The Free Speech Rights of Cable Broadcasters: You Can't Tell the Players Without a Scorecard

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Introduction

In Turner Broadcasting Co. v. FCC,[1] the Supreme Court is poised to rule on the free speech rights of cable broadcasters. Unfortunately, neither the procedural posture of the Turner case, the strategic positions of the parties, the factual record before the Court or the existing analytic vocabulary is likely to help the Justices to grapple effectively with free speech in the 21st century. If, as appears inevitable, we are on the brink of an information era dominated by powerful economic entities that both speak and exercise monopoly control over the technology needed to amplify their speech, free speech theory must evolve more sophisticated ways to think about the intersection of speech, law and amplifying technology.

The act of speech, standing alone, may border on the trivial. Most speech becomes significant only when it is linked to a hearer; the more hearers, the greater the speech's potential

[1]819 F. Supp. 32 (D.D.C. 1993), appeal argued before United States Supreme Court, No 93-44, October Term, 1993.

significance.[2] Thus, an intense symbiotic relationship exists between the act of speech and the various amplifying technologies that increase its potential audience. Despite such an intense link between speech and amplifying technology, the precise legal relationship between the two remains one of our public policy enigmas.

At times, the Supreme Court has uncoupled technological amplification from speech, permitting regulation of the technology despite its effect on a speaker's potential audience.[3] At times, the Court has merged the act of speech into its amplifying technology, treating the two as integral aspects of the act of communication.[4] But the Court has never attempted a comprehensive discussion of the issue. Indeed, the intellectual

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[2] I do not mean to suggest that speech is important only because it has an impact on a hearer. Tom Emerson's powerful reminder of the self-affirming nature of speech demonstrates that speech affects the speaker at least as intensely as it affects a hearer. Emerson, The System of Free Expression (1970). But even the self-affirming nature of speech is dependent on the speaker's belief that an audience is present, or at least possible.

[3] E.g. Saia v. New York, 334 U.S. 558 (1948); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (uncoupling electronic amplification from speech); Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981) (uncoupling billboards from speech); Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, 4143 U.S. 376 (1973)(uncoupling speech from print technology).

[4] E.g. Schneider v. State, 308 U.S. 147 (1939); Niemotko v. Maryland, 340 U.S. 268 (1951) and Lee v. Int'l Society for Krishna Consciousness, 112 S.Ct. 2709 (1992)(refusing to uncouple leafletting from speech); Pacific Gas & Electric Co. v. Public Utilities Comm'n, 461 U.S. 190 (1983)(refusing to uncouple speech from utility billing envelopes); Linmark v. Township of Willingboro, 431 U.S. 85 (1977)(refusing to uncouple speech from lawn sign); Buckley v. Valeo, 424 U.S. 1 (1976)(refusing to uncouple speech and money).

chaos that characterizes the legal rules governing regulation of broadcasting - both cable and over-the-air - is a function of our failure to think more carefully about the relationship between speech and amplifying technology.[5]

I believe that the intersection of speech and amplifying technology requires us to answer at least five questions:

1. When, if ever, should we seek to separate the two concepts by divorcing the amplification process from the idea of speech?

2. When, if ever, should we merge the two by treating amplification as an integral part of the act of speaking?

3. When, if ever, should we encourage vertical integration of the two by placing them in the same economic unit?

4. When, if ever, should we seek to divorce speech from amplifying technology by vesting control over each activity in a different entity.

5. Finally, does the First Amendment inform, control or inhibit our answers to these questions?

A. An Overview of the Relationship Between Speech and Amplifying Technology

In the era before Gutenberg, little attention was paid to the intersection of speech, law and technology precisely because

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[5]In fairness, the Court's effort to draw lines between content-based regulations and "time, place or manner" rules is one way of approaching the issue. Similarly, the use of the O'Brien test to measure the constitutionality of regulations having an "incidental" effect on speech is an effort to distinguish direct regulation of speech from other regulations. The Court has not, however, used the "time, place or manner" doctrine or the O'Brien test to explore the relationship between speech and amplifying technology, except perhaps in a conclusory way.

