id. The court decided that UT’s policy was more extensive as to server efficiency than was necessary to block spam. Id. at 376. Therefore, it was only necessary to consider lesser restrictive alternatives to user efficiency. The district court realized that by blocking off all communication with UT servers, White Buffalo could not even respond to customer emails and that the use of ISP-specific filters would not be perfectly tailored to avoid blocking some wanted emails, but that the filters were satisfactory. White Buffalo, 2004 WL 1854168, at *6. The Fifth Circuit discussed some of the more important ramifications of an ISP-specific filtration system such as the distinction between commercial messages that are obscene, that provide an unsubscribe feature, email sent during off-peak hours, and email that comes from an authentic email address, in noting the poor fit between UT’s policy and substantial interest in server efficiency. White Buffalo, 420 F.3d at 377. The author asserts that these restrictions would apply to user efficiency as well, based on the fact that user and server efficiency is, according to this court, “almost always coextensive.” Id.
Spam is a pervasive problem, at least in the sense that ISPs must address it and the time and money costs associated with it that are ultimately passed on to the consumer. \(^{205}\) Nevertheless, courts must strike a balance between prohibition of speech and First Amendment protection afforded commercial speech. One of the ways in which UT could achieve its goal without infringing upon free speech is to utilize less-aggressive filters that allow an individual user to determine whether she wishes to receive an email. \(^{206}\) UT could tailor this filter to stop incoming emails from going directly to a user’s inbox and hold the emails until a specified time during off-peak hours. The filter allows a student to decide what emails to accept, rather than UT making this decision for the student. When UT bans an ISP, it has made the blanket rule that such email has no value to any member of the UT community. UT has effectively censored such speech and the Fifth Circuit condoned it.

This decision will have a profound effect on commercial email because every public university has a substantial interest in protecting its computer network from “the ever-increasing deluge of spam”\(^{207}\) and could adopt policies that ban such speech without violating the First Amendment interests of the senders. As a result, a university is in the position of determining whether email is spam because it must take affirmative action by manually blocking an ISP address from its server.

Clearly this is not the desired result. Universities have always been a breeding ground for free flowing thoughts and ideas, a place for expression and opportunity. \(^{208}\) The Fifth Circuit has pulled the reins on the First Amendment by determining that UT’s anti-spam policy could prohibit commercial speech because the policy passed the *Central Hudson* test for commercial speech sufficient to warrant affirmation of summary judgment. \(^{209}\) Upon further review, UT’s policy would not survive the test because its policy was more restrictive than necessary as to server efficiency\(^{210}\) and there were less restrictive means to

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\(^{208}\) See, e.g., Yale College Undergraduate Regulations, available at http://www.yale.edu/yalecollege/publications/uregs/free_expression.html, (last visited October 26, 2005), noting that:

>[t]he primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom.

\(^{209}\) *White Buffalo*, 420 F.3d at 378.

\(^{210}\) Id. at 376 (rejecting UT’s asserted interest in server efficiency as more extensive than necessary, noting that “‘Suffer the servers’ is among the most chronically over-used and
promote user efficiency.  Furthermore, by categorically banning all unsolicited commercial email, UT became a censor of commercial speech.

C. Email in the Public Forum: I want my spam!

I assert that spam directed toward a public university email network should be analyzed under the public forum analysis, rather than the four prong Central Hudson test. The nature of the email should not be the focus, but where the email is being sent. Having determined that UT’s anti-spam policy was constitutionally permissible under the Central Hudson commercial speech test, the Fifth Circuit did not find it necessary to address what type of First Amendment forum protection is afforded to a public university email network. The district court noted that because Central Hudson was the appropriate test to apply to UT’s policy, even if UT’s network was a public forum, it was unnecessary to determine whether UT’s email server is a public forum. Yet, when faced with applying either the commercial speech test or public forum analysis, the Supreme Court used public forum analysis in previous cases.

As courts continue to become more familiar with Internet litigation, it will be necessary to determine what type of forum protection is available to a public university email network. White Buffalo defined commercial speech as an “expression related solely to the economic interests of the speaker and its audience.” The Central Hudson test does not appear to fit as well with email as it does other types of commercial speech, probably because email is a unique communication tool that is not regulated like other types of advertising, such as billboards, mail, and television.

It would appear that forum analysis of government-owned property, such as a public university email server, might provide a better framework within which a university may create its anti-spam policy. UT argued that its email system was designed to transmit university messages and facilitate communication between students, faculty, and staff. Further, UT asserted that under-substantiated interests asserted by parties involved in Internet litigation, and rules imposed pursuant to such interests require more than a judicial rubber-stamp.

211. See, e.g., supra note 206 and accompanying text.
212. Id.
214. See, e.g., Krishna Consciousness, 505 U.S. at 699 (Kennedy, Blackmun, Stevens, and Souter, JJ., concurring) (noting that courts should consider the property’s use, rather than the type of speech that is sought to be regulated or First Amendment analysis would be reduced to a case-by-case balancing that would lead to inconsistencies).
215. See, e.g., White Buffalo, 420 F.3d at 377 n.24.
216. White Buffalo, 420 F.3d at 374 (quoting Central Hudson, 447 U.S. at 561).
218. See supra II.B and note 47.
even though the email server was used for personal email and for some solicited commercial email, the network was not a public forum because there was never an intention to open the server to the general public.\textsuperscript{220}

The fact that UT’s network was used for private correspondence did not, at least according to \textit{Perry}, render the school’s internal mail system a public forum.\textsuperscript{221} In \textit{Perry}, the school’s internal mail system was used by organizations not affiliated with the school, but the Court held that this was not a public forum because there was no indication that the school opened its mail system to the public.\textsuperscript{222} Also, there was evidence that permission to use the mail system was required before gaining access to the mailboxes and the Court ruled that a selective access did not create a public forum.\textsuperscript{223} If UT’s network were deemed a nonpublic forum, UT’s anti-spam policy would allow UT the right to use ISP-specific filters in banning access to UT’s email system as long as the restrictions were reasonable and not viewpoint-based.\textsuperscript{224}

A public university’s email network does not easily fit into one of the three fora categories: public forum, limited public forum, and nonpublic forum.\textsuperscript{225} While a public university campus has never been considered a traditional public forum, the Supreme Court recognized that a public university campus shares many similarities with a public forum.\textsuperscript{226} In \textit{Brister v. Faulkner}, the Fifth Circuit held that a sidewalk located between UT’s Erwin Center and Red River Street was a traditional public forum.\textsuperscript{227} The Fifth Circuit limited its holding to the facts at issue, acknowledging that the campus sidewalk abutted the public sidewalk such that they were indistinguishable from one another.\textsuperscript{228} After all, a public university has the authority to impose reasonable regulations on the use of its campus and facilities,\textsuperscript{229} with respect to use of its buildings or grounds.\textsuperscript{230} Nevertheless, because no court has held that a public university campus is a traditional public forum,\textsuperscript{231} it is unlikely that an email server would be considered a traditional public forum.

\begin{footnotes}
\footnotetext{220}{Id.}
\footnotetext{221}{Id.}
\footnotetext{222}{\textit{Perry}, 460 U.S. at 47.}
\footnotetext{223}{Id.}
\footnotetext{224}{\textit{White Buffalo}, 420 F.3d at 374 n.15.}
\footnotetext{225}{\textit{Perry}, 460 U.S. at 45-46.}
\footnotetext{226}{\textit{See Widmar}, 454 U.S. 263, 267 n.5 (1981).}
\footnotetext{227}{\textit{Brister v. Faulkner}, 214 F.3d 675, 683 (5th Cir. 2000).}
\footnotetext{228}{Id.}
\footnotetext{229}{\textit{Widmar}, 454 U.S. at 276 (“Our holding . . . in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations . . . [or] the right of the University to make academic judgments as to how best to allocate scarce resources . . . .”).}
\footnotetext{230}{\textit{See}, e.g., \textit{Bourgault v. Yudof}, 316 F. Supp. 2d 411, 419-20 (N.D. Tex. 2004) (mem.) (holding that a university is not a traditional public forum and that it may limit access to non-students as long as the limitations are reasonable in light of the intended purpose of the regulations).}
\footnotetext{231}{Id. at 419.}
\end{footnotes}
On the other end of the spectrum is the nonpublic forum. A forum is considered nonpublic when, by clear evidence, the state shows that it “did not intend to create a public forum or where the nature of the property at issue is inconsistent with the expressive activity, indicating that the government did not intend to create a public forum.” A nonpublic forum, being government-owned property, may put time, place, and manner restrictions on speech and reserve the forum for its intended purposes as long as the restrictions are reasonable and not an attempt to suppress speech based on a disagreement with the speaker’s view.

UT contended that because it did not open its email network to the general public, it did not intend to create a public forum and should receive nonpublic forum status. The purpose of an email network, it asserted, is to facilitate research and to nurture communication between community members. UT did not deny that it would allow White Buffalo to send unsolicited email if there were certain time- and volume-limitations, nor did it deny that the network is available for solicited email and even personal business. When a person opens an email account, the email address is an open access to anyone that has that email address. The fact that UT did not open its email network for use by the general public does not create a per se nonpublic forum, but rather a limited or designated public forum.

In differentiating between a designated public forum and a limited public forum, courts have considered two factors: “(1) the government’s intent with respect to the forum, and (2) ‘the nature of the [forum] and its compatibility with the speech at issue.” A designated public forum is created when a public university intentionally provides general access to the public that is intended to encourage public discussion of community issues. A designated public forum is subject to strict scrutiny. A limited public forum, on the other hand, is

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232. Perry, 460 U.S. at 46.
234. Perry, 460 U.S. at 46.
236. See supra note 168.
237. White Buffalo, 420 F.3d at 377.
238. Reno, 521 U.S. at 851.
239. See, e.g., Bourgault, 316 F. Supp. 2d at 419-20. The court recognized that a public university campus has never been deemed a traditional public forum, but that it is more likely either a nonpublic forum, a limited public forum, or a designated public forum. Id. The court considered both the state’s intent respecting the forum and the nature of the forum and its “compatibility with the speech at issue” in order to determine that a university campus is a limited public forum. Id. at 420.
240. Chiu, 260 F.3d at 346 (quoting Estiverne v. Louisiana State Bar Ass’n, 863 F.2d 371, 378 (5th Cir. 1989)).
242. Id.
typically created when the state opens a nonpublic forum to either a specific group or for discussion on a limited subject. A limited public forum exists when the state designates a place or channel of communication for use by the public for assembly and speech, for use by specific speakers, or for the discussion of specific subjects. The Supreme Court held that a limited public forum was created when a public university opened certain campus facilities to various student groups. After a university opens its campus to certain groups, the state may only restrict speech that occurs within the forum as long as the regulation does not discriminate on the basis of viewpoint and is reasonable in light of the regulation’s purpose.

Here, UT’s email server was intended to create a channel of communication for specific individuals, but a member was not limited to communicating only with other members. Rather, an individual may send and receive emails with anyone who has an email address. Unlike in Perry, an email network is far more accessible than a physical mailbox and email access does not require prior permission. Furthermore, a public university’s email system, which is arguably sui generis, is not deserving of nonpublic forum status merely because it is available only to UT faculty, students, and staff. This analysis suggests that a public university network should be considered a designated public forum.

If by merely providing general access to its network, a public university created a designated public forum, it is arguable that a public university might not want to provide Internet access or an email network because the burden would be too high to make the system useful. As in Krishna Consciousness, UT created access to its network by opening the network to email communication. It is obvious that UT did not provide network access to the general public. However, the general public has access to UT community members by the very nature of the Internet and email infrastructure. If the intended purpose of access to the network is for research and communication, then it is unclear whether by providing unlimited access to a limited group of speakers, a designated public forum or a limited public forum has been created.

244. Perry, 460 U.S. at 45-46.
247. White Buffalo, 420 F.3d at 369-70.
248. See ACLU, 929 F. Supp. at 834.
249. Reno, 521 U.S. at 870.
250. White Buffalo, 420 F.3d at 376, n.20 (recognizing that UT must have some filters available or its system would not operate). The Fifth Circuit also noted that UT should have considered the costs and benefits of the burden its policy places on free speech. Id. at 376-77.
252. Id. at 369.
In a limited public forum, the state may not discriminate on the basis of content or viewpoint and the restriction must be reasonable in light of the forum’s intended purpose. Turning to the first issue of whether UT discriminated based on viewpoint, UT asserted that its ITC policy was intended to prevent unsolicited, unwanted commercial email from clogging and overburdening its servers. Yet, UT admitted that spam did not overburden the system, but was merely amounted to misuse. Spam has been defined as unsolicited, unwanted commercial email, but there is a difference between unsolicited and unwanted. Unsolicited means “not asked for,” while unwanted is defined as “not wanted; not needed or useful; detrimental in character.” It is important to distinguish between unsolicited and unwanted because the latter connotes an opinion based on content or viewpoint. If a local pizza parlor were to send a bulk emailing to UT providing a coupon for a free pizza, the email would be considered unsolicited spam, but most people would want to receive the coupon. It is not surprising that most spam that offers products such as mortgage refinancing, male enhancement drugs, and pornography is blocked by networks.

The fact that spam is characterized as a nuisance that impedes communication and research, does not warrant ignoring First Amendment protection altogether. Email is effective as an advertising medium because of the ease with which a business can contact a large number of consumers with relatively little cost. There are no stamps to purchase, labels to print, mailboxes in which to deliver mail, and there is 24 hour access to the Internet. Until the Internet is the subject of uniform federal regulation, courts should be reluctant to allow a university, or any institution, to determine whether email is appropriate for delivery, either by express or implied censorship. When a university categorically bans incoming email from a server at the request of a few, it amounts to something more than protecting user efficiency, merely by the

255. White Buffalo, 420 F.3d at 376.
256. Id. at 377.
257. Id. at 368 n.1 (“[T]he term ’spam’ . . . necessarily implies that the email was unsolicited.”).
258. Id. at 374-75 (“[W]e acknowledge as substantial the government’s gatekeeping interest in protecting users of its email network from the hassle associated with unwanted spam.”) (emphasis added); Id. at 376 (“We have little problem affirming that proposition that, to keep community members from wasting time identifying, deleting, and blocking unwanted spam, UT may block otherwise lawful commercial spam . . . .”)(emphasis added).
260. Id. at 2514.
261. Playboy, 529 U.S. at 814 (holding that banning unwanted speech is subject to strict scrutiny because it is a content-based regulation).
263. See Ferguson v. Friendfinders, Inc., 94 Cal. App. 4th 1255, 1267 (Cal. Ct. App. 2002) (noting that spam is easy and inexpensive to create and can be sent at little or no cost to the sender).
nature of commercial email. A university may advance its interests in user and server efficiency, but it must not do so at the risk of strangling the First Amendment. The user, rather than the university, should determine whether to accept the email. Anything less is in opposition to the First Amendment. Therefore, it appears that UT’s policy has an implied effect of discrimination against volume-based commercial email.

Next, the court must consider whether the regulation limiting the network is reasonable in light of the intended purpose of the forum. The reasonableness of the restriction test is similar to the fourth prong of Central Hudson because both require that a court consider whether the policy advancing a substantial interest is no more extensive than is necessary; the restriction must be reasonable. Both the circuit court and the district court recognized that UT’s policy and its system of email filters might prevent otherwise solicited email from reaching its intended recipients. Either for summary judgment purposes or for the purposes of meeting the Central Hudson test, UT may block some email because the benefits outweigh the costs of allowing all incoming email to reach the inboxes of UT’s system. As stated in the record, UT’s policy is narrowly tailored to restrict unsolicited, commercial emails originating from specific ISP addresses. But, it is also noted that UT should employ more specific filters, such as time of day and volume filters, rather than categorically banning all ISP-specific email.

It is as if the Fifth Circuit is aware that there is an “insufficient fit” not only with the UT policy and the Central Hudson test, but also with the reasonableness of UT’s policy. The court recognized that if there were a better way to analyze UT’s asserted substantial interest with respect to its email network, then such an application would warrant a different result. Furthermore, the court

264. See, e.g., Bolger, 463 U.S. at 72 (noting that under the First Amendment, recipients of objectionable mail should have the sole discretion to keep mail that was offensive or unwanted).
266. Central Hudson, 447 U.S. at 569-71.
267. Bourgault, 316 F. Supp. 2d at 420 (noting that a university’s restriction must be reasonable); White Buffalo, 420 F.3d at 375.
269. White Buffalo, 420 F.3d at 376-77 (The challenged regulation must show that UT “carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition.” (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993))).
271. White Buffalo, 420 F.3d at 377.
272. Id.
273. Id. (discussing that the record did not show that UT is using filters that categorically exclude all unsolicited commercial email because spam is overburdening the network). See also id. at 374 n.15 (“[I]f a server is a private forum, the government may regulate the speech so long as it is viewpoint-neutral. In the alternative, if a server is a public forum, we apply
acknowledged that commercial email, limited by time and volume, would not impede server efficiency.\textsuperscript{274} Such communication would be considered reasonable in light of UT’s policy.\textsuperscript{275} On the one hand, the policy is reasonable and on the other hand, the policy is unreasonable.\textsuperscript{276} If commercial email is blocked because it impedes user efficiency, but the same email could be sent in a way that does not impede server efficiency, the court is left with a dilemma and the answer is quite unclear and unresolved.

