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Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine

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Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine

*Marvin Ammori**

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ABSTRACT

This Article argues that there are two traditions in American free speech scholarship that result in two opposing speech doctrines, but that American law students are exposed to only one of them. Of the two traditions, one derives its doctrine from the most significant media in society—such as broadcast, cable, the internet, and other electronic media. The other derives its doctrine from society's more marginal communications media—such as leaflets, pickets, soapboxes, and burning flags. Yet, for no good historical reason, the doctrine derived from burning flags and other marginal media takes center stage in law school casebooks, while the doctrine derived from significant media is ignored and harshly criticized.

The two speech doctrines are not identical. They would lead to different results in many significant speech controversies, especially those involving speech through current and evolving electronic media. The two doctrines also have different animating concerns. The major concern of the doctrine derived from electronic media is a distrust of government action where the action diminishes the diversity of viewpoints and the wide distribution of speech power. The animating concern of the other doctrine, however, is a distrust of "any" government action directed at speech.

This Article demonstrates that constitutional and First Amendment casebooks and treatises largely ignore electronic media cases even though electronic media are Americans' primary speech media, and even though, in practice, speech doctrine derives from such cases. These books devote very little space to broadcast, cable, the internet, and the telephone, while focusing most of their attention on less significant media like burning flags and soapboxes. Moreover, in the brief space that these law books devote to electronic media cases, they imply the cases were wrongly decided and they privilege the decisions on insignificant media. In the process, law students' books push one conception of free speech doctrine, derived from marginal media, at the expense of another, derived from society's most widely used media.

INTRODUCTION

The following quotation favorably compares speech through posters on utility poles to speech through broadcast television:

> The mass media are not invariably the most effective means of communication. For example, the right to place messages on utility poles concerning a lost dog may be more important than access to a radio or a television station.[1]

This comes from the 2001 edition of a widely-used constitutional law casebook. It begins a 47-page section on electronic media in a chapter on freedom of expression that devotes its other 419 pages to pamphleteering, pornography, obscenity, flag and draft card burning, utility pole postings, fighting words, libel, advocacy of illegal action, commercial advertising, racist or hate speech repeatedly (*e.g.*, section four: "Hate Speech Revisited—Again"), defamation, licensing leafleteers, arts funding, speech by government employees, parades, billboards, etc.[2] Although some of the other topics involve electronic media, the section devoted specifically to electronic media fills only 10 percent of the chapter's pages, in a section beginning with the above caveat.

These apparently peculiar lines and emphasis are, for law casebooks, not peculiar. They are emblematic. This Article demonstrates that 80 to 90 percent of free-speech material in constitutional and First Amendment casebooks and treatises focuses on non-electronic speech. When they present electronic speech cases, the law books criticize and marginalize them. By contrast, electronic media are Americans' primary communication media: the Supreme Court has repeatedly noted the pervasiveness of electronic media,[3] and the Justices understand that "[m]inds are not changed in the streets and parks as they once were," but through "mass and electronic media."[4]

Ignoring and marginalizing electronic media cases gives students a skewed view of free speech doctrine. Cases involving electronic media provide a much different conception of free speech doctrine than do many of the cases emphasized in law books. As a result, students learn one conception of doctrine at the expense of another, and fail to explore the conception that animates cases centered on influential communications media.

This theoretical debate has enormous normative and regulatory implications for the emerging communications environment. For example, the two

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1. JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS 915 (9th ed. 2001).

2. *Id.* at xx-xxvii.

3. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

4. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in part and dissenting in part).

speech conceptions would result in different laws for issues such as high-speed internet delivery, media concentration, and spectrum allocation. Meanwhile, current scholarly and public conceptions of constitutional doctrine help shape the conceptions of sitting judges and policy-makers.[5] Current law students eventually will become law professors, lawyers, law clerks, judges, and policy makers. The dominant doctrinal conception of speech will help shape American communications, in established and emerging media, perhaps for generations to come. Nonetheless, the law curriculum advances one side of this constitutional debate.

This Article has three main Parts. The first Part plots the differences between the two speech doctrines by examining the doctrines' scholarly traditions. For at least four decades, scholars have understood this central doctrinal debate. The second Part presents data demonstrating that American free speech occurs largely through electronic media, not through pamphlets, newspapers, picketing, hate-speaking, etc. The third Part quantitatively and qualitatively analyzes a sample of constitutional and First Amendment treatises and casebooks used at the "top ten" law schools. This Article concludes that, despite electronic media's social impact, the law books devote little space to electronic media, and, within that space, they strongly favor the doctrine of non-electronic media.

I. THE SECOND TRADITION OF FREE SPEECH

A. Two "Well-Established" Traditions

There are not only two sides to a free speech argument, there are two coexisting, equally old traditions of scholarship and Supreme Court decisions.

The distinction between the traditions is obvious in certain cases. In 1969, the Supreme Court determined the constitutionality of the FCC's fairness doctrine in *Red Lion Broadcasting Co. v. FCC*.[6] The fairness doctrine required broadcasters to provide response time to those who weathered personal attacks and to those with opposing views when one side of a controversial public issue was aired.[7] The Supreme Court ruled unanimously that the rule did not unconstitutionally burden broadcasters' speech.

5. *See, e.g.*, MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 122-64 (1991) (chronicling Zechariah Chafee's contributions to free speech doctrine); Judge Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295 (2000). *See also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405 (1986) (noting that a perceived "[t]radition is the background against which every judge writes") [hereinafter, Fiss, *Free Speech*].

6. 395 U.S. 367 (1969).

7. *See* Yochai Benkler, *Free Markets vs. Free Speech: A Resilient* Red Lion *and its Critics*, 8 INT'L J.L. & INFO. TECH. 214, 215 (2000) (reviewing RATIONALES AND RATIONALIZATIONS, REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed., 1997)) [hereinafter Benkler, *Resilient*].

Before the case, however, First Amendment scholars submitted *amici* briefs supporting the broadcasters' position, not the Supreme Court's eventual unanimous decision.[8] Years later, in 1987, the FCC agreed with those speech scholars. It abandoned the fairness doctrine, claiming the doctrine "cannot be reconciled with well-established constitutional precedent."[9] With this statement, the FCC ignored the well-established constitutional precedent, called *Red Lion*, that had already upheld the doctrine at issue, and privileged other "well-established constitutional precedent" which did not involve the rule at issue, broadcast, or electronic media.

Free speech scholars have long understood a schism between the line of cases and commentary centering on *Red Lion* and other electronic media cases, and the line of cases comprising what the FCC called "well-established constitutional precedent," largely focusing on leaflets, pickets, and burning flags. Scholars have argued, agreeing with the FCC, that the two lines of cases are irreconcilable.[10] The FCC could ignore *Red Lion* largely because it chose one "well-established" line over another well-established line derived from electronic media.

The traditions are about the same age. Electronic media cases and regulation did not mark "new" exceptions to "well-established" doctrine. Early leaflet and street corner cases include *Abrams v. United States*,[11] decided in 1919, important for its dissent and not for its law,[12] and *Near v. Minnesota*,[13] decided in 1931. Meanwhile, broadcast regulation began with the first Federal Radio Act in 1912.[14] The Federal Radio Commission was established in 1927,[15] and it became the Federal Communications Commission in 1934.[16] The most revered non-electronic-media cases—such as *New York Times Co. v. Sullivan*[17] in 1964, and *Brandenburg v. Ohio*,[18] which essentially protected

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8. *See* Fiss, *Free Speech*, *supra* note 5, at 1416.

9. *See, e.g.*, Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1003 (1993) (internal quotations omitted).

10. Lee Bollinger refers to "opposing constitutional traditions regarding the press." Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 1 (1976-1977). Cass Sunstein states simply that "[t]here are two free speech traditions, . . . not simply one." Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1759 (1995). *See also* OWEN M. FISS, THE IRONY OF FREE SPEECH 70-74 (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 28 (1993); Weinberg, *supra* note 9.

11. 250 U.S. 616 (1919).

12. That same year, the U.S. Supreme Court unanimously approved of imprisoning a then-popular political figure for giving a speech against the military draft. J.M. Balkin, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 978 n.52 (discussing Debs v. United States, 249 U.S. 211 (1919)).

13. 283 U.S. 697 (1931).

14. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (repealed 1927).

15. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

16. Communications Act of 1934, ch. 652, 48 Stat. 1064.

17. 376 U.S. 254 (1964).

street corner speech, in 1969—were decided more than thirty years after the FCC's founding. In fact, the Court decided *Red Lion* the same year it decided *Brandenburg*.

It also decided *Red Lion* five years before *Miami Herald Publishing Co. v. Tornillo*.[19] *Tornillo* involved issues nearly identical to *Red Lion* but applied to newspapers. The Court in *Tornillo* surprisingly held the nearly identical law unconstitutional, notwithstanding *Red Lion*, and did not even cite *Red Lion*. The later case, *Tornillo*, became the scholars' "traditional" rule, while the older case became the "new" media exception.[20]

So as speech doctrine developed, many speech scholars segregated these cases by forming a perceived doctrinal "core" of "traditional" cases (which were not "traditional") and a doctrinal "periphery" of "new media." As a general rule in law scholarship, "core" cases receive broad interpretations; "peripheral" cases receive narrow interpretations, and often are presumptively limited to their facts. In addition, the "core" determines *how* one views and interprets the periphery; the core determines what is central to those peripheral cases. In one scholarly speech tradition, the core includes leaflets, hate speech, and newspapers, while the periphery includes broadcast and other electronic media. The second speech tradition places electronic media in the core with other speech cases.

B. Terms

Here, I call the tradition with a leaflet-core the "paper tradition,"[21] partly to emphasize its doctrinal emphasis on speech's medium and its preference for many of the cases that involve paper. The scholars writing in this tradition, and the cases they emphasize, are animated by one primary theme: the unwavering distrust of government. In many ways, it is a "worthy tradition,"[22] a "triumph"[23] of "the Constitution's most majestic guarantee."[24] In theory, its core doctrine protects street corner speakers and pamphleteers

18. 395 U.S. 444 (1969).

19. 418 U.S. 241 (1974).

20. C. Edwin Baker, Turner Broadcasting: *Content-based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 104.

21. *Weinberg, supra* note 9, at 1131 (arguing that broadcast doctrine "conflicts in almost every respect, and gratuitously so, with conventional freedom-of-speech philosophy").

22. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed. 1988).

23. SUNSTEIN, *supra* note 10, at 14.

24. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785 (2d ed. 1988). Free speech protections have not amassed, however, but have rather "ebb[ed] and flow[ed]." *See* Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 1, 3 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

from content-based government interference.[25] But its advocates lament that its doctrine does not extend to electronic media, which receive what they call "less" speech freedom.[26] They have long attacked *Red Lion*'s reasoning and emphasize that, to the extent *Red Lion* may have once been relevant to broadcast, it should never extend to anything outside of broadcast.

I call the second tradition the "communication tradition." It focuses on speech as it occurs in modern society—largely through electronic media—and on individuals' actual power to communicate.[27] Its primary aim is speech diversity, not government distrust. It differs from the paper tradition on several points based on one primary doctrinal disagreement. Unlike paper tradition, it permits government constitutional leeway to adopt structural regulations that foster "uninhibited, robust, and wide-open" public debate and advance social values like viewpoint diversity and localism.[28] So it does not have the same unrelenting government distrust which would cripple government's leeway to distribute speech power. As a result, this tradition has several other conflicts with paper tradition. It does not focus on the technological particulars of a medium to limit to that medium a particular case it dislikes.

C. Scholars

Since the late 1940s, scholars have analyzed socially significant free speech decisions and laws and concluded that the speech doctrine of mass and electronic media differs from the doctrine of leaflets. Many of their major themes have, in fact, remained unchanged over the years.

Zechariah Chafee, a father of the paper tradition,[29] also helped father the communication tradition.[30] In 1947, twenty-two years before *Red Lion*, he

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25. *See* Fiss, *Free Speech*, *supra* note 5, at 1409 (noting that such a doctrine is an accomplishment, though an obsolete criterion for free speech).

26. *See, e.g.*, SUNSTEIN, *supra* note 10, at 14; Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, But the First Amendment Issues Don't*, 79 B.U. L. REV. 959 (1999); Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175 (2000).

27. *See* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 34 (2001) [hereinafter Benkler, *Siren Songs*] (noting "we must focus on law's effects on the conditions that enable persons situated within a set of worldly constraints"); Sunstein, *supra* note 10, at 1790. *See also* Benkler, *Resilient*, *supra* note 7, at 220 (noting "speech . . . must be understood in context of . . . market and technological conditions").

28. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964); *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, 365 (1999) [hereinafter Benkler, *Enclosure*].

29. *See, e.g.*, ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 986 (15th ed. 2004) [hereinafter Sullivan].

30. *See* Benkler, *Enclosure*, supra note 28, at 364-77 & 377 n.104-05; Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Towards*

published a two-volume book, *Government and Mass Communications*,[31] written with a group of public and private actors and scholars called the Commission on Freedom of the Press. It did not limit its conclusions to the broadcast medium. Indeed, *Red Lion* cites Chafee's book (discussing newspapers, not broadcast) at key passages.[32]

Chafee had concerns beyond mere government distrust. In the preface, the Commission asserted that freedom of the press "must mean more than the traditional conception of immunity from government control."[33] From the Commission's perspective, "governmental action is only part of the main problem . . . perhaps a small part," likely less than "ten percent" of the problem.[34]

Chafee did not focus solely on government because he did not adopt unrealistic assumptions about pamphleteers. Instead he focused on actual speech in society. Chafee suggested that the new institutional structures, incentives, economic requirements, and powers of the press should impact our conception of the law, because freedom of the press "was laid down when the press was a means of *individual* expression, comment, and criticism."[35] The Commission listed significant contemporary obstacles to press freedom other than classical government censorship, such as advertisers' impact on the news media and the decreased "number of persons who can acquire and operate a successful newspaper"[36] or other media outlets,[37] all of which matter in communication tradition.

In rejecting a singular focus on government threats to an idealized image of pamphleteers, Chafee emphasized a freedom not only "*from* something," meaning government, but also "*for* something,"[38] such as effective speech or viewpoint diversity for listeners. In assessing freedom "*for* something," Chafee considered both speaker and listener interests. For example, he used the term "communication," which he defined as "a two-way process of mutual response between the members of the community,"[39] rather than freedom

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Sustainable Commons and User Access, 52 FED. COMM. L.J. 561, 565-67 (2000) [hereinafter Benkler, *Users*]; Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 954 (1995) (defending the asymmetry in speech and economic markets, listing "new speech regulators" with whom she disagrees).

31. *See* ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS (1947).

32. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (citing 2 CHAFEE, *supra* note 31, at 546) (announcing that the rights of viewers and listeners, not broadcasters, are paramount).

33. 1 CHAFEE, *supra* note 31, at vii.

34. *Id.* at ix.

35. *Id.* at 15, 19.

36. *Id.* at vii-viii.

37. *Id.* at xi-xii.

38. *Id.* at viii.

39. *Id.* at 21.

of "expression," a term suggesting a focus on the expresser, not the mutual exchange. In addition, Chafee did not limit his conclusions to any particular medium. He did not refer to mass "media," but to "mass communication."[40]

Because of the technology at the time, advancing listener interests and a freedom "*for* something" implied "a friendlier view of the relationship between the government and mass communications" than had "[p]ast writers" who—like many future writers—had seen "government as solely an enemy of the press."[41]

Rejecting the false pamphleteering myth and anti-government stance, Chafee supported government efforts to structure the communications order on behalf of the public interest. For example, he supported the FCC's efforts "to encourage better and more extensive communication" and "encourag[e] discussion."[42]

In addition, Chafee presumed that right-of-reply statutes, like those at issue in *Red Lion* and *Tornillo,* were constitutional, even as applied to newspapers.[43] History, however, seems to have obscured this early presumption. For example, some rely on 1974's *Tornillo* to suggest that right-of-reply has traditionally[44] been "unthinkable."[45] But Chafee, decades earlier, noted that Nevada had established a statutory right-of-reply in newspapers in 1911.[46] Chafee even argued that some instances (for example, libel) may call more for a right-of-reply than monetary damages.[47] He could imagine no constitutional problem with requiring a right-of-reply that was not overly burdensome in space or expense: the 1911 Nevada statute, he wrote, "seems free from constitutional objections."[48]

In 1967, more than 20 years after Chafee's book and more than 50 years after the passage of the Nevada statute, Jerome Barron developed and added to many of Chafee's arguments. Barron argued for "access to the press,"[49]

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40. I thank David Barron for this point. *See also* CHARLES R. WRIGHT, MASS COMMUNICATION: A SOCIOLOGICAL PERSPECTIVE 12 (1959) ("In popular usage the phrase 'mass communication' evokes images of television, radio, motion pictures, newspapers, comic books, etc.").

41. 1 CHAFEE, *supra* note 31, at viii-ix.

42. *Id.* at 3-4.

43. *Id.* at 146-47.

44. *See* TRIBE, *supra* note 24, at 1002 (referring to a "tradition of unfettered" newspaper editorial discretion).

45. *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 632 (2d ed. 1998).

46. *See* 1 CHAFEE, *supra* note 31, at 171 & n.26.

47. *See id.* at 146-47 (regarding damages as merely historical baggage).

48. *Id.* at 172. He did, however, consider it constitutionally problematic to require a newspaper to print a statement correcting a mistake when the newspaper believed it made no mistake. *Id.*

49. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

such as the access facilitated by right-of-reply laws. Barron also argued, and felt the need to argue, that the "essentially romantic" pamphleteering and soapbox images had become obsolete; he too argued that the First Amendment must "respond[] to the present reality" of mass media.[50] Barron also argued against a narrow conception of government speech threats: the romantic soapbox images inaccurately implied that, at the time, "without government intervention, there is a free market mechanism for ideas."[51] Unfortunately, this ignored the "reality and implications of nongovernmental obstructions to the spread of political truth."[52] Barron argued at length for analyses based on reality and context that considered economic and technological factors.[53] Although he argued that courts could find a constitutional right of access for the public, he considered access legislation "more appropriate" and constitutional.[54]

Barron made the central distinction between "freedom of media content" and "freedom of media [owners] to restrict access,"[55] a distinction between content regulation and structural regulation that is now central to communication tradition discussions. Freedom of content serves free speech values, while media owners' freedom from access might not always serve those values: "a right of expression is somewhat thin [for individuals] if it can be exercised only at the sufferance of the managers of mass communications."[56] He expressed particular concern that the First Amendment had become a means for media owners to "repress[] competing ideas."[57]

Like communication tradition scholars after him, Barron supported the holding and spirit of *United States v. Associated Press*,[58] which applied antitrust laws to the press, partly based on the First Amendment. Barron considered the case an important "acknowledgment that the public interest, here embodied in the antitrust statutes, can override the first amendment claims of the mass media."[59] Barron noted that Judge Learned Hand's opinion in the trial court "suggests first amendment protection for the interest which the individual members of the body politic have in the communications process itself."[60]

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50. *Id.* at 1641-43.

