TOWARDS A NEW STANDARD FOR FIRST AMENDMENT REVIEW OF STRUCTURAL MEDIA REGULATION

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The Supreme Court's decisions in the Turner Broadcasting *cases ushered in a new era of rigorous judicial oversight of regulations aimed at shaping the economic structure of the media industry. The* Turner *decisions, and especially their application by lower courts, have expanded the range of regulations subject to heightened First Amendment scrutiny, consistently granted lower levels of deference to legislative and administrative judgments, and applied a degree of economic scrutiny of regulatory choices unseen since the* Lochner *era. In this Note, Michael Burstein argues that such scrutiny is inappropriate in light of the quickening pace of technological and economic change that marks the modern information environment. He observes that the technological balkanization of First Amendment jurisprudence has outlived its usefulness and that applying a unitary standard to all activities of a particular type of media fails to focus judicial attention on the entity's core speech activities. Instead, Burstein proposes that courts draw a distinction between regulations that impact content production or editorial choices and those which aim to structure the distribution of information. The former remain deserving of heightened scrutiny, but the latter implicate a long tradition of allowing government regulation to improve the information order. Because government necessarily must make choices among competing instrumental arrangements, none of which implicates a particular normative theory of the First Amendment, such choices are entitled to judicial deference. As technology blurs the lines between different media outlets, this framework should provide the needed flexibility to protect the First Amendment interests of both media entities and the public they serve.*

INTRODUCTION

In the late 1990s, the spread of high-speed broadband Internet connections began to capture the attention of telecommunications companies and consumers. Upgrades to digital cable systems provided many customers with faster access to online content. Consumer advocates worried, however, that monopoly cable providers in control of high-speed Internet access would be able to exert disproportionate

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influence over personal communications and content.[1] They argued that cable monopolies should be required to allow third-party Internet Service Providers (ISPs) to interconnect with their networks.[2] The Federal Communications Commission (FCC), reluctant to interfere with the development of new technology, did not move quickly to set ground rules for the new services, preferring instead to make policy as particular questions arose.[3] Local governments stepped in to fill the gap in regulation, promulgating their own statutes requiring open access as a condition of cable franchise renewal. The cable providers reacted by going to court, armed with a First Amendment defense: Open access mandates interfered with cable operators' editorial control over their systems and were therefore unconstitutional.[4] At least one court agreed.[5]

How did we get to a point where it might be unconstitutional to limit the ability of a monopoly cable provider to restrict others' speech? In the world of modern media and telecommunications regulation, this constitutional posture is not uncommon. Since the Supreme Court's decisions in the *Turner Broadcasting* cases,[6] media companies have found a potent First Amendment shield against government regulation, and lower courts have been increasingly willing to take it up on their behalf.[7] Courts frequently characterize structural media regulations not as a form of economic regulation of the media

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[1] *See* William E. Lee, *Cable Modem Service and the First Amendment: Adventures in a "Doctrinal Wasteland,"* 16 HARV. J.L. & TECH. 125, 126–27 (2002).

[2] This arrangement is known as "open access." It is patterned on the common carrier requirements for local telephone companies, by which they are compelled to allow other providers access to their physical plant and network. *See generally* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 892–94 (2001) (describing open access debate).

[3] *See* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Notice of Inquiry, 15 F.C.C.R. 19,287 (2000) [hereinafter Open Access NOI] (opening inquiry but declining to set national policy). The Federal Communications Commission (FCC) since has clarified its position, declaring cable modem service to be exclusively an information service under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.). *See* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (2002) [hereinafter Open Access Order], *vacated in part by* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003) (holding that cable broadband is part "information service" and part "telecommunications service").

[4] *See, e.g.*, Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000); *see also* AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000) (challenging open access on statutory grounds).

[5] *Comcast*, 124 F. Supp. 2d at 694.

[6] Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994).

[7] *See* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 944–45 (1998) ("Indeed, it sometimes appears that the First Amendment

industry, but rather as content-neutral restrictions on particular corporate speakers. Taking their cue from the *Turner* decisions, they then can apply a more stringent form of "intermediate scrutiny" that calls for a deep economic inquiry into the purpose and fit of the regulation. Following this First Amendment analysis, courts can engage in a searching review of—and easily can reject—regulatory policies.[8] This Note argues that such *Lochner*-like scrutiny is inappropriate in media regulation cases, where there are legitimate speech interests on both sides of the dispute.[9]

"Structural" regulation of the media industry long has been seen as advancing First Amendment goals rather than retarding them.[10] Beginning with Justice Black's famous observation in *United States v. Associated Press*[11] that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"[12] the Supreme Court routinely upheld broadcast and newspaper regulations aimed at reducing media concentration and ensuring access and diversity.[13] Ironically, this First Amendment tradition of allowing regulation to improve the communications order appears to be in jeopardy just when it may be needed most.

Media companies today are large conglomerates that both produce content and distribute it.[14] This blending of editorial and distri-

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has become the first line of challenge for virtually all forms of regulatory initiatives."); *see also* cases cited *infra* notes 42–48.

[8] See *infra* Part I for a discussion of the doctrinal development behind this line of argument.

[9] *See infra* Part III.A. There are at least two respects in which telecom jurisprudence mirrors the discredited approach of *Lochner v. New York*, 198 U.S. 45 (1905). First, it hangs deep review of economic regulation on a fundamental right—free speech, rather than due process, on which the *Lochner* Court relied. Second, it denies the institutional capability of the political branches to settle questions where there are diametrically opposed claims of right. Justice Breyer recently criticized this aspect of the Court's contemporary jurisprudence, arguing that the current approach "limit[s] the public's economic and social choices well beyond any point that a liberty-protecting framework for democratic government could demand. That, along with a singular lack of modesty, was the failing of *Lochner*. No one wants to replay that discredited history in modern First Amendment guise." Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 255–56 (2002) (footnote omitted). Many commentators have leveled the charge of neo-*Lochner*ism at the Court's recent media jurisprudence. *See, e.g.*, Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 201–05 (2003); Robinson, *supra* note 7, at 945.

[10] "Structural regulation," as used throughout this Note, refers to regulation of the economic structure of the media industry.

[11] 326 U.S. 1 (1945) (holding that antitrust laws apply to newspaper industry).

[12] *Id.* at 20.

[13] *See infra* notes 146–54 and accompanying text.

[14] *See infra* notes 131–32 and accompanying text.

butional functions—enabled by digital media and the Internet—long ago outstripped courts' ability to apply traditional "newspaper" and "broadcast" lines of cases, and the result has been doctrinal confusion.[15] Much is at stake in resolving the confusion: Modern media must be subject to some regulation in order to prevent the owners of content and conduit from becoming the arbiters of free expression.[16]

This Note proposes a new constitutional framework for evaluating structural media regulation that focuses on the specific speech activities of media corporations and is therefore protective of both media speakers and the public they are supposed to serve. Part I describes the current standard. It reads the Supreme Court's *Turner* decisions in light of lower court application, particularly in *Time Warner Entertainment Co. v. FCC*,[17] and finds that courts can manipulate the *Turner* standard in order to engage in deep economic scrutiny of structural media regulations. Part II argues that the Supreme Court's technology-specific framework for evaluating regulation of the media has outlived its usefulness in a world of telecommunications convergence. By focusing on the technological and economic characteristics of each particular medium, rather than the actual "speech" activities of the entities involved, the Court has blinded itself to the core First Amendment interests on both sides of any given regulation. Part II proposes an alternative functional distinction between content production and distribution that is independent of any particular medium.

Part III develops the implications of this framework for judicial review. It argues that congressional and administrative choices about how to distribute the benefits and burdens of speech entitlements generally ought to be given deference, but where regulations impact core speech production rather than distribution, *Turner*'s intermediate scrutiny should retain its force.

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[15] *See infra* Part II.

[16] There is a significant literature that addresses the dangers of concentrated media in the digital environment. Lawrence Lessig argues, for example, that cable companies easily could leverage their control over physical plants to disadvantage competitors' content on the Internet and frustrate the free culture that it spawned. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 153–54 (2001); *see also* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 377–84 (1999) (describing adverse normative effects of information concentration).

[17] 240 F.3d 1126 (D.C. Cir. 2001).

I

THE *TURNER* DECISIONS AND THEIR PROGENY

This Part reads the *Turner* decisions and their progeny together to articulate the current "standard" for First Amendment review of structural media regulations.[18] Although the cases are ambiguous, three key themes emerge: (1) the expansion of the "content neutral" category to include most structural media regulations; (2) the reinvigoration of intermediate scrutiny to produce judicial review that is much less deferential to legislative and administrative fact-finding and judgments; and (3) the practice of courts routinely engaging in close economic analysis—focused on competition—to judge the importance of the government interests in regulation and the fit of the challenged regulation to those interests.

A. Content-Neutral Speech Regulation

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act.[19] Sections 4 and 5 of the Act require cable operators to carry the signals of local broadcasters over their systems.[20] This requirement, sought by the major broadcast networks, was designed to ensure that as cable grew in popularity, broadcast television would remain a viable medium. Specifically, Congress found that:

> As a result of the economic incentive that cable systems have to delete, reposition, or not carry local broadcast signals, coupled with the absence of a requirement that such systems carry local broadcast signals, the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.[21]

By requiring cable providers to carry broadcast channels, Congress sought to preserve the *medium* of broadcast television and

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[18] The analysis in this Part takes as its starting point the notion that the Supreme Court's pronouncements in the *Turner* cases are sufficiently ambiguous and confusing to create room for lower courts to interpret and shape the constitutional rule. While lower courts have been the primary source of mischief, the Supreme Court shares the blame for sanctioning it. This Note's criticisms of the *Turner* cases are therefore addressed to the constitutional doctrine as it may be applied at any level.

[19] Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 U.S.C.) [hereinafter 1992 Cable Act].

[20] Specifically, cable systems with twelve or fewer usable channels must carry at least three local commercial television stations. 47 U.S.C. § 534(b)(1)(A) (2000). Large operators, those with more than twelve usable channels, must carry the signals of all local commercial stations, up to one-third of the number of usable channels. § 534(b)(1)(B). Cable operators are also subject to carriage requirements for noncommercial educational television. § 535.

[21] 1992 Cable Act § 2(a)(16).

its *content*, especially locally originated news and programming.[22] The cable providers claimed that the legislation restricted their speech in two ways: It reduced the number of channels over which cable operators could exert editorial control and made it more difficult for cable programmers to compete for space on the remaining channels.[23] Cable operators brought suit under the Act's expedited review procedures,[24] and the Supreme Court visited the matter twice.

