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During the 1989 clerkship season, then Chief Judge Breyer and Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit attempted to achieve a consensus among the U.S. circuit judges on a March 1 interview date. n6 They polled all the circuit judges regarding their willingness to adhere to a March 1 interview date if eighty-five percent of all circuit judges agreed. When only some seventy-five percent of the circuit judges responded positively, Judge Becker notified the judges on January 23, 1989, that "you and your colleagues should feel no constraints about interviewing and selecting law clerks at any time during the forthcoming 'season.'" n7

- - - - -Footnotes- - - - -

n6 Judges Becker and Breyer sought consensus first among U.S. circuit judges in 1989 and later years because of the vastly smaller size of the federal appellate (in contrast to the trial) judiciary, making it far easier to communicate with and obtain responses from the judges. All such initiatives were taken in the hope that the district judges would follow suit.

n7 Letter from Judge Becker to Courts of Appeals Colleagues 1 (Jan. 23, 1989) (on file with Judge Becker).

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Soon after Judge Becker's letter, a highly critical and ultimately quite influential article appeared in The New York Times. The author stated:

The once-decorous process by which Federal judges select their law clerks has degenerated into a free-for-all in which some of the nation's most eminent judges scramble for the top law school students.

In their eagerness to capture the best clerks, the judges have steadily pushed up the hiring process; instead of looking for students [*210] in their third year of law school as custom once required, judges surreptitiously began recruiting second-year students in the fall and offered some jobs as early as February, disrupting studies and making decisions on the basis of fewer grades and flimsier evidence.

"It was positively surreal, the most ludicrous thing I've ever been through," said one Stanford student who recently endured the process. "Here are these brilliant, respected people -- they're Federal judges, for God's sake -- and they're behaving like 6-year-olds." n8

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n8 David Margolick, At the Bar: Annual Race for Clerks Becomes a Mad Dash, with Judicial Decorum Left in the Dust, N.Y. TIMES, Mar. 17, 1989, at B4. Chief Judge Alfred T. Goodwin of the Ninth Circuit offered a more colorful description of the process:

There has been a lot of electronic traffic on the annual competition to join the Supreme Court's farm club system. The competition has all of the dignity of the Oklahoma land rush and the efficiency of the calf scramble.

Some of our urban members may never have seen a calf scramble. It is the low point of many western rodeos. A small number of calves are turned loose in the arena, along with a larger number of adolescent cow persons. The latter attempt to seize, subdue and carry out the former. The SPCA writes letters to the editor during the following week.

Memorandum from Alfred T. Goodwin, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to [Judicial] Associates 1 (Jan. 4, 1989) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

Making reference to the words that start the annual Indianapolis Speedway race, the article's author concluded that, instead of notifying the judges of the absence of constraints, Judge Becker might as well have told them, "Ladies and Gentlemen, start your engines." n9

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n9 Margolick, supra note 8, at B4.

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Stung by the article and by other criticism, Judges Becker and Breyer, joined by Chief Judges James Oakes (Second Circuit) and Patricia Wald (D.C. Circuit), initiated a campaign that yielded an agreement for the 1990 season among more than two-thirds of the U.S. circuit judges. Under the 1990 plan, while clerkship interviews could take place at any time, judges would not make offers until May 1 at 12:00 noon Eastern Daylight Time. n10 The implementation of this more ambitious proposal was also a failure.

- - - - -Footnotes- - - - -

n10 Letter from Judge Becker to Judge Breyer; Wilfred Feinberg, Chief Judge, U.S. Court of Appeals for the Second Circuit; and Patricia M. Wald, Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit 1 (Jan. 18, 1989) (on file with Judge Becker); see Letter from James L. Oakes, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Betsy Levin, Executive Director, Association of American Law Schools 1 (Dec. 11, 1989) (stating that nine of the thirteen circuits "have agreed in principle that no offers will be made to law clerk applicants until 12:00 noon, Eastern Daylight Time, on May 1, 1990, for 1991-92 clerkships and that applicants will have twenty-four-hour lead time for acceptance of such offers") (on file with Judge Becker); Memorandum from Betsy Levin, Executive Director, Association of American Law Schools, to Deans of Member Schools and Members of the House of Representatives 2 (Jan. 23, 1990) (urging Deans to reinforce efforts of Judicial Circuit Councils) (on file with Judge Becker); Letter from Chief Judge Breyer to Judge Becker; James Oakes, Chief Judge, U.S. Court of Appeals for the Second Circuit; Stephen Reinhardt, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit; and Patricia Wald, Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit 1-2 (Apr. 19, 1990) (suggesting that at noon Eastern Daylight Time, offerees should be given "at least an hour" to consider the offer, and that after the "noon" round it will be "a free for all") (on file with Judge Becker).

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There were a few reports of students getting phone calls from judges in the weeks before May 1 asking the students questions of the sort, "If I were to [*211] give you an offer, would you accept?" Some judges called applicants promptly at noon only to find that they had accepted another offer a few minutes earlier from a judge whose "watch was fast." Moreover, because the judges had not reached an agreement on how long they were to keep the offers open, a frenzy of offers and acceptances ensued within minutes of the noon hour. As a result, many clerkship applicants did not get their preferred clerkship, and judges who allowed students time to consider an offer and comparison shop discovered that, if the student advised the judge an hour or two later that he or she had accepted another clerkship, the judge's next five or more choices had already committed themselves to someone else. In short, as a follow-up survey among judges showed, nobody ended up happy. n11

-Footnotes-

n11 See Memorandum from James L. Oakes, Chief Judge, U.S. Court of Appeals for the Second Circuit, to all Second Circuit Judges 1 (Dec. 26, 1990) (noting that almost half of the judges who participated in 1990's May 1 date considered it unsatisfactory) (on file with Judge Becker).

-End Footnotes-

After the 1990 clerkship season, Judge Becker and Chief Judges Breyer, Oakes, and Wald abandoned their reform efforts. Predictably, 1991 was as frenetic as 1989 had been. The next year was even worse. In the 1992 clerkship season, virtually all judges on the D.C. Circuit had finished their hiring by February. Many judges elsewhere did likewise. Some judges made offers in December 1991 to students who were not even halfway through law school.

The downward spiral accelerated the next year when Professor Kent Syverud, clerkship advisor at the University of Michigan Law School, wrote to all federal judges that the Michigan students, so as not to be beaten to the door by the competition, would be applying for clerkships in September of their second year of law school. n12 The 1993 law clerk hiring season thus began in earnest in the early fall of 1992, the earliest date ever. A joke began to circulate about competitive judges casing kindergartens for bright young prospects. When a statement to this effect attributed to Judge Becker appeared in the legal press, n13 one of his former law clerks collaborated with a friend on a mock application:

I know it's early, but my mommy was reading the Legal Times and told me that you know of judges who are accepting resumes from people who had good grades in kindergarten. Although my kindergarten, like Yale, didn't really have grades, I am now a first [*212] grader and did super well last year. . . . I can count all the way up to 37 without making any mistakes at all, and then I can go usually all the way up to 71 with just a couple of boo-boos. I promise to write opinions that don't have more pages than I can count.

-Footnotes-

n12 Letter from Kent D. Syverud, Professor, University of Michigan Law School, to Judge Becker 1 (Aug. 11, 1992) (noting that it "has been our repeated and painful experience in the past years that many judges who express a resolve not to be rushed nevertheless end up interviewing and hiring before our

students get their applications out") (on file with Judge Becker). Professor Syverud explains that his letter of August 1992 was motivated by the embarrassment he suffered in both 1990 and 1991 when students relied on his advice that "distinguished federal judges" would abide by the various dates they had set for themselves and then the judges "interviewed much earlier than those dates." Letter from Kent D. Syverud, Professor, University of Michigan Law School, to Judge Becker 1-2 (Sept. 20, 1994).

n13 Steve Albert, Judges Try To Impose Rules on Scramble for Top Law Clerks; 9th Circuit Balks, LEGAL TIMES, Nov. 15, 1993, at 1.

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EDUCATION

Kindergarten

Grades: Out of 6 projects, 4 Gold Stars, 1 Silver Star, and a Smiley Face.

Class Rank: Second Tallest

Received special school arts-and-crafts award for best papier-mache likeness of Barney the Purple Dinosaur.

Nominated for Inclusion in Who's Who Among American Kindergarten Students.

PUBLICATIONS

Dick, Jane, and Gender: Deconstructing The "Text" of Childhood, 24 FISHMAN KINDERGARTEN Q. 288 (forthcoming 1994). n14

- - - - -Footnotes- - - - -

n14 Application for employment as a judicial clerk from "Adrian Mackensworth" to Judge Becker 1 (Nov. 26, 1993) (ghostwritten by Paul Fishman and Eric Muller).

- - - - -End Footnotes- - - - -

The scramble caused by Michigan's announcement of a September start date convinced Chief Judge Breyer and Judge Becker that the time had come to make yet another effort to achieve a semblance of order and decorum. They began by sending a questionnaire to all U.S. circuit judges inquiring whether they would agree to a "benchmark" starting date for law clerk interviews -- even if some judges did not honor it. n15

- - - - -Footnotes- - - - -

n15 Memorandum from Chief Judge Breyer and Judge Becker to all United States Circuit Judges 1 (Jan. 11, 1993) (on file with Judge Becker).

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III. SETTING THE MARCH 1 BENCHMARK

After responses to a questionnaire showed overwhelming support among the judges for a "benchmark date," n16 Chief Judge Breyer and Judge Becker [*213] presented the matter at the February 1993 National Workshop for U.S. Circuit Judges. The consensus among the judges attending the presentation was that any action, to be effective, must not be cartel-like. Rather, it should be simple and nonbinding and function as a "benchmark" that would help to harmonize the activities of the many judges who desired coordination. The discussion led to the formation of an Ad Hoc Committee on Timing of Law Clerk Interviews.

-Footnotes-

n16 See, e.g., Letter from Francis D. Murnaghan, Jr., Circuit Judge, U.S. Court of Appeals for the Fourth Circuit, to Judge Becker 1 (Jan. 18, 1993) ("I heartily endorse a recommended date for commencing law clerk interviews. . . . I would prefer an even later date . . . but I recognize that getting agreement on any date [later] than March 1 is extremely unlikely?) (on file with Judge Becker). The tabulated results of the survey follow:

Total Responses Received: 145

Question #1 (Do you endorse a non-binding recommended date for commencement of interviews?)

Yes	121
No	21
Blank	3

Question #2 (Suggested Date)

December 1	1
January 1	3
February 1	22
March 1	39
April 1	40
May 1	1
June 1	3
June 15	1
July 1	2
September 1	2
October 1	2
NO DATE	29

Question #3 (Or should we simply forget the whole business?)

Yes	29
No	98
Blank	18

Memorandum from Judge Becker to All Circuit Judges 1-2 (Feb. 2, 1993) (tabulating results of questionnaire).

-End Footnotes-

With the encouragement of the Ad Hoc Committee, Guido Calabresi, then Dean of the Yale Law School, wrote to every law school dean in the nation. n17 Dean Calabresi's letter brought a tidal wave of endorsements for the Ad Hoc Committee's March 1 benchmark proposal. n18

-Footnotes-

n17 See, e.g., Letter from Dean Calabresi to Mark A. Nordenberg, Dean, University of Pittsburgh School of Law 1 (June 22, 1993) (encouraging Dean Nordenberg to write to Judicial Conference indicating whether or not be supported the guidelines) (on file with Judge Becker).

n18 Deans from the following 66 law schools, constituting approximately 40% of the accredited law schools in the nation, answered Dean Calabresi's letter by endorsing the Ad Hoc Committee's March 1 benchmark proposal in the strongest terms: The American University, Arizona State University, Benjamin N. Cardozo School of Law, Boston College, Boston University, Bridgeport School of Law, Brooklyn Law School, Capital University, Chicago-Kent College of Law, College of William and Mary, Columbia University, DePaul University, Duke University, Emory University, Fordham University, George Mason University, Georgetown University, Golden Gate University, Harvard University, Howard University, Indiana University, John Marshall Law School, Louisiana State University, Memphis State University, New York Law School, Northwestern School of Law of Lewis & Clark College, Notre Dame Law School, Pace University, Pepperdine University, Rutgers University (Newark), St. John's University, St. Mary's University, Santa Clara University, Southern Illinois University (Carbondale), Stanford Law School, Temple University, Thomas M. Cooley Law School, Touro College, Tulane Law School, University of Arkansas, University of Chicago, University of Cincinnati, University of Colorado, University of Detroit Mercy, University of Idaho, University of Kansas, University of Kentucky, University of Louisville, University of Maine, University of Michigan, University of Minnesota, University of Mississippi, University of Missouri-Columbia, University of North Carolina (Chapel Hill), University of Oklahoma, University of Pennsylvania, University of San Diego, University of Southern California, University of Tennessee (Knoxville), University of Toledo, University of Virginia, University of Wyoming, Washburn University, Washington University (St. Louis), Wayne State University, and Widener University. Letters on file with Judge Becker.

-End Footnotes-

[*214] A few excerpts from these letters are telling:

The recent acceleration of the clerkship selection process has been very disruptive to the educational process here at the Duke Law School, as students have scrambled to apply for clerkships early in their second year, when they have barely begun taking advanced courses and working on journals. It is difficult for faculty to write effective recommendations for students so early in the process as these students have not yet had the opportunity to demonstrate their intellectual abilities in smaller elective courses and seminars. The chaotic timetable also has caused a great deal of uncertainty for those of us who advise students about how and when to apply for clerkships. n19

-Footnotes-

n19 Letter from Susan L. Stockwell, Associate Dean, Duke University School of Law, to Judge Becker 1 (June 30, 1993) (on file with Judge Becker).

-End Footnotes-

And:

The existing state of affairs is nothing short of absurd. It demeans the federal judiciary, undermines the educational process and results in judges making their selections on the basis of inadequate information. n20

-Footnotes-

n20 Letter from Geoffrey R. Stone, Dean, University of Chicago Law School, to Judge Becker 1 (July 7, 1993) (on file with Judge Becker).

-End Footnotes-

Armed with the law deans' letters, the Ad Hoc Committee persuaded the Judicial Conference to pass the March 1 resolution unanimously at its September 1993 meeting. n21 All judges and law deans were then notified of its terms. As the interviewing season approached, Dean Calabresi suggested to the deans of other law schools that they ask their students not to apply and their faculty not to send letters of recommendation until, at least three weeks before the March 1 date. n22 The deans agreed. n23 Robert C. Clark, Dean of the Harvard Law School, then wrote a letter on behalf of fourteen other deans to all federal judges stating that "we have now asked our students not to send [*215] applications to judges before February 1, and our faculty not to send out recommendations before the same date." n24 The posting of Dean Clark's letter settled the final design of the March 1 Solution.

-Footnotes-

n21 See supra notes 1-2 and accompanying text.

n22 See, e.g., Letters from Dean Calabresi to the Deans of the law schools of Columbia University, Georgetown University, Harvard University, New York University, Northwestern University, Stanford University, University of California at Berkeley, University of California at Los Angeles, University of Chicago, University of Michigan, University of Pennsylvania, University of Southern California, and University of Virginia (Oct. 8, 1993) (suggesting that deans can urge "students not to apply prematurely" and that faculty can "refuse to send recommendations by letter or by phone until three weeks prior to the March 1st date") (on file with Judge Becker); cf. Memorandum from Robert C. Clark, Dean, Harvard Law School, to Faculty, Staff and Students [of Harvard Law School] 1 (Oct. 15, 1993) (announcing that "[s]tudents applying for federal clerkships beginning [in the] Fall 1995 should not submit application materials" and "[f]aculty members should not send letters of recommendation in support of 1995 federal clerkship applications before February 1, 1994") (on file with Judge Becker).

n23 E.g., Letter from Robert C. Clark, Dean, Harvard Law School, to Dean Calabresi 1 (Oct. 20, 1993) (exclaiming "Bravo! Your letter of October 8 regarding the Judicial Conference was most appropriate") (on file with Judge Becker).

n24 Letter from Robert C. Clark, Dean, Harvard Law School, to All Federal Court Judges 1 (Oct. 25, 1993) (signed by Dean Clark on behalf of Dean Judith C. Areen, Georgetown University Law Center; Dean Robert W. Bennett, Northwestern University School of Law; Dean Scott H. Bice, University of Southern California Law Center; Dean Lee C. Bollinger, University of Michigan Law School; Dean Paul A. Brest, Stanford University School of Law; Dean Guido Calabresi, Yale Law

School; Dean Colin S. Diver, University of Pennsylvania School of Law; Dean Herma Hill Kay, University of California at Berkeley School of Law (Boalt Hall); Dean Lance M. Liebman, Columbia University School of Law; Dean Susan Westerberg Prager, University of California at Los Angeles School of Law; Dean Robert E. Scott, University of Virginia School of Law; Dean John E. Sexton, New York University School of Law; Dean Geoffrey R. Stone, University of Chicago Law School; and Dean Mark G. Yudof, University of Texas School of Law) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

IV. THE MARCH 1 INTERVIEW DATE -- RESULTS AND REACTIONS

The vast majority of judges complied with the March 1 Solution. With the apparent exception of the Eighth Circuit, the defections that were reported were minor in both number and effect. Some Ninth Circuit judges let it be known that they would conduct interviews over winter break with students who were attending law schools away from the West Coast and who were returning for vacation, though they would not extend offers until at least March 1. A number of judges in other circuits announced similar intentions. The designs of those judges who desired to repeat the previous years' practice of interviewing and hiring in December and January, however, were largely frustrated by a lack of applicants prior to February 1. n25 After February 1, judges received applications, but most continued to wait until March 1 to interview.

- - - - -Footnotes- - - - -

n25 Some law schools whose students tend to apply for clerkships in those circuits with judges who announced that they would interview prior to March 1 felt they had "no choice but to continue to comply with individual deadlines." Letter from Richard S. Wirtz, Dean, University of Tennessee at Knoxville College of Law, to Dean Calabresi 1 (June 7, 1994) (emphasis added) (on file with Judge Becker). Our impression, however, is that most law students and faculty commendably hewed to the February 1 date for applications and letters of reference.

- - - - -End Footnotes- - - - -

We acknowledge that, although the vast majority of judges abided by the March 1 date, others did not. One law dean, while heralding the general success of the March 1 deadline, opined that it "appears to have been violated much more often than the February 1 starting date for applications and letters of recommendation. 'Open season' did seem to begin during the month of February, although it lacked the frenzy of activity we have sometimes witnessed in the past." n26 This phenomenon appears to be, in large measure, a result of the willingness of students and professors to abide by the March 1 date. Indeed, the authors have received anonymous reports that students from some law schools, acting on the advice of their clerkship advisers, declined [*216] invitations to pre-March 1 interviews. Similarly, some students who did agree to early interviews complied with the spirit of the guidelines and declined to accept clerkship offers prior to March 1.

- - - - -Footnotes- - - - -

n26 Letter from Robert E. Scott, Dean, University of Virginia School of Law, to Dean Calabresi 1 (June 16, 1994) (on file with Judge Becker).

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Moreover, the overwhelming majority of judges interviewing before March 1, including those on the Ninth Circuit, apparently refrained from making job offers until on or after March 1. Judges who made offers precisely on March 1 reaped a certain competitive advantage over those who did not commence interviewing until March 1, but the advantage seems to have been inconsequential. Indeed, our reports from deans of law schools in the Ninth Circuit reflect general satisfaction with the March 1 program. n27 Eighth Circuit judges were the least willing to follow the March 1 benchmark date for extending offers, and many Eighth Circuit judges also conducted interviews prior to February 1 during the holidays with students who had returned home for vacation.

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n27 See, e.g., Letter from Scott H. Bice, Dean, University of Southern California Law Center, to Dean Calabresi 1 (June 20, 1994) ("[T]he time table went a long way towards restoring sanity to the nearly out-of-control process.") (on file with Judge Becker); Letter from Paul Brest, Dean, Stanford University School of Law, to Dean Calabresi 1 (June 28, 1994) (stating that "[p]ostponing the clerkship process noticeably reduced the student anxiety," but that "students at West Coast Schools considering clerkships in the East may be particularly disadvantaged because . . . most of the judges refusing to follow the guidelines are in California") (on file with Judge Becker); Letter from Herma Hill Kay, Dean, University of California at Berkeley School of Law (Boalt Hall), to Dean Calabresi 1 (July 21, 1994) (stating that "postponing the start of the application and interviewing achieved its most important goals" and urging that applications and interviews be "postponed until the summer after second year" to "reduce the relative disadvantages of West Coast students") (on file with Judge Becker).

- - - - -End Footnotes- - - - -

Although we cannot speak with scientific accuracy, we can draw several reliable conclusions on the basis of reports from members of the Ad Hoc Committee, other judges throughout the nation, and law deans: (a) that the vast majority of law students and professors honored the February 1 application/letter of recommendation date; and (b) that most federal judges honored the March 1 benchmark date for the commencement of interviews.

V. ADVANTAGES OF THE MARCH 1 SOLUTION

Based upon a survey of law deans, the law schools in general seem quite pleased with the results of the March 1 Solution. n28 Prior to implementation of the benchmark date, the law school deans articulated several problems with the existing "free market" in clerkships -- all of which were substantially alleviated by the March 1 reform.

- - - - -Footnotes- - - - -

n28 See Letters from the deans of the law schools of Boston College, Creighton University, Duke University, Emory University, Harvard University, Indiana University, Louisiana State University, Mercer University, Mississippi College, New York University, Northwestern University, Ohio State University, Rutgers University (Newark), Seton Hall University, South Texas College, Temple University, University of California at Berkeley, University of Cincinnati, University of Detroit Mercy, University of Florida, University of Iowa, University of Maryland, University of Mississippi, University of Missouri, University of Southern California, University of Toledo, Wayne State University, and Widener University, to Dean Calabresi (received in June and July 1994) (on file with Judge Becker).

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[*217] As noted above, the deans had argued that the early clerkship season had three particularly harmful effects. First, it interfered with classes because students often had to take several trips to obtain a clerkship. Second, it denied students the opportunity to adjust to the rigors of law school and to obtain a desirable clerkship based on their performance after their first year. Third, it prevented students from focusing their interests in law before deciding whether to apply for a clerkship. The early clerkship season also forced judges to make decisions based only on first-year grades and recommendations from faculty members who only had contact with students in large first-year classes.

The March 1 arrangement alleviated most of the deans' concerns. By the time of hiring, most judges had students' third-semester grades in addition to first-year grades. Faculty members provided more informative recommendations for students who had taken small upper-level seminars. And students had more time to think about whether and where they really wanted to clerk.

There were other advantages of the March 1 reform. The most frequent comment from the law deans was that the March 1 Solution provided students much more certainty as to when to apply and enabled them to concentrate more on their fall semester studies and exam preparations. With additional time available at the beginning of the spring semester, students could more effectively prepare application materials and arrange for faculty references. And the February 1 application date afforded students more time to research and apply to a wider range of judges.