51. *Id.* at 1642.

52. *Id.* at 1643.

53. *See id.* at 1644-47, 1650-53. He notes, for example, "if the raison d'etre of the mass media is not to maximize discussion but to maximize profits, inquiry should be directed to the possible effect of such a fact on constitutional theory." *Id.* at 1660-61.

54. *See id.* at 1670.

55. *Id.* at 1651.

56. *Id.* at 1648.

57. *Id.* at 1642.

58. 326 U.S. 1 (1945).

59. Barron, *supra* note 49, at 1654.

60. *Id.* at 1654-55 (discussing United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

Since Barron's work, scholars have built on and refined this tradition over the last three decades. They include Owen Fiss,[61] Jonathan Weinberg,[62] C. Edwin Baker,[63] Cass Sunstein,[64] Jack Balkin,[65] Lawrence Lessig,[66] and Yochai Benkler.[67] The tradition is not monolithic, and the scholars disagree with one another on many points. But their work presents a central doctrine that is at odds with paper tradition's "standard" free speech doctrine of leaflets taught in law schools.

D. Paper Tradition: Five Established Tenets

The communication tradition conflicts with five central tenets of paper tradition. As law students learn, paper tradition posits: 1) equating structural regulation and content regulation; 2) a marked public/private distinction, with an indifference to supposedly private speech power; 3) a nearly fatal presumption against content-based speech regulation; 4) a consistent preference for clear rules over standards or balancing; and 5) little distinction between entities' and individuals' speech.[68]

1. Equating Structural Regulation and Content Regulation

As Barron's work suggested, communication tradition distinguishes between the ideas of "content censorship" and "structural regulation." There is

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61. *See, e.g.*, Fiss, *Free Speech*, *supra* note 5.

62. *See, e.g.*, Weinberg, *supra* note 9.

63. *See, e.g.*, Baker, *supra* note 20.

64. *See, e.g.*, Sunstein, *supra* note 10.

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

66. Lessig's arguments are often economic, but the speech components are evident. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001).

67. *See, e.g.*, Yochai Benkler, *Communications Infrastructure Regulation and the Distribution of Control Over Content*, 22 TELECOMM. POL'Y 183 (1998) [hereinafter Benkler, *Distribution of Control*]. Benkler classifies contemporary constraints on freedom of speech in three general categories: physical layer constraints ("wires, cables, fibers, and radio frequency spectrum" manipulated by infrastructure owners), logical layer constraints ("software and standards" that burden users' speech), and content layer constraints (often limited through overly protective exclusive rights in expression). Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure* (Mar. 2001) (Brennan Ctr. for Justice at New York Univ. Sch. of Law, White Paper for the First Amendment Program), *available at* http://www.benkler.org/WhitePaper.pdf [hereinafter Benkler, *Core Common Infrastructure*]. For an excellent discussion of contemporary constraints at all layers see *id. See also* LESSIG, supra note 66, at 23.

68. For ease of discussion, I must leave aside many of the nuances of free speech doctrine. *See* Bollinger & Stone, *supra* note 24, at 1 (noting that free speech doctrine is a "highly intricate body of principles, doctrines, exceptions, and rationales").

generally no such distinction in paper tradition. For communication tradition, content censorship is where government targets and/or silences speech content that it disfavors. Structural regulations, by contrast, determine to some extent who can speak to whom in society through structuring media industries. These include rules for telegraph, mail, telephone, broadcast, cable, satellite, and the internet. They aim more at structure than content. They include, for example, certain access regulations, media concentration rules, and communications-specific laws.

Paper tradition considers any communications-specific structuring to be "government action" affecting speech, and almost *per se* invalid. It finds any attempt to "burden" a speaker, like requiring a broadcaster or cable operator to carry certain types of local or diverse speech, to be tantamount to content censorship, and thus unconstitutional.

2. A Sharp Public/Private Distinction

Underlying paper tradition doctrine is a sharp public/private distinction that strongly distrusts government intervention with private speech.[69] Rhetorically, the distinction between public and private is clear with the image of a soapbox or pamphleteer. A police officer or other state agent silences the private speaker.[70]

The tradition has a specific conception of "government action," and such action is impermissible.[71] The doctrine considers the exclusive focus desirable because government is the biggest speech threat.[72] It establishes a speech "zone of noninterference . . . around each individual" prohibiting "the state (and the state alone)" from restricting speech.[73] Government cannot be trusted in any way to empower any private speech, even through structural policies.[74]

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69. Paper tradition advocates deem some government interventions acceptable, like generally applicable laws touching on speech, but most are suspect. Sunstein, *supra* note 10, at 1760-61 & n.22.

70. *See* Fiss, *Free Speech*, *supra* note 5, at 1413 (noting "[c]lassical liberalism," like paper tradition, "presupposes a sharp dichotomy between state and citizen").

71. Weinberg, *supra* note 9, at 1182 (noting few "sharply bound" exceptions, such as that police must protect an endangered speaker from a private mob). Cass Sunstein "enthusiastically agree[s] that the First Amendment is aimed only at governmental action." SUNSTEIN, *supra* note 10, at 36-40. But he blurs the public/private distinction in such a way that, in effect, the First Amendment covers almost everything. *See id.*

72. Fiss, *Free Speech*, *supra* note 5, at 1410 (noting it "assumes that by leaving individuals alone" free speech doctrine will foster "full and fair consideration of all the issues").

73. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 785 (1987) [hereinafter Fiss, *Why the State*].

74. *See* SUNSTEIN, *supra* note 10, at 5; Weinberg, *supra* note 9, at 1111.

Paper tradition ignores any threat from "private" speech. For example, it does not concern itself with discrepancies in private speech capacity, such as lack of communicative property.[75] Indeed, it "protects" speech in the private sphere largely by making property law central to its speech doctrine. Private actors use property to speak—like pamphlets, bullhorns, flags, printing presses, and cable systems. So government cannot "burden" property even for ostensibly speech-promoting reasons.[76]

Paper tradition also makes no distinction between forcing speakers, or owners of media infrastructure, to carry *government* speech and to carry (for a price or free) others' *private* speech.[77] In this tradition, forcing a property owner, like a cable operator, to carry others' speech is analogous to forcing schoolchildren to repeat the pledge of allegiance. All carriage is a speech "restriction," or "burden," even though one could view carriage as a burden on one speaker—generally the owner of communication infrastructure—and not on others, those without cable systems or broadcast stations. This is partly why it believes *Red Lion* should be unconstitutional: it forces the broadcast owner to "speak."

In keeping with this property-centric speech theory, the tradition interprets even electronic media cases through the lens of property. When courts determine that government *can* constitutionally "burden" a speaker in electronic media, paper tradition rationalizes the courts' decisions with property justifications. Paper tradition proponents generally conclude that *Red Lion*'s decision, which they say burdens broadcasters, *must* result not from a free speech principle but from the government "owning" the airwaves as property. Similarly, "burdens" on cable operators *must* derive from property rights in governmentally conferred rights-of-way to lay coaxial cable. The same scholars, nonetheless, find their own property theories of electronic media cases problematic, if not incoherent,[78] and then argue, as a result, to discard the electronic media cases as wrongly decided.

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75. *See, e.g.*, TRIBE, *supra* note 24, at 808 n.16. Law has noted real world disparities in other areas of law, such as employment law. *See, e.g.*, Weinberg, *supra* note 9, at 1146 & n.205.

76. *See* Benkler, *Core Common Infrastructure*, *supra* note 67, at 29 (noting that, although Justice Black's absolutist position on the First Amendment, that "no law" means "no law," has "been largely abandoned," "one sees occasional lapses . . . in particular in the past decade where the property rights of media owners have been concerned").

77. *See, e.g.*, TRIBE, *supra* note 24, at 804-05.

78. *See, e.g.*, *id.* at 1003; Bollinger, Jr., *supra* note 10 (referring to "the very weakness" of arguments favoring broadcast regulation).

3. A Nearly Fatal Presumption Against Content-based Speech Laws

In standard free speech doctrine, the divide between content-based and content-neutral regulations is well-established,[79] central, and often praised.[80] Content-based restrictions are virtually *per se* invalid while content-neutral restrictions benefit from a balancing test.[81] Paper tradition commends the distinction because content-based restrictions "cut[] to the very heart of the First Amendment," and let government determine what issues "may and may not be questioned."[82]

4. A Preference for Clear Rules over Balancing or Standards

Distrusting any government discretion, paper tradition holds that government must be bounded by fixed rules, not standards or balancing of interests.[83] The distrust of balancing is almost unique to speech doctrine.[84] Although several Justices have strongly endorsed balancing, even if in questionable cases,[85] paper tradition advocates consider balancing to be "seductively simple," better in theory than in practice, and argue that it could smuggle in deference to other political branches and to majority rule.[86] Paper tradition even uses terms that reflect this preference for rules: holdings and Justices are often called "speech-restrictive" or "speech-protective." This suggests there is only one speech interest—and no others to balance. A decision balancing two speech interests, however, may in theory be speech-protective no matter which speech interest it decides to protect.

5. Entities and Individuals Are Interchangeable

Paper tradition doctrine generally does not distinguish between the speech of entities and that of individuals.[87] For example, corporate speech generally benefits from rules and precedents based on individuals' speech. Nor is corporate speech subject to balancing of interests, but to *per se* rules, where content-based restrictions are involved. Treating entities and individu-

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79. Fiss, *Free Speech*, *supra* note 5, at 1408-09 (noting the "rule against content regulation . . . now stands as the cornerstone of the Free Speech Tradition").

80. *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 43 (1992).

81. *See* SUNSTEIN, *supra* note 10, at 13; TRIBE, *supra* note 24, at 791.

82. Bollinger & Stone, *supra* note 24, at 20-21.

83. *See, e.g.*, *id.* at 17; Weinberg, *supra* note 9.

84. SMOLLA, *supra* note 80, at 39-42.

85. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 747 (1996); SMOLLA, *supra* note 80, at 40.

86. SMOLLA, *supra* note 80, at 39-42.

87. *See* Fiss, *Free Speech*, *supra* note 5, at 1422 (discussing the majority opinion in *First Natl. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

als identically derives from the strong public/private divide and the myth of the soapbox speaker; the corporation is one speaker like any other.

E. Communication Tradition: Five Counter-Tenets

Communication tradition disagrees with these five venerable, established tenets of paper tradition. Communication tradition disagrees largely because it permits government some discretion with structural regulation while paper tradition does not. As a result, communication tradition does not disagree with paper tradition on pamphlet or flag-burning cases, even while it would base its preferences on different animating concerns. Such cases are properly decided based on the First Amendment's concern for promoting antagonistic viewpoints and sources. But the tradition also agrees with most of the electronic media cases based on the same concern, while the paper tradition adamantly disagrees.

1. Structural Regulation Versus Content Censorship

Communication tradition maintains a distinction between structural regulation and content regulation. It agrees with paper tradition that content censorship is unconstitutional. It notes, however, that structural regulations can differ from content regulations and have often been ruled constitutional. It also supports some structural regulations based on normative concerns. It argues that structural regulations are constitutional only when they tend towards producing more distinct voices and outlets,[88] such as promoting diversity and localism, and do not target disfavored groups or opinions.[89] Concentrating speech power, and silencing disfavored groups or viewpoints through structure, is essentially a method of encouraging private censorship. Well-designed, viewpoint-neutral structural regulations that encourage a wide distribution of information from diverse and antagonistic sources are constitutional.[90]

For communication tradition, courts play a central role in ensuring government does not abuse structural regulation to censor. Society cannot blindly trust government to properly structure speech because government has a monopoly on the use of force, has the ability to impose regulations on all private actors,[91] and often has a strong motive to suppress speech. Courts should, and generally do, exercise "close judicial review"[92] where the regulation affects the design and flow of information.[93] Courts should analyze

88. *See, e.g.*, Benkler, *Core Common Infrastructure, supra* note 67.

89. *See* Jerome A. Barron, *Reading* Turner *Through a* Tornillo *Lens*, 13 COMM. LAW. 7, 8 (Summer 1995); Sunstein, *supra* note 10, at 1769-70.

90. Benkler, *Core Common Infrastructure, supra* note 67, at 30-31.

91. *See, e.g.*, Benkler, *Siren Songs, supra* note 27, at 73; Fiss, *Why the State, supra* note 73, at 787.

92. Benkler, *Core Common Infrastructure, supra* note 67, at 30.

the design and flow of information.[93] Courts should analyze both a rule's effect and intent because regulation intended to increase opportunities for expression can be designed poorly because of "lack of sufficient care" (effect) or because of "successful lobbying" by a few against the many when "burdens in general are diffuse and vague" (intent).[94]

The distinction between structural regulation and censorship is theoretically blurred at times,[95] as is any distinction (like the distinctions for commercial speech, political speech, and indecency). Like those distinctions, however, the distinction is generally workable. It can be illustrated more concretely with foundational electronic media cases. This requires presenting communication tradition's seminal cases.

a. Communication Tradition's Foundational Cases

The communication tradition, naturally, derives from a set of foundational Supreme Court cases, lower court cases, and regulations. Here I will focus on a few Supreme Court cases for ease of discussion. These are *Associated Press v. United States*[96] (newspapers), *Red Lion* (broadcast), *FCC v. National Citizens Commission for Broadcasting*[97] (newspapers and broadcast), and the two *Turner* cases (*Turner I* and *II*)[98] (cable). All involve and strongly support structural regulations—media-ownership regulations or required-access regulations meant to increase speech diversity and foster other First Amendment values. Together, these cases reject the idea that "the First Amendment is concerned solely with" a narrow conception of "government power."[99] They even suggest at points that government may be "constitutionally prohibited from diminishing the diversity of voices in our marketplace of ideas" through encouraging or permitting domination of the speech market, even by nongovernmental actors.[100]

The first case, *Associated Press*, in 1945, held that the First Amendment did not absolutely shield newspapers from antitrust laws. Writing for the Court, Justice Hugo Black held that the First Amendment reinforced the case against the newspapers: "far from providing an argument against application of [antitrust law], [the First Amendment] here provides powerful reasons to

93. *Id.*

94. *Id.* at 30, 39.

95. *See, e.g.*, Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996).

96. 326 U.S. 1 (1945).

97. 436 U.S. 775 (1978)

98. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

99. *See* Benkler, *Core Common Infrastructure*, *supra* note 67, at 27.

100. Benkler, *Enclosure*, *supra* note 28, at 365. *See also* Benkler, *Resilient*, *supra* note 7, at 219 ("Sometimes government intervention is the lesser evil when abstaining from action would mean[] concentration of control over our information environment.").

the contrary."[101] The Court stressed that nongovernmental actors can undermine free speech values "if they impose restraints upon that constitutionally guaranteed freedom." Similarly, "[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[102] In its most quoted line, the Court stated that a central goal of the First Amendment is to ensure citizens attain "the widest possible dissemination of information from diverse and antagonistic sources."[103]

Second, *Red Lion*, in 1969, upheld the fairness doctrine. It is perhaps communication tradition's emblematic case, largely because of the Court's rhetoric in upholding the doctrine. It emphasized that viewer and listener interests were supreme and outranked mere property rights of powerful speakers. It suggested the First Amendment does not protect specific speakers, but protects speech in general; it does not just protect property interests, but principally speech interests: "the people as a whole retain their interest *in free speech* [not a form of property interest, as with paper tradition] by radio."[104] The Court also suggested that government must not sanction speech market concentration: "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[105] The Court apparently did not rely merely on scarcity, but also the government's role in structuring the media, and on the claims of access-seekers:

> In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations . . . at issue . . . constitutional.[106]

This suggests the Court considered all three factors—scarcity, the government's role in structuring the communication industry through allocation, and the legitimate claims of other citizens, such as listeners and access-seekers.[107] The Court explicitly held that the interests of viewers, not broadcasters, were paramount.[108]

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101. Associated Press v. United States, 326 U.S. 1, 20 (1945).
102. *Id.*
103. *Id.*
104. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added).
105. *Id.*
106. *Id.* at 400-01.
107. *See* Baker, *supra* note 20, at 100-03.
108. *Red Lion*, 395 U.S. at 390.

