Speech, Technology, and the Emergence of a Tricameral Media: You Can't Tell the Players without a Scorecard

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by

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Introduction

The act of speech, standing alone, may border on the trivial. Most speech becomes significant only when it is linked to a hearer; generally, the more hearers, the greater the speech's potential significance. An intense symbiotic relationship exists, therefore, between the act of speech and the various amplifying technologies that increase its potential audience. Despite the close link between speech and amplifying technology, the precise legal relationship between the two remains one of our public policy enigmas.

At times, the Supreme Court has uncoupled technological amplification from speech, permitting regulation of the technology despite its effect on a speaker's potential audience. At times, the Court has merged the act of speech into its amplifying technology, treating the two as integral aspects of the act of communication. But the Court has never attempted a comprehensive discussion of the issue. Indeed, the intellectual chaos that characterizes the legal rules governing regulation of broadcasting—both cable and over-the-air—is a

1. I do not mean to suggest that speech is important only because it has an impact on the hearer. Thomas Emerson's powerful reminder of the self-affirming, dignitary nature of speech demonstrates that speech may affect the speaker at least as intensely as it affects a hearer. Thomas L. Emerson, The System of Freedom of Expression (1970). But the self-affirming nature of speech is at least partially dependent on the speaker's belief that someone will, or at least may, hear it. For current writing on the dignitary nature of speech, see C. Edwin Baker, Human Liberty and Freedom of Speech (1989); Jürgen Habermas, The Theory of Communicative Action: Lifeworld and System: A Critique of Functionalist Reason (1987).

2. Amplifying technologies include, at a minimum: the printing of posters, signs, books, magazines, and newspapers; sound equipment; telephone, telegraph, tape recordings, phonograph records, and movies; radio and broadcast television; cable television; and computer transmission. Other candidates include the postal service and highly visible street rhetoric.


5. For a pioneering effort to think about speech and technology, see Ithiel de Sola Pool, Technologies of Freedom (1983).
function of our failure to think more precisely about the relationship between speech and amplifying technology.\(^6\)

Until recently, the principal price paid for the lack of clarity in thinking about the relationship between speech and amplifying technology was incoherent legal doctrine in the broadcast area.\(^7\) We are, however, on the brink of an information era dominated by powerful economic entities that both speak and exercise oligopolistic control over the technology needed to amplify their speech.\(^8\) Where control over amplifying technology carries with it not merely the ability to be a powerful speaker, but also the power to prevent others from using critical technology to reach a mass audience, free speech theory must evolve more sophisticated ways to describe the intersection of speech, law, and amplifying technology.

In order to confront the intersection of speech and amplifying technology, we must answer at least six questions:

1. When, if ever, should we seek to separate the amplification process from the idea of speech?
2. When, if ever, should we collapse the two concepts by treating amplification as an integral part of the act of speaking?
3. When, if ever, should we encourage vertical integration of the two concepts by allowing both functions to be performed by the same economic unit?
4. When, if ever, should we seek to separate speech from amplifying technology by vesting control over each activity in a different economic entity?
5. If we permit the same economic entity to function as both a speaker and an amplifier, when, if ever, may the government regulate either function?


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

I
An Overview of the Relationship Between Speech and Amplifying Technology

In the era before Gutenberg, little attention was paid to the intersection of speech, law, and technology because primitive technology and mass illiteracy radically constrained the potential audience of a controversial speaker. In a world where sophisticated communication consisted of the Book of Kells or the Bayeux tapestry, law could safely ignore both speech and technology. With the emergence of print technology and vernacular language, however, a controversial speaker's potential sphere of influence dramatically expanded. Supporters of the status quo quickly sought to use law as a means of limiting the destabilizing impact of technologically amplified speech by regulating the technology—generally by requiring the licensing of printers.

The first great statement of the free speech principle in the Anglo-American legal tradition, Milton's *Areopagitica* (1644), was a plea to liberate print technology from government licensing. Similarly, the first defense of the free speech principle in the American


10. The shift to printing in vernacular language vastly increased the potential for mass literacy.


Law also sought to control access to the "technology" of vernacular language. Jan Hus was burned for, among other sins, translating The Bible into the vernacular. MATTHEW SPINKA, JAN HUS: A BIOGRAPHY (1968).


14. Milton's work is closely bound up with the relationship between free speech and scientific progress. In 1633, Galileo was placed under house arrest in Acetri by the Inquisition because he criticized Copernican theory. The young Milton, fresh from the University, visited Galileo at Acetri in 1638 and was deeply moved by the plight of Europe's preeminent scientific mind. When Milton received news of Galileo's death in 1641, he immediately began work on the *Areopagitica*, which eventually found an honored place in the libraries of Madison and Jefferson and played a major role in the genesis of the First Amendment.
tradition, the acquittal of John Peter Zenger in 1735, refused to hold a printer criminally responsible for the speech of a controversial speaker.15

As Milton and Zenger illustrate, the early days of print technology and free speech theory were characterized by a clear vertical separation between speech and its amplifying technology. Writers wrote and printers printed, but they were separate entities pursuing independent agendas subject to different legal rules. Whether and to what extent we can or should seek to replicate Milton's model today by preventing a single entity from controlling both the speech and the amplification function remains one of our most difficult public policy choices.16