For a pioneering effort to think about speech and technology, see I. deSola Pool, Technologies of Freedom (1983)

primitive technology and mass illiteracy radically constrained the potential audience of a controversial speaker. With the emergence of print technology (and vernacular language), a controversial speaker's potential sphere of influence dramatically expanded.[6] Not surprisingly, law quickly sought to limit the destabilizing impact of technologically amplified speech by seeking to regulate the technology - generally by requiring the licensing of printers.[7]

The first great statement of the free speech principle in the Anglo/American legal tradition, Milton's Areopagetica (1644), was a plea to liberate print technology from government licensing.[8] Similarly, the first great defense of the free speech principle in the American tradition, the acquittal of John Peter

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[6] For a survey of the evolution of print technology in England, see Emford, Freedom, Technology and the First Amendment (1991), pp. 24-29

[7] Licensing of printing presses was initially imposed in England in 1530. It was abandoned in 1694. See F. Siebert, Freedom of the Press in England, 1476-1776, 46 (1952).See also J. Smith, Printers and Press Freedom (1988); L. Levy, Emergence of a Free Press (1985).

Law also sought to control access to the "technology" of vernacular language. Jan Hus, among others, was burned for translating the bible into the vernacular.

[8]Milton's work is closely bound up with the relationship between free speech and scientific progress. In 1633, Galileo was placed under house arrest in Acetri by the Inquisition because he criticized Copernican theory. The young Milton, fresh from the university, visited Galileo at Acetri in 1638 and was deeply moved by the plight of Europe's pre-eminent scientific mind. When Milton received news of Galileo's death in 1641, he immediately began work on the Areopagetica, which eventually found an honored place in the libraries of Madison and Jefferson and played a major role in the genesis of the First Amendment.

Zenger in 1735, refused to hold a printer criminally responsible for the speech of a controversial client.[9]

As Milton and Zenger illustrate, the early days of print technology and free speech theory were characterized by a clear vertical separation between speech and its amplifying technology. Writers wrote and printers printed, but they were separate people pursuing independent agendas subject to different legal rules. Whether and to what extent we can and/or should seek to replicate Milton's model in other contexts by divorcing speech from its amplifying technology remains one of our most difficult public policy choices.

The evolution of mass newspapers in the 19th century was characterized, for the first time, by vertical integration of speech and amplifying technology.[10] Mass circulation newspapers did not rely on independent printers. They merged the speaker and amplifying print technology into an integrated economic unit.[11]

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[9] The Zenger trial is reported at 17 How. St. Tr. 675 (1735). William Bradford was the actual author of the words for which John Peter Zenger, his printer, was tried. Bradford's pamphlet describing the Zenger trial reproduced Alexander Hamilton's summation to the jury and became the most celebrated defense of the free speech principle in Colonial America. It went through fourteen editions before 1791. For a thoughtful discussion of the Zenger trial, see E. Moglen, [cite]. See also Buranelli (ed), The Trial of Peter Zenger (1957).

[10][cites on development of mass press]

[11]Interestingly, book publishers and most magazines did not seek to integrate vertically in the 19th century. Unlike the mass press, where the author, editor, publisher and printer became vertically integrated into a single economic unit, the publication of books and most magazines involved independent authors and independent printers.

The result was the emergence of an economically powerful, technologically amplified speaker that, predictably, called forth a new legal response - a countervailing right of privacy and a resurgence of the law of libel.[12]

Efforts to regulate mass circulation newspapers have tended to ignore the merger of speech and technology, presumably because print technology is (or at least was) widely available to all comers. The result has been the evolution of an economically powerful, technologically amplified speaker with no obligation to share its technological advantages with anyone else.[13] Even in a newspaper context, however, when a newspaper's control over amplifying technology threatens to prevent other speakers from reaching an audience, vigorous regulation of the technological amplification process takes place, usually under the rubric of the anti-trust laws.[14]

The invention of revolutionary forms of speech amplification technology during the 20th century raised the ante on the legal

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[12]Brandeis and Warren, The Right of Privacy; [cite to 19th century libel law]

[13] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[14] Eg. Associated Press v. United States, 326 U.S. 1 (1945); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

Financially ailing newspapers have been permitted to pool their access to amplifying technology pursuant to joint operating agreements exempted from the anti-trust laws by Congress. See generally Oppenheim & Shields, Newspapers and the Anti-trust Laws (1981).

relationship between speech and amplification technology. For example, when Thomas Edison attempted to dominate the amplifying technology underlying motion pictures by linking camera and projector patents, ownership of the stock of raw film and control over movie distribution, federal courts ordered the dissolution of his Motion Pictures Patent Company in 1915.[15] Despite the Edison case, the motion picture industry rapidly developed into a vertically integrated oligopoly in which a consortium of powerful studio-speakers prevented speech by independent producers, in large part because the studios controlled the necessary amplifying technology. After a decade of anti-trust litigation, the Paramount consent decree[16] and the aggressive prodding of the Supreme Court broke the vertical link between speech and amplifying technology in the motion picture industry.[17] With speech uncoupled from amplifying technology, the industry flourished, artistically and financially.