The responding deans also commented that the March 1 arrangement had done much to eliminate the informal but gripping rumor mill about when students from different law schools had sent out applications and what judges or circuits were about to hire. The unreliability of such information had, in the past, increased student anxieties in what is at best a stressful process. As one dean put it, the students liked the fact that there was "less of a premium on being connected to a good 'grapevine.'" n29 We do not mean to suggest that the March 1 Solution eliminated student anxiety over early hiring. That would be too much to expect, especially because no one was sure how the first year of the March 1 program would work. We believe, however, that the March 1 benchmark substantially reduced stress and that, in the wake of the generally successful results, the second and subsequent years of the program will see still further reduction in tensions if law schools hold the line.

- - - - -Footnotes- - - - -

n29 Letter from Robert C. Clark, Dean, Harvard Law School, to Dean Calabresi 1 (July 20, 1994) (on file with Judge Becker).

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The March 1 Solution was also kind to students on the important issue of interviewing expenses. Since most judges were conducting interviews at about the same time, students were able to schedule multiple interviews for the cost [*218] of one round-trip airfare. n30 The grouping of interviews helped student couples coordinate their clerkship searches. Students also seemed to like the longer break between the search for summer placement and the clerkship search.

- - - - -Footnotes- - - - -

n30 On a practical level, the free-market approach to the hiring process is extremely expensive for students. When judges operate on different timetables, applicants may have to fly long distances for each interview. Airfares are prohibitively expensive to some applicants. This is especially true since the free-market interview schedule will normally not accommodate an economy fare. The fact that the high cost of air travel prices many students out of the national clerkship market alone compelled the writers to urge the Judicial Conference to support the March 1 Solution as "the right thing to do." Memorandum from Judge Becker and Chief Judge Breyer to Members of the Judicial Conference 7 (Sept. 8, 1993) (on file with Judge Becker).

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In general, the consensus was that the process was much less frantic and disruptive than in previous years, not only for the students, but also for law school faculties and administrators. n31 Administrators, who had previously found it difficult to organize efficient administrative support for clerkship recommendation letters and applications because the "season" could start without warning, were now able to schedule secretarial and administrative support productively and arrange for timely informational meetings and counseling.

- - - - -Footnotes- - - - -

n31 See, e.g., Letter from Scott H. Bice, Dean, University of Southern California Law Center, to Dean Calabresi 1 (June 20, 1994); Letter from Robert E. Scott, Dean, University of Virginia School of Law, to Judge Becker 1 (June 16, 1994) (noting absence of "frenzy of activity" typical of past years); Letter from Susan L. Sockwell, Associate Dean, Duke University School of Law, to Dean Calabresi 1 (June 13, 1994) (claiming the March 1 Solution is "extremely helpful to those of us who work with both students and faculty during the clerkship application process") (on file with Judge Becker).

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For example, the clerkship advisor for the University of Michigan Law School, where the secretarial staff sent approximately 10,000 reference letters to judges last season, reported that the process ran smoothly this year because the timing of the letters was known well in advance and because most students had

the leisure to approach professors for their letters of recommendation at least a month before they were due. Faculty liked having the recommendation process concentrated in a few weeks. n32

-Footnotes-

n32 Letter from Deborah C. Malamud, Assistant Professor of Law, University of Michigan Law School, to Judge Becker 2 (May 13, 1994) (on file with Judge Becker).

-End Footnotes-

One law dean summed up all these concrete and salutary consequences as follows:

We believe the timetable went a long way toward restoring sanity to a nearly out-of-control process. Very few of our students complained that they were disadvantaged by complying with the timetable; the vast majority of our applicants and their faculty recommenders expressed profound gratitude for the spring hiring schedule. n33

-Footnotes-

n33 Letter from Scott H. Bice, Dean, University of Southern California Law Center, to Dean Calabresi 1 (June 20, 1994) (on file with Judge Becker).

-End Footnotes-

The reaction from the judges has also been generally positive, although somewhat more mixed than that from the law schools. Most judges are pleased [*219] with the program and urge its continuation. They seem to find particularly attractive the fact that the program allows them to confine the interviewing process to a discrete block of time, even though it makes for a very busy period. Under the March 1 reform, judges were able to complete the

dinterviews and selections within a few weeks, permitting comparisons between applicants still fresh in their minds, and they were able to meet a fair sampling of the best applicants. n34

-Footnotes-

n34 As Judge Sifton acutely observed:

Whether intended or not, the March 1 starting date for interviews effectively imposed a matching system which, as you note, provided some minimal rationality. Judges gave preference in scheduling to applicants who looked best on the basis of their written submissions (offering an interview date on or close to March 1). Applicants accepted early interview dates with those judges they knew they wanted to work for. As a result the interview season for me and a number of other judges started and ended on March 1.
Letter from Charles Sifton, District Judge, U.S. District Court for the Eastern District of New York, to Jon O. Newman, Chief Judge, U.S. Court of Appeals for the Second Circuit 1 (June 9, 1994) (on file with Judge Becker).

-End Footnotes-

Nevertheless, the March 1 deadline, far from a panacea, engendered a few problems of its own. Given the history of this process, law school clerkship advisers remained cautious and apprehensive, largely because they were not sure which judges would observe the March 1 benchmark. A number of deans mentioned the "rumor problem" that scared some students into applying before February 1. n35 And a number of faculty members faced the problem of whether to supply a letter of recommendation in December or January to a judge who was not abiding by the arrangement. n36 It seems that some faculty members did, believing it was in the best interests of their particular students, while others did not, believing it was in the best interest of students overall. Some students faced the dilemma of whether to accept offers that were tendered before March 1. Apparently most students accepted the early offers, though, as noted above, we know of students who consulted with their school's clerkship committee and respectfully declined. n37

-Footnotes-

n35 See, e.g., Letter from Professor Barbara Bennett Woodhouse, Professor Frank Goodman, and Jo Ann Verrier, University of Pennsylvania School of Law, to Judge Becker 2 (May 23, 1994) ("Rumors about judges interviewing early were still a problem, although on a far smaller scale.") (on file with Judge Becker).

n36 See, e.g., Letter from Paul Brest, Dean, Stanford University School of Law, to Dean Calabresi 1 (June 28, 1994) (claiming that numerous judges "sought and obtained evaluations of candidates by phone from faculty members of various [other] institutions," but that "Stanford faculty adhered to the guidelines -- to our students' comparative disadvantage") (on file with Judge Becker).

n37 Interview with anonymous student, Yale Law School, J.D. '94, by Judge Becker (Mar. 3, 1994) (regarding offer by First Circuit judge).

-End Footnotes-

Although the plan had the desired effect of bringing more predictability and composure to the process, it meant that both interviews and offers bunched around the March 1 date, so students had little latitude in scheduling interviews. Unfortunately, although the offers now tended to be bunched together, students still felt compelled to accept the first offer rather than wait for news from a judge with whom they might have been the best match.

[*220] It should come as no surprise that some judges have voiced displeasure with the March 1 arrangement. Much of the dissatisfaction is arrayed along geographical lines because of the perceived advantage held by judges on the East Coast. For example, a Texas judge complained that the de facto shortening of the interview period compounded the advantages of the East Coast judges, because so many top law schools and judges are concentrated on the East Coast. Apparently, judges in the Northeast corridor benefit from students' desire to schedule their initial interviews along the eastern seaboard where quick and inexpensive travel between chambers enables them to schedule multiple prime interviews in a short time frame. n38

-Footnotes-

n38 Memorandum from Jerry E. Smith, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, to Emilio Garza, Circuit Judge, U.S. Court of Appeals for

the Fifth Circuit 1-2 (May 20, 1994) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

Also as a result of the perceived advantage for judges on the East Coast, some Ninth Circuit judges interviewed before March 1. For the coming season, while they still seem intent upon interviewing before the benchmark date, they seem to be willing to withhold offers until March 1. As one judge wrote:

Our deviation from the March 1 date [for interviewing] did not work any particular unfairness on clerkship applicants because, as far as I know, we did not insist on immediate answers from students who told us that they were interested in talking to a couple of East Coast judges first. Most, if not all of us, told such applicants that they could delay responding to our offers and take a day or two for East Coast interviews. n39

- - - - -Footnotes- - - - -

n39 Letter from Stephen Reinhardt, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Judge Becker 1-2 (May 31, 1994) (also noting that "we would be better off selecting clerks after the start of their third year in law school" and "there should be a period for interviews before the opening date for job offers" so that applicants could "see all the judges in whom they are interested and judges could see however many applicants they wish[ed]") (on file with Judge Becker).

- - - - -End Footnotes- - - - -

As can be expected from such a large and diverse group of individuals, a few judges do not intend to support the March 1 benchmark. One judge from a mountain state lamented that because of the high cost of air fare and the difficulty of combining an interview with interviews in other cities within a short time frame, only students who have targeted a particular city in his area as their first choice were likely to come there on March 1. And apparently relatively few students who attend school on either coast target geographically remote cities such as his. He therefore intends to interview earlier from now on, though he expressed support for an "offer date," because it creates a longer time period for interviews. n40 In contrast, an Eighth Circuit judge, apparently [*221] expressing opposition to the perceived regimentation, proclaimed: "I am bailing out of the cartel. Let a thousand flowers bloom." n41

- - - - -Footnotes- - - - -

n40 Letter from Monroe G. McKay, Circuit Judge, U.S. Court of Appeals for the Tenth Circuit, to Judge Becker 1 (May 13, 1994) (on file with Judge Becker).

n41 Letter from Morris S. Arnold, Circuit Judge, U.S. Court of Appeals for the Eighth Circuit, to Judge Becker 1 (May 13, 1994) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

VI. OTHER PROPOSALS

Judges Wald, Kozinski, and Oberdorfer have each in turn proposed solutions to the law clerk selection problem. n42 There is much to commend in each of their proposals. But the pages of history we have recounted demonstrate that each of the approaches previously advanced possesses a serious flaw.

-Footnotes-

n42 In 1990, Chief Judge Patricia M. Wald first proposed the "medical match" system for clerkship applicants. Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990). In 1991, Judge Alex Kozinski severely criticized the medical match model and strongly advocated the free-market approach. Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991). More recently, in 1992, Judge Louis F. Oberdorfer re-proposed the medical match system. Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply To The Bad Apple*, 101 YALE L.J. 1097 (1992).

-End Footnotes-

The most ambitious and theoretically sound proposal is the medical school matching model first recommended by Judge Wald n43 and later endorsed by Judge Oberdorfer. n44 The medical match system would work essentially as follows: On a specified date, presumably sometime in the fall of the third year, each student and judge would rank his or her preferences on a form and file it with a central clearinghouse. A few days later, each student and judge would receive a computer printout of his or her preferences to check for errors. Once these were verified, a program would automatically match each judge with students whom that judge ranked highest and who ranked that judge highest. Once the rankings were completed, students and judges would be notified of their matches and would be required to accept them unless a good reason could be certified. Any judges with leftover positions would be free to offer them to any unmatched students. n45

-Footnotes-

n43 Wald, *supra* note 42.

n44 See Oberdorfer & Levy, *supra* note 42.

n45 This type of system has been used for many years to match graduating medical students with residencies at hospitals and other medical institutions.

-End Footnotes-

Judge Kozinski has written an extensive critique of the medical match system. n46 One need not endorse all his criticisms to conclude that the match system would not solve the judicial clerkship problem. Judge Kozinski's point that the match procedure would not permit judges to create a "mix," or build a team of clerks whose skills and backgrounds complement and balance each other, is well taken. As Judge Kozinski noted:

Many judges consider geographical, racial and gender balance to be important, but not necessarily crucial, provided other criteria are met. Other judges may want at least one clerk who has served on a law [*222] review, or who has taken certain courses, or who comes from a particular school. Age and non-law experience may be an important factor in the mix; if you have two young, male

hot dogs you may deem it particularly important to have a third clerk who is a bit older, or female, or who has had a prior career. Equally important are the intangible factors: How will a particular set of clerks get along with each other and the rest of the judge's staff? n47

-Footnotes-

n46 See Kozinski, supra note 42, at 1720.

n47 Id. at 1722.

-End Footnotes-

While there is much to be said for Kozinski's view, there is another simpler reason to reject the medical match model, and an irresistible one: Judges find it unacceptable. In the 1989 survey, only one-third of the judges voted in favor of the match system. And the failure of five less ambitious attempts at reform suggests the futility of such a radical alternative. Indeed, most consistent with the theme of this Essay is the reaction of Judge Richard Cudahy of the Seventh Circuit, who observed that a "simple date like this was all that could be fruitfully suggested," and that "anything more sophisticated [would be] likely to break down." n48

-Footnotes-

n48 Letter from Richard Cudahy, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, to Judge Becker 1 (May 16, 1994) (on file with Judge Becker).

-End Footnotes-

Although we agree with Judge Kozinski's criticisms of the medical match system, we do not believe that his "free-market" solution is acceptable. The free-market approach has, after all, led to both the problems that have brought the process into disrepute and the continuing efforts at reform. Judge Kozinski argues that no alternative to the free-market system will eliminate its faults. Our one-year experience with the March 1 benchmark, however, strongly suggests the contrary. We entertain no illusions that the March 1 Solution is perfect, but we respectfully submit that, like democracy with all its flaws, it is the best system that anyone has conceived thus far. n49

-Footnotes-

n49 See Winston Churchill, Speech to the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897 TO 1963, at 7566 (Robert R. James ed., 1974) ("[I]t has been said that democracy is the worst form of Government, except all those other forms that have been tried from time to time.").

-End Footnotes-

VII. SOME SUGGESTED MODIFICATIONS

Although we believe that the modest March 1 Solution is the best system presently attainable, we view it as not having defeated one major shortcoming of the hiring process: the fact that many judges still require applicants to

accept offers either on the spot or within an unreasonably short time -- as little as forty-eight or even twenty-four hours. Such "exploding" or "short-leash" offers result in unfairness to applicants who, quite reasonably, would like the opportunity to interview with other judges in the hopes of securing the most [*223] desirable offer in terms of judge and location. The problem is especially acute for "student couples" who wish to clerk in the same vicinity.

The decision to accept or reject an exploding offer can be exceedingly anguishing when an interview is beckoning elsewhere. The imposition of short-leash offers is also unsporting toward other judges, particularly those geographically dispersed, who would also like to interview and perhaps make an offer to the applicant. Unfortunately (and undeniably), the urge of some judges to snare a desirable candidate and to prevent comparison shopping is strong.

Furthermore, the untoward effect of this exploding-offer syndrome has been exacerbated by the "conventional wisdom" propagated in many law schools that applicants are obliged to accept the first offer tendered. We find this state of affairs inexplicable and indefensible; because it is so terribly inequitable to the students, we do not understand how or why it ever gained acceptance. The explanatory note to the Judicial Conference resolution addressed and debunked the theory that students are obliged to accept the first offer tendered, but unfortunately that portion of the explanatory note to the resolution has not been publicized. The authors urge law school deans and faculty to act immediately to counter the conventional wisdom and to counsel students instanter that they are not obligated to accept, and should request a reasonable time to consider, an offer for a judicial clerkship.

With respect to the continued tendency of some judges to require answers in a short amount of time or even immediately, the authors believe that fundamental fairness and optimal placement require that a student be given a minimum of three working days to a week to accept an offer, with the option of an extension for good cause shown. This timetable should allow the student to pursue other options; but it is not so protracted as to prejudice the judges who would like to assemble a clerkship team and return to judicial business. Dean Paul Brest of Stanford University School of Law has strongly advanced a five-day minimum rule n50 that seems to be winning broad support in the academy.

- - - - -Footnotes- - - - -

n50 Letter from Paul Brest, Dean, Stanford University School of Law, to Dean Calabresi 1 (June 28, 1994) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

The authors also believe that the best possible time to select applicants would be the fall term of their third year in law school. n51 The law deans generally favor this approach. n52 This "fifth semester" approach would give the [*224] applicant more time to compile a well-rounded record and minimize the disruption of study periods and exams. Such a regime would also furnish judges with the benefit of a full two years of law school accomplishments as well as summer employment to consult when making clerkship decisions.

- - - - -Footnotes- - - - -

n51 A date during the second year that is later than March 1, while seemingly desirable, presents practical problems because the March 1 date permits interviewing during spring break, while a later date loses this advantage and may conflict with examinations. March 1 does, unfortunately, create problems for schools on a "quarter system." See Letter from Elena Kagan, Professor, University of Chicago Law School, to Dean Calabresi 1 (June 4, 1994) (noting the "serious problem" of interviews taking place during exam week and urging either an April 1 date or interviews in the summer after the second year with offers in the fall) (on file with Judge Becker).

n52 See, e.g., Letter from David P. Currie, Interim Dean, University of Chicago Law School, to Judge Becker 1 (June 1, 1994) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

Moreover, if the fall deadline were made into an offer date (i.e., a program whereby the only constraint was the date before which an offer could not be made), interviews could be permitted throughout the summer to maximize flexibility. Sentiment in favor of summer interviewing runs extremely strong on the West Coast, where the judges see the summer after the second year as the optimum period for interviews. n53 Unfortunately, we discern a problem vexing the summer interview program. Having an offer date rather than an interview date seems to be the reason that the approach tried during the 1990 clerkship interview season -- where interviews could be held at any time but offers had to be reserved until May 1 at noon EDT -- came crashing down. Indeed, it crashed so hard that the judges essentially wanted no more part of it, and most judges with whom we have spoken continue to want no part of it. Pushing the interview date back to the fall of the third year is somewhat more realistic, and likely to be advantageous, but does not seem to have enough support to be implemented any time soon.

- - - - -Footnotes- - - - -

n53 See, e.g., Letter from Herma Hill Kay, Dean, University of California at Berkeley School of Law (Boalt Hall), to Dean Calabresi 1 (July 21, 1994) (on file with Judge Becker).

- - - - -End Footnotes- - - - -

VIII. CONCLUSION

The Judicial Conference resolution has no "sunset" provision and hence as a statement of policy it is ongoing. Rejection of the nonbinding program by a large number of federal judges would destroy it, but as the foregoing discussion suggests, there is no reason to believe that such widespread defections will occur. We can expect that judges from areas of the country with fewer law schools, and perhaps some judges in the Midwest and on the West Coast, will conduct interviews before March 1, but it appears that only a handful of those who do will extend offers before then. The pool of highly qualified applicants is sufficiently numerous that a small number of defections will not undermine the proposal.

That is not to say that we encourage defections; we would prefer all federal judges to abide by the March 1 solution. But we recognize that judicial

perception of special problems in certain geographic regions will lead a modest number of judges to interview before March 1. We nonetheless envision that these judges, motivated by respect for the Judicial Conference resolution, will not make offers until and preferably after March 1. We also believe that the vast majority of federal judges will continue to honor the March 1 interview [*225] date. It is noteworthy that many federal judges have never interviewed before that date anyway.

After all is said and done, law students and faculty hold the trump card. If the students and faculty adhere to the February 1 and March 1 benchmark dates, the judges will simply be unable to impose their own designs on the process. As evidenced by the letters expressing overwhelming support for the March 1 Solution, n54 it seems likely that a majority of law school deans will continue their efforts. Indeed, recent communications among the law deans suggest that they are already at work on obtaining a consensus for the 1995 clerkship season that will not only replicate what was accomplished in 1994, but strengthen it by asking faculty to refrain from making oral recommendations as well as written ones before February 1.

- - - - -Footnotes- - - - -

n54 See supra note 28.

- - - - -End Footnotes- - - - -

We have remarked on our conviction that pushing back the benchmark date for commencement of interviews until September of the third year of law school would improve upon the system even more. We hope that a few years of satisfactory experience with the March 1 Solution will lead to a broad consensus for a later date. For now, the habit of hiring during the second year seems to have become strongly ingrained, and old habits die hard. Thus, under the circumstances, our recommendation to students, law schools, and judges for the 1995 hiring season and beyond is to adhere to the Judicial Conference resolution (and its explanatory note) -- that is, (a) applications and faculty recommendations should not be submitted until on or after February 1; and (b) interviews should not be conducted, and offers should not be extended, until on or after March 1. We also encourage law schools to inform students that they are not obliged to accept the first offer tendered, and we encourage judges to hold offers open for a reasonable time -- from three working days to a week -- with the option of an extension for good cause. We truly believe that this March 1 Solution will not only "hold," but also mature and improve. Toward that end, we urge our colleagues at the district court and appellate levels in the federal judiciary, our friends in the academy, and the clerkship applicants to help make it work.

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SYMPOSIUM: EMERGING MEDIA TECHNOLOGY AND THE FIRST AMENDMENT: The First Amendment in Cyberspace.

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-----Footnotes-----

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-----End Footnotes-----

SUMMARY:

... Consider the extraordinarily rapid development of the institution of electronic mail, which lies somewhere between ordinary conversation ("voice mail") and ordinary written communication ("snail mail" or "hard mail"), or which perhaps should be described as something else altogether. ... Under Turner, (a) government may regulate (not merely subsidize) new speech sources so as to ensure access for viewers who would otherwise be without free programming and (b) government may require owners of speech sources to provide access to speakers, at least if the owners are not conventional speakers too; but (c) government must do all this on a content-neutral basis (at least as a general rule); but (d) government may support its regulation not only by reference to the provision of "access to free television programming" but also by invoking such democratic goals as the need to ensure "an outlet for exchange on matters of local concern" and "access to a multiplicity of information sources." ... Hence the Court offered a number of justifications for regulation of cable technology. ... The question then arises: If diversity is a legitimate goal, why might the Turner model be superior to the Madisonian model? One possible view is that the Turner model is not superior, but that it should be regarded instead as a cautious and incompletely theorized step that appropriately leaves gaps for future refinement. ...

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the

community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them. n1

-Footnotes-

n1 James Madison, Remarks to the Virginia Convention (June 20, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536-37 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1836).

-End Footnotes-

The right of electing the members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. n2

-Footnotes-

n2 James Madison, Report on the Virginia Resolutions, Feb. 7, 1777, in 6 WRITINGS OF JAMES MADISON 341, 397 (Gaillard Hunt ed., 1906) In his report, Madison objects to the Sedition Act on First Amendment grounds.

-End Footnotes-

"[T]elelevision is just another appliance. It's a toaster with pictures." n3

-Footnotes-

n3 Bernard D. Nossiter, Licenses To Coin Money: The F.C.C.'s Big Giveaway Show, 240 NATION 402 (1985) (quoting Mark Fowler, former FCC Chair).