The evolution of mass newspapers in the nineteenth century was characterized by large-scale vertical integration of speech and the newly invented rotary press.17 Unlike New York in 1735, nineteenth century mass circulation newspapers did not rely on independent printers. They merged the speaker and amplifying print technology into a powerful new institution—a speaker capable of reaching a mass audience without help from anyone else.18 The result was the emergence of an economically powerful, technologically amplified speaker with enormous influence in the society.19

15. The Zenger trial is reported at 17 How. St. Tr. 675 (1735). James Alexander was the actual author of the words for which John Peter Zenger, his printer, was tried. William Bradford's pamphlet describing the Zenger trial reproduced Hamilton's summation to the jury and became the most celebrated defense of the free speech principle in colonial America. It went through 14 editions before 1791. For a thoughtful reinterpretation of the Zenger trial, see Eben Moglen, Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York, 94 COLUM. L. REV. 1495 (1994). See also EMORD, supra note 11, at 56-58; ROBERT W. JONES, JOURNALISM IN THE UNITED STATES 89-93 (1947); THE TRIAL OF PETER ZENGER (Vincent Buranelli ed., 1957).

16. Adoption of a "common carrier" approach to amplifying technology is the most prominent example of an attempt to return to the world of Milton and Zenger. See Note, The Message in the Medium, supra note 8.

17. For a discussion of the technological advances that enabled the evolution of the nineteenth century mass press, see CLAIR, supra note 11, at 205-29. For a discussion of the impact of the telegraph on newspapers, see MENAHEM BLONDHEIM, NEWS OVER THE WIRES: THE TELEGRAPH AND THE FLOW OF PUBLIC INFORMATION IN AMERICA 184-87 (1994).

18. Interestingly, book publishers and most magazines did not seek to integrate vertically in the nineteenth century. Unlike the mass press, where the author, editor, publisher, and printer became vertically integrated into a single economic unit, the publication of books and most magazines involved independent authors and independent printers. JAMES PLAYSTEAD WOOD, MAGAZINES IN THE UNITED STATES (1971).

Efforts to regulate mass circulation newspapers have tended to ignore the merger of speech and technology, presumably because print technology is widely available to all who can afford it. The result has been the evolution of an economically powerful, technologically amplified speaker with no obligation to share its technological advantages.\textsuperscript{20} Even in a newspaper context, however, when a newspaper’s monopoly control over print technology threatens to prevent other speakers from reaching an audience, regulation of the technological amplification process takes place, usually under the rubric of the antitrust laws.\textsuperscript{21}

The invention of revolutionary forms of amplification technology during the late nineteenth and twentieth centuries raised the ante on the legal relationship between speech and amplification technology. For example, when Thomas Edison attempted to dominate the amplifying technology underlying motion pictures by linking camera and projector patents, ownership of the stock of raw film, and control over movie distribution, federal courts ordered the dissolution of his Motion Pictures Patent Company in 1915.\textsuperscript{22} Despite the Edison case, the motion picture industry rapidly developed into a vertically integrated oligopoly in which a consortium of powerful studio-speakers limited speech by independent producers, in large part because the studios controlled the necessary amplifying technology. After a decade of antitrust litigation, the Paramount consent decree\textsuperscript{23} and the aggressive prodding of the Supreme Court broke the vertical link between speech and amplifying technology in the motion picture industry.\textsuperscript{24}

The invention of the telephone triggered yet another round in the relationship between speech and amplifying technology. Initially, we


Financially ailing newspapers have been permitted to pool their access to amplifying technology pursuant to joint operating agreements exempted from the antitrust laws by Congress. See generally S. Chesterfield Oppenheim & Carrington Shields, Newspapers and the Antitrust Laws (1981).

\textsuperscript{22} See Dana E. Roof et al., Structural Regulation of Cable Television: A Formula for Diversity, 15 Comm. & L. 43, 59-65 (1993) for a helpful history of the enforcement of the antitrust laws in the motion picture context.


\textsuperscript{24} See generally Michael Conant, Antitrust in the Motion Picture Industry (1960).
elected a radical separation of speech and amplifying technology. Regulators ceded an economic monopoly to Bell Telephone over the technological amplification process in return for a promise that Bell would wholly divorce speech from technology and operate solely as a conduit, not as a speaker. It was as though Milton had been given a license for a massive monopoly printing press capable of serving all comers, on the condition that everyone could use it at reasonable cost, and that Milton himself could not speak.

Separating speech from technology in the telephone context worked fine, at least in the early days. But the technological monopoly eventually turned into an anti-competitive nightmare leading to the breakup of the Bell system. With the re-establishment of technological competition in the telephone area, the question of whether the separation of speech from technology in the telephone context should continue is at center stage. Once Milton's massive printing press loses its monopoly status, why not let it speak.