Third, *FCC v. National Citizens Commission for Broadcasting*, in 1978,[109] echoes *Associated Press* but rests even more strongly on the First Amendment. In that case, the Supreme Court upheld the FCC's prohibition on an entity owning a newspaper and broadcast station in the same area. Unlike *Associated Press*, these were not generally applicable antitrust laws based on competition policy but, like *Red Lion*, specific regulations that the FCC implemented based on speech considerations. According to the challengers, the regulations unconstitutionally "burdened" the speech rights of broadcast and newspaper speakers.[110] The Court soundly rejected this challenge. It made clear that "the Commission relied primarily on First Amendment rather than antitrust considerations" to implement and defend the regulations, and the Court upheld the regulations on that basis.[111] The Court specifically held that the regulations did not violate the First Amendment rights of broadcast *or* newspaper owners.[112] The Court even suggested a preference for regulation that structured the media environment towards diversity and thereby reduced the need for constant government interference: "far from seeking to limit the flow of information, the Commission has acted . . . to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech."[113] In 2004, the Third Circuit relied heavily on *NCCB* to uphold FCC action against the challenges by infrastructure-owners claiming limitations on their business activity violated the First Amendment, even if these limitations enhanced speech diversity.[114]

Fourth, *Turner I* and *II* permitted Congress to require cable operators to carry local broadcast channels. Despite their arguments in *Red Lion*, broadcasters had a "predictable" "change of heart," and argued for access when the question of access involved others' property.[115] Again, the Justices upheld access. The *Turner I* majority deemed the must-carry legislation content-neutral,[116] targeting not content but cable's threat to free television and cable's peculiar power to control a communications "bottleneck."[117] It remanded the case for further judicial factual development.[118]

In a forceful dissent, however, Justice O'Connor argued that the First Amendment "rests on the premise that it is government power, rather than private power, that is the main threat to free expression."[119] It is Justice O'Connor's view of free speech—the overwhelming view, as we shall see,

109. 436 U.S. 775 (1978).
110. *Id.* at 789-99.
111. *Id.* at 800 n.18.
112. *Id.* at 798-802.
113. *Id.* 801-02 (citation and internal quotations omitted).
114. Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).
115. Barron, *supra* note 89, at 7.
116. Sunstein, *supra* note 10, at 1770, 1778.
117. *Id.* at 1765.
118. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 668 (1994).
119. *Id.* at 683-85 (O'Connor, J., concurring in part and dissenting in part).

taught to free speech students—that the majority rejected.[120] Instead, the *Turner I* Court held that "'assuring 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.'"[121]

When the case returned to the Court after additional factual development, in *Turner II*, Justice Breyer's fifth-vote concurrence, to uphold access, relied on *Associated Press* and *Red Lion* for communication tradition's proposition that the First Amendment should encourage "'the widest possible dissemination of information from diverse and antagonistic sources.'"[122] It explicitly acknowledged speech interests on both sides of the case.[123]

The rules at issue in *Red Lion* and the *Turner* cases, for example, were structural regulations. Both the fairness doctrine and the must-carry rules structured who could speak; they did not target specific disfavored content. The fairness doctrine was part of how government structured the use of the airwaves. Due to early technological constraints, bandwidth had to be apportioned; the government decided to allocate bandwidth primarily to concentrated, commercial uses despite the availability of many other options. The fairness doctrine was part of this structure; it meant to ensure that viewers would receive many viewpoints despite the few local outlets.

Similarly, the must-carry rules structured cable communications so that cable operators did not have exclusive control over their subscribers' channel offerings, and so that local free broadcast speech would remain available to viewers. Although cable operators owned the communication infrastructure, local broadcast stations could not be shut out of viewers' homes, and viewers could continue to receive local broadcast without difficulty, when purchasing cable.

Communication tradition interprets all these rulings broadly to justify structural regulation, while paper tradition limits all of them and, as noted, emphasizes a property-based justification for them all. To limit *Red Lion*, paper tradition argues that *Red Lion* should be, or is, limited to broadcast even though *Red Lion* consistently cited non-broadcast cases to justify its opinion. For key holdings, *Red Lion* relied heavily on *Associated Press* and cited *New York Times Co. v. Sullivan*,[124] a newspaper libel case, and *Abrams v. United States*, a street corner case.[125] Moreover, at places, it spoke of

120. Benkler, *Enclosure*, *supra* note 28, at 375.

121. *Id.* at 372-73 (quoting *Turner*, 512 U.S. at 663).

122. Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 226-27 (1997) (Breyer, J., concurring) (quoting *Turner*, 512 U.S. at 663) ("That policy [fostering the widest possible dissemination], in turn, seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic goverment presupposes and the First Amendment seeks to achieve.").

123. *Id.* (Breyer, J., concurring).

124. 376 U.S. 254 (1964).

125. 250 U.S. 616 (1919). It cited the cases when it proclaimed, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will

broadcast as though it were not unique: "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[126]

Similarly, paper tradition limits *Associated Press* to its unique facts. The case means merely that the First Amendment does not shield the press from generally applicable laws, or perhaps merely from antitrust violations.[127] This reading of *Associated Press*, however, differs from the Supreme Court's reading of it in *Red Lion* and the *Turner* cases, both of which relied on *Associated Press* for support but involved communications-specific regulation rather than a generally applicable law.[128] Even *Tornillo*, which refused to follow *Associated Press*, did not read it so narrowly.[129] Usually, however, paper tradition just ignores *Associated Press* as apparently irrelevant for the First Amendment.[130]

b. Structural Regulation Versus Content in Particular Cases

With this distinction in place, the two traditions do agree on certain cases. Communication tradition would generally agree with paper tradition that *FCC v. Pacifica Foundation*[131] is wrongly decided because it permits content censorship. In 1973, as part of an afternoon radio program about soci-

ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (citing *New York Times Co.*, 376 U.S. at 270; Associated Press v. United States, 326 U.S. 1, 20 (1945); *Abrams*, 250 U.S. at 630).

126. *Red Lion*, 395 U.S. at 387.

127. *See infra* notes 483-85 and accompanying text.

128. *Red Lion* cited *Associated Press* at three points: 1) "'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'" *Red Lion*, 395 U.S. at 392 (quoting *Associated Press*, 326 U.S. at 20); 2) "It is the purpose of the 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." *Id.* at 390; and 3) "The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others." *Id.* at 387.

Turner I cited *Associated Press* for this proposition: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 657 (1994).

129. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254 (1974).

130. For example, *Associated Press* receives one brief reference in Laurence Tribe's influential constitutional law treatise, where it quotes the words "'the widest possible dissemination of information.'" *See* TRIBE, *supra* note 24, at 998 & n.2 (quoting *Associated Press*, 326 U.S. at 20).

131. 438 U.S. 726 (1978).

ety's attitude towards language, a station played a comedian's monologue of "seven dirty words" which are not permitted on radio.[132] The FCC concluded that the station had broadcast indecent speech and thus violated federal law.[133] The Supreme Court upheld the FCC's determination, partly because the Court claimed broadcast "received the most limited First Amendment protection."[134] For paper tradition, however, the broadcaster is a speaker, and the government should not silence it. For communication tradition, the FCC's ruling simply targeted disfavored speech by the broadcaster and Mr. Carlin. Although one could argue that many speech interests are potentially involved, such as listeners' interests in not hearing indecent speech, silencing all speakers of certain content differs from attempts to foster a wide variety of speech. That is, one can both support *Red Lion* and reject *Pacifica*.

The distinction also helps make sense of current speech threats. This is evident in *Denver Area Education Telecommunications Consortium, Inc. v. FCC*,[135] where the Court seemed confounded by the cable rules at issue. There, the federal government attempted to use structural regulation to censor (and got away with it in part). The government permitted cable operators to deny otherwise required carriage to indecent but protected speech on commercial leased-access and public, educational, and governmental channels.[136] The nine Justices produced six opinions urging four different results, upholding the regulation on leased-access channels.[137] For communication tradition, *Denver Area* is a content (indecency) case masquerading as a structural case: it is government's "self-conscious exclusion of certain content from [access] coverage . . . to squelch unwanted speech."[138] Communication tradition would find Congress's intent and effect censorial and unconstitutional. This is censorship laundered through private hands, which is a major communication tradition concern.

Paper tradition would reach the opposite result. The rules would be constitutional because of the private cable operator's involvement. Private parties, like cable operators, cannot technically "censor." "Returning" editorial discretion to deny coverage to the cable operator, therefore, is unproblematic.

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132. *Id.* at 729-30.

133. *Id.* at 739.

134. *Id.* at 748.

135. 518 U.S. 727 (1996).

136. *Id.* at 732-33. There was a third provision at issue, on which the two traditions would agree. The Court invalidated a provision *requiring* leased channel operators to segregate "patently offensive" programs to a single channel, block that channel, and require viewers to call in and unblock it after the viewer's written request. *Id.* at 733. Paper tradition proponents would consider this infringing upon the operator's editorial discretion. Communication tradition proponents would consider this to burden the speech rights of viewers, as well as burden disfavored speech.

137. *See* Jonathan Weinberg, *Cable TV, Indecency and the Court*, 21 COLUM.-VLA J.L & ARTS 95, 96 (1997).

138. Benkler, *Siren Songs*, *supra* note 27, at 79-80.

In fact, the cable operator should be able to deny coverage whenever, wherever, not just for indecent programs on these channels. The rules do not go far enough.[139]

2. Public and Private Blurred

In communication tradition, two distinct rationales complicate the paper tradition's clear public/private divide. The first rationale focuses on media industries, where the pubic and private blend. Government is already, and necessarily, involved in electronic media speech, and much more than it is involved in an individual's pamphlet speech. In any electronic media case, a regulatory regime of generally applicable and communications-specific laws is already in place.[140] All free markets, even speech markets, "require a large role for law."[141] Generally applicable laws that affect electronic media include property, contracts, and torts, because media industries require complex agreements and clear allocations of contractual and property rights. Communications-specific laws also shape the speech environment, including intellectual property laws, especially copyright and trademark, as well as specific telecommunication acts, cable acts, and satellite acts.[142] Even paper tradition proponents consider much of this government action beneficial.[143] Completely precluding government would be impossible. Moreover, it would result in a return to *Lochner v. New York*,[144] a widely-discredited case that constitutionally protected pre-existing property allocations.[145]

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139. *See, e.g.*, *Denver Area*, 518 U.S. at 812 (Thomas, J., dissenting in part and concurring in part).

140. SUNSTEIN, *supra* note 10, at 37.

141. *Id.*

142. *See* LESSIG, *supra* note 66, at xvi.

143. For example, they approve of copyright, although the tradition's doctrine could imply that copyright itself is unconstitutional. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 2-3, *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1402 (4th ed. 2001) [hereinafter STONE].

144. 198 U.S. 45 (1905).

145. Often the tone of these government-pervasiveness arguments resemble legal realists' nuanced attacks on legal reasoning behind infamous cases like *Lochner*, which did not permit legislatures much constitutional range in choices regarding economic regulation. The reasoning behind *Lochner*'s fatal constitutional scrutiny for economic regulation, according to legal realists of the 1920s and 1930s, rested largely on false notions of government neutrality, based on an overemphasis on the difference between "private" and "public" law and action. *See, e.g.*, Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923).

For arguments that speech law is at places "Lochnerized," see SUNSTEIN, *supra* note 10, at 28-34, 98; Fiss, *Free Speech*, *supra* note 5, at 1422-23; Morton J. Horwitz, *The*

The second rationale that questions the sharp public/private line focuses on the individual speaker or listener. To the speaker or listener, it does not matter if constraints are governmental or private. The constraints themselves are what matter, and non-state actors can constrain an individual.[146] As Zechariah Chafee wrote, "[i]t matters little who puts on the fetters."[147] This argument is as strong for a listener as for a speaker, as listeners should receive information permitting them a wide range of "meaningfully different" options.[148]

The prevalence of government action, however, can be considered central also to the second rationale. Laws impact the degree private parties can control the communications environments of other individuals or entities. These include corporate law and speech doctrines. Part of the holding in *Denver Area Educational Telecommunication Consortium, Inc. v. FCC*[149] helps illustrate this effect. As noted, the Supreme Court considered rules permitting, though not requiring, cable operators to deny otherwise required access to protected speech. Justice Stevens's concurrence stated that the First Amendment forbids government from creating "authorized private censors."[150] In fact, a plurality of the Court suggested that laws that unnecessarily increased the censoring power of private speakers were invalid.[151] So law could constrain speech by authorizing private parties to constrain it.

These two rationales, pervasive government action and a focus on the communicating individual, suggest a permissible concern for private speech power. The "private" speech burdens result not only from legal rules, but also from the rules' interplay with technology and economics. Technological concerns include, for example, how law and software code shape computer users' choices, or how legal choices of infrastructure and content provision determine the speaking and listening choices of Americans.[152] Economic concerns derive from the conclusion that "left to itself," the speech market will not conform to classical economic theory to satisfy consumer desires. These concerns include, for example, asymmetric information, transaction costs,[153]

Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 HARV. L. REV. 30, 109-16 (1993); Weinberg, *supra* note 9, at 1164.

146. Benkler, *Siren Songs*, *supra* note 27, at 51.

147. 2 CHAFEE, *supra* note 31, at 546.

148. Benkler, *Siren Songs*, *supra* note 27, at 53.

149. 518 U.S. 727 (1996).

150. Benkler, *Siren Songs*, *supra* note 27, at 28 n.17 (quoting *Denver Area*, 518 U.S. at 773 (Stevens, J., concurring)).

151. Benkler, *Enclosure*, *supra* note 28, at 365-66.

152. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); Benkler, *Distribution of Control*, *supra* note 67.

153. Transaction costs include "information gathering and negotiation costs," which affect the market decisions of rational actors. Benkler, *Siren Songs*, *supra* note 27, at 68.

scarcity,[154] public good characteristics,[155] externalities,[156] and the extensive effects of advertising.[157] As a result, government, which is already heavily involved in communications through laws and regulation that may hinder individuals' speech or sometimes concentrate speech power, can attempt to foster diverse speech.

3. Content-based Restrictions Are Not Automatically Invalid

In communication tradition, structural regulations that improve meaningful access to public debate may be necessarily content-based, and therefore should not automatically be considered unconstitutional.[158] First, content-based regulation is permitted in some areas of speech doctrine, even outside electronic media.[159] Second, in electronic media, automatically fatal scrutiny for content-based restrictions may thwart free speech purposes. Government must often use content-based criteria to promote speech diversity, as effective regulation to promote diversity would require a focus on particular speech "products." The "economic concepts of a product and product market

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154. Although the street corner image "tends to . . . mask[]" scarcity, scarcity is the rule, not the exception, in markets. Fiss, *Free Speech*, *supra* note 5, 1411-12. Speakers' resources, time, and opportunities, and listeners' resources, time, and attention are all scarce. *Id.* Because of this scarcity, communication tradition explores ways to make the most of scarcity. *See, e.g.*, Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J. L. & TECH. 287 (1998).

155. Information can be seen as "a true public good in the strict economic sense. It is not only nonexcludable, it is also nonrival." Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2065 (2000).

156. Speech creates positive and negative externalities, which the speech provider cannot or does not internalize. *See, e.g.*, Benkler, *Core Common Infrastructure*, *supra* note 67, at 48.

157. *See, e.g.*, C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) [hereinafter BAKER, ADVERTISING]; C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY (2002) [hereinafter BAKER, MEDIA MARKETS]. Empirically, advertising leads to less market competition. *See* C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2123-32 (1992). Further, some interpret evidence to show that advertising produces "direct and indirect controls" on content, such as self-censorship and conforming content to advertisers' desires. *See, e.g.*, SUNSTEIN, *supra* note 10, at 62-66; Weinberg, *supra* note 9, at 1155-56; Jennifer Barrett, *Where's the Dissent? Antiwar Protests Are Happening All Over the Country and the World, But the Mainstream Media Are Hardly Paying Attention*, Newsweek Web Exclusive, Jan. 16 2003, *at* 2003 WL 11863126.

158. *See* Fiss, *Free Speech*, *supra* note 5, at 1416.

159. R.A.V. v. City of St. Paul, 505 U.S. 377, 425 (1992) (Stevens, J., concurring) (noting that the premise "that '[c]ontent-based regulations are presumptively invalid'—has simplistic appeal, but lacks support in our First Amendment jurisprudence"). Speech doctrine is riddled with categorical content-based restrictions, such as commercial speech, political speech, indecency, obscenity, and fighting words. *See* Bollinger & Stone, *supra* note 24, at 9.

are rooted in the concept of substitutability."[160] CNN, the *New York Times*, and MTV demonstrate that "[i]n media markets, the question of substitutability turns inevitably on the content of speech."[161] To enhance product diversity, economic regulation of speech markets "must employ categories based, at least at some formalistic level, on . . . content."[162]

Third, content-based decisions are not only required by economics, but also have been historically ruled constitutional.[163] Edwin Baker provides ample evidence that "content-discrimination analysis is . . . not a faithful application of prior media law precedent."[164] For both electronic and print media, "content-based governmental involvement with the communications order has been a constant and . . . courts have routinely upheld the governmental involvement on the few occasions" of First Amendment challenges.[165] One example of many is that Congress used the postal system to favor categories of newspapers based on their content. Congress historically favored "intelligent" content through second-class postage, created in 1879, available only to newspapers disseminating "information of a public character, or devoted to literature, the sciences, arts or some special industry."[166] Certain content was specifically excluded, thus facially burdened, including "regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."[167]

Similarly, Sunstein argues that *Turner I* established a speech model, but with an "important paradox at [its] heart."[168] *Turner I* requires both a presumptive invalidity of content-based restrictions *and* an endorsement of efforts to increase diversity and promote local content. Diversity and localism, however, are content-based preferences. These are preferences that government has long promoted, constitutionally, generally through structural regulation.

4. Rules and Balancing

Communication tradition stresses that competing speech interests must often be balanced in electronic media speech. Private speech interests often conflict in speech industries. As a result, balancing is often required and should be acknowledged. With cable broadband internet, for example, one may consider the speech rights of internet users, content providers, internet

160. Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 164 (1995).

161. *Id.*

162. *Id.*

163. *See* Baker, *supra* note 20.

164. *Id.* at 127-28.

165. *Id.* at 62.

166. *Id.* at 107 (quoting Post Office Act of March 3, 1879, 20 Stat 355).

167. *Id.* at 108 (quoting 20 Stat 355).

168. *See* Sunstein, *supra* note 10, at 1778.

service providers, and infrastructure-owners. If one ignores the speech interests of everyone but infrastructure-owners, the owners' interests would be deemed on balance constitutionally paramount.[169] The benefit of this sort of balancing is that it is not case-by-case but can be used as a general rule, limiting judicial discretion to one case. The problem with this rule is that it may effectively silence more people than would case-by-case analysis. Thus, the dangers of balancing may or may not be less than those realized by applying rules.[170]

In addition, balancing may be more transparent. It may more accurately reflect judges' rationales for their decisions. Judges have wide discretion because they have many conflicting rules to choose from, all of which *seem* to compel them to a result.[171] Judicial transparency in speech regulation would conform with free speech goals better than judicial opacity.

Communication tradition advocates argue that balancing has historically played an important role in communication regulation. For example, government balanced the interests of different newspapers when it established postal subsidies, causing burdens for some and not for others. *Red Lion* deemed listeners' speech interests more significant, on balance, than those of the broadcasters.[172] Breyer's concurrence in *Turner II* explicitly endorsed balancing.[173]

5. Entities and Individuals Get Different Treatment

Some communication tradition scholars argue that the constitutional speech rights of individuals should differ from those of legally created entities. Edwin Baker, the major advocate for this position, argues first that courts should treat precedents involving individuals as different from those involving corporations.[174] This could permit greater individual speech rights, while corporate speech, or structural media, cases would not weaken individual freedom. For example, advertisers should not inherit "soapbox protections," nor should broadcasters, cablecasters, and newspapers inherit "schoolchildren

169. *Cf.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 816 (1996) (Thomas, J., concurring in part and dissenting in part) ("the operator's right . . . is preeminent").

170. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1687-89 (1976).

171. *See* David Kairys, *Freedom of Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 200 (David Kairys ed. 3d ed. 1998). For example, in the cable case *Denver Area*, the Justices could have analogized cable speech to bookstores, broadcast, or common carriers, and their chosen sharp ("predictable") legal rules to apply accordingly. *See Denver Area*, 518 U.S. at 741-42.

172. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).

173. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring).

174. *See* Baker, note 20, at 62-80.

forced speech protections." Second, while content-based restrictions should be "presumptively objectionable" when applied to individuals, such restrictions should not carry as strong a presumption when applied to legally created entities.[175] Yochai Benkler argues that free speech claims of entities must at least be checked by instrumental considerations of whether a rule will enhance an individual's expressive freedom.[176]

Although disparate individual/entity treatment can be rooted in a theory of the First Amendment like the marketplace of ideas or self-governance,[177] Baker and Benkler emphasize the autonomy rationale.[178] Many have argued corporations lack real autonomy:[179] "[i]t is meaningless to speak of a collection of contracts and hierarchical organizational relations as being 'the subject' of autonomy."[180] Despite extremely wide philosophical divergences in the use of the term "autonomy," "[a]bout the only features held constant . . . are that autonomy is *a feature of persons* and that it is a desirable quality to have."[181]

Even if entities could have autonomy, law should be more able to affect this "autonomy" through structural regulation because law already creates and structures these entities.[182] "[L]aw has little role in structuring individuals" other than perhaps shaping some self-conceptions.[183] Yet government regulations, like corporate and contract law, inevitably shape authority relationships in entities.[184] Law allocates rights and establishes baselines where there is no "natural" default.[185] Partly as a result of such structuring, law decides which persons within the organization who can speak for the organization and which can silence others wishing to speak through the organization or its property. Although "[i]n the United States most commentators without

175. *See id.* at 62.

176. Benkler, *Core Common Infrastructure*, *supra* note 67, at 8.

177. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

178. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-51 (1989); Benkler, *Siren Songs*, *supra* note 27.

179. *See, e.g.*, MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 12 (2001) (summarizing some notions of autonomy in free speech, generally based on "human beings" developing their "humanity" or "self-realization").

180. *See* Benkler, *Siren Songs*, *supra* note 27, at 58. *See also* Benkler, *Core Common Infrastructure*, *supra* note 67, at 8 ("real human beings, not corporate entities, are the bearers of the moral claims of autonomy to freedom of expression"); Timothy J. Brennan, *The Spectrum as Commons: Tomorrow's Vision, Not Today's Prescription*, 41 J.L. & ECON. 791, 796-97 (1998) (arguing corporations lack "rights" to communicate).

181. GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 6 (1988) (emphasis added), *cited in* Benkler, *Siren Songs*, *supra* note 27, at 32 n.29.

182. With individuals, however, personal choice is "fundamental [and] deeply rooted." Baker, *supra* note 20, at 67.

183. *Id.* at 62.

184. *Id.* at 67.

185. *Id.* at 67-69.

reflection identify the press with owners [not] . . . editors and journalists,"[186] it is speech law that determines what we mean by the "speaker" of, for instance, a cable operator's "protected speech."[187] The "speaker" could be the corporate "owner(s) (often thousands of stockholders)," the board of directors, the senior management, particular journalists or producers, or perhaps, metaphysically, the "entity itself."[188] Therefore, when courts defend corporate speech, they defend the speech of individuals on whom government itself has conferred speech power to silence others—others within and without the organization.

Similarly, in addition to pervasive government structuring of entities, Baker argues that corporate speech is a blend of subsidy and restriction.[189] Media companies can deduct their speech as a business expense, and any company can deduct advertising, which is protected speech.[190] These deductions are government speech subsidies that typical individual speakers are rarely entitled to take. Other government benefits include mundane laws like perpetual corporate life and limited liability. Therefore, government can perhaps condition its many speech subsidies to corporations in ways it cannot with individuals.

II. EMPIRICS: DISCOURSE IN AMERICA

Electronic media have not only inspired a speech doctrine that apparently conflicts with other doctrine, but they also play a central role in American communication. Unlike for electronic media, there are no data quantifying how much political or nonpolitical information or communication occurred in the last two centuries through pamphlets, handbills, leaflets, street corner speech, picketing, posters, burning flags, hate speech in any medium, etc. Since communications technology has expanded individuals' perceived political and cultural communities, however, it is unlikely that soapboxes and leaflets can satisfy individuals' demand to communicate within their relevant communities.[191] Most studies, perhaps assuming the marginal impact of leaflets, pickets, and handbills, usually provide information only on newspapers, cable, and the internet.

A serious study of leaflet communication took place in 1951-1954, half a century ago.[192] When an author discussed the study a few years later, he noted the marginal effect of leaflets even then: "When we talk about the mass media we do not ordinarily think of leaflets. . . . [U]sually leaflets fall on the periphery of our

186. *Id.* at 112 n.177.

187. *Id.* at 62-63.

188. *Id.* at 63.

189. *See id.* at 69.

190. *Id.* at 63. *See also* Bernard Wolfman, *In Memoriam: Stanley S. Surrey: Statesman, Scholar, Mentor*, 98 HARV. L. REV. 343, 344 (1984) (discussing the tax expenditure).

191. Benkler, *Core Common Infrastructure*, *supra* note 67, at 2.

192. WRIGHT, *supra* note 40, at 68-72.

attention."[193] The U.S. Air Force commissioned the study, which attempted to determine what would happen if an enemy power eliminated the electronic communications media.[194] This suggests, obviously, that electronic media would provide primary communication, while leaflets would help only in an emergency. The study included air drops of leaflets over eight communities over three years, local mass media's agreement not to cover the story or interrupt the experiment, and pamphlets that encouraged the recipient to spread word of the experiment.[195] For many reasons, including a pamphleteer's usual lack of an air force, this study did not reveal much about the actual day-to-day impact of leafleteers, then or now.

Newspapers, another medium within paper tradition's First Amendment "core," are used much less frequently than electronic media. Since the early 1960s, newspapers have not been America's number one news source; broadcast has been.[196] Since the 1940s, newspaper circulation per capita has been declining.[197] Nor do Americans consider newspapers superior to other sources. In fact, the opposite is true: "Americans give newspapers lower marks for believability and credibility than they do for local television news, or any of the three network newscasts and CNN. . . . The only news medium that newspapers seemed to surpass when it comes to believability is print magazines."[198]

By contrast, electronic media are America's dominant communication methods, and have been for over half a century. Their impact is not previously unnoticed. As early as 1933, Franklin Delano Roosevelt's "Fireside Chats" demonstrated the importance of broadcast radio. Television, specifically the first televised presidential debate series, is generally credited with John F. Kennedy's 1960 election. Seventy million Americans watched the debates, and more than half of voters reported that the debates influenced their votes.[199]

In addition, many First Amendment scholars, even those who seem to focus on non-electronic speech, have long noted electronic speech's importance. Over fifteen years ago, Laurence Tribe, who devotes little space to electronic speech in his influential constitutional treatise, noted that "[t]he printing press ha[d] been

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193. *Id.* at 68.

194. *Id.* at 69.

195. *Id.* at 69-70.

196. Project for Excellence in Journalism, *The State of the News Media 2004*, *available at* http://www.stateofthenewsmedia.com/2004 (under "Newspaper" and "Audience"); PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, CABLE AND INTERNET LOOM LARGE IN FRAGMENTED POLITICAL NEWS UNIVERSE (2004), *available at* http://www.pewinternet.org/reports/pdfs/PIP_Political_Info_Jan04.pdf.

197. Project for Excellence in Journalism, *supra* note 196.

198. Project for Excellence in Journalism, *supra* note 196, *available at* http://www.stateofthenewsmedia.org/narrative_newspapers_publicattitudes.asp?cat=7&media=2 (under "Newspapers" and "Public Attitudes").

199. *See* Erika Tyner Allen, *The Kennedy-Nixon Presidential Debates, 1960*, *available at* http://www.museum.tv/archives/etv/K/htmlK/kennedy-nixon/kennedy-nixon.htm (last visited Mar. 20, 2005).

replaced by" television.[200] The influence of newspapers, he claimed, was "dwarfed" by radio stations and "the gargantuan television networks with their myriad affiliates."[201] Tribe noted that the average family watched "TV for more than a third of its waking hours" and that "television ha[d] become the primary source of news for a majority of the population."[202] Earlier, the speech scholar Harry Kalven noted before his death in 1974 how speech was skewed by "the sheer weight of broadcasting, the sheer weight of advertising, and the ownership of the means of communication."[203]

Today's data on broadcast and cable television indicate that television continues to be an enormous part of Americans' daily communication. The vast majority of Americans have televisions—in 2000, approximately 97 percent of all households.[204] The majority receive their content through cable or satellite. Almost 65 percent of these households have cable delivery[205] and approximately 15 percent have direct satellite delivery.[206] Only one in five households, then, receive televised content through broadcast.

Cable not only *delivers* most television content, it also provides much of it to the 80 percent of television households that receive cable content.[207] Cable provides Americans as much watched content as broadcast provides: in 2002, "ad-supported cable . . . [narrowly] surpassed the seven national broadcast networks combined in primetime viewership for a complete season."[208]

Not only do Americans own televisions, but as one would expect, they watch them often. According to Nielsen Media Research, every day, on average, adult men watch more than four hours of television, adult women more than five,

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200. TRIBE, *supra* note 24, at 1007.

201. *Id.*

202. *Id.*

203. KALVEN, *supra* note 22, at xiv.

204. *Compare* Press Release, Nielsen Media Research, Nielsen Media Research Estimates 102.2 Million TV Households in USA (Aug. 24, 2000), *available at* http://www.nielsenmedia.com/newsreleases/2000/2000-01UE.htm (102.2 million households with television) *with* Census Bureau, *U.S. Summary 2000*, *available at* http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf (last visited Nov. 12, 2004) (105,480,101 total households).

205. *Compare* Press Release, FCC, FCC Releases Ninth Annual Report on Competition in Video Markets 1 (Dec. 31, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-229984A1.pdf (last visited Jan. 7, 2005) (unofficial FCC announcement) *with* Census Bureau, *supra* note 204, at 2.

206. *See* Press Release, FCC, *supra* note 205.

207. *See* Cabletelevision Advertising Bureau, *Penetration of Cable Programming Climbs to an All-Time High in April*, *at* http://www.cabletvadbureau.com/01news/010411news.htm.

208. *See* Press Release, Cabletelevision Advertising Bureau, A TV First: Ad-Supported Cable Wins Primetime Viewership Race for Entire 2001/2002 Season (Sept. 24, 2002), *available at* http://www.cabletvadbureau.com/02PressReleases/020924.htm.

and those between the ages of 2 and 17 watch more than three.[209] In all, the average American household watches more than eight hours a day.[210] The average American child spends more time watching television than she spends attending school.[211] Television is America's informal and continuing educational resource.[212]

Americans receive more of their news information from television than any other medium, although the internet may soon change this.[213] It "'continues to be far and away Americans' primary and most credible source for news and information.'"[214] One 2003 survey indicated that television remains the most trusted news source: respondents said that when they "hear conflicting versions of the same news story" they "most trust" network television news (30.8 percent) and local television news (24.3 percent) ahead of newspapers (21.3 percent).[215] Politicians know to focus on television. For the 2004 presidential election, candidates raised hundreds of millions of dollars, largely to pay for television advertising.

Considering cable specifically, all-news channels are major sources of news and information. In 2002, 72 million viewers a month watched CNN and 54 million watched Fox News.[216] During prime time hours, Fox News averaged 1.2 million viewers nightly; CNN averaged 900,000; and MSNBC averaged 360,000.[217] Thus, even the least watched of these stations probably reached a thousand times more people nightly than could the most proficient and untiring pamphleteer or flag burner.

The internet, like broadcast and cable, is a frequently used and important medium and news source. In 2001, over 165 million Americans were estimated

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209. Shankar Vedantam, *Study Ties Television Viewing to Aggression: Adults Affected as Well as Children*, WASH. POST, Mar. 29, 2002, at A01, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A33672-2002Mar28¬Found=true.

210. *Id.*

211. *See* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 18 (1995).

212. *See* Owen M. Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1216 (1999).

213. *See* Dawn Kawamoto, *Net Ranks as Top Information Source*, CNet News.com, (Jan. 31, 2003), *at* http://news.com.com/2100-1040-982995.html?tag=cd_mh.

214. Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1720 n.192 (1997) (citing ROPER STARCH WORLDWIDE, AMERICA'S WATCHING: PUBLIC ATTITUDES TOWARD TELEVISION (1995)); Pew Research Ctr. for the People & the Press, Survey Report: President's Criticism of Media Resonates, But Iraq Unease Grows, (Oct. 21, 2003), *available at* http://people-press.org/reports/print.php3?PageID=748 (Questionnaire, Question 8).

215. *See* Radio-Television News Dirs. Found., 2003 Local Television News Study of News Directors and the American Public 17, *available at* www.rtnda.org/ethics/2003survey.pdf (2003 data).

216. *See* Brian Lowry, *For Cable Networks, 2002 Was a Solid Year*, L.A. TIMES, Jan. 1, 2003, at 4.

217. *Id.*

as World Wide Web users.[218] One study indicates that in 2002, more than 70 percent of all Americans went online.[219] Meanwhile, a survey of two thousand households notes that 47 percent of non-internet users in 2002 reported to be "somewhat" or "very likely" to go online within the next year.[220]

Time spent online continues to increase, exceeding time spent reading newspapers or pamphlets.[221] Online time will likely increase because broadband use is increasing while modem use is decreasing, and broadband users spend more time online than modem users.[222] Also, an individual's online use increases based on the number of years she has been online.[223]

The internet has a profound impact on personal communication and speech. For example, one study notes that more than half of internet users report an increase in the number of people with whom they stay in contact since beginning their internet use.[224] Much of this communication includes political activity. For example, in 2002, about 27 percent of users (or 19 percent of Americans), used e-mail to communicate with a government official.[225] That same year, 46 percent of users agreed or strongly agreed that "by using the Internet people like you can better understand politics,"[226] and half that number believed the internet increased their actual political power.[227]

In terms of news delivery, as early as 1999, a statistical survey by MSNBC indicated that online news was "in a statistical dead heat with cable television and radio and is used slightly more often than magazines."[228] A 2002 survey showed 60.5 percent of internet users considered the internet a "very important or extremely important source of information."[229] This will also likely increase with broadband deployment, as broadband users consider the internet a more important information source than do modem users.[230] This usage may increase as users become more experienced: users who have been online for at least six years

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218. *See* Victoria D. Bush & Faye W. Gilbert, *The Web as a Medium: An Exploratory Comparison of Internet Users Versus Newspaper Readers*, J. MKTG. THEORY & PRAC., Winter 2002, at 1, 1, 2002 WL 25332625, at *1.

219. *See* HARLAN LEBO, THE UCLA INTERNET REPORT: SURVEYING THE DIGITAL FUTURE, YEAR THREE 17 (Feb. 2003), *available at* http://ccp.ucla.edu/pdf/UCLA-Internet-Report-Year-Three.pdf.

220. *Id.* at 30.

221. *Id.* at 17.

222. *See id.* at 25.

223. *Id.* at 22.

224. *Id.* at 55.

225. *See id.* at 58.

226. *Id.* at 69.

227. *See id.* at 69-70.

228. Adam Clayton Powell III, *MSNBC: Online News Audience Now Equals Radio News Listeners* (Jan. 26, 1999), *at* http://www.freedomforum.org/templates/document.asp?documentID=11362.

229. LEBO, *supra* note 219, at 35.

230. *See id.* at 37.

rank the internet "higher than books, television, radio, newspapers, and magazines as an important source of information."[231] Reading news is the third most popular internet activity, engaged in by 51.9 percent of users in 2002.[232]

Finally, other electronic devices are important to Americans' lives and already have the capacity to be important conduits of speech. Video game machines could become important communications devices. For instance, some gaming machines (*e.g.*, Microsoft's Xbox) provide online access and can possibly be used as personal computers.[233] Because 92 percent of Americans aged 2-17 play video games or computer games, communications through video game consoles could become significant.[234] In addition, DVD and VCR players and digital programming recorders like TIVO (used in at least 1.5 million households)[235] and its more open competitors[236] are already significant for speech: 90 percent of American households use VCRs and roughly 30 percent own a DVD player.[237] In fact, Americans grow up on electronic media: "The average American child grows up in a home with two TVs, . . . three radios, two VCRs, two CD players, one video game player and one computer."[238]

Clearly, electronic media powerfully impact American society. Consequently, the law of electronic media, not pamphlets, structures most of American speech. "Free speech" law is, or should be considered, the law that shapes speech through electronic media.

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231. *See id.* at 35.

232. *Id.* at 18.

233. *See* Seth Schiesel, *Some Xbox Enthusiasts Microsoft Didn't Aim For*, N.Y. TIMES, July 10, 2003, at G1, *available at* http://www.nytimes.com/2003/07/10/technology/circuits/10xbox.html; Xbox-Linux Project, *at* http://www.xbox-linux.org (last modified Jan. 3, 2005).

234. *See* Nat'l Inst. on Media and the Family, Sixth Annual Video and Computer Game Report Card 2 (Dec. 13, 2001), *at* http://www.mediafamily.org/research/report_vgrc_2001.pdf, *cited in* Media Family, *Fact Sheet, Media Use, available at* http://www.mediafamily.org/facts/facts_mediause.shtml (last visited Nov. 12, 2004).

235. *See* Michael Learmonth, *The AtTaCk OF TiVo*, FOLIO, Feb 1, 2003.

236. *See* Leander Kahney, *Tired of the Telly? Reprogram It*, WIRED NEWS, (July 22, 2003), *at* http://www.wired.com/news/technology/0,1282,59690,00.html.

237. *See* Media Family, *supra* note 234 (noting "30 million households own a DVD player") (citing Rick Lyman, *Revolt in the Den: DVD Has VCR Headed for the Attic*, N.Y. TIMES, Aug. 26, 2002, at A1).