V. CONCLUSION

Twenty years ago, the Internet could barely walk; today, it is more like a long-distance runner. The post office used to be the primary means of communication, but email has forever changed the way in which we interact.\textsuperscript{277} Access to the Internet and to email is even available on cellular phones.\textsuperscript{278} Justice Stevens compared the Internet to a “sprawling mall offering [a limitless number of] goods and services.”\textsuperscript{279} One court described the Internet as a vast system of highways, giving the user a number of different streets to find information.\textsuperscript{280} By these descriptions, the Internet sounds more like a specific place or location, akin to a mailbox or a library. Places are subject to public forum analysis\textsuperscript{281} and there is no reason why a university email network should not receive the same treatment in determining whether speech should be regulated. The Supreme Court declared unconstitutional a statute that sought to ban unsolicited “junk” mail, because the burden on the First Amendment was too great to justify the proposed benefit.\textsuperscript{282} If a person has a right to his mail,\textsuperscript{283} then he should have the same right to his email. Yet \textit{White Buffalo} has effectively

\begin{itemize}
\item \textit{Central Hudson}. The court recognized that determining the fora status of a public university email server is a “dicey but admittedly important question . . . .” Id.
\item \textsuperscript{274} \textit{White Buffalo}, 420 F.3d at 377.
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Id. at 376-77.
\item \textsuperscript{279} \textit{Reno}, 521 U.S. at 853.
\item \textsuperscript{280} Edias Software Int’l, LLC v Basis Int’l, Ltd., 947 F. Supp. 413, 419 (D. Ariz. 1996).
\item \textsuperscript{281} See, e.g., \textit{Krishna Consciousness}, 505 U.S. at 678-79 (airport terminal); \textit{Perry}, 460 U.S. at 45-48 (school’s internal mail system); \textit{Kokinda}, 497 U.S. at 727-28 (public sidewalk outside the post office).
\item \textsuperscript{282} \textit{Bolger}, 463 U.S. at 72.
\item \textsuperscript{283} \textit{Rowan}, 397 U.S. at 737.
\end{itemize}
allowed a public university to choose what is best for all, based on the complaints of a few.\footnote{White Buffalo, 420 F.3d at 368 n.2.}

Application of the commercial speech four prong test to commercial e-mail is another step in the wrong direction for the Internet because the test focuses on the nature of the e-mail and not on the destination or “mailbox” of the e-mail.\footnote{Id. at 374-78. The court explained that Central Hudson was applicable because of the “commercial character of the speech at issue.” Id. at 374. Further, the court did not find it necessary to consider public forum analysis. Id. at 378.}

Nevertheless, the state must use the least restrictive means possible to promote the efficient use of its resources\footnote{See supra note 47 and accompanying text.} and there are other less restrictive means available than ISP-banning filters, such as more sensitive filters, student-controlled filters, and opt-out options. Although burdensome or even costly, these alternatives allow a university to have some control over its network and still protect First Amendment interests. As Justice Kennedy wrote, “[t]he First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech.”\footnote{Krishna Consciousness, 505 U.S. at 701-02. (Kennedy, Blackmun, Stevens, and Souter, JJ., concurring).}
JOHANNS V. LIVESTOCK MARKETING ASSOCIATION: THE OUTSOURCING OF GOVERNMENT SPEECH

by Beth Bryan*

I. INTRODUCTION

Imagine you own a small family cattle farm. You are interested in advertising your product, but because you are such a small enterprise you cannot afford to do so. But you know of a federal program that allows you to pool your resources with other small farmers to buy advertising. You think this is a great idea and you are happy to pay $1 on every head of cattle to produce commercials. For you, that is roughly $250 a year—a true bargain.

Now imagine that you are the CEO of a Fortune 500 company that produces beef. Your company has an entire team devoted to developing an advertising campaign that highlights the superiority of your product. But you learn that you are required to pay the federal government $1 on every head of cattle to fund an advertising campaign that benefits all cattle producers by characterizing beef as one type of product. This additional fee is going to cost you roughly $5 million dollars each year. As a business owner you are outraged. Why should you have to pay to fund an advertising campaign that you do not agree with—one stating that all beef is the same? This is America; you have a constitutional right of freedom of speech. You can’t be compelled to speak or fund a message with which you disagree . . . or can you?

According to a recent United States Supreme Court opinion, agriculture producers’ First Amendment rights are not violated when they are required to pay the federal government mandatory fees which are then used to produce generic advertising campaigns for their products. This note examines the standards courts apply to determine the constitutionality of mandatory assessments levied on producers of agriculture products. Section II outlines the creation of agriculture commodity checkoff programs and summarizes the guiding First Amendment principles. Section II also examines how courts have ruled on previous challenges to the mandatory assessments. Section III includes the specific facts and holding of Johanns v. Livestock Marketing Association.

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2. Id.
3. The hypothetical contained in the introduction is loosely based on the facts of an actual case. See Johanns v. Livestock Mktg. Ass’n, 125 S. Ct. 2055 (2005).
5. Livestock Mktg. Ass’n, 125 S. Ct. at 2064-65.
6. Id.
Section IV provides an analysis of the Supreme Court’s opinion regarding compelled subsidy of government speech and explains how it conflicts with existing precedent. Section V concludes the note.

II. BACKGROUND LAW

A. Creating Checkoffs

Congress first created farm commodity programs in 1933 during the height of the Great Depression. At that time, the nation had seen farm prices drop fifty percent and individual efforts of farmers to combat the falling prices had failed. Congress responded by passing the Agriculture Adjustment Act of 1933. A key feature of the act was the mandatory United States Department of Agriculture (USDA) price support of specified commodities. Shortly thereafter, Congress passed the Agriculture Marketing Agreement Act of 1937, which provided for the creation of marketing orders and mandatory checkoffs. A “checkoff” is a fixed fee assessed on every unit of a qualifying commodity to fund research and promotional programs.

Originally, Congress had to pass legislation that was specific to one commodity in order to create a checkoff program. However, the Commodity, Promotion, Research, and Information Act of 1996 (CPRI) changed this by giving the USDA authority to implement programs through the issuance of orders. Currently, national checkoff programs can be started as either a proposed order from an interested group, such as a trade association, or as a proposed order initiated by the USDA.

8. Id.
10. Id.
12. The National Agricultural Law Center, http://www.nationalaglawcenter.org/readingrooms/checkoff/ (last visited Oct. 11 2005). The term checkoff is derived from voluntary programs in which producers simply checked the box to indicate they wanted to participate in the program. Id.
13. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 458 (15th ed. 1971) (defining a commodity as “a product of agriculture, mining or sometimes manufacture as distinguished from services”).
17. Id.
Under the CPRI, the proposed order must create a board to administer the planning and operation of the program and define the duties and powers of the board.\textsuperscript{18} The USDA then reviews the proposed order to ensure that the checkoff program is consistent with the goals of the CPRI Act.\textsuperscript{19} If it meets the criteria, the proposal is posted for public comment.\textsuperscript{20} The USDA reviews the public comments and then publishes a final order that establishes the order.\textsuperscript{21} All persons subject to the checkoff must approve the program by a referendum within three years after the beginning of assessments for the program to continue.\textsuperscript{22}

B. The Beef Checkoff Program

The beef checkoff program was created pursuant to the passage of the Beef Promotion and Research Act of 1985 (Beef Act).\textsuperscript{23} The goals of the program include strengthening the position of beef in the marketplace, increasing domestic markets, and expanding uses for beef.\textsuperscript{24} The statute directs the Secretary of Agriculture (Secretary) to implement this policy by issuing a Beef Promotion and Research Order (Beef Order).\textsuperscript{25} The Beef Order provides for the creation of the Cattlemen’s Beef Promotion and Research Board (Beef Board).\textsuperscript{26} The Beef Board members must be composed of a geographically representative group of beef producers and importers.\textsuperscript{27} The Secretary selects the members from a group of candidates nominated by trade associations.\textsuperscript{28} The Beef Board then convenes an Operating Committee made up of ten Beef Board members and ten representatives named by a federation of state beef councils.\textsuperscript{29} A checkoff of \$1 is imposed on every head of cattle sold or imported,\textsuperscript{30} which is then used to fund beef-related projects including promotional campaigns.\textsuperscript{31} It is collected primarily by state beef councils, which forward the proceeds to the Beef Board.\textsuperscript{32} The Operating Committee proposes projects to be funded by the checkoff and

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\bibitem{19} See 7 U.S.C. § 7401(b)(3) (2000) (stating that the central purpose of the commodity promotion law is to expand and maintain the overall demand for the specific commodity rather than maintain or expand the share of markets held by individual producers).
\bibitem{25} 7 U.S.C. § 2903(b) (2000).
\bibitem{31} 7 U.S.C. § 2901(b) (2000).
\end{thebibliography}
the Secretary or his or her designee approves each project. One of the best-
known promotional campaigns created under this program was the “Beef. It’s
What’s For Dinner” commercial campaign.

The Beef Order was promulgated in 1986 on a temporary basis, subject to a
referendum among beef producers to make it permanent. While a majority
voted to continue the program in May 1988, a vocal minority of producers has
consistently challenged the constitutionality of the program since 1989 on
grounds that the mandatory checkoff used to fund advertisements violated their
First Amendment rights. To fully understand the challenges to the Beef Act, it
is necessary to provide some explanation of the guiding First Amendment
principles as set forth by the Court.

C. First Amendment Considerations

One of the main arguments asserted by those challenging the checkoff
programs was that the promotional campaigns created with funds from the
checkoff violated their First Amendment rights of freedom of speech. The First
Amendment provides: “Congress shall make no law . . . abridging the freedom of
speech . . . .” This includes the right to speak, as well as the right not to speak.

In compelled speech cases, the Supreme Court applies a strict scrutiny
balancing test to determine whether the challenged governmental action is
justified. The Court has divided cases challenging compelled speech into two
categories: “true compelled speech” and “compelled subsidies.” In “true
compelled speech” cases, an individual is required to personally speak or display
a message with which he or she disagrees. The Court has held that an
individual cannot be compelled to communicate an idea with which he or she

11, 2005).
36. See United States Dep’t of Agric., Beef Promotion and Research Order, available at
ballots cast in the May 10, 1998 referendum, 78.91% of the cattle producers and importers voted in
favor of the program. Id.
37. See United States v. Frame, 885 F.2d 1119, 1122 (3d Cir. 1989); Goertz v. Glickman, 149
F.3d 1131, 1138 (10th Cir. 1998); Johanns v. Livestock Mktg. Ass’n, 125 S. Ct. 2055, 2060
(2005).
38. See United States v. United Foods, 533 U.S. 405, 409 (2001); Glickman v. Wileman
Bros., 521 U.S. 457, 460-61 (1996); Cal-Almond, Inc. v. United States Dept. of Agric., 192 F.3d
1272, 1273 (9th Cir. 1999); Frame, 885 F.2d at 1129.
include the right to speak as well as the right to “refrain from speaking at all.”).
42. Livestock Mktg. Ass’n, 125 S. Ct. at 2060.
43. Id.
disagrees. Additionally, a person cannot be compelled to use his or her private property to display an ideological message.

The other category of compelled speech that violates the First Amendment is “compelled subsidies,” in which an individual is required by the government to fund a message with which he or she disagrees that is expressed by a private entity. The Court has found that it is permissible for lawyers to be required to become members of the state bar and to pay its annual dues, and that public-school teachers can be compelled to join their labor union or pay “service fees” equal to the union dues. However, it is not permissible for those private entities to use the collected dues to express a political or ideological message that is not related to the organization’s purpose. Thus, in the case of compelled subsidies, the First Amendment is invoked when either the regulation compels ideological speech or the speech is not germane to a larger regulatory scheme.

D. The Government Speech Doctrine

Under the government speech theory, the government asserts the First Amendment argument that it is entitled to “speak for itself.” As a result of its constitutional authority, “[t]he government is entitled to ‘promote particular messages’ . . . and to take legitimate and appropriate steps to ensure that its messages are neither garbled nor distorted—that is, the government may limit the scope of the message it sends.” The government may use resources “whether derived from taxes, dues, fees, tolls, tuition, donations, or other sources, for any purpose within its authority.” It may use its own agents and

44. See *Barnette*, 319 U.S. at 642 (1943) (holding that the West Virginia requirement that every school child recite the Pledge of Allegiance while saluting violated the First Amendment because public authorities cannot compel a person to utter a message with which he does not agree).

45. *Id.* at 632-33.


47. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990) (holding that the use of mandatory bar fees to fund political or ideological activities that were not germane to legal profession violated members First Amendment rights).

48. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (holding that although the requirement to pay the service fee was constitutional, the union’s spending part of their required “service fees” to express ideological views unrelated to its duties as exclusive bargaining representatives violated the First Amendment).

49. *Id.* at 234-35.

50. *Id.*

51. Sons of Confederate Veterans v. Comm’n of Va. Dept. of Motor Vehicles, 288 F.3d 610, 626 (4th Cir. 2002) (holding that the Sons of Confederate Veterans First Amendment rights were violated when the state refused to issue license plates that contained the group’s logo, a confederate flag, because the creation of the license plate did not constitute government speech).

52. *Id.* at 616-617.

officials to promote its agenda. 54 Lastly, it may use private speakers to spread messages relating to government programs. 55

When the government engages in “government speech,” it is mostly immune from First Amendment restrictions, 56 including viewpoint and content-based challenges, which are applicable to speech by private entities. 57 But, the government speech doctrine does not provide immunity for all types of First Amendment claims, including freedom of religion challenges. 58

The problem with the government speech doctrine is that no clear standard has been adopted by the Supreme Court to determine when the government is “speaking.” 59 However, the Fourth Circuit in Sons of Confederate Veterans v. Comm’n of Virginia Dept. of Motor Vehicles listed several factors useful to the inquiry including:

(1) the central ‘purpose’ of the program in which the speech in question occurs; (2) the degree of ‘editorial control’ exercised by the government or private entities over the content of the speech; (3) the identity of the ‘literal speaker’; and (4) whether the government or the private entity bears the ‘ultimate responsibility’ for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking. 60

But, as Justice Luttig pointed out in his concurring opinion, there may be instances in which expression may not simply fall into clean categories of government or private speech, but instead constitute hybrid speech. 61

E. Commercial Speech

It has also been asserted that checkoff programs should be categorized as commercial speech. 62 Commercial speech is defined as “expression related solely

54. Sons of Confederate Veterans, 288 F.3d at 617.
57. See Rust v. Sullivan, 500 U.S. 173, 192-195 (1991) (holding that the government may selectively fund speech on a viewpoint basis, while at the same time restricting funding that promotes an alternative viewpoint).
59. See Sons of Confederate Veterans, 288 F.3d at 618. It is clear though that when the government is speaking that viewpoint-based distinctions may be sustained, whereas courts may not allow the state to make viewpoint-based restrictions on private speech. Id.
60. Id.
61. Sons of Confederate Veterans, 288 F.3d 610 (4th Cir. 2002), rev’d en banc, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., concurring) (stating that courts have oversimplified the analysis finding that speech can be either private or that of the government but not both).
to the economic interests of the speaker and its audience. While commercial speech is constitutionally protected, regulations restricting it are subjected to less scrutiny. Instead of traditional mid-level or strict scrutiny, commercial speech is evaluated under the four-prong Central Hudson test. In order for a regulation restricting commercial speech to be constitutional, one must demonstrate that: “the speech must advertise lawful activity and not be false or misleading; [that] the asserted government interest must be substantial; the government regulation must directly advance the government interest asserted; [and] the regulation must be no more extensive than necessary to serve that interest.”

F. Challenges to Checkoff Programs

The earliest challenge to the beef checkoff program came in 1989. In this case, Robert Frame challenged the constitutionality of the Beef Act after the United States brought an action against him to recover unpaid checkoff fees. Relying on Justice Powell’s concurring opinion in Abood v. Detroit Bd. of Educ., the court held that the advertisements and promotions created pursuant to the Beef Order did not constitute “government speech” and therefore were subject to First Amendment scrutiny. It further found that such promotions constituted commercial speech governed by the Central Hudson test. In finding the program constitutional, the Third Circuit held that the legislation furthered an “ideologically neutral compelling state interest,” and was drafted as narrowly as possible to serve the state interest.

64. Id. at 563.
65. Id. at 566.
66. Id.
67. Frame, 885 F.2d at 1122.
68. Id. at 1125.

Compelled support of private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer’s money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interest. The withholding of financial support is fully protected speech in this context.

70. Frame, 885 F.2d at 1132.
71. Id. at 1133-34; see also Central Hudson, 447 U.S. at 566 (outlining a four part test to be used when analyzing commercial speech under the First Amendment).
72. Frame, 885 F.2d at 1137.
The first case to reach the Supreme Court challenging the constitutionality of the checkoff program was *Glickman v. Wileman Bros.* They refused to pay the required assessment and filed a petition challenging the order after they experienced difficulties with certain size and maturity requirements under marketing orders. In 1988, they filed a second petition that included a challenge to the generic advertising requirement as a violation of free speech under the First Amendment. The Administrative Law Judge ruled in favor of Wileman Bros., but did not address their First Amendment claim. That decision was reversed by the USDA, which resulted in Wileman Bros. and fifteen other handlers challenging the USDA ruling in district court. The district court granted summary judgment in favor of the USDA and ordered the handlers to pay $3.1 million for past due assessments.

The Ninth Circuit Court of Appeals reversed the district court’s decision. Under the *Central Hudson* test, the Court held that generic advertising violated the free speech of the growers because the order was not narrowly tailored to the government’s interest in promoting “California summer fruits.” Since this rationale conflicted with the earlier Third Circuit decision, the Supreme Court granted certiorari to resolve the conflict.

In a 5-4 decision, the Supreme Court reversed the Ninth Circuit and determined that the advertising program did not constitute compelled speech in violation of the First Amendment. First, it did not require respondents to state an objectionable message. Second, it did not require them to use their own property to convey an offensive message. Lastly, it did not require them to be publicly identified or associated with another’s message or to respond to a hostile message.

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74. *Id.* at 463 (regulated fruits included California nectarines, plums and peaches).
75. *Id.* at 464; see also 7 C.F.R. §§ 916.350 - 916.356 (2005) (outlining specific size and packaging requirement for nectarines including the coloring of scars, the shape and size of diameter); 7 C.F.R. § 917 (2005) (outlining the size and packaging requirements for peaches).
77. *Id.*
78. *Id.*
79. *Id.*
82. *Id.* at 466-67.
83. *Id.* at 469-70.
84. *Id.*
85. *Wileman Bros.*, 521 U.S. at 469-70. See also Wooley v. Maynard, 430 U.S. 705, 713 (1977) (holding that requiring a couple to display a license plate bearing the motto “Live Free or Die” on their car constituted an impermissible compulsion of expression).
86. *Id.* See also Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980) (holding that state constitutional provisions which allowed individuals to exercise free speech and free
Furthermore, the Court determined that the speech did not constitute an impermissible “compelled subsidy” because the advertising was relevant to the purpose of the marketing order. In reaching this decision, the Court explicitly rejected the idea that generic advertising should be reviewed under the test for commercial speech outlined in Central Hudson as applied by both the Ninth and Third Circuits. Instead, they found that compelled support for generic advertising was a “legitimate part of the government’s collectivist centralization of the market for tree fruit.”

After the Supreme Court decided Wileman Bros., the constitutionality of the Beef Act was once again challenged in Goertz v. Glickman. In a case very similar to Frame, the United States brought suit against Goertz for failure to pay the required checkoff. Goertz defended on grounds that the checkoff violated his First Amendment rights. The Tenth Circuit held that the Act constituted government speech rather than commercial speech.