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

One possible regulatory response would have been to follow the telephone model and to separate speech from broadcast technology by requiring broadcasters to perform solely as conduits, leaving others to perform the speech function. But Congress, seeking to replicate in the broadcast sphere the communicative and economic power of the vertically integrated mass newspaper, explicitly rejected the common carrier approach for broadcasting in favor of the newspaper model of vertical integration.
Congress, however, never fully embraced the newspaper model. Concerned over possible abuse of scarce broadcast technology, Congress sought to retain significant regulatory control over the technology.\textsuperscript{31} Today, an uneasy truce reigns between the concept of a broadcaster as a full-fledged vertically integrated speaker and a broadcaster as a partial conduit for the speech of others.\textsuperscript{32}

As the newspaper antitrust cases illustrate, even a vertically integrated speaker in control of both the speech function and the means of technological amplification is subject to technological regulation when undue control of the amplification process threatens the ability of others to make themselves heard.\textsuperscript{33} This is especially so when control over the amplification technology is, in part, the result of a government decision. Thus, the FCC's chain broadcasting regulations successfully limited the power of a vertically integrated broadcast network to use its excessive control of amplification technology to limit the speech of others.\textsuperscript{34} Similarly, efforts to assure fair access to ownership and management of the amplification technology by historically excluded groups have been upheld by the Court,\textsuperscript{35} as have more problematic bans on the cross-ownership of print and media amplifying technology in the same market.\textsuperscript{36}

Cable broadcasting began, like the early telephone, as a classic example of a separation between speech and technology. The early cable television broadcasters did little more than provide a new technology for amplifying someone else's speech, which was almost always the broadcast signals of local over-the-air stations. Cable television functioned like Milton's printer, but without the ability to pick and choose what it amplified.\textsuperscript{37}

When cable broadcasters sought to attain a degree of vertical integration between speech and amplifying technology by selecting the speech they wished to amplify, and by generating speech of their own, they ran into two roadblocks. First, the FCC treated cable broadcasters as satellites of the over-the-air broadcast industry and imposed re-

\begin{itemize}
\item \textsuperscript{31} See, e.g., Radio Act of 1927, § 18 (currently codified as § 315 of the Communications Act of 1934 (current version at 47 U.S.C. § 315 (1988))).
\item \textsuperscript{33} See, e.g., Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Associated Press v. United States, 326 U.S. 1 (1945).
\item \textsuperscript{34} NBC v. United States, 319 U.S. 190 (1943).
\item \textsuperscript{35} Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990).
\item \textsuperscript{37} See generally DANIEL BRENNER ET AL., CABLE TELEVISION AND OTHER NON-BROADCAST VIDEO (1986 & Supp. 1993).
\end{itemize}
strictive regulations designed to prevent cable from posing a competitive threat to the profitability of over-the-air broadcast technology. Second, regulators exhibited the same ambivalence toward the vertical integration of cable broadcasting that has characterized the approach to over-the-air broadcasting. On one hand, regulators were tempted by the promise of a new category of powerful, vertically integrated speakers with the economic power to develop and implement new speech technology and the capacity to produce quality programming. Accordingly, cable systems were quickly authorized to function as vertically integrated speakers in the tradition of broadcasters and newspapers, as opposed to merely providing a technologically amplified conduit for the speech of others in the tradition of initial efforts at telephone regulation.

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

One possible legal approach to the regulatory compromise, adopted by the majority of the three-judge district court in Turner Broadcasting, is to uncouple cable broadcaster speech from its amplifying technology and to view the 1992 statute as a mere regulation

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of technology, triggering the most permissive form of scrutiny—rational basis.\textsuperscript{43}

The polar approach, urged by the dissent, is to view cable broadcasters as totally integrated speakers, so that any effort to interfere with a broadcaster's control over amplifying technology becomes an assault on speech itself, triggering the strictest First Amendment scrutiny—strict scrutiny.\textsuperscript{44}

I believe that both polar approaches are wrong. Each reflects a traditional "either/or" assumption that has viewed amplifying technology either as inherently separate from speech or as an inherent part of the speech itself. In fact, it is neither. There is no inherent relationship between speech and amplifying technology. Rather, there are four basic public policy questions:

1. Do we wish to permit vertically integrated speakers in the broadcast area?
2. Do we wish to exercise any control over what such vertically integrated broadcasters say?
3. Do we wish to make the amplifying technology available to other speakers?
4. What does the First Amendment have to do with the answer to the first three questions?

The answer to the first question, whether to permit (and de facto, to foster) vertically integrated broadcasters, is driven more by economic necessity than by First Amendment fiat. In settings like the newspaper industry where government does not allocate control over the amplifying technology to a favored few, a combination of First and Fifth Amendment values probably prohibits government from forbidding the vertical integration of speech and technology. We have never confronted the legal issue, however, because, even if we could prohibit newspapers from owning their own printing presses, it would not make economic sense to forbid vertical integration. The economic and social success story of linking speech to technology through a mass press is a persuasive argument against any effort to reinvent the Zenger model of separate ownership of speech and press. Indeed, faced with an ailing newspaper industry, we should be increasing the potential for vertical integration (by abolishing restrictive cross-own-

\textsuperscript{43} FCC v. Beach Communications, Inc., 113 S. Ct. 2096 (1993), is an example of a case potentially impacting on speech that was decided on the basis of rational basis scrutiny. Significantly, the potential free speech issues in Beach Communications were not before the Court.