The first problem facing the Court in *Turner I* was the appropriate standard of review. On the one hand, courts traditionally have upheld structural regulation of the broadcasting industry as a matter of course.[25] The landmark case *Red Lion Broadcasting v. FCC*[26] upheld the FCC's "fairness doctrine," which required broadcasters to give coverage to both sides of a political issue, without engaging in the tiers-of-scrutiny analysis that has become *de rigueur* in the aftermath of the *Turner* decisions.[27] The *Red Lion* Court instead found that broadcast spectrum was a scarce resource—there inevitably would be more broadcasters seeking to use the airwaves than available frequencies—and that regulation was justified to avoid chaos.[28] This rationale saved most broadcast rules from heightened scrutiny[29] and still may have vitality today, despite the evanescence of its technological and economic underpinnings.[30] In the cable context, however, it clearly had no application. Scarcity among the airwaves is simply an incor-

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[22] *See* 1992 Cable Act § 2(a)(11) ("Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.").

[23] *See Turner I*, 512 U.S. 622, 636–37 (1994).

[24] *See* 1992 Cable Act § 23.

[25] This tradition extends farther back than broadcast. *See* C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 93–114 (describing history of permissive Supreme Court decisions on structural regulation).

[26] 395 U.S. 367 (1969).

[27] *See id.* at 375. The FCC itself abandoned the "fairness doctrine" some years later. *See generally* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) [hereinafter Fairness Doctrine Report].

[28] *See Red Lion*, 395 U.S. at 387–89, 397–400.

[29] *See, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (upholding limits on cross-ownership between broadcasters and newspapers serving same community).

[30] *See, e.g.*, Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("[T]his court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense."). Despite its continued judicial significance, most commentators agree that scarcity has outlived its usefulness as a justification for regulation. *See, e.g.*, Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 267–79 (2003). *Red Lion* itself may remain good law in another sense, that is, as part of a tradition of upholding diversity in media as a valid objective of government regulation. *See* Benkler, *supra* note 16, at 367–71; *see also infra* notes 149–50 and accompanying text.

rect model of cable service; cable signals travel through proprietary wires, unconstrained by interference from other would-be providers.[31]

But the traditional model of print media access did not fit either. The *Turner* Court found *Miami Herald Publishing Co. v. Tornillo*,[32] which invalidated a right-of-reply statute as compelled speech, inapposite because of the different technology involved.[33] Cable operators, unlike newspaper publishers, occupied a "bottleneck" position and therefore could "prevent [their] subscribers from obtaining access to programming [they chose] to exclude."[34] While an op-ed rejected by one newspaper easily could find placement in another, or find another media outlet entirely, a cable television show could gain access to consumers only through the cable operators' physical plant. The Court found that regulating to limit the operators' potentially censorial power was at least well enough justified to avoid the categorical imposition of strict scrutiny.[35]

Lacking a compelling constitutional analogy, the Court proceeded to evaluate the "must carry" rules under its more traditional method of First Amendment analysis: categorizing the rules as content based or content neutral, and then applying the appropriate scrutiny. The Court split 5-4 over the proper categorization. The majority held the statute to be content neutral, and therefore subject to intermediate scrutiny. Adopting an expansive definition of content neutrality, Justice Kennedy wrote:

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. . . . By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.[36]

Framing the core dispute in *Turner I*, the majority found the "must carry" rules to be content-neutral structural regulations aimed at curbing economic power,[37] while the dissent argued that the legislation was a content-based choice to favor local broadcasters.[38]

Turner I thus represents a departure from previous media cases like *Red Lion* and *Tornillo*, which, instead of categorizing media regulations as content based or content neutral, treated them as *sui generis* and directly evaluated their First Amendment impacts. Two points

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31 *See Turner I*, 512 U.S. 622, 639 (1994).
32 418 U.S. 241 (1974).
33 *Turner I*, 512 U.S. at 653–57.
34 *Id.* at 656.
35 *Id.* at 657.
36 *Id.* at 643.
37 *See id.* at 643–49.
38 *See id.* at 677–79 (O'Connor, J., dissenting).

about this doctrinal shift bear noting. First, the framework may not be internally consistent. The content-based/content-neutral analysis is supposed to distinguish laws that incidentally burden speech, like time-place-manner regulations, from laws that censor specific expression.[39] But many structural regulations—including those upheld under the old regime—in fact may be content based but not censorial, and otherwise justified in light of competing First Amendment concerns.[40]

More importantly, the *Turner I* formulation appears to foreclose any return to *sui generis* treatment. Almost every structural media regulation can be thought of as a content-neutral restriction of at least *some* speech.[41] Indeed, the variety of regulations found to be content neutral and therefore subject to heightened scrutiny after *Turner I* includes: limits on local telephone companies' provision of video services,[42] surcharges on non-locally produced cable programming,[43] municipalities' grants of exclusive local cable franchises,[44] open access requirements for cable Internet service provision,[45] limits on cable channel allocation to affiliated programmers (vertical ownership rules),[46] limits on the total number of subscribers that can be served by a single cable provider (horizontal ownership rules),[47] and "must carry" requirements as applied to satellite television providers.[48]

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[39] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54–55 (1987) (arguing that content-based regulations deserve greater scrutiny because they implicate government in "distortion of public debate, improper motivation, and communicative impact").

[40] Baker draws this distinction and criticizes *Turner I* on the ground that the "must carry" rules were in fact content based, but were nevertheless justified by a long tradition of regulating to preserve the values of localism and diversity in the press. *See* Baker, *supra* note 25, at 91–93.

[41] This Part reserves judgment of this development as a normative matter. Parts II and III, *infra*, critique the Supreme Court's recent media cases. It is sufficient here to note that the vast majority of structural regulations are now subject to increased scrutiny.

[42] *See* Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for determination of mootness*, 516 U.S. 415 (1996).

[43] *See* Horton v. Houston, 179 F.3d 188 (5th Cir. 1999).

[44] *See* Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir. 1994).

[45] *See* Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

[46] *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001).

[47] *See id.*

[48] *See* Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337 (4th Cir. 2001). The breadth of content neutrality has the potential to expand even further. Many commentators, for example, have noticed the similarities between copyright, which structures the production of information, and media/telecom regulation, which structures its distribution. *See* Benkler, *supra* note 16, at 364–66; *see also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 50–51 (2001); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with*

Given the relative decline of broadcasting vis-à-vis other media—especially cable, satellite, and the Internet[49]—it appears that we have moved to a much more stringent regime of judicial oversight of the modern media.

B. Reinvigorated Intermediate Scrutiny and the Problem of Deference

Having found the "must carry" rules to be content neutral, the Court went on to apply the intermediate scrutiny test first laid out in *United States v. O'Brien*:[50] A content-neutral speech restriction may be sustained if (1) it furthers an important governmental interest unrelated to the suppression of speech, and (2) the incidental restriction on speech is no more burdensome than necessary to effect the regulation's aim.[51] *Turner I* put a significant new spin on the *O'Brien* test, however, by applying it with "unaccustomed vigor."[52] *O'Brien* established a deferential standard that requires simply a facial showing of important government purpose;[53] *Turner I* gave the standard teeth. Justice Kennedy, for the majority, wrote, "When the Government defends a regulation on speech . . . it must do more than simply 'posit the existence of the disease sought to be cured.'"[54]

Operationally, this stance resulted in significant skepticism of Congress's findings in *Turner I*.[55] After setting forth the need for more detailed empirical proof, Justice Kennedy wrote that although courts usually defer to Congress on such matters, "deference afforded

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Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation, 42 B.C. L. REV. 1, 41–43 (2000). Although the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), declined to subject copyright to First Amendment scrutiny, those advocating such an extension of First Amendment principles placed copyright squarely within *Turner I*'s definition of content neutrality. *See* Brief of Jack M. Balkin, Yochai Benkler, Burt Neuborne, Robert Post, and Jed Rubenfeld as *Amici Curiae* in Support of Petitioners at 15–21, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618); Netanel, *supra*, at 54.

[49] *See* Ashish Bhandhari, Hamid Biglari, Michael Burstein, Andre Dua & John Rose, *The End of Broadcast?*, MCKINSEY Q., 2000, no. 3, at 138, 144 ("Since the rise of the cable networks 30 years ago, the viewer penetration rate of the three major US broadcasters—ABC, CBS, and NBC—has declined to less than 38 percent, from 56 percent.").

[50] 391 U.S. 367 (1968).

[51] *Id.* at 377.

[52] *See* Netanel, *supra* note 48, at 56.

[53] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1203–04 (1996); Stone, *supra* note 39, at 49–52.

[54] *Turner I*, 512 U.S. 622, 664 (1994) (quoting Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

[55] For a detailed discussion of deference in the *Turner* cases, see Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's* Turner Broadcasting *Decisions*, 97 COLUM. L. REV. 1162, 1165–70 (1997) [hereinafter Columbia Comment] and Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2313–15 (1998).

to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law."[56] The concepts of deference and independent judgment appear to be at odds. In an effort to reconcile them, Kennedy wrote, "This obligation to exercise independent judgment . . . is not a license to reweigh the evidence *de novo*, or to replace Congress's factual predictions with our own. Rather, it is to assure that . . . Congress has drawn *reasonable inferences based on substantial evidence.*"[57] This formulation suggests the use of the "substantial evidence" test, ordinarily used to scrutinize formal administrative agency proceedings.[58] In the context of agency action, "substantial evidence" refers to the strength of the administrative record that an agency must compile in formal rulemaking or adjudication to facilitate judicial review.[59] By invoking administrative law principles, the Court both departed from precedent, as such principles previously had not been applied to Congress, and suggested a more detailed review than that ordinarily accorded to legislative findings. At the same time, however, the Court was careful to note that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."[60] Nevertheless, for the lower court to engage in the deeper analysis required by the Supreme Court it would need more detailed factual support. *Turner I* is thus somewhat cryptic.

When the *Turner* case made its way back to the Supreme Court three years later, the Justices attempted to clarify the standard of review and in so doing adopted a significantly more deferential tone. Justice Kennedy, again writing for the majority, stated that the Court's "sole obligation" was to review Congress's determination to ensure that it drew reasonable inferences based on substantial evidence, and this time he explicitly noted that "substantiality is to be measured in

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56 *Turner I*, 512 U.S. at 666 (internal quotations and citations omitted).

57 *Id.* (emphasis added).

58 *See generally* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.3.1 (3d ed. 1999) (outlining jurisprudential development of substantial evidence test).

59 The classic formulation of the substantial evidence test was articulated in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938): "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 229. The Court's most recent formulation can be found in *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998): "[W]e must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." *Id.* at 366–67.