One year after Goertz, the Ninth Circuit ruled on the constitutionality of an almond checkoff program in Cal-Almond, Inc. v. United States Dept of Agric. There, a group of almond handlers subject to a checkoff argued that the Almond Marketing Order violated the First Amendment. Citing Wileman Bros., the court upheld the Almond Order because the assessments funded a non-ideological message that was germane to the purpose of the Almond Order.

Four years after the Wileman Bros. decision, the Supreme Court once again examined the constitutionality of a checkoff program in United States v. United Foods, this time holding that a mushroom checkoff program violated the First Amendment. The Court distinguished Wileman Bros., finding that there was no “broader regulatory system in place” that collectivizes aspects of the beef association rights at a privately owned shopping center open to the public did not violate the owners First Amendment rights.

87. Wileman Bros., 521 U.S. at 473 (finding that the generic advertising of California peaches and nectarines was unquestionably germane to the purpose of the marketing orders and that the assessments were not used to fund ideological activities).
88. Id. at 474-75.
89. Id. at 475. The Court stated that California nectarines, peaches and plums were marketed pursuant to detailed marketing orders that displaced independent business activity. Id. Restrictions included the exemption from antitrust laws, the presence of a uniform price, limits on the quantity and quality of fruits that can be marketed, and determination of the grade and size of the fruit. Id.
90. See Johanns v. Livestock Mktg. Ass’n, 125 S.Ct. 2055, 2061, n.3 (2005) (commenting on Goertz v. Glickman, 149 F.3d 1131, 1132 (10th Cir. 1998)).
91. United States v. Frame, 885 F.2d 1119, 1125 (3d Cir. 1989); Goertz, 149 F.3d at 1133.
92. Goertz, 149 F.3d at 1134.
93. Id. at 1138.
94. Cal-Almond, Inc. v. United States Dept. of Agric., 192 F.3d 1272, 1273 (9th Cir. 1999).
96. Cal-Almond, 192 F.3d at 1273.
97. Id. at 1276-77.
market unrelated to free speech . . . .".

The compelled subsidy line of cases controlled since the statute required all mushroom producers to provide financial support to a private group that engaged in advertising. Refusing to dilute the holdings of compelled subsidy cases, the Court found that advertising could not be germane to the purpose of the organization if the sole purpose was to engage in advertising.

In reaching this conclusion, the Supreme Court chose not to hear the argument that the advertising constituted “government speech” because the argument was not “raised or addressed” in the Court of Appeals. By so doing, the Court set the stage for the government speech defense to be raised in Johanns v. Livestock Marketing Ass’n.

III. STATEMENT OF FACTS AND HOLDING OF JOHANNS V. LIVESTOCK MARKETING ASSOCIATION

A. Facts and Procedure Below

The Livestock Marketing Association is a trade association composed of cattle producers who are required to pay the cattle checkoff. It sued the Secretary of the USDA, the USDA, and the Beef Board seeking to enjoin the enforcement of the Beef Act, on the grounds that it violated federal law, after the Secretary refused to hold a second referendum. While this case was pending, the Supreme Court decided in United Foods that a nearly identical

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99. See Johanns v. Livestock Mktg. Ass’n, 125 S. Ct. 2055, 2061, n.3 (2005) (quoting United Foods, 533 U.S. at 415) (finding that the advertising itself was the principle object of the regulatory scheme, there were no marketing orders that regulated how mushrooms could be produced and sold, no exemption from anti-trust laws, and no uniform price requirements).


101. Id. at 415.

102. Id. at 416.

103. Livestock Mktg. Ass’n, 125 S. Ct. at 2060.

104. Id. at 2059.

105. Id. See also Livestock Mktg. Ass’n v. United States Dept. of Agric., 335 F.3d 711, 715 (8th Cir. 2003), rev’d sub nom. Johanns v. Livestock Mktg. Ass’n, 125 S. Ct. 2055 (2005). The Livestock Association sought:

1) A declaratory judgment that the Beef Act, or the Secretary’s action violate federal law;
2) an injunction prohibiting the Secretary from continuing the beef checkoff program;
3) a preliminary injunction ordering defendants to take immediate action toward a referendum on the continuation of the beef checkoff program; and
4) an order requiring the beef board to cease expenditures for “producer communications” and to make restitution of over $ 10 million, representing the producer communications since 1998. Id.

106. Livestock Mktg. Ass’n, 335 F.3d at 714. See also 7 U.S.C. § 2906(b) (2000). The Beef Act requires the Secretary to hold another referendum within six months if 10% of the cattle producers demand another referendum. Id.
program compelling mushrooms producers to pay a mandatory fee used for advertising violated the mushroom producers’ First Amendment rights. As a result, the Livestock Marketing Association amended their complaint to assert a First Amendment challenge to the use of the beef checkoff for promotional activity. The USDA argued that the checkoff program constituted government speech and therefore was not subject to First Amendment scrutiny. 

The district court found that the advertising funded by the checkoff did not constitute compelled government speech. In reaching its decision, the court relied heavily on the Wileman Bros. and United Foods decisions. Ultimately, the court found United Foods and the compelled subsidy line of cases controlled because the Beef Board was “representative of one segment of the population with certain common interest.” The district court also rejected the government’s argument that the test for commercial speech announced in Central Hudson controlled. Instead it found that the Beef Order constituted compelled funding of speech rather than a restriction of commercial speech.

The Eight Circuit Court of Appeals affirmed the decision of the lower court but on different grounds. It believed the case did not involve a challenge to the content of the government speech but instead concerned the constitutionality of compelled subsidy of objectionable government speech.

Relying on the United Foods decision, the Eighth Circuit engaged in an application of the Central Hudson test stating that “had the government relied upon Central Hudson in United Foods, the Supreme Court would have adapted the Central Hudson test to the circumstances of that case . . . .” The United Foods rationale was based on the argument that the purpose of the Mushroom Act was to advertise mushrooms in a commercially competitive industry that was not subject to extensive regulations.

107. United Foods, Inc., 533 U.S. at 415 (holding that compelling mushroom producers to pay mandatory assessments to be used for generalized advertising violated the First Amendment).

108. Livestock Mktg. Ass’n, 125 S. Ct. at 2059-60 (arguing that the advertising promoted beef as a generic commodity, which impeded their efforts to promote the superiority of American beef, grain-fed beef, certified Angus, or Hereford beef).

109. Id. at 2060.


112. Id. at 1004 (citing Frame, 885 F.2d at 1133).

113. Livestock Mktg. Ass’n, 207 F. Supp. 2d at 999.

114. Livestock Mktg. Ass’n v. United States Dept. of Agric., 335 F.3d 711, 720-21 (8th Cir. 2003).

115. Livestock Mktg. Ass’n, 335 F.3d at 717-21.

116. Id. at 720-721.

117. See id. at 722; United States v. United Foods, 533 U.S. 405, 410 (2001) (stating that because the government did not argue that the statute should be evaluated under the Central Hudson test, the Court would not consider the issue).

B. Justice Scalia’s Majority Opinion

The United States Supreme Court reversed the decision of the Eighth Circuit.119 Because the federal government controlled the message, the Court found that the Beef Order’s advertising campaign, although managed by a private entity, was not susceptible to First Amendment scrutiny.120 Scalia noted that “[w]hen, as here, the government sets the overall message to be communicated and approves every word that is disseminated, [the Court] is not precluded from relying on the government-speech doctrine merely because it solicits assistance from non-governmental sources in developing specific messages.”121

The Court also rejected the Livestock Marketing Association’s argument that the program could not be considered government speech because it was funded by beef producers, rather than by general revenues.122 It reasoned that the compelled speech analysis is not affected by the manner in which the funds are obtained by the government.123 Because the Beef Act and Beef Order did not require attribution, the Court refused to determine the validity of the argument that the advertisement could not be government speech because it was credited to someone other than the government.124 However, the Court left the door open to a finding on remand that the statue implicated the First Amendment if, on an as-applied basis, it could be established that individual beef advertisements were attributed to the respondents.125

C. Justice Thomas’ Concurring Opinion

Justice Thomas agreed with the premise that this subsidy constituted government speech.126 However, he argued that the association might have a valid First Amendment challenge on an as-applied basis if the generic advertisement could be shown to be attributed either to the individual members or the association.127 Justice Thomas stressed that the government may not

120. Id. at 2062. All assessments are paid to the Beef Board. Id. at 2058. The Operating Committee’s involvement is limited to designing promotional campaigns. Id. at 2062. The Secretary supervises and has final authority over the promotional campaign. Id. Officials from the USDA also attend and participate in the meetings where proposals are developed. Id.
121. Id. at 2063.
122. Id.
123. Id. See also United States v. Lee, 455 U.S. 252, 260 (1982) (holding that there is no principled way to distinguish between general taxes and those imposed under the Social Security Act in evaluating the burden of free exercise).
124. Livestock Mktg. Ass’n, 125 S. Ct. at 2064-65 (noting that the advertisements were credited to “America’s Beef Producers”).
125. Id. Neither of the groups challenging the case claims to be mistaken for “America’s Beef Producers.” Id. at n.11.
126. Id. at 2066.
127. Id.
compel individuals to convey messages with which they disagree. Additionally, Justice Thomas noted that the First Amendment protection of freedom of association prohibits the government from coercively associating individuals or groups with unwanted messages.

D. Justice Souter’s Dissenting Opinion

Justice Souter argued that the Court unwisely accepted the defense left open in United Foods that a compelled subsidy would be valid if it constituted government speech. He argued that in order for the government to rely on the government speech doctrine to compel specific groups to fund speech, it must prove that the message is actually a government message.

Because the ads did not indicate that it was paid for or produced by the USDA, Justice Souter did not believe the beef ads qualified as government speech. In making this argument he examined the guiding principles of the government speech doctrine. He recognized that it was a legitimate exercise of power for the government to speak, despite objections from those whose taxes or exactions funded the speech. However, the First Amendment interest in avoiding fixed subsidies was served by a political system of checks and balances. His argument was cloaked in the idea that if voters disagreed with the government’s message or the use of taxpayer dollars to produce and send the message, they could chose to end the message by voting for a change in office in the next election.

Unlike the majority, Justice Souter saw this case as a challenge to advertisements he found misleading because they were not properly attributed to the USDA. The inclusion of the red check to symbolize the federal checkoff program was not enough to notify the general public that this was government

128. Id.
129. Livestock Mktg. Ass’n, 125 S. Ct. at 2066-2067 (Thomas, J., concurring) (citing Boy Scouts of America v. Dale, 530 U.S. 640, 653 (2000)). The Dale Court held that the government cannot force an organization to send a message with which it disagrees. Id.
130. Id. at 2068 (Souter J., dissenting).
131. Id. at 2068-69.
132. Id. at 2070.
133. Id.
134. Id. See also Keller v. State Bar of Cal., 496 U.S. 1, 13-14 (1990) If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.
135. Livestock Mktg. Ass’n, 125 S. Ct. at 2070-71 (Souter J., dissenting).
136. Id. at 2071.
137. Id. at 2072. The ads were misleading because a regular citizen viewing the ads would think that the beef producers had created the commercials to increase their sales. Id. He analogized it to commercials for Pepsi and Levis arguing that no one would believe these were ads paid for by the government. Id.
speech rather than advertising by beef producers. As a result, he believed the government did not meet its burden of showing that the advertisements constituted government speech.

IV. ANALYSIS

With the United States Supreme Court ruling on the constitutionality of commodity checkoff programs three times in the last eight years, one would think that the area is clear enough so that some bright line rules and predictability would be established. Instead, the Court’s development of case law in the commodity checkoff area has become so confused and technical that no clear guidelines exist. At this point, it seems clear that a commodity checkoff program is constitutional when it is essential to a larger regulatory scheme in the industry, as was demonstrated with the California fruit tree checkoff in Wileman Bros. However, by reaching different conclusions on the constitutionality of identical programs not controlled by Wileman Bros., the Court confused the standard to apply when the checkoff is not part of a broad regulatory scheme.

A. Broad First Amendment Concerns

The Livestock Marketing Ass’n case represents the manifestation of Justice Luttig’s concurring opinion in Sons of Confederate Veterans. Instead of a bright line rule determining whether the ads are government or private speech, the ads produced by the Beef Board seem to fall into a “hybrid” speech category. But the Supreme Court did not acknowledge this problem and instead tried to put the speech on one side of a continuum, not recognizing any middle ground.

On one side, the Court found that the mushroom checkoff was subject to strict scrutiny because the program constituted compelled speech under United Foods. At the other end of the spectrum, the California fruit tree checkoff program received no First Amendment scrutiny under Wileman Bros. because it was part of a broader regulatory scheme. However, even though the Court found that the “beef checkoff is, in all material respects, identical to the

138. Livestock Mktg. Ass’n, 125 S. Ct. at 2072, n.6 (Souter J., dissenting).
139. Id. at 2073-74.
141. See Wileman Bros., 521 U.S. 469-77; United Foods, 533 U.S. at 415-416 (2001); Livestock Mktg. Ass’n, 125 S. Ct. at 2063-2066.
142. Wileman Bros., 521 U.S. at 477.
143. See United Foods, 533 U.S. at 409, 415; Livestock Mktg. Ass’n, 125 U.S. at 2066.
144. See supra note 61 and accompanying text.
145. See supra note 61 and accompanying text.
146. Livestock Mktg. Ass’n, 125 S. Ct. at 2061-2062.
148. See Wileman Bros., 521 U.S. at 477.
mushroom checkoff,”149 the beef checkoff fell at the Wileman Bros. end of the spectrum and is not subjected to First Amendment scrutiny.150

In reaching its decision, the Court for the most part entirely ignored the rationale asserted in United Foods.151 For instance, it was stated in United Foods that “First Amendment values are at serious risk if the government can compel a particular citizen, or group of citizens to subsidize speech on the side that it favors; and . . . [a]s a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.”152 But in a complete turn around, the Court applied wide deference to the speech at issue in Livestock Marketing Ass’n on the basis that it was government speech, stating that “[w]e have generally assumed, though not squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.”153 What seems so odd about this path is that in United Foods it was clear that the government would defend ongoing challenges to checkoff programs on the grounds that they constituted government speech.154 However, nowhere in the Court’s opinion in United Foods was it asserted that the analysis to be used by the Court to decide a government speech argument should be so vastly different.155

B. Keller Line of Cases Should Control

Previously, in order to discern whether the compelled subsidy line of cases or the newly created government speech cases controlled, the Court first determined whether the entity distributing the message was a governmental entity.156 However, in Livestock Marketing Ass’n, the Court stated, “[w]e therefore need not label the Operating Committee as ‘governmental’ or ‘nongovernmental.’ The entity to which assessments are remitted is the Beef Board, all of whose members are appointed by the Secretary pursuant to law.”157

This finding is in stark contrast with the Keller v. State Bar of California case.158 There, the State Bar was created by California law to regulate the legal profession.159 The statute created an “integrated bar,” meaning that membership

149. Livestock Mktg. Ass’n, 125 S. Ct. at 2061. (quoting Livestock Mktg. Ass’n v. United States Dept. of Agric., 335 F.3d 711, 717 (8th Cir. 2003)).
150. Livestock Mktg. Ass’n, 125 S. Ct at 2062.
151. See United Foods, 533 U.S. at 410; Livestock Mktg. Ass’n, 125 S.Ct. at 2061-66.
152. United Foods, 533 U.S. at 411.
153. Livestock Mktg. Ass’n, 125 S. Ct. at 2062.
155. Id.
157. Livestock Mktg. Ass’n, 125 S. Ct. at 2062, n.4.
158. Contra Keller, 496 U.S. at 11.
159. Keller, 496 U.S. at 4-5.
and dues were mandatory in order to practice in California. The legislation also provided for a State Bar Board of Governors to be created whose members were to be appointed by the Governor. However, the Court found that the State Bar did not constitute a governmental agency, principally because all of the operating funds came from individual exactions rather than appropriations from the general fund. The Court stated in Keller:

> The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing respondent’s argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

But in an astounding leap that is highly inconsistent with Keller, the Livestock Mktg. Ass’n Court found that because the Secretary had the final authority to appoint the Beef Board and to approve the promotional ads, it was irrelevant whether the Beef Board was a governmental agency for purposes of First Amendment analysis. The Court reasoned that “[t]his degree of governmental control over the message funded by the checkoff distinguishes these cases from Keller.” The most inconsistent part of this argument is that Keller controlled in United Foods, and yet the Court made no attempt to argue that the Beef Act gave any more control of the message to the Secretary than that granted under the Mushroom Act.

This inability or unwillingness of the Court to set forth a clear standard to determine what constitutes a governmental agency makes the analysis of what constitutes government speech even more unpredictable. The fact that the Governor of California had the power to appoint the State Bar Board seems to fall far enough under the analysis utilized in Livestock Marketing Ass’n to convert the state bar association into a “governmental agency” for purposes of

160. Id.
161. Id.
162. Id. at 11.
163. Id. at 13.
165. Id. at 2063.
167. See Livestock Mktg. Ass’n, 125 S. Ct. at 2061 (stating that the beef checkoff is for the most part identical to the mushroom checkoff).
First Amendment analysis. This view also conflicts with that announced in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, where the United States Supreme Court stated that “[e]ven extensive regulation by the government does not transform the actions of the regulated entity into those of the government.” Here, the Court did not find “extensive regulation,” but rather rested on the idea that the power of appointment and minor supervision of the activities by the Secretary was enough to grant governmental agency status to the Beef Board.

The line of reasoning laid out in *Livestock Marketing Ass’n* does not add any predictability to the very complicated area of government speech, but instead turns the compelled subsidy line of cases on its head. It effectively gives the government broad authority to create organizations that operate outside the confines of government strictures that are afforded the same sweeping First Amendment protections as government agencies.

C. The Government Speech Doctrine As Applied Dilutes Political Accountability

Notwithstanding the problems with the *Keller* analysis, the Court also significantly diluted the previously announced government speech doctrine. The doctrine was first asserted as a defense to challenges by individual taxpayers who argued that general revenues could not fund programs they found objectionable. The defense took hold in *Rust v. Sullivan*, when the United States Supreme Court found that a statute that limited health clinics who received Title X funding from engaging in abortion-related activities and counseling did not infringe on the recipient’s First Amendment freedom of speech rights. This case represents the first time that the Supreme Court extended the rationale to speech funded by exactions on a particular segment of the population, designed not for the benefit of the general public, but solely to benefit a small segment of the population.