-End Footnotes-

TEXT:
[*1758] I. THE FUTURE

Imagine you had a device that combined a telephone, a TV, a camcorder, and a personal computer. No matter where you went or what time it was, your child could see you and talk to you, you could watch a replay of your team's last game, you could browse the latest additions to the library, or you could find the best prices in town on groceries, furniture, clothes -- whatever you needed.

Imagine further the dramatic changes in your life if:

- * The best schools, teachers, and courses were available to all students, without regard to geography, distance, resources, or disability;
- * The vast resources of art, literature, and science were available everywhere, not just in large institutions or big-city libraries and museums;
- * Services that improve America's health care system and respond to other important social needs were available on-line, without waiting in line, when

and where you needed them;

* You could live in many places without foregoing opportunities for useful and fulfilling employment, by "telecommuting" to your office through an electronic highway. . . ;

* You could see the latest movies, play the hottest video games, or bank and shop from the comfort of your home whenever you chose;

* You could obtain government information directly or through local organizations like libraries, apply for and receive government benefits electronically, and get in touch with government officials easily. . . . n4

-Footnotes-

n4 Administration Policy Statement, 58 Fed. Reg. 49,026 (1993).

-End Footnotes-

Thus wrote the Department of Commerce on September 15, 1993, when the federal government announced an "Agenda for Action" with respect to "the National Information Infrastructure." n5 The statement may seem weirdly futuristic, but the nation is not at all far from what it prophesies, and in ways that have already altered social and legal relations and categories.

-Footnotes-

n5 Id.

-End Footnotes-

Consider the extraordinarily rapid development of the institution of electronic mail, which lies somewhere between ordinary conversation ("voice mail") and ordinary written communication ("snail mail" or "hard mail"), or which perhaps should be described as something else altogether. E-mail has its own characteristic norms and constraints. Those norms and constraints are an important part of the informal, unwritten law of cyberspace. The norms and constraints are a form of customary law, determining how and when people [*1759] communicate with one another. n6 Perhaps there will be a formal codification movement before too long; certainly the norms and constraints are codified in the sense that, without government assistance, they are easily accessible by people who want to know what they are. n7

-Footnotes-

n6 See HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY 38-64 (1993). The area thus fortifies the analysis in ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991), of how social norms can develop lawlike constraints in the absence of actual law.

n7 LEXIS Counsel Connect has posted a statement of recommended online etiquette, which, following customary usage, it calls "netiquette." LEXIS Counsel Connect, Netiquette, Aug. 13, 1994, available online at LEXIS Counsel Connect, Discuss Menu, Browse: About the Discussion Groups Forum.

-End Footnotes-

The Commerce Department's claims about location have started to come true. What it meant to "live in California" became altogether different, after the invention of the airplane, from what it meant in (say) 1910. With the advent of new communications technologies, the meaning of the statement, "I live in California" has changed at least as dramatically. If people can have instant access to all libraries and all movies, and if they can communicate with a wide range of public officials, pharmacists, educators, doctors, and lawyers by touching a few buttons, they may as well (for most purposes) live anywhere.

In any case, the existence of technological change promises to test the system of free expression in dramatic ways. What should be expected with respect to the First Amendment?

II. THE PRESENT: MARKETS AND MADISON

There are two free speech traditions in the United States, not simply one. n8 There have been two models of the First Amendment, corresponding to the two free speech traditions. The first emphasizes well-functioning speech markets. It can be traced to Justice Holmes' great Abrams dissent, n9 where the notion of a "market in ideas" received its preeminent exposition. The market model emerges as well from Miami Herald Publishing Co. v. Tornillo, n10 invalidating a "right of reply" law as applied to candidates for elected office. It finds its most recent defining statement not in judicial decisions, but in an FCC opinion rejecting the fairness doctrine. n11

-Footnotes-

n8 The distinction is elided in the best general treatment, HARRY KALVEN JR., A WORTHY TRADITION (1992).

n9 Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

n10 418 U.S. 241 (1974).

n11 Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5054-55 (1987).

-End Footnotes-

The second tradition, and the second model, focuses on public deliberation. The second model can be traced from its origins in the work of James Madison, n12 with his attack on the idea of seditious libel, to Justice Louis Brandeis, with his suggestion that "the greatest menace to freedom is an inert [*1760] people," n13 through the work of Alexander Meiklejohn, who associated the free speech principle not with laissez-faire economics, but with ideals of democratic deliberation. n14 The Madisonian tradition culminated in New York Times v. Sullivan n15 and the reaffirmation of the fairness doctrine in the Red Lion case, n16 with the Supreme Court's suggestion that governmental efforts to encourage diverse views and attention to public issues are compatible with the free speech principle -- even if they result in regulatory controls on the owners of speech sources.

-Footnotes-

n12 See CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH at xvi-xvii (1993).

n13 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

n14 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

n15 376 U.S. 254 (1964).

n16 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

-End Footnotes-

Under the marketplace metaphor, the First Amendment requires -- at least as a presumption -- a free speech market, or in other words a system of unrestricted economic markets in speech. Government must respect the forces of supply and demand. At the very least, it may not regulate the content of speech so as to push the speech market in its preferred directions. Certainly it must be neutral with respect to viewpoint. A key point for marketplace advocates is that great distrust of government is especially appropriate when speech is at issue. Illicit motives are far too likely to underlie regulatory initiatives. For the marketplace model, Tornillo n17 is perhaps the central case. The FCC has at times come close to endorsing the market model, above all in its decision abandoning the fairness doctrine. n18 When the FCC did this, it referred to the operation of the forces of supply and demand, and suggested that those forces would produce an optimal mix of entertainment options. n19 Hence former FCC Chair Mark Fowler described television as "just another appliance. It's a toaster with pictures." n20 Undoubtedly, the rise of new communications technologies will be taken to fortify this claim. n21

-Footnotes-

n17 418 U.S. 241 (1978).

n18 See Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5055 (1987).

n19 See id.

n20 Nossiter, supra note 3, at 402.

n21 See Thomas G. Krattenmaker & L.A. Powe, Jr., Converging First Amendment Principles for Converging Communications Media, 104 YALE L.J. 1719 (1995).

-End Footnotes-

Those who endorse the marketplace model do not claim that government may not do anything at all. Of course government may set up the basic rules of property and contract; it is these rules that make markets feasible. Without such rules, markets cannot exist at all. n22 Government is also permitted to [*1761] protect against market failures, especially by preventing monopolies and

monopolistic practices. Structural regulation is acceptable so long as it is a content-neutral attempt to ensure competition. It is therefore important to note that advocates of marketplaces and democracy might work together in seeking to curtail monopoly. Of course, the prevention of monopoly is a precondition for well-functioning information markets.

- - - - -Footnotes- - - - -

n22 Thus wrote the greatest critic of socialism in the 20th century:

It is regrettable, though not difficult to explain, that in the past much less attention has been given to the positive requirements of a successful working of the competitive system than to these [previously discussed] negative points. The functioning of a competition not only requires adequate organization of certain institutions like money, markets, and channels of information -- some of which can never be adequately provided by private enterprise -- but it depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible. . . .

In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.
FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 38-39 (1944).

- - - - -End Footnotes- - - - -

Government has a final authority, though this authority does not easily fall within the marketplace model itself. Most people who accept the marketplace model acknowledge that government is permitted to regulate the various well-defined categories of controllable speech, such as obscenity, false or misleading commercial speech, and libel. n23 This acknowledgment will have large and not yet explored consequences for government controls on new information technologies. Perhaps the government's power to control obscene, threatening, or libelous speech will justify special rules for cyberspace. n24 But with these qualifications, the commitment to free economic markets is the basic constitutional creed.

- - - - -Footnotes- - - - -

n23 See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Miller v. California*, 413 U.S. 15 (1973).

n24 See *infra* part V.C.7.

- - - - -End Footnotes- - - - -

Many people think that there is now nothing distinctive about the electronic media or about modern communications technologies that justifies an additional governmental role. n25 If such a role was ever justified, they would argue, it was because of problems of scarcity. When only three television networks exhausted the available options, a market failure may have called for regulation designed to ensure that significant numbers of people were not left without their preferred programming. n26 But this is no longer a problem. With so dramatic a proliferation of stations, most people can obtain the programming

they want, or will be able to soon. n27 With cyberspace, people will be able to make or to participate in their own preferred programming in their own preferred "locations" on the Internet. With new technologies, perhaps there are no real problems calling for governmental controls, except for those designed to establish the basic framework.

-----Footnotes-----

n25 See, e.g., Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043 (1987); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 277 (1994); Krattenmaker & Powe, supra note 21.

n26 See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992).

n27 Of course, significant numbers of Americans do not have cable television -- now about 38% of households that have television -- and many citizens are without access to the Internet. NRTC Executive: DirectTV a Big Hit in the Country, MULTICHANNEL NEWS, Dec. 15, 1994, at 32 [hereinafter DirectTV a Big Hit]; see infra text accompanying notes 145-51.

-----End Footnotes-----

[*1762] The second model, receiving its most sustained attention in the writings of Alexander Meiklejohn, n28 emphasizes that our constitutional system is one of deliberative democracy. This system prizes both political (not economic) equality and a shared civic culture. It seeks to promote, as a central democratic goal, reflective and deliberative debate about possible courses of action. The Madisonian model sees the right of free expression as a key part of the system of public deliberation.

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n28 See MEIKLEJOHN, supra note 14.

-----End Footnotes-----

On this view, even a well-functioning information market n29 is not immune from government controls. Government is certainly not permitted to regulate speech however it wants; it may not restrict speech on the basis of viewpoint. But it may regulate the electronic media or even cyberspace to promote, in a sufficiently neutral way, a well-functioning democratic regime. It may attempt to promote attention to public issues. It may try to ensure diversity of view. It may promote political speech at the expense of other forms of speech. In particular, educational and public-affairs programming, on the Madisonian view, has a special place.

-----Footnotes-----

n29 See the futuristic picture in Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805 (1995), on the risks posed by such a system.

-----End Footnotes-----

I cannot attempt in this space to defend fully the proposition that the Madisonian conception is superior to the marketplace alternative as a matter

of constitutional law; n30 a few brief notes will have to suffice. The argument for the Madisonian conception is partly historical; the American free speech tradition owes much of its origin and shape to a conception of democratic self-government. The marketplace conception is a creation of the twentieth century, not of the eighteenth. As a matter of history, it confuses modern notions of consumer sovereignty in the marketplace with democratic understandings of sovereignty, symbolized by the transfer of sovereignty from the King to "We the People." The American free speech tradition finds its origin in that conception of sovereignty, which, in Madison's view, doomed the Sedition Act on constitutional grounds. n31

- - - - -Footnotes- - - - -

n30 I try to do this in SUNSTEIN, supra note 12.

n31 Id. at xvii.

- - - - -End Footnotes- - - - -

But the argument for Madisonianism does not rest only on history; it is partly evaluative as well. We are unlikely to be able to make sense of our considered judgments about free speech problems without insisting that the free speech principle is centrally (though certainly not exclusively) connected with democratic goals; n32 and without acknowledging that marketplace thinking is inadequately connected with the point and function of a system of free expression. A well-functioning democracy requires a degree of citizen participation, which requires a degree of information; n33 and large disparities [*1763] in political (as opposed to economic) equality are damaging to democratic aspirations. n34 To the extent that the Madisonian view prizes education, democratic deliberation, and political equality, it is connected, as the marketplace conception is not, with the highest ideals of American constitutionalism.

- - - - -Footnotes- - - - -

n32 See JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN, 136-38 (1994).

n33 See supra text accompanying notes 1-2.

n34 See the discussion of the fair value of political liberties in JOHN RAWLS, POLITICAL LIBERALISM 356-63 (1993).

- - - - -End Footnotes- - - - -

Some people think that the distinction between marketplace and Madisonian models is now an anachronism. n35 Perhaps the two models conflicted at an earlier stage in history; but in one view, Madison has no place in an era of limitless broadcasting options and cyberspace. Perhaps new technologies now mean that Madisonian goals can best be satisfied in a system of free markets. Now that so many channels, e-mail options, and discussion "places" are available, cannot everyone read or see what they wish? If people want to spend their time on public issues, are there not countless available opportunities? Is this not especially true with the emergence of the Internet? Is it not hopelessly paternalistic, or anachronistic, for government to regulate for Madisonian reasons?

-Footnotes-

n35 See generally KRATTENMAKER & POWE, supra note 25.

-End Footnotes-

I do not believe that these questions are rhetorical. We know enough to know that even in a period of limitless options, our communications system may fail to promote an educated citizenry and political equality. Madisonian goals may be severely compromised even under technologically extraordinary conditions. There is no logical or a priori connection between a well-functioning system of free expression and limitless broadcasting or Internet options. We could well imagine a science fiction story in which a wide range of options coexisted with little or no high-quality fare for children, with widespread political apathy or ignorance, and with social balkanization in which most people's consumption choices simply reinforced their own prejudices and platitudes, or even worse.

Quite outside of science fiction, it is foreseeable that free markets in communications will be a mixed blessing. They could create a kind of accelerating "race to the bottom," in which many or most people see low-quality programming involving trumped-up scandals or sensationalistic anecdotes calling for little in terms of quality or quantity of attention. It is easily imaginable that well-functioning markets in communications will bring about a situation in which many of those interested in politics merely fortify their own unreflective judgments, and are exposed to little or nothing in the way of competing views. n36 It is easily imaginable that the content of the most [*1764] widely viewed programming will be affected by the desires of advertisers, in such a way as to produce shows that represent a bland, watered-down version of conventional morality, and that do not engage serious issues in a serious way for fear of offending some group in the audience. n37

-Footnotes-

n36 Note in this regard The Wall Street Journal's recently released Personal Journal, which is available online. Each subscriber receives only the portion of the Journal that is "relevant" to him, which includes major headlines and news stories on the 10 corporations he has chosen to follow. See Michael Putzel, A Personal Journal from Dow Jones, BOSTON GLOBE, Feb. 6, 1995, at 19; Morning Edition: "Personal Journal" Delivers News Based on Need (NPR radio broadcast, Mar. 11, 1995).

n37 See C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 44 -- 70 (1994).

-End Footnotes-

Consider, by way of summary of existing fare, the suggestion that

TV favors a mentality in which certain things no longer matter particularly: skills like the ability to enjoy a complex argument, for instance, or to perceive nuances, or to keep in mind large amounts of significant information, or to remember today what someone said last month, or to consider strong and carefully argued opinions in defiance of what is conventionally called "balance." Its content lurches between violence of action, emotional hyperbole, and blandness of opinion. . . . Commercial TV . . . has come to present

society as a pagan circus of freaks, pseudo-heroes, and wild morons, struggles on the sand of a Colosseum without walls. It thus helps immeasurably to worsen the defects of American public education and of tabloid news in print. n38

-Footnotes-

n38 Robert Hughes, Why Watch It, Anyway?, N.Y. REV. BOOKS, Feb. 16, 1995, at 38.

-End Footnotes-

From the standpoint of the present, it is easily imaginable that the television -- or the personal computer carrying out communications functions -- will indeed become "just another appliance . . . a toaster with pictures," and that the educative or aspirational goals of the First Amendment will be lost or even forgotten.

I shall say more about these points below. n39 For now it is safe to say that the law of free speech will ultimately have to make some hard choices about the marketplace and democratic models. It is also safe to say that the changing nature of the information market will test the two models in new ways. In fact, the Supreme Court has recently offered an important discussion of the topic, Turner Broadcasting System, Inc. v. FCC. n40 Turner is also the most sustained exploration of the relationship between conventional legal categories and the new information technologies. The decision contains a range of lessons for the future.

-Footnotes-

n39 See infra part V.B.2.

n40 114 S. Ct. 2445 (1994).

-End Footnotes-

My principal purpose here is to discuss the role of the First Amendment and Madisonianism in cyberspace -- or, more simply, the nature of constitutional constraints on government regulation of electronic broadcasting, especially in the aftermath of Turner. In so doing, I will cover a good deal of ground, and a number of issues of law and policy, in a relatively short space. I do, however, offer three relatively simple goals to help organize the discussion. Most important, I attempt to make a defense of Madisonian [*1765] conceptions of free speech, even in a period in which scarcity is no longer a serious problem. The defense stresses the risks of sensationalism, ignorance, failure of deliberation, and balkanization -- risks that are in some ways heightened by new developments. In the process I discuss some of the questions that are likely to arise in the next generation of free speech law.

I have two other goals as well. I attempt to identify an intriguing and new model of the First Amendment and to ask whether that model -- the Turner model -- is well adapted to the future of the speech market. A relatively detailed and somewhat technical discussion of Turner should prove useful, because the case raises the larger issues in a concrete setting.

I also urge that, for the most part, the emerging technologies do not raise new questions about basic principle but instead produce new areas for applying or perhaps testing old principles. The existing analogies are often very good, and this means that the new law can begin by building fairly comfortably on the old. The principal problem with the old law is not so much that it is poorly adapted for current issues -- though in some cases it may be -- but that it does not depend on a clear sense of the purpose or point of the system of free expression. In building law for an age of cyberspace, government officials -- within the judiciary and elsewhere -- should be particularly careful not to treat doctrinal categories as ends in themselves. Much less should they act as if the First Amendment is a purposeless abstraction unconnected to ascertainable social goals. Instead they should keep in mind that the free speech principle has a point, or a set of points. Among its points is the commitment to democratic self-government.

III. TURNER: A NEW DEPARTURE?

The Turner case is by far the most important judicial discussion of new media technologies, and it has a range of implications for the future. I therefore begin with that case, turning to broader issues of law and policy in Part V. It is important, however, to say that Turner involved two highly distinctive problems: (a) the peculiar "bottleneck" produced by the current system of cable television, in which cable owners can control access to programming; and (b) the possible risk to free television programming created by the rise of pay television. These problems turned out to be central to the outcome in the case. For this reason, Turner is quite different from imaginable future cases involving new information technologies, including the Internet, which includes no bottleneck problem. Significantly, the Internet is owned by no one and controlled by no organization. But at least potentially, the principles in Turner will extend quite broadly. This is especially true insofar as the Court adopted ingredients of an entirely new model of the First Amendment and insofar as the Court set out principles governing content [*1766] discrimination, viewer access, speaker access, and regulation of owners of speech sources.

A. The Background

In the last decade, it has become clear that cable television will be in potential competition with free broadcasting. In 1992, motivated in large part by concerns about this form of competition, Congress enacted the Cable Television Consumer Protection and Competition Act (the Act).ⁿ⁴¹ The Act contains a range of provisions designed to protect broadcasting and local producers, and also at least nominally designed to protect certain consumers from practices by the cable industry. The relevant provisions include rate regulations for cable operators, a prohibition on exclusive franchise agreements between cable operators and municipalities, and restrictions on affiliations between cable programmers and cable operators.ⁿ⁴²

- - - - -Footnotes- - - - -

n41 47 U.S.C. §§ 534-535 (Supp. V 1993).

n42 See the outline in Turner, 114 S. Ct. at 2452-53.

- - - - -End Footnotes- - - - -

A major part of the Act was motivated by the fear that cable television's success could damage broadcast television. n43 If cable flourishes, perhaps broadcasters will fail? The scenario seems at least plausible in light of important differences in relevant technologies. Broadcast television comes, of course, from transmitting antennae. It is available for free, though in its current form, it cannot provide more than a few stations. By contrast, cable systems make use of a physical connection between television sets and a transmission facility, and through this route cable operators can provide a large number of stations. Cable operators are of course in a position to decide which stations, and which station owners, will be available on cable television; cable operators could thus refuse to carry local broadcasters. To be sure, cable operators must respond to forces of supply and demand, and perhaps they would do poorly if they failed to carry local broadcasters. But because they have "bottleneck control" over the stations that they will carry, they are in one sense monopolists, or at least so Congress appears to have thought.

-Footnotes-

n43 See S. REP. NO. 92, 102d Cong., 1st Sess. 3-4 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1135-36.

-End Footnotes-

For purposes of policymaking, an important consideration is that about forty percent of Americans lack a cable connection, and must therefore rely on broadcast stations. n44 (This is a point of general importance in light of the possibility that access to communications technology will in the future be unequally distributed.) In the Act, the potential conflict between cable and broadcast television led Congress to set out two crucial, hotly disputed provisions. Both provisions required cable operators to carry the signals of [*1767] local broadcast television stations. These "must-carry" rules were the focus of the Turner case.

-Footnotes-

n44 114 S. Ct. at 2451.

-End Footnotes-

The first provision, section 4, imposes must-carry rules for "local commercial television stations." n45 Under the Act, cable systems with more than twelve active channels and more than three hundred available channels must set aside as many as one-third of their channels for commercial broadcast stations requesting carriage. n46 These stations are defined to include all full-power television broadcasters except those that qualify as "noncommercial educational" stations. n47

-Footnotes-

n45 47 U.S.C. @ 534 (Supp. V 1993)

n46 Id. @ 534(b)(1).

n47 Id. @ 534(b)(1)(A)-(B).

-End Footnotes-

Section 5 adds a different requirement. n48 It governs "noncommercial educational television stations," defined to include (a) stations that are owned and operated by a municipality and that transmit "predominantly noncommercial programs for educational purposes" n49 or (b) stations that are licensed by the FCC as such stations and that are eligible to receive grants from the Corporation for Public Broadcasting. n50 Section 5 imposes separate must-carry rules on noncommercial educational stations. A cable system with more than thirty-six channels must carry each local public broadcast station requesting carriage; n51 a station having between thirteen and thirty-six must carry between one and three; n52 and a station with twelve or fewer channels must carry at least one. n53

-Footnotes-

- n48 Id. @ 535.
- n49 Id. @ 535(1)(1)(B).
- n50 Id. @ 535(1)(1)(A)(ii).
- n51 Id. @ 535(b)(1).
- n52 Id. @ 535(b)(3).
- n53 Id. @ 535(b)(2).

-End Footnotes-

What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable. This is a quite reasonable suggestion, for it is unlikely that market arrangements would lead to a situation in which significant numbers of Americans are entirely without access to television broadcasting. The scenario that Congress apparently feared -- a victory of cable television over the broadcasting industry, with the result that forty percent of Americans would lack television at all -- seems wildly unrealistic. Insofar as Congress was responding to the interests of local broadcasters, it may well have been catering to interest-power rather than attempting to protect otherwise deprived consumers.

Here there is a large lesson for the future. New regulations, ostensibly defended as public-interested or as helping viewers and consumers, will often [*1768] be a product of private self-interest, and not good for the public at all. It is undoubtedly true that industries will often seek government help against the marketplace, invoking public-spirited justifications for self-interested ends. n54 Whether and to what extent this is a constitutional (as opposed to a political) problem may be disputed. n55 But it points to a distinctive and legitimate concern about governmental regulation of the communications industry.

-Footnotes-

n54 This is a simple insight of public choice theory. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991).

n55 See Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 65 (D.D.C. 1993) (Williams, J., dissenting) (treating interest-group feature of case as relevant to constitutional issue), vacated and remanded, 114 S. Ct. 2445 (1994).