\textsuperscript{44} Turner Broadcasting, 819 F. Supp. at 57.
ership rules, for example), not thinking of ways to restrict such integration.

In settings like over-the-air or cable broadcasting, where government allocates ownership and control of the amplifying technology to a favored few, the legal issue of whether broadcasters may be forbidden from developing an integrated speech arm is an open one. For years, we have prevented telephone companies from taking such action. While the legal issue is far from clear, we probably have the power to compel the complete separation of speech and technology in the broadcast area. Broadcasters could be made to function like printers in Milton’s time or as common carriers like the early phone company, but why would we want them to do so?

In the broadcast area, technological innovation requires the efficient assembly of enormous quantities of capital. Preventing vertical

45. Existing law forbids ownership of a television station and a newspaper in the same market. 47 U.S.C. § 301 (1988). Ailing newspapers are thus denied access to infusions of capital from logical partners, even in cities like New York, where much competition exists.

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

Of course, if cable develops an amplifying technology that does not implicate the government in its allocation, its legal status may change. At present, the widespread assumption is that monopoly control over cable in a community will continue to be enjoyed by a single favored speaker. Currently, fewer than one percent of cable systems face competition from a competing system. Must Carry: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 101st Cong., 1st Sess. 40 (1989). The 1992 Cable Act forbids localities from granting formal monopoly status to cable franchisers. See Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985) (overturning cable monopoly), aff’d on narrower grounds, 476 U.S. 488 (1986).


48. Estimates of the amounts needed to install fiber optic wires needed for the information superhighway range from a low of $26 billion needed to relay existing cable television lines to $276 billion to rewire the local telephone circuits. See Note, The Message in the Medium, supra note 8, at 1068 n.25.
integration impedes the evolution of powerful communication entities capable of developing and implementing new technology and producing quality programming. Thus, whether by legal rule or economic good sense, we have opted to permit vertically integrated speakers in the broadcast area.

Once we make the decision to permit and, thus, to foster vertical integration of speech and broadcast technology (cable or over-the-air), we must answer the second question—whether to seek to control what is broadcast. It is at this point that our choices should be most constrained by the First Amendment. Having elected to allow speakers to operate as technologically amplified, vertically integrated economic units, we should afford such powerful speakers full First Amendment protection against government efforts to control what they say. It would be a dangerous mistake to foster the growth of extremely powerful, vertically integrated broadcast speakers only to place that vast communicative power at the disposal of the government.49

Of course, the very power of the vertically integrated broadcast speaker has been urged by some as a justification for setting limits on what the speaker may say.50 However, it seems risky to permit the government to control the speech of a particularly powerful speaker, merely because the speaker is powerful. If, in fact, a vertically integrated broadcast speaker has too much power over the audience, the last hand you want on the microphone is the government's. If vertically integrated speakers are deemed too powerful, the more appropriate response is to adjust the degree of vertical integration between speech and amplifying technology rather than to censor the speech itself.

That brings us to the third, and most difficult, question: to what extent may the government regulate the intersection between speech and amplifying technology without infringing the free speech rights of a vertically integrated speaker? Even if we choose to link speech and amplifying technology in a single powerful speaker for economic rea-

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49. The difficulty of controlling private concentrations of power is one of the dilemmas of the liberal state. Thoughtful critics argue that under certain circumstances, it is better for government to regulate powerful speakers in the common interest than to leave the area to private choice. Cass Sunstein, Democracy and the Problem of Free Speech (1993).

   I hope that the Supreme Court's decision in Turner Broadcasting, discussed infra at text accompanying notes 68-109, allows a sufficient degree of regulation designed to assure access to amplifying technology to satisfy critics. I suspect, however, that pressure to regulate broadcast content will continue, generally phrased as an effort to protect vulnerable hearers against abuse by a powerful speaker. See, e.g., FCC v. Pacifica Found., 438 U.S. 726 (1978).

sons, we do not lose all ability to regulate the amplifying technology. This is especially true when the speaker enjoys privileged access to the amplifying technology only because the government has bestowed it upon him. The key is to determine when a "technology" regulation unduly infringes the speech interest of a vertically integrated speaker—thus triggering First Amendment scrutiny—as opposed to merely regulating the fair use of the government-allocated amplification technology. That task requires a more precise First Amendment metric than the one we usually employ.

II
Toward a First Amendment Metric For Use in Measuring the Effect on Speech of Efforts to Regulate Amplifying Technology

I have argued that three corollaries should govern the relationship between speech and amplifying technology:

Corollary I:
Primarily for reasons of economic efficiency, we should allow speakers to develop vertically integrated economic units that unite the speech function and the amplification function in a single powerful entity.

Corollary II:
The resulting powerful, technologically amplified speaker should enjoy full First Amendment protection over the content of its speech.

Corollary III:
Government may, however, regulate amplifying technology that it has allocated to a monopoly or oligopoly user to assure technical quality, fair price, and fair use by competing speakers, but may not impinge upon the speech function.