In its first clear adoption of the government speech doctrine, the Court laid out a three-prong analysis. First, the government must establish the overall
message that is being communicated.\textsuperscript{179} Second, the government must control the overall message.\textsuperscript{180} Finally, the government must be politically accountable for the message.\textsuperscript{181}

The first prong was satisfied merely by passing a statute with vague terms that called for promotional campaigns to increase beef sales.\textsuperscript{182} Under the Court’s analysis, the statute did not need to specify a message or lay out the manner in which the message would be conveyed.\textsuperscript{183} It was enough merely to assert that the overall goal was to increase the market.\textsuperscript{184} The second prong was met by final approval of the message.\textsuperscript{185} It was not necessary for the government to be involved in the development or creation of the message.\textsuperscript{186} The fact that a non-governmental entity created, developed and disseminated the message did not have an impact on the analysis as long as someone employed by USDA reviewed the final product.\textsuperscript{187}

This application conflicts with previous analysis of government speech disseminated by private entities.\textsuperscript{188} For instance, in \textit{Rosenberger v. Rector & Visitors of Univ. of Va.}, the Court stated that “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate \textdagger right steps to ensure that its message is neither garbled nor distorted by the grantee.”\textsuperscript{189} But in the present case, there is no disbursement of public funds.\textsuperscript{190} The checkoff funds are collected by the local beef counsels and then forwarded to the Beef Board.\textsuperscript{191} None of the money enters into the general coffers of the federal government nor does the Beef Board receive funds allocated from general revenues.\textsuperscript{192}

Moreover, the significant weight placed on the final approval of the message by the Secretary does not seem to rise to the standard of control articulated in \textit{Rosenberger}, because no standards are set forth in the Beef Act to determine whether specific messages are acceptable under the statute.\textsuperscript{193}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 2062.
\item \textit{Id.} at 2063.
\item \textit{Id.} at 2064.
\item \textit{Id.} at 2062-2063.
\item \textit{Livestock Mktg. Ass’n}, 125 S. Ct. at 2063.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Rosenberger}, 515 U.S. at 833 (citing \textit{Rust}, 500 U.S. at 196-200).
\item \textit{Id.} at 2058.
\item \textit{Id.}
\item 7 U.S.C. § 2901 (2000) (outlining the goals of the advertising campaign).
\end{enumerate}
\end{footnotesize}
To demonstrate the third prong of government accountability, the Court essentially blended the first two prongs of the analysis. The political accountability prong was met by the statute, which authorized the utilization of a checkoff to fund advertising and granted the government authority of final approval of the message.

This reasoning conflicts with the rationale that government speech is immune from First Amendment constraints because “[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.” The biggest flaw with the Court’s analysis is that it assumed that the general public has enough political savvy to know that the government even passed legislation creating the program. However, since only one in three Americans are able to name their Congressional Representative, it is highly unlikely that they will notice when a specific piece of legislation creating a marketing program is passed. Furthermore, the Court assumed that if the general public remembered the legislation, then they would be able to recognize the commercials as a product of the legislation rather than those disseminated by individuals marketing their particular product. By reaching this conclusion, the entire political accountability argument has been diluted to the point that it is practically non-existent.

D. Alternative Course

In order to finally establish a clear standard to separate government speech from compelled speech, the Court should have announced a two-step process. First, a court would determine whether the speech was disseminated from a private entity or a government entity. Then, the Court would determine whether the speech actually constituted government speech.

Following the Keller line of cases, a three-step process should be employed to determine if the organization is a government entity. First, the court should

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195. *Id.*
200. *Id.*
202. *Id. See also* United States v. United Foods, 533 U.S. 405, 410 (2001) (stating that cases addressing the compelled subsidy of speech is the starting point).
203. *See Livestock Mktg. Ass’n*, 125 S. Ct. at 2062-63 (finding that the message is one established by the government after discussing whether the Beef Board is a government agency).
204. *Keller*, 496 U.S. at 11-12.
review how the entity was created and formed and consider the statute that created the entity.\textsuperscript{205} It should ask whether the entity’s purpose is to benefit the public as a whole or merely benefit a narrower segment of the population.\textsuperscript{206} The more that the public benefits, the more likely it is that the organization would be considered a government entity.\textsuperscript{207}

Second, the funding of the entity should be examined.\textsuperscript{208} Is it funded by general revenues or by exactions on those individuals who benefit directly from the statute?\textsuperscript{209} The fact that a program operates exclusively on exactions rather than appropriations from general funds greatly reduces the likelihood that the organization is governmental in nature.\textsuperscript{210}

Third, the purpose of the entity should be analyzed.\textsuperscript{211} The following questions are useful in this analysis: was it formed to participate in the general government under the state?\textsuperscript{212} Are persons members because they are citizens or voters, or because they belong to a more specific segment of the population?\textsuperscript{213}

If it is determined that the organization is a non-governmental entity, than the compelled subsidy line of cases should control.\textsuperscript{214} However, if the organization is a government entity, then the court should next determine if the speech involved constitutes government speech.\textsuperscript{215}

Under the government speech analysis, the court should engage in a three-part test.\textsuperscript{216} First, the legislation that is the impetus for the speech should be scrutinized.\textsuperscript{217} Following the \textit{Wileman Bros.} and \textit{United Foods} rationales, the court should consider legislative history to determine whether the purpose of the legislation was to engage in speech\textsuperscript{218} or whether it related to a broader regulatory scheme.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{205} Id. at 11.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id. at 11-12.
\item \textsuperscript{208} Keller, 496 U.S. at 11 (stating that the Bar Board is very different from a regular government agency because its principal funding comes from bar dues rather than general appropriations).
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. at 12 (stating that he character of the bar distinguishes it from the role of a typical government agency because the bar is not able to express any view, but rather must express a view consistent with the bar board’s purpose).
\item \textsuperscript{213} Keller, 496 U.S. at 11.
\item \textsuperscript{214} Id. at 14.
\item \textsuperscript{215} Johanns v. Livestock Mktg. Ass’n, 125 S. Ct. 2055, 2062 (2005) (stating that “compelled support of private association is fundamentally different from compelled support of government.”).
\item \textsuperscript{216} See id. at 2061-65.
\item \textsuperscript{217} Id. at 2063.
\item \textsuperscript{218} See United States v. United Foods, 533 U.S. 405, 415 (2001) (stating that the Court has not upheld a compelled subsidy of speech when the purpose of the program was speech itself).
\item \textsuperscript{219} Id. at 411.
\end{itemize}
Second, the level of control that the government exercises over the message should be examined. The Court could consider whether an employee of the government contributes to the creating, crafting and dissemination of the message or whether that employee regularly attends meetings to monitor the advancement of the message.

Lastly, the government accountability for the message should be reviewed. Essential to this analysis is whether the general public will be able to recognize that the government is responsible for the content of the message. The standard of review should focus on whether a reasonable person would know that the message is one set forth from the government rather than from a private entity.

Under the test outlined above, the Beef Act would fail under the Keller line of cases. First, the Beef Act was passed to benefit only cattle producers, not the general public. This is reflected in the purpose of the statute, which was to increase markets and uses for beef. Next, the promotional campaigns were funded solely through the monies collected through the beef checkoff program. None of the Beef Board’s budget comes from general tax dollars. Furthermore, the Beef Board was not formed to participate generally in the government. Instead, it was formed to create promotional campaigns in order to increase beef sales, and in turn increase profits for beef producers.

Even if the Beef Board was deemed to be a government entity, the Beef Act still could not pass the government speech prong of the analysis. First, the Beef Act was passed solely to create an entity to engage in advertising. Thus, there

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221. *Id.* at 2062.
222. *Id.* at 2063.
223. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259, n.13 (1977) (Powell, J., concurring) (stating that “the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people.”); Bd. of Regents of the Univ. of Wis. Sys. V. Southworth, 529 U.S. 217, 235 (2000) (noting that “[w]hile the government speaks, for instance, to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials could espouse some different or contrary position.”).
225. *Id.*
229. *Id.*
232. *Id.*
is no broader regulatory scheme for which the speech can be germane. Next, while the Beef Act gives the Secretary final approval of the message, it does not require active participation in the creation and shaping of the message. Lastly, the promotional ads produced pursuant to the Beef Act contained the tag-line “funded by America’s Beef Producers,” which would make it highly unlikely that a member of the general public would recognize this commercial as one produced by the government. Accordingly, the general public would not hold the government politically accountable for the content of the message. As a result, the Beef Act violated the First Amendment rights of those subject to the checkoff.

V. CONCLUSION

In Livestock Marketing Ass’n, the Supreme Court incorrectly found that the mandatory checkoff program did not violate the First Amendment. This decision significantly clouds any future analysis of checkoff programs because the Court did not articulate a clear standard of review. Lower courts are now left to determine which of three standards to apply when evaluating the constitutionality of checkoff programs.

The Supreme Court did not overrule the United Foods decision, nor did it attempt to explain its usefulness in the analysis. Instead, other than a cursory reference to the similarities between the mushroom and the beef programs, the Court ignored it. Even though it is likely that lower courts will disregard the United Foods decision, it remains to be seen whether consistency in this area will develop in the ongoing challenges to checkoffs. Additionally, this decision will likely have an impact on general compelled subsidy analysis because the

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233. Compare Livestock Mkts. Ass’n, 125 S. Ct. at 2059 (stating that the beef act is identical to the mushroom act) with United States v. United Foods, 533 U.S. 405, 415 (2001) (stating that the mushroom act is not related to any broader regulatory scheme for which it could be germane).
234. 7 U.S.C. § 2904(4)(B) (2000) (stating that the Operating Committee will develop the advertising plans).
235. Livestock Mkts. Ass’n, 125 S. Ct. at 2059.
236. See id. at 2072 (Souter, J., dissenting).
237. Id.
238. Id. at 2073-74.
239. Compare Livestock Mkts. Ass’n, 125 S. Ct. at 2063-2065 (holding that farmers’ First Amendment rights are not implicated by advertisements funded with checkoffs because the advertisements constitute government speech), with United Foods, 533 U.S. at 415 (holding that farmers’ First Amendment rights were violated by compelled support of speech that is not part of a broader regulatory scheme), with Glickman v. Wileman Bros., 521 U.S. 457, 469-70 (1996) (finding that the First Amendment is not violated when advertisements paid for by checkoff programs are part of a broad regulatory scheme).
240. Livestock Mkts. Ass’n, at 2061-63.
241. Id.
242. See generally id. at 2061 (stating that just like in United Foods, there is not broader regulatory scheme in place).
Court seems to retreat from its previous holdings requiring that speech be
germane to a purpose other than advertising.243

The Livestock Marketing Ass’n decision creates another exception to the
protection afforded individual First Amendment rights.244 It disregards one of the
guiding principals behind the First Amendment—the right not to speak.245 If the
Supreme Court continues on this path, it is likely that this constitutionally
protected right will no longer be a valid defense for farmers wishing to challenge
objectionable speech that they are required to fund through checkoffs.

243. Id. at 2061.
244. Id. at 2063-66.
I. INTRODUCTION

Modern Establishment Clause jurisprudence is in a state of disarray. One scholar in particular has noted that “[t]he Court has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common . . . In the forty years since Everson [v. Bd. of Educ.], the Court has reached results in establishment clause cases that are legendary in their inconsistencies.” What is it about the nature of religion questions that causes courts such problems? No doubt, one cause is the very sensitive nature of religious issues in general. However, there is a more tangible explanation: the United States Supreme Court’s failure to settle on a coherent rule to use in such cases. While this problem has plagued the Court since the time of Justice Black, three cases decided during the most recent term underscore the currentness of this problem.

In Cutter v. Wilkinson, the United States Supreme Court reversed the Sixth Circuit and upheld the Religious Land Use and Institutionalized Act by finding

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2. See, e.g., Everson v. Bd. of Educ., 330 U.S. 1 (1947). The majority opinion was written by Justice Black.

   No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:
   (A) is in furtherance of a compelling governmental interest; and
   (B) is the least restrictive means of furthering that compelling governmental interest.
that it merely accommodates religious practice. Then, in McCreary County v. ACLU, the Court enjoined two counties from posting the Ten Commandments in their courthouses, applying the well-known Lemon test outlined in Lemon v. Kurtzman. Finally, in Van Orden v. Perry, the Court permitted a religious display on state capital grounds on the basis that the history and tradition of religion in this country allow it.

What then, is to be made of this tangled web of rules? How are lower courts to decide cases, especially when Supreme Court decisions come out differently in seemingly similar situations? In search of a single coherent rule, or principled set of rules, this article suggests that such a rule already exists. Justice O’Connor’s endorsement test, first explained in Lynch v. Donnelly, has provided a thoughtful alternative to the very controversial Establishment Clause stand-bys. Many courts, including the Supreme Court itself, as well as a

5. Cutter, 125 S. Ct. at 2125.
7. See discussion infra Part II.
9. For two perennial examples of these inconsistencies, consider Meek v. Pittenger, 421 U.S. 349 (1975) (Brennan, Douglas, and Marshall, J. concurring in part and dissenting in part) (Burger, J., concurring in part and dissenting in part) (Rehnquist and White, J.J., concurring in parts and dissenting in part), and Wolman v. Walter, 433 U.S. 229 (1977) (Burger, J., concurring in part and dissenting in part) (Rehnquist and White, J.J., concurring in part and dissenting in part) (Brennan, J., concurring in part and dissenting in part) (Rehnquist and White, J.J., concurring in part and dissenting in part) (Brennan, J., concurring in part and dissenting in part) (Marshall, J., concurring in part and dissenting in part) (Powell, J., concurring in part and dissenting in part) (Stevens, J., concurring in part and dissenting in part). Both Meek and Wolman involved taxpayer challenges to state statutes providing funding to private religious schools for textbooks and other educational resources. Meek, 421 U.S. at 351, Wolman, 433 U.S. at 232-33. In each case, the Court upheld the constitutionality of the textbook loan provisions of the statutes. Meek, 421 U.S. at 362, Wolman, 433 U.S. at 238. In Meek, the Court struck down those provisions of the statute which provided for additional educational resources on the grounds that, unlike the secular textbooks which went directly to the students, the resources in question went to the schools and could conceivably be used for non-secular purposes. Meek, 421 U.S. at 366. “But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act.” Id. at 363. In Wolman, the Court permitted some additional materials going to sectarian schools than were allowed in Meek. Wolman, 433 U.S. at 236-48. “Section 3317.06 was enacted after this Court’s May 1975 decision in Meek v. Pittenger . . . and obviously is an attempt to conform to the teachings of that decision.” Id. at 233. Thus, the Wolman Court upheld those provisions of the statute that gave sectarian schools access to standardized testing and scoring services, diagnostics services for the hearing impaired, and therapeutic services for special needs students. Id. at 238-48. However, the Court, citing Meek, threw out the statutory provisions for instructional materials and equipment, as well as money for field trips. Id. at 248-55. The distinction in the eyes of the Court was that the allowable provisions did not risk direct advancement of the religious mission of the schools—they could not easily be used for religious purposes. Id. at 236-348. As to those items disallowed, the Court was concerned that they could in fact be used for religious purposes and any attempt by the state to monitor such uses would necessarily violate the third prong of the Lemon test which prohibits excessive entanglement. Id. at 248-255. Perhaps seeing the error of its own way, the Court overturned both decisions in 2000 in Mitchell v. Helms, 530 U.S. 793, 837 (2000) (Souter, Stevens, and Ginsburg, J.J., dissenting).
11. See infra note 52 and accompanying text.
number of scholars, have openly adopted or supported Justice O'Connor's endorsement test.

This article addresses not only the need for a coherent Establishment Clause rule, but also suggests that Justice O'Connor's endorsement test, with some revision, is up to the challenge. First, this article provides some Establishment Clause background to open the discussion. Second, the Cutter, McCreary, and Van Orden decisions, as well as their respective precedent-creating cases, will be analyzed in turn. Third, this article will suggest some explanations for the Supreme Court's failure to settle on a single rule in Establishment Clause cases. Fourth, Justice O'Connor's endorsement test will be introduced and discussed. Finally, some revisions to the standard endorsement test will be offered in order to develop a more fundamentally sound doctrine.

12. See, e.g., County of Allegheny v. ACLU 492 U.S. 573, 593-94 (1989) (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1989) (O'Connor, J., concurring)). The Court stated: Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community. See also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting Wallace v. Jaffree, 472 U.S. 38, 73 (O'Connor, J., concurring)) ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").