60 *Turner I*, 512 U.S. at 666; *see also id.* at 670 n.1 (Stevens, J., concurring in part and concurring in judgment) (reiterating support for "no record" caveat); Columbia Comment, *supra* note 55, at 1173 (noting possible importance of "no record" caveat to Justice Stevens's decision to concur in judgment).

this context by a standard more deferential than we accord to judgments of an administrative agency."[61]

Even with these qualifications, however, the *Turner II* Court engaged in an extensive analysis of both the economic data before Congress and the economic data assembled by the district court.[62] In several instances where the majority and the dissent cited data leading to opposite conclusions, the majority conceded that varying interpretations were possible,[63] and the Court ultimately held that it was Congress's role to choose among various interpretations of substantial evidence, so long as its interpretation was reasonably well supported.[64] Although the Court's evaluation of Congress's anticompetitive rationale was lukewarm, the Court punctuated its discussion by noting: "We need not put our imprimatur on Congress's economic theory in order to validate the reasonableness of its judgment."[65]

Despite the moderating influence of *Turner II*, lower courts in most subsequent cases have adopted the approach of *Turner I* wholesale. In the most important lower court application of the *Turner* cases, *Time Warner Entertainment Co. v. FCC*,[66] the D.C. Circuit focused its analysis on the implications of *Turner I*. Two different FCC rules were at issue in *Time Warner*: horizontal ownership limits—a cap on the number of cable systems that any one company could own nationwide—and a vertical limitation specifying the number of channels that had to be reserved for non-affiliated programming.[67] The court analyzed the agency's specific implementation of a statute just as it would an act of Congress, noting that "constitutional authority to impose some limit is not authority to impose any limit imaginable," and quoting the standard of review directly from *Turner I*. The FCC had to "show a record that validates the *regulations*, not just the abstract statutory authority." [68]

By shifting the context of the decisionmaking, the court applied an inappropriate standard to agency actions. The D.C. Circuit drew upon the *Turner I* Court's invocation of the "substantial evidence"

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[61] *Turner II*, 520 U.S. 180, 195 (1997).

[62] *See infra* notes 74–81 and accompanying text.

[63] *See, e.g.*, *Turner II*, 520 U.S. at 210–11 (discussing evidence of financial viability of local broadcast stations); *id.* at 215 (discussing burdens of "must carry").

[64] *Id.* at 211 ("The question is not whether Congress, as an objective matter, was correct . . . . Rather, the question is whether the legislative conclusion was reasonable and supported by substantial evidence . . . .").

[65] *Id.* at 208.

[66] 240 F.3d 1126 (D.C. Cir. 2001).

[67] *See id.* The relevant statute, section 11 of the 1992 Cable Act, already had been upheld in a facial challenge. *See* Time Warner Entm't Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000).

[68] *Time Warner*, 240 F.3d at 1130 (relying on *Turner I*, 512 U.S. 622, 664 (1994)).

test[69]—most frequently used to review agency fact-finding in formal rulemaking and adjudication[70]—to evaluate the results of the FCC's informal notice-and-comment rulemaking. By importing the exceptional standard of legislative review from *Turner I*, the appellate court bumped up against precedential constraints on the use of the "substantial evidence" test in administrative law.[71] The D.C. Circuit's interpretation of the *Turner* cases therefore suggests that agencies will be expected to justify in constitutional terms the very specific regulatory choices they make—a task far more difficult than that which Congress faces when it makes similar judgments.

C. *The Role of Economic Analysis in* Turner *Scrutiny*

In evaluating whether the interest in upholding the "must carry" rules was important and whether the statute was well tailored to satisfy that interest, Justice Kennedy, writing for a plurality in *Turner II*, couched the question in explicitly economic terms: The government, to prove that its interest in the "must carry" rules was sufficiently important, first had to demonstrate that "'significant numbers of broadcast stations [would] be refused carriage on cable systems' absent must-carry," and, second, that "'the broadcast stations denied carriage [would] either deteriorate to a substantial degree or fail altogether.'"[72] Justice Breyer, concurring in *Turner II*, disagreed with this interpretation of intermediate scrutiny, derisively reformulating it as "whether or not the statute is properly tailored to Congress's purely economic objectives."[73]

In approaching this deep economic analysis, the Court in *Turner II* considered a wide range of economic theories and justifications for

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[69] *See supra* notes 57–60 and accompanying text.

[70] *See generally* PIERCE ET AL., *supra* note 58.

[71] Of course, the line between substantial evidence and other administrative law standards—such as arbitrary and capricious review—is thin at best, *see id.* § 7.3.3, so it is unclear precisely how much courts reviewing administrative actions will change their analysis. The D.C. Circuit's approach to these cases is not necessarily inconsistent with administrative law cases generally, where a "hard look" at the agency's rationale frequently turns up deficiencies that justify remand and/or vacatur of agency action. *See, e.g.*, GTE Serv. Corp. v. FCC, 205 F.3d 416, 426 (D.C. Cir. 2000) (finding unreasonable certain aspects of FCC collocation order). The argument in this Note is that the *Turner* test is flawed as a constitutional matter. The appropriateness (or inappropriateness) of applying traditional canons of administrative law to structural media regulations is beyond the scope of this Note.

[72] *Turner II*, 520 U.S. 180, 195 (1997) (quoting *Turner I*, 512 U.S. at 666) (internal citations omitted).

[73] *Id.* at 229 (Breyer, J., concurring in part). Justice Breyer would have determined the statute's constitutionality solely on the basis of its non-economic objectives, namely preserving the benefits of free, over-the-air television and promoting diversity in information sources. *Id.* at 228.

the government's interest in "must carry":[74] the structure of the cable industry,[75] monopoly power of local cable systems,[76] cross-elasticity of demand between cable and broadcast programming,[77] competition for advertising revenue and its importance in industry economics,[78] empirical evidence of adverse carriage decisions by cable operators,[79] and continued growth in the cable market.[80] In many cases, the plurality and the dissent were able to cite evidence that supported diametrically opposed findings.[81]

In response, the plurality reiterated that their project was not to assess competing economic theories, but only to determine whether Congress reasonably could draw the inferences that it did.[82] Nevertheless, the fact that the Court sought the creation of an expanded judicial record, and that it engaged in a deep review of that record, suggests that the Justices approached Congress's determinations with a healthy dose of skepticism. More importantly, by opening the door to this deep analysis but ultimately deferring to Congress, the Court left unclear the standard of economic proof needed to sustain a regulation under intermediate scrutiny.

Lower courts applying the *Turner* decisions often have required a significant showing of economic rationality in order to uphold a structural regulation. Analyzing the horizontal ownership restrictions in *Time Warner*, for example, the D.C. Circuit was faced with the task of assessing the risk of collusion in the cable industry.[83] The FCC

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[74] *See* Nancy Whitmore, *Congress, the U.S. Supreme Court and Must-Carry Policy: A Flawed Economic Analysis*, 6 COMM. L. & POL'Y 175, 192–93 (2001) (parsing variety of theories relied upon by Congress and verified by plurality in *Turner II*).

[75] *Turner II*, 520 U.S. at 197–98.

[76] *Id.* at 197.

[77] *Id.* at 200–01.

[78] *Id.*

[79] *Id.* at 202–06.

[80] *Id.* at 206–07.

[81] *See id.* at 241–44 (O'Connor, J., dissenting).

[82] *See id.* at 207–08. Some critics of the opinion fault the Court for subscribing to a flawed economic theory. They argue, for example, that the Court *could have* made its own assessment of the data and, by choosing not to, allowed a theory that was questionable at best to remain the law. *See* Whitmore, *supra* note 74, at 205–11.

[83] The FCC's argument for establishing a thirty percent limit was based on the agency's estimate that an average cable network needed to reach about twenty percent of cable subscribers to be economically viable. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1131 (D.C. Cir. 2001). The agency then assumed, or, in the court's somewhat derisive terms, "divine[d]" that subscriber penetration on systems that agree to carry that network will be only fifty percent, thus requiring an "open field" of forty percent of cable operators willing to carry the network. *Id.* The FCC then reasoned to the thirty percent limit by positing that a forty percent open field will be maintained even if the two largest operators under this restriction collude. *Id.* The relevant question for the court was then whether there was substantial evidence of the likelihood of collusion. *Id.* at 1132.

presented evidence that did not show affirmatively that collusion was occurring, but instead supported the inference of collusion arising from the economic structure of the cable industry.[84] The court criticized the FCC's sole reliance on "assumptions" about the economic incentives that cable operators face and its failure to point to specific examples.[85] The problem, of course, is that in fashioning a prophylactic rule like the horizontal ownership limitation, the FCC necessarily was engaged in making *predictive* judgments.[86] The *Turner II* Court acknowledged this problem, and therefore softened its "substantial evidence" requirement.[87] But the D.C. Circuit, while paying lip service to the need for agencies to exercise their independent judgment,[88] insisted that the predictive judgments were not sufficiently supported by the evidence.[89] Instead, the court substituted its own economic judgment for that of the agency.

The vertical integration rule was plagued by similar problems.[90] Note, however, the similarity between this rule and the "must carry" rule that ultimately was upheld in the *Turner* cases. By imposing a forty percent limit on the channels that could be occupied by affiliated programs, the FCC essentially created a "must carry" requirement based on institutional affiliation rather than medium or local content. This rule should have been less objectionable than that in the *Turner* cases because there was no plausible claim that it could be content based; instead, it required the cable operator to carry unidentified, unaffiliated content in a partial common carrier arrangement. Seen this way, the *Time Warner* holding actually may be contrary to the *Turner* holdings; even Justice O'Connor approved of this kind of rule in dissent, arguing that common carrier requirements were content neutral and therefore less constitutionally suspect.[91] Nevertheless, the

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[84] *See id.*

[85] *Id.*

[86] *Cf.* Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281 (2000) (arguing for heightened concern with predictive judgments).

[87] *See Turner II*, 520 U.S. at 206–07 (reviewing evidence about likelihood of anticompetitive behavior as horizontal integration proceeds in cable industry).

[88] *See Time Warner*, 240 F.3d at 1133 ("[W]e must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.").

[89] *See id.* ("[T]he FCC has put forth no evidence at all that indicates the prospects for collusion.").

[90] *See id.* at 1138 (finding that FCC made "no effort to link the numerical limits to the benefits and detriments depicted").

[91] *See Turner I*, 512 U.S. 622, 684 (1994) (O'Connor, J., dissenting) ("Congress might . . . obligate cable operators to act as common carriers for some of their channels . . . . [S]uch an approach would not suffer from the defect of preferring one speaker to another.").

Time Warner court struck down the rule because it believed the forty percent requirement was "plucked . . . out of thin air."[92]

This dissonance between the actual holding of the *Turner* cases ("must carry" requirements good) and the subsequent lower court applications of the standard (structural regulations bad) highlights the core of the problem: The intermediate scrutiny approach, coupled with a focus on economic rationality as a measure of "important government interests," creates room for any court to strike down any provision of a structural regulation of which it does not approve.