There is, of course, real tension between Corollary II's promise that a technologically amplified speaker can say what it wishes and Corollary III's insistence that it must occasionally use its amplification facilities to broadcast the speech of others. A more precise analysis of the effect of technological regulation on the speaker function can, however, reduce this tension.

During the seventy years that the Supreme Court has struggled with free speech theory, the model of the speech process has grown

from a naive preoccupation with the speaker to an effort to integrate the hearer into the Court’s analysis.\(^{52}\) It is time to expand the model even further to take account of the conduit.

In the beginning, there was the speaker. The modern Supreme Court’s encounter with free speech opens with the paradigm of the heroic speaker of conscience, pressed by her art or her politics or her science or her religion to speak the truth to a hostile world that prefers silence.\(^{53}\) The romantic conception of the speaker of conscience dominated the first fifty years of contemporary free speech theory in the Supreme Court. The high level of protection for worthless, even destructive speech, like the Nazi invective in Skokie,\(^ {54}\) flowed in large part from the Court’s historic tendency to place the speaker at the center of the First Amendment universe. While the benefits of free speech for hearers and the greater society were occasionally trotted out as rhetorical flourishes in the early cases, the early years of modern free speech protection were speaker-centered.

Several events nudged the Supreme Court away from an exclusively speaker-centered view of the First Amendment. Free speech cases arose where it was difficult to identify a protected speaker.\(^ {55}\) Challenges to government secrecy raised the issue of the unwilling speaker.\(^ {56}\) Troublesome cases arose involving involuntary hearers where the usual serendipity between willing speaker and willing hearer did not exist.\(^ {57}\) Entire categories of speech arose where the principal justification for First Amendment protection was the hearer’s right to know.\(^ {58}\) The net effect was a quantum shift in the

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\(^{58}\) The two most prominent examples of protected speech in the absence of romantic speakers are commercial and corporate speech. First Nat’l Bank of Boston v. Bellotti, 435
free speech universe to a greater concern with the interest of hearers.\(^{59}\)

The full implications of integrating the hearer's interest into the speaker-centered world of the First Amendment have yet to be resolved. Since a hearer-sensitive view of the speech process will be more instrumental than the speaker-centered version, a hearer-centered vision of the speech process carries with it the dangerous potential for diluting the rights of speakers. This is especially true when the interests of speakers and hearers are said to diverge. The chronic instability of much First Amendment doctrine—witness the residential picketing cases,\(^{60}\) the anti-solicitation decisions,\(^{61}\) or the cases dealing with indecent broadcast speech\(^{62}\)—is attributable to the fact that we have not yet developed a metric to weigh the interests of speakers against the interest of hearers and have not decided who should win when the interests diverge.

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

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

\(^{59}\) The interests of hearers were prominently featured in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).


The best way out of the "either-or" box that views powerful conduit-speakers either as fair game for widespread censorship of content or as loose cannons beyond the reach of regulatory control, is to uncouple the speaker function from the conduit function. Doing so would protect the former and regulate the latter.

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

Much, perhaps most, regulation of amplifying technology never progresses beyond the first question. If a regulation affects the amplifying technology without affecting the speech function, it simply does not implicate the First Amendment. Most efforts at regulation of cost, technical quality, structural organization, and taxation fall into this category. Even regulations appearing to affect content, such as must-carry rules, do not actually affect the speech function if the broadcaster would have carried the signal in the absence of the regulation.

When, however, a regulation forces a technologically amplified speaker to act as a conduit for something it otherwise would not say, the speech function is obviously implicated. But, in the absence of a content based objection to amplifying the speech in question, the interference may not violate the First Amendment. For example, a reluctance to act as a conduit for someone else's speech based on non-content related criteria, such as a disagreement about audience demand, a disagreement over fees, or a desire to maximize market share, can be overridden without a serious intrusion into the speech function. Overriding a conduit's views about audience desires, transmission fees, or market share is simply not the same as forcing a conduit to pledge allegiance to an idea it hates, or to say something with which it disagrees.

In the absence of such a significant content based objection, requiring a conduit to amplify the speech of a third person does not materially subvert the speaker function.

In at least two settings, though, technology regulations affecting broadcast content will materially interfere with the speaker function.

When a conduit is forced to amplify speech with which it disagrees, or is forced to displace preferred speech in favor of coerced speech, the speech function is overridden by the desire to regulate technology.

Conduit objections to substantive content, while clearly posing a substantial speech-based issue, can arguably be dealt with by permitting a disclaimer and a disavowal of responsibility by the amplifier. We follow precisely that course when we compel speech on private property,\textsuperscript{66} or permit religious speech on public property.\textsuperscript{67}

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

I believe that the legal rules governing efforts to regulate amplifying technology should vary according to the degree of interference with the speech function. If a regulation does not implicate a significant speech interest, it is not subject to First Amendment scrutiny. If a regulation requires a broadcaster to act as an involuntary conduit but does not require a broadcaster to transmit material with which it disagrees, the regulation affects the broadcaster's speech interest but does not materially infringe it. If, however, a regulation displaces a broadcaster's preferred speech in favor of speech with which it disagrees, the regulation directly attacks the speech function and, thus, should satisfy a rigorous First Amendment standard of review. How, if at all, would such a proposed scheme work in the \textit{Turner Broadcasting} case?