14. See also Books v. City of Elkhart, 235 F.3d 292, 308 (7th Cir. 2000) ("[T]he Supreme Court's cases, and the decisions of our court in conformity with those precedents of the High Court, simply prevent government at any level from intruding into the religious life of our people by sponsoring or endorsing a particular perspective on religious matters."); Doe v. Porter, 188 F. Supp. 2d 904, 911 (E.D. Tenn. 2002). The court stated: But the government, through its public school system, may not teach, or allow the teaching of a distinct religious viewpoint. This is what the Rhea County School Board has done by allowing the teaching of the Bible . . . In so doing, these defendants have acted with both purpose and effect to endorse and advance religion in the public schools. This is prohibited by the Establishment Clause. See also Williams v. Lara, 52 S.W.3d 171, 190 (Tex. 2000) ("[I]n determining whether the challenged government practice in this case violates the Establishment Clause, we begin by inquiring whether the purpose of the government's practice is legitimately secular . . . that is, whether the actual intent of the government's action is to endorse or disapprove of religion."); Sands v. Morongo Unified Sch. Dist., 809 P.3d 809, 814 (Cal. 1991) ("Regardless of its actual purpose, when the government sponsors prayers at high school graduation ceremonies it gives the appearance of taking a position on religious questions.").
II. ESTABLISHMENT CLAUSE BACKGROUND

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.15

A great many developments have occurred since Thomas Jefferson voiced his early view of the religion clauses in his famous letter to the Danbury Baptist Association in 1802:

I contemplate with sovereign reverence that act of the whole American people which declared their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State.16

However, centuries of debate over the meaning of the religion clauses, and especially the Establishment Clause, have done little to temper the confusion now faced by the courts.17

The First Amendment to the Constitution prohibits Congress from making any “law respecting an establishment of religion, or prohibiting the exercise thereof,”18 and by passage of the Fourteenth Amendment in 1868,19 was made applicable to the states.20 The religion clauses, as they are commonly known,

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17. See supra note 1.
18. U.S. CONST. amend. I, cl. 1, 2; See also infra note 67 and accompanying text.
19. U.S. CONST. amend. XIV; See also infra note 68 and accompanying text.
20. See Cantwell v. Conn., 310 U.S. 296, 303 (1940). The Court stated:
   The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or
include the Establishment and Free Exercise Clauses. For more than 200 years, American jurists have battled over their precise meaning, and given that no less than three such cases were brought before the Supreme Court bench during the most recent term, it seems unlikely that the battle will soon subside. Early Establishment Clause cases demonstrated a sharp theoretical divide between those Justices who advanced the ideal of pure separation of church and state on the one hand, and those Justices who believed that the Establishment Clause, when read in tandem with the Free Exercise Clause, required accommodation of religious practice on the other. While the Court has sought to delineate the workings of government from those of religious organizations so as to comport with the requirements of the First Amendment, the notion of pure separation has proven to be an untenable expectation. Moreover, numerous commentators have argued that the First Amendment has never entailed separation at all.

prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

22. See Cutter, 125 S. Ct. 2113 (2005); McCreary, 125 S. Ct. 2722 (2005); Van Orden, 125 S. Ct. 2854 (2005).
23. See, e.g., Everson, 330 U.S. at 29 (Rutledge, Frankfurter, Jackson, and Rutledge, JJ., dissenting) (“I cannot believe that the great author of those words, or the men who made them law, could have joined this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by . . . the First Amendment.”); See also id. at 31-32 where the dissent writes:
   The amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.
24. Id. at 16. Everson established the basis for the notion of religious accommodation by holding that government cannot withhold generally available benefits to members of religious organizations. Id. In the Court’s words, the state “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faiths, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” Id. (emphasis in original).
25. See, e.g., Lynch, 465 U.S. at 673 (“No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.”); Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) (“[T]his Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation . . . .”); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The Court stated:
   The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other. Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.
Several constitutional historians have suggested that, while separation of church and state as a constitutional standard may be an accurate reflection of the framers intentions, the modern connotations associated with the phrase “separation” mistake those same intentions.27

Over the course of the six decades since Everson, Establishment Clause jurisprudence has shifted away from these seemingly polar opposite interpretations and has settled upon the principle of neutrality. “The touchstone of our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”28 However, this principle of neutrality has proven to be only a starting point for further analysis, an analysis that requires some analytical framework for courts to evaluate claims of Establishment Clause violations. It is this need for such an analytical framework that has given birth to several, often conflicting, rules and doctrines.29

The first of these frameworks to be developed was the doctrine of accommodation.30 As the Supreme Court strained to understand how the principle of neutrality should be applied across the many types of issues raised by litigants seeking protection under the Establishment Clause, the post-Everson Court adopted the standard that government may not create undue burdens on religious practice.31 The notion of accommodation can be traced back to the Court’s holistic view of the religion clauses, taking the approach that the commandments of the Establishment Clause can only be determined in light of those of the Free Exercise Clause as well.32 That is to say, there exists a “narrow channel” between the prohibitions of the Establishment Clause on one “shore” and the requirements of the Free Exercise Clause on the other, providing

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27. See generally Philip Hamburger, Separation of Church and State 1-17 (Harvard University Press 2002) Hamburger argued that the separation envisioned by the framers and ratifiers is very different than the separation accepted by the courts after Everson. Id. Specifically, the religious minorities that played such a significant role in defining the early meaning the religious liberty under the Establishment Clause did not anticipate that separation would be used to severe all relations between church and state. Id. Rather, separation was in intended only to protect the religious minorities from the overreaching of state-sponsored religious majorities. Id. It was not until the twentieth century when religious secularists, frustrated by the majority efforts of Catholics to entangle government and religion, sought to establish the notion of separation as a true “wall.” Id.

28. McCreary, 125 S. Ct. at 2733 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

29. This article will only address the three specific rules and doctrines upon which the three 2005 term cases were decided.

30. See infra Part III.A.

31. See also Sch. Dist. of Abington Twp. v. Schempp 374 U.S. 203, 295 (1963) (Brennan, J., concurring) (citing to a number of instances where the Court has used religious accommodation as the basis for its decisions). Justice Brennan noted that “I think a brief survey of certain of these forms of accommodation will reveal that the First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion.” Id.

32. See, e.g., Santa Fe Indep. Sch. Dist., 530 U.S. at 313 (quoting Engel v. Vitale, 370 U.S. 421, 430 (1962)) (“[T]he common purpose of the Religion Clauses ‘is to secure religious liberty.’”).
government with at least a modicum of leeway in which to operate. It is this leeway that eliminates the need for government to “show a callous indifference to religious groups.”

While accommodation as a doctrine proved to be somewhat useful, the Supreme Court searched for a more analytical approach. That search ended in 1971 with their decision in Lemon v. Kurtzman, a case involving the constitutionality of a Rhode Island statute providing aid to parochial schools in the form of public school teachers. Although the teachers were only to provide instruction on secular subjects, the Court nonetheless found that such benefits resulted in an excessive entanglement of the state with the religious schools. By synthesizing disparate precepts from two previous cases, the Court formulated the current Lemon test: “First, the statute must have a secular legislative purpose . . . second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’” Lemon has persisted as the primary rule in Establishment Clause cases, and although many have harkened its demise, it continues to be employed by courts in one form or another.

33. See Cutter, 125 S. Ct. at 2121. Justice Ginsburg, writing the opinion for the majority, described the accommodation doctrine as a narrow corridor between Free Exercise and Establishment. Id.
35. See e.g. Lemon, 403 U.S. 602.
36. Id.
37. Id. at 607.
38. Id.
39. Id. at 615-20.
40. See Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (indicating that a governmental act is constitutional under the Establishment Clause if it has a secular purpose and its principal or primary effect neither advances nor inhibits religion); Walz v. Tax Comm’n 397 U.S. 664, 674 (1970) (stating a governmental act must not foster ‘an excessive government entanglement with religion’).
42. See, e.g., Van Orden, 125 S. Ct. at 2861 (“Whatever may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia and Thomas, JJ., dissenting). The dissent stated:

As to the Court’s invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.

43. See, e.g., Santa Fe Ind. Sch. Dist., 530 U.S. at 314 (using Lemon to invalidate a local rule permitting prayer at public high school football games); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (using Lemon to permit a holiday display which included a Christmas tree and a menorah but to enjoin a display of a cèèche on courthouse staircase); Freethought Soc. v. Chester County, 334 F.3d 247 (3d Cir. 2003) (using Lemon to permit a plaque with the Ten Commandments); Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 425-430 (2d
The most recent doctrine adopted by the Court for analyzing alleged Establishment Clause cases, considered by some to be little more than an exception to the Lemon test, is the history and tradition doctrine. The Court has used history and tradition to justify practices such as legislative prayers, national anthems, and more recently, displays of the Ten Commandments. At the core of the doctrine is the idea that certain practices, while being openly sectarian in nature, comport with the Establishment Clause on the basis that they are “deeply embedded in the history and tradition of this country.” Although the contours of this doctrine are still unclear, and little guidance has been offered to explain when it applies, it seems likely that history and tradition will continue to be used by the Court in cases where Lemon or some other test simply would not produce the right result.

III. OLD RULES OF THE ESTABLISHMENT CLAUSE

In its efforts to bring enlightenment to the difficult area of the Establishment Clause, the United States Supreme Court has developed a series of doctrines and rules. However, in attempting to navigate the rough waters of the First Amendment, the Court has done little more that create more uncertainty. In this section, we will explore how this uncertainty came about by examining three Establishment Clause cases decided during the 2005 Supreme Court term. To aid in this discussion, the leading cases within each rule will be analyzed, thereby providing a reference for later critique. The three rules discussed herein


The Supreme Court in Marsh had carved out an exception to accepted establishment clause doctrine to uphold the constitutionality of a ‘unique,’ deeply-rooted historical and religious tradition and had then sought to legitimize that exception through a comprehensive survey of the historical acceptance of that challenged government exercise in particular.

45. See infra Part III.C.


47. See McCreary, 125 S. Ct. at 2758.


49. Id. at 2863 (“Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance.”).

50. Id. at 2862.

51. See infra note 52 and accompanying text.
include the accommodation doctrine, the *Lemon* test, and the history and tradition doctrine.\footnote{52}

A. The Accommodation Rule: Splitting the Difference Between Establishment and Free Exercise

*That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.*\footnote{53}

Numerous cases have pointed out the frequent clash between the Establishment and Free Exercise Clauses.\footnote{54} “These clauses provide: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension.”\footnote{55} In many of these same cases, the Court has held that the governmental acts complained of were not violations of Establishment Clause, but rather allowable exercises of accommodation of religious liberty.\footnote{56} This was the rule adhered to in *Cutter v. Wilkinson*,\footnote{57} a rule which found its genesis in *Zorach v. Clauson*\footnote{58}.

\footnote{52. With the exception of the *Lemon* test, these are not rules with clearly defined factors. Rather, they have served as guiding principles for the Court in evaluating Establishment Clause claims. This article asks how the Court decides which doctrine or test should apply in any given case.}

\footnote{53. *Everson*, 330 U.S. at 18.}

\footnote{54. *See*, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting) (“The Court correctly acknowledges that there is a ‘tension’ between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution.”); *Cutter*, 125 S. Ct. at 2120-21. The *Cutter* Court stated:

The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people. While the two Clauses express complementary values, they often exert conflicting pressures.

*Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun and O'Connor, JJ., concurring) (“This tension between mandated and prohibited religious exemptions is well recognized.”); *Marsh*, 463 U.S. at 809 (Brennan and Marshall, JJ., dissenting) (“It is indeed true that there are certain tensions inherent in the First Amendment itself . . . .”); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (“But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses . . . .”).


1. The Leading Case: Zorach v. Clauson

In Zorach, the United States Supreme Court was asked to rule on the constitutionality of a New York City early release program that allowed public school children to attend religious instruction.\(^\text{59}\) Under the early release provision, students left the school grounds and no public monies were expended in the instruction.\(^\text{60}\) The petitioner was the parent of two children who attended public schools in New York.\(^\text{61}\) He brought suit, alleging that the early release times constituted an establishment of religion.\(^\text{62}\) Following the lead of the New York Court of Appeals,\(^\text{63}\) the Court disagreed and upheld the early release provision, explaining:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.\(^\text{64}\)

Thus, according to the Court, the early release program represented nothing more than a permissible accommodation because it did not entail the showing of a religious preference by the state or the schools.\(^\text{65}\)

2. Cutter v. Wilkinson

Cutter involved the consolidation of the three cases.\(^\text{66}\) The petitioners were Ohio state inmates practicing nontraditional religions.\(^\text{67}\) Each brought suit against the Ohio Department of Corrections for alleged violations of their First\(^\text{68}\)

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59. Id. at 308.
60. Id. at 308-9.
61. Id. at 309.
62. Id. at 310.
64. Zorach, 343 U.S. at 313-14.
65. Id. at 315.
67. Id. at 2116-17. Petitioners were members of the Satanist, Wicca, Asatru religions, as well as the Church of Jesus Christ Christian, a faith based in part upon notions of white supremacy. Id.
68. U.S. Const. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
and Fourteenth Amendment rights for failure to allow them to practice their respective faiths. While these actions were pending, Congress enacted the Religious Land Use and Incarcerated Persons Act (RLUIPA). Under section three of RLUIPA, prison officials are prohibited from infringing upon the free exercise of the religious practices of inmates unless such infringements further compelling governmental interests and are carried out in the least restrictive way. RLUIPA was enacted in response to the Court’s decision in City of Boerne v. Flores, which invalidated the Religious Freedom Restoration Act (RFRA), itself a legislative response to Employment Division v. Smith. In enacting RFRA, Congress attempted to make its requirements applicable to the states by way of its section five powers under the Fourteenth Amendment. The Court in Boerne, however, held that Congress’ section five powers did not stretch this far, as RFRA was not merely remedial in nature. RLUIPA does not

press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”) (italics added).

69. U.S. Const. amend. XIV. Section one of the Fourteenth Amendment reads:
   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

70. Cutter, 125 S. Ct. at 2117.
73. City of Boerne v. Flores, 521 U.S. 507 (1997) (O’Connor, J., dissenting) (Souter and Breyer, JJ., dissenting). After the Court’s decision in Employment Div. v. Smith, see infra note 75, and the Congress’ subsequent enactment of RFRA, see infra note 74, a Texas church wanted to expand in order to accommodate more parishioners. Id. at 512. However, a local ordinance had designated the church as an historical landmark, prohibiting development. Id. The Bishop of the church brought suit, alleging, inter alia, violations of RFRA. Id. In holding that RFRA was not a proper exercise of Congress’ powers under the Fourteenth Amendment, the Court reasoned that RFRA was not merely remedial and therefore constitutional in nature, but rather was overly pervasive and not tailored to specific instances of protection, and were thereby preventative in nature. Id. at 534-36.
   (a) In general Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
   (b) Exception Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.
76. U.S. Const. amend. XIV, § 5. (stating that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.”).
77. Boerne, 521 U.S. at 532-36.
suffer from this infirmity, as Congress used the Commerce and Spending powers as the vehicles by which RLUIPA would apply to the states. The petitioners amended their complaints to include claims under RLUIPA’s section three.

The majority opinion, authored by Justice Ginsburg, began its analysis by noting that “there is room for play in the joints” between the [Establishment and Free Exercise] Clause, and thus there exists “some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.” By validating RLUIPA, the Court ultimately found that the Act “does not . . . exceed the limits of permissible government accommodation of religious practice.” Under it’s ruling in Corp. of Presiding Bishop for the Church of Jesus Christ of Latter-Day Saints v. Amos, Congress may act to alleviate excessive governmental restrictions on the exercise of religion. Thus, removing prison barriers to inmates’ religious practice, according to the Court, fell within the Amos rule. In further support of this finding, the Court pointed to its decisions allowing army chaplains and upholding legislation that permitted service personnel to wear items of religious significance as part of their uniforms.

Moreover, RLUIPA does not overshadow the need for prison officials to carry out corrections operations in a safe and orderly fashion. Thus, despite the new standard, deference was given to prison officials considering their “experience and expertise” in “establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of

78. U.S. Const. Art. I, § 8, cl.3. The Commerce Clause of the Constitution reads: “[t]he Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Id.
79. U.S. Const. Art. I, § 8. The Spending Clause of the Constitution reads: “[t]he Congress shall have the power . . . to pay the debts and provide for the common Defence and general Welfare of the United States.” Id.
81. Id. at 2119.
82. Id. at 2118 (citing Walz v. Tax Comm’n 397 U.S. 664, 669 (1970) (Douglas, J., dissenting)).
83. Id.
84. Id. at 2117.
85. 483 U.S. 327 (1987). In Amos, the Court evaluated the constitutionality of section 702 of the Civil Rights Act of 1964. Id. at 329-330. Section 702 provides for certain employment exemptions in the hiring practices of religious organizations. Id. at 330. The Court held that “it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” Id. at 335. Thus, section 702 was a permissible accommodation of religious practice. Id. at 338-340.
86. Cutter, 125 S. Ct. at 2122.
87. Id. at 2123-24.
88. Id. at 2122.
89. Id. at 2122-23.
costs and limited resources.\textsuperscript{90} Finally, the Court noted that RLUIPA’s benefits apply to all faiths, not merely to those tagged as bona fide.\textsuperscript{91}

B. Lemon v. Kurtzman: The Modern Establishment Clause Yardstick

\textit{In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.}\textsuperscript{92}

Ever since its first formulation in 1971, the so-called Lemon test, in one form or another, has served as the Court’s most consistent analytic tool for reviewing alleged Establishment Clause violations.\textsuperscript{93} Under the Lemon test, a governmental act will be held invalid unless it has a secular purpose, its primary effect neither advances nor inhibits religion, and it does not excessively entangle government with religion.\textsuperscript{94} Although subjected to years of criticism, Lemon's value as a trusted standard was reinforced in \textit{McCreary County v. ACLU}.\textsuperscript{95} The leading case applying the Lemon test is \textit{Edwards v. Aguillard}.\textsuperscript{96}

1. The Leading Case: \textit{Edwards v. Aguillard}

Louisiana enacted the Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act (hereinafter “Act”),\textsuperscript{97} which prohibited public schools from teaching evolutionary theories unless creationist theories were also taught.\textsuperscript{98} After the federal district court granted request for an

\begin{itemize}
\item \textsuperscript{90} \textit{Id.} at 2123.
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Lemon}, 403 U.S. at 612 (citing Walz v. Tax Comm’n, 397 U.S. 664, 668 (1969)).
\item \textsuperscript{93} \textit{See}, e.g., Carole F. Kagan, \textit{Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause}, 22 N. Ky. L. Rev. 621, 633 (1995) (“The Court, as Justice O’Connor noted, has never repudiated \textit{Lemon}, and it is apparent from the decision in \textit{Kiryas Joel} that it has found no substitute test . . . Rumors of Lemon’s death have been . . . ‘greatly exaggerated.’”); Penny J. Meyers, Note, \textit{Lemon is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation Ceremonies}, 34 Val. U. L. Rev. 231, 243 (1999) (“The Lemon test has the longest tenure of all Establishment Clause tests. Despite the efforts to sink it, the Lemon test remains afloat.”).
\item \textsuperscript{94} \textit{Lemon}, 403 U.S. at 612-13.
\item \textit{McCreary}, 125 S. Ct. at 2745.
\begin{quote}
Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public
\end{quote}
injunction against implementation of the Act and the Fifth Circuit affirmed, petitioner state officials appealed. The Supreme Court, in an opinion authored by Justice Brennan, began by citing *Lemon*:

The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted a law with a secular purpose. Second, the statute’s principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.100

The Court further indicated that its concern regarding alleged Establishment Clause cases was heightened, and thus review was “particularly vigilant” when such allegations involved children in grade school.101 Turning its attention to the purpose prong of the *Lemon* test, the Court noted that it was equally impermissible for government to purposively promote either a particular set of religious beliefs or religion in general.102 Petitioners were unable to provide such a satisfactory secular purpose.103 In the minds of the Justices, the claim by the state that the Act was intended to promote academic freedom was undermined by the fact that evolution was not permissible to teach if creationism was not given the same opportunity.104 For this reason, the stated purpose was self-destructive.105 Moreover, the pursuit of academic freedom could not be accomplished when teachers had less flexibility in the manner in which they carried out their jobs.106 In essence, the state’s attempt to force academic freedom was inconsistent on its own terms.107 Based upon this reasoning, the Court concluded that “[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.”108 Because the Court was unable to identify a secular purpose, its analysis stopped without examining the effect and entanglement prongs of the *Lemon* test.109

schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.