238. *Id.*

III. ANALYSIS OF CASEBOOKS AND TREATISES

A. Casebooks

> The first [major technique of "renormalizing" doctrine] is simple enough: Ignore the case. Treat it as a unique event in the legal universe, unlikely ever to be repeated.[239]

In this Part, I evaluate a sample of constitutional law and First Amendment casebooks used in the "top ten" law schools[240] to learn how much space is devoted to electronic media and to learn which narrative, paper tradition or communication tradition, predominates.[241] I also evaluate the two standard constitutional law treatises, by Tribe and by Rotunda.

My sample of constitutional textbooks includes five,[242] each of which I refer to by the name of the first listed author: Sullivan,[243] Stone,[244] Choper,[245] Rotunda,[246] and Chemerinsky.[247] The initial sample of First Amendment textbooks includes four: Stone,[248] Volokh,[249] Shiffrin,[250] and Van Alstyne.[251] For two reasons, I analyze the constitutional and First Amendment texts together. First, the constitutional texts devote fairly long sections to freedom of speech;

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239. Mark Tushnet, *Renormalizing* Bush v. Gore*: An Anticipatory Intellectual History*, 90 GEO. L. J. 113, 114 (2001).

240. I based this list of schools on *U.S. News and World Report*'s 2004 list of top law schools: Yale, Harvard, Stanford, Columbia, New York University, Chicago, University of Michigan–Ann Arbor, University of Pennsylvania, University of Virginia, and Duke. I excluded Northwestern, tied at 10. The top ten schools of 2004 are the same as the top ten schools of 2005. The 2005 list is available at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php (last visited Mar. 20, 2005).

241. Publishers would not provide any sales information, so to determine the books used at these ten schools, I contacted their primary bookstores for lists of the ordered constitutional law textbooks and First Amendment casebooks for the school year for 2003-04.

242. A sixth book, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000 & Supp. 2004) [hereinafter BREST], does not have an individual section on freedom of speech, and devotes so little space to speech issues that I do not include it in the sample.

243. SULLIVAN, *supra* note 29.

244. STONE, *supra* note 143.

245. CHOPER, *supra* note 1.

246. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (7th ed. 2003).

247. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2001).

248. GEOFFREY STONE ET AL., THE FIRST AMENDMENT (2d ed. 2003)

249. EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS (2001).

250. STEVEN H. SHIFFRIN & JESSE H. CHOPER, FIRST AMENDMENT (3d ed. 2001).

251. WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY (3d ed. 2002).

and these sections are comparable in length to the First Amendment texts.[252] Second most of the First Amendment texts in the sample are simply stand-alone publications of the First Amendment sections of constitutional texts in the sample.[253] To that extent, I analyze the constitutional law texts, for consistency, when the two books overlap. Third, scholars rely on the constitutional casebooks, of course, for their First Amendment sections.[254]

The method of choosing the sample has some drawbacks. For example, schools outside of *U.S. News*'s top ten may not use these same texts.[255] The focus on "top schools," however, is deliberate because of their disproportionate influence in producing and molding future scholars: "Harvard, Yale, and Chicago train over 70% of the authors of the most highly cited legal articles."[256] The textbooks of my sample provide the range of topics to which these law students are exposed and from which law professors choose to expose these students.[257]

I first note the amount of space each text allocates collectively to broadcast, cable, the internet, and telephone versus other methods of communication. Then I discuss the texts' structure and organization, as well as salient details of each text's treatment of electronic media.

252. As I analyze only the sections of the constitutional law casebooks devoted to freedom of speech, I exclude Brest. Brest does not cover free speech in its own section. *See* BREST, *supra* note 242. Although analysis is possible, comparison seemed less useful. For a discussion of traditional casebooks, which Brest is not, see Richard B. Collins, *Cases Versus Theory*, 21 SEATTLE U. L. REV. 853 (1998) (reviewing WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW (10th ed. 1997)).

253. The Stone, Sullivan, and Shiffrin First Amendment texts reprint, sometimes with minor changes, the sections in the Stone, Sullivan, and Choper constitutional texts, respectively.

254. For example, Sullivan's casebook is among the most cited law books. *See* Fred R. Shapiro, *The Most-cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397, 405 tbl. 2 (2000) (referring to earlier editions, and listing only the Tribe treatise, *supra* note 24, at number one, and another treatise, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (1991) (1995), at number seven, as more cited constitutional treatises or textbooks).

255. In 1998, there were only twelve constitutional law casebooks on the market. David E. Engdahl, *Casebooks and Constitutional Competency*, 21 SEATTLE U. L. REV. 741, 744 (1998). Many other casebooks have been published since then.

256. Fred R. Shapiro, *The Most-cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 762-65 (1996).

257. Moreover, I performed this analysis twice, once when I originally wrote the article, and once updated a year later in preparation for publication. The first draft, which included University of California in the top ten, and had some other differences, included five other distinct texts. The quantitative and qualitative analysis of those books was in keeping with the analysis of these books.

1. Overview

The following two tables compare the number of pages devoted to cases or discussion centering on electronic media.[258] The column entitled "Electronic Media Ratio" compares the ratio of pages centering on electronic media to the total number of speech pages. I consistently err on the side of overstating the media emphasis, to ensure I do not understate electronic media pages.[259]

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258. I counted the number of pages in the published textbook (not including the yearly supplement) devoted to freedom of speech and press. I compared that number to the total number of pages devoted to issues of electronic media. In the total, I included every page from the first page of a chapter dealing with freedom of speech to the last page with text devoted to the subject and excluded pages devoted to other First Amendment rights such as association or religious liberties—partly because such pages tended not to include any electronic media.

259. For example, I include any page that has at least one paragraph of text, though not merely text in footnotes, devoted to a case or discussion on these media. I also include *Tornillo* in the count of electronic media pages. Although it is a newspaper case that does not cite *Red Lion*, it generally accompanies *Red Lion* or begins a section (as the supposed "rule") to demonstrate that *Red Lion* and the *Turner* cases which follow, are "exceptions." *See, e.g.*, ROTUNDA, *supra* note 246, at 1092; STONE, *supra* note 143, at 1389-91.

Textbook	Electronic Media Ratio	Electronic Media Percentage
Sullivan[260]	55/480	11.46%
Stone[261]	39/411	9.49%
Choper[262]	47/419	11.22%
Rotunda[263]	40/335	11.94%
Chemerinsky[264]	33/321	10.28%
Van Alstyne[265]	49/820	5.98%
Volokh[266]	65/588	11.05%

260. The total SULLIVAN, *supra* note 29, speech pages include 984-1502, excluding 1386-1424 (Freedom of Association). The electronic media speech pages include 1138-58 (communications indecency, including *Pacifica*, Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989), United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000), *Reno v. ACLU*, Ashcroft v. ACLU, 124 S. Ct. 2783 (2004)); 1285-88 (Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); United States v. Am. Library Ass'n, Inc., 539 US 194 (2003)); 1321-22 (FCC v. League of Women Voters of California, 468 U.S. 364 (1984)); 1332-33 (*Am. Library Ass'n, Inc.* again); 1340-41 (Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2001)); 1344-45 (Illinois v. Telemarketing Assoc., Inc., 538 US 600 (2003)); 1378-83 (compelled right-of-replies, including *Tornillo*, *Turner I* and *II*, a brief reference to *Red Lion*, and other cases); 1486-88 (*Turner I*); 1490-1502 ("Differential Regulation" of media).

261. The total STONE, *supra* note 143, speech pages include 993-1409 (excluding 1354-59, a case and accompanying "Note: association and the First Amendment"). The electronic media speech pages include 1192-1204 (media cases in indecency section), 1286-88 (*Ark. Educ.* in public forum), 1363-64 (discussing media access or compelled media speech), 1389-1409 (section entitled "Regulating the Press to 'Improve' the Marketplace of Ideas," including *Tornillo*, *Red Lion*, and *Turner I* and *II*).

262. The total CHOPER, *supra* note 1, speech pages include 569-1032 (Chapter 7: "Freedom of Expression and Association") excluding, as I do in the sample, freedom of association pages, 961-1005. The electronic media speech pages include 915-61 (Chapter 7:8: "The Electronic Media").

263. The total ROTUNDA, *supra* note 246, speech pages include 963-1340 (Chapter 10: "Freedom of Speech"), while I exclude 1205-1247. The electronic media speech pages include 1092-1113 (*Tornillo* and *League of Women Voters*, 468 U.S. 364 (1984), and others); 1303-04 (*Sable*, *Playboy*); 1309-10 (*Aschroft v. Free Speech Coalition*); 1316-29 (*Reno v. ACLU*).

264. The total CHEMERINSKY, *supra* note 247, speech pages including 895-1236 ("Freedom of Expression"), from which I exclude association, 1180-1200. The electronic media speech pages include 904-07 (*Turner I*), 1039-55 (*Pacifica*, *Sable*, *Reno v. ACLU*, *Denver Area*, *Playboy*), 1157-61 (*Ark. Educ.*), 1216-22 (*Red Lion*, *Tornillo*).

265. The total VAN ALSTYNE, *supra* note 251, speech pages include 1-820. The electronic media speech pages include 200-03 (*Tornillo*), 476-510 (*Red Lion*, *Turner*, *Denver Area*), 802-11 (*Reno v. ACLU*).

266. The total VOLOKH, *supra* note 249, speech pages include 1-588. The electronic media speech pages include 43 (*Reno v. ACLU*); 203, 221-32 (copyright and right of publicity, including Harper & Row Publishers v. Nation Enters., 471 U.S. 539 (1985)), and Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1997)); 169 (*Free Speech Coali-*

The general range, then, is between 5 and 12 percent of the free speech pages. These low percentages, however, may paint a falsely optimistic picture because many of the electronic media pages focus on indecency.

Before reading these casebooks, students might think that electronic media implicates questions of who gets to speak to whom in society (organizationally, functionally, or theoretically), and that electronic media generally affect politics, autonomy, or the search for truth. But electronic media as defined in the casebooks are largely concerned with sexual speech—electronic smut targeted by government. Smut cases, however, involve content, and do not address structural regulation or conflicting private speech rights.[267] The following chart shows the ratio of electronic media indecency pages to overall electronic media pages.

Textbook	Indecency Ratio	Percentage
Sullivan[268]	25/55	45.45%
Stone[269]	13/39	33.33%
Choper[270]	26/47	55.32%
Rotunda[271]	18/40	45.00%
Chemerinsky[272]	17/33	51.52%
Van Alstyne[273]	10/49	20.41%
Volokh[274]	22/65	33.85%

tion v. Reno, 198 F.3d 1083 (9th Cir. 1999)); 279-82 (Problem: Violence on Television; Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989)); 421 (*Ark. Educ.*), 436-40 (*League of Women Voters*, discussing just the subsidy aspects); 477-501 ("Government as Regulator of the Airwaves," including *Red Lion*, *Tornillo*, *Pacifica*, *Reno v. ACLU*, and problems); 510-13 (*Reno v. ACLU*) (discussing just vagueness); 546-48 (discussing speech compulsions, violence ratings on television); 555-56 (discussing web page response law); 571-74 (*Turner I*, on compelled speech); 581-82 (television identification requirements).

267. Where a case is printed both in an indecency section and elsewhere, I only count it in the indecency section. I do not wish to overstate the indecency obsession accompanying electronic media in these textbooks, and partly because sections excerpted elsewhere likely focus less on the indecency per se. Again, where a page contains only a paragraph on indecency, I have counted it as an indecency page, for consistency, and thus many of the pages are included as electronic media pages simply because of such paragraphs.

268. The SULLIVAN, *supra* note 29, electronic media indecency speech includes: 1138-58; 1332-33; 1340-41.

269. The STONE, *supra* note 143, electronic media indecency speech includes: 1192-1204.

270. The CHOPER, *supra* note 1, electronic media indecency speech includes: 936-44 (*Pacifica*), 945-61 (*Sable*, *Denver*, *Reno v. ACLU*).

271. The ROTUNDA, *supra* note 246, electronic media indecency speech includes: 1303-04; 1309-10; 1316-29.

272. The CHEMERINSKY, *supra* note 247, electronic media indecency speech includes: 1039-55.

273. The VAN ALSTYNE, *supra* note 251, electronic media indecency speech includes: 802-11.

Six of the seven texts devote from a third to over a half of their electronic media pages to indecency. The other devotes a fifth. The implication, then, is that electronic media are not where almost all public discourse occurs. Electronic media are where Americans get their smut.

The casebooks' focus on Supreme Court cases does not account for this discrepancy. Although the editors may have a lot of electronic media indecency cases as material,[275] they also have many cases, especially broadcast cases since the 1940s, which turn on structural regulations as well as political speech. It does not matter that other casebooks, such as telecommunications casebooks, may include more electronic media cases. The central point is that free speech in American society happens through electronic media, and the study of free speech law should reflect that.

2. Sample of Casebooks

When one turns from the casebooks' number of pages to their content, some general themes emerge. First, electronic media cases not only receive little space, they are generally segregated in sections announcing them as "special" or "exceptional." Broadcast has "special problems" whereas hate speech is apparently an ordinary problem. Second, the "special" "exception" is usually labeled as pertaining only to broadcast even when cable and the internet are also included in the broadcast subsection. This implies that broadcast is left aside as a *particularly* special exception while other media should or do follow print/property principles. The books' universal hope, implicitly or explicitly, seems to be that future media will choose the "ordinary" print model and not the "special" broadcast model. Third, broadcast and cable cases are often edited and presented with a focus on the technological facts of the industries, making the cases seem not only "special" but also highly technical.[276] Fourth, copyright issues receive scant attention as speech issues[277] even though the concept and law of copyright is important for free speech.[278]

274. The VOLOKH, *supra* note 249, electronic media indecency speech includes: 43 (*Reno v. ACLU*), 169 (*Free Speech Coalition v. Reno*), 279-82 (*Sable*), 486-501 (*Pacifica, Reno v. ACLU*).

275. *See, e.g.*, DERRICK A. BELL, JR., CONSTITUTIONAL CONFLICTS 422-24 (1997).

276. I thank Matthew Heckman for this point.

277. An exception is VOLOKH, *supra* note 249, at 221-29.

278. Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 40, *available at* http://www.nytimes.com/2004/01/25/magazine/25COPYRIGHT.html?ex=1390366800&en=9eb265b1f26e8b14&ei=5007&partner=USERLAND.

a. Sullivan

As listed above, Sullivan devotes few speech pages to electronic media, and almost half are indecency pages. Sullivan's structure and headings also betray her focus on non-electronic media. She discusses freedom of speech in chapters 11 through 13, centering on how and why *government* restricts speech. Chapter 11 addresses "why government restricts speech," and Chapter 12 addresses "how" it does, while Chapter 13 addresses "rights ancillary to the freedom of speech." The first two chapters, for non-"ancillary" rights, address paper tradition's key issues: incitement, fighting words, reputation harms, sexual expression, and commercial speech are discussed in Chapter 11, and the content distinction, government's power to limit speech in different roles, and overbreadth and vagueness are discussed in Chapter 12. Meanwhile, the "Rights Ancillary to Freedom of Speech" include compelled speech (including media access), campaign finance, and finally freedom of the press. In short, the "ancillary" speech rights are central to democracy and how Americans communicate and gather information in society.

The last of the ancillary rights sections is freedom of the press, and has four subsections itself. These are press access to government information, government demands for press information, laws discriminating against the press, and (the last subsection of the last section of the last chapter on speech) electronic media regulation. This last section has two parts, the first concerning broadcast, the second concerning cable and the internet. Naturally, this section on electronic media is shorter than the discussion on indecency through such media, in a different section.[279]

In keeping with the space allocation and structure, the content heavily favors paper tradition. The last speech subsection is entitled "Differential Regulation of the Broadcast Media."[280] The regulation is "differential," that is, relative to the supposedly ordinary regulation of the previous sections. Moreover, the title suggests electronic media do not have unifying themes and that broadcast is merely unique. The chapter addresses broadcast, cable, and the internet, but this title mentions only broadcast.

Sullivan takes the vantage point of the broadcasters. It is their speech rights that concern her, and it is largely through their eyes that the reader sees doctrine. Sullivan states that in "both Pacifica and Red Lion, the Court upheld restrictions upon broadcasters that would have been impermissible if imposed on those seeking to communicate by print."[281] This is not quite accurate; the restrictions would have been impermissible not for those "seeking to communicate by print" (that would include access-seekers), but for those who owned a newspaper.

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279. SULLIVAN, *supra* note 29, at xix-xx.
280. *Id.* at 1490.
281. *Id.*

As a result, Sullivan tends to ignore the rights, privileges, and benefits for access-seekers and listeners. She focuses on two main parties: the infrastructure-owner and the government. She refers several times to the government "impos[ing]" access "obligations on" the broadcasters, including in the title to the first heading for *Red Lion*'s discussion.[282] Indeed, her paragraph following this first heading, directly preceding the *Red Lion* discussion, oddly does not mention listeners' interests at all. She presents the issue merely as turning on government attempts to "safeguard individual reputations."[283] She ignores the part of the fairness doctrine that required presenting both sides of an issue. She even compares *Red Lion*'s willingness to protect reputations, the only concern she mentions, with doctrines providing the media protection from libel actions.[284] *Red Lion*, of course, did not rest simply on the access-seeker's reputational harm; it centered on listeners as well, and on their right to receive diverse viewpoints and ideas.