The invention of the telephone triggered yet another round in the relationship between speech and amplifying technology. In the telephone context, we initially elected a radical divorce

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[15]See Roof, Trauth & Huffman, Structural Regulation of Cable Television: A Formula for Diversity, 15 Communications and the Law 43, 59-65 (1993) for a helpful history of the enforcement of the anti-trust laws in the motion picture context.

[16] United States v. Paramount Pictures, Inc., 1940-1943 Trade cas. (CCH) 288 (S.D.N.Y. 1940). See also, United States v. Paramount Pictures, Inc., 66 F. Supp. 229 (S.D.N.Y. 1946), 70 F. Supp. 53 (S.D.N.Y. 1947), aff'd in part 334 U.S. 131 (1948).

[17]See generally M. Conant, Antitrust in the Motion Picture Industry (1960).

between speech and amplifying technology.[18] Regulators ceded an economic monopoly to Bell Telephone over the technological amplification process in return for a promise that Bell would wholly divorce speech from technology by operating as a conduit, not a speaker.[19] It was as though Milton had been given a license for a massive monopoly printing press capable of serving all comers, on condition that everyone could use it at reasonable cost.

Divorcing speech from technology in the telephone context worked fine at the level of speech, at least in the early days. But the technological monopoly eventually turned into an anti-competitive nightmare leading to the breakup of the Bell system.[20] With the re-establishment of technological competition in the telephone area, the question of whether and to what extent the divorce of speech from technology in the telephone context should be continued now moves to center stage.[21] After all, once Milton's massive printing press loses its monopoly status, why shouldn't it attempt the vertical integration of speech and technology?

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[18]See Robert W. Garnett, The Telephone Enterprise: The Evolution of the Bell System's Horizontal Structure, 1876-1909 (1985).

[19]See Commerce Court (Mann-Elkins) Act, ch. 309, sec. 7, 36 Stat. 539 (1910). The rise and fall of the Bell system is chronicled in Kellogg, Thorne & Huber, Federal Telecommunications Law (1992) at pp. 5-48.

[20]See Kellog, Thorne & Huber, supra at ch 4.

[21]cite to litigation over removal of programming restrictions on BOCS.

The evolution of the law governing over-the-air broadcast media reflects a profound ambivalence about whether broadcasters should be permitted to control both speech and the technology of amplification. Unlike the vertical integration of speech and print technology that characterizes newspapers, the technology of over-the-air broadcast amplification cannot be made equally available to all comers. The physical limits of the broadcast spectrum means that only a few will be permitted to operate that form of amplification technology.

One possible regulatory response would have been to follow the telephone model by divorcing speech from broadcast technology by requiring broadcasters to perform solely as conduits, leaving it to others to perform the speech function. But Congress, seeking to replicate in the broadcast sphere the communicative and economic power of the vertically integrated mass newspaper, explicitly rejected the common carrier approach to broadcasting in favor of a vertical integration approach.[22]

Congress never fully embraced the newspaper model, however. Concerned over possible abuse of scarce broadcast technology, Congress sought to retain significant regulatory control over it.[23] Today, an uneasy truce reigns between the concept of a broadcaster as a full-fledged vertically integrated speaker and a

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[22]See FCC v. Midwest Video Corporation, 440 U.S. 689, ____ (1979).

[23] See, e.g. Radio Act of 1927, sec. 18; currently codified as sec. 315 of the Communications Act of 1934.

broadcaster as a partial conduit for the speech of others.[24]

As the newspaper anti-trust cases illustrate, however, even a vertically integrated speaker in control of both the speech function and the means of technological amplification is subject to technological regulation when undue control of the amplification process threatens the ability of others to make themselves heard. That is especially so when control over the amplification technology is, in part, the result of a government decision. Thus, the FCC's chain broadcasting regulations successfully limited the power of a vertically integrated broadcast network to use its excessive control of amplification technology to limit the speech of others.[25] Similarly, efforts to assure fair access to ownership and management of the amplification technology by historically excluded groups have been upheld by the Court[26], as have been more problematic bans on the cross-ownership of print and media amplifying technology in the same market.[27]

Cable broadcasting began, like early telephone, as a classic example of a divorce between speech and technology. The early CATV broadcasters did little more than provide a new technology for amplifying someone else's speech, almost always the broadcast

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[24] Compare Red Lion Broadcasting Co v. FCC, 395 U.S. 367 (1969) with CBS v. DNC, 412 U.S. 94 (1973).

[25] National Broadcasting Company v. United States, 319 U.S. 190 (1943).