- - - - -End Footnotes- - - - -

The interest-group account therefore has considerable plausibility. On the other hand, some people might reasonably think that the must-carry rules were a good-faith effort to protect local broadcasters, not because of their political power, but because their speech is valuable. Their speech is valuable because it ensures that viewers will be able to see discussion of local political issues. Perhaps the must-carry rules -- especially section 5, but perhaps section 4 as well -- had powerful Madisonian justifications insofar as cable operators might choose stations that failed to offer adequate discussion of issues of public concern, especially to the local community. Other observers might invoke a different justification, also with Madisonian overtones. Perhaps the effort to protect broadcasters was a legitimate effort to safeguard the broadcasting industry, not because of the political power of the broadcasters, and not because of the content of broadcast service, but because millions of Americans must rely on broadcasters for their programming. Perhaps Congress wanted to ensure universal viewer access to the television market. On this view, the key goal behind the must-carry rules was to ensure viewer access.

Let us put these possibilities to one side and take up the constitutional issue. In Turner, the cable operators challenged sections 4 and 5 as inconsistent with the First Amendment. They did not make a distinction between section 4 and section 5; to the cable companies, both provisions were illegitimate interferences with their right to choose such programming as they wished. For obvious reasons, the government also made no such distinctions. The government wanted to defend both provisions, and a defense of section 5, by itself, would produce only a partial victory. The key aspects of the case lay in the operators' contention that both sections amounted to a form of content regulation, and that even if they should be seen as content-neutral, they were unconstitutional because inadequately justified.

B. The Genesis of the Turner Model

In its response, the Court created something very much like a new model for understanding the relationship between new technologies and the First [*1769] Amendment. This model is a competitor to the marketplace and Madisonian alternatives. And while it is somewhat unruly, it is not difficult to describe. It comes from the five basic components of the Court's response to the cable operators' challenge.

First, the Court held that cable television would not be subject to the more lenient free speech limitations applied to broadcasters. n56 On the Court's view, the key to the old broadcast cases was scarcity, and scarcity is not a problem for cable stations. To be sure, there are possible "market dysfunctions" for cable television; as noted, cable operators may in a sense be a monopoly by virtue of their "bottleneck control." But this structural fact

did not, in the Court's view, dictate a more lenient approach in the cable context. In the Court's view, the key point in the past cases had to do with scarcity.

-Footnotes-

n56 Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456-58 (1994).

-End Footnotes-

This is an especially significant holding. n57 It suggests that new technologies will generally be subject to ordinary free speech standards, not to the more lenient standards applied to broadcasters. Scarcity is rarely a problem for new technologies.

-Footnotes-

n57 It is also quite vulnerable. All goods are scarce, in a sense, and hence the scarcity rationale has never been a secure one. See Ronald H. Coase, The Federal Communications Commission, 2 J.L. & ECON. 1, 14, 20 (1959). Perhaps market failures of a certain sort justified special controls on local broadcasting. See OWEN & WILDMAN, supra note 26, at 275-76. But if this is true, the question becomes whether there are market failures, and of what sorts, rather than whether there is "scarcity." Hence the Court's crisp distinction between scarce sources and nonscarce sources is quite crude.

-End Footnotes-

Second, the Court said that the Act was content-neutral, and therefore subject to the more lenient standards governing content-neutral restrictions on speech. For the Court, the central point is that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." n58 This is because "the extent of the interference does not depend upon the content of the cable operators' programming." n59 In the Court's view, the regulations are certainly speaker-based, since we have to know who the speaker is to know whether the regulations apply; but they are not content-based, since they do not punish or require speech of a particular content.

-Footnotes-

n58 114 S. Ct. at 2460.

n59 Id.

-End Footnotes-

This holding is also quite important. It means that Congress will be permitted to regulate particular technologies in particular ways, so long as the regulation is not transparently a subterfuge for a legislative desire to promote particular points of view. It means that Congress can give special benefits to special sources, or impose special burdens on disfavored industries.

Third, the Court said that there was insufficient reason to believe that a content-based "purpose" underlay the content-neutral must-carry law. n60 Hence

the content neutrality of the law could not be impeached by an investigation of the factors that led to its enactment. The Court explored the relevant [*1770] legislative findings, which showed not only a (by hypothesis questionable n61) congressional interest in encouraging the sorts of programming offered by local broadcasters, but also a distinctive and legitimate concern that cable operators have a strong financial interest in favoring their own affiliated programmers, and in doing so at the expense of broadcast stations. The findings therefore suggested that the cable operators have an economic incentive not to carry local signals.

-Footnotes-

n60 Id. at 2461-62.

n61 It is questionable because it is content-discriminatory. In the end, content discrimination of this sort might be legitimate, see infra text accompanying notes 77-82 (discussing Justice O'Connor's analysis), but there is of course a presumption against it.

-End Footnotes-

This fact led to the important problem supporting the Act: Without the must-carry provision, Congress concluded, there would be a threat to the continued availability of free local broadcast television. n62 The elimination of broadcast television would in turn be undesirable not because broadcasters deserve protection as such -- they do not -- but because (a) broadcast television is free and (b) there is a substantial government interest in assuring access to free programming, especially for people who cannot afford to pay for television. As Congress had it, the must-carry rules would ensure that the broadcast stations would stay in business.

-Footnotes-

n62 114 S. Ct. at 2455.

-End Footnotes-

The Court said that this purpose -- the protection of access to free programming through the protection of broadcast stations -- was unrelated to the content of broadcast expression and was therefore legitimate. It was significant in this regard that for Congress to seek to protect broadcasters, Congress did not have to favor any particular kind or speech or any particular point of view. To be sure, and importantly, Congress' description of the purposes of the Act also referred to a content-based concern -- to the effect that broadcast programming is "an important source of local news[,] public-affairs programming and other local broadcast services critical to an informed electorate," and also to the judgment that noncommercial television in particular "provides educational and informational programming to the Nation's citizens." n63 On the Court's view, however, these statements did not show that the law was content-based. The acknowledgment of certain virtues of broadcast programming did not mean that Congress enacted the legislation because it regarded broadcast programming as substantively preferable to cable programming.

-Footnotes-

n63 Id.

- - - - -End Footnotes- - - - -

Fourth, the Court said that strict judicial scrutiny was not required by the fact that the provisions (a) compel speech by cable operators, (b) favor broadcast programmers over cable programmers, and (c) single out certain members of the press for disfavored treatment. n64 The fact that speech was mandated was irrelevant because the mandate was content-neutral and because [*1771] cable operators would not be forced to alter their own messages to respond to the broadcast signals. So too, the Court said that a speaker-based regulation would not face special judicial hostility so long as it was content-neutral. It was important in this regard that the regulation of this particular industry was based on the special characteristics of that industry -- in short, "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." n65 In such a case, the Court concluded, legislative selectivity would be acceptable.

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n64 Id. at 2464.

n65 Id. at 2468.

- - - - -End Footnotes- - - - -

These conclusions are also of special importance for the future. They reinforce the point that Congress may favor some industries over others. They also suggest that Congress may compel companies to give access to speakers, at least so long as (a) the companies themselves are permitted to offer the messages they favor and (b) the access rights are given out on a content-neutral basis. The Turner Court stressed the governmental goal of ensuring access to free programming for viewers; but in upholding the Act, it also said that it was legitimate to require access for speakers, so long as the requirement of content neutrality was met.

Finally, the Court explored the question whether the must-carry rules would be acceptable as content-neutral regulations of speech. Content-neutral regulations may well be invalid if they fail a kind of balancing test. n66 The Court concluded that "intermediate scrutiny" would be applied. n67 The Court said the appropriate test, drawing on familiar cases, n68 would involve an exploration whether the regulation furthers an important or substantial government interest and whether the restriction on First Amendment freedoms is no greater than necessary to promote that government interest. The Court had no difficulty in finding three substantial interests: (a) preserving free local television, (b) promoting the widespread dissemination of information from a multiplicity of sources, and (c) promoting fair competition in the market for television programming. n69 On the Court's view, each of these was both important and legitimate.

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n66 See, e.g., United States v. O'Brien, 391 U.S. 367 (1968) (requiring that speech regulation serve important government interest and be narrowly tailored to achieve that interest).

n67 114 S. Ct. at 2469.

n68 See, e.g., O'Brien, 391 U.S. at 377.

n69 114 S. Ct. at 2469.

- - - - -End Footnotes- - - - -

What is of particular interest is the fact that interests (a) and (b) are connected with Madisonian aspirations. Thus in an especially significant step, the Court suggested that a content-neutral effort to promote diversity may well be justified. In its most straightforward endorsement of the Madisonian view, the Court said that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it [*1772] promotes values central to the First Amendment." n70 Hence the Court expressed special concern, in a perhaps self-conscious echo of Red Lion, over the cable operator's "gatekeeper[] control over most (if not all) of the television programming that is channeled into the subscriber's home." n71 The Court also emphasized "[t]he potential for abuse of this private power over a central avenue of communication." n72 It stressed that the First Amendment "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." n73

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n70 Id. at 2470.

n71 Id. at 2466.

n72 Id.

n73 Id.

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On the other hand, the Court thought that it was impossible to decide the case without a better factual record than had been developed thus far. n74 As it stood, the record was insufficient to show whether the must-carry rules would serve these legitimate interests. Would local broadcasters actually be jeopardized without the must-carry rules? Here we should return to the possibility, of which the Court was surely aware, that the rules were really an effort to favor the broadcasting industry, not to help viewers.

- - - - -Footnotes- - - - -

n74 Id. at 2472.

- - - - -End Footnotes- - - - -

The Court suggested that courts should maintain a basic posture of deference to Congress' predictive judgments. n75 In its view, judges should not second-guess those judgments even if they distrust them. On the other hand, Congress' judgments would face a form of independent judicial review, designed to ensure that Congress had made "reasonable inferences based on substantial

evidence." n76 The Court therefore remanded the case to the lower court for factual findings on (a) the question whether cable operators would refuse significant numbers of broadcast stations without the must-carry rules and (b) the question whether broadcast stations, if denied carriage, would deteriorate to a substantial degree or fail altogether.

-Footnotes-

n75 Id. at 2471. This was Justice Stevens' major point; he would have affirmed rather than remanded for this reason. See id. at 2473.

n76 Id. at 2471.

-End Footnotes-

Justice O'Connor's dissenting opinion, joined by three other Justices, also deserves some discussion, since the opinion may have considerable future importance in view of the obvious internal fragmentation of the Court on these questions. Justice O'Connor insisted above all that the must-carry rules were based on content. n77 To reach this conclusion, she investigated the Act and its history to show that the nominally neutral measures were in fact designed to promote local programming. In her view, the existence of content discrimination was not decisive against the must-carry rules. It was still necessary to see whether the government could bring forward a strong interest, [*1773]. and show that the regulation promoted that interest. But Justice O'Connor found that the government could not meet its burden.

-Footnotes-

n77 Id. at 2479.

-End Footnotes-

In Justice O'Connor's view, the interest in "localism" was insufficient justification. n78 In words that have considerable bearing on what government may do with any information superhighway:

It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one. And the same is true of the interest in diversity of viewpoints: While the government may subsidize speakers that it thinks provide novel points of view, it may not restrict other speakers on the theory that what they say is more conventional. n79

-Footnotes-

n78 Id. at 2478.

n79 Id.

-End Footnotes-

Justice O'Connor referred independently to the interests in public-affairs programming and educational programming, finding that these interests are

"somewhat weightier" than the interest in localism. But in her view, "it is a difficult question whether they are compelling enough to justify restricting other sorts of speech." n80 Because of the difficulty of that question, Justice O'Connor did not say whether "the Government could set some channels aside for educational or news programming." n81 (This is of course a central issue for the future.)

-Footnotes-

n80 Id.

n81 Id. at 2479.

-End Footnotes-

In her view, the Act was too crudely tailored to be justified as an educational or public-affairs measure. The Act did not neutrally favor educational or public-affairs programming, since it burdened equally "CNN, C-Span, the Discovery Channel, the New Inspirational Network, and other channels with as much claim as PBS to being educational or related to public affairs." n82 Whether or not a neutral law favoring educational and public-affairs programming could survive constitutional scrutiny, this Act could not, for it was insufficiently neutral.

-Footnotes-

n82 Id.

-End Footnotes-

IV. THE TURNER MODEL

A. Description

I have noted that there have been two free speech traditions and two principal models of free speech. The marketplace model eschews content regulation; it is animated by the notion of consumer sovereignty. The Madisonian model may permit and even welcome content regulation; it is [*1774] rooted in an understanding of political sovereignty. There is now a third model -- the Turner model -- of what government may do. An interesting question, not fully resolved by Turner itself, has to do with the extent to which the Turner model will incorporate features of its predecessors.

The new model has four simple components. Under Turner, (a) government may regulate (not merely subsidize) new speech sources so as to ensure access for viewers who would otherwise be without free programming and (b) government may require owners of speech sources to provide access to speakers, at least if the owners are not conventional speakers too; but (c) government must do all this on a content-neutral basis (at least as a general rule); but (d) government may support its regulation not only by reference to the provision of "access to free television programming" but also by invoking such democratic goals as the need to ensure "an outlet for exchange on matters of local concern" and "access to a multiplicity of information sources." n83

-Footnotes-

n83 Id. at 2469-70.

-End Footnotes-

Remarkably, every Justice on the Court appeared to accept (a), (b), and (c) and parts of (d) (with minor qualifications). Perhaps the most notable feature of the Court's opinion is its emphasis on the legitimacy and the importance of ensuring general public (viewer) access to free programming. In this way, the Court accepted at least a modest aspect of the Madisonian ideal, connected with both political equality and broad dissemination of information. This general goal is likely to have continuing importance in governmental efforts to control the information superhighway so as to ensure viewer and listener access. The Turner Court has put its stamp of approval on that goal. Recall in particular that the government justified the must-carry rules on the theory that without those rules, ordinary broadcasters would be unable to survive. The consequence would be that people without cable would be without broadcasting at all. The Court enthusiastically accepted this claim. It said that "to preserve access to free television programming for the 40 percent of Americans without cable" was a legitimate interest. n84 This holding suggests that the government may provide access not only through subsidies, but also through regulation.

-Footnotes-

n84 Id. at 2479.

-End Footnotes-

On the other hand, the Court's quite odd refusal n85 to distinguish between sections 4 and 5 and its use of the presumption against content discrimination seem to support the marketplace model. Certainly the Court did not say that it would be receptive to content discrimination if the discrimination were an effort to promote attention to public affairs and exposure to diverse sources. The Court did not claim or in any way imply that educational and public-affairs programming could be required consistently with the First Amendment. On the contrary, it suggested that it would view any content discrimination, [*1775] including content discrimination having these goals, with considerable skepticism. The result is a large degree of confusion with respect to whether and how government may promote Madisonian aspirations. I will return to this point.

-Footnotes-

n85 See infra text accompanying notes 86-87.

-End Footnotes-

B. A Problem: Commerce vs. Public Affairs

The Court's major internal dispute involved the question whether the content neutrality of the must-carry rules was impeached by the history suggesting that Congress was particularly enthusiastic about local programming. This is an issue on which reasonable people may disagree; it turns largely on the extent to which statements in the legislative history will be used to cast light on

legislative goals. But the issue of content discrimination seems, on inspection, to rest on a matter not discussed by anyone on the Court; it is principally that matter, not the legislative history, that raises special issues about content discrimination.

More concretely: From the standpoint of traditional free speech argument, there is an obvious problem with the analysis offered by the Turner Court. Section 4 and section 5 are quite different; they appear to have different justifications. In any case, different carriage requirements in the two sections, targeted to two different kinds of broadcasting, plainly reveal content discrimination. The two sections explicitly define their correlative obligations in terms of the nature, or content, of the programming. This is proof of content discrimination.

How should that discrimination be handled? Under the Madisonian view, there is all the difference in the world between section 4 and section 5. As I have noted, section 5 imposes certain carriage requirements for educational and public-affairs stations, whereas section 4 imposes different carriage requirements for commercial stations. For Madisonians, section 5 stands on far stronger ground, since it is apparently an effort to ensure education and attention to public issues. It seems to serve straightforward democratic functions. This does not mean that it is necessarily legitimate. Perhaps Justice O'Connor's response -- to the effect that section 5 does not adequately promote that goal -- is decisive as against a Madisonian defense of section 5. But section 4 appears to stand on far weaker ground from the Madisonian standpoint. Thus Madisonians would distinguish between the two provisions and would be far more hospitable toward section 5. n86

-Footnotes-

n86 See Monroe E. Price & Donald W. Hawthorne, Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation, 17 HASTINGS COMM. & ENT. L.J. 65, 91-95 (1994), for an argument that on remand, the district court should uphold section 5 even if it finds section 4 unconstitutional.

-End Footnotes-

In fact, the Court should have analyzed the two sections differently. The validity of section 4 turned on whether the factual record could support the [*1776] idea that the section was necessary to ensure the continued availability of free public television. On this score the Court's basic solution -- a remand -- was quite reasonable, even if the statute was treated as content-based. On remand, the question would be whether content regulation of this sort was sufficiently justified as a means of saving free public television.

The analysis for section 5 should be quite different. The provision of educational and public-affairs programming is entirely legitimate, certainly if there is no substantial intrusion on speakers who want to provide another kind of programming. n87 The validity of section 5 thus should have turned on whether it was sufficiently tailored to the provision of educational and public-affairs programming. Perhaps Justice O'Connor was right in doubting whether adequate tailoring could be shown; in any case this is the issue to be decided. In short, both provisions are content-based, but this phrase should not be used as a talisman. The question was whether the content-based restrictions were

sufficiently connected with legitimate goals. An approach of this kind would have been the most reasonable one to take.

-Footnotes-

n87 Thus it could be imagined that a serious question would be raised if Congress said that a humor magazine had to educate too, or that speakers on a comedy show had to have serious bits as well.

-End Footnotes-

On the other hand, within the marketplace model, the very existence of two separate sections is problematic. Why should the government concern itself with whether stations are commercial or noncommercial? Marketplace advocates would find the Act objectionable simply by virtue of the fact that it distinguishes between commercial and noncommercial stations. To them, the fact that two different sections impose different carriage requirements shows that there is content discrimination in the Act.

Under the two prevailing free speech models, then, it would make sense either to treat section 5 along a different track from section 4 (the better approach), or to question them both as content-discriminatory on their face. Both of these approaches would have been quite plausible. Remarkably, however, no Justice in Turner took either approach. Indeed, no Justice drew any distinction at all between section 4 and section 5, and no Justice urged that the existence of two different sections showed that there was content discrimination.

This is a genuine puzzle. Why did no Justice invoke Madisonian goals to treat section 5 more generously? Why did no Justice invoke content neutrality to complain about the existence of two separate sections? As we have seen, none of the parties raised the issue, and perhaps the question was not squarely presented, permitting the Court to decide the case on a narrower and less controversial ground. Under the approach of both the majority and the dissent, it may not have been necessary to answer the hard questions of whether and how government might promote educational and public-affairs programming. [*1777] But why did no Justice suggest that the two sections embodied content discrimination? This question is much harder to answer.

Perhaps the Court had something like the following in mind. The two sections involve speakers rather than speech; they point to the nature of the station, not to the nature of the programming. Thus the Act may perhaps be understood as imposing a speaker-based restriction of the sort that the Court found legitimate insofar as the Act applied only to cable television.

On reflection, however, this response seems implausible. The kind of speaker-based restriction reflected in the two sections has everything to do with content. The definition of section 5 stations is inextricably intertwined with the speech offered by such stations. So too with the definition of section 4 stations. The Court therefore appears to have blundered in failing to find content discrimination in the existence of two separate sections. Perhaps the content discrimination could have been justified if the Court had attended to separate justifications for the two provisions, or at least the Court might have upheld section 5 if it could have met Justice O'Connor's concerns. I return to this point below.

C. A Paradox and a Provisional Solution: Madisonians and Marketeers vs. Turner?

Now let us proceed to a larger matter. As I have noted, the Turner Court did not accept a Madisonian model of free speech. The distinction between content-based and content-neutral restrictions was crucial to the opinion, and that distinction hardly emerges from a Madisonian model, which would carve up the free speech universe in a different way. But the Court certainly did not accept the marketplace model in its entirety. In addition to emphasizing the legitimacy of ensuring access to free programming -- and of doing so through regulation rather than subsidy -- the Court stressed more or less democratic justifications for the must-carry rules, including broad exposure to programming on public issues, and to a multiplicity of sources of information. It might be argued both that Turner is insufficiently responsive to marketplace concerns and that Turner is a Madisonian failure insofar as the Turner model appears to do nothing about the problem of low-quality programming and insufficient exposure to public debate.

1. The Paradox

An especially distinctive feature of the Court's opinion is its ambivalence about the legitimacy of governmental efforts to promote diversity. There is ambivalence on this score because while the Court invoked diversity as a goal, it also made its skepticism about content-based regulation quite clear, and many imaginable efforts to promote diversity are content-based. Consider the [*1778] fairness doctrine as well as many European initiatives to promote diversity in the media. n88 The Court found it necessary to insist that Congress was not trying, through the must-carry rules, to ensure exposure to local news sources.

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n88 See SUNSTEIN, supra note 12, at 77-81 (noting that several European high courts have found that governments were not merely permitted to promote diversity in the media, but were constitutionally obliged to do so); see also ELI NOAM, TELECOMMUNICATIONS IN EUROPE (1992).

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On the other hand, the Court suggested that a content-neutral effort to promote diversity may well be justified. Hence the Court offered a number of justifications for regulation of cable technology. As we have seen, the Court expressed concern over the cable operator's "gatekeeper[] control over most (if not all) of the television programming that is channeled into the subscriber's home." n89 The Court emphasized "[t]he potential for abuse of this private power over a central avenue of communication." n90 The Court stressed that the First Amendment "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." n91 And thus the Court emphasized "the importance of local broadcasting units" in promoting attention to public issues. n92 In these ways, the Turner opinion contains an echo, albeit a faint one, of the highly Madisonian analysis in Red Lion.

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n89 Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994).

n90 Id.

n91 Id.

n92 Id. at 2469.

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There is therefore an important paradox at the heart of the Turner model. The paradox emerges from (a) the presumptive invalidity of content-based restrictions, accompanied by (b) the insistence by the Court on the legitimacy of the goals of providing access to a multiplicity of sources and outlets for exchanges on issues of local concern. This is a paradox because if these goals are legitimate, content-based regulation designed to promote them might well be thought legitimate too. If government may engage in content-neutral restrictions designed self-consciously to provide access to many sources, why may it not favor certain speech directly? The most natural way to provide certain kinds of programming is through content-based regulation. n93

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n93 Cf. Metro Broadcasting v. FCC, 497 U.S. 547 (1990) (upholding affirmative action for minority owners on theory that this indirect, content-neutral approach would provide broadcasting of certain content -- even though nondiscriminatory alternative, pursuing that very same goal directly, would probably be unconstitutional).