100. *Id.* at 582-83.
101. *Id.* at 583.
102. *Id.* at 585.
103. *Id.*
104. *Id.* at 586-587.
106. *Id.* at 587.
107. *Id.*
108. *Id.* at 591.
109. See *id.* at 585 (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)) (“If the law was enacted for the purpose of endorsing religion, ‘no consideration of the second or third criteria [of *Lemon*] is necessary.’”).
2. McCreary County v. ACLU

The petitioners, two Kentucky counties, mounted copies of the Ten Commandments in their respective courthouses. The respondents challenged the action under 42 U.S.C. § 1983 in federal district court as impermissible establishments of religion in contravention of the First Amendment. Before the claim could be heard in court, the two counties expanded their questionable displays by adding several documents to each. Upon suit, the district court granted the respondent’s request for injunction, finding that both the original and revised displays failed the purpose prong of the Lemon test. In response to this ruling, the petitioners filed a notice of appeal but voluntarily dismissed it. They then revised their displays for a third time. Again the respondents asked for an injunction. The district court again granted the injunction, noting that the petitioners’ claims that the new displays were supported by secular purposes “crumbles upon an examination of the history of the litigation.” A divided Sixth Circuit affirmed the decision, and the petitioners appealed.

Without a clear consensus, the Supreme Court affirmed, holding that the displays violated the Establishment Clause. At the heart of the Court’s decision was their finding that the displays lacked a secular purpose under the Lemon test. “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . .” The proper inquiry looks at the governmental action through the lens of the “objective observer,” taking account

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110. McCreary, 125 S. Ct. at 2728. The two Kentucky counties were McCreary and Pulasky.
111. Id. at 2727 (2005).
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
113. McCreary, 125 S. Ct. at 2729.
114. Id.
115. Id.
116. Id.
117. Id.
118. Id. at 2731.
119. McCreary, 125 S. Ct. at 2731.
120. Id. at 2731-32.
121. Id. at 2732.
122. Id. at 2739.
123. Id. at 2733.
of relevant “text, legislative history, and implementation of the statute.”

Applying this approach, the Court found that the displays, because of their continued modification, clearly lacked a secular purpose under the Court’s previous decision in *Stone v. Graham*. Moreover, the last set of revisions to the displays highlighted some of the more religious aspects not indicated in the second set.

Justice Scalia authored a persuasive dissent. “Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality.” Justice Scalia forcefully argued that, contrary to *McCreary* and many decisions that preceded it, the Establishment Clause was never intended to require governmental neutrality toward religion, and in fact such neutrality is destructive to the concept that religion is a necessary component of a moral society. In support of his position, Scalia cited numerous historical events and phenomena, ranging from statements by the first Congress and President George Washington calling upon God to provide aid, to prayers opening Congressional sessions, and even to the oft-quoted Thomas Jefferson who stated that “I shall need, too, the favor of that Being in whose hands we are . . . .” On this basis, Justice Scalia concluded that “[n]othing stands behind the Court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the Court’s own say-so.”

Interestingly enough, the Court early in its opinion sought to defend the *Lemon* test, pointing out that the Court has “found government action motivated by an illegitimate purpose only four times since *Lemon*, and ‘the secular purpose requirement alone may rarely be determinative . . . .’” Noticeably missing from this defense was any explanation as to what type of purpose standing alone would be sufficient to have an invalidating effect. Adding to this confusion, the Court noted that “since *Everson v. Board of Education* . . . it has been clear that Establishment Clause doctrine lacks the

125. *Id.* at 2725 (“[T]he [Ten] Commandments being a central point of reference in the religious and moral history of the Jews and Christians.”).
126. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). In *Stone*, the Supreme Court was faced with the question of whether a Kentucky statute requiring public schools to place copies of the Ten Commandments in each classroom was impermissible under the Establishment Clause. *Id.* The Court applied the familiar three-prong *Lemon* test, *id.* at 40, and held that the statute had a sectarian purpose, despite the claims of the state that the displays were intended to illustrate the beginnings of modern law. *Id.* at 41. Thus, the statute was invalidated. *Id.* at 40.
128. *Id.* at 2748 (Scalia, Rehnquist, Thomas, and Kennedy, JJ., dissenting).
129. *Id.* at 2749.
130. *Id.*
131. *Id.*
132. *Id.* at 2750.
134. *Id.*
comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.”\(^{135}\) It is thus obvious that, while the Justices of the Supreme Court have not been able to agree on an analytical framework for addressing Establishment Clause questions, they can at least agree on one point – they refuse to be tied to a strict application of any rule.

A. History and Tradition: The Road to Van Orden v. Perry

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.\(^{136}\)

One answer the Supreme Court has occasionally given to parties alleging Establishment Clause violations is that the questionable act was permissible on the grounds that, while it technically may have violated the principle of neutrality, it was nonetheless justified by the history and tradition of this nation.\(^{137}\) This analysis formed the backbone of the Van Orden v. Perry\(^ {138}\) decision, but found its roots some two decades earlier in Marsh v. Chambers.\(^ {139}\)

1. The Leading Case: Marsh v. Chambers

Marsh involved a claim brought by a Nebraska legislator alleging that the practice of opening state legislative session with a chaplain, whose services where paid for with public funds, violated the Establishment Clause.\(^ {140}\) The opinion by Justice Burger, set the tone early: “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.”\(^ {141}\) Citing numerous historical references,\(^ {142}\) the United States Supreme Court determined that its framers would not have intended the First Amendment to outlaw prayer as a means of

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\(^{135}\) Id. In support of this seemingly contradictory statement, the Court cited to Marsh v. Chambers, one of the central precedents upon which the Van Orden opinion was premised. Id. The obvious question presented here is why the particular authors of McCreary appear to support a legal concept with which they previously disagree in Van Orden.


\(^{137}\) See Marsh, 463 U.S. at 786-795 (Brennan, Marshall, and Stevens, JJ., dissenting).

\(^{138}\) Van Orden, 125 S. Ct. at 2861-62.

\(^{139}\) Marsh, 463 U.S. at 786-795 (Brennan, Marshall, and Stevens, JJ., dissenting).

\(^{140}\) Id. at 785-786.

\(^{141}\) Id. at 786.

\(^{142}\) Id. at 787-88. The opinion cited the adoption of legislative prayer by the Continental Congress, as well as by the Senate and House of Representatives individually. Id. Also, the Virginia Legislature, which the court touted as the birthplace of the Bill of Rights, adhered to the practice of prayer prior to session. Id. at 787.
commemorating legislative sessions. 143 “[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.” 144

The respondent legislator offered three grounds for enjoining the prayers, which the Court dispatched in turn. 145 First, the respondent argued that the same pastor had delivered the prayers for more than sixteen years by the time of the litigation, and this demonstrated a preference for his particular set of beliefs. 146 The Court responded to this by noting that this fact only strengthened the petitioner’s argument, as his long service demonstrated the non-denominational character of his prayers. 147 Second, the respondent suggested that the use of state funds to pay for the chaplain was itself an Establishment Clause violation. 148 Citing again to history, the Court held that governmental reimbursement for chaplaincy services was a long tradition in our country. 149 Finally, the respondent sought invalidation on the grounds that the prayers consistently spoke to those with Judeo-Christian beliefs. 150 The Court responded by saying that “[t]he content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” 151

2. Van Orden v. Perry

The controversy in Van Orden v. Perry 152 involved a monument depicting the Ten Commandments placed on the Texas State Capitol Grounds in Austin. 153 The display was situated between the Capitol Building and the State Supreme Court Building, stood some six feet tall, and incorporated a number of additional symbols both religious and civic in nature. 154 “Presented to the People and Youth of Texas by the Fraternal Order of Eagles of Texas 1961,” was inscribed at its base. 155 The Eagles, “a national social, civic and patriotic organization,” bore the cost of installation of the monument. 156 Petitioner Van Orden, an

143. Marsh, 463 U.S. at 789.
144. Id. at 790.
145. Id. at 793.
146. Id.
147. Id.
149. Id. at 794.
150. Id. at 793.
151. Id. at 794-95.
153. Id. at 2858.
154. Id.
155. Id.
156. Id.
Austin resident, brought suit after a number of visits to the Supreme Court building led him past the display.\footnote{Id. (noting that Van Orden, a lawyer, frequently used the library located in the Supreme Court building).}

Chief Justice Rehnquist, in writing the opinion of the Court, elected not to apply the \textit{Lemon} test to \textit{Van Orden}, instead deciding the case upon a more general set of principals.\footnote{Van Orden, 125 S. Ct. at 2861.} Specifically, the Court stated that its “analysis [was] driven both by the nature of the monument and by our Nation’s history.”\footnote{Id.} In support of this jurisprudential substitution, the Court found that “the factors identified in \textit{Lemon} serve as ‘no more that helpful guideposts.’”\footnote{Id. (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).} The opinion then proceeded to cite several Establishment Clause cases that were not decided using the \textit{Lemon} test.\footnote{See \textit{Zelman v. Simmons-Harris}, 536, U.S. 639 (2002); \textit{See also} Good News Club v. Milford Cent. Sch., 533, U.S. 639 (2001).} “Whatever may be the fate of the \textit{Lemon} test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”\footnote{Van Orden, 125 S. Ct. at 2861.}

In the decision, the Court provided numerous examples which purported to demonstrate that “religion [had] been closely identified with our history and government.”\footnote{Id. (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 212 (1963)).} and that “[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.”\footnote{Id. at 2861 (quoting Lynch v. Donnelly, 465 U.S. 668, 674 (1984)).} Examples included a request made of President Washington by Congress to issue a Thanksgiving Day Proclamation recognizing “the many and signal favors of Almighty God.”\footnote{Id. (quoting \textit{1 ANNALS OF CONG.} 90 (1789)).} recognition that state legislatures may open sessions with prayers led by state-funded chaplains,\footnote{Id. at 2862.} and the upholding of statutes prohibiting the sale of merchandise on Sunday.\footnote{Id. (quoting 1 \textit{ANNALS OF CONG.} 90 (1789)).} All of these acts, according to the majority, supported the proposition that government and religion share an entirely American heritage.\footnote{Van Orden, 125 S. Ct. at 2863.}

Finally, the Court suggested that the display involved in \textit{Van Orden} was “common throughout America,”\footnote{Id. at 2862-63.} noting several instances of clearly religious symbols adorning governmental facilities, including the Library of Congress, the Ronald Reagan building, the federal courthouses in the District of Columbia, as well as the Supreme Court building itself.\footnote{Id. at 2862-63.}
Interestingly, the Court did not attempt to demonstrate a secular purpose behind the monument by disavowing any sectarian one, presumably because the Court did not feel constrained to fit its analysis within the confines of the *Lemon* test.171 Rather, the Court expressly admitted that “the Ten Commandments are religious – they were so viewed at their inception and so remain. The monument, therefore, has religious significance.”172 Moreover, the Court boldly proclaimed that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”173

Justice Breyer in a concurring opinion offered several justifications for the monument.174 First, the Establishment Clause had never required complete religious neutrality, and thus “borderline” cases were not susceptible to application of any one test.175

[Un]tutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and persuasive devotion to the secular and a passive, or even active, hostility to the religious.176

Justice Breyer suggested that, upon recognition of incomplete adherence to absolute neutrality in cases on the margin, the Ten Commandments in *Van Orden* should be examined in terms of all the messages it might have conveyed because the “placement . . . and physical setting” of the display suggested a more secular purpose.177 Second, Justice Breyer showed concern that invalidation of the *Van Orden* monument would open the “floodgates” of litigation, which might

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171. The fact that the Supreme Court felt no need to evaluate the monument under the *Lemon* test serves only to illustrate the confusion that is the topic of this article. If one is to accept that history and tradition, at least as an independent inquiry, is consistent with the Establishment Clause, then one must still attempt to understand when such inquiry is sufficient. One must be able to determine where the dividing line is between acceptable religious practices, deserving of protection, and all other religious practices, which are open to scrutiny. It is precisely for this reason that the history and tradition doctrine is unworkable in practice. *See also* Christal L. Hoo, Comment, *Thou Shalt not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 PENN ST. L. REV. 683, 693 (2004). The author stated:

The historical approach of Marsh fails to explain why the founding fathers did not think legislative prayers offended the Establishment Clause. Without this explanation, Marsh sheds no light on the Establishment Clause beyond issues expressly confronted by the founders—only if the founders addressed and allowed the practice, is it constitutional. Therefore, it is difficult to apply this rationale to forms of public religious expression, other than legislative prayers, that do not have a history reaching back to the practices of the founding fathers.


173. *Id.*

174. *Id.* at 2868 (Breyer, J., concurring).

175. *Id.* at 2869.

176. *Id.*

177. *Van Orden*, 125 S. Ct. at 2870.
inevitably call into question a whole host of religious monuments already standing.\(^\text{178}\) In so doing, the Court would undermine the very intent of the framers, namely, to avoid “religiously based divisiveness.”\(^\text{179}\)

Four justices dissented in an opinion penned by Justice Souter.\(^\text{180}\) The dissent began by arguing that the “simple realities that the Ten Commandments constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same.”\(^\text{181}\) Further, the opinion noted several aspects that imbued the monument with religious connotations, including the bold use of the term “Lord” and the incorporation of several religious symbols.\(^\text{182}\) Based upon these findings, the opinion rather succinctly concluded that “[i]t would therefore be difficult to miss the point that the government of Texas is telling everyone who sees the monument to live up to a moral code because God requires it . . . ”\(^\text{183}\)

Justice Souter next opined that, in some cases, establishment principles would not be violated where the Ten Commandments were displayed as part of a greater collection of works geared toward illustrating their historical influence on the law.\(^\text{184}\) However, the display in \textit{Van Orden} could not be seen as part of such a collection, despite the pundits of the respondent.\(^\text{185}\) Rather, “anyone strolling around the lawn would surely take each memorial on its own terms without any dawning sense that some purpose held the miscellany together more coherently than fortuity and the edge of the grass.”\(^\text{186}\)

Lastly, the dissent questioned the Court’s reliance on several decisions employed to limit the applicability of \textit{Stone v. Graham}\(^\text{187}\) to cases involving “the classroom setting.”\(^\text{188}\) According to Justice Souter, this reliance was misplaced and \textit{Stone} should be fairly read to expressly prohibit, under Establishment Clause principles, the state-sponsorship or endorsement of any monument advancing as its primary purpose the text of the Ten Commandments.\(^\text{189}\)

\(^{178}\) \textit{Id.} at 2871.
\(^{179}\) \textit{Id.} (citing \textit{Zelman v. Simmons-Harris}, 536 U.S. 639, 717-729 (2002)).
\(^{180}\) \textit{Id.} at 2892 (Souter, Ginsburg, and Stevens, JJ., dissenting).
\(^{181}\) \textit{Id.}
\(^{182}\) \textit{Id.} at 2893.
\(^{183}\) \textit{Van Orden}, 125 S. Ct. at 2893.
\(^{184}\) \textit{Id.} at 2893-94.
\(^{185}\) \textit{Id.} at 2895.
\(^{186}\) \textit{Id.}
\(^{188}\) \textit{Van Orden}, 125 S. Ct. at 2896.
\(^{189}\) \textit{Id.} at 2897.
IV. WHY HAS THE SUPREME COURT BEEN UNABLE TO SETTLE ON A COHERENT ESTABLISHMENT CLAUSE RULE?

Despite ample opportunity to satisfy itself with a single coherent standard, or at least a set of coherent standards, the United States Supreme Court has failed to do so. This has several negative consequences. First, it provides no guidance to other courts as to how they should rule in particular cases. Second, it leaves governmental bodies guessing as to their limitations in enacting legislation. Finally, perceived inconsistencies in its decisions ultimately call into question the legitimacy of the Court.

There are at least two causes for this failure to accept a single rule, namely, the inability of the current tests and doctrines to adequately meet the needs of Establishment Clause issues and the differing opinions among the Justices as to the meaning of the Clause in the first place.

A. Current Options Are Not Suitable

Over time, the various Establishment Clause tests and doctrines have shown their inability to consistently produce intelligible outcomes. This is evident

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190. For a clear example of this lack of guidance, consider the wildly differing views of four Circuit Courts of Appeals with respect to RLUIPA. In three of the four cases, the courts upheld RLUIPA as a permissible accommodation of religion. See Madison v. Riter, 355 F.3d 310 (4th Cir. 2003); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002). Both the Madison and Mayweathers courts purported to apply Lemon, but in each case the court held that the Supreme Court’s decision in Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987), demonstrated that RLUIPA’s purpose of accommodating religion was sufficiently secular. Madison, 355 F.3d at 317; Mayweathers, 314 F.3d at 1068. In Verhagen, the court did not even attempt to apply Lemon, but relied solely on Amos. Verhagen, 348 F.3d at 610. In the last case, Cutter v. Wilkinson, 349 F.3d 257 (2003), the court likewise applied Lemon, but instead held that Amos did not apply to RLUIPA and thus did not control. Cutter, 349 F.3d at 263. Rather, the Cutter court found that, by elevating religious rights above other fundamental rights and in so doing giving religious prisoners more protections than are available to non-religious ones, Congress had not acted with neutrality. Id.

191. See supra note 9 and accompanying text. See also Wolman v. Walter, 433 U.S. 229 (1977) (noting that the state attempted to model its legislation after the Court’s decision 2 years earlier in Meek v. Pittenger, 421 U.S. 349 (1975)).


the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court’s efforts to protect the Cherokee Indians) might have said, ‘John Marshall has made his decision; now let him enforce it!’


194. See infra note 237.

195. See supra note 1 and accompanying text.
from the three 2005 cases discussed already. Each test or doctrine has its own inherent weaknesses.

Accommodation, as a rule in evaluating Establishment Clause cases, is problematic because the notion of accommodation is not self-defining and courts are left completely to their own devices in determining how narrow (or wide) the accommodation “channel” should be. Zorach v. Clauson serves as a prime example of this concern. While the majority concluded that the early release times under review in Zorach were permissible accommodations of free religious exercise, the dissent, authored by Justice Black who also authored the majority opinion accommodating religion via monetary reimbursement for bus transport to parochial schools, determined that the early release times impermissibly advanced religion. Likewise, the Sixth Circuit in Cutter v. Wilkinson disagreed with three other circuits and held that RLUIPA did not qualify for accommodation under the Amos decision. Thus, while accommodation, like neutrality, sounds appealing as a guiding principle, it lacks the specificity needed to serve as a workable Establishment Clause test.