II
TECHNOLOGY-SPECIFIC LAW IN AN ERA OF MIXED MEDIA

The *Turner I* Court began its analysis by stating, "There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[93] With the rights of cable operators as its starting point, the Court proceeded to measure the constitutionality of the "must carry" rules against this baseline. This Part argues that the reality of modern media entities is much more complicated than the Court believes. Over the years, the Court has developed different models for evaluating regulation of the print media, telephones, broadcast, and now cable. This approach was sustainable when the speech activity and the entity were coterminal. Newspapers printed and distributed journalistic content. Telephone companies provided wires for people to communicate with one another. Broadcasters provided content over scarce airwaves, and cable providers selected a menu of television content to present to consumers.[94] Conceived in this manner, each media entity comprised a "speaker" for First Amendment purposes and engaged in one form of technologically-bounded speech. As the above discussion of the *Turner* cases suggests, the contours of permissible regulation for each entity were defined by reference to the type of speech in which it engaged and were applied to the entity as a whole.[95]

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[92] *Time Warner*, 240 F.3d at 1137.

[93] *Turner I*, 512 U.S. at 636 (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991)).

[94] The protracted grappling over the nature of cable service in the *Turner* decisions is evidence that even this technological change has been difficult to reconcile with traditional media jurisprudence. *See infra* notes 120–22 and accompanying text.

[95] *See* Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law

Two trends have converged to make this approach unsustainable: rapid technological change that has enabled media companies to provide a much wider range of services over the same physical plant, and the increasing integration of the media industry such that large companies now play multiple roles in the content production and delivery process. This Part proposes a new framework based on the distinction between content production and distribution and shows that the First Amendment interests of media companies are different with respect to the two functions.

A. The Obsolescence of Technology-Specific Models

1. The Two Poles: Print and Telephone

Newspapers are the paradigmatic "press" actors. They exercise editorial discretion through their selection and transmission of stories, and they express themselves through editorials. As such, newspapers have been afforded significant protection in their expressive capacities. As the Court said in the landmark case *New York Times Co. v. Sullivan*,[96] freedom of the press, in the sense of editorial functions, represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[97] Newspapers thus are accorded First Amendment status that is almost on par with that granted to individuals: They are treated as expressive entities in themselves. In invalidating a state "right of reply" statute that would have compelled newspapers to print rebuttals from political candidates for stories appearing in the newspaper, *Miami Herald Publishing Co. v. Tornillo*[98] established the principle that newspapers were not platforms for public communication, but were purely editorial enterprises. Thus, "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[99] Government regulation of this process was held to be a violation of the First Amendment.[100] It is worth noting, however, that because print entities' First Amendment interests have been characterized in terms of the content they produce rather than

unto itself . . . ."); *see also* Yoo, *supra* note 30, at 248 n.5 (citing line of Supreme Court cases justifying distinctions among media).

96 376 U.S. 254 (1964).

97 *Id.* at 270. For an account of the history of the editorial freedom of the press, see generally ANTHONY LEWIS, MAKE NO LAW (1991).

98 418 U.S. 241 (1974).

99 *Id.* at 258.

100 *Id.*

their distributive function, most *structural* regulation in the newspaper field—such as the application of antitrust principles—has not presented problems.[101]

In contrast to the content-centered print model, telephony has been conceived of primarily as a conduit. Telephone utilities are regulated as common carriers: They must provide service to any and all customers "on demand, at tariffed rates that are just and reasonable, and without any unreasonable discrimination or undue preference."[102] This economic structure, mirroring that of other natural monopoly public utilities, has resulted in a vast regime of rate regulation and has meant that telephone companies have few or no First Amendment rights in the content that is transmitted over their wires.

With respect to their customers, phone companies generally cannot exert any control over what people say or do by telephone. When Congress attempted to ban the transmission of indecent phone messages (a response to the burgeoning "Dial-a-Porn" industry),[103] the Supreme Court struck down the ban as a violation of the *customers'* speech.[104] In so doing, the Court implicitly affirmed the person-to-person nature of telephone communications. Whether the First Amendment permits telephone companies to engage in private censorship of their customers is an open question, although doing so would be a violation of their common carrier regulations.[105] Nevertheless, that Congress constitutionally cannot impose such obligations[106] suggests that phone companies' rights to restrict their customers' speech are limited at best.

With regard to the telephone companies' own content, however, the law is unsettled. Until very recently, it did not make sense to speak of phone companies as providers of content.[107] As discussed below, technological developments allowing for the distribution of non-voice content over phone lines have brought this issue to the fore. Although one appellate court found a First Amendment right for

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101 *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 7 (1945) (upholding application of antitrust laws to media companies); *see also* Baker, *supra* note 25, at 108–11 (recounting history of structural regulation of newspaper industry).

102 PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.11, at 279 (2d ed. 1999).

103 *See* Sable Communications of Cal., Inc., 492 U.S. 115, 120–23 (1989).

104 *See id.* at 126–31.

105 *See* HUBER ET AL., *supra* note 102, § 14.6.6.

106 *Sable Communications*, 492 U.S. at 126–31. There is an exception, as usual, for obscenity. *See id.* at 124–26.

107 However, as Baker notes, telephone companies *could* have asserted editorial control over their systems, before the development of common carriage laws, as the "publishers" of the communications carried over telephone lines. That they chose not to do so simply may be a historical contingency. *See* Baker, *supra* note 25, at 94–96.

phone companies to transmit their own content, striking down a ban on "video dialtone" services, the Supreme Court has not weighed in.[108]

Print and telephone thus represent two different poles of media activity. Newspapers are the quintessential "press" entities, and are speakers in themselves. Telephone companies, on the other hand, are the paradigmatic conduits for others' speech, engaging in almost no speech activity of their own.

2. *The Anomalies: Broadcast and Cable*

These two "easy" cases, however, are quickly complicated. Consider broadcast radio and television. Broadcasters in some respects are just content producers, creating and disseminating news and entertainment to consumers. As such, the Court has been consistently protective of broadcasters' rights to editorialize and to exercise control over their programming.[109]

Congress and the FCC, however, effectively have transformed broadcasters into providers of communications facilities by erecting a scheme of licensing for radio spectrum use and allowing only license holders to broadcast specific content at specific times in specific places.[110] This regulation was deemed a necessary consequence of the "scarcity" of broadcast spectrum; that is, if every person with a transmitter were to broadcast what she wanted there would be "chaos" on the airwaves.[111] Absent extensive government regulation, no one would be able to use the airwaves effectively; therefore, by regulating in this area, the government actually was enhancing the communications environment. Courts picked up on this rationale and used it to hold constitutional as against First Amendment challenges a wide range of regulations that would be impermissible if applied against newspapers or other "pure" speakers.[112] In *Red Lion*, for example,

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[108] Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 415 (1996). The statute at issue in *Chesapeake* prohibited telephone companies from offering cable television services to their common carrier customers. *Id.* at 185 & n.4.

[109] *See* FCC v. League of Women Voters, 468 U.S. 364 (1984) (striking down regulation that conditioned funding for PBS stations on refraining from "editorializing"); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (holding that fairness doctrine did not compel broadcaster to accept editorial advertisements). See also *infra* notes 134–44 and accompanying text for a more complete discussion of editorial discretion.

[110] For an overview of the broadcast licensing system, see generally BENJAMIN ET AL., *supra* note 2, at 62–64.

[111] *Id.* at 35–37.

[112] *See* Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1000–06 (1989) (providing examples of rules that control broadcasting systems but that would violate First Amendment if applied to newspapers or magazines).

the Court upheld the FCC's "fairness doctrine," which required broadcasters to grant equal coverage to both sides of a political issue,[113] thus affirming in the broadcast space almost the same rule that was invalidated as applied to print media in *Tornillo*.[114] Even though the fairness doctrine has been abandoned,[115] the Court has continued to recognize more expansive rights of access in broadcast.[116]

The scarcity rationale has been subject to harsh criticism,[117] and both lawyers and technologists are recognizing its technological evanescence.[118] Nevertheless, broadcasting remains subject to less First Amendment scrutiny than other media. The *Turner* decisions themselves distinguished cable from broadcast and affirmed that "[t]he justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."[119]

Cable is one step removed from the broadcast model. Instead of a single stream of programming, cable operators provide hundreds of different streams. Cable is a hybrid: In one sense, cable operators are mere conduits, transmitting the programming of others, including

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113 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 396 (1969).

114 *See supra* notes 98–100 and accompanying text.

115 *See infra* note 135.

116 *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 566–68 (1990) (using scarcity rationale to justify minority preferences in broadcast license distribution), *overruled in part on other grounds by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding unconstitutional minority preferences in government contracting).

117 The seminal economic criticism was leveled by Ronald Coase, who argued that spectrum ought to be treated as property and left to market forces for efficient allocation. *See* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959) (arguing that spectrum is not truly "scarce" in economic sense). Contemporary scholars focus on the constitutional implications of the doctrine, arguing that scarcity forms an inadequate basis for constitutional rules. *See, e.g.*, Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 926–30 (1997) (asserting that scarcity doctrine is internally inconsistent and thus incapable of forming coherent justification for public policy); Spitzer, *supra* note 112 (arguing that scarcity rationale fails to justify treating broadcast differently from print media); Yoo, *supra* note 30, at 267–69 (enumerating deficiencies of scarcity doctrine).

118 *See* Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. REV. 2007, 2024–32 (2003) (describing spread spectrum technologies with potential to expand significantly amount of useable radio spectrum); Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25, 38–47 (2002) (same); Yoo, *supra* note 30, at 279–83 (same).

119 *Turner I*, 512 U.S. 622, 637 (1994). It is important to note an alternative rationale for content-based regulation of broadcasters developed in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In that case, the Court held that the "uniquely pervasive presence" and accessibility of broadcast justified a lower level of First Amendment scrutiny. *Id.* at 748–49. While not as relied upon as scarcity, the "unique pervasiveness" rationale is also an example of the Court taking a specific characteristic of the medium and using it to develop a First Amendment standard applicable to most activities of entities using that medium.

broadcasters, into consumers' homes for a fee. On the other hand, the operators make choices in allocating channels across their network; these choices constitute a kind of "editorial discretion" similar to that exercised by newspaper publishers in deciding which stories to print.[120] Even this role is more complicated, however; the *Turner* cases themselves upheld a restriction on editorial discretion, and cable operators are required by law to set aside some channels for leased access, which in some ways more closely resembles a "common carrier" model.[121] Importantly, this blending of functions may explain the recent doctrinal move toward affording cable companies free speech rights in their carriage functions.[122] If cable operators are "speakers" by virtue of the content they assemble, and are free from the technological constraints of over-the-air broadcast, then why should they be limited by regulation from reaching the maximum number of listeners?