[26] FCC v. Metro Broadcasting,

[27] FCC v. CCNB, 436 U.S. 775 (1978).

signals of local over-the-air stations. CATV functioned like Milton's printer, but without the ability to pick and choose what it amplified.

When cable broadcasters sought to attain a degree of vertical integration between speech and amplifying technology by selecting the speech they wished to amplify and by generating speech of their own, they ran into two roadblocks. First, the FCC treated cable broadcasters as satellites of the over-the-air broadcast industry, imposing restrictive regulations designed to prevent cable from posing a competitive threat to the profitability of over-the-air broadcast technology.[28]

Second, regulators exhibited the same ambivalence toward the vertical integration of cable broadcasting that has characterized the approach to over-the-air broadcasting. On one hand, regulators were tempted by the promise of a new category of powerful, vertically integrated speaker with the economic power to develop and implement new speech technology and the capacity to produce quality programming. Accordingly, we quickly recognized that cable systems may function as vertically integrated speakers in the tradition of broadcasters and newspapers as opposed to merely providing a technologically amplified conduit for the speech of others in the tradition of

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[28] Eg. United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Midwest Video Corp., 406 U.S. 649 (1972); FCC v. Midwest Video Corporation, 440 U.S. 689 (1979).

our initial effort at telephone regulation.[29]

On the other hand, regulators were haunted by the specter of oligopoly control of the new amplification technology that might strangle competing voices in the tradition of the pre-Paramount motion picture industry and the anti-competitive track record of the old Bell system. The net result was yet another untidy regulatory compromise in 1992 that recognizes cable broadcasters as full-fledged, vertically integrated speakers, but requires them to make their amplification technology available to outsiders at reasonable cost pursuant to leased access and to local educational and commercial over-the-air broadcasters free of charge, while forbidding cable broadcasters from applying their amplification technology to an over-the-air broadcaster's speech without its permission.[30]

One possible legal approach to the regulatory compromise, adopted by the majority of the three-judge Court in Turner Broadcasting, is to uncouple cable broadcaster speech from its amplifying technology and to view the 1992 statute as a mere regulation of technology, triggering the most permissive form of rational basis scrutiny. FCC v. Beach Communications, Inc. 113 S.Ct. (1993).

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[29] Preferred Communications, Inc. v. City of Los Angeles, 476 U.S. 488 (1986). See also Home Box Office v. FCC, 567 F2d 9 (D.C. Cir. 1977); Quincy Cable Television, Inc. v. FCC, 768 F2d 1434 (D.C. Cir. 1985); Century Communications Corp. v. FCC, 835 F2d 292 (D.C. Cir. 1987).

[30] Cable Act, P.L. 102-385; 1992 S. 12; sec. 4, 106 Stat. 1460; Turner Broadcasting v. FCC, supra.

The polar approach, urged by the dissent, is to view cable broadcasters as totally integrated speakers, so that any effort to interfere with a broadcaster's control over amplifying technology becomes an assault on speech itself, triggering the strictest First Amendment scrutiny.

I believe that both polar approaches are wrong. Each reflects a traditional "either/or" assumption that has viewed amplifying technology either as inherently separate from speech, or as an inherent part of the speech itself. In fact, it is neither. There is no "inherent" relationship between speech and amplifying technology. Rather, there are, I believe, four basic public policy questions. First, do we wish to permit vertically integrated speakers in the broadcast area? Second, do we wish to exercise any control over what such vertically integrated broadcasters say? Third, do we want to make the amplifying technology available to other speakers? And, fourth, what does the First Amendment have to do with the answer to the first three questions?

The answer to the first question about whether to permit (and, thus, de facto, to foster) vertically integrated broadcasters is driven more by economic necessity than by First Amendment fiat. In settings like the newspaper industry where government does not allocate control over the amplifying technology to a favored few, I assume that a combination of First and Fifth Amendment values prohibit government from forbidding the vertical integration of speech and technology. We have never

confronted the legal issue because, even if the we could prohibit newspapers from owning their own printing presses, it would not make economic sense to forbid the vertical integration. Indeed, faced with an ailing newspaper industry, we should be increasing the potential for vertical integration, not thinking of ways to narrow it.

In settings like over-the-air or cable broadcasting, however, where government allocates ownership and control of the amplifying technology to a favored few[31], the legal issue of whether broadcasters may be forbidden from developing an integrated speech arm is at least an open one. While the legal issue is far from clear, I believe that we have the power to compel the complete divorce between speech and technology in the

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[31]The rationale for government involvement in the allocation of amplifying technology in the broadcast area varies from over-the-air (inherent necessity of allocating scarce space on the broadcast spectrum) to cable (need for local monopoly on installation of cable under the streets). While the rationales are different, the legal consequence of each rationale is identical. When government legitimately allocates monopoly control over amplification technology to a favored few, it retains the right to regulate the use of the technology to assure that other voices have access to it.