\section*{III}

\textit{Turner Broadcasting} and the Tricameral Media

Any effort to disentangle the speech function from the conduit function must be fact intensive. Until a court measures the precise effect of a conduit regulation on the speech function, it cannot know whether the regulation should be tested under the First Amendment or some less demanding standard. Unfortunately, the district court in the \textit{Turner Broadcasting} case failed to make this evaluation.\textsuperscript{68}

\begin{footnotes}
\item[66.] Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
\end{footnotes}
In its haste to assure speedy judicial review of the 1992 Cable Act, Congress provided for an accelerated review procedure involving a three-judge court and a direct appeal to the Supreme Court. The accelerated review provisions encouraged a wide-ranging facial attack on the leased-access and must-carry rules imposed by the statute. Instead of requiring a series of as-applied challenges to the regulations by broadcasters with a specific, factually-rooted complaint capable of being assessed by the courts, Congress' special review procedures encouraged an outpouring of facial challenges to the 1992 Cable Act based on hypothetical events and anecdotal assertions. Little, if any, effort was made in the district court to pinpoint the precise nature of the interference with the speech function claimed by the multiple parties.

Moreover, for understandable reasons, the legal strategy followed by each of the three major parties in Turner Broadcasting tended to downplay the facts. It is no coincidence that all parties agreed that summary judgment was appropriate. The government downplayed the facts because, as a matter of policy, it sought to avoid judicial second-guessing of Congress' factual assumptions about the necessity for the must-carry and leased-access rules. In effect, the government argued that when regulation of amplifying technology is at issue, Congress should make the final call about whether the regulation is needed. Thus, no matter how drastic the resulting interference with the speaker function, such regulation would be subject to relaxed rational basis scrutiny in the courts. The net effect of this would be to uncouple speech from amplifying technology, leaving Congress free to regulate amplifying technology, even when the regulation directly interferes with such speech function.

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

Finally, the over-the-air broadcasters downplayed the facts because they were afraid to put Congress' assumptions about the possible abuse of the cable "gatekeeper" function into judicial play, and because they recognized that in a few settings the cable broadcaster

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speech function (as this Article has attempted to define it) is genu-
inely overridden when a cable broadcaster must delete its preferred
speech in favor of the speech of others.\footnote{72}

The net result was a district court record that did not begin to
explore the actual impact of the must-carry rules on the cable broad-
casters' speech functions, and a set of highly competent Supreme Court briefs that made little effort to distinguish the speech from the
conduit function.\footnote{73} Despite the unfortunate procedural posture, however, the Supreme Court in \textit{Turner Broadcasting} made real strides to-
towards a reasoned approach to the relationship between law and technology.\footnote{74}

When the dust cleared, it became apparent that the Court in \textit{Turn-
er Broadcasting} established a tricameral media.\footnote{75} When regulating
the print media, amplifying technology is to be treated as an integral
part of the act of speaking.\footnote{76} When regulating the over-the-air broad-
cast media, amplifying technology is to be treated as severable from
the act of speaking in order to assure a broad diversity of voices on
the "scarce" broadcast spectrum.\footnote{77} When regulating the cable broad-
casters, amplifying technology is to be severable from the act of
speaking when necessary to prevent abuse of a cable broadcaster's
"gatekeeper" powers.\footnote{78} Finally, all efforts to regulate the amplifica-
tion function that impinge on the speech function must be justified by
a factual showing of necessity.\footnote{79}

The precise issue in \textit{Turner Broadcasting} was the constitutionality
of the must-carry rules imposed by Congress in the 1992 Cable Act.
Under must-carry, cable broadcasters must include the signals of all
local over-the-air television broadcasters in their basic package.\footnote{80}
Congress imposed the must-carry rules in order to protect over-the-air
broadcasters from potential discrimination at the hands of cable broadcasters who control access to cable systems and who are said to

\footnote{72}{My assessments of the parties' strategic thinking in \textit{Turner Broadcasting} is, admit-
tedly, purely subjective. I base it on my own experience as a litigator.}

\footnote{73}{See, e.g., Appellant's Brief, \textit{Turner Broadcasting} (No. 93-44); Respondent's Brief,
\textit{Turner Broadcasting} (No. 93-44); Reply Brief, \textit{Turner Broadcasting} (No. 93-44).}

\footnote{74}{\textit{Turner Broadcasting}, 114 S. Ct. at 2445.}

\footnote{75}{\textit{Id.} at 2454-72. My use of the "tricameral" metaphor owes its genesis to Lee Bol-
linger's helpful article describing a bicameral media. Lee C. Bollinger, \textit{Freedom of the
Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media}, 75
\textit{Mich. L. Rev.} 1 (1976).}