The *Turner* Courts, like their predecessors, thought of cable operators as engaging in a particular kind of speech, and then justified regulation based on the characteristics of the underlying technology. The Court explained: "When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[123] This technological characteristic is the lynchpin of the Court's permissive stance toward cable regulation.

3. *The New Problems: Convergence and Conglomeration*

In the four examples above, the Court generally has proceeded down the same path, developing a model of First Amendment regulation dependent not upon the activities of the putative speaker, but upon the characteristics of the medium. Based on this model, the Court has chosen a particular type of scrutiny or analysis and then

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120 *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494–95 (1986) ("[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek[ ] to communicate messages on a wide variety of topics and in a wide variety of formats."); *see also* Satellite Broad. & Communications Ass'n v. FCC, 275 F.3d 337, 352–53 (4th Cir. 2001) (finding satellite editorial discretion analogous to cable).

121 *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 739 (1996) ("And in respect to leased channels, [cable operators'] speech interests are relatively weak because they act less like editors . . . than like common carriers, such as telephone companies.").

122 *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1129 (D.C. Cir. 2001) ("The horizontal limit interferes with petitioners' speech rights by restricting the number of viewers to whom they can speak.").

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

applied it to most regulations of a particular medium. Thus, newspapers almost always are treated as "speakers," while telephone companies are not. Broadcasters almost always are afforded a lesser degree of First Amendment protection, and regulations on cable providers almost always are subject to intermediate scrutiny.

This approach is not sustainable. Trends in technology and media industry structure continue to blur the lines between different types of media. More importantly, the correlation between the type of provider and the service provided is disappearing. This convergence of media makes the above distinctions increasingly anachronistic. Consider the following examples:

- Telephone companies now provide high-speed Internet access through digital subscriber line (DSL) technology.[124] Consumers subscribing to this service can receive real-time streaming audio and video that comes close to mimicking television. Might telephone companies begin streaming media content over DSL just as cable providers do over their plant? If so, what rights do they have? Prior to passage of the Telecommunications Act of 1996,[125] which changed the regulatory structure of high-speed data services, one appellate court found that the telephone companies had an editorial right to broadcast content over their physical plant, despite the history of common carriage described above.[126]
- Cable operators already provide high-speed Internet access, which is necessarily a blend of content and conduit. Many are starting to roll out voice-over-IP services which will allow ordinary telephone calls to be placed over the Internet, through a cable modem.[127] The question of whether ordinary cable Internet access should be regulated like telephones, with their common carrier obligations, or like cable television itself is unsettled.[128] What about when cable companies start offering

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[124] *See* ANNABEL Z. DODD, THE ESSENTIAL GUIDE TO TELECOMMUNICATIONS 196–203 (2d ed. 2000) (describing major variants of DSL technology).

[125] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

[126] *See* Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded for consideration of mootness*, 516 U.S. 415 (1996); *see also* Adam J. Coates, Comment, *The First Amendment, the FCC, and Digital Subscriber Line Service: Will Congress Get It Right This Time?*, 5 U. PA. J. CONST. L. 734 (2003) (comparing digital subscriber line (DSL) and cable modem regulatory regimes).

[127] *See* Stephen Labaton, *Thorny Issues Await F.C.C. as It Takes up Internet Phones*, N.Y. TIMES, Feb. 9, 2004, at C1 (noting initiation of rulemaking proceedings).

[128] *See* Open Access Order, *supra* note 3, at 4819 (ruling that cable Internet access is solely "information service"), *vacated in part by* Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003) (holding broadband Internet service to be part "telecommunications

telephony? That is, even if cable companies are entitled to First Amendment protection for their expressive services, are they protected in their more conduit-based functions?[129]

These examples, along with new services that media entities continue to roll out, such as video-on-demand or interactive television, illustrate that the nature of the communications themselves will evade easy definition: Is interactive television closer to person-to-person telephony or to passive entertainment? Eventually, improvements in wireless technology have the potential to eliminate the platform-based distinctions among video, voice, and data. If everything digital can be sent and received through a distributed network with no central controller, as some technologists predict,[130] then the current regulatory and constitutional regime—parsed in terms of the constitutional status of providers in a medium—will cease to have meaning. At the very least, the convergence of media technologies means that the traditional boundaries separating newspapers, telephone, broadcast, and cable are blurring.

Consolidation in the media industry accelerates this trend. Vertical integration among media companies blends content production and dissemination functions within the same corporation.[131] The 2000 merger between America Online and Time Warner, for example, was premised in large part on the production of content through Time Warner's record, movie, and television studios, and its distribution through broadband Internet connections—leveraging both the Time Warner cable assets and America Online's strong Internet presence. It is difficult to treat a cable operator as a unitary entity for First Amendment purposes when it both manufactures its own content and distributes that of others. Time Warner thus has multiple speech

service" and part "information service"); *see also* AT&T Corp. v. City of Portland, 216 F.3d 871, 877–78 (9th Cir. 2000) (same); Lee, *supra* note 1, at 128, 139–40 (discussing split between courts and FCC's classification of cable modem service).

[129] The court in *Comcast* appeared to answer this question in the affirmative, grouping cable modem service with "newspapers and periodicals, pamphlets and leaflets," as possessing liberty of circulation. Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000). The court observed: "'The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)).

[130] *See supra* note 118.

[131] The economic effects of vertical integration are a subject of some debate. *See generally* Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171 (2002) (analyzing vertical integration in broadcasting, cable television, and high-speed broadband). This Note does not take a position on the benefits and burdens of vertical integration, but instead simply notes the constitutional implications of a single company providing both content production and distribution.

interests, some or all of which may be affected by any given regulation.

Horizontal consolidation also affects the First Amendment analysis. When large media companies become powerful enough to overcome local barriers, their national scale enables disproportionate control of the media environment.[132] Most of the technology-based approaches to the First Amendment discussed above developed in response to *local* concerns. Telephone and cable companies began as localized natural monopolies, and local affiliates are the primary legal instantiation of broadcast networks. The regulatory response to national-scale institutions necessarily must be different.

B. Drawing a Functional Distinction

The technology-specific approach to the First Amendment thus appears to be breaking down. In its place, this Section suggests a distinction between "speech" as editorial control or content production and "speech" as distribution, and argues that the former implicates a stronger First Amendment interest. This "activity-based" distinction finds support in two lines of precedent that are exceedingly difficult to reconcile under the old framework: the expansion of editorial rights to different media, and the long-standing tradition of upholding regulation to reduce centralization and improve the performance of the information environment.

1. Content Production

The media long has occupied a special place in American constitutional law. Justice Potter Stewart noted that "[t]he publishing business is . . . the only organized private business that is given explicit constitutional protection."[133] At the core of First Amendment protections of the press are editorial rights—the freedom of media entities to publish as they please and thereby enhance public discourse and information. As discussed below, the activities that likely will be captured by a "content production" rubric vary in their particulars, but share the common attribute of expressive choice, exemplified by the editorial function of the press. These activities are characterized by judgments about *what* message to transmit.

The right to editorial control in newspapers was established in a line of cases beginning with *New York Times Co. v. Sullivan* and cul-

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[132] *See* C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 902–13 (2002) (demonstrating ill effects of media concentration); *cf.* Benkler, *supra* note 16, at 400–08 (modeling effects of information concentration in intellectual property context and finding significant reduction in innovation).

[133] Potter Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631, 633 (1975).

minating in *Tornillo*.[134] In the broadcast arena, it has been more difficult to delineate the scope of the right, but following the demise of the fairness doctrine,[135] courts have come down squarely in favor of preserving broadcasters' autonomy in choosing what content to broadcast. In *CBS v. Democratic National Committee*,[136] the Supreme Court struck down a regulation requiring broadcasters to accept paid editorial advertisements on the Vietnam War.[137] Specifically, the Court was concerned that such mandated carriage would result in the "erosion of the journalistic discretion of broadcasters in the coverage of public issues."[138] *FCC v. League of Women Voters*[139] similarly held that the government could not require that public television stations refrain from "editorializing" as a condition of receiving federal funds.[140]

In other media contexts, the scope of the editorial right is harder to define. In cable, the Court has held that the selection of channels offered to consumers on a cable network is an act of editorial discretion.[141] While arguably not the expression of a particular message, this decision still involves a choice of *what* content to present to an audience, and is therefore protected. The regulations at issue in *Denver Area Educational Telecommunications Consortium v. FCC*,[142] for example, addressed cable operators' ability to choose what content to accept on their "leased access" channels. The Supreme Court first held that cable operators could prohibit indecent programming on their own "private" channels,[143] thus trumping the rights of the constitutionally protected speakers seeking access. Second, the Court held that the government could not require cable operators to segregate indecent content on these channels, thus trumping the government's structural regulation.[144]

The *Turner* cases, which held that cable operators *did* have to carry the content of broadcasters, could be seen as an exception to the strong protection of editorial rights laid out above; however, they can

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134 *See supra* notes 98–100 and accompanying text.

135 Although the FCC officially abrogated the fairness doctrine in 1985, *see* Fairness Doctrine Report, *supra* note 27, at 147, it had fallen into disuse long before that time. *See* BENJAMIN ET AL., *supra* note 2, at 168 (describing "complicated" path to abandoning fairness doctrine).

136 412 U.S. 94 (1973).

137 *Id.* at 130.

138 *Id.* at 124.

139 468 U.S. 364 (1984).

140 *Id.* at 402.

141 *See supra* note 120 and accompanying text.

142 518 U.S. 727 (1996).

143 *Id.* at 751–53.

144 *Id.* at 759.

be reconciled with this view of editorial control because Congress was not dictating any particular message. Instead, the right of access was granted to a *class* of speakers who otherwise would be unable to reach their audience.

2. *Content Distribution*

As one commentator points out, the model of editorial control does not make sense when applied to problems of economic power and the *distribution* of content: "To grant absolute protection to the editorial right in the economic context would be to nullify all regulations affecting channel make-up, program access, and ownership relations."[145] In other words, a strongly protected expressive right realistically cannot imply an *absolute* right to reach all audiences at all times. When restrictions are placed not on the media entity's ability to choose its message, but on its ability to make business investments that help to disseminate that message, the character of the First Amendment interest becomes less clear.