After suggesting *Red Lion*'s only concerns were "individual reputations" and a broadcaster's free speech, she then asks, "May government regulate the media with the aim of improving the marketplace of ideas?"[285] This question has an apparent bias. Most readers would probably oppose "government regulat[ing]" any speech, especially at the end of three free speech chapters. Moreover, using the marketplace metaphor here undercuts "regulation." Governments do not regulate markets to "improve" them; in theory, they do so in specific situations to correct market imperfections.[286]

To make sense of *Red Lion*, Sullivan focuses on technological scarcity, though she reprints *Red Lion* passages suggesting its wider reach. She begins the "Differential" section with a discussion of broadcast technology and, in presenting *Red Lion*, prints two paragraphs from *Red Lion*'s decision focused specifically on technology.[287] Although Sullivan does not reprint some of *Red Lion*'s more sweeping language favoring the fairness doctrine, she reprints some passages revealing that the case is not concerned merely with reputational harm (but also with "multiplying the voices and views" for the public), with technology (but also with other "channels of communication"), and with broadcasters (but also with the "public").[288] With little analysis, she quotes and presents four paragraphs of *Red Lion* not focused on technology: 1) "there is no sanctuary in the First Amendment for unlimited private censorship" in broadcast; 2) there is no evidence the doctrine will censor broadcasters; 3) government could obligate broadcasters to give time and attention to matters of great public concern; and 4) apart from technological or economic

282. *Id.* at 1490-91.
283. *Id.* at 1491.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 1490-91.
288. *Id.* at 1492.

scarcity, "Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through . . . devices which limit or dissipate the power of those who sit astride the channels of communication."[289]

Sullivan follows these passages by essentially calling *Red Lion* mistaken. The line following the *Red Lion* presentation is: "[f]or commentary on the problems raised by Red Lion, see [citing three articles]. On the fairness doctrine generally, see [citing three cases]."[290] Thus, she assumes the case created "problems," and directs the reader to articles presenting that view, while not suggesting that it created benefits or citing sources for that view.

Just as Sullivan makes sense of *Red Lion* through technology, she limits it through technology. The second heading in the *Red Lion* discussion, after mentioning it raised problems, is "The limits of *Red Lion*."[291] These limits are technological: *Red Lion* "emphasized technological scarcity."[292] She suggests *Red Lion* has no implications for other cases, such as those involving economic scarcity, because the "'access advocates'" failed in *Tornillo*.[293]

The next heading discusses the repeal of the fairness doctrine as though the repeal is an unqualified good. She mentions that the doctrine "was subject to considerable criticism," but does not mention any of its support in public or in Congress.[294] Instead, she notes that "[b]roadcasters resisted being treated less protectively than other media" (meaning "media owners")[295]; she notes that "[s]ome observers" suggested the doctrine made broadcasters avoid controversy (which is something advertising also does),[296] was not administrable, and was obsolete.[297] She mentions no one, and no reason, in its favor. She quotes the FCC chairman, without criticism or discussion, on its repeal: "The First Amendment does not guarantee a fair press, only a free press."[298] She does not ask the question that Jerome Barron asked—a free press for whom—nor the question of what kind of free press.[299] She then suggests that the Court, in *CBS v. Democratic National Committee*,[300] concluded that the First Amendment, by itself, without FCC regulation, does not mandate access.[301]

With "New Media," or cable and the internet, Sullivan asks if courts should apply "traditional First Amendment principles," meaning apparently

289. *Id.*
290. *Id.* at 1493.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *See* BAKER, ADVERTISING, *supra* note 157, at 56-58.
297. SULLIVAN, *supra* note 29, at 1493.
298. *Id.*
299. Benkler, *Users*, *supra* note 30, at 566 & n.22.
300. 412 U.S. 94 (1973).
301. SULLIVAN, *supra* note 29, at 1490-94.

paper tradition principles rather than communication tradition principles.[302] She begins the discussion of cable by distinguishing its technology from broadcast's. Again, she takes the vantage point *not* of cable viewers or independent speakers but of the cable industry. She says, the "cable industry argued against [the] application of *Red Lion* or any other lesser standard of protection," [303] but she does not present the arguments of opposing speakers, or that *Red Lion* would provide these opposing speakers with a higher standard of protection. Instead, she presents the argument against the cable industry's position, without presenting the speakers who advocate this position, and centers on cable's connection to property rights, "including [government] rights-of-way over streets."[304] Again, property is central.

Sullivan presents *Turner I* and *Denver Area* as triumphantly deviating from *Red Lion*. She presents passages of *Turner* focusing on the technological difference between broadcast and cable. Sullivan says the Court applied "ordinary principles"[305] to cable, apparently distinguished from broadcast's *un*-ordinary principles. These ordinary principles, however, also turn on cable's "particular characteristics," which are either technological or economic. She quotes the majority that, because a cable operator can "silence the voice of competing speakers with a mere flick of the switch," the "potential for abuse of this private power over a central avenue of communication cannot be overlooked."[306] This quote shows concern for private speech power and the excluded speech of non-infrastructure-owners, but Sullivan's commentary does not emphasize (or discuss) this concern. Here Sullivan also does not present *Turner II*, whose rhetoric treats the cable operators with less solicitude.[307]

Instead, Sullivan equates the rights of cable operators with First Amendment protection of "cable" in general. She says that Justice Clarence Thomas, in his *Denver Area* dissent, would prefer to state that "cable's First Amendment protection was equivalent" to the print press.[308] His dissent strongly favors paper tradition principles; Sullivan devotes twice as much space to this dissent as she does to the plurality opinion.[309]

Sullivan then suggests that public access and leased channels are unconstitutional, though *Denver Area* did not address the question. She devotes the next paragraph to a question "not directly in issue" in *Denver Area*, but which Justice Thomas addressed in his dissent.[310] Justice Thomas questioned the constitutionality of public and leased-access channels, calling them a "type of

302. *Id.* at 1496.
303. *Id.*
304. *Id.*
305. *Id.* at 1498.
306. *Id.*
307. *See, e.g.*, VAN ALSTYNE, *supra* note 251, at 500-01.
308. SULLIVAN, *supra* note 29, at 1498.
309. *Id.*
310. *Id.* at 1499.

forced speech."[311] The following paragraph presents Justice Anthony Kennedy's opposing view that the channels are constitutional and should be treated as public fora. For him, as for Congress which he quotes, the access-seeker and not the cable operator is the leafleteer.[312] In the next paragraph, after presenting these two views, Sullivan asks a paper tradition question about Justice Kennedy's conclusion (if they are public fora, must hate speech be allowed on such channels), and concludes with Justice Thomas's property-based response to Justice Kennedy's conclusion: "[n]ote Justice Thomas' reply . . . : [Cable] systems are not public property. Cable systems are privately owned and privately managed."[313] A "formal easement or other property right," he wrote, is necessary to declare fora public.[314] Again, the privileged position focuses on property, not speech.

In discussing the internet, Sullivan focuses on content regulation, not the more difficult questions of structural regulation. She refers to "[p]roponents of regulation" who fear the dissemination of pornography, copyright infringement, and harassment.[315] In response, opponents of regulation advocate letting "the market" correct these problems, without discussing the intricacies and regulations of that market.[316] She then discusses the many different technological features of different modes of communication through the internet and discusses possible analogies to other media.[317] She reprints passages from *Reno v. ACLU*, a content rather than structural regulation case, quoting the majority's rejection of any lower level of scrutiny for content on the internet.[318]

Other sections make clear Sullivan's privileging of speech rights of property owners, coupled with limiting *Red Lion* to its facts. The "compelled speech" section has essentially two parts, one about compelling individuals, the other about compelling organizations. The second part is called "Compelled Access for the Speech of Others."[319] This views speech from the owner's vantage point: the "[o]thers" are parties that do not own the communication property. Referring to the access as "[c]ompelled" also emphasizes government action *against* one speaker (the property owner), and not *in favor of* a different speaker, who is not being compelled but helped. The first paragraph in this second part mentions *Red Lion*; directs the reader forward to the last section, where *Red Lion* is presented; and limits *Red Lion* by saying it "relied heavily on the scarcity of the broadcast spectrum as a justification for

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 1500.
316. *Id.*
317. *Id.* at 1500-01.
318. *Id.* at 1501-02.
319. *Id.*

imposing forced access rights on unwilling media."[320] On top of immediately limiting *Red Lion* with technology, this phrase is tellingly redundant; "forced" and "unwilling" merely shape how the reader frames the issue. For example, imposing "reply" access rights on "one-sided" media would present the reader a different frame. Following this paragraph that dismisses *Red Lion*, Sullivan presents non-broadcast cases: *Tornillo*; a shopping mall case permitting access;[321] a case involving company mailings that followed *Tornillo*'s logic;[322] and then the *Turner* cases. She presents the *Turner* cases evenly but within the paper tradition narrative. It is a case involving the compelled speech of the property owner—the cable operator.

Finally, Sullivan devotes much of the electronic media attention to indecency. She treats the indecency cases as largely comparable to cases involving local zoning ordinances for sexual dancing: "outright bans are invalidated but some partial regulations are upheld."[323]

b. Stone

Stone's speech section is entitled "Freedom of Expression,"[324] with freedom of the press having a subsection.[325] The electronic media section proceeds from print rule to electronic exceptions.[326] The electronic media section title, "Regulating the Press to 'Improve' the Marketplace of Ideas,"[327] demonstrates how the electronic media issues are framed. First, "regulat[ion]" feels ominous. This section comes at the end of hundreds of pages painting First Amendment "regulation" as censorial. Second, the object of regulation is purportedly "the press," which seems singled out in the title for special regulation. The chapter, of course, primarily addresses broadcast licensees and cable system operators, not journalists or other press representatives. Third, the characterization of "improv[ing]" the "marketplace" of ideas reminds one that regulation does not "improve" markets. The usual justifications for regulation are market failures, not market "improvement." Fourth, the title implies that electronic media speech law is based on the marketplace of ideas rationale,[328] and not on democracy[329] or autonomy.[330] The electronic

320. *Id.*

321. *Id.* at 1378-79 (presenting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

322. *Id.* at 1379-81 (presenting Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986)).

323. *Id.* at 1138.

324. STONE, *supra* note 143, at 993.

325. *Id.* at 1365.

326. *Id.* at 1405-08.

327. *Id.* at 1389.

328. Many communication tradition advocates criticize the marketplace rationale as descriptively inaccurate and normatively hopeless, and base arguments on other rationales.

media section begins, following this heading, by asking: "In what circumstances, *if any*, is it appropriate for government to regulate the media in order to 'improve' the system of free expression?"[331] (Interestingly, Sullivan asked almost the same question: "May government regulate the media with the aim of improving the marketplace of ideas?")[332]

Following this first sentence are a set of cases and discussions, beginning with the "rule," print media (*Tornillo*), followed with the broadcast exception (*Red Lion*), cable exception (*Turner I* and *II*), and then cyberspace.[333] The prevailing question is, Should "ordinary" pamphlet/parade/print principles apply to new media, or should these media principles (characterized by the book as restrictive, and peripheral) apply instead?[334]

At one point, Stone argues that a broadcaster is a speaker, but is not a speaker, and at any rate, paper tradition should apply:

> In 1987, the FCC repealed the fairness doctrine, asserting that the doctrine was unconstitutional because it "chilled" the first amendment rights of broadcasters. Reflecting the FCC's market-oriented position at the time it repealed the fairness doctrine, Chair Mark Fowler remarked that "television is just another appliance. It's a toaster with pictures."[335]

The second sentence departs from the first, shifting focus from broadcasters' speech (which can be chilled) to implying the speech is as significant as toasters' speech, so free speech doctrine should not concern itself with the toasters' pictures.

Beyond the electronic media subsection, Stone's choice of titles emphasizes the content-based line. The headings for three of the six freedom of expression sections include the word "content-based" or "content-neutral."[336] Stone does, however, question the content-based line in discussing electronic media speech, devoting several paragraphs to "*Turner* and the problem of content," which drew from Baker's[337] and Sunstein's respective models of speech.[338]

See Weinberg, *supra* note 9, at 1157-64. *See* works cited in SULLIVAN, *supra* note 29, at 988-89.

329. As Sunstein argues. *See* SUNSTEIN, *supra* note 10.

330. As Benkler argues. *See* Benkler, *Siren Songs*, *supra* note 27.

331. STONE, *supra* note 143, at 1389 (emphasis added).

332. SULLIVAN, *supra* note 29, at 1491.

333. STONE, *supra* note 143, at 1389-1408.

334. *Id.* at 1407.

335. *Id.* at 1397.

336. *Id.* at xi.

337. *Id.* at 1402 (citing Baker, *supra* note 20, at 61, 66, 72, 91).

338. *See id.* (citing Sunstein, *supra* note 10, at 1767-68).

c. Choper

Choper's casebook provides the quote about utility poles that begins this Article. Its text segregates electronic media into their own section. Choper addresses electronic media more comprehensively than other casebooks discussed here. Unlike other casebooks, Choper's section heading does not refer to electronic media's "specialness."[339] Further, Choper addresses more than merely access to mass media by including a section on content-regulation. Moreover, there is some overlap of sections, indicating media access's possible effect on content.[340]

Choper downplays spectrum scarcity as a rationale. "Scarcity" is usually used to confine *Red Lion*'s principles to broadcast. Choper emphasizes the pervasiveness rationale of *Pacifica*[341] and explicitly wonders if the "powerful" effect of broadcast may color the Court's decisions.[342] Regarding cable, he quotes Jerome Barron as saying that "'it is not intuitively obvious that cable operators enjoy the whole panoply of First Amendment rights.'"[343] Other books tend to hint (often through silence) that the "full panoply" is the intuitive rule for infrastructure-owners, and that deviation requires substantial justification. Choper quotes an author criticizing the "'[o]ffhand comments about broadcasting enjoying "the most limited" First Amendment protection'": "'[w]hat of comic books . . . [or] Chinese cookie fortunes?'"[344]

Nonetheless, Choper devotes little space to electronic media speech, after devoting most attention to advocacy of illegal action, false light, obscenity, fighting words, flag burning, indecent speech, commercial speech, "Hate Speech Revisited—Again,"[345] and utility poles.

d. Rotunda

Rotunda characterizes *Red Lion* as abnormal, and limited to broadcast. The short section that includes cable and broadcast speech is the fifth of twelve speech sections, and entitled "Distinguishing Print from Broadcast Media."[346] In this section, he presents two cases, and notes to those cases.

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339. CHOPER, *supra* note 1, at 915.

340. *Id.* at 953. Choper treats *Denver Area* partly as an indecency (*i.e.*, content) case and partly as an access case.

341. *Id.* at 944.

342. *Id.*

343. *Id.* at 953-54 (quoting Jerome A. Barron, *The Electronic Media and the Flight From First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 868, 870 (1998)).

344. *Id.* at 944 (quoting Daniel Brenner, *Censoring the Airwaves: The Supreme Court's* Pacifica *Decision*, *in* FREE BUT REGULATED: CONFLICTING TRADITIONS IN MEDIA LAW 175, 177, 179 (1982)).

345. *Id.* at xx-xxvi.

346. ROTUNDA, *supra* note 246, at 1092.

The two cases are, first, *Tornillo*, and second, *FCC v. League of Women Voters of California*.[347] *League of Women Voters*, not *Red Lion*, represents the broadcast exception. This case struck down regulations on public broadcast stations that forbid them from editorializing if they accepted government grants.[348] The passages reprinted from *League of Women Voters* distinguish broadcast from other media, and note that "although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters."[349] The majority also concluded the regulations were unnecessarily drastic in part because the fairness doctrine provided beneficial balance.[350]

In the notes following *League of Women Voters*, Rotunda discusses *Red Lion* briefly.[351] Rotunda recounts that Congress eventually passed a statute to make the fairness doctrine permanent, but President Ronald Reagan vetoed it "as unconstitutional."[352] Of the eight lines in this note, four discuss this veto.[353] Rotunda quotes part of the president's veto message, as though the president, and not the unanimous Supreme Court in *Red Lion*, was the authority on the doctrine's constitutionality: "'This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed' by the Constitution."[354] Rotunda then moves on. The other notes are generally balanced.[355]

Unlike cable, the internet is not included in the section distinguishing broadcast. Instead, "The Internet" is the heading of a subsection on "Obscenity."[356] The internet discussion consists of roughly thirteen pages of *Reno v. ACLU* passages[357] and short notes following these pages, discussing the subsequent posture of the case.[358] Rotunda then moves on to other topics in obscenity, like public indecency, which follows "The Internet."[359]

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347. 468 U.S. 364 (1984).

348. *Id.*

349. ROTUNDA, *supra* note 246, at 1099-1100 (from *League of Women Voters*).

350. *Id.* at 1104 (from *League of Women Voters*).

351. *Id.* at 1109-10.

352. *Id.* at 1110.

353. *Id.*

354. *Id.*

355. The notes also present *Pacifica*, the *Turner* cases, *Denver Area*, and others. *Id.* at 1108-13.

356. ROTUNDA, *supra* note 246, at 1316.

357. *Id.* at 1316-28.

358. *Id.* at 1328-29.

359. *Id.* at 1329.

e. Chemerinsky

Chemerinsky devotes little space to electronic media, and criticizes communication tradition doctrine in those passages. The free speech chapter's overall structure favors paper tradition: it is entitled "First Amendment: Freedom of Expression,"[360] and establishes the centrality of the content-based/neutral distinction early in the chapter.[361] Moreover, Chemerinsky presents electronic media largely in the indecency sections.[362]

Chemerinsky does not transparently criticize electronic media regulation, but suggests a slight privileging of *Tornillo.* He presents only two structural regulation cases, *Red Lion* and *Tornillo.*[363] The presentation does not focus on broad issues, like structural regulation or (less broadly) access, but on the narrow subject of right-of-reply rules. In framing the two cases, he writes:

> A distinct issue arises concerning laws that attempt to regulate the press and require that it allow others to use it. Can the government require that the media make newspaper space or broadcast time available to respond to personal attacks?[364]

Following the cases, he states the upshot of the "distinct issue": "Right-to-reply laws are allowed as to the broadcast media, but not the print media."[365] He then contrasts *Tornillo* and *Red Lion*, saying the distinction between the two "seems to be based on the inherent scarcity of the broadcast media."[366] He criticizes this rationale as false, both economically and technologically.[367] Economically, newspapers are even more scarce than broadcasters in many cities.[368] Technologically, cable television and direct broadcast satellites undermine scarcity, "even if [scarcity] was ever true."[369] He then notes that the FCC repealed the fairness doctrine requiring access.[370]

Chemerinsky does not, however, criticize *Tornillo.* He did not present any factor in *Tornillo* that would distinguish *it* from *Red Lion*: it is normal, while *Red Lion* turns on scarcity. He does not discuss *Red Lion*'s conclusion that the interests of viewers are paramount, or base the distinction on the interests on viewers. He does not scrutinize *Tornillo* at all in discussing the

360. CHEMERINSKY, *supra* note 247, at 895.
361. *Id.* at 903.
362. *Id.* at 1039-55.
363. *Id.* at 1216-22.
364. *Id.* at 1216.
365. *Id.* at 1222.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*

distinction. Following this discussion, he asks, "If the distinction between the print and broadcast media is rejected," which case should apply "to both media"?[371] He then states two sides of the debate:

> Allowing right to reply laws has the benefit of enhancing the viewpoints that are heard. But such laws also intrude on a crucial First Amendment value: press autonomy to decide what to publish.[372]

The subtle contrast of these sentences is striking. The first, presenting what he lists as the one benefit of reply laws, features a passive verb, and no noun-subject for the verb "heard." Instead of saying the laws "enhance the viewpoints that Americans (the public, citizens, voters, etc.) hear," the laws "ha[ve] the benefit of enhancing" viewpoints "that are heard." This viewpoint diversity is not called "a crucial First Amendment value," despite its centrality to free speech cases. The second sentence begins with the strong "[b]ut," has the active verb "intrude," and presents what it calls a "crucial First Amendment value" against reply laws.