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2. Substantive Doctrine and Institutional Constraints

The question then arises: If diversity is a legitimate goal, why might the Turner model be superior to the Madisonian model? One possible view is that the Turner model is not superior, but that it should be regarded instead as a cautious and incompletely theorized step n94 that appropriately leaves gaps for [*1779] future refinement. Perhaps the Turner model will have to be elaborated, as it clearly can be, to make clear that well-tailored efforts to promote diversity and broader democratic goals are legitimate even if they are content-based.

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n94 We might even see the outcome as an incompletely theorized agreement, a distinctive kind of judicial judgment. See Cass R. Sunstein, Incompletely Theorized Agreements, 108 HARV. L. REV. (forthcoming May 1995).

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For reasons to be suggested, this would indeed be a sensible step. But there is another point. Despite appearances, there is good reason for the Turner Court's skepticism toward content-based regulation, and the reason operates by reference to institutional considerations involving the distinctive characteristics of judge-made doctrine. Those considerations have everything

to do with the potential superiority of (not entirely accurate) rules of law over highly individuated, case-by-case judgments. This defense of Turner says not that the case reflects the best understanding of the substantive content of the free speech principle, but that it may be the best way for the Supreme Court to police that principle in light of its institutional limits.

In brief: In light of the nature of the current electronic media, in which scarcity is a decreasing problem, a presumptive requirement of content neutrality may well be the best way for judges to police objectionable governmental purposes, especially in the form of viewpoint discrimination. n95 If government favors speech of certain kinds through content regulation, there is always a risk that it is actually trying to favor certain views. For example, a regulatory requirement of discussion of abortion, or race relations, or feminism would raise serious fears to the effect that government is seeking to promote certain positions. Through insisting on content neutrality -- again, at least as a presumption -- courts can minimize the risk of impermissibly motivated legislation, and they can do so while limiting the institutional burden faced by judges making more individualized judgments. The presumption in favor of content neutrality has the fortunate consequence of making it unnecessary for courts to answer hard case-by-case questions about the legitimacy of diverse initiatives, many of which will, predictably, be based on illegitimate motivations.

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n95 See the valuable analysis in Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine (unpublished manuscript, on file with author), on which I draw for this and the preceding paragraph.

-End Footnotes-

We might thus offer a cautious defense of the Turner model over the Madisonian model. The defense would depend on the view that the Turner model may well best combine the virtues of (a) judicial administrability (a real problem for Madisonians n96), (b) appreciation of the risk of viewpoint discrimination (a real problem for Madisonians too), and (c) an understanding of the hazards of relying on markets alone (addressed by Turner insofar as the Court allows Congress considerable room to maneuver). For this reason, the [*1780] Turner model may well be better, at least in broad outline, than the Madisonian and marketplace alternatives.

-Footnotes-

n96 See Krattenmaker & Powe, supra note 21.

-End Footnotes-

3. Countervailing Considerations

There are important countervailing considerations. As indicated above, n97 the application of the Turner model to technologies other than cable raises serious problems, for cable presents the special question of "bottleneck control." Many of the other new technologies raise questions not involving anything like "bottleneck control," which was central to the resolution in

Turner. In general, regulation of the Internet raises no such problem. In Turner, moreover, the principal access issue was the right to hear; in other cases, the central issue, also one of access, will involve the right to speak. Sometimes the principal question will be whether certain speakers can have access to certain audiences. In other contexts, regulatory efforts may involve educational goals more straightforwardly, as in guarantees of free media time to candidates or in provisions to ensure public-affairs programming or programming for children.

-Footnotes-

n97 See the introduction to Part III supra.

-End Footnotes-

As I have argued, moreover, speech should not be treated as a simple commodity, especially in a period dominated by attention to sensationalistic scandals and low-quality fare. n98 In light of the cultural consequences of broadcasting -- through, for example, its effects on democratic processes and children's education -- we should not think of electronic media as "just . . . appliance[s]," or as "toaster[s] with pictures." n99 At least part of the First Amendment inquiry should turn on the relationship between what broadcasters provide and what a well-functioning democracy requires. If we have any sympathy for Brandeis' judgment -- shared by Madison n100 -- that "the greatest menace to freedom is an inert people," we will acknowledge that the marketplace model may not perform an adequate educative role, and that a system of free markets may well disserve democratic ideals.

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n98 There is of course a large and insufficiently analyzed problem: defining the relevant market. Perhaps those interested in Madisonian goals should focus on the entirety of the free speech market, seeing magazines, broadcasting, and even books as aspects of a single market, to be taken as a whole. I cannot address this issue here.

n99 See Nossiter, supra note 3.

n100 See supra text accompanying note 1.

-End Footnotes-

Of course there are hard issues about which bodies are authorized to decide what programming ought to be offered. n101 But the Turner model is vulnerable insofar as it brackets the deeper issues and addresses Madisonian concerns with the useful but crude doctrinal categories "content-based" and "content-neutral." Those categories are crude because they are not tightly [*1781] connected with any plausible conception of the basic point or points of a system of free speech.

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n101 See KRATTENMAKER & POWE, supra note 25 (stressing this problem).

-End Footnotes-

Some qualifications of the Turner model, pointing in Madisonian directions, are therefore desirable. The majority does not foreclose such qualifications, and Justice O'Connor's dissenting opinion actually makes some space for arguments of this sort. I will suggest some important qualifications that are nonetheless consistent with the general spirit of Turner itself.

V. SPEECH, EMERGING MEDIA, AND CYBERSPACE

A. New Possibilities and New Problems: Referenda in Cyberspace and Related Issues

It should be unnecessary to emphasize that the explosion of new technologies opens up extraordinary new possibilities. As the Department of Commerce's predictions suggest, ordinary people might ultimately participate in a communications network in which hundreds of millions of people, or more, can communicate with each other and indeed with all sorts of service providers -- libraries, doctors, accountants, lawyers, legislators, shopkeepers, pharmacies, grocery stores, museums, Internal Revenue Service employees, restaurants, and more. If you need an answer to a medical question, you may be able to push a few buttons and receive a reliable answer. If you want to order food for delivery, you would be able to do so in a matter of seconds. If you have a question about sports or music or clothing, or about the eighteenth century, you could get an instant answer. People can now purchase many goods on their credit cards without leaving home. It may soon be possible to receive a college education without leaving home. n102 As I have suggested, the very notions of "location" and "home" will change in extraordinary ways.

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n102 See In 2050, Computers May Be Collegian's "Campus", CHI. TRIB., Nov. 7, 1994, at 4. It is revealing that many of the footnotes in this Essay come from newspapers and weekly news magazines. With respect to communications technologies, development is occurring so rapidly that other sources are often obsolete upon publication.

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Many of the relevant changes have already occurred. Consider the fact that in 1989, there were about 47.5 million cable television subscribers, accounting for 52.5% of television households -- whereas by 1995, there were 59 million subscribers, accounting for 61.8% of television households. n103 Consider the following chart: n104 [*1782]

Year	Millions of TV Households	Millions of Homes Passed by Cable	Homes Passed as a % of TV Homes	Millions of Cable Households	Cable Subscribers as a % of Homes Passed	Cable Penetration of TV Households (%)
1989	90.4	80.0	88.5	47.5	59.4	52.5
1990	92.1	84.4	91.6	50.5	59.8	54.8
1991	93.1	87.2	93.7	52.6	60.3	56.5
1992	92.1 n105	88.9	96.5	54.3	61.1	59.0
1993	93.1	90.1	96.8	56.2	62.4	60.4
1994	94.2	91.3	96.9	57.2	62.7	60.7

1995 95.4 92.5 97.0 59.0 63.8 61.8

104 Yale L.J. 1757, *1782

-----Footnotes-----

n103 See DirecTv a Big Hit, supra note 27.

n104 Id.

n105 Revised downward based on 1990 census.

-----End Footnotes-----

TABLE 1.

The number of subscribers to major online services is also increasing rapidly, with 6.3 million American subscribers. n106 Consider also the following chart: n107

Technology	Number of Users
Internet	30-40 million
CompuServe	2,700,000
America Online	2,300,000
Prodigy	2,000,000
The WELL	11,000
Women's Wire	1300

-----Footnotes-----

n106 On-Line Computer Services Had Another Boom Year, Survey Says, L.A. TIMES, Jan. 14, 1995, at D2.

n107 This chart was compiled on the basis of data in John Flinn, The Line on On-Line Services, S.F. EXAMINER, Mar. 1, 1995, at B1, and Philip Elmer-DeWitt, Welcome to Cyberspace, TIME, Spring 1995 (Special Issue), at 9. In some countries the number of Internet users has grown more than 1000% in the past three years. Id.

-----End Footnotes-----

TABLE 2.

The forerunners of the "information superhighway" are thus increasingly available to large numbers of people. In this Section, I discuss some large and general questions about communications in a democracy; I turn to more specific policy issues in Sections B and C.

[*1783] 1. Economics and Democracy

Technological developments enjoyed by so many people bring with them extraordinary promise and opportunities from the standpoints of both Madisonianism and the marketplace. From nearly n108 any point of view, nostalgia for preexisting speech markets makes little sense.

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n108 The qualification is necessary because of threats posed by the new technologies to the possibility of commonly shared experience and to exposure to positions contrary to one's own. See infra text accompanying notes 121-28.

- - - - -End Footnotes- - - - -

The economic point is obvious, for the costs of transacting -- of obtaining information and entering into mutually beneficial deals -- will decrease enormously, and hence it will be much easier for consumers to get what they want, whatever it is that they want. To say the least, a shopping trip -- for groceries, books, medicines, housing, trial transcripts, clothing -- will be much simpler than it now is; it may well be significantly simpler now than it was when this Essay was first written. n109 In these ways the new information technologies are a great boon.

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n109 See Barrett Seaman, *The Future Is Already Here*, TIME, Spring 1995 (Special Issue), at 30-33.

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At the same time, and equally important, there are potential democratic gains, since communication among citizens and between citizens and their representatives will be far easier. Citizens may be able to express their views to public officials and to receive answers more effectively. To state a view or ask a question on the issue of the day, no town meeting need be arranged. High-quality, substantive discussions may well be possible among large numbers of people; town meetings that are genuinely deliberative may become commonplace. Voting may occur through the Internet. This is one of the most intriguing features of cyberspace. n110 It will be possible to obtain a great deal of information about candidates and their positions.

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n110 See generally RHEINGOLD, supra note 6.

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In fact much of this has already occurred. The practice of journalism has changed in the sense that reporters communicate regularly with readers. n111 Before the 1994 elections, public library computers delivered considerable information about the candidates via the World Wide Web of the Internet. n112 The Web also allows people to see photographs of candidates and to have access to dozens of pages of information about them and their positions. The Web may be used nationally for these purposes as early as 1996. A number of elected officials -- in the White House, the Senate, and the House -- now have e-mail addresses and communicate with their constituents in cyberspace.

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n111 See David S. Jackson, *Extra! Readers Talk Back!*, TIME, Spring 1995 (Special Issue), at 60.

n112 Peter H. Lewis, Voters and Candidates Meet on Information Superhighway, N.Y. TIMES, Nov. 6, 1994, at 30.

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In Minnesota, five candidates for governor and three candidates for the senate participated in debates on electronic mail. n113 In 1993, President [*1784] Clinton established connections with millions of e-mail users, putting his address into their system and inviting them to give reactions on public issues. Candidates generally are obtaining and publicizing e-mail addresses. n114 Thus presidential candidate Lamar Alexander launched his campaign with a forum via America Online, in which he spoke to all those who chose to join the forum. n115 The Madisonian framework was based partly on the assumption that large-scale substantive discussions would not be practicable. n116 Technology may well render that assumption anachronistic.

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n113 Id.

n114 See Howard Fineman with Stephen A. Tuttle, The Brave New World of Cybertribes, NEWSWEEK, Feb. 27, 1995, at 30-33.

n115 See id. at 30.

n116 See THE FEDERALIST No. 70 (Alexander Hamilton).

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The result may be of particular benefit for people of moderate or low income. People without substantial means may nonetheless make their views heard. So too relatively poor candidates may be able to communicate more cheaply. n117 In this way the new communications technologies may relieve some of the pressure for campaign finance restrictions by promoting the Madisonian goal of political equality. n118 In the midst of economic inequality, perhaps technological advances can make political equality a more realistic goal. n119

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n117 See Lewis, supra note 112.

n118 Thus Madison listed "establishing a political equality among all" as the first means of combatting the "evil" of parties. See James Madison, Parties, NAT'L GAZETTE, Jan. 23, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 197-98 (Robert A. Rutland et al. eds., 1983). On the risks of government by referendum, see DAVID B. MAGLEBY, DIRECT LEGISLATION (1984).

n119 See the discussion of Vice President Gore's proposals in RHEINGOLD, supra note 6, at 304, which calls for avoiding "information haves" and "have-nots."

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Moreover, education about public issues will be much simpler and cheaper. The government, and relevant interest groups, will be able to state their

cases far more easily. And after touching a few buttons, people will be able to have access to substantial information about policy dilemmas -- possible wars, environmental risks and regulations, legal developments, trials, medical reform, and a good deal more. Consider as simply one example, the astonishing service LEXIS Counsel Connect. With this service a lawyer can have access to essentially all proposed laws. A lawyer can also join substantive "discussion groups," dealing with, for example, the Simpson trial, recent tax developments, risk regulation, securities arbitration, affirmative action, LEXIS Counsel Connect, cyberspace, the First Amendment in cyberspace, and much more. The proliferation of law-related discussion groups on law-related topics is one tiny illustration of a remarkable cultural development. Thus the Usenet includes more than 10,000 discussion groups, dealing with particle physics, ring-tailed lemurs, and Rush Limbaugh, among countless others. n120

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n120 Elmer-DeWitt, supra note 107, at 4, 9-10. A special advantage of the Internet is its grassroots, "bottom-up" quality. In contrast to the mass media, in which a large broadcaster speaks to millions, the Internet allows individual citizens to spread news or commentary to one person, or to hundreds, or to thousands, or to millions. The problem of access to the media is in this respect greatly reduced. A decentralized system has the distinct virtue of promoting Jeffersonian aspirations to citizenship.

-End Footnotes-

[*1785] 2. Dangers

At least from the standpoint of the founding era, and from the standpoint of democratic theory, the new technology also carries with it significant risks. There are two major problems. The first is an absence of deliberation. The second is an increase in social balkanization.

a. Absence of Deliberation

The Madisonian view of course places a high premium on public deliberation, and it disfavors immediate and inadequately considered governmental reactions to pressures from the citizenry. n121 The American policy is a republic, not a direct democracy, and for legitimate reasons; direct democracy is unlikely to provide successful governance, for it is too likely to be free from deliberation and unduly subject to short-time reactions and sheer manipulation. From the inception of the American system a large point of the system of republicanism has been to "refine and enlarge the public view" through the system of representation. n122

-Footnotes-

n121 See THE FEDERALIST No. 10 (James Madison); see also JOSEPH M. BESSETTE, THE MILD VOICE OF REASON (1994).

n122 THE FEDERALIST No. 10 (James Madison).

-End Footnotes-

This process of refinement and enlargement is endangered by decreased costs of communication. As I have noted, discussions in cyberspace may well be both substantive and deliberative; electronic mail and the Internet in particular hold out considerable promise on this score. n123 But communications between citizens and their representatives may also be reactive to short-term impulses, and may consist of simple referenda results insufficiently filtered by reflection and discussion.

-Footnotes-

n123 See supra text accompanying note 120 (discussing LEXIS Counsel Connect); see also RHEINGOLD, supra note 6.

-End Footnotes-

In the current period, there is thus a serious risk that low-cost or costless communication will increase government's responsiveness to myopic or poorly considered public outcries, or to sensationalistic or sentimental anecdotes that are a poor basis for governance. Although the apparent presence of diverse public voices is often celebrated, electoral campaigns and treatment of public issues already suffer from myopia and sensationalism, n124 and in a way that compromises founding ideals. On this count it is hardly clear that new technologies will improve matters. They may even make things worse. The phenomenon of "talk radio" has achieved considerable attention in this regard. It is surely desirable to provide forums in which citizens can speak with one [*1786] another, especially on public issues. But it is not desirable if government officials are reacting to immediate reactions to misleading or sensationalistic presentations of issues.

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n124 See generally SHANTO IYENGAR, IS ANYONE RESPONSIBLE? (1992); SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS (1987); PHYLLIS KANISS, MAKING LOCAL NEWS (1989). See also STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 33-51 (1993).

-End Footnotes-

Ross Perot's conception of an "electronic town meeting" is hardly consistent with founding aspirations, at least if the meeting has the power to make decisions all by itself. Democracy by soundbite is hardly a perfect ideal. New technologies may make democracy by soundbite far more likely. Everything depends on how those technologies are deployed in communicating to public officials.

We can make these points more vivid with a thought experiment. Imagine that through the new technologies, the communications options were truly limitless. Each person could design his own communications universe. Each person could see those things that he wanted to see, and only those things. Insulation from unwelcome material would be costless. Choice of particular subjects and points of view would be costless too. Would such a system be a communications utopia? Would it fulfill First Amendment aspirations? n125

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n125 For a description of the possibility of such a system, see Volokh, supra note 29.

- - - - -End Footnotes- - - - -

The answer is by no means simple. Of course a system of this kind would have advantages. It might well overcome some of the problems produced by extremes of wealth and poverty, at least insofar as poor people could both speak and hear far more cheaply. But the aspiration to an informed citizenry may not be well served. Under the hypothesized system, perhaps most people would be rarely or poorly informed. Perhaps their consumption choices would disserve democratic ideals. n126 If the system of free expression is designed to ensure against an "inert people," we cannot know, a priori, whether a system of well-functioning free markets would be desirable.

- - - - -Footnotes- - - - -

n126 On the issue of choice, see infra part V.B.2.

- - - - -End Footnotes- - - - -

b. Balkanization and Self-Insulation

The hypothesized system would have another problem: It would allow people to screen out ideas, facts, or accounts of facts that they find disturbing. In the current system, people are often confronted with ideas and facts that they find uncongenial. This is an important democratic good; it promotes education and discussion. A well-functioning system of free expression is one in which people are exposed to ideas that compete with their own, so that they can test their own views and understand other perspectives even when they disagree. This process can produce a capacity for empathy and understanding, so that other people are not dehumanized even across sharp differences in judgment and perspective. Important forms of commonality and respect might emerge simply by virtue of presenting the perspectives of others from others' points of view.

[*1787] A system of individually designed communications options could, by contrast, result in a high degree of balkanization, in which people are not presented with new or contrary perspectives. Such a nation could not easily satisfy democratic and deliberative goals. In such a nation, communication among people with different perspectives might be far more difficult than it now is; mutual intelligibility may become difficult or even impossible. In such a nation, there may be little commonality among people with diverse commitments, as one group caricatures another or understands it by means of simple slogans that debase reality and eliminate mutual understanding.

These suggestions are far from hypothetical. They capture a significant part of the reality of current communications in America. They create serious political risks.

3. A Caution About Responses

It is far from clear how government can or should overcome these various problems. Certainly government should not be permitted to censor citizen efforts to communicate with representatives, even if such communications carry risks to deliberative ideals. It does seem clear, however, that government

should be cautious about spurring on its own the use of new technologies to promote immediate, massive public reactions to popular issues. Government by referendum is at best a mixed blessing, with possible unfortunate consequences wherever it is tried. n127 The electronic media should not be used to create a form of government by referendum. Regulatory efforts to facilitate communication need not be transformed into an effort to abandon republican goals.

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n127 See generally MAGLEBY, supra note 118.

-End Footnotes-

Rather than spurring referenda in cyberspace, or referenda by soundbite, government should seek to promote deliberation and reflection as part of the process of eliciting popular opinion. n128 Any such efforts might well be made part of a general strategy for turning new communications technologies to constitutional ends. As we have seen, electronic mail has considerable promise on this score.

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n128 See the discussion of the deliberative opinion poll in JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION 1-2, 84 (1991).

-End Footnotes-

B. Some Policy Dilemmas

A large question for both constitutional law and public policy has yet to receive a full democratic or a judicial answer: To what extent, if any, do Madisonian ideals have a place in the world of new technologies, or in cyberspace? Some people think that the absence of scarcity eliminates the [*1788] argument for governmental regulation, at least if it is designed to promote attention to public issues, to increase diversity, or to raise the quality of public debate. n129 If outlets are unlimited, why is regulation of any value? In the future, people will be able to listen to whatever they want, perhaps to speak to whomever they choose. Ought this not to be a constitutional ideal?

-Footnotes-

n129 See KRATENMAKER & POWE, supra note 25.

-End Footnotes-

The question is meant to answer itself, but perhaps enough has been said to show that it hardly does that. Recall first that structural regulation, assigning property rights and making agreements possible, is a precondition for well-functioning markets. Laissez-him is a hopeless misdescription of free markets. A large government role, with coercive features, is required to maintain markets. Part of the role also requires steps to prevent monopoly and monopolistic practices.

Moreover, Madisonian goals need not be thought anachronistic in a period of infinite outlets. In a system of infinite outlets, the goal of consumer sovereignty may well be adequately promoted. That goal has a distinguished place in both law and public policy. But it should not be identified with the Constitution's free speech guarantee. The Constitution does not require consumer sovereignty; for the most part, the decision whether to qualify or replace that goal with Madisonian aspirations should be made democratically rather than judicially. A democratic citizenry armed with a constitutional guarantee of free speech need not see consumer sovereignty as its fundamental aspiration. n130 Certainly it may choose consumer sovereignty if it likes. But it may seek instead to ensure high-quality fare for children, even if this approach departs from consumer satisfaction. It may seek more generally to promote educational and public-affairs programming.

-Footnotes-

n130 It is revealing in this regard that many European nations do not identify their free speech principle with consumer sovereignty. See SUNSTEIN, supra note 12, at 77-81. The experience of the Bundesverfassungsgericht (German Constitutional Court) is of special interest, for the Court has self-consciously decided that democratic aspirations require the government to regulate the broadcast media to create a forum for speakers with a broad range of interests and opinions. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 227-33 (1994); CASS R. SUNSTEIN, supra note 12, at 77-79 (discussing recent Bundesverfassungsgericht cases).

-End Footnotes-

The choice between these alternatives should be made through the political branches rather than as a matter of constitutional law. In this Section, I try to support this basic conclusion, and to do so in a way that is attuned to many of the pathologies of "command-and-control" regulation. The goal for the future is to incorporate Madisonian aspirations in a regulatory framework that is alert to the difficulty of anticipating future tastes and developments, that sees that incentives are better than commands, and that attempts to structure future change rather than to dictate its content.