\footnote{76}{\textit{Turner Broadcasting}, 114 S. Ct. at 2465.}

\footnote{77}{\textit{Id.} at 2457.}

\footnote{78}{\textit{Id.} at 2468.}

\footnote{79}{\textit{Id.} at 2471.}

\footnote{80}{47 U.S.C. § 534 (Supp. IV 1992).}
have a motive to weaken or destroy over-the-air broadcasters.\textsuperscript{81} Cable broadcasters challenged the must-carry rules, arguing that they were content-based efforts to control the speech of the cable broadcast industry.\textsuperscript{82} Justice Kennedy, writing for a shifting majority in \textit{Turner Broadcasting},\textsuperscript{83} sought to establish a framework for analyzing the free speech rights of cable broadcasters.\textsuperscript{84}

Analogizing the 1992 Cable Act to the antitrust laws, the government argued that the must-carry rules should be subject merely to "rational basis" scrutiny, since they are bona fide efforts to assure diversity and fair structure in the broadcast industry.\textsuperscript{85} Eight members of the Court (Kennedy, Rehnquist, Blackmun, O'Connor, Scalia, Souter, Thomas, and Ginsburg) rejected the government's rational basis position on two grounds.\textsuperscript{86} First, they rejected the notion that efforts to correct for market breakdown in the speech area should be governed by rational basis scrutiny, noting that such an approach would require the overruling of \textit{Miami Herald Publishing Co. v. Tornillo}.\textsuperscript{87}

Second, they rejected the analogy between over-the-air and cable broadcasters.\textsuperscript{88} Although efforts to assure diversity in the over-the-air broadcast world may be subject to relaxed scrutiny under \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{89} Justice Kennedy reasoned that the government's increased regulatory power over traditional radio and television is justified only because of the scarcity of broadcast frequencies.\textsuperscript{90} Because scarce frequencies make it impossible to add more speakers, the existing frequencies may be monitored to assure fair access and diversity.

Cable television, wrote Justice Kennedy, does not pose a scarcity problem.\textsuperscript{91} Technology promises a virtually inexhaustible number of cable stations. Thus, Justice Kennedy reasoned, efforts to assure diversity in the cable world should not be governed by the same ground rules that govern the over-the-air world.\textsuperscript{92} Only Justice Stevens, in a

\begin{itemize}
\item \textsuperscript{81} \textit{Turner Broadcasting}, 114 S. Ct. at 2454.
\item \textsuperscript{82} \textit{Id.} at 2461.
\item \textsuperscript{83} Four Justices filed separate opinions, and three Justices joined in Justice O'Connor's dissenting opinion. \textit{Id.} at 2445.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 2458.
\item \textsuperscript{86} \textit{Id.} at 2461.
\item \textsuperscript{87} \textit{Id.} at 2458-59; see \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241 (1974).
\item \textsuperscript{88} \textit{Turner Broadcasting}, 114 S. Ct. at 2457-58.
\item \textsuperscript{89} 395 U.S. 367 (1969).
\item \textsuperscript{90} \textit{Turner Broadcasting}, 114 S. Ct. at 2456-57.
\item \textsuperscript{91} \textit{Id.} at 2457.
\item \textsuperscript{92} \textit{Id.} at 2457-58.
\end{itemize}
concurring opinion, appeared willing to endorse aspects of the government's rational basis position.93

A majority of the Court similarly rejected the arguments of cable broadcasters that efforts to regulate cable speech should be governed by the same stringent rules that insulate newspapers from government regulation.94 Writing for a narrower five-Justice majority (Kennedy, Rehnquist, Blackmun, Stevens, and Souter), Justice Kennedy noted that although the scarcity problem does not exist in the cable area, the technology of cable allows cable broadcasters to be "gatekeepers" for the speech of others, such as over-the-air broadcasters.95 Content-neutral efforts to regulate a cable broadcaster's "gatekeeper" function, argued Justice Kennedy, should not be subject to strict scrutiny, but to the intermediate O'Brienv standard that is more stringent than rational basis but less stringent than strict scrutiny.97

Writing for the same five-Justice majority, Justice Kennedy rejected the cable industry's alternative argument that the must-carry rules are an exercise in content-based regulation of speech triggering strict scrutiny, arguing that the content of the speech had nothing to do with Congress' desire to impose must-carry rules in an effort to preserve the economic health of the over-the-air broadcast industry.98

Four Justices vigorously dissented (O'Connor, Scalia, Ginsburg, and Thomas), arguing that Congress' concern with protecting local programming and non-profit television was clearly content-based, and thus subject to the lethal strict scrutiny test of a compelling state interest and no less drastic means. Since they believed the must-carry rules to be content-based, the four dissenters did not express themselves on the appropriate standard governing content-neutral regulation of cable's gatekeeper function.