This observation is supported by a tradition of constitutionally permissible government regulation to improve the functioning of the information environment.[146] Where media entities act as conduits for others' speech, the constitutional concern is not government censorship, but the ability of private sector actors to silence one another through their control of the sources and flow of information. Thus, when the government regulates the structure of the information industries, it asserts an interest on behalf of the public—an interest in receiving information from "diverse and antagonistic sources,"[147] and in participating in the widest possible dissemination of ideas and information. This goal is the animating force behind many of the great cases in the First Amendment tradition. In *Associated Press v. United States*, the Court held that the antitrust laws apply to the news media, as a mechanism for encouraging diversity of expression.[148] And the core of the Court's holding in *New York Times Co. v. Sullivan* is that private citizens do not have an unqualified right to stifle public discourse on topics of public importance.

Modern media cases also have reflected the tradition of enhancing public discourse. The Court in *Red Lion* explicitly relied upon this rationale in regulating broadcast: "It is the purpose of the

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145 Cristian DeFrancia, *Ownership Controls in the New Entertainment Economy: A Search for Direction*, 7 VA. J.L. & TECH. 1, ¶ 97 (2002), *at* http://www.vjolt.net/vol7/issue1/v7i1_a01-defrancia.pdf.

146 This Section draws heavily on the analysis in Benkler, *supra* note 16, at 364–77.

147 Associated Press v. United States, 326 U.S. 1, 20 (1945).

148 *Id.*

First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[149] As Yochai Benkler notes, the demise of the fairness doctrine itself has not undermined the basic commitment to decentralization that the *Red Lion* Court found so important.[150] The *Turner* cases themselves turned on the question of whether the "must carry" regulations were content based or content neutral. Having found them to be content neutral, the Court was comfortable applying a lower level of scrutiny appropriate to a prophylactic measure that "prevent[s] cable operators from exploiting their economic power to the detriment of broadcasters, and thereby . . . ensur[ing] that all Americans . . . have access to free television."[151] The Court cited the promotion of viewpoint diversity as one of the important government interests on which it relied to uphold the regulations.[152] The Court wrote: "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[153] In *Denver Area*, another cable case, the Court held that cable operators could not prohibit programming found to be indecent from being broadcast on public access (as opposed to commercial leased access) channels.[154] Although the case did not involve a structural regulation per se, the "access rights" involved may be thought of as a form of limited common carriage. The lesson to be learned from these recent cable cases may be not only that diversity of views in the national media remains an important constitutional value, but also that when private entities controlling key infrastructure can silence *individuals*, citizens continue to have a limited access interest as against such media entities.

This regulatory tradition now may be in danger. Despite the holding in the *Turner* cases that "must carry" structural rules were constitutional, the Court's reasoning has been invoked to reach the opposite result in other cable and broadband Internet cases.[155] Regulatory policy, as fashioned both in the courts and in the FCC, also has been shifting towards allowing greater concentration of the

149 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

150 Benkler, *supra* note 16, at 367 & n.56.

151 *Turner I*, 512 U.S. 622, 649 (1994).

152 *Id.* at 663.

153 *Id.*

154 *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 753–60 (1996).

155 *See supra* Part I.

media industry.[156] In June 2003, the FCC radically revised its rules for media ownership, changing long-standing restrictions on cross-ownership across different media and easing limitations on the number of broadcast stations that could be owned by networks.[157] This norm, however, has yet to affect constitutional jurisprudence. Although the D.C. Circuit, by many accounts, was the animating force for many of the rule changes allowing greater concentration,[158] it is important to note that the court decisions requiring FCC review of its media concentration rules were based on administrative law principles rather than the First Amendment. In fact, the most sweeping court ruling in this area, *Fox Television Stations, Inc. v. FCC*, disapproved of the FCC's failure to amend the National Television Station Ownership (NTSO) rule on the grounds that it was "arbitrary and capricious," rather than on any First Amendment rationale.[159] The *Fox* court thus declined the broadcasters' invitation to extend the standards applicable to editorial discretion to an almost purely economic regulation.[160]

C. *Summary*

Convergence and consolidation have rendered the classic constitutional models for evaluating structural media regulations increasingly anachronistic and difficult to apply. Moreover, they have led to a unitary jurisprudence for each type of media regulation, largely divorced from an examination of the actual activities and interests at stake. It is not surprising, then, that the *Turner* Courts relied so

156 *See generally* Baker, *supra* note 132 (describing and evaluating changes in legal treatment of media concentration); DeFrancia, *supra* note 145 (same).

157 *See* Stephen Labaton, *Regulators Ease Rules Governing Media Ownership*, N.Y. TIMES, June 3, 2003, at A1. These changes were very controversial; over 500,000 comments submitted to the FCC over the course of the proceeding expressed their disapproval of the proposed changes. *Id.* Congress since has taken action to repeal some elements of the FCC's revised rules. *See* David Firestone, *Congress Appears Set to Reverse F.C.C.*, N.Y. TIMES, Nov. 21, 2003, at C4 (detailing bipartisan compromise to increase limits on national television station ownership).

158 *See* News Release, FCC, FCC Sets Limits on Media Concentration 1 (June 2, 2003) ("Recent court decisions reversing FCC ownership rules emphasized that any limits must be based on a solid factual record and must reflect changes in the media marketplace."), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A1.pdf. The recent history of media ownership policymaking is complicated. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.), required the FCC to review its ownership rules biennially. § 202(h). In challenges to the FCC's failure to amend the rules after review, the D.C. Circuit struck down the rules in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), and *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

159 *Fox*, 280 F.3d at 1042–44.

160 *Cf.* DeFrancia, *supra* note 145, at ¶ 96 (citing First Amendment arguments in plaintiffs' briefs).

heavily on deep economic analysis: Once cable operators were viewed as a single entity with speech rights, the relevant inquiry was whether the government regulation was sufficiently important and well tailored to justify a violation of those rights. This Part instead has proposed a more nuanced analysis based on two qualitatively different types of speech activity: content production and distribution—formulating and articulating one's own message, and carrying the messages of oneself and others. Even in the balkanized jurisprudence of the last fifty years, constitutional protection has evolved to be stronger for the former and weaker for the latter. This observation, though, still leaves an open question: How ought the courts apply this framework?

III
REDEFINING THE ROLE OF THE COURTS

This Part answers the question posed above. It argues that the bifurcation of speech activities presents a more nuanced framework for courts that avoids the pitfalls of the *Turner* analysis. This framework prevents the First Amendment from being turned into a tool for striking down almost any structural regulation of the media industry and allows courts to consider more directly the competing speech interests at play in any given regulation. The core principle of this approach is that courts ought to be generally deferential to legislative judgments about the economic structure of speech delivery in the modern information environment. Conversely, they ought to guard vigilantly against encroachment on media entities' expressive choices. Because there are inevitable shades of gray, courts taking this approach likely first will have to decide whether the regulation pertains to core expressive or distributional activities, and then judge the level of scrutiny accordingly. There are, however, some signposts along the way.

A. Turner *as* Lochner*: Deferential Analysis of Distributional Regulations*

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.[161]

[161] *See, e.g.*, 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

As demonstrated earlier, importing content neutrality and tiered scrutiny into the constitutional analysis of structural regulation has opened the door to deep economic review.[162] Applying the *Turner* cases and their progeny, it is relatively easy to draw a link between regulatory burdens and a speech interest; once this link is drawn, the burden is on the government to justify the interest as "important," even if only tangentially related to core First Amendment values.[163] To the extent that recent cases have used the First Amendment as a mechanism for deep economic review, and frequently reversal, of legislation that would appear to be ordinary economic legislation in most other industries, this analogy is facially appealing. Stuart Minor Benjamin, for example, argues that if the wires at issue in the *Turner* cases carried gas rather than video, the rules requiring the carriage of locally produced gas would be upheld easily under rational basis review.[164] In a related context, Justice Breyer, dissenting in *United States v. United Foods*,[165] which held unconstitutional as compelled speech a requirement that mushroom growers contribute to a fund for generic advertising,[166] expressed his belief that the scheme was ordinary economic legislation. He wrote, "I do not believe the First Amendment seeks to limit the Government's economic regulatory choices . . . any more than does the Due Process Clause."[167]

The facial analogy between speech regulation and economic regulation is, however, of limited value. Because speech represents a fundamental constitutional right, economic and social legislation is (and should be) scrutinized more carefully for interference with this

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of this sphere of social and economic life."); Robinson, *supra* note 7, at 945 ("The strategy [employed by media industry litigants] plainly is to achieve a degree of judicial scrutiny that . . . would be quite beyond the pale using the due process minimal rationality standard applied to social and economic legislation. The First Amendment has become, in short, a vehicle for selectively reviving *Lochnerian* review within the domain of electronic media regulation."); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 34–35 (1993) (calling for "New Deal for Speech").

162 *See supra* Part I.

163 Jed Rubenfeld calls this the "*O'Brien*-as-*Lochner* result." *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 771–72 (2001). Rubenfeld's example is extreme: He posits a motorist ticketed for speeding who then claims a First Amendment violation. He argues that the lower speed limit does not further an important government interest, and has amassed significant empirical evidence showing that lower speed limits are not effective highway traffic safety measures. *Id.* This result is partly mitigated by the requirement of expressive conduct, as laid out in *Spence v. Washington*, 418 U.S. 405, 409–11 (1974). But expressive conduct is a very broad category of activity. *See* Rubenfeld, *supra*, at 772–75.

164 *See* Benjamin, *supra* note 86, at 288–89.

165 533 U.S. 405 (2001).

166 *Id.* at 408, 413.

167 *Id.* at 429 (Breyer, J., dissenting) (citing Lochner v. New York, 198 U.S. 45 (1905)).

right.[168] The analogy to *Lochner*, however, is deeper than the above description suggests, and points to an independent rationale for abandoning *Turner* scrutiny of structural media regulation. *Lochner v. New York*[169] struck down a state maximum-hours statute for bakers[170] and was emblematic of an era when the Court read the Due Process Clause of the Fourteenth Amendment to require the maintenance of "economic liberty" and freedom of contract, thereby invalidating much social and economic regulation.[171] Now widely reviled, *Lochner* has been criticized on a multitude of different theories.[172]

One of the more persuasive critiques argues that the *Lochner* Court misunderstood the relationship between government and the economic system and therefore drew an unsupportable line between the public and private spheres.[173] On this account, government only could act in a neutral way in the public sphere. Because "neutrality" was defined by reference to the existing distribution of wealth and property under a free market system, any departure from that distribution was non-neutral and therefore constitutionally suspect. Economic regulation was essentially a "taking" from one person to another and wholly private, outside the purview of government action.[174] In the years between *Lochner* and the New Deal, however, the understanding of neutrality shifted.[175] The essential recognition was that there was nothing inherently "neutral" about the free market distribution of wealth because government itself created the market status quo; property, tort, and contract all involve government action to enforce the common law and structure the market. The final step in this shift was to recognize that once the existing distribution of

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168 *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . .").