[*1789] 1. Advertising

It is commonly thought that viewers and listeners purchase a communications product, and that their purchase decisions should be respected; but this picture is not altogether right. The decisions of viewers and listeners are different from most consumption decisions, in the sense that viewers and listeners often pay nothing for programming, and often they are, in a sense, the product that is being sold. For much commercial programming, a key source of revenues is advertisers, and programmers deliver viewers to advertisers in return for money. For this reason the broadcasting market is not a conventional one in which people purchase their preferred products. People's viewing and listening time is bought and sold.

There is an important consequence for the substantive content of broadcasting: What is provided in a communications market is not the same as what viewers would like to see. Advertisers have some power over the content of communication, for they may withdraw their support from disfavored programming. They may withdraw their support not simply because the programming does not

attract viewers, but also because (a) the programming is critical of the particular advertisers, (b) it is critical of commerce in general, (c) it stirs up a controversial reaction from some part of the audience, or (d) it is "depressing" or creates "an unfavorable buying atmosphere." There is a great deal of evidence that advertiser control does affect the content of programming. n131 Controversial programs have been punished; presentations of contested issues, such as abortion, have been affected by advertisers' goals. n132

-Footnotes-

n131 See the extensive discussion in BAKER, supra note 37, at 44-70; see also SUNSTEIN, supra note 12, at 62-66.

n132 See BAKER, supra note 37, at 55-65.

-End Footnotes-

In an era of numerous options, the influence of advertising over programming content should be less troublesome, since controversial points of view should find an outlet. Certainly there is no such problem on the Internet. But there will nonetheless continue to be a structural problem in broadcasting markets, since viewers' demand for programs will not be fully responsible for the programs that are actually provided. Many imaginable proposals could help counter this problem. Such proposals should not be found unconstitutional even if consumer sovereignty is the overriding policy goal. n133

-Footnotes-

n133 See id. at 83-117.

-End Footnotes-

2. "Choice" and Culture

If we put the questions raised by advertisers to one side, we might urge that there is a decisive argument in favor of the marketplace model and against Madisonianism. The marketplace ideal values "choice," whereas the [*1790] Madisonian alternative can be seen to reflect a form of dangerous paternalism, or disrespect for people's diverse judgments about entertainment options. n134 Perhaps Madisonianism is illiberal insofar as it does not respect the widely divergent conceptions of the good that are reflected in consumption choices.

-Footnotes-

n134 See, e.g., Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5052 (1987); KRATTENMAKER & POWE, supra note 25.

-End Footnotes-

The argument is certainly plausible. In most arenas, consumers are allowed to choose as they wish, and governmental interference requires special justification. But in this context, at least, the argument from choice is quite unconvincing, for it wrongly takes people's consumption choices as definitive or exhaustive of "choice." In fact the notion of "choice" is a complex one that admits of no such simple understanding. n135 In a democratic society, people

make choices as citizens too. They make choices in democratic arenas as well as in stores and before their computers. What those choices are depends on the context in which they are made.

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n135 See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190-216 (1993).

-End Footnotes-

For this reason, the insistence on respect for "choice," as a defense of the marketplace model, sets up the legal problem in a question-begging way. People do make choices as consumers, and these choices should perhaps be respected. But those choices are heavily geared to the particular setting in which they are made -- programming consumption. They do not represent some acontextual entity called "choice." In fact there is no such acontextual entity. n136

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n136 See Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. CHI. L. REV. 1, 78-79 (1995); Amartya Sen, Internal Consistency of Choice, 61 ECONOMETRICA 495 (1993).

-End Footnotes-

The question is not whether or not to respect "choice," but what sorts of choices to respect. More particularly, the question is whether to allow democratic choices to make inroads on consumption choices. In a free society, consumption choices should usually be respected. But the Constitution does not require this result, and in some settings democratic judgments contrary to consumption choices are legitimate. For example, a requirement that broadcasters provide free media time for candidates might well receive broad public support, even if viewers would, at the relevant time, opt for commercial programming. n137 There should be no constitutional barrier to such a requirement.

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n137 Of course it is possible that any regulatory requirements would be futile, since people might simply change the channel, or cease watching at all. This may be a good objection, as a matter of policy, to any particular initiative. The important point is that it is an objection of policy, not of constitutional law.

-End Footnotes-

The central point is that in their capacity as citizens assessing the speech market, people may well make choices, or offer considered judgments, that diverge from their choices as consumers. n138 Acting through their elected representatives, the public may well seek to promote (for example) educational [*1791] programming, attention to public issues, and diverse views. Perhaps the public -- or a majority acting in its democratic capacity -- believes that education and discussion of public issues are both individual and collective goods. Any system of expression has cultural consequences; it helps create and sustain a certain kind of culture. Perhaps the public wants to ensure a

culture of a certain sort, notwithstanding consumption choices. n139 Perhaps it seeks to protect children and adolescents, and sees regulation of broadcasting as a way of accomplishing that goal. Perhaps people believe that their own consumption choices are less than ideal, and that for justice-regarding or altruistic reasons, or because of their basic commitments and judgments, regulations should force broadcasters or cable operators to improve on existing low-quality fare.

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n138 See HOWARD MARGOLIS, SELFISHNESS, ALTRUISM, AND RATIONALITY (1987); Cass R. Sunstein, Preferences and Politics, 20 PHIL. & PUB. AFF. 3 (1991).

n139 Compare the discussion of the right to free speech in RAZ, supra note 32, at 131-54.

If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option. Id. at 39.

-End Footnotes-

Perhaps people seek and hence choose to ensure something like a political community, not in the sense of a place where everyone believes the same thing, but in the sense of a polity in which people are generally aware of the issues that are important to the future of the polity. Perhaps people think that the broadcasting media should have a degree of continuity with the educational system, in the sense that broad dissemination of knowledge and exposure to different views are part of what citizens in a democratic polity deserve. Perhaps people believe that many citizens do not value certain high-quality programming partly because they have not been exposed to it, and perhaps experiments are designed to see if tastes for such programming can be fueled through exposure. n140

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n140 Cf. JON ELSTER, SOUR GRAPES (1983) (discussing adaptive preferences); Sushil Bikhchandani et al., A Theory of Fads Fashion, Custom and Culture Change as Informational Cascades, 100 J. POL. ECON. 992 (1992) (theorizing that because decisions based upon limited information are fragile, relatively unimportant new information may radically shift social equilibria).

-End Footnotes-

Would measures stimulated by such thoughts be objectionable, illegitimate, or even unconstitutional? Would they interfere in an impermissible way with something called "choice"? I do not believe so. Surely any such efforts should be policed by courts, so as to ensure that government is not discriminating against or in favor of certain viewpoints. The mere fact that the democratic majority seeks to overcome consumption choices is not legitimating by itself; the democratic judgment may be unacceptable if it involves viewpoint discrimination or content discrimination suggestive of viewpoint bias. But rightly conceived, our constitutional heritage does not disable the public,

acting through the constitutional channels, from improving the operation of the speech market in the ways that I have suggested. Whether it should do so is a question to be answered democratically rather than judicially.

[*1792] 3. Analogies

An important issue for the future involves the use of old analogies in novel settings. The new technologies will greatly increase the opportunities for intrusive, fraudulent, harassing, threatening, libelous, or obscene speech. n141 With a few brief touches of a finger, a speaker is now be able to communicate to thousands or even millions of people -- or to pinpoint a message, perhaps a commercial, harassing, threatening invasive message, to a particular person. A libelous message, or grotesque invasions of privacy, can be sent almost costlessly. Perhaps reputations and lives will be easily ruined or at least damaged. There are difficult questions about the extent to which an owner of a computer service might be held liable for what appears on that service. n142

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n141 See, e.g., Anne Wells Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces, 104 YALE L.J. 1639 (1995); Lawrence Lessig, The Path of Cyberlaw, 104 YALE L.J. 1743 (1995); Volokh, supra note 29.

n142 See infra note 169, discussing S. 314, the proposed Communications Decency Act of 1995.

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At this stage, it remains unclear whether the conventional legal standards should be altered to meet such problems. For the most part, those standards generally seem an adequate start and must simply be adapted to new settings. For purposes of assessing cyberspace, there are often apt analogies on which to draw. In fact the legal culture has no way to think about the new problems except via analogies. The analogies are built into our very language: e-mail, electronic bulletin boards, cyberspace, cyberspaces, n143 and much more. n144

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n143 See Branscomb, supra note 141.

n144 See Lessig, supra note 141, at 1744; see also Cass R. Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741 (1993); Cass R. Sunstein, Political Conflict and Legal Judgment, 1996 THE TANNER LECTURES IN HUMAN VALUES (forthcoming).

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Thus, for example, ordinary mail provides a promising foundation on which to build the assessment of legal issues associated with electronic mail. It is far from clear that the standards for libelous or fraudulent communication must shift with the new technologies. To be sure, there will be new and somewhat vexing occasions for evaluating the old standards. Judges may not understand the novel situations, especially those involving the Internet. In particular, the low cost of sending and receiving electronic mail, and of sending it to

thousands or millions of people, may produce some new developments and put high pressure on old categories. Certainly it is likely that new and unanticipated problems will arise and a degree of judicial caution is therefore desirable in invoking the First Amendment. But it is by no means clear that the basic principles will themselves have to be much changed.

4. Access

I have noted that the government has said that "universal access" is one of its goals for the information superhighway. The question of access has [*1793] several dimensions. To some extent it is designed to ensure access to broadcasting options for viewers and listeners -- the central problem in Turner. Here a particular concern is that poor people should not be deprived of access to a valuable good. Currently the expense of Internet connections is prohibitively high for many families. This may entail a form of disenfranchisement and to some extent the problem is to ensure access for certain speakers who want to reach part of the viewing or listening public. In cyberspace, of course, people are both listeners and speakers.

Perhaps the goal of universal viewer or listener access should be viewed with skepticism. The government does not guarantee universal access to cars, or housing, or food, or even health care. It may seem puzzling to suggest that universal access to information technologies is an important social goal. But the suggestion can be shown to be less puzzling than it appears. Suppose, for example, that a certain network becomes a principal means by which people communicate with their elected representatives; suppose that such communications become a principal part of public deliberation and in that way ancillary to the right to vote. Suppose too that companies engage in a form of "electronic redlining," in which they bypass poorer areas, both rural and in the inner city. n145 We know that a poll tax is unconstitutional because of its harmful effects on political equality. n146 On a broadly similar principle, universal access to the network might be thought desirable. To be sure, such access would be most unlikely to be constitutionally mandated, since the right to vote is technically not involved. But universal access could be seen to be part of the goal of political equality. More generally, universal access might be necessary if the network is to serve its intended function of promoting broad discussion between citizens and representatives. It is notable that at least seven million Americans, most of whom are poor, lack telephones, and hence are without basic access. n147

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n145 Suneel Ratan, A New Divide Between Haves and Have-Nots?, TIME, Spring 1995 (Special Issue), at 25, 26.

n146 See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).

n147 See Ratan, supra note 145, at 26.

- - - - -End Footnotes- - - - -

The point might be generalized. For any particular speaker, part of the advantage of having access to a certain means of communication is that everyone, or almost everyone, or a wide range of people, can be reached. The Postal Service, for example, is justified in part on the ground that a national

system of mail is necessary or at least helpful for those who send mail; we can be assured that any letter can reach everyone. The claim is controversial. But perhaps a requirement of universal access can be justified not as an inefficient n148 effort to subsidize people who would be without service, but on the quite different ground that universal service is a way of promoting the [*1794] communicative interests of those who already have service. The interests of the latter group may well be promoted by ensuring that they can reach everyone, or nearly everyone.

-Footnotes-

n148 It is likely to be inefficient when compared with subsidies for people who are unable to afford access.

-End Footnotes-

Arguments of this kind have been used throughout the history of telecommunications regulation. For most of the twentieth century, there have been cross-subsidies, as local companies with local monopolies have charged high prices to certain customers (usually businesses) with which they subsidized less profitable services. Perhaps a similar model would make sense for modern technologies. The issue is already receiving considerable public attention. n149

-Footnotes-

n149 See Vice President Gore's suggestions, outlined in RHEINGOLD, supra note 6, at 11.

-End Footnotes-

There are, however, significant inefficiencies in this model of cross-subsidization, n150 and a system of open-ended competition may well be better than one based on universal access. It may be that open-ended competition will provide universal access in any case, or something very close to it. Or it may be that open-ended competition, combined with selective subsidies, would be better than the regulatory approach. This question cannot easily be answered in the abstract. Certainly debate over universal access should not be resolved by constitutional fiat. This is an area for public debate and a large degree of experimentation.

-Footnotes-

n150 See STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

-End Footnotes-

5. Incentives Rather than Command-and-Control

In general, any regulatory controls should take the form of flexible incentives rather than rigid commands. Command-and-control systems are usually ineffective in achieving their own goals; they tend to promote interest-group power, in which well-organized private groups are able to use governmental authority to redistribute wealth or opportunities in their favor; they also tend to be inefficient. n151

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n151 See generally Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 13 COLUM. J. ENVTL. L. 171 (1988). A vigorous popular treatment is PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994). FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960), can well be read as a sustained attack on command-and-control regulation, and what Hayek says bears directly on efforts to regulate emerging technologies.

-End Footnotes-

I cannot discuss this issue in detail here, but the explosion of new technologies reinforces the point. It is predictable that owners of some services will attempt to obtain governmental aid to disadvantage actual or potential competitors. n152 Especially in an era of rapid and only partly foreseeable technological change, the government's basic duty is to provide a framework for competitive development, n153 rather than specification of end-states. Any [*1795] such specifications will likely prove counterproductive in light of developments that cannot now be predicted.

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n152 See, e.g., The Cable Act, 47 U.S.C. @@ 534-535 (Supp. V 1993); supra text accompanying notes 54-55.

n153 This is a Hayekian point connected with the difficulty of foreseeing the future. See HAYEK, supra note 151.

-End Footnotes-

This is not to say that government regulation has no place, or even that government should restrict itself to the task of ensuring well-functioning markets. But even good Madisonians should insist that rigid dictates ought to be avoided. Regulation will do far better if it takes the form of incentives rather than mandates. Consider, as possible forerunners of future approaches, the FCC's use of auction systems accompanied by the grant of "points" toward licensing n154 for preferred licensees. Consider too the use of government subsidies to public broadcasting or to certain high-quality programs, or the transfer of resources from commercial broadcasters for the benefit of noncommercial, educational, or public-affairs programming. Initiatives of this sort would not mandate particular results but instead would create pressures to improve the speech market.

-Footnotes-

n154 Consider the FCC's quite promising auction system, in which points are granted to minority and women applicants. See John McMillan, Selling Spectrum Rights, J. ECON. PERSP., Summer 1994, at 145.

-End Footnotes-

C. Law

The ultimate shape of constitutional constraints on regulation of the electronic media cannot be foreseen. Too many new possibilities will come into view. Too many distinctions will become relevant. Consider, for example, the fact that for many dozens of years, there has been a clear difference between two different kinds of communication. The first is ordinary broadcasting or publishing, in which an owner makes available a certain range of communications; offers that range of communications as an indivisible package for hundreds, thousands, or millions of subscribers; and sells advertising time for commercial interests. The second involves the mail, in which one person typically sends a message to another, or in which one person might send a message to a group of people; in any case mail involves highly differentiated, rather than indivisible, communication, in the sense that no single "package" is made available to wide ranges of people. Moreover, no advertisers need be involved. Many of the complexities in free speech law have arisen from this distinction, though the implications of the distinction are of course sharply contested.

New technologies may weaken or even undo the distinction between these two categories. In the long-term future, the "mail" analogy may become the more apposite one, as it becomes simpler and cheaper for a person to send communications to any particular person, or to a large group of people, on such terms as he chooses. Communications may increasingly come in an indivisible package, and increasingly take the particular form that the particular actors choose. Perhaps in the future, "broadcasting" will increasingly have this [*1796] characteristic. Often the purchaser of the relevant information will pay for it without the intermediation of advertisers. n155 In such a future, the constitutional issues will take on different dimensions. A key question will be the extent to which the owner or manager of the "mail" may be held liable for injuries that occur as a result of use of some service. It will be plausible to say that just as the United States and Federal Express are not liable for harms caused by packages they carry, so too the owner of an electronic service ought not to pay damages for harms that owners cannot reasonably be expected to prevent or control. But it is far too soon to offer particular judgments on the issues that will arise.

-Footnotes-

n155 It is now impossible to know exactly what sorts of communications packages will be provided.

-End Footnotes-

It is nonetheless possible to describe certain categories of regulation and to set out some general guidelines about how they might be approached. I have suggested that existing law provides principles and analogies on which it makes sense to draw. An exploration of new problems confirms this suggestion. It shows that current categories can be invoked fairly straightforwardly to make sense of likely future dilemmas.

A large lesson may emerge from the discussion. Often participants in legal disputes, and especially in constitutional disputes, disagree sharply with respect to high-level, abstract issues; the debate between Madisonians and marketplace advocates is an obvious illustration. But sometimes such disputants can converge, or narrow their disagreement a great deal, by grappling with highly particular problems. In other words, debate over abstractions may conceal a potential for productive discussion and even agreement over

particulars. n156 Perhaps this is a strategy through which we might make much progress in the next generation of free speech law.

-Footnotes-

n156 See Sunstein, supra note 94.

-End Footnotes-

1. Requiring Competition

Many actual and imaginable legislative efforts are designed to ensure competition in the new communications markets. There is no constitutional problem with such efforts. n157 The only qualification is that some such efforts might be seen as subterfuge for content regulation, disguised by a claimed need to promote monopoly; but this should be a relatively rare event. If government is genuinely attempting to prevent monopolistic practices, and to offer a structure in which competition can take place, there is no basis for constitutional complaint. Here First Amendment theorists of widely divergent views might be brought into agreement.

-Footnotes-

n157 See also KRATTENMAKER & POWE, supra note 25 (favoring legal efforts to encourage competition).

-End Footnotes-

[*1797] 2. Subsidizing New Media

It is predictable that government might seek to assist certain technologies that offer great promise for the future. Some such efforts may in fact be a result of interest-group pressure. But in general, there is no constitutional obstacle to government efforts to subsidize preferred communications sources. Perhaps government believes that some technological innovations are especially likely to do well, or that they could receive particularly valuable benefits from national assistance. At least so long as there is no reason to believe that government is favoring speech of a certain content, efforts of this kind are unobjectionable as a matter of law. n158 They may be objectionable as a matter of policy, since government may make bad judgments reflecting confusion or factional influence; but that is a different issue.

-Footnotes-

n158 This follows from Rust v. Sullivan, 500 U.S. 173 (1991).

-End Footnotes-

3. Subsidizing Particular Programming or Particular Broadcasters

In her dissenting opinion in Turner, Justice O'Connor suggested that the appropriate response to government desire for programming of a certain content is not regulation but instead subsidization. n159 This idea fits well with the basic model for campaign finance regulation, set out in Buckley v. Valeo. n160 It also fits with the idea, found in Rust v. Sullivan, n161 that the

government is unconstrained in its power to subsidize such speech as it prefers. Hence there should be no constitutional objection to government efforts to fund public broadcasting, to pay for high-quality fare for children, or to support programming that deals with public affairs. n162 Perhaps government might do this for certain uses of the Internet.

-Footnotes-

n159 Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478 (1994) (O'Connor, J., dissenting).

n160 424 U.S. 1 (1976).

n161 500 U.S. 173 (1991).

n162 There is a question of policy in the background, made highly visible by controversy over government funding of the Corporation for Public Broadcasting and the National Endowment for the Humanities. In principle, such funding is justified in light of the "public good" features of the relevant products and in light of the possibility that the funded sources can increase opportunities for preference formation by providing greater exposure to high-quality material. See ANDERSON, supra note 135, at 149. But the ultimate value of funding depends on a range of more practical and empirical issues that cannot be decided a priori, including the actual products that result, the opportunities to provide private funding instead, and the alternative use of government money.

-End Footnotes-

To be sure, it is doubtful that Rust would be taken to its logical extreme. Could the government fund the Democratic Convention but not the Republican Convention? Could the government announce that it would fund only those public-affairs programs that spoke approvingly of current government policy? If we take the First Amendment to ban viewpoint discrimination, funding of this kind should be held to be improperly motivated. On the other hand, government subsidies of educational and public-affairs programming need not [*1798] raise serious risks of viewpoint discrimination. It therefore seems unexceptionable for government, short of viewpoint discrimination, to subsidize those broadcasters whose programming it prefers, even if any such preference embodies content discrimination. So too, government might promote "conversations" or fora on e-mail that involve issues of public importance, or that attempt to promote educational goals for children or even adults. n163

-Footnotes-

n163 See supra text accompanying notes 112-15 (discussing role of new technologies in connection with elections).

-End Footnotes-

4. Leaving Admittedly "Open" Channels Available to Others Who Would Not Otherwise Get Carriage

Suppose that a particular communications carrier has room for five hundred channels; suppose that four hundred channels are filled, but that one hundred are left open. Would it be legitimate for government to say that the one

hundred must be filled by stations that would otherwise be unable be pay for carriage? Let us suppose that the stations would be chosen through a content-neutral system, such as a lottery. From the First Amendment point of view, this approach seems acceptable. The government would be attempting to ensure access for speakers who would otherwise be unable to reach the audience. It is possible that as a matter of policy, government should have to provide some payment to the carrier in return for the access requirement. But there does not seem to be a First Amendment problem.

5. Requiring Carriers To Be Common Carriers for a Certain Number of Stations, Filling Vacancies with a Lottery System or Timesharing

In her dissenting opinion in Turner, Justice O'Connor suggested the possibility that carriers could be required to set aside certain channels to be filled by a random method. n164 The advantage of this approach is that it would promote access for people who would otherwise be denied carriage, but without involving government in decisions about preferred content. This approach should raise no First Amendment difficulties.

-Footnotes-

n164 Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2480 (O'Connor, J., dissenting).

-End Footnotes-

6. Imposing Structural Regulation Designed Not To Prevent a Conventional Market Failure, But To Ensure Universal or Near-Universal Consumer Access to Networks

The protection of broadcasters in Turner was specifically designed to ensure continued viewer access to free programming. Notably, the Court permitted government to achieve this goal through regulation rather than [*1799] through subsidy. Of course subsidy is the simpler and ordinarily more efficient route. If government wants to make sure that all consumers have access to communications networks, why should government not be required to pay to allow such access, on a kind of analogue to the food stamp program? The ordinary response to a problem of access is not to fix prices but instead to subsidize people who would otherwise be without access. The Turner Court apparently believed that it is constitutionally acceptable for the government to ensure that industry (and subscribers), rather than taxpayers, provide the funding for those who would otherwise lack access.