Nonetheless, the worst part of Chemerinsky's brief space devoted to electronic media is how brief it is.

f. Van Alstyne

Van Alstyne devotes very little space to electronic media, less than 6 percent. His discussion clearly casts *Red Lion* as exceptional and in desperate need of justification, while casting *Tornillo* as a well-decided case. For newspapers, broadcast, and cable, he presents speech issues with the infrastructure-owner as protagonist, and through the owner's eyes. In conjunction, he locates speech rights in property rights and discusses property at length, assuming property's centrality to freedom of speech.

Van Alstyne presents *Tornillo* as a "very strong" First Amendment case, turning on property and contract issues.[373] Unlike most other casebooks, Van Alstyne's places *Tornillo* in the section on libel.[374] He presents *Tornillo* in the tradition of the celebrated libel case, *New York Times Co. v. Sullivan*,[375] and emphasizes that the right-of-reply in *Tornillo* did not meet *Sullivan*'s standards.[376] *Tornillo* is strong, he suggests, because it is based on private property:

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371. *Id.*
372. *Id.*
373. VAN ALSTYNE, *supra* note 251, at 203.
374. *Id.* at 200-04.
375. 376 U.S. 254 (1964).
376. VAN ALSTYNE, *supra* note 251, at 203.

> *Tornillo* is surely a very strong case insofar as it interprets the first amendment to reserve to each privately owned publication an editorial autonomy to decide what it will and will not publish.[377]

Tornillo receives praise, as "surely a very strong case," apparently because it respects property rights (of a "privately owned publication").

Van Alstyne also suggests *Tornillo*'s correctness based on contract law. He suggested that had the newspaper in *Tornillo* previously contracted to a right-of-reply through private bargaining, or a court order, the newspaper would have had less, or no, First Amendment defense.[378]

Van Alstyne's *Red Lion* discussion similarly turns on property rights, perhaps more than speech rights. For example, Van Alstyne categorizes *Red Lion* in a section on the "Government's Management of Public Property: First Amendment Rights of Access and Use,"[379] in a subsection called "Who Owns the Airwaves?"[380] The discussion of airwaves is long and in-depth. He reprints four casebook pages' worth from *Red Lion*,[381] and follows this with eight pages of notes and discussion on *Red Lion* and *Tornillo*.[382] Through this long discussion, as the heading suggests, property remains the key theme.

The notes following *Red Lion* distinguish it from *Tornillo*, assuming *Tornillo*'s preferability.[383] He assumes *Tornillo* is the rule, and attempts to distinguish, and cabin, *Red Lion* as a result.[384] The first line of the notes is "*Red Lion*[] should immediately bring to mind (for comparison and contrast)" *Tornillo*, which he notes was "unanimous," while not noting the same of *Red Lion*.[385] He then proffers a distinction between the two cases, which he quickly rejects for another distinction. First, he distinguishes the two based on technology: *Tornillo* involved newspapers, and thus perhaps the press clause, while *Red Lion* involved a different technology.[386] But, he says, despite the other casebooks' emphasis on a technological distinction, "by itself, that distinction seems extremely weak. . . . [T]his suggested distinction would not appear to explain the differences between two cases."[387]

Van Alstyne claims, rather, that *Red Lion* is "expressly distinguished," through language in *Red Lion*, based on broadcast involving "government-owned or government-managed *public* property."[388] Like other casebooks,

377. *Id.*
378. *Id.* at 203-04.
379. *Id.* at 373.
380. *Id.* at 476.
381. *Id.* at 476-79.
382. *Id.* at 480-87.
383. *Id.* at 480.
384. *Id.* at 480-87.
385. *Id.* at 480.
386. *Id.*
387. *Id.*
388. *Id.*

Van Alstyne downplays the claims of the access-seekers and government's structuring role. He spends several paragraphs and pages distinguishing *Red Lion* based on government's "socialized" property, especially because the government allocated frequencies for free.[389] He explicitly distinguishes *Red Lion* from *Tornillo* because the government essentially allocated property-like rights in spectrum, while in *Tornillo* it merely *enforced* a conception of property rights for newspapers.[390] He suggests that had the government charged the broadcasters for their use, the charge would affect their First Amendment claims because broadcasters would have essentially received property (and speech) rights through the fee.[391] That is, one could argue, he says, especially based on paper tradition's doctrine, that "the price paid by the successful bidder would make the 'property' private property for first amendment purposes."[392]

This extended discussion to limit *Red Lion* suggests it is unordinary and highly limited. Having limited the case based on government granting use—for *free*—of public property, he writes, "[v]iewed *this* way, the case may seem both easy and right."[393] This suggests that when viewed in more general ways, the case may not seem "right." As a result, "from this [limited] perspective," *Red Lion* is "a very modest" case.[394] It is so "modest," it is almost limited to its facts. Going forward, he presumes the "easy and right" spin on *Red Lion*, and "viewed *this* way," raises several questions.

Of these questions, the first two, along with a footnote, slightly favor communication tradition, at least more heavily than other casebooks' takes on the same issues. Although other casebooks emphasize that the FCC has abandoned the fairness doctrine, Van Alstyne notes that the FCC still enforces regulations similar to the fairness doctrine, such as regulations for candidates.[395] He asks whether, if all fairness-doctrine-like rules were repealed, the First Amendment, by itself, would provide for access.[396] Other casebooks suggest that a case (*CBS v. Democratic National Committee*[397]) already answered this question.[398] Van Alstyne, by contrast, describes that case more narrowly; the First Amendment alone was insufficient "in light of" the continued existence of the fairness doctrine then.[399] Separately, Van Alstyne also asks if the government could impose other "*greater*" restrictions, such as

389. VAN ALSTYNE, *supra* note 251, at 481.
390. *Id.*
391. *Id.* at 482.
392. *Id.* at 482 n.98.
393. *Id.* at 482.
394. *Id.*
395. *Id.* at 483 n.100.
396. *Id.* at 483.
397. 412 U.S. 94 (1973).
398. *See, e.g.*, SULLIVAN, *supra* note 29, at 1493-94.
399. VAN ALSTYNE, *supra* note 251, at 483 n.101 (emphasizing the holding "in light of fairness doctrine").

common carrier obligations, on broadcast.[400] Suggestions of greater restrictions on broadcasters, or greater freedom for non-infrastructure-owners, are notably absent in other casebooks. In addition, a footnote in the questions distinguishes *Red Lion* from *Pacifica*, emphasizing that *Red Lion* cannot justify *Pacifica*.[401]

The next three questions emphasize paper tradition ideas. The third question asks if the fairness doctrine leads to self-censorship of the infrastructure-owner,[402] and the fourth emphasizes that "the [economic] market" apparently works in magazine publishing (a convenient example, since magazines are the least concentrated media[403]), and likely works toward speech purposes everywhere else.[404] The fifth question argues that scarcity does not matter for broadcast because all economic goods are scarce.[405] Society usually relies on the market to allocate scarce resources, not government allocation. This continues his focus on property-based explanations of *Red Lion*.

Van Alstyne then turns to cable, also presenting it through a paper-tradition lens. First, he presents the *Turner* cases and distinguishes them from *Red Lion* based on public property as well as through broadcast technology.[406] He notes that cable operators do not have "exclusive" use of frequency.[407] He does not discuss, however, the public property or contract issues of local exclusive franchises for cable, which would apparently be relevant in the paradigm of his *Red Lion* discussion.

After distinguishing *Red Lion*, which is the apparent exception, he asks if government may "nonetheless presume to dictate to cable companies" what to carry against their judgment.[408] This loads the question, obviously, as Americans do not prefer government "dictat[ing]" speech against a speaker's judgment. It also ignores the possibility of the cable operators "dictat[ing]" what their subscribers get to see and believe. Indeed, Van Alstyne suggests that cable subscribers "might prefer a different selection of channels and programs" than the government would, [409] but does not indicate that they might prefer a different selection than the cable operators would, based for example on fee arrangements for different channels.

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400. *Id.* at 483.

401. *Id.* at 482 n.99.

402. *Id.* at 484.

403. Project for Excellence in Journalism, *supra* note 196, *at* http://www.stateofthenewsmedia.org/narrative_magazines_ownership.asp?cat=5&media=7 (on magazine ownership in 2004).

404. VAN ALSTYNE, *supra* note 251, at 484-85. For a critique of this position, see BAKER, MEDIA, MARKETS, *supra* note 157.

405. VAN ALSTYNE, *supra* note 251, at 486.

406. *Id.* at 487-502.

407. *Id.* at 487.

408. *Id.* at 488.

409. *Id.*

Van Alstyne does present long passages from *Turner I*, roughly ten casebook pages.[410] He also explains that *Turner II* was even more protective of the free speech rights of non-infrastructure-owners,[411] though other casebooks do not make this development so clear.[412]

After presenting the *Turner* cases, he presents *Denver Area* largely through the lens of paper tradition. Van Alstyne frames the issues as Justice Thomas did in his dissent.

> [The issue] was whether in changing its mind, in *permitting* cable companies to *refuse* to carry certain material (even on the must-carry channels), Congress acted to abridge freedom of speech—*not* that of the cable company, rather, the freedom of speech of those the cable company was previously required to carry unedited. . . . When Congress merely "gives back" to cable companies *some* portion of such control as they would have had more completely if Congress had simply left them alone in the first place . . . wherein can one find grounds to frame a suitable . . . complaint?[413]

This centers on the cable operator's viewpoint, and assumes that structural regulation violates operators' First Amendment rights. He suggests that it is almost inconceivable for a non-infrastructure-owner to have a First Amendment complaint, implying the implausibility of a speech claim that was "*not* that of the cable" operator. He suggests that one perhaps cannot "find grounds" for a "suitable complaint" here.

In privileging the cable operators' viewpoint, he also privileges their speech rights through property. He frames the issue, as does Justice Thomas, as merely returning to cable operators some of the speech control (over other people's speech) that they should have already had based on their property rights. Van Alstyne suggests, as well, that must-carry rules involve government action—through them, "Congress had" not left cable operators "alone in the first place." Yet, he does not suggest that government action could be responsible for excluding speakers from cable. He considers the deliberate exclusion of certain content from the (adjudged content-neutral) must-carry rules to be "mere forbearance by Congress"; apparently Congress should leave cable operators "alone" based on the free speech guarantee.[414] In fact, he does not seem to think the content-based nature of the exclusion matters much. Only at the end of a three paragraph discussion does he mention that the "certain material" excludable is indecent, a word he places in parentheses

410. *Id.* at 488-98.
411. *Id.* at 500-01.
412. *See, e.g.*, SULLIVAN, *supra* note 29, at 1493-94.
413. VAN ALSYTNE, *supra* note 251, at 501.
414. *Id.*

and quotation marks.[415] For him, the central issue for cable, as other media, is whether the infrastructure-owner gets its supposed constitutional due against others' asserted rights.

g. Volokh

The Volokh casebook has an innovative structure. Among other things, it focuses on problem-examples, has an explicit focus on policy arguments, has extra historical discussion, and includes a summary of law before the speech sections.[416]

Like the other casebooks, however, it devotes little space to electronic media, and it presents the electronic media through the lens of paper tradition. For example, the rough outline of free speech doctrine on the first two pages begins with and emphasizes two rules that are paramount in paper tradition: 1) the First Amendment turns only on government action, and 2) content-based restrictions are presumptively invalid unless they fall into a doctrinal exception.[417]

The casebook frames the electronic media cases with paper tradition doctrine. The discussion of electronic media is largely centered in two sections, each with a title that fits perfectly with paper tradition's emphasis: "The Government as Regulator of the Airwaves,"[418] and "Speech Compulsions."[419] The section on "Government as Regulator," as its title suggests, presumes broadcast doctrine is government "regulat[ion]," and is based primarily on its relationship to the "airwaves." The section's law summary states explicitly that broadcast is exceptional: "This rule [the standard of scrutiny summarized as similar to strict scrutiny at parts] is applicable only to broadcasting over the airwaves," and "not to newspapers" or to "the Internet" or "even to cable television."[420]

In discussing government airwaves regulation, the text focuses on the pernicious effects of content censorship, not on structural regulation. Its first posed "problem" involves censoring songs on the internet that glorify drugs; it poses no structural regulation problems.[421] Similarly, it devotes fifteen pages to *Pacifica*—an indecent-content case—and one third that to *Red Lion*.[422] Much of *Pacifica*'s space presents the dissent, and Mr. Carlin's speech; nonetheless, *Pacifica*, the indecency case, appears as the central case in broadcast regulation.

415. *Id.* at 502.
416. VOLOKH, *supra* note 249, at vii-viii.
417. *Id.* at 1-2.
418. *Id.* at 477.
419. *Id.* at 546.
420. *Id.* at 477.
421. *Id.* at 477-78.
422. *Id.* at 478-82, 486-99.

Once again, access regulation is placed doctrinally as compelled speech. This means compelled speech, of course, *of* the infrastructure-owner, privileging its speech. The summary of the "speech compulsion" section cites both *Turner I* and *Tornillo*.[423] *Red Lion*, which permitted "compelled speech," is not cited.[424] After the summary, among the edited cases, the reader is directed to review *Tornillo*,[425] which was printed in the "Government as Regulator" section. This pointer to *Tornillo* precedes *Wooley v. Maynard*,[426] an individual forced-speech-on-a-license-plate case, and comes less than ten pages after *West Virginia v. Barnette*,[427] an individual school child flag-pledge case. This suggests a similarity between media owners and these other free speech claimants, which is doctrinally accepted in paper tradition, and which I discuss in greater detail with the Tribe treatise below. The Table of Cases includes neither *Associated Press* nor *Denver Area*.

B. Treatises

1. Tribe

Of the many constitutional law guides available to students, the most popular and most quoted is Laurence Tribe's treatise, *American Constitutional Law*.[428] The treatise deserves special treatment, being the most cited legal book (in *any* field) over at least the last twenty-five years,[429] a "student guide[],"[430] and the book generally acknowledged as the leading constitutional treatise.

I analyze the second edition published in 1988 for the treatise's treatment of freedom of speech. The second volume of the third edition has yet to be published; and the first volume of the third edition does not address free speech. The internet, as a result, plays no role in the text. The speech treatment is primarily in the twelfth chapter, "Rights of Communication and Expression."[431]

Tribe devotes little space to electronic media speech compared to the space devoted to other speech. The chapter addressing speech is 277 pages long,[432] yet only nine pages explicitly discuss broadcast and cable[433] and three

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423. *Id.* at 546.
424. *Id.* at 546-47.
425. *Id.* at 556.
426. 430 U.S. 705 (1977).
427. 319 U.S. 624 (1943).
428. *See* TRIBE, *supra* note 24.
429. *See* Shapiro, *supra* note 254, at 403 n.4.
430. *Id.* at 404.
431. *See* TRIBE, *supra* note 24, at 785.
432. *Id.* at 785-1061.
433. *Id.* at 1002-10.

more address *Pacifica*.[434] So 4.3 percent of the chapter discusses cable and broadcast. This is despite referring to the voluminous evidence demonstrating mass communications' impact, that the average family watches "TV for more than a third of its waking hours," and that "television has become the primary source of news for a majority of the population."[435]

Tribe argues that government cannot force an owner to use its property to convey a message. The structure of this argument is repeated in two places.[436] He uses *West Virginia v. Barnette*[437] and *Wooley v. Maynard*[438] to draw analogies to media companies. In *Barnette*, the Supreme Court held that a Jehovah's Witness child in public school could not be required to salute the U.S. flag.[439] In *Wooley*, the Court held unconstitutional a state statute requiring motor vehicles to bear license plates with the words "Live Free or Die."[440] From both of these cases, Tribe derives broad principles. That is, unlike the qualifiers used with *Red Lion*, *Barnette* is not the "schoolchild exception"; *Wooley* is not limited to the "unique medium" of personal automobile license plates.

In the first presentation of this argument, one sentence after citing *Barnette*, Tribe writes "government cannot compel an individual to display on his person *or property* a message fostering public adherence to an ideological view the individual finds unacceptable [citing *Wooley*], and it may not force a newspaper to print a story it does not want to print [citing *Tornillo*]."[441]

The application of the "broad" principle extracted from *Wooley* and *Barnette* to *Tornillo* seems surprising here: media access is not akin to forcing schoolchildren and individual drivers to speak. Tribe ignores differences with *Wooley*, like the type of property (an individual's private car versus business property run for profit), the intents of the regulations (adherence to an ideology versus reply space for balanced news), the content of the speech (slogan versus response story), the speakers privileged by the regulation (government versus primarily private speakers), or the cases' likely effects on general discourse. He ignores differences with *Barnette*, such as that school children are considered impressionable (newspapers are not),[442] the child had religious objections (newspapers generally do not), and the Pledge of Allegiance is clearly pro-government speech (responses may not be).[443]

434. FCC v. Pacifica Found., 438 U.S. 726 (1978).

435. TRIBE, *supra* note 24, at 1007.

436. *See id.* at 804, 1001-03.

437. 319 U.S. 624 (1943).

438. 430 U.S. 705 (1977).

439. *Barnette*, 319 U.S. 624.

440. *Wooley*, 430 U.S. 705.

441. TRIBE, *supra* note 24, at 804.

442. *See, e.g.*, Baker, *supra* note 20, at 62-63 (mentioning distinction between cable operators and "schoolchildren during a flag ceremony").

443. FISS, *supra* note 10, at 82-83.

In addition, Tribe neglects to cite or mention *Red Lion* in this discussion of compelled speech that includes *Tornillo, Wooley*, and *Barnette*. He does not include a "*but see*," or a disclaimer for "special," "peripheral" rules that allow "compelling" messages.