Of course, if cable develops an amplifying technology that does not implicate the government in its allocation, its legal status may change. At present, the widespread assumption is that localities may allocate monopoly control over cable to a single favored speaker, both to avoid disruption and to induce enhanced service. I may be premature in assuming that localities may allocate cable monopolies in order to minimize the disruption caused by multiple efforts to lay cable under a locality's streets or to induce the favored company to serve otherwise unprofitable markets. See Preferred Communication, Inc. v. City of Los Angeles, 754 F.2d 1396 (1985)(overturning cable monopoly), aff'd on narrower grounds, 476 U.S. 488 (1986), on remand, ___F. Supp.___( )(refusing to enforce monopoly status).

broadcast area. Broadcasters could be made to function like printers in Milton's time, or even as common carriers like the early phone company. But why would we want them to do so? Especially in the broadcast area where technological innovation requires the efficient assembly of substantial capital, preventing vertical integration impedes the evolution of powerful communication entities capable of implementing new technology and producing quality programming. Thus, whether by legal rule or economic good sense, we have opted to permit vertically integrated speakers in the broadcast area.

Once we make the decision to permit (foster) vertical integration of speech and broadcast technology (cable or over-the-air), we must answer the second question - whether to seek to control what is broadcast. It is at that point that our choices should be most constrained by the First Amendment. Having elected to allow speakers to operate as technologically amplified, vertically integrated economic units, we should afford such powerful speakers full First Amendment protection against government efforts to control what they say. It would, I believe, be a dangerous mistake to foster the growth of extremely powerful, vertically integrated broadcast speakers only to place that vast communicative power at the disposal of the government.[32]

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[32]The difficulty of controlling private concentrations of power is one of the dilemmas of the liberal state. Some critics will argue that it is better to regulate powerful speakers in the common interest than to leave the area to private choice. I hope that a sufficient degree of regulation is possible at the level

Of course, the very power of the vertically integrated broadcast speaker has been urged by some as a justification for setting limits on what the speaker may say.[33] It seems awfully risky, though, to permit the government to control the speech of a particularly powerful speaker, merely because the speaker is powerful. If, in fact, a vertically integrated broadcast speaker has too much power over the audience, the last hand you want on the microphone is the government's. If vertically integrated speakers are deemed too powerful, the more appropriate response is to adjust the degree of vertical integration between speech and amplifying technology rather than censoring the speech itself.

That brings us to the third, and most difficult, question: To what extent may the government regulate the intersection between speech and amplifying technology without impinging on the free speech rights of the vertically integrated speaker? I believe that even if we choose to link speech and amplifying technology in a single powerful speaker for economic reasons, we do not lose all ability regulate the amplifying technology, especially when the speaker enjoys privileged access to the amplifying technology only because the government has bestowed it upon him. The key is to determine when a "technology" regulation

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of fair access to the amplifying technology to satisfy communitarian critics. See infra at 17 et seq. I suspect, however, that pressure to regulate broadcast content will continue, generally phrased as an effort to protect hearers against abuse by a powerful speaker.

[33] E.g. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

unduly impinges on the speech interest of a vertically integrated speaker (thus triggering First Amendment scrutiny), as opposed to merely regulating the fair use of the government-allocated amplification technology. That task requires a more precise First Amendment scorecard than the one we usually employ.

B. Toward a First Amendment Scorecard For Use in Measuring the Effect on Speech of an Effort to Regulate Amplifying Technology

I have suggested three corollaries that ought to govern the relationship between speech and amplifying technology:

Corollary I:

> Speakers should be allowed to develop vertically integrated economic units that merge the act of speech and government-allocated amplifying technology in a single powerful entity.

Corollary II:

> The resulting powerful, technologically amplified speaker should enjoy full First Amendment protection over what it chooses to say.

Corollary III:

> Government may regulate amplifying technology that it has allocated to assure technical quality, fair price and fair access by competing speakers, but may not impinge upon the speech function.

There is, of course, real tension between Corollary II's promise that a technologically amplified speaker can say what it wishes and Corollary III's insistence that it must occasionally broadcast the speech of others. Nevertheless, I believe that a more precise analysis of the effect of technological regulation

on the speaker function can reduce the tension. But such a task requires a more precise set of analytical tools than we usually deploy in free speech cases.