The precise implications of this holding remain to be seen. It is impossible to foresee the range of structural regulations that might be proposed in an effort to ensure that all or almost all citizens have access to free programming or to some communications network, including any parts of the "informational superhighway." Some such regulations might in fact be based on other, more invidious motives, such as favoritism toward a particular set of suppliers; as we have seen, this may well be true of the measure in Turner itself. The Turner decision means that courts should review with some care any governmental claim that regulation is actually based on an effort to promote free access. But the key point here is that if the claim can be made out on the facts, structural regulation should be found acceptable.

7. Protecting Against Obscene, Libelous, Violent, Commercial, or Harassing Broadcasting or Messages

New technologies have greatly expanded the opportunity to communicate obscene, libelous, violent, or harassing messages -- perhaps to general groups via stations on (for example) cable television, perhaps to particular people via electronic mail. n165 Invasions of privacy are far more likely. The Internet poses special problems on these counts. As a general rule, any restrictions should be treated like those governing ordinary speech, with ordinary mail providing the best analogy. If restrictions are narrowly tailored, and supported by a sufficiently strong record, they should be upheld.

-Footnotes-

n165 See Branscomb, supra note 141.

-End Footnotes-

Consider in this regard the highly publicized case involving "cyberporn" at the University of Michigan. n166 A student is alleged to have distributed a fictional story involving a fellow student, explicitly named, who was, in the story, raped, tortured, and finally killed. The first question raised here is whether state or federal law provides a cause of action for conduct of this sort. Perhaps the story amounts to a threat, or a form of libel, or perhaps the most plausible state law claim would be based on intentional infliction of emotional [*1800] distress. The next question is whether, if a state law claim is available, the award of damages would violate the First Amendment. At first glance it seems that the question should be resolved in the same way as any case in which a writer uses a real person's name in fiction of this sort. And it certainly does not seem clear that the First Amendment should prohibit states from awarding damages for conduct of this kind, so long as no political issue is involved. n167 Perhaps the ease of massive distribution of such materials, which can be sent to much of the world with the touch of a button, argues in favor of loosening the constitutional constraints on compensatory damages.

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n166 See Stephen Levy, TechnoMania, NEWSWEEK, Feb. 27, 1995, at 24, 29; Peter H. Lewis, Writer Arrested After Sending Violent Fiction over Internet, N.Y. TIMES, Feb. 11, 1995, at A10.

n167 See Hustler v. Falwell, 485 U.S. 46, 51-52 (1988).

-End Footnotes-

What of a regulatory regime designed to prevent invasion of privacy, libel, unwanted commercial messages, and obscenity, n168 harassment, or infliction of emotional distress? Some such regulatory regime will ultimately make a great deal of sense. The principal obstacles are that the regulations should be both clear and narrow. It is easy to imagine a broad or vague regulation, one that would seize upon the sexually explicit or violent nature of communication to justify regulation that is far broader than necessary. Moreover, it is possible to imagine a situation in which liability was extended to any owner or operator who could have no knowledge of the particular materials being sent. n169 The

underlying question, having to do with efficient risk allocation, involves the extent to which a carrier might be expected to find and to stop unlawful messages; that question depends upon the relevant technology.

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n168 See S. 314, 104th Cong., 1st Sess. @ 2(a) (1995), which would have extended liability to telecommunications providers of obscene materials.

n169 In January 1995, for example, Senator Jim Exon (D-Neb.) introduced S. 314, the Communications Decency Act of 1995, in the U.S. Senate. In an effort to control digital pornography, it originally would have made all telecommunications providers doing business in the United States (from the telephone companies, all the way down to offices that use local area networks) liable for the content of anything sent over their networks. As it emerged from committee, S. 314 exempted carriers from liability. Id.; see also Peter H. Lewis, Despite a New Plan for Cooling It Off, Cybersex Stays Hot, N.Y. TIMES, Mar. 26, 1995, at 1, 34 (discussing S. 314 and its potential unconstitutionality).

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Consider more particularly possible efforts to control the distribution of sexually explicit materials on the Internet. Insofar as the government seeks to ban materials that are technically obscene, and imposes civil or criminal liability on someone with specific intent to distribute such materials, there should be no constitutional problem. By hypothesis, these materials lack constitutional protection, and materials lacking constitutional protection can be banned in cyberspace as everywhere else. On the other hand, many actual and imaginable bills would extend beyond the technically obscene, to include (for example) materials that are "indecent," or "lewd," or "filthy." n170 Terms of this sort create a serious risk of unconstitutional vagueness or overbreadth. n171 At least at first glance, they appear unconstitutional for that reason.

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n170 See, e.g., S. 314, 104th Cong., 1st Sess. (1995).

n171 Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126-31 (1989); Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992).

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[*1801] The best justification for expansive terms of this kind would be to protect children from harmful materials. It is true that the Internet contains pornography accessible to children, some of it coming from adults explicitly seeking sexual relations with children. There is in fact material on the Internet containing requests to children for their home addresses. n172 Solicitations to engage in unlawful activity are unprotected by the First Amendment, whether they occur on the Internet or anywhere else. For this reason, regulation designed to prevent these sorts of requests should not be held unconstitutional.

-Footnotes-

n172 James Coates, Access to Answers, CHI. TRIB., Mar. 27, 1995, @ 4, at 1, 4.

-End Footnotes-

But when government goes beyond solicitation, and bans "indecent" or "filthy" material in general, the question is quite different. Here a central issue is whether the government has chosen the least restrictive means of preventing the relevant harms to children. In a case involving "dial-a-porn," for example, the Court struck down a ban on "indecent" materials on the ground that children could be protected in other ways. n173 On the Madisonian view, this outcome is questionable, since "dial-a-porn" ranks low on the First Amendment hierarchy. But under existing law, it seems clear that in order to support an extension beyond obscenity, Congress would have to show that less restrictive alternatives would be ineffectual. The question then becomes a factual one: What sorts of technological options exist by which parents or others can provide the relevant protection? To answer this question, it would be necessary to explore the possibility of creating "locks" within the Internet, for use by parents, or perhaps for use by those who write certain sorts of materials. n174

-Footnotes-

n173 Sable Communications, 492 U.S. at 128-31.

n174 See Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619, 1632-34 (1995).

-End Footnotes-

Different questions would be raised by the imposition of civil or criminal liability not on the distributors having specific intent to distribute, but on carriers who have no knowledge of the specific materials at issue, and could not obtain such knowledge without considerable difficulty and expense. It might be thought that the carrier should be treated like a publisher, and a publisher can of course be held liable for obscene or libelous materials even if the publisher has no specific knowledge of the offending material. But in light of the relatively low costs of search in the world of magazine and book publishing, it is reasonable to think that a publisher should be charged with having control over the content of its publications. Perhaps the same cannot be said for the owner of an electronic mail service. Here the proper analogy might instead be the carriage of mail, in which owners of services are not held criminally or civilly liable for obscene or libelous materials. The underlying theory is that it would be unreasonable to expect such owners to inspect all the materials they transport, and the imposition of criminal liability, at least, would have an unacceptably harmful effect upon a desirable service involving the [*1802] distribution of a great deal of protected speech. If carriers were held liable for distributing unprotected speech, there would inevitably be an adverse effect on the dissemination of protected speech too. In other words, the problem with carrier liability, in this context, is that it would interfere with protected as well as unprotected speech.

How do these points bear on the First Amendment issue with respect to the Internet? Some of the services that provide access to the Internet should not themselves be treated as speakers; they are providers of speech, but their own speech is not at issue. This point is closely related to the debate in Turner about the speech status of cable carriers. But whether or not a carrier or provider is a speaker, a harmful effect on speech would raise First Amendment issues. We can see this point with an analogy. Certainly it would not be constitutional to say that truck owners will be criminally liable for carrying newspapers containing articles critical of the President. Such a measure would be unconstitutional in its purposes and in its effects, even if the truck owners are not speakers. From this we can see that a criminal penalty on carriers of material that is independently protected by the First Amendment should be unconstitutional. Thus a criminal penalty could not be imposed for providing "filthy" speech, at least if "filthy" speech is otherwise protected.

But a penalty imposed on otherwise unprotected materials raises a different question. Suppose that the government imposes criminal liability on carriers or providers of admittedly obscene material on the Internet. The adverse effect on unprotected speech should not by itself be found to offend the Constitution, even if there would be a harmful economic effect, and even unfairness, for the provider of the service. Instead the constitutional question should turn on the extent of the adverse effects on the dissemination of materials that are protected by the Constitution. If, for example, the imposition of criminal liability for the distribution of unprotected speech had serious harmful effects for the distribution of protected speech, the First Amendment issue would be quite severe. But that question cannot be answered in the abstract; it depends on what the relevant record shows with respect to any such adverse effects.

To answer that question, we need to know whether carrier liability, for unprotected speech, has a significant adverse effect on protected speech as well. We need to know, in short, whether the proper analogy is to a publisher or instead to a carrier of mail. It is therefore important to know whether a carrier could, at relatively low expense, filter out constitutionally unprotected material, or whether, on the contrary, the imposition of criminal liability for unprotected material would drive legitimate carriers out of business, or force them to try to undertake impossible or unrealistically expensive "searches." The answer to this question will depend in large part on the state of technology.

[*1803] 8. Imposing Content-Based Regulation Designed To Ensure Public-Affairs and Educational Programming

It can readily be imagined that Congress might seek to promote education via regulation or subsidy of new media. It might try to ensure attention to public affairs. Suppose, for example, that Congress sets aside a number of channels for public-affairs and educational programming, on the theory that the marketplace provides too much commercial programming. This notion has in fact been under active consideration in Congress. Thus a recent bill would have required all telecommunications carriers to provide access at preferential rates to educational and health care institutions, state and local governments, public broadcast stations, libraries and other public entities, community newspapers, and broadcasters in the smallest markets. n175

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n175 S. 1822, 103d Cong., 2d Sess. @ 103(a) (1994) (Communications Act of 1994).

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Turner certainly does not stand for the proposition that such efforts are constitutional. By hypothesis, any such regulation would be content-based. It would therefore meet with a high level of judicial skepticism. On the other hand, Turner does not authoritatively suggest that such efforts are unconstitutional. The Court did not itself say whether it would accept content discrimination designed to promote Madisonian goals. Certainly the opinion suggests that the government's burden would be a significant one. But it does not resolve the question.

It is notable that Justice O'Connor's opinion appears quite sensible on this point, and she leaves the issue open. n176 As I have noted, her principal argument is that the "must-carry" rules are too crude. Certainly crudely tailored measures give reason to believe that interest-group pressures, rather than a legitimate effort to improve educational and public-affairs programming, are at work. But if the relevant measures actually promote Madisonian goals, they should be upheld. There is of course reason to fear that any such measures have less legitimate purposes and functions, and hence a degree of judicial skepticism is appropriate. But narrow measures, actually promoting those purposes, are constitutionally legitimate.

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n176 Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478 (O'Connor, J., dissenting).

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VI. MADISON IN CYBERSPACE?

Do Madisonian ideals have an enduring role in American thought about freedom of speech? The Supreme Court has not said for certain; its signals are quite mixed; and the existence of new technologies makes the question different and far more complex than it once was. It is conceivable that in a world of newly emerging and countless options, the market will prove literally [*1804] unstoppable, as novel possibilities outstrip even well-motivated government controls.

If so, this result should not be entirely lamented. It would be an understatement to say that a world in which consumers can choose from limitless choices has many advantages, not least from the Madisonian point of view. If choices are limitless, people interested in politics can see and listen to politics; perhaps they can even participate in politics, and in ways that were impossible just a decade ago. But that world would be far from perfect. It may increase social balkanization. It may not promote deliberation, but foster instead a series of referenda in cyberspace that betray constitutional goals.

My central point here has been that the system of free expression is not an aimless abstraction. Far from being an outgrowth of neoclassical economics, the First Amendment has independent and identifiable purposes. Free speech doctrine, with its proliferating tests, distinctions, and subparts, should not

lose touch with those purposes. Rooted in a remarkable conception of political sovereignty, the goals of the First Amendment are closely connected with the founding commitment to a particular kind of polity: a deliberative democracy among informed citizens who are political equals. It follows that instead of allowing new technologies to use democratic processes for their own purposes, constitutional law should be concerned with harnessing those technologies for democratic ends -- including the founding aspirations to public deliberation, citizenship, political equality, and even a certain kind of virtue. If the new technologies offer risks on these scores, they hold out enormous promise as well. I have argued here that whether that promise will be realized depends in significant part on judgments of law, including judgments about the point of the First Amendment.

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NOTE: A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees To Support Political Speech at Public Universities.

Carolyn Wiggin

SUMMARY:

... Classroom nudity and hate speech regulations are two much publicized free speech issues that have arisen recently at the University of California at Berkeley (hereinafter "U.C. Berkeley" or "University"). ... University administrations typically have not considered the political content of a student organization's speech in determining whether or not to grant it funding. ... Part IV explores the impact the Smith court's order will have on the activity group system and argues that discrimination against "political" and "ideological" student speech amounts to discrimination against student organizations based not only on the content but also on the viewpoint they express. ... Even if the public university campus is properly considered a public forum, for the sake of argument it is worth considering a contention that public forum doctrine does not apply to the question of whether the University can deny funding to all "political" and "ideological" student groups. ... Consider, for example, Gay & Lesbian Students Ass'n v. Gohn, a case challenging a rule prohibiting the funding of any student group "organized around sexual preference." ... If one analyzes subsidized speech on university campus grounds in light of the fact that the university is a public forum with respect to its students, however, one can see that under the forced association doctrine, content-neutral funding is not only permitted but required. ...

TEXT:

[*2009] Classroom nudity n1 and hate speech regulations n2 are two much publicized free speech issues that have arisen recently at the University of California at Berkeley (hereinafter "U.C. Berkeley" or "University"). Both topics raise important questions about the limits of tolerance for free expression at a large public University, particularly one with a long tradition of free speech activities, yet both deal with expression which many believe has little civic value. Pleas to protect hate speech, for instance, often take the form of arguments that if we do not protect speech and expression absolutely, we risk jeopardizing speech on public policy, the speech which First Amendment theory values most. n3 Yet a greater threat to free speech on campus has gone largely unnoticed. In Smith v. Regents of the University of California, n4 the California Supreme Court ruled that the use of mandatory activity fees to fund political or ideological student groups at public universities violates the First [*2010] Amendment. This decision will in fact severely diminish student speech on issues of public concern at state universities.

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n1 See, e.g., T. Christian Miller, 'Naked Guy' Plans a Return to Class -- in the Nude, S.F. CHRON., Nov. 11, 1992, at A19. But see Peter Fimrite, Naked Guy Arrested in Berkeley Under New Public Nudity Law, S.F. CHRON., Aug. 28, 1993, at B4.

n2 The University of California at Berkeley Code of Student Conduct, Nov. 11, 1992, Part I.B. 16. For a discussion of the university tradition and hate speech codes, see Stephen C. Veltri, Free Speech in Free Universities, 19 OHIO N.U. L. REV. 783 (1993), which includes references to many of the dozens of articles and notes that have been written on this topic.

n3 One prominent judicial and philosophical justification for protecting free speech is that free speech facilitates representative democracy. GERALD GUNTHER, CONSTITUTIONAL LAW 998 (12th ed. 1991). A leading proponent of this view is Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). This view "tends to reserve the highest protection for political speech." GUNTHER, supra, at 1001. Meiklejohn argued that political speech should receive the highest level of First Amendment protection. MEIKLEJOHN, supra, at 24-25. For a criticism of Meiklejohn's position, see Zechariah Chafee, Jr., 62 HARV. L. REV. 891 (1949) (book review) (challenging Meiklejohn's argument that speech pertaining to self-government enjoys absolute protection under First Amendment). For a contemporary argument that speech on public issues is central to the First Amendment, see Cass R. Sunstein, Half Truths of the First Amendment, 1993 U. CHI. LEGAL F. 25, 33 (suggesting that principal current threat to freedom of expression is fact that our culture and economy produce very little speech on public issues).

n4 844 P.2d 500 (Cal.), cert. denied, 114 S. Ct. 181 (1993).

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University administrations typically have not considered the political content of a student organization's speech in determining whether or not to grant it funding. n5 Since the early 1970's, students have challenged activity fee systems that funnel general fees to groups that individual fee payers find offensive. n6 Prior to Smith, courts consistently upheld such systems, basing their decisions on factors such as university officials' discretion to determine which activities warrant subsidization, the importance in higher education of learning to tolerate speech and debate with one's opponents, and the idea that universities foster a "marketplace of ideas" by providing "wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues.'" n7 Underpinning most of these decisions is a concept of the university campus as a public forum for its students.

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n5 A survey of 301 two-year and four-year private and public colleges, to which 217 institutions responded, indicated that 70.3% of colleges that collected a student activity fee did not consider whether student organizations were affiliated with political groups in determining whether they were eligible to receive funds. The remaining 29.7% prevented groups affiliated with political groups from receiving funds generated by mandatory activity fees. DAVID L. MEABON ET AL., STUDENT ACTIVITY FEES 20, 27, Table 8 (1979).

n6 See infra Part II.B for a discussion of these cases.

n7 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citation omitted).

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This Note argues that in Smith the California Supreme Court broke with a tradition that permits universities to fund political student groups with mandatory fees, and that it did so because it failed to appreciate the relationship between the fee system and the creation of a public forum for students' speech. If the campus is viewed as a public forum, not only is the fee program which supports speech within the forum constitutional, but cutting off "political" student groups from such support is unconstitutional. These two propositions are intimately connected: The reason that the University does not violate the First Amendment when it compels students to support on-campus political speech is that the activity funding system, like campus grounds and facilities, is a public forum; because the activity funding system is a public forum, the University of California Regents (hereinafter "Regents") may not discriminate against political groups in subsidizing speech within that forum. If the Regents choose to subsidize speech within the public forum of the campus, they must do so according to content-neutral criteria. Reciprocally, by remaining neutral toward student speech within the forum, the University avoids endorsing any particular group's political and ideological opinions and thus avoids compelling speech in violation of the First Amendment. n8

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n8 The argument advanced in this Note would not apply to private colleges and universities because the Fourteenth Amendment makes the First Amendment applicable only to government actions. The Civil Rights Cases, 109 U.S. 3, 17 (1883). Occasionally, courts have found that private parties have engaged in "state action" and thus are bound by the Fourteenth Amendment. See, e.g., Lugar v. Edmonson Oil Co., 457 U.S. 922, 942 (1982). For a discussion of what factors courts consider in determining whether private university actions constitute "state action," see Mindy A. Kaiden, Note, Albert v. Carovano, The Second Circuit Redefines Under Color of State Law for Private Universities, 39 AM. U. L. REV. 239 (1989). Tests for whether a private party has engaged in "state action" and "acted under the color of state law" are usually identical. Lugar, 457 U.S. at 928-32. For a discussion of various theories that courts have employed in finding that action by a private university or college is "state action," see Richard Thigpen, The Application of Fourteenth Amendment Norms to Private Colleges and Universities, 11 J.L. & EDUC. 171 (1982).

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[*2011] Part I of this Note describes the Smith opinion, outlining the logic that led the court to order the Regents to identify student groups whose objectives are more political than educational and deny those groups access to funds generated by mandatory fees. Part II discusses the mandatory fee doctrine on which the court relied. It argues that the court should have asked whether or not funding a wide range of student speech, including political speech, was "germane" to the purpose of the activity fee program, rather than asking whether particular student groups were more "political" than "educational." In addition, Part II illustrates that in the past courts have found that support for

controversial speech on public matters, as part of public university programs to support a campus forum in which a diversity of views are expressed, is germane to the university's educational mission. Part III argues that because the activity fee program's purpose was to support a public forum for students' speech, the University could not constitutionally discriminate against political and ideological speech in distributing funds for speech within that forum. Part IV explores the impact the Smith court's order will have on the activity group system and argues that discrimination against "political" and "ideological" student speech amounts to discrimination against student organizations based not only on the content but also on the viewpoint they express. Part V concludes that, as long as public universities utilize a distribution system which is itself content-neutral, they should be able to distribute funds generated from mandatory activity fees to political and ideological student groups that participate within the public forum of the campus.

I. THE SMITH DECISION

In *Smith*, the California Supreme Court ordered the Regents to restructure the student activity fee system that had been in place at U.C. Berkeley since 1955. n9 For nearly forty years before *Smith* was decided, every student at U.C. Berkeley had paid a mandatory activity fee to the Regents each semester. A portion of the funds generated by this fee were transferred from the University to the Associated Students of the University of California, Berkeley (hereinafter "A.S.U.C."), a student association which finances student government and student activity groups. Under the guidelines in place when the system was challenged, any four U.C. Berkeley students could create an activity group eligible for A.S.U.C. funding by registering with the University [*2012] and agreeing to comply with content-neutral regulations. Properly constituted student activity groups could use funds they received from the A.S.U.C. for defined activities. n10 The guidelines provided that the funds could be used for purposes related to the University or beneficial to the student body, and could not be used in connection with partisan political activities or ballot measures, except to fund nonpartisan educational fora on issues of interest. n11 In practice, this meant that groups receiving money were allowed to take ideological stands, but not to endorse political candidates or lobby for legislation. n12

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n9 *Smith*, 844 P.2d at 504.

n10 *Id.* To obtain funds, the groups submitted a budget to the A.S.U.C. Finance Committee for review, and the Finance Committee then forwarded the budget along with its recommendation to the A.S.U.C. Senate for approval. If a group's budget was approved, it could receive reimbursement from the A.S.U.C. for expenses incurred in running the organization. Expenses for which the student organization could receive reimbursement were "(1) personal services, (2) stationery and supplies, (3) telephone, (4) travel, (5) dues and subscriptions, (6) postage, (7) equipment rental, (8) advertising, (9) programs and printing, (10) facilities rental, and (11) other." *Id.*

n11 *Smith v. Regents of the Univ. of Cal.*, 248 Cal. Rptr. 263, 266 (Ct. App. 1988), rev'd, 844 P.2d 500 (Cal.), cert. denied, 114 S. Ct. 181 (1993).

n12 Philip Hager, Justices Halt Some Uses of Mandatory Student Fees, L.A. TIMES, Feb. 4, 1993, at A3, A19.