Justice Kennedy lost his majority when he attempted to apply the O'Brienv test to the record before the district court. Because the lower court had granted summary judgment, almost no factual development took place. Four members of the Court (Kennedy, Rehnquist, Blackmun, and Souter) held that additional hearings were needed below to determine whether Congress had developed sufficient evidence on which to base its fear that over-the-air broadcasters were in danger of being harmed by improper use of the gatekeeper function.99

93. Id. at 2474-75.
94. Id. at 2464-66.
95. Id.
98. Id.
99. Id. at 2473.
same four Justices also wished to see a factual development of the precise impact of the must-carry rules on cable broadcasters.100

Justice Stevens believed that the legislative record developed over three years of hearings was sufficient to satisfy the *O'Brien* test.101 Indeed, he declined to join the portion of the Court’s opinion rejecting the government plea for rational basis review. Accordingly, he would have voted to affirm.102 Justice Stevens, however, lent his vote to the Kennedy plurality in order to achieve a dispositive set of instructions for the lower court,103 because four members of the Court believed that the 1992 Cable Act should be measured by strict scrutiny on remand and four members believed that remand was necessary to decide whether intermediate scrutiny was satisfied.

When all the smoke clears, *Turner Broadcasting* stands for two important principles. First, it establishes a threefold structure for media regulation. Newspapers are governed by *Tornillo*.104 Over-the-air broadcasters are governed by *Red Lion Broadcasting*, at least where the regulation is an effort to advance diversity of views.105 Cable broadcasters receive *Tornillo*-like protection when the regulation seeks to control content106 but *O'Brien* protection when the regulation is a content-neutral effort to regulate the gatekeeper function.107

Second, *Turner Broadcasting* reasserts the important institutional responsibility of the judiciary to conduct an independent review of the factual sufficiency of legislative justifications for regulating amplification technology.108 On remand, the district court will be placed in the awkward position of second-guessing Congress’ judgment that the must-carry rules are necessary to protect over-the-air broadcasters from gatekeeper abuse. Requiring careful judicial scrutiny of the asserted justifications for regulations of technology that impinge on speech is necessary, however, if the legal rules are to have teeth.

Moreover, on remand, the district court should make a serious effort to disentangle the speech and conduit functions in order to assess the actual impact of the 1992 regulations on the behavior of cable broadcasters. First, it should ask whether the must-carry rules actually affect a cable broadcaster’s speech function. The vast bulk of cable

100. *Id.*
101. *Id.* at 2472-74.
102. *Id.* at 2473-74.
103. *Id.* at 2475.
104. *Id.* at 2464.
105. *Id.* at 2456.
106. *Id.* at 2465.
107. *Id.* at 2469.
108. *Id.* at 2473.
systems may wish to carry the signals of local over-the-air stations and do not object to reasonably priced leased access. The 1992 Cable Act does not implicate their speech functions at all. When a cable broadcaster performs as a willing conduit, no First Amendment interests are violated. Speculation about possible future conflict should not force the district court into deciding a facial challenge to the statute.

Second, the district court should identify those relatively few cable broadcasters who are being forced to carry signals they would otherwise have refused to transmit and explore the broadcasters' reluctance to amplify the over-the-air signal. If a cable broadcaster's reluctance to allow the use of an otherwise unused channel is based on disagreements that do not materially implicate the speech function, such as disagreements about audience demand, signal quality, transmission fees, or market share, the broadcaster may be required to act as a conduit without material damage to its speech function. The broadcaster enjoys monopoly access to the amplifying technology. Therefore, it can be forced to share the amplifying technology as long as its speaker function is not impaired. At most, such a predominantly conduit-based regulation should be measured by the energized rational basis standard used in City of Cleburne.109

Third, the court should single out the (perhaps non-existent) cable broadcasters whose reluctance to carry an over-the-air broadcast signal on an otherwise unused channel is motivated by a disagreement over substantive content. At that point, coercing a cable broadcaster to operate as an involuntary conduit for speech with which it disagrees undoubtedly impacts on the speech function. Requiring someone, even a conduit, to assist in the dissemination of material with which it disagrees seriously impinges on the speaker function, even if a disclaimer is attempted. Therefore, the court should require a substantial showing of need before enforcing such a regulation. Since the availability of a disclaimer somewhat alleviates, but does not eliminate, the impact on the speech function, intermediate scrutiny under O'Brien seems appropriate.

Finally, the court on remand should identify settings in which a cable broadcaster is required to displace preferred speech from a system operating at capacity in order to make room for the speech of someone else. Even in this setting, it might be possible to ask whether the forced substitution impinges on a material speech interest, for example in situations where the preference is not based on any content-related criteria. However, the coerced displacement of a broad-

caster's speech by someone else's speech is a direct impingement on the speaker function, whatever the broadcaster's motives may be. Thus, before a regulation could force the displacement of an existing signal, the regulation should satisfy an exacting First Amendment showing of factual necessity at least as stringent as \textit{O'Brien}.

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

In short, the court deciding the \textit{Turner Broadcasting} case on remand should determine exactly what the impact on the speech function really is. On remand, it is likely that most of the cable broadcasters will not be able to point to a material interference with the speech function because they would have carried the signal anyway, or because the reluctance to carry the signal on an unused channel is not based on content. If a close scrutiny of the facts reveals a cable broadcaster with a claim of material infringement on the speech function because the broadcaster actually disagrees with the coerced speech, or because the coerced speech displaces other speech, we should refuse to enforce the regulation as applied to that broadcaster, unless the government makes a fact-based showing of necessity far stronger than that made in the original \textit{Turner Broadcasting} record.