During the 70 years that the Supreme Court has struggled seriously with free speech theory[34], the model of the speech process has grown from a naive pre-occupation with the speaker to an effort to integrate the hearer into the Court's analysis.[35] It is, I believe, time to expand the model even further to take account of the conduit.

In the beginning, there was the speaker. The modern Supreme Court's encounter with free speech opens with the paradigm of the heroic speaker of conscience, pressed by her art or her politics or her science or her religion to speak the truth to a hostile world that prefers silence. The romantic conception of the speaker of conscience dominated the first 50 years of contemporary free speech theory in the Supreme Court. The high level of protection for worthless, even destructive speech, like Nazi

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[34]The modern story of the First Amendment begins about 70 years ago with the seminal Holmes-Brandeis opinions. Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes and Brandeis dissenting); United States ex rel Milwaukee Soc. Democrat Publishing Co., v. Burleson, 255 U.S. 407, 436-38 (1920) (Holmes, J. dissenting); Gilbert v. Minnesota, 254 U.S. 325, 337 (1920) (Brandeis, J. dissenting); Pierce v. United States, 252 U.S. 239, 272-73 (1920) (Holmes and Brandeis, dissenting); Schuyler v. United States, 251 U.S. 466 , 482 (1920) (Holmes and Brandeis, JJ. dissenting); Whitney v. California, 274 U.S. 357, 372-78 (1927) (Brandeis and Holmes, concurring).

[35]I have discussed the relationship between speaker-centered and hearer-centered theories of the First Amendment in Neuborne, The First Amendment and Government Regulation of the Capital markets, 55 Brooklyn L. Rev. 5 (1989).

invective in Skokie[36], flows in large part from the Court's historic tendency to place the speaker at the center of the First Amendment universe. While the benefits of free speech for hearers and the greater society were occasionally trotted out as rhetorical flourishes in the early cases, the early years of modern free speech protection were what I have called speaker-centered.

Several events nudged the Supreme Court away from an exclusively speaker-centered view of the First Amendment. Free speech cases arose where it was difficult to identify a protected speaker.[37] Challenges to government secrecy raised the issue of the unwilling speaker.[38] Troublesome cases arose involving involuntary hearers where the usual serendipity between willing speaker and willing hearer did not exist.[39] Entire categories of speech arose where the only justification for First Amendment protection was the hearer's right to know.[40] The net effect was a quantum shift in the free speech universe to a greater concern

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[36]National Socialist Party v. Skokie, 432 U.S. 43 (1977). See also Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978). Skokie is a paradigmatic speaker-centered case.

[37] Lamont v. Postmaster General, 381 U.S. 301 (1965); Procunier v. Martinez, 416 U.S. 396 (1974).

[38] New York Times v. United States, 403 U.S. 713 (1971); Rust v. Sullivan, 111 S.Ct. 1759 (1991).

[39] E.g. Frisby v. Schultz, 487 U.S. 474 (1990).

[40] Va Bd of Pharmacy v. Virginia Consumer Council, 425 U.S. 478 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

with the interest of hearers.

The full implications of integrating the hearer's interest into the speaker-centered world of the First Amendment remain to be worked out. Since a hearer-sensitive view of the speech process will be more paternalistic than the speaker-centered version, a hearer-centered vision of the speech process carries with it the dangerous potential for diluting the rights of speakers, especially when the interests of speakers and hearers are said to diverge. The chronic instability of much First Amendment doctrine - witness the residential picketing cases, the anti-solicitation decisions or the cases dealing with indecent broadcast speech - is attributable to the fact that we have not yet developed a metric to weigh the interests of speakers against the interest of hearers and have not decided who should win when the interests diverge.

Just as events overtook an exclusively speaker-centered view of the First Amendment in favor of greater concern with the interests of hearers, the reality of contemporary communication technology is forcing us to acknowledge that the modern speech process involves at least one more significant player - the conduit, who conveys speech from speaker to hearer, generally through the medium of technological amplification. We have not yet begun to define the precise legal rights of the conduit, often because we have tended to merge the conduit with the speaker, treating the process of amplification as though it were inherently a part of the speech function. Often, it is unneces-

sary to attempt to sort out the separate speaker, hearer and conduit interests because all three interests pull in the same direction. However, with the emergence of vertically integrated broadcasters using amplification technologies bestowed on a favored few by the government, we can no longer afford such a luxury. Since the interests of conduits may conflict with the interest of speakers and/or hearers, we must work out a way of dealing with the conflicts.