169 198 U.S. 45 (1905).

170 *Id.* at 58.

171 *See* Adkins v. Children's Hosp., 261 U.S. 525, 539, 562 (1923) (striking down minimum wage law); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (striking down law prohibiting "yellow dog" employment contracts).

172 *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 718–23 (4th ed. 2001) (discussing substantive and institutional critiques of *Lochner*).

173 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-5, at 1355–57 & n.28 (3d ed. 2000); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987).

174 *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1717 (1984).

175 For an account of the "internalist" perspective of this New Deal shift, see generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

resources is government created, there is no reason to privilege it over another distribution.[176]

Structural media cases increasingly invoke the rhetoric of free markets, arguing against government intervention to change the existing distribution of media assets.[177] This approach fundamentally misunderstands the relationship between government and media in much the same way that the *Lochner* Court misunderstood the relationship between government and economic regulation. The analogy proceeds in two steps. First is a reiteration of the critical difference between distributional and editorial speech regulation. As described in Part II, editorial regulation of the media usually will be constitutionally suspect.[178] But distributional regulation tends to focus on competing instrumental arguments: There is no constitutionally compelling reason to favor one particular instrumental arrangement over another.[179] What is at stake in structural regulation is not the content of speech, but the allocation of speech entitlements. The relevant question is what institutional arrangement will produce the optimal information environment; the answer is not forthcoming from any particular normative theory of the First Amendment.[180]

The analogy is complete when government's role in structuring the media environment is made explicit. Much of our information infrastructure would cease to exist or function absent government regulation. Government essentially "creates" the broadcast spectrum, for example, by carving it into discrete parcels and licensing them for use so that interference is minimized. Indeed, the original rationale for radio spectrum regulation was the "chaos" that ensued absent a

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176 As Sunstein notes,

> [T]he theoretical basis of the *Lochner* era foundered on a mounting recognition that the market status quo was itself the product of government choices. When private property was viewed as a creation of such choices, efforts to reallocate property rights could be understood as a legitimate effort to promote the public good.

Sunstein, *supra* note 174, at 1697.

177 *See* SUNSTEIN, *supra* note 161, at 3–8.

178 *See supra* Part II.B.1; *see also* Sunstein, *supra* note 174, at 1718 (arguing that fundamental rights continue to represent barriers to government action). *But see* Baker, *supra* note 25, at 82–87 (arguing that content-based structural regulations are consistent with constitutional protection of individual speaker autonomy).

179 *See supra* Part II.

180 *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 197–271 (1989) (arguing that media companies' claims are limited to "instrumental" First Amendment claims); MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 55–119 (1986) (finding no normative preference for one instrumental speech claim over another).

controlling mechanism.[181] Cable providers typically operate under municipally sanctioned monopoly grants, owing to the fact that they have many attributes of a "natural monopoly" business.[182] Cable franchises also are subject to federal rate regulation, a scheme that has been upheld against constitutional attack.[183]

Viewed this way, there is neither a constitutionally compelled structure for the information environment nor a natural allocation of speech opportunities such that government intervenes in the communications order only in derogation of some commitment to "neutrality." Government engages in numerous actions that constitute the existing communications order. Given that the structural regulation of this order is largely instrumental, there appears to be no reason constitutionally to privilege one communications order over another.

The analogy with *Lochner* thus argues for less scrutiny than is currently applied. With respect to economic regulation in the post-*Lochner* era, rational basis review is generally sufficient.[184] Absent a compelling constitutional basis for choosing among alternative economic arrangements, courts have no real institutional competence to evaluate legislative choices. Because such choices are made by elected bodies, a simple rationality check ensures their democratic pedigree.[185] In the absence of constitutional requirements for a particular communications order, legislative and regulatory judgments generally ought to stand; judicial interference in the absence of a constitutional mandate raises standard countermajoritarian objections. Nevertheless, the analogy is not a perfect one. At issue is not eco-

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[181] *See* BENJAMIN ET AL., *supra* note 2, at 13–23 (describing early history and rationale for telecom regulation). Importantly, technological developments in "spread-spectrum" and other wireless technologies are calling into question the continued necessity of government regulation. *See* Benkler, *supra* note 118, at 32 (predicting that given "the present state of our technological knowledge, . . . open wireless networks will be more efficient in the foreseeable future"). This contention is hotly disputed, however, and the FCC seems likely to continue to play an important role in spectrum regulation. *See* Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 556–65 (2001) (arguing that system of spectrum regulation is resistant to fundamental change).

[182] *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 492–95 (1986) (reasoning that monopoly grant would be constitutional absent additional physical capacity; postponing decision of constitutionality of grant where there is excess economic capacity).

[183] *See, e.g.*, Time Warner Entm't Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995).

[184] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (applying rational basis review to uphold minimum-wage law).

[185] *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 55 (1985) (arguing that rationality review provides check on exercises of raw interest group power).

nomic regulation, but regulation of *expression*, which is still constitutionally protected, regardless of any uncertainty surrounding the precise scope of protection. At least two specific considerations caution courts against blindly applying rationality review.

First, structural regulations still must be evaluated for censorial intent.[186] The statutes at issue in *Denver Area*, for instance, seem to straddle the line between structural and content regulation.[187] The case addressed conditions for access to "leased" channels and "PEG" (public, educational, or governmental) channels.[188] The plurality opinion drew a distinction between public access channels, which took on the characteristics of a common carrier, and leased access channels, which were within the editorial purview of the cable operators.[189] Part of the difficulty in the case may have been detangling what appeared to be a structural question—to what extent the public access channels should have been given common-carrier-like status—from the content-based motivations for the access requirements. In order to prevent censorial wolves from dressing in structural sheep's clothing, courts must continue to determine whether the regulation is actually censorship in disguise and, if so, apply more rigorous scrutiny.

Apart from the continued risk of censorship, it may be the case that there are heightened public interest obligations that attach to regulation of expression but not to ordinary social or economic legislation. Justice Breyer, dissenting in *Eldred v. Ashcroft*,[190] would have examined the constitutionality of copyright, arguably another form of structural regulation, through the lens of heightened rationality review.[191] His reasoning is instructive:

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186 Ostensibly structural regulations found to be censorial are better thought of as editorial regulations. See *infra* Part III.B for a discussion of the proper standard to apply to regulations implicating editorial control.

187 *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 734–35 (1996).

188 *See id.* One statute *permitted* cable operators to deny access on leased channels to programming that was deemed indecent; this provision was upheld as an exercise of editorial discretion. *Id.* The two remaining provisions, both struck down, would (1) require cable operators who chose to permit indecent broadcasting on leased channels to "segregate and block" such programming; and (2) permit cable operators to deny access on public access channels. *Id.*

189 *Id.* at 760–62.

190 537 U.S. 186 (2003).

191 *Id.* at 244–45 (Breyer, J., dissenting). See *supra* note 48 for a discussion of the similarities between copyright and structural media regulation. Despite the academic commentary seeking stricter scrutiny of copyright legislation, the core First Amendment holding of *Eldred* appears to be that, although not categorically immune from First Amendment scrutiny, copyright legislation will be subjected to heightened scrutiny only if it "alter[s] the traditional contours of copyright protection." *Eldred*, 527 U.S. at 221. Justice Breyer's formulation therefore is used with a double caveat: First, it is unclear that he meant it to

> [I]t is necessary only to recognize that [the Copyright Term Extension Act] involves not pure economic regulation, but regulation of expression, and what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression—in a Nation constitutionally dedicated to the free dissemination of speech, information, learning, and culture. In this sense only, and where line-drawing among constitutional interests is at issue, I would look harder . . . at the statute's rationality . . . .[192]

Ordinary rationality review, as practiced in due process challenges to ordinary social and economic legislation, looks to see whether a particular statute is rationally related to a legitimate government objective.[193] In practice, social and economic legislation almost never is struck down on due process grounds. This approach is predicated on the belief that in a pluralist political system, legislative outcomes in the economic arena are likely to be driven by interest group politics, and that there is little constitutional suspicion of such transactions.[194] As described above, however, regulation of expression is not mere economic regulation. Though it takes on the characteristics of such regulation, it allocates speech entitlements in the shadow of fundamental free speech rights. Thus, while no particular allocation of entitlement is constitutionally compelled, the First Amendment does not disappear from the analysis; when the allocation interferes with the "fundamental" rights that structural regulation is supposed to enable, the allocation should become constitutionally suspect.

The challenge lies in identifying when the line has been crossed. Because allocative decisions in structural media regulation necessarily deprive some people or entities of the ability to speak to some audiences, it is crucial that Congress or the FCC make such decisions in the public interest. At a minimum, this means that the general policy behind rationality review—ensuring that legislation is not solely the product of interest group deals in derogation of the public interest—should be given teeth.

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apply to the structural media regulations discussed throughout this Note; second, it is not the law. Nevertheless, the parallel is sufficiently well defined that his formulation is conceptually instructive, and provides a good starting framework for the appropriate constitutional scrutiny of structural media regulations.

192 *Eldred*, 527 U.S. at 244–45 (Breyer, J., dissenting).

193 *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding state statute that prohibited opticians from fitting lenses).

194 This view is not without controversy. Sunstein, for example, takes issue with the "pluralist bazaar" model of politics and holds up rationality review as a means to ensure some public-regarding purpose to legislation. *See generally* Sunstein, *supra* note 185.

Interest group politics is particularly pervasive in media/telecommunications regulation.[195] The FCC enjoys a close relationship with the entities that it regulates, and frequently is criticized as being unresponsive to public needs and desires.[196] This "regulatory capture"[197] increases the likelihood that structural regulation decisions will be made to benefit those with access to the regulators or Congresspeople. The result is a heightened danger that, despite the broad authority of Congress and the FCC to make structural choices, one or both will overstep their instrumental bounds and threaten the underlying fundamental speech rights of individuals.

Courts engaging in the type of review suggested here therefore may do well to apply rational basis review more carefully or stringently than in other circumstances.[198] Although it is notoriously difficult to articulate the precise contours of "heightened" rational basis review,[199] the constitutional interests underlying media regulation suggest two factors that courts ought to take seriously.[200] First, because structural regulation generally is justified in First Amendment terms,[201] Congress or administrative agencies at least should be required to articulate some speech-promoting purpose. Second, to ensure that the policymaking process has not been overshadowed by

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195 *See generally* REED E. HUNDT, YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS (2000) (recounting political travails of former FCC Chairman).

196 The FCC's recent media concentration decision vividly illustrates this criticism. *See supra* notes 157–58. At least one watchdog group reports that in developing the rules, FCC officials met with top broadcasters on seventy-one separate occasions, in stark contrast with the five meetings held with the two largest consumer advocate groups. *See* Bob Williams, Ctr. for Pub. Integrity, *Behind Closed Doors: Top Broadcasters Met 71 Times with FCC Officials*, *at* http://www.publicintegrity.org/report.aspx?aid=83&sid=200 (May 29, 2003).