In the second presentation of this same argument, Tribe makes more explicit the *Lochner*-esque status of property ownership within paper tradition's core. He also makes explicit his perception of *Wooley*'s applicability to media, or at least to *Tornillo*.[444] He quotes the *Wooley* Supreme Court, adding emphasis where New Hampshire had compelled speakers to "'*use their* [*own*] *property*'"[445] (automobiles) to display "'the State's ideological message.'"[446] On the following page, Tribe writes:

> Given the historic function of newspapers and broadcasters as speakers in their own right as well as conveyers of the messages of others, the analogy to *Wooley v. Maynard* is considerably less strained when one turns to attempts to subordinate the editorial rights of the print or electronic media to the first amendment rights of those with messages they wish to convey or of those with messages they wish to receive. In fact, the Court in *Wooley* relied in part on [*Tornillo*], a decision which had unanimously upheld editorial rights over rights of access.[447]

Once again, Tribe makes the direct analogy from carrying a state message on a personal car to media speech regulation. Three problems arise from this passage. First, Tribe ignores the implications of his concession that newspapers and broadcasters are "conveyers of messages of others." Automobile owners are not often considered conveyers of state ideological messages, or "mobile billboards."[448] This distinction could matter.[449] Second, Tribe mentions "print or electronic media" as though they are identical—but on the next page he begins the task of limiting *Red Lion*. Third, Tribe presumes that the First Amendment must subordinate the rights of those "with messages they wish to convey" or "receive" to the rights of those with property. *Red Lion*, another unanimous Supreme Court case, declared the opposite: the right of the viewers and listeners was paramount.[450]

Tribe's discussion of access rights finally acknowledges *Red Lion*, although Tribe marginalizes *Red Lion* in the space devoted to it. In a subsection

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444. TRIBE, *supra* note 24, at 1001-02.

445. *Id.* at 1000 (quoting *Wooley*, 430 U.S. at 715).

446. *Id.* (quoting *Wooley*, 430 U.S. at 715).

447. *Id.* at 1001-02 (footnotes omitted).

448. *Id.* at 1000 (quoting *Wooley*, 430 U.S. at 715).

449. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994) (noting the importance of cable's historic role of conveying broadcast messages and the lack of listener confusion as to whose message is conveyed).

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

called, "Private Forums: From Shopping Centers to the Media,"[451] Tribe undercuts the argument for access. He states that *Red Lion* stressed the "counter-dangers [of a no-access rule], and omitt[ed] any reference to the tradition of unfettered editorial discretion for the print media."[452] This unfettered tradition may be inaccurate, as evidenced by many laws,[453] including the 1911 Nevada law providing newspaper access rights.[454] Even if this unfettered tradition existed, it could not be a long tradition, as *New York Times Co. v. Sullivan*[455] is fairly recent. Moreover, if Baker is correct, *Tornillo* announced this "tradition" *after Red Lion.* Thus, Tribe may be wrong to call *Red Lion* "a chain-breaking departure from the constitutional approach to newspapers and magazines."[456] In the footnote to this sentence, he reprints chosen quotes from scholars calling supporters of the fairness doctrine "hopelessly optimistic" and the doctrine itself a "major first amendment loss."[457]

Instead of attempting to draw out principles from *Red Lion* to evaluate how it affects free speech doctrine, Tribe emphasizes the supposed incomprehensibility of broadcast law. Perhaps because the law fails to fit within this narrative of free speech doctrine, Tribe states its development is "simpler to summarize than to comprehend."[458] He quotes Holmes that "'a page of history is worth a volume of logic,'"[459] but presents an apparently different history here than he presented earlier with the clear and present danger test. There was a low level of speech protection prior to the 1930s, yet Tribe states that the "first amendment guarantee of freedom from government intrusion reigns most confidently in the realm of the print media, since newspapers and pamphlets [along with pulpits and soap boxes[460]] were the most significant modes of mass communication in the world of the Framers."[461] This does not explain why print media receive more protection: by Tribe's depiction elsewhere,[462] the Framers did not always protect print from government intrusion.

Tribe paints a historical picture showing that access rights, or any government regulation on media infrastructure-owners, are intolerable speech burdens. He says the First Amendment's "sweeping guarantees have been most compromised in the realm of the most modern medium: electronic broadcasting."[463] Notwithstanding cable, the sentence assumes that speech's

451. TRIBE, *supra* note 24, at 998.
452. *Id.* at 1002.
453. Baker, *supra* note 20, at 105-11.
454. *See supra* note 46 and accompanying text.
455. 376 U.S. 254 (1964).
456. TRIBE, *supra* note 24, at 1003.
457. *Id.* at 1003 n.37.
458. *Id.* at 1003.
459. *Id.* (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).
460. *Id.* at 1003 n.42.
461. *Id.* at 1003.
462. *Id.* at 863.
463. *Id.* at 1004.

"sweeping guarantees" center on property-owners' rights and bar any government attempts to enhance discourse. Tribe spends the next pages focusing on electromagnetic radiation and the government's role rather than on broadcasters' speech or gatekeeping powers, seeming to lament that "government design" affects broadcasters while it does not affect newspapers[464] (which also may not be quite accurate[465]).

According to Tribe, cable cases "amount[] to an invitation to reconsider the tension between the Supreme Court's radically divergent approaches to the print and electronic media."[466] The implication from Tribe's structure, space-allocation, and tone is that the tension should be reconsidered and eliminated, and future media should follow print.

Tribe argues both sides of an empirical argument to reach the same conclusion—that media owners should be free from access requirements. Tribe notes the supposed indeterminate impact of mass media to stress that owners with even extraordinarily powerful speaking ability, like media corporations, must be allowed to use this property to speak anyway they choose. He writes:

> This cautionary note [media speech's indeterminacy] is all the more reassuring because theories that maintain that some forms of expression should be curtailed because they are unusually effective in persuading listeners, or because of the speaker's identity, are theories that run counter to important first amendment teachings.[467]

This conclusion seems not to follow from its premise: it is unclear how indeterminacy is related to the theories except as evidence and not as showing which theories most conform to the First Amendment teachings. Nor does Tribe note that speech is "curtailed" either way—for the newspaper or the person seeking access. In the string cite following this sentence, Tribe cites several commercial speech cases, a campaign finance case, a corporate speech case, and *Tornillo,* with the brief parenthetical "(invalidating right of reply statute)."[468] Apparently, the teachings of an uncited case, *Red Lion,* are not "important" despite upholding a right-of-reply regulation.

While critiquing *Red Lion*, however, Tribe relies on broadcast's *determinative* impact. Broadcast needs more First Amendment "protection," or protection for the broadcasting property owners, because "the picture tube" has "replaced" the "printing press."[469] He notes that "television has become the primary source of news for a majority of the population."[470] As a result,

464. *Id.* at 1004-07.
465. Baker, *supra* note 20, at 105-11.
466. TRIBE, *supra* note 24, at 1005.
467. *Id.* at 809 n.16.
468. *Id.*
469. *Id.* at 1007.
470. *Id.*

Tribe laments that the "trouble lies in the fact that, although *these powerful new media* have acquired the functions of the press, they have not yet obtained the rights of the press."[471] No longer is electronic media's effect "indeterminate" and thus "all the more reassuring" that access is unnecessary.[472] The effect is now "powerful," and thus access is intolerable.

Nonetheless, after limiting *Red Lion*'s application, Tribe takes comfort in Bollinger's perceptive method of treating electronic media and print media as two different worlds acting together.[473] Tribe hopes that the "danger of escalating" regulation to intolerable levels will be averted or at least *limited* to broadcast.[474]

Tribe also advances other paper tradition tenets, such as the content line, rules, and treating corporations and individuals the same.[475]

2. Rotunda

The Rotunda treatise[476] is one of the ten most cited law books and the second most popular constitutional law treatise.[477] In the five volume Rotunda treatise, 469 pages of the fourth volume cover freedom of speech[478] but only 43 cover electronic media.[479]

Rotunda's treatment of *Associated Press* most clearly shows his support for paper tradition principles. He treats the case narrowly, segregating it to a section on "The Antitrust Laws" in "Other Regulation of the Press."[480] Rotunda produces a well-known block quote from *Associated Press*, with an addition in brackets in the following sentence to "clarify" the passage:

471. *Id.* (emphasis added).

472. *Id.* at 809 n.16.

473. *Id.* at 1009 (referring to Bollinger Jr., *supra* note 10).

474. *Id.* at 1010.

475. For content, see, for example, *id.* at 789, 790, 794, 836. For rules over balancing, see *id.* at 703, 803. For corporations, see, for example, *id.* at 795-96.

476. 4 RONALD E. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (3d ed. 1999).

477. *See* Shapiro, *supra* note 254, at 405 (listing the book at number seven).

478. This is volume four, 239-756, excluding Freedom of Association, or 520-68.

479. *Id.* at 332-61 (the first part of part VI, "The Other Side of the Coin from Prior Restraint of the Press—Access to and by the Press"), 754-56 (*Pacifica*, *Denver Area*, *Reno v. ACLU*; under "Obscenity"), 370 (*Associated Press*), 479-80 (*Tornillo*), 415, 422-24 (discussing tobacco advertising over broadcast), 313-14 (a footnote section called "Tort Claims Against the Media, Because of What They Broadcast," though primarily listing print cases), 428-30 ("Radio and Television Broadcasts of Lottery Results").

480. *Id.* at 370.

> Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests [through conspiracies in restraint of trade].[481]

This addition is not necessary to relay facts, as Rotunda also quotes the sentence following this passage: "'The First Amendment affords not the slightest support for the contention that a *combination to restrain trade* in news and views has any constitutional immunity.'"[482] The effect of Rotunda's addition is to limit *Associated Press*, apparently *by its own terms*, to antitrust offenses. This fails to reveal that scholars and Justices have drawn broad free speech propositions from this case, finding support in this very passage.

Rotunda bases broadcast access on technological constraints while acknowledging a larger principle. The section on "access to the press" differentiates electronic media from other speech based on technological difference, *i.e.*, "[*d*]*ue to the unique nature of electronic media* and the present state of the art."[483] Rotunda attributes the courts' deference to the FCC and Congress on broadcast's technological "complexity."[484] Nonetheless, he finds the technological distinction weak. The footnote to this first sentence asserts that while the Court "has often commented on the monopoly nature of broadcasting, this premise has been attacked," and lists eleven articles and books in support.[485]

Rotunda balances the broad principle of access with other considerations. First, he traces broadcast regulation cases and quotes Court language that "the interest of the listening public in 'the larger and more effective use of radio'" can override the First Amendment interests of a licensee.[486] This broad principle is balanced with a quote that radio is "[u]nlike other modes of expression," and thus "subject to governmental regulation."[487]

Rotunda implicitly criticizes *Red Lion*, introducing it as the case that "brought into sharp focus" the "extent of the right of the government to *control* the electronic media."[488] Despite this perspective, Rotunda focuses not on "government control," but on the individual's right of access. The FCC, Rotunda explains, "require[d] broadcasters to follow a 'fairness doctrine.'"[489] Rotunda's subtle use of the article "a" instead of "the" when joining it to the term "fairness doctrine," as well as placing the term in quotation marks, taints the readers' faith in the doctrine. The broadcasters' challenge to the fairness

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481. *Id.* (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)) (alteration in original).

482. *Id.* (quoting *Associated Press*, 326 U.S. at 20) (emphasis added).

483. *Id.* at 332 (emphasis added).

484. *Id.* at 340.

485. *Id.* at 332 n.1 (citations omitted). Of these eleven, three are by L.A. Powe.

486. *Id.* at 333 (quoting NBC v. United States, 319 U.S. 190, 216 (1943)).

487. *Id.* (quoting *NBC*, 319 U.S. at 226).

488. *Id.* (emphasis added).

489. *Id.* at 334.

doctrine was on "*conventional* First Amendment grounds as abridging freedom of speech and press."[490] By contrast, *Red Lion*'s rejection of these grounds was apparently unconventional. The Court, according to Rotunda, said the right to free speech for broadcasters is not "identical to published or spoken speech."[491] He likened the fairness doctrine to a prior restraint, placing "a recognizable burden upon broadcaster programming discretion," and added that *Red Lion* "spent little time discussing" the "additional burden" and the fear of broadcaster self-censorship.[492]

Rotunda frames the access debate on whether a right to access is constitutionally *required*, whereas the other books ask if legislatures or agencies could constitutionally permit access. Without discussion, he seems to assume that limited access rights are permissible: a "carefully drawn statute providing for limited access" is constitutional.[493]

Rotunda treats *Tornillo*, unlike *Red Lion*, as largely unproblematic. *Tornillo* appears in a section in "Traditional Print Media."[494] The subsection heading claims "No Right of Access to Newspapers."[495] Rotunda refers to those favoring access as promoting "regulation" of the print media.[496] To distinguish print and broadcast beyond technology factors, Rotunda emphasizes that broadcast monopolies are legally sanctioned. Without accounting for the economic peculiarities of information markets, Rotunda trusts that economic markets will develop newspapers sensitive to readers' wants.[497] Making a practical argument to downplay access, he argues with a long block quote (from an article) that access is not as effective as presumed: "those arguing for government regulation of the print media . . . overestimate[] its effectiveness."[498]

Discussing the *Turner* cases, Rotunda does not focus on the viewers but on the "speakers." He says the must-carry rules "regulate[] cable speech" in two ways, burdening cable operators and cable programmers.[499] Further, he characterizes O'Connor's *Turner I* dissent as "more protective of the free

490. *Id.* (emphasis added).

491. *Id.* at 335.

492. *Id.* at 335-36.

493. *Id.* at 340 (discussing CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973), and CBS v. FCC, 453 U.S. 367 (1981)).

494. *Id.* at 356.

495. *Id.* Rotunda also discusses *Tornillo* in a section called "Rights of Reply." The section, however, mainly discusses the possible constitutionality of retraction statutes, as opposed to rights of reply, noting that most victims of slander do not want money but to correct false statements. *Id.* at 479-80.

496. *Id.* at 358.

497. *Id.*; *see* BAKER, MEDIA, MARKETS, *supra* note 157.

498. ROTUNDA & NOWAK, *supra* note 476, at 358.

499. *Id.* at 350.

speech rights of the cable operators."[500] He does not, however, call the majority "more protective" of the speech rights of everyone else in society.

The last three pages of the free speech chapter discuss "Sexually Oriented Material on Broadcast and Cable Channels" and "Sexually Oriented Material on the Internet."[501] This is the only sustained discussion of the internet. In addition to his criticism of access, Rotunda embraces paper tradition tenets.[502]

IV. THE FUTURE OF FREE SPEECH

Much is at stake in teaching law students that electronic media cases are exceptional, limited to their facts, and supposedly rely only on specific technological factors. Paper tradition advocates hope to disburden the "exceptional" broadcasters and other owners of electronic media infrastructure of restrictions. Being pro-speech means being in favor of one speaker, an infrastructure-owner, at the expense of other speakers, and core speech values. More importantly, the advocates hope to foist paper doctrine on all future media, including internet delivery.

The internet is at stake in many ways. The distinction between structural regulation and content leads to different constitutional decisions. Although both speech doctrines would approve of the holding in *Reno v. ACLU*,[503] that case merely involved content, not structure, of the internet. It invalidated internet anti-indecency legislation. So, though *Reno v. ACLU* is ringing endorsement for the free speech on the internet, it did not present conflicting private speech (or business) interests, like *Red Lion* and the *Turner* cases did. Nor as broadband-delivery does. Cable and telephone companies, and some scholars, argue that the broadband-infrastructure-owner should have constitutional rights to consumers' internet speech.[504] The Supreme Court will have to determine, once again, if it will follow communication tradition, or regulate internet delivery like a burning flag.

One hopes that advances in technology make the two traditions converge. With the advent of the internet, continuing government supervision for broad access, like in *Red Lion*, is no longer even arguably necessary, so long as the internet is kept free through setting the proper regulatory baselines in advance.[505] The debate need not be between continuous government oversight and concentrated powerful media companies, so long as the law stops protecting communi-

500. *Id.* at 352.

501. *Id.* at 754-56.

502. For content, see *id.* at 263 n.19 (noting that this is "examined in various sections throughout this chapter regarding specific topics such as the clear and present danger, obscenity, and defamation"). For balancing, see *id.* at 263. For corporate speech, see generally *id.* §§ 20:51, 20:31.

503. 521 U.S. 844 (1997).

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

505. For a good introduction, see LESSIG, *supra* note 66.

cation bottleneck masters and gatekeepers and sets proper initial rules.[506] A focus on open forms of the internet could "replace [government-]regulated mass media giants" by connecting all speakers to each other and could "enhance the ability of all in society to speak creatively and effectively."[507] With less powerful gatekeepers on whom the government can lean centrally, decentralized networks like the initial internet should permit less "regulatability" by the government.[508] This could satisfy both traditions and result in a realignment of the debate. Ensuring such open forms of internet, however, requires that regulatory decisions be based on the technologies, economics, and a conception of free speech that concerns itself with dispersed speech power and wide viewpoint diversity; not analogies from pamphlets.

But however one frames the future debates, this is a constitutional debate to which law students should be invited. The effect of marginalizing socially dominant electronic media in the free speech curriculum is largely to advance one view of speech doctrine over another—the government distrust over a focus on society members' ability to participate in communication. A long tradition of thorough scholarship has attempted to grapple with the complex and important questions of speech and speech law as they operate in society and affect its members.

Neither this scholarly tradition nor entire communications industries should be ignored. Ignoring these industries merely pushes, by analogy, a doctrinal position onto new and old communication media and onto future lawyers and law scholars. Without studying these issues, students are less able to anticipate future free speech debates or to contribute to present debates, such as those involving broadband delivery, the structure of the internet, digital television, Tivo-like machines, video game consoles used as computers on the internet, code, copyright, privacy, wireless and wireline communications, etc. Instead, students should receive diverse and antagonistic conceptions of free speech doctrine, including the doctrine applied to society's most pervasive media.

506. Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC, Dec. 14, 1998, at 12, 14.

507. Benkler, *Core Common Infrastructure*, *supra* note 67, at 28.

508. Benkler, *Siren Songs*, *supra* note 27, at 74 (citing LESSIG, *supra* note 152, at 19).