I believe that the best way out of the "either-or" box that views such powerful conduit/speakers either as fair game for widespread censorship of content or as loose canons beyond the reach of regulatory control is to attempt to uncouple the speaker function from the conduit function in order to protect the former and regulate the latter.

That requires asking at least three questions about the precise effect of a proposed regulation. Does a regulation force a vertically integrated speaker to transmit something it would not otherwise say? What is the speaker's precise objection to transmitting the required material? And, does the regulation prevent the transmission of something the speaker wishes to say?

Much, perhaps most, regulation of amplifying technology never gets beyond the first question. If a regulation affects the amplifying technology without interfering with the speech function, it simply does not implicate the First Amendment. Most efforts at regulation of cost, technical quality, structural organization and, even, taxation fall into this category. Even

regulations appearing to affect content, such as "must carry" rules, do not actually affect the speech function if the broadcaster would have carried the signal in the absence of the regulation.

When a regulation forces a technologically amplified speaker to act as a conduit for something it otherwise would not say, the speech function is obviously implicated. But, in the absence of a strong speech-based objection to amplifying the speech in question, the interference may not implicate the First Amendment. For example, a reluctance to act as a conduit for someone else's speech based on non-content related criteria, such as a disagreement about audience demand, or a disagreement over fees, or a desire to maximize market share, can be overridden without a serious intrusion into the speech function. Being overridden about audience desires or transmission fees or market share is simply not the same as being forced to pledge allegiance to an idea you hate, or to say something you do not believe. In the absence of such a significant speech-based objection, I do not believe that requiring a conduit to amplify the speech of a third person materially subverts the speaker function.

In at least two settings, though, technology regulations affecting broadcast content will materially interfere with the speaker function. When a conduit is forced to amplify speech with which it disagrees, or is forced to displace preferred speech in favor of coerced speech, the speech function is overridden by the desire to regulate technology.

Objections to substantive content, while clearly posing a substantial speech-based issue, can arguably be dealt with by permitting a disclaimer and a disavowal of responsibility by the amplifier. We follow precisely that course when we compel speech on private property[41], or permit religious speech on public property.[42]

Displacement of a broadcast-speaker's preferred speech by the coerced speech of third persons raises the most significant speech-based objection, especially where the broadcaster's objection to the coerced speech is linked to substantive content. When preferred speech is displaced by coerced speech, the conduit function has blotted out the speech function, triggering classic First Amendment protection.

I believe that the legal rules governing efforts to regulate amplifying technology should vary with the degree of interference with the speech function. If a regulation does not implicate a significant speech interest, it is not subject to First Amendment scrutiny. If a regulation requires a broadcaster to act as a involuntary conduit, but does not require a broadcaster to transmit material with which it disagrees, the regulation affects the broadcaster's speech interest, but does not materially impinge upon it. If, however, a regulation displaces a broadcaster's preferred speech in favor of speech with which it disagrees, the regulation directly attacks the speech function and, thus,

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[41]Pruneyard

[42]Allegheny

should satisfy the First Amendment's most rigorous standard of review. How, if at all, would such a proposed scheme work in the Turner case?

C. Turner Broadcasting and Cable Free Speech

I have argued that any effort to disentangle the speech function from the conduit function must be fact intensive. Until we measure the precise effect of a conduit regulation on the speech function, we cannot know whether the regulation should be tested under the First Amendment or some less demanding standard. Unfortunately, that is exactly what is not taking place in the Turner case.

In its haste to assure speedy judicial review of the Cable Act of 1992, Congress provided for an accelerated review procedure involving a three judge court and a direct appeal to the Supreme Court. In and of itself, the accelerated review provisions encouraged a wide-ranging facial attack on the leased access and must carry rules imposed by the statute. Instead of requiring a series of as-applied challenges to the regulations by broadcasters with a specific, factually-rooted complaint capable of being assessed by the courts, Congress' special review procedures encouraged an outpouring of facial challenges to the 1992 act based on hypothetical events and anecdotal assertions. Since allegations or speculation often substitute for facts in Turner, little, if any, effort was made to pinpoint the precise nature of the interference with the speech function claimed by the multiple

parties.

Moreover, for understandable reasons, the legal strategy followed by each of the three major parties in Turner has tended to downplay the facts. It is, I suggest, no coincidence that all three parties agreed that summary judgment was appropriate. The government downplays the facts because, as a matter of policy, it is seeking to avoid judicial second-guessing of Congress' factual assumptions about the necessity for the must carry and leased access rules. In effect, where regulation of amplifying technology is at issue, the government argues that Congress should make the final call about whether the regulation is needed, no matter how drastic the resulting interference with the speaker function. The net effect of the government's argument is to uncouple speech from amplifying technology, leaving Congress free to regulate amplifying technology, even when the regulation directly interferes with the speech function.