The same is true of the history and tradition doctrine. Again, courts are left to decide ad hoc which practices are worthy of protection under the doctrine. A comparison of McCreary County v. ACLU and Van Orden v. Perry illustrates the point. Both cases involved displays of the Ten Commandments on

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196. See supra note 3 and accompanying text.
197. Id.
198. See, e.g., Sherbert v. Verner, 374 U.S. 398, 422 (1963). The dissent argued: The constitutional obligation of ‘neutrality,’ . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism.
200. Id. at 315.
202. See Zorach, 343 U.S. at 318 (Black, J., dissenting) (arguing that, by enacting the early release provision, New York used “its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery,” and that such action was “not separation but combination of Church and State.”).
204. Id. at 263-64.
205. See also W. Scott Simpson, Comment, Lemon Reconstituted: Justice O’Connor’s Proposed Modifications of the Lemon Test for Establishment Clause Violations, 1865 BYU L. REV. 465, 467-70 (1986) (arguing that history and tradition as an Establishment Clause test is unworkable because it can be used in virtually all situations. Thus, according to the author, “because the tradition argument can so readily satisfy the purpose prong, that prong is entirely toothless. Such a blunted test is no test at all.”).
public property.\textsuperscript{208} However, the results were clearly in conflict, and neither opinion was capable of justifying the other. The only common denominator between them was the agreement of both results by Justice Breyer, and even he could not reconcile his positions.\textsuperscript{209}

The \textit{Lemon} test also suffers from significant deficiencies and despite the Supreme Court’s fastidious use of the test over time; it has been the subject of much criticism.\textsuperscript{210} First, \textit{Lemon}’s purpose prong allows little room for the government to maneuver, even when the principle of accommodation demands it.\textsuperscript{211} Thus, many forms of accommodation held constitutional would, upon strict application of \textit{Lemon}, find themselves on the wayward side of the Establishment Clause.\textsuperscript{212} Much the same can be said of \textit{Lemon}’s effect prong. By its own terms, the prohibition, at least strictly speaking, against even incidental positive or negative effects would render a great many public works unconstitutional. This concept was clearly evidenced even prior to the \textit{Lemon} decision.\textsuperscript{213}

\textsuperscript{208} For a discussion of the \textit{McCreary} decision, consult III.B.2 of this article. For a discussion of the \textit{Van Orden} decision, consult III.C.2 of this article.

\textsuperscript{209} Justice Breyer joined the majority opinion of Souter in \textit{McCreary}, 125 S. Ct. at 2722, and authored a concurring opinion in \textit{Van Orden}, 125 S. Ct at 2868.

\textsuperscript{210} See, e.g., \textit{Lamb’s Chapel}, 508 U.S. at 399 (Scalia and Thomas, JJ., concurring) (“For my part, I agreed with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”).

\textsuperscript{211} See, e.g., \textit{Walz}, 397 U.S. at 669. In finding unconstitutional a New York statute that exempted religious institutions from property tax, Justice Burger stated:

\begin{quote}
The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
\end{quote}

\textsuperscript{212} For example, consider the early release times for religious instruction held to constitutional in \textit{Zorach v. Clauson}, 343 U.S. 306, 314 (1952). See also III.A.1 of this article. There can be little doubt that, in the strictest sense, these release times were purely sectarian-based measures. That is to say, the only purpose of early release times was to allow the practice of religion. Nowhere did the opinion refer to any purpose that could have been viewed as secular in nature. Rather, the Supreme Court suggested only that the early release times were a fair accommodation of religious practice. \textit{Zorach}, 343 U.S. at 314. Under a pure \textit{Lemon} review, such provisions would not have survived scrutiny.

\textsuperscript{213} See, e.g., \textit{Everson}, 330 U.S. at 17-18. In its analysis upholding the use of tax monies to transport children to parochial schools, the Court stated:

\begin{quote}
Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might
\end{quote}
Second, *Lemon* does not lend itself well to consistent adjudication of Establishment Clause cases. "As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."214 Many others have posited that cases applying *Lemon* are irreconcilable.215

Another problem associated with *Lemon* is that the Supreme Court has, over time, developed offshoots of the standard rule for use in certain situations.216 The most notable example is that used to evaluate questions dealing with benefits conferred to religious schools.217 Prior to 1997, such issues were answered using the original *Lemon* test.218 However, in *Agostini v. Felton*,219 the

be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.


Although the Court recites the tripartite [*Lemon*] test formula regularly, it seems to apply the formula inconsistently. As if the tripartite test were not flexible and amorphous enough in itself, the Court occasionally articulates some different test or no test at all to dispose of an establishment clause case. Finally, the Court seems to have accepted the notion that there should be some sort of historic exception to what would otherwise be a finding of unconstitutionality under the usual establishment clause criteria.


This scatter-pattern of decisions is the combined product of the tripartite *Lemon* test and the Court's occasional desire to provide an escape from the straitjacket that an honest application of *Lemon* would force upon society in its attempts to accommodate religion. Obviously, the Lemon test has not made for very predictable adjudication.

216. Justice O'Connor's endorsement test was itself such an offshoot. While it is clear that the endorsement test is not relegated to a specific class of cases, it is still very much unclear how pervasive its influence will ultimately be.


218. *Lamb's*, 508 U.S. at 395. The Court explained:

permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon* v. Kurtzman . . . The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.

See also Bd. of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (in explaining that adhering to the requirements of free speech can constitute a secular purpose, the court stated "[a]s an initial matter,
Court revised the rule as applied to religious schools. The Agostini Court was asked whether the law respecting the placement of public school teachers in religious schools had changed since its earlier decision of Aguilar v. Felton, so that the permanent injunction issued in that case could be lifted. Aguilar involved a federal statute, which, inter alia, permitted public school teachers to assist special needs children, many of whom attended private religious schools. The Aguilar Court, citing its precedent set in Meek v. Pittenger, held that the Establishment Clause prohibited public schools teachers from providing such assistance on religious school property, offering four justifications for its decision. First, allowing public school teachers to place themselves in eminently religious environments created a significant risk that the teachers may become indoctrinated, and that such indoctrination may find its way into their lessons. Second, the placement of public school teachers in religious schools perpetuated a perception of a union between church and state. Third, providing secular education directly to religious schools was viewed as a direct subsidy which “impermissibly finances” the schools’ religious missions. Finally, the excessive monitoring required to ensure that the conduct of the public school teachers remained secular despite their sectarian environments would excessively entangle government with the schools.

However, cases which came after Aguilar placed its holding in jeopardy. Specifically, Zobrest v. Catalina Foothills Sch. Dist. reversed the inference relied on in Aguilar that the placement of public school teachers in religious schools necessarily led to “state-sponsored indoctrination” or “a symbolic union

the Act’s prohibition of discrimination on the basis of ‘political, philosophical, or other’ speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the Lemon test.”

220. Id. at 222 (emphasizing that while the inquiry still entails discovery of both the purpose and effect of legislation of school aid, the criteria in evaluating the effect had changed).
221. Aguilar, 473 U.S. at 402.
222. Agostini, 521 U.S. at 215. Petitioners in Agostini sought relief under Fed. R. Civ. P. 60(b)(5), which states in relevant part:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons . . . the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . .

223. Aguilar, 473 U.S. at 404.
226. Id. at 386-87.
227. Id. at 389-91.
228. Id. at 385.
229. Id. at 412-13.
between government and religion.\textsuperscript{231} According to the Court, “[s]uch a flat rule, smacking of antiquated notions of ‘taint,’ would indeed exalt form over substance.”\textsuperscript{232}

Moreover, in \textit{Witters v. Washington Dept. of Services for Blind},\textsuperscript{233} the Court rejected the concern expressed in \textit{School Dist. of City of Grand Rapids v. Ball},\textsuperscript{234} the companion case to \textit{Aguilar}, that even direct aid to religious schools is contrary to Establishment Clause principles.\textsuperscript{235} Thus, because the underlying assumptions upon which the \textit{Aguilar} case was premised no longer controlled, the \textit{Agostini} Court overruled \textit{Aguilar} and lifted the injunction placed by that decision.\textsuperscript{236}

\section*{B. Discord Among Justices as to the Meaning of the Establishment Clause}

The Supreme Court’s failure to settle on a single rule in Establishment Clause cases can also be attributed to substantive disagreement between the Justices over the Clause’s requirements. The best evidence of this has been the fracturing of the Justice’s voting patterns in Establishment Clause cases since \textit{Everson v. Bd. of Education}\.\textsuperscript{237} This dichotomy between the separationist Justices on the one hand and the accommodationist Justices on the other has been the source of frequent dictum. In \textit{McCreary County v. ACLU},\textsuperscript{238} Justice

\begin{itemize}
\item \textsuperscript{231} \textit{Agostini}, 521 U.S. at 223; \textit{Zobrest}, 509 U.S. at 9-13.
\item \textsuperscript{232} \textit{Id.} at 203-04 (quoting \textit{Zobrest}, 509 U.S. at 13.)
\item \textsuperscript{233} 474 U.S. 481 (1986).
\item \textsuperscript{234} 473 U.S. 373 (1985) (overruled by \textit{Agostini} v. \textit{Felton}, 521 U.S. 203 (1997)).
\item \textsuperscript{235} \textit{Agostini}, 521 U.S. at 225.
\item \textsuperscript{236} \textit{Id.} at 240.
\item \textsuperscript{238} \textit{McCreary}, 125 S. Ct. at 2722.
\end{itemize}
Scalia, in a dissent joined by three other Justices, questioned the majority’s decision in light of what he considered to be overwhelming contradictory evidence demonstrating the founders’ intentions:

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that ‘the First Amendment mandates governmental neutrality between . . . religion and nonreligion,’ . . . and that ‘[m]anifesting a purpose to favor . . . adherence to religion generally,’ . . . is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society’s constant understanding of those words.239

Then, in a concurring opinion in Van Orden v. Perry, Justice Scalia, despite approval of the Court’s result, noted that:

I would prefer to reach the same result by adopting an Establishment Clause jurisprudence that is in accord with our Nation’s past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State’s favoring religion generally.240

Conversely in Van Orden, Justice Stevens, in his dissent, claimed that “[i]ndeed, Justice Scalia is unable to point to any persuasive historical evidence or entrenched traditions in support of his decision to give specially preferred constitutional status to all monotheistic religions.”241

In Zelman v. Simmons-Harris,242 yet another decision with four dissenters, Justice Souter criticized the Court’s validation of an Ohio state voucher system which paid for religious school tuition,243 noting that:

[it] is only by ignoring Everson that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today’s decision on those criteria.244

Finally, in Mueller v. Allen,245 a case where the Court allowed Minnesota to provide tax deductions for monies spent by parents on religious school tuition,246

239. Id. at 2750 (Scalia, Rehnquist, Thomas, and Kennedy, JJ., dissenting).
240. Van Orden, 125 S. Ct. at 2864 (Scalia, J., concurring).
241. Id. at 2886 (Stevens and Ginsburg, JJ., concurring).
243. Id. at 686.
244. Id. at 688.
246. Id. at 391-92.
Justice Marshall’s dissent, which was joined by three other Justices, pointed out that:

> [f]or the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion.  

VI. IN SEARCH OF AN ALTERNATIVE: JUSTICE O’CONNOR’S ENDORSEMENT TEST

A. A Brief History of Endorsement

The idea of the Supreme Court concerning itself with the symbolic effects of governmental affiliation with religion is of a vintage that pre-dates Justice O’Connor’s formal exposition of the endorsement test. For example, in *Larkin v. Grendel’s Den, Inc.*, the Court invalidated a state statute that effectively granted to religious organizations the power to veto the issuance of liquor licenses within five hundred feet of their property. The Court applied the *Lemon* test, and in so doing, stated that “the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.”

Similarly in *Marsh v. Chambers*, the Supreme Court addressed the issue of whether a state legislature could open each session with a prayer led by a denominational state-paid chaplain without violating the Establishment Clause. While the Court ultimately upheld the practice, it noted that “the delegates did not consider the opening prayers as a proselytizing activity or as symbolically placing the government’s ‘official seal of approval on one religious view.’” Additional cases have employed similar reasoning. Thus, even

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247. *Id.* at 416-17 (Marshall, Brennan, Blackmun, and Stevens, JJ., dissenting).
248. Most jurists elect to refer to O’Connor’s test as the “no endorsement” test because application of the Justice’s test requires a finding of no endorsement in order for the government act to be valid.
250. *Id.* at 127.
251. *Id.* at 125-26 (emphasis added).
253. *Id.* at 784-86.
254. *Id.* at 792 (emphasis added).
255. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (White, J., dissenting). *Widmar* involved a challenge brought by a religiously based student group at the University of Missouri at Kansas City against the university for denying them access to facilities available to non-religious organizations. *Id.* at 265-66. The Court ultimately affirmed the decision of the Eighth Circuit and held that the
before *Lynch*, the Court addressed itself to the various perceptions created by government affiliation with religion. The endorsement test made its formal debut in Justice O’Connor’s concurrence in *Lynch v. Donnelly*. *Lynch* involved a crèche erected annually by the city of Pawtucket on a privately owned park as part of larger holiday display. The question faced by the Court was whether the crèche constituted a violation of the Establishment Clause. While the majority opinion applied *Lemon*, Justice O’Connor suggested a different analysis, one which she believed would adequately guard against governmental invasion of religious liberty. Justice O’Connor framed her fledgling doctrine as the appropriate inquiry under both the purpose and effect prongs of *Lemon*. Under Justice O’Connor’s endorsement test, the purpose prong asks whether the government university did not have a compelling justification for excluding the group from designated public forums created by the school. *Id.* at 277. According to the Court, although compliance with constitutional requirements may be sufficiently compelling in the appropriate circumstances, the Establishment Clause was not implicated in that case. *Id.* at 272-73. In explaining its rationale, the Court noted that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.” *Id.* at 274. (emphasis added); See also *Gillette v. United States*, 401 U.S. 437, 450 (1971) (Douglas, J., dissenting) (“[A]s a general matter it is surely true that the Establishment Clause prohibits the government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.”).

256. For a protracted discussion pertaining to the Court’s pre-*Lynch* consideration of symbolic significance in Establishment Clause cases, consider William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 522-31 (1985).


258. *Id.* at 671.

259. *Id.* at 670-71.

260. *Id.* at 679.

261. *Id.* at 688-89. In this early exposition of her endorsement test, Justice O’Connor concerned herself with two distinct ways in which government can “run afoul” of the Establishment Clause. First, “excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies along religious lines.” *Id.* at 688. This protection appears to be two-fold. On the one hand, governmental acts which place burdens on religion, directly or indirectly, raise issues sounding of Free Exercise. Thus, this aspect of entanglement would concern strong-arm practices where government and religion would be forced to meet. This signals a clear distrust of the government to refrain itself in such instances. On the other hand, there is an equally clear distrust of religious majorities who would attempt to use proximity with the government as means of harnessing control for its own ends. “The second and more direct infringement is government endorsement or disapproval of religion.” *Id.* This concern is the focus of the endorsement test.

262. *Id.* at 691 (“The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.”).

263. *Lynch*, at 691-92. The Court explained:

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion… What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.
intends to convey a message of endorsement, while the effect prong asks whether, irrespective of intent, a message of endorsement has actually been conveyed.264

The rationale provided in the opinion for the focus on endorsement was that a message of endorsement serves to separate society into two groups: those whose religious beliefs have been approved and those whose religious beliefs have not.265 The danger in this, according to Justice O’Connor, is that those whose religious beliefs have not been approved of will feel alienated from the political community.266 Unfortunately, however, Justice O’Connor’s explanation of this danger stopped there, and much scholarly work has been devoted to the task of picking up where she left off.267 Nonetheless, Justice O’Connor’s endorsement test was a welcomed breath of fresh air into the stifling environment of the Establishment Clause doctrine.

Later decisions have helped to clarify not only Justice O’Connor’s position, but also the Supreme Court’s acceptance of its new analytical tool. In Wallace v. Jaffree,268 Justice O’Connor, again speaking from the confines of a concurrence, refined her analysis by making two notable alterations.269 First, under the purpose prong of the Lemon-endorsement hybrid test,270 courts should provide some deference to the government when examining its intent.271 Thus, “courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing [religion].”272 Second, the question of whether a given governmental act endorses religion is one that should be answered from the viewpoint of “an

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264. Id. at 691-92.
265. Id. at 688 (“[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).
266. Id. 267. See, e.g., Neal R. Feigenson, Political Standing and Government endorsement of Religion: An Alternative to Current Establishment Clause Doctrine, 40 DEPAUL L. REV. 53 (1990) (discussing the failure of Justice O’Connor to complete her explanation of dangers created by religious alienation).
269. Id. at 68-70.
270. This is described as a Lemon-endorsement hybrid test because, as originally devised, the endorsement test was intended merely to provide definitions to the first two prongs of Lemon. Id. at 69. Thus, as first announced, Justice O’Connor’s endorsement test had no life independent of Lemon; rather, Justice O’Connor suggested a symbiotic relationship. Id. at 68-69.
271. Wallace, 472 U.S. at 74-75.
272. Id. at 75. Interestingly enough, Justice O’Connor later points out that she has “little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one . . .” Id. This raises an additional issue. Namely, Justice O’Connor seems to contradict herself in that she very much limits the field of play when it comes to evaluating the first prong in one sentence, and then seems to encourage courts to go on judicial fishing expeditions to determine intent in the next. Id.
objective observer, acquainted with the test, legislative history, and implementation of the statute . . . .”

B. Decisions Adopting the Endorsement Test

Justice O’Connor’s endorsement test swiftly gained a judicial following, including several of her fellow members on the Supreme Court. Beginning with the Court’s decision in County of Allegheny v. ACLU, the endorsement test has slowly crept into several majority opinions. In County of Allegheny, the Court was asked to review the constitutionality of two holiday displays. The first was a crèche displayed prominently on the grand staircase of the county courthouse; the second was a collection of individual displays, which included a forty-five foot Christmas tree, an eighteen-foot menorah, and a sign saluting liberty. The Court invoked Lemon, but in its familiar explanation of the three prongs, noted that “[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion . . . .” Applying this standard to the first display, the Court held that the crèche violated the Establishment Clause. “In sum, Lynch teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line.” Such was not the fate of the second display. Again applying its endorsement analysis, the Court found that the particular grouping of the displays served to convey a secular message by creating an “overall holiday setting.”