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In 1979, the Pacific Legal Foundation filed a complaint in the California Superior Court on behalf of four U.C. Berkeley students challenging the Regents' power to collect mandatory fees and distribute them to student organizations dedicated to political or ideological causes. n13 The plaintiffs claimed that the University had violated both the California and U.S. Constitutions n14 by providing mandatory student contributions to the following groups: Amnesty International, Berkeley Students for Peace, Campus N.O.W. (National Organization for Women), Campus Abortion Rights Action League, East Bay Right to Life, Gay and Lesbian Union, Progressive Students Organization, Radical Education and Action Project, Sparticus Youth League, Students Against Intervention in El Salvador, Students for Economic Democracy, Iranian Student Association, U.C. Berkeley Feminist Alliance and Women Organized Against Sexual Harassment, U.C. Campus Sierra Club, Conservation and Natural Resources Study Student Organization, and Greenpeace Berkeley. n15

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n13 In 1980, 32 additional students joined the plaintiffs. Id.

n14 Smith, 844 P.2d at 505.

n15 Smith, 248 Cal. Rptr. at 266 n.4. The suits were consolidated, and in 1982 the superior court held that U.C. Berkeley's fee system was constitutional. The California Court of Appeals affirmed. Id. at 275. The California Supreme Court accepted the case for review, but deferred briefing pending release of the U.S. Supreme Court's decision in Keller v. State Bar, 496 U.S. 1 (1990), a case challenging the California State Bar's practice of using mandatory fees to support political and ideological activities. The California Supreme Court then remanded the case for reconsideration in light of Keller, and the Court of Appeals once again affirmed the superior court's judgment. Smith, 3 Cal. Rptr. 2d 384 (Ct. App. 1992). The California Supreme Court then granted review of the decision. Smith, 844 P.2d at 505.

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The Smith court began its discussion by reviewing the Supreme Court's First Amendment mandatory fee doctrine. This doctrine generally prohibits the state from compelling an individual to fund political or ideological speech with which he or she disagrees. An exception to this prohibition arises when the [*2013] state can compel an individual to support an organization because the organization serves a public function, and speech by the organization which the individual incidentally supports is "germane" to that function. n16 The question before the Smith court was whether speech by political and ideological student groups was sufficiently "germane" to the function served by the University to fit within the exception.

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n16 See discussion infra Part II.A for a description of this doctrine and the Smith court's treatment of it.

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The court rejected the University's argument that funding political student groups is germane to the University's purpose because it educates students by allowing them to express their views, participate in campus administration, learn about governmental processes, develop social skills, inform the student body about various issues, and ensure freedom of expression and association. n17 The court dismissed the possibility that public forum doctrine applied to the case, relegating that issue to a footnote. n18 Rather than analyzing the entire mandatory fee system as a means of promoting a forum for a wide range of student speech, the court attacked the educational value of particular groups that received funding. The court asserted that it is "obviously true . . . that a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf." n19 Thus, the court reasoned, the mandatory fees were being spent for political speech which, by definition, was not germane to the public function served by the University. The court's solution to what it perceived as a violation of the freedom not to fund speech was to require the Regents to determine which student groups are more ideological or political than educational, and to offer students the option of deducting an amount corresponding to the percentage of the A.S.U.C. budget that any of those groups would receive from the students' activity fees. n20

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n17 Smith, 844 P.2d at 508.

n18 Id. at 509 n.8.

n19 Id. at 508.

n20 Id. at 513. The court called for use of a procedure similar to those used by labor unions and bar associations. Id. The University and A.S.U.C. sought review of the decision, but in October 1993, the Supreme Court denied a petition for certiorari. Regents of Univ. of Cal. v. Smith, 114 S. Ct. 181 (1993). Thus, the Regents must abide by the California Supreme Court order that they determine which groups are more political or ideological than educational and offer students an opportunity to withhold funds from those groups. The University of California President has issued Interim Guidelines to assist University of California campuses in complying with Smith. The Guidelines would make groups that are "principally dedicated to effecting political or ideological purposes, as distinguished from educational purposes such as promoting discussion or debate from different perspectives," ineligible for funds generated by mandatory activity fees. Interim Guidelines for Implementing the Requirements of Smith v. Regents, Part I (Nov. 4, 1993).

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Under the Smith regime, groups branded "political" or "ideological" will suffer. While the amounts of money at stake are not huge, student groups rely on the money to carry out such projects as bringing speakers to campus, renting meeting facilities, showing films, and printing literature for distribution [*2014] to the student body. "Political" and "ideological" expressive activities will decrease if student-run organizations must rely on voluntary

donations from fellow students for financial support of these activities. The decision flies in the face of the campus' function as a forum for students and ignores "[t]he principle underlying the expenditure of student body organization funds collected through mandatory fees [--] that such expenditures shall be made in programs that reflect the broadest variety of student interests and that are open to all students who wish to participate." n21 If the University were permitted to distribute the money to student groups on a content-neutral basis, on the other hand, it could properly assert that the mandatory fees were used to create a public forum for diverse student speech. As will be argued, when a public university funds political speech as part of a program in which funds for speech are granted on a content-neutral basis to support a campus forum, the university avoids the First Amendment evil of forced speech. n22

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n21 Cal. Code Regs. tit. 5, @ 42659 (1993).

n22 See ifnra Part II.B.

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II. MANDATORY FEE DOCTRINE

Contrary to the Smith court's averments, its decision did not proceed logically from the Supreme Court's doctrine regarding the use of mandatory fees to support political and ideological speech. This doctrine requires an inquiry into the relationship between the funded speech and the recipient organization's larger purpose. If the funded speech is germane to the function served by the organization -- that is, the function which justifies the government compelling individuals to fund the organization in the first place -- then the organization may use compelled dues to fund the speech. Thus, in Smith, the court should have asked whether the funding scheme as a whole was germane to the government's neutral goal of creating a forum for student speech, not whether individual student groups were primarily political. By narrowly focusing on the political nature of the funded speech, the Smith court failed to see the connection between the speech and the University's educational purpose.

A. The "Germaneness" Test

In describing the mandatory fee doctrine, the Smith court discussed Abood v. Detroit Board of Education n23 and Keller v. State Bar n24 at some length. Like the student plaintiffs in Smith, dues-payers in Keller and Abood objected to having the fees they were compelled to pay used to support speech with which they disagreed. In Abood, a case in which non-union employees challenged a [*2015] labor union's use of their mandatory union fees to fund political speech, the Court recognized that a union's activities as an exclusive bargaining agent are, to a certain extent, inherently ideological. n25 For example, in negotiating health benefits, a union cannot help but take a position as to how to treat abortion. n26 Far from being unconstitutional forced speech, "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." n27 On the other hand, union contributions to political candidates or to fund political speech were held to be similar to compelled affirmations of belief in certain political opinions, an infringement on First Amendment rights. n28 The First Amendment thus prohibits

unions "from requiring any of the appellants to contribute to the support of an ideological cause he may oppose" n29 if it is unrelated to the union's purpose for existing, that is, collective bargaining. n30 In Keller, the Court applied the same principles to a challenge to a state bar's use of mandatory dues for political speech and held that the functions for which mandatory fees could be used were limited to those "in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession," n31 rather than taking positions on political issues.

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n23 431 U.S. 209 (1977).

n24 496 U.S. 1 (1990).

n25 Abood, 431 U.S. at 222. The union's collective bargaining agreement included an "agency-shop" clause requiring every employee who was not a member of the union to pay a union service charge equal to the regular dues required of union members. Id. at 212.

n26 Id. at 26.

n27 Id.

n28 Id. at 234-36. The principle that the First Amendment includes a right against compelled speech has been affirmed many times by the Court. See, e.g., West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state may not compel students to salute flag).

n29 Abood, 431 U.S. at 235.

n30 Id. at 235-36.

n31 Keller v. State Bar, 496 U.S. 1, 15-16 (1990).

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Thus, using mandatory fees to fund political speech or activities is not per se unconstitutional. Organizations can fund political or ideological speech with the mandatory fees of dissenters as long as it is germane to the purpose that justifies the compelled association. n32 In cases involving labor unions courts have recognized a range of activities, including political activity, as germane to collective bargaining. Non-union employees can "be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract . . . but also the expenses of activities or undertakings . . . reasonably employed to implement or effectuate the duties [*2016] of the union as exclusive representative of the employees in the bargaining unit." n33

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n32 In his concurrence to Abood, Powell emphasizes that speech must be both political or ideological and not germane to the organization's purpose to be forbidden by mandatory fee doctrine: "In order to vindicate his First

Amendment rights in a union shop, the individual employee apparently must . . . initiate a proceeding to determine what part of the union's budget has been allocated to activities that are both 'ideological' and 'unrelated to collective bargaining.'" Abood, 431 U.S. at 254-55 (emphasis added).

n33 *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435, 448 (1984). In *Ellis*, employees objected to an agency-shop fee they were required to pay under the Railway Labor Act, 45 U.S.C. @ 152, Eleventh (1988). The Court was willing to recognize that activities other than formal bargaining, for instance attending national union conventions, union social activities, and publishing portions of a union magazine that did not discuss political issues, were all sufficiently related to collective bargaining to justify compelled support. *Id.* at 448-51.

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Unions have been allowed to use mandatory fees for lobbying activities when "pertinent to the duties of the union as a bargaining representative." n34 For example, in *Robinson v. New Jersey*, the Third Circuit held that a union could lobby state legislators in regard to state regulation of such matters as pensions, overtime, subcontracting, and health plans with nonmembers' funds. n35 As long as the lobbying is germane to the purpose which justified the compelled association, it "has no different constitutional implication from any other form of union activity that may be financed with representation fees." n36 Thus, non-union employees can be forced to subsidize it.

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n34 *Robinson v. New Jersey*, 741 F.2d 598, 609 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985).

n35 *Id.*

n36 *Id.*

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Far from being a litmus test for whether an activity is political or nonideological, "germaneness" looks at the connection between the funded activity and the organization's purpose. Thus, the Smith court should not have ordered the Regents to cut off funding eligibility for all political groups before carefully considering whether political speech was germane to the purpose of the student activity program. As will be argued, distribution of funds to student organizations which spoke on political and ideological issues was not only "germane" but essential to the purpose that justified the mandatory dues: creating a public forum for student speech.

B. Mandatory Funding of Political Student Speech Is Germane to the Creation of a Forum for Student Speech

While ostensibly using a "germaneness" test to decide whether the University could use mandatory funds to support political student speech, n37 the Smith court failed to recognize that "germaneness" and purpose are intricately connected. If the student activity group program serves a purpose which is appropriate for the University to pursue, and funding political student groups is germane to the purpose of the program, then use of the mandatory activity

fees to fund speech by political student organizations is constitutional.

-Footnotes-

n37 The Smith court did acknowledge that "the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purposes that justified the requirement of support." Smith, 844 P.2d at 508.

-End Footnotes-

[*2017] When deciding the constitutionality of student activity programs resembling the one at U.C. Berkeley, other courts have recognized that the purpose of mandatory student fees is to create a public forum for student speech. These programs serve an educational purpose appropriate for an institution of higher education. As one court stated, "[t]he fact that certain ideas are controversial and wholly disagreed with does not automatically make them non-educational." n38 While exposure to only a single point of view might indoctrinate rather than educate, exposure to debate between opposing viewpoints is educational and does not imply that a particular point of view is correct.

-Footnotes-

n38 Lace v. University of Vt., 303 A.2d 475, 480 (Vt. 1973).

-End Footnotes-

Not only have programs to support diverse student speech been regarded as educational, but if fees are distributed to student groups on a content-neutral basis, then the programs have been deemed to serve the neutral purpose of supporting a forum, not the purpose of espousing any particular group's viewpoint. It is the lack of content-based standards that enables the system to support a legitimate campus forum, and this in turn creates a distance between those who fund the forum and any particular view expressed within it, thus avoiding unconstitutional forced speech. The idea that support for a particular group's speech as an incident to support for a campus forum does not imply endorsement of that group's message was most clearly established in Widmar v. Vincent. n39 In Widmar, the Court rejected the university's argument that if it were to allow religious groups to use its buildings, it would give the impression that it was endorsing religion in violation of the Establishment Clause: "[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there." n40

-Footnotes-

n39 454 U.S. 263 (1981).

n40 Id. at 272 n.10. In Widmar, mandatory student fees were used to defray the cost of facility use by student groups such as the plaintiffs', so the issue of mandatory student fees being used to compel support of speech was incorporated into the question of whether the university was endorsing speech by allowing an organization to use its facilities. Id. at 265.

-End Footnotes-

In deciding cases challenging public universities' use of mandatory fees to support fora for student expression, several courts have held that the systems were constitutional because they did not involve endorsement of any particular group's speech. n41 In rejecting a student's constitutional challenge to use of mandatory fees to support a student newspaper, student association, and campus speaker program, one court drew a distinction between forcing students to adopt political opinions and imposing a tax with which to finance "programs which provide a forum for expression of opinion." n42 The university funding of programs that expressed "widely divergent opinions on a number of [*2018] topics," n43 did not show in itself that the university advocated a particular philosophy or viewpoint. n44 Courts have also distinguished between forced subsidization of particular causes and the forced subsidization of a "speakers corner," such as that in Hyde Park, which "provides a platform for the espousing of social, religious and political ideas by various and divergent individuals . . . to inject a spectrum of ideas into the campus community." n45 In *Good v. Associated Students*, n46 a Washington state case in which the court upheld a student activity program similar to that at U.C. Berkeley, the court held that students could be compelled to pay an activity fee to support programs which foster "an atmosphere of learning, debate, dissent and controversy." n47 Although students may not agree with all the speech which receives funding, "[i]f such views are expressed only as a part of the exchange of ideas and there is no limitation or control imposed so that only one point of view is expressed through the program, there is no violation of the constitutional rights of the plaintiffs." n48 The court reasoned that because the university was funding a public forum, students were not forced to support speech with which they disagreed. n49

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n41 *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert denied*, 414 U.S. 1135 (1974); *Good v. Associated Students*, 542 P.2d 762 (Wash. 1975) (en banc); *Lace*, 303 A.2d at 475.

n42 *Veed*, 353 F. Supp. at 152-53.

n43 *Id.* at 152.

n44 *Id.*

n45 *Lace*, 303 A.2d at 479.

n46 542 P.2d 762 (Wash. 1975) (en banc).

n47 *Id.* at 768.

n48 *Id.* at 769.

n49 While funding student organizations with diverse viewpoints was constitutional, the court held that the university "may not compel membership in an association . . . which purports to represent all the students at the university" when it makes political and ideological statements, *id.* at 768, for "[t]here is no room in the First Amendment for such absolute compulsory support, advocacy and representation." *Id.* This supports the thesis that what makes mandatory activity fee systems such as those at issue in *Smith and Good*

constitutional is the fact that they involve support for a public forum, or student organizations in their totality, as opposed to support for any particular organization which espouses a particular point of view.

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The distinction between forced support of a public forum and forced support of a particular speaker has also been used in upholding the constitutionality of forced support of campus newspapers. n50 Students may be required to support a campus newspaper because it serves the permissible government purpose of "complement[ing] classroom education by exposing the student body to various points of view on significant issues, and [allowing] students to express themselves on those issues." n51 Because particular editorial positions do not claim to express the opinion of the entire student body, courts have held that support for the newspaper does not imply that one agrees with views expressed within the forum by particular speakers. n52 As one court stated,

[*2019] the University's imposition of student fees is not designed to further the University's ideological biases, but instead to support an independent student newspaper. The University's academic judgment is that the paper is a vital part of the University's educational mission, and that financing it is germane to the University's duties as an educational institution. n53

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n50 Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974).

n51 Id. at 1362.

n52 The newspaper "speaks only for those which control its content at any given time. It does not speak on behalf of a group with which the plaintiffs are identified, i.e., the student body." Id.

n53 Kania v. Fordham, 702 F.2d 475, 480 (4th Cir. 1983). In Kania, a student at the University of North Carolina at Chapel Hill argued that Abood forbade the university from compelling the student to pay the portion of his mandatory fees that funded a student newspaper. The Daily Tar Heel, with which he disagreed.

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When a general fund is made available so that students of differing viewpoints can express themselves to their fellow students, fee-paying students are not being compelled to fund the dissemination of one viewpoint with which they disagree. n54

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n54 In Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993), students also alleged that university funding of a student newspaper with mandatory fees violates Abood. The court noted that the student-run newspaper increased debate on campus and that the university had not attempted to "control the viewpoints expressed by the newspaper and that there were no ideological prerequisites for joining the paper's staff. The University provided the students with the funds needed for the students themselves to

engage in debate and did not force ideological conformity." Id. at 123. Again, the fact that funds were not used to support one particular political or ideological position but to create a forum for debate among political positions was viewed as an important distinction between the mandatory activity fee system and the agency-shop system.

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These cases indicate both (1) that activity group programs that support student organizations holding a diversity of views, including political views, can be considered educational and thus appropriate for universities to administer, and (2) that in order to ensure that students are not forced to endorse particular views when they pay their activity fees, funds cannot be distributed within such programs in ways that favor some viewpoints over others. Courts have been concerned with the possibility that the mandatory student activity fee system could be used to distort public debate if funds are given to student groups on the basis of their point of view. n55 In addition, if funds were given out in a content-biased way, the university would appear to endorse the viewpoints of groups that had succeeded in their application for funds. To avoid this possibility, students who wish to express their opposition to positions taken by funded student groups must also have access to funds for this purpose. Unless universities are forbidden from discriminating on the basis of content in distributing funds, students who pay mandatory fees will in fact be forced to subsidize a particular set of views rather than a public forum. Thus, under the rationale which makes use of mandatory fees to support political student speech constitutional -- that the funds are used to support a [*2020] public forum for student speech -- it is critical that the university distribute funds to student groups on a content-neutral basis.

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n55 In *Good*, the court stated that a university may not give out funds to student groups in a manner that promotes "one particular viewpoint, political, social, economic or religious." *Good v. Associated Students*, 542 P.2d 762, 769 (Wash. 1975) (en banc). In *Arrington*, the court noted that while the school newspaper's editorials may be subsidized, "plaintiffs have available an additional forum to express themselves in opposition to views set forth therein." 380 F. Supp. at 1362.

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The fact that it is the concept of funding a public forum which made these programs constitutional is highlighted by the only two cases in which courts have found that *Aboud* forbids compelled funding of political organizations. Both of these cases involved groups seeking money for off-campus speech. In both cases, the courts held that *Aboud* prohibited universities from requiring students to support off-campus activities by Public Interest Research Groups (PIRG's). n56 In *Galda v. Rutgers*, n57 the court explained that a distinction could be drawn between a PIRG and student organizations funded through student activity fees. "[T]he student activity fee is used to subsidize a variety of student groups, and therefore that assessment can be 'perceived broadly as providing a 'forum' for a diverse range of opinion,'" n58 and "exposing the university community to a diversity of responsible opinion." n59 The PIRG, by contrast, is a separate entity which takes single, consolidated political positions and conducts much of its speech outside the campus forum. In

Carroll v. Blinken, n60 the court held that a PIRG served university-related functions sufficient to justify its compelled funding for its speech on campus. n61 Indeed, the court noted that a scheme in which funding was optional would impair the group's ability to enrich campus life, and "funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view." n62 As to off-campus activities, however, the court found that the educational value of activities did not justify compelled student support. Both Galda and Carroll suggest that until Smith, courts allowed universities to charge mandatory fees to support political speech within the campus forum, as long as the system created a true public forum in which the [*2021] government did not discriminate against speakers on the basis of the content of their speech. n63

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n56 In Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), cert. denied, 475 U.S. 1065 (1986), the court held that a state university could not compel students to pay a fee "to an independent outside organization that espouses and actively promotes a political and ideological philosophy which they oppose and do not wish to support." Id. at 1064. The court went to great lengths to make clear that it did not decide whether a student-run organization that used funds for expressive activity on campus could receive funds from a mandatory activity fee.

n57 Id.

n58 Id.

n59 Id. at 1067.

n60 957 F.2d 991 (2d Cir. 1992).

n61 Id. at 1000-01.

n62 Id. at 1002.

n63 This analysis is also consistent with Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 476 (1st Cir. 1989), in which the court refused to engage in a public forum analysis of the University of Massachusetts' decision to abolish its Legal Services Office, because the office was not a public forum. Rather, the court held, the office existed to help students participate in the public forum of the court system. This distinction, between a group which speaks within the campus forum and a group which helps students speak within an outside forum, is similar to the Galda and Carroll distinction between PIRG groups organized for on-campus speech and those which lobby in another public forum, the state legislature. Only if speech is directed to the on-campus forum is public forum doctrine controlling.

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III. PUBLIC FORUM DOCTRINE

It is well established that when a public university opens campus spaces for expression by student groups, it creates a public forum. n64 A public university cannot prevent groups from using public facilities that constitute a public forum on the basis of the content of the groups' speech, n65 nor can it

prevent the campus from becoming a public forum for students simply by imposing rules that partially limit speech on campus grounds. n66 Relying on the conventional conception of "public fora" as spatial property, one might argue that while public university campus grounds and facilities are a public forum for students, access to funds used to amplify one's speech within the [*2022] forum need not be analyzed in terms of public forum doctrine. Presumably the California Supreme Court did just that, thereby removing the mandatory funding system from public forum analysis. This Part argues that a stark distinction between granting access to public fora as space and granting money for the speech within that space is superficial. For the forum to be meaningfully available to speakers on a content-neutral basis, both access to space for expressive activity and access to funds with which to support expression within that space must be distributed on a content-neutral basis.

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n64 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (public university campus is a "designated" public forum); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *Hays County Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992), cert. denied, 113 S. Ct. 1067 (1993) ("[T]he outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students."). Because public university campuses are sometimes described as "designated" public fora and sometimes simply as public fora, and because the same standards govern designated public fora and public fora, see *infra* note 65, this Note refers to them simply as "public fora."

n65 The type of speech restrictions the government is permitted to make depends on the character of the public property on which the speech takes place. In *Perry*, the Court recognized three categories of public property for the purposes of public forum analysis: the traditional public forum, the limited or designated public forum, and the nonpublic forum. *Perry*, 460 U.S. at 45-46. Quintessential traditional public fora are public streets and parks, which for "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In traditional public fora the government may not discriminate among speakers on the basis of the content of their speech without narrowly drawn restrictions that serve a compelling state interest. *Perry*, 460 U.S. at 45. In limited or designated public fora, property not traditionally open for free speech but which the government has "expressly dedicated to speech activity," *United States v. Kokinda*, 497 U.S. 720, 726 (1990), the state "is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46. Examples of limited or designated public fora include university meeting facilities, school board meetings, and municipal theater. *Id.* at 45-46. Thus, in *Widmar*, the Court held that a public university may not prevent religious groups from using campus facilities on the basis of the content of the group's speech. *Widmar*, 454 U.S. at 267-77. Finally, in nonpublic fora, "[p]ublic property which is not by tradition or designation a forum for public communication," such as the school mail facilities at issue in *Perry*, the government may restrict speech according to content to reserve the forum for its intended purposes. *Perry*, 460 U.S. at 46. Regulations of speech in nonpublic fora need only be reasonable and viewpoint neutral. *Id.*