197 *See* Hazlett, *supra* note 181, at 405–06 & n.219 (criticizing allocation method in spectrum auctions).

198 *Cf.* Romer v. Evans, 517 U.S. 620 (1996) (invalidating under rational basis review statewide referendum that invalidated antidiscrimination laws protecting homosexuals); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating under rational basis review economic regulation that disadvantaged mentally disabled).

199 Indeed, the concept is in part a contradiction in terms. Nevertheless, one interpretation of the Court's rational basis jurisprudence is that although it was designed initially as a check on interest group politics, courts' refusal to take it seriously has undermined its effectiveness. *See generally* Sunstein, *supra* note 185. The following discussion may be read as a more modest attempt to reinvigorate the standard.

200 This formulation builds on Justice Breyer's observation in *Eldred*. *See supra* notes 190–92 and accompanying text; *cf.* Eldred v. Ashcroft, 537 U.S. 186, 245 (2003) (Breyer, J., dissenting) ("I would find that the statute lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective.").

201 *See supra* Part II.B.2.

private interests, the regulation should be subject to a minimal check for rationality: Is the regulation supported by a plausible economic theory?[202] This analysis should be highly deferential to legislative and administrative judgments.

To take an example, the cable open access regulations at issue in *Comcast* readily could be classified as a distribution regulation rather than a content regulation. While ISPs frequently provide some content of their own, their primary purpose is to serve as a connection to the Internet. With the proliferation of broadband connections, there is little technical constraint on allowing competitors access to the "bottleneck" route into consumers' homes and very little interference with the cable provider's ability to serve its own content. Open access is a classic common carrier requirement.[203]

Similarly, the horizontal ownership cap at issue in *Time Warner* should present an easy case.[204] Although a cap on the nationwide percentage of the cable market that can be served by a single provider restricts cable operators' potential audience size, it neither requires carriage of any particular content nor dictates any editorial choices. The cap does not implicate strong editorial rights, especially since the editorial rights themselves—the choice of carriage of channels on a cable network—are somewhat attenuated. Instead, this rule represents a judgment about allocating speech entitlements. Its purpose, again, is to reduce concentration in the cable industry and to facilitate diversity in information sources.[205] In evaluating whether the regulation is rational, recall that the FCC determined that, by statute, forty percent of the market for cable subscribers had to be "open" in order to ensure that "no single 'cable operator or group of cable operators can unfairly impede . . . video programming.'"[206] It then reasoned to a thirty percent horizontal ownership limit on the theory that if two thirty-percent owners colluded to exclude particular programming, that would leave forty percent of the market open to competition.[207]

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[202] It is admittedly difficult to conceive of regulations that are wholly economically irrational, but the copyright statute at issue in *Eldred* again may be instructive. Assuming for the moment that copyright is a form of structural media regulation aimed at providing incentives for the production of creative works, *see supra* note 48, then by granting retroactive copyright extensions it could not possibly have provided additional incentives for the creation of *new* works. *Eldred*, 537 U.S. at 254–55 (Breyer, J., dissenting). Such a statute would not survive the analysis proposed in this Note.

[203] *See supra* notes 102–06 and accompanying text (describing common carrier phone regulation).

[204] *See supra* notes 83–89 and accompanying text.

[205] *See* 1992 Cable Act § 2; 47 U.S.C. § 521 (2000).

[206] Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (quoting 47 U.S.C. § 533(f)(2)(A) (2000)); *see also supra* note 83.

[207] *Time Warner*, 240 F.3d at 1130–31; *see also supra* note 83.

On its face, this reasoning is plausible and therefore should be given deference. The D.C. Circuit took issue with the possibility of collusion, essentially replacing the FCC's economic judgment as to the likelihood of collusion with its own.[208] This is the kind of judgment that legislatures and agencies should be left free to make.

B. More Rigorous Scrutiny of Regulations That Implicate Editorial Control

Regulations that more directly implicate editorial control still may be justified if applied in a content-neutral manner. But there are several problems with the current *Turner* approach. First, the standard is malleable and uncertain, and it ultimately fails to take seriously both competing claims. Because economics is predictive in nature, any deep analysis a court undertakes will open the door to *Time Warner*–like judicial discretion in choosing which economic arguments to believe. The lack of any clear standard across different fact patterns for judging when economic proof of "important government interests" or "narrow tailoring" is satisfactory only compounds the problem.

Second, and perhaps more importantly, economic analysis at a level deeper than a mere rationality check likely will focus on the wrong object of optimization when applied to media cases. The ultimate concern in media regulation is not necessarily the market for media goods and services; it is instead the *speech market*.[209] Structural choices shape the market for speech: They seek to adjust its quantity, diversity, source, and availability. Unfortunately, such things are not easily measured (or even defined). As a result, courts are left with the relatively clumsy proxy of efficiency in the market for media goods and services.

Frequently, the efficient outcome in the market for media goods and services will differ from the efficient outcome in the speech market. C. Edwin Baker, for example, describes how preference shaping in the market for media goods and services is distorted by the presence of advertisers, who mediate between consumer preferences

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[208] *Id.* at 1136 ("[T]he Commission has pointed to nothing in the record supporting a non-conjectural risk of anticompetitive behavior . . . .").

[209] This term is somewhat elusive. Sunstein defines two relevant "markets" for speech, and claims that "market failures" pervade each, despite the presence of efficiencies in the market for media goods and services. The first market is the set of consumer preferences over the speech that they receive. *See* Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 514 (2000). The second is a hypothetical ideal speech market for maximizing some normative First Amendment goal. *Id.* at 518. Sunstein's normative goal of choice is democratic deliberation. *Id.*

and media company supply.[210] Sunstein identifies two further market failures arising from the "commodification of eyeballs" that is forced by the advertising model: increasing homogeneity and incentives to achieve scale economies in production and distribution, and a significant collective action problem with respect to enacting change in the media environment.[211]

The result is that standard economic analysis of the sort employed by courts—typically focused on efficiency and competition in the measurable markets—fails to map onto the true free speech concerns implicated by competing structural choices. Returning to *Time Warner*, for example, part of the court's difficulty with the FCC's thirty percent horizontal ownership cap may have been that, by normal antitrust standards, thirty percent does not represent market concentration. In the underlying speech market, however, the antitrust concerns lie with concentration in the marketplace of ideas, in which effective control of thirty percent of cable households may allow a company to exert outsized influence.[212]

Focusing on government's speech-related goals avoids this difficulty and takes seriously the claims of parties on both sides of a regulation. Rather than attempting to justify the true government interest in economic terms, as the current standard attempts to do, courts should acknowledge, based on the functional distinction laid out in this Note, that the importance of government interests ought to be judged in terms of, and weighed against, the relevant speech interests on both sides.

The cable "must carry" rules upheld in the *Turner* cases exemplify the type of regulation likely to be upheld under this analysis. The "must carry" rules require not only that cable operators serve as partial common carriers, but that they carry the particular content designated by Congress (i.e., broadcasters' programming). Thus, the degree of editorial control being exerted by the government is stronger than in cases more closely mimicking true common carriage.[213] Because this is a close question,[214] a reviewing court should

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[210] *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 88–92 (2002).

[211] Sunstein, *supra* note 209, at 515–17.

[212] *Cf.* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249 (2001) (arguing that impact of concentration in marketplace of ideas should be part of antitrust analysis in media/telecommunications industries).

[213] This feature differentiates these rules from the vertical integration rules of *Time Warner*, which required common carriage based on institutional affiliation rather than content. The *Time Warner* rules thus would be analyzed as distributional regulations rather than editorial regulations.

[214] Recall that in *Turner I*, the Court split 5-4 over the question of whether the regulation was content based or content neutral. *See supra* notes 36–38 and accompanying text.

not assume constitutionality, but instead should engage in a more rigorous analysis to determine if the incidental burdens on editorial control are justified by other First Amendment concerns. Excluding economic considerations, Justice Breyer, concurring in *Turner II*, argued that the regulations were justified by reference to their speech-promoting objectives of (1) "preserving the benefits of free, over-the-air local . . . television,"[215] and (2) ensuring diversity of information flows.[216] This approach seems correct. As the *Turner II* Court demonstrated, this sort of cable regulation is amenable to multiple competing economic interpretations and may not be fully justified in antitrust terms.[217] Justice Breyer instead applied an intermediate scrutiny–like approach to the speech objectives, which resulted in his weighing the sufficiency of the speech-promoting effect and the likelihood of the regulation furthering that effect against the potential speech-restricting effects.[218] Under this analysis, the "must carry" rules are supported by important government objectives—the aforementioned improvements to the communications environment—and are sufficiently well tailored to achieve these goals without imposing significant burdens on other speech.[219]

CONCLUSION

This is a pivotal moment for media regulation. As the courts struggle with existing models of First Amendment review—frequently technology-specific, and increasingly out of step with technological progress and economic reality—regulators face the prospect of continued uncertainty as their attempts to structure the media environment fall victim to an aggressive, deregulatory interpretation of the First Amendment. This Note has argued that regulation of the distribution of media assets, as differentiated from editorial control, is a choice among different arrangements of speech entitlements with no a priori constitutional order. Under these conditions, Congress and reg-

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215 *Turner II*, 520 U.S. 180, 226 (1997) (Breyer, J., concurring in part).

216 *Id.*

217 *See supra* Part I.C.

218 *Turner II*, 520 U.S. at 225–29 (Breyer, J., concurring in part). This balancing approach has characterized much of Justice Breyer's free speech jurisprudence. *See* Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 189–98 (describing Breyer's recent opinions). While a pure balancing test is likely to be too flexible to afford meaningful review in this area, an intermediate scrutiny focused on non-economic objectives would be functionally similar but more analytically rigorous.

219 *See Turner II*, 520 U.S. at 226–27 (Breyer, J., concurring in part). Although this Note takes issue with the majority's economic holdings, the majority opinion echoed Justice Breyer's non-economic holdings. *See id.* at 189–90 (affirming that "preserving the benefits of free, over-the-air local broadcast television . . . [and] promoting fair competition in the market for television programming" are "important governmental interest[s]").

ulatory agencies, rather than courts, are the proper forums for making decisions that allocate speech entitlements. Courts should continue to play an important role in policing these bodies to ensure that censorship or disproportionate private control does not unnecessarily, and unconstitutionally, restrict free speech. This realignment is crucial to ensure both that the rights of individuals and media entities are properly balanced and that the promise of new technologies is harnessed to further the normative goals of the First Amendment.