The cable broadcasters downplay the facts for two reasons: first, because their knockout punch, the asserted analogy between cable broadcasters and newspapers, would only be weakened by close factual scrutiny of their local monopoly status; and, second, because a close look at the facts might have revealed how thin the actual interference with the speech (as opposed to the conduit) function really is.

Finally, the over-the-air broadcasters downplay the facts because they are afraid to put Congress' assumptions about the possible abuse of the cable "gatekeeper" function into judicial

play and because they recognize that in a few settings the speech function is genuinely overridden by the must carry rules.

The net result is a record that does not begin to explore the actual impact of the 1992 must carry rules on the cable broadcasters' speech functions and a set of highly competent briefs that make little or no effort to distinguish the speech from the conduit function.

Faced with such a procedural posture, the Supreme Court is unlikely to go beyond the traditional "either/or" approach to the relationship between speech and technology. Thus, after Turner, cable broadcasters will probably be subject either to over or under-regulation.

A more serious effort to disentangle the speech and conduit functions would concentrate on the actual impact of the 1992 regulations on the behavior of cable broadcasters. First, it would ask whether the must carry rules actually affect a cable broadcaster's speech function. Since, according to the cable broadcasters, the vast bulk of cable systems wish to carry the signals of local over-the-air stations and do not object to reasonably priced leased access, the 1992 act does not implicate their speech functions at all. When a cable broadcaster performs as a willing conduit, no First Amendment interests are violated. Speculation about possible future conflict should not force the Court into deciding a facial challenge to the statute.

Second, it would identify those relatively few cable broadcasters who are being forced to carry signals they would other-

wise have refused to transmit and explore the broadcaster's reluctance to amplify the over-the-air signal. Where the cable broadcaster's reluctance to allow the use of an otherwise unused channel is based on disagreements that do not materially implicate the speech function, such as disagreements about audience demand, signal quality, transmission fees or market share, I believe that the broadcaster may be required to act as a conduit without material damage to its speech function. Since the broadcaster enjoys government-conferred monopoly access to the amplifying technology, it can be forced to share the amplifying technology as long as its speaker function is not impaired. At most, such a predominantly conduit-based regulation should be measured by the energized rational basis standard used in Cleburne.

Third, it would single out the perhaps non-existent cable broadcasters whose reluctance to carry an over-the-air broadcast signal on an otherwise unused channel is motivated by a disagreement over substantive content. At that point, coercing a cable broadcaster to operate as an involuntary conduit for speech with which it disagrees undoubtedly impacts on the speech function. Requiring someone, even a conduit, to assist in the dissemination of material with which it disagrees seriously impinges on the speaker function, even if a disclaimer is attempted.[43] I would, therefore, require a substantial showing of need before enforcing such a regulation. Since the availability

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[43]Barnette; Wooley v. Maynard

of a disclaimer somewhat alleviates, but does not eliminate, the impact on the speech function, intermediate scrutiny would seem appropriate.

Finally, it would identify settings in which a cable broadcaster is required to displace preferred speech from a system operating at capacity in order to make room for the speech of someone else. While, even in this setting, it might be possible to ask whether the forced substitution impinges on a material speech interest - for example situations where the preference is not based on any content-related criteria - I believe that the coerced displacement of a broadcaster's speech by someone else's speech is a direct impingement on the speaker function, whatever the broadcaster's motives may be. Thus, before a regulation could force the displacement an existing signal, I would require the regulation to satisfy an exacting First Amendment showing of factual necessity.

It should, of course, be noted that the displacement scenario is a vanishing phenomenon. Most existing cable systems are currently operating with excess capacity. Within the foreseeable future, the 500 channel system will be commonplace, making it extremely unlikely that displacement will be a serious problem.

Thus, if I were deciding the Turner case, I would send it back to find out exactly what the impact on the speech function really is. I suspect that, on remand, most of the cable broadcasters would be unable to point to a material interference

with the speech function because they would have carried the signal anyway, or because the reluctance to carry the signal on an unused channel is not based on content. If a close scrutiny of the facts revealed a cable broadcaster with a claim of material infringement on the speech function because it actually disagrees with the coerced speech, or because the coerced speech displaces other speech, I would refuse to enforce the regulation as applied to that broadcaster, unless the government makes a fact-based showing of necessity far stronger than anything I have seen in the Turner record.

Don't worry, though. The closest I'll ever get to deciding cases like Turner is this conference.