In Texas Monthly, Inc. v. Bullock, the Supreme Court invalidated a Texas statute which created sales tax exemptions for certain magazines on the basis that the exemption disproportionately favored religious publications. Borrowing from Justice O’Connor, the Court similarly stated that the government:

may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored

273. Id. at 76.
275. Id. at 578.
276. Id. at 579.
277. Id. at 581-82.
278. Id. at 592.
279. Id. at 601.
281. Id. at 620.
282. Id. at 614.
religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.284

Finally, in Santa Fe Independent School Dist. v. Doe,285 the Supreme Court invalidated a local rule that permitted a student elected by the student body to deliver a prayer prior to weekly football games.286 The Court explained that “[i]n cases involving state participation in a religious activity, one of the relevant questions is ‘whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.’”287 The Court ultimately held that, despite the contentions of the school district that the student-run nature of the prayer took it outside the realm of government speech and made it private religious speech, the prayers would be perceived as the school’s endorsement of the message.288

V. THE ENDORSEMENT TEST: WHERE IT SHINES AND WHERE IT FAILS?

A. What Is Right About The Endorsement Test

To understand the value of Justice O’Connor’s endorsement analysis is to understand the very purpose of the Establishment Clause in the first place. The Establishment and Free Exercise Clauses of the First Amendment, like the remaining rights elucidated in the Bill of Rights, were created to place those particular aspects of human destiny beyond the power of the vote.289 Thus, the Bill of Rights specifically, as well as the Constitution generally, is seen by many as having the primary purpose of protecting the minority in a system of near pure democracy.290

Moreover the Establishment and Free Exercise Clauses, despite often seeming to have competing values, were created to work in tandem toward the

284. Id. at 9.
286. Id. at 301.
287. Id. at 308 (citing Wallace v. Jaffree, 472 U.S. 73, 77 (1985) (O’Connor, J., concurring)).
288. Id. at 315-16.
   “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicsissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to… freedom of worship… and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
290. See, e.g., Neal R. Feigenson, Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine, 40 DePaul L. Rev. 53, 86 (1990) (explaining that one of the purposes of the religion clauses is to protect the religious liberties of those with even “idiosyncratic” beliefs).
ultimate goal of ensuring private religious liberty.291 This concern was brought to the New World by colonists unable to secure this same freedom in their native lands.292

Despite great disagreement as to the particular commandments embodied in the Establishment Clause, it is accepted universally that, at a minimum, the government is prohibited from setting up a state-sanctioned religion to which the citizenry must pledge their devotion and support.293 It is upon this common base of understanding that scholars, judges, and jurists have sculpted their respective theories of Establishment Clause doctrine. Justice O’Connor’s notion of endorsement is such a theory.294

Justice O’Connor’s theory suggests that, consistent with the constitutional ideal that certain rights are outside of majority coercion, religious choices are personal and cannot be imposed upon by the “power, prestige and financial support” of the government.295 In this sense, governmental acts, which serve to make religious affiliation relevant to one’s position in society, are inconsistent with the Establishment Clause.296 Consequently, when the effect of one’s vote, the right of one to marry, or the protection of one’s ability to speak freely is linked to one’s religious beliefs, the notion of religious liberty has collapsed.

291. See Lee v. Weisman, 505 U.S. 577, 605 (1992) (Blackmun, Stevens, and O’Connor, JJ., concurring) (“The First Amendment encompasses two distinct guarantees—the government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof—both with the common purpose of securing religious liberty.”); See also Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 1 (“[R]eligious liberty is the central value and animating purpose of the Religion Clauses.”).

292. See McCreary, 125 S. Ct. at 2742 (providing a historical backdrop for the majority’s interpretation of the religion clauses); See also id. at 2746 (O’Connor, J., concurring). Justice O’Connor wrote:

The First Amendment expresses our Nation’s fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendents of people who had come to this land precisely so that they could practice their religion freely.

293. Everson, 330 U.S. at 15-16. The majority opinion states:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

294. See, e.g., Wallace, 472 U.S. at 69 (O’Connor, J., concurring) (“[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person’s standing in the political community.”).


The value, however, of Justice O’Connor’s approach is not necessarily limited to this theoretical understanding; rather, her approach recognizes that these harms are not only realized when government actually sponsors religion, but also when there is the perception of such sponsorship. 297 This is true because being made to feel like a political outsider encourages assimilation and this would result whether or not the alignment was reality or just a convincing impression. 298

Furthermore, the endorsement test acknowledges, although not explicitly, that political alienation based upon religion serves to undermine the legitimacy of a government elected by the people. 299 When religious minorities are made to feel less influential, the result is a withdrawal from public discourse. 300 This lessening of participation necessarily runs contrary to the political scheme that depends upon such participation. 301 Put another way, the legitimacy of government’s power is directly proportional to the quantum of political participation. 302 Actions backed by a great percentage of the population carry more weight than those backed only by a religious majority.

B. What Is Bad About The Endorsement Test?

Justice O’Connor’s endorsement test, while certainly a step in the right direction, suffers from a number of infirmities that necessarily limit its jurisprudential value. The lack of any explanation by Justice O’Connor as to the dangers of alienating religious minorities ultimately undermines the legitimacy of the endorsement test. Moreover, Justice O’Connor’s adoption of the “objective observer” criteria fails to take account of relevant perceptions, leaving the fate of an endorsement claim squarely within the purview of a nothing more than a legal fiction.

1. O’Connor’s Explanation of the Dangers Associated with Religious Alienation Stopped Short

While Justice O’Connor’s inventive endorsement test gave birth to a new era of Establishment Clause jurisprudence, her explanation of the dangers involved left much to the imagination. 303 One scholar has noted that “[w]hile the no endorsement test is promising, it cannot fulfill its promise as long as the concept

297. See Lynch, 465 U.S. at 690 (O’Connor, J., concurring) (discussing two aspects of endorsement, one of them being the “objective” perceptions of people).
298. Id.
299. See Feigenson, supra note 267, at 69. The author argues that alienation on the basis of religion serves to keep the alienated out of the public political discourse, and in so doing, reduces the legitimacy of a government which is premised upon maximum participation.
300. Id. See also Lynch, 465 U.S. at 688.
301. See Feigenson, supra note 267, at 69.
302. Id.
303. See, e.g., Feigenson, supra note 267, at 63 (“Justice O’Connor adopts [no] . . . explanation of how political standing is related to religious liberty”).
of political standing on which the test is based remains inchoate, and its status as an establishment clause value remains unclear.304 It is now widely understood and oft quoted that endorsement of religion by the government conveys the message to religious minorities that they are outsiders.305 However, in order for courts to appreciate the gravity of this threat, the divide between the threat posed and the danger realized must be explored. The real danger of alienating those of different belief systems is quite simply that such alienation encourages those of non-preferable religious belief systems to adopt preferable alternatives.306 This sort of coercion, even if only subtle, is inconsistent with the notion of religious liberty embodied in the First Amendment.307

For example, one can easily imagine a scenario such as that presented in McCreary County v. ACLU308 where copies of the Ten Commandments adorn the courthouse walls.309 The threat in such a situation may seem minimal enough in a society composed entirely of Christians. However, quite a different result may be had if a non-Christian were subjected to the clear message. Assuming this person notices the display, as would be the intention of those who placed it there, would it not be fair to say that he or she might think that those for whom the display had some religious significance were in some sense preferred, and that they would receive better treatment? Such a leap is neither unwarranted nor unreasonable. Would this perception create an incentive for the non-Christian to conform? Clearly, this presents a more dramatic case, but the conclusion would be very much the same even in more innocuous cases. That is, when the government takes it upon itself to create the perception of a union between itself and religion, the coercive power of the government is brought to bear on the nonadherent in such a way as to encourage religious assimilation.310 Justice O’Connor’s failure to explicitly provide this admonition has served only to weaken her test’s acceptance by the legal community.311

304. See Feigenson, supra note 267, at 62.
305. See Lynch, 465 U.S. at 688 (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).
306. See, e.g., Feigenson, supra note 267, at 63 (“[I]f a person is made to feel like an ‘outsider,’ then she may be led to change here religious affiliation so as to become an ‘insider,’ realizing that her beliefs now ‘cost’ her something in terms of her standing in the secular community.”).
307. See, e.g., Developments in the Law—Religion and the State, 100 HARV. L. REV. 1607, 1647 (1986) (“Signaling a preference for religion in the public sphere carries exclusionary messages and exerts pressure to conform that is fundamentally at odds with religious autonomy.”).
309. Id. at 2727.
310. See Feigenson, supra note 267 and accompanying text.
311. See id. at 64. (“By failing to elaborate on the notion of political standing, Justice O’Connor’s theory remains prone to the difficulties that inhere in any effort to focus the establishment clause exclusively on indirect threats to religious liberty.”).
2. The Objective Observer Standard Misses the Point

In describing the endorsement test, Justice O’Connor suggested that courts should evaluate alleged Establishment Clause violations through the lens of the “objective observer,” one who is conversant with the context of the legislation.\(^\text{312}\) This presents theoretical difficulties given the aim not only of the endorsement test, but also that of the First Amendment. The central concern of the endorsement approach, and arguably the Establishment Clause as well, is that religious minorities will somehow feel marginalized by perceived government affiliation with religion, marginalization that leads to ostracism from political discourse. It logically follows then that the perceptions that courts ought to be most interested in are those belonging to the minority class.\(^\text{313}\)

By definition, an “objective observer” is not at all like the religious minority in several ways. First, a detached “objective observer” has no religion, and thus could never be placed in the shoes of the religious minority. And if, as we stated already, the concern is how actual religious minorities will be affected, then viewing the case through the eyes of a person in his or her place is the only way to understand whether endorsement has occurred. Second, the objective observer standard demands far too much from average persons.\(^\text{314}\) Again, the focus of the endorsement test is on the sentiments of actual persons, not imaginary characters presumed to know everything related to a particular piece of legislation and its context.

Returning again to our previous example of the Ten Commandments in the courthouse, but changing the facts of the case such that the display was in fact a combination of many documents, some of which were secular and others of which were religious, but all having had a significant impact on the development of American law. Furthermore, assume that the intentions of the local legislature in posting the displays were completely void of any desire to subject the passersby to the religious message hidden therein. While an “objective observer”, realizing that the display, despite its religious connotations, was intended only to be a secularly-based montage of legal history, an actual observer, armed with less than complete information and his or her own religious beliefs, may not reach such a conclusion. Rather, he or she may, as in the case described above, view this display as clearly demonstrating the government’s preference for Christianity. The obvious point is that while the “objective

\(^{312}.\) See Wallace, 472 U.S. at 76 (O’Connor, J., concurring).

\(^{313}.\) See, e.g., Developments in the Law—Religion and the State, 100 Harv. L. Rev. 1606, 1648 (1986) (“If it is to protect nonadherents against coercion or exclusion, O’Connor’s ‘objective observer’ test must explicitly take into account the probable perceptions of the outsider.”).


The ideal human Justice O’Connor describes knows and understands much more than meets the eye. Her ‘reasonable person’ comes off as a well-schooled jurist, a being finer than the tort-law model. With respect, I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context.
observer” is walking merrily away, confident that his government has dutifully remained neutral, the actual citizen is stifled by a sense of religious alienation. For these reasons, Justice O’Connor’s “objective observer” standard is all too objective.315

Furthermore, some have argued that the “objective observer” standard is inappropriate not only because it fails to take into account perceptions of the religious outsider, but also because it gives courts a veritable “blank slate” upon which to create the standard according to their own substantive proclivities. “A purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive and there is no empirical touchstone or outside referent upon which a critic could rely to show that the author was wrong.”316 Thus, the court becomes the ultimate gatekeeper of what does and does not constitute endorsement.317

VI. TOWARDS A BETTER ENDORSEMENT TEST

Justice O’Connor’s endorsement approach to Establishment Clause cases has much jurisprudential merit. However, in light of the issues raised above, it is necessary to revise the test further if it is to be of any value.

So, what is to be made of O’Connor’s endorsement test? To answer this question, we must again return to its foundations. The endorsement test is premised upon the notion that government affiliation with religion, either in fact or in appearance, leads necessarily to the alienation of some or many groups based upon a common denominator.318 In the obvious cases where there is such affiliation with a particular set of religious beliefs, nonadherents, through their non-majoritarian religious practices, are clearly marginalized. However, as has been stated, the government need not affiliate with a particular sect in order to trigger this alienating effect, for it is equally true that general government affiliation with religion causes marginalization of those who have no religion at all.319

315. See, e.g., Feigenson, supra note 267, at 93 (“In sum, while Justice O’Connor’s . . . ‘objective’ or ‘reasonable’ observer standard which determines endorsement lacks support in a sound theory of meaning and fails to serve its intended doctrinal goals of consistent and coherent application.”).
317. See, e.g., Feigenson, supra note 267, at 90 (“[T]he ‘objective’ or ‘reasonable’ observer is, in the final analysis, the judiciary.”).
318. See Feigenson, supra note 307 and accompanying text.
319. See Wallace, 472 U.S. at 52-53. The Court explained:
   Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal
Working from this notion that non-adherents will be alienated from the political process, we can offer a standard by which cases should be evaluated. Government endorsement of religion, either intended or unintended, violates the Establishment Clause when such action would have the reasonable effect, in light of the values embodied in both the Free Speech and Free Exercise clause, of discouraging political participation by non-adherents due to their religious affiliation. This standard encompasses the core of O’Connor’s endorsement test while at the same time addressing its shortcomings. First, it requires courts to examine the governmental act from the view of the religious minority rather than some vague third-party.\(^\text{320}\) Thus, while the court potentially has some leeway in reviewing such cases, the test would at least mandate that a fair justification be given for denying the requested remedy. Moreover, as was well conceived in Justice O’Connor’s endorsement test, this reformulation requires not only that the claim be reasonable, but also one which understands the competing constitutional values of religious liberty and free speech. Finally, it answers the question not addressed in the \textit{Lynch} concurrence—whether the alleged endorsement would result in an actual reduction in political participation by the claimant. This stipulation allows courts to dismiss claims of alleged endorsement that present no real danger of the sort warned of in \textit{Lynch} and its progeny.\(^\text{321}\)

As a final note, it must be understood that in a religiously pluralistic society such as ours, any proposed test for Establishment Clause cases will necessarily be flawed in some way.\(^\text{322}\) A perfect test appears to be a theoretical impossibility.\(^\text{323}\) Thus, the goal must be to identify a standard that most closely addresses the core concern of the Establishment Clause in the first instance.

respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. See also Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) (the “principle at the heart of the Establishment Clause that government should not prefer one religion to another, or religion to irreligion.”).

\(^{320}\) See also Abner S. Greene, \textit{The Political Balance of the Religion Clauses}, 102 YALE L.J. 1611, 1619-24 (1993) (positing that political alienation based upon religion is an important consideration but one which must be seen from the vantage point of the religious outsider); \textit{But see} Scott C. Idleman, \textit{Ideology as Interpretation: A Reply to Professor Greene’s Theory of the Religion Clauses}, 1994 U. ILL. L. REV. 337, 357 (1994) (criticizing Prof. Greene’s premise that the appropriate observer under the Establishment Clause should be the religious minority).

\(^{321}\) See supra Part V.

\(^{322}\) See, e.g., William P. Marshall, \textit{We Know It When We See It: The Supreme Court and Establishment}, 59 S. CAL. L. REV. 495, 498 (1985). The author argued:

[T]here is a substantial argument to be made that the difficulty in achieving an intelligible establishment doctrine rests primarily with the issue itself and only to a lesser extent with the Court’s deficiencies. Inherent inconsistencies exist with the establishment inquiry itself which serve to make its interpretation highly problematic.

\(^{323}\) See, e.g., Phillip E. Johnson, \textit{Concepts and Compromise in First Amendment Religious Doctrine}, 72 CALIF. L. REV. 817, 819 (1984) (“Despite the most determined efforts of the Justices and the scholars, no single logical framework seems capable of explaining the law.”).
Much, of course, must ultimately be left to the good intentions of the reviewing court.

VII. CONCLUSION

This comment has put several tests on display, including the accommodation doctrine, the *Lemon* test, and the history and tradition doctrine. Each has its respective advantages and limitations. However, far and away the most significant disadvantage created by this assortment of standards is the seemingly haphazard methodology the Court uses to determine which particular standard should apply in a given situation. This state of confusion, coupled with the inconsistency created by the varied applications of each specific standard, serve only to undermine the notion of judicial legitimacy and is ultimately nothing more than a collection of indiscriminate decisions based solely upon the happenstance of judicial whim. Nevertheless, help out of this quagmire may not be lacking.

Justice O'Connor’s endorsement test provides a refreshing analytical tool for courts to put in their jurisprudential “toolboxes.” This article has attempted to demonstrate that the endorsement test is preferable to other standards, not because it provides more definitive guidelines in Establishment Clause cases, for no conceivable rule will render such value, but rather because it at least attempts to address the appropriate issues. Specifically, the endorsement test is helpful because it focuses on the result of governmental affiliation with religion, which is the central concern of the Establishment Clause. Still, scholars have correctly criticized the endorsement test as slightly missing the point in some of its details. This comment has suggested some slight tweaks to Justice O’Connor’s original vision, tweaks that, while not displacing the real value of the test, only assist in harnessing the real value of endorsement. Under this revision, a court considering alleged Establishment Clause violations must consider the effect of the governmental act, not from the point of view of some “objective observer,” but instead from that of a reasonable observer belonging to the class against whom the act is levied, asking whether such a reasonable observer would consider their participation in the political community to be marginalized. In this way, the court is forced to understand the problem from the vantage point of the person for whom the Constitution was written—the minority outsider.

324. See supra Part IV.
325. See supra note 1 and accompanying text.
326. See supra note 192 and accompanying text.
327. As noted, this concern is that actual or perceived government affiliation will ultimately lead to alienation of non-preferred religious minorities, and thereby encourage their assimilation into the majority. This, I posit, is not consistent with the promise of religious liberty represented by both the Establishment and Free Exercise Clauses of the First Amendment.
328. See Feigenson, supra note 267, at 64.