TO CONVERGENCE AND BEYOND: FIRST AMENDMENT LAW TO WITHSTAND FAST-PACED CHANGE IN THE TELECOMMUNICATIONS INDUSTRY

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INTRODUCTION

Telecommunications can be defined as "[t]he art and science of 'communicating' over a distance."[1] The telecommunications industry includes long-distance, local and wireless telephone companies, cable and satellite television providers, radio and television broadcasters, Internet service providers, optical network providers, and all other organizations involved in voice or data communications. Technology magnifies the voices with which telecommunications companies speak, thus rendering them more powerful than ordinary speakers.[2] For example, a relatively small number of radio and television broadcasters has the ability to spread their messages to a mass audience. Accordingly, the government heavily regulates these companies

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1. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 683 (17th ed. 2001) (defining Telecommunications as "[t]he art and science of 'communicating' over a distance by telephone, telegraph, and radio. The transmission, reception and the switching of signals, such as electrical or optical, by wire, fiber, or electromagnetic (i.e. through-the-air) means.").

2. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386–88 (1969) ("Differences in the characteristics of new media justify differences in the First Amendment standards applied to them. . . . [T]he reach of radio signals is incomparably greater than the range of the human voice."); PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL COMMUNICATIONS LAW 1277–79 (2d ed. 1999).

in an effort to reduce the risk that a few speakers will dominate the marketplace of ideas.[3]

Regulated companies often balk at government's requirements and attack them in several characteristic ways: federal laws are attacked for constitutional reasons such as equal protection or vagueness,[4] administrative rules for being beyond the scope of agency authority or for being unsubstantiated,[5] and state and local laws under the preemption doctrine.[6] The telecommunications industry, however, differs from other regulated industries because, by its very nature, it involves speech. When a regulated company can argue that it "speaks," and that a law somehow hinders its speech, the company has another weapon in its arsenal with which to attack: the First Amendment.

Indeed, the First Amendment is battle-tested in the area of telecommunications.[7] Over the last half-century, the courts have developed a detailed and frequently controversial body of law concerning the intersection of the First Amendment and telecommunications.[8] As is typical in constitutional analysis,

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3. *See, e.g.*, HUBER, KELLOGG & THORNE, *supra* note 2, at 1279–80 (asserting that one reason for regulation is to prevent a monopoly telecommunications *carrier* from extending its monopoly into the *content* that it carries—thus eliminating content diversity); Susan Dente Ross, *First Amendment Trump? The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281, 282 (1998) ("Congress expressly designed must-carry to . . . ensure diversity of voices in the video market . . . .").

4. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 861–62 (1997) (not reaching the Fifth Amendment vagueness issue, but noting that the district court had overturned the Communications Decency Act in part because it was too vague).

5. *See, e.g.*, Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1131–36 (2001) (holding that the FCC's horizontal cable ownership rule was in excess of statutory authority).

6. *See, e.g.*, Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (holding that an Oklahoma statute requiring cable television operators to delete all alcoholic beverage commercials was preempted by federal cable retransmission regulations).

7. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1370 (1998) ("[T]he First Amendment has become the preferred constitutional assault vehicle for telecommunications companies challenging government regulation."); Ross, *supra* note 3, at 289 (Telephone companies employed the First Amendment "'where Congress had failed or declined to adapt telecommunications law to changing technological and economic circumstances.'") (quoting Ameritech Corp. v. United States, 867 F. Supp. 721, 728 (N.D. Ill. 1994)).

8. *See* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 249–50 (1994).

the courts developed this doctrine based on factual inquiries into the technological and market situations at the times the cases arose.[9] I will call these facts "contextual facts" because they describe the situation surrounding these controversies. Other courts then analogized to these precedents to decide subsequent cases, sometimes without reevaluating the relevant contextual facts.[10]

But the telecommunications industry is extremely dynamic.[11] Both technology and market conditions change rapidly.[12] For example, in recent years satellite technology has enabled new sources of television and radio programming so that cable operators and local radio stations now face more competition.[13] The Internet provides an immense amount of news and information, supplementing the traditional newspaper. Telephone, cable, and satellite companies are upgrading

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9. *See id.*, at 253–54. Court decisions rest upon facts, not abstract theories of law. *See* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 273–75 (1999) (quoting Kenneth Davis and concluding that "application of legal tests 'must depend on fact-finding'" on page 275). Sometimes these facts surround a specific incident and are historically fixed, as in cases seeking a remedy for past action, i.e. tort actions and criminal cases. *Id.* at 276–77 ("Where the original facts were significant for the light they shed on a past interaction that was the basis of some damages claim, it is hard to see how a future change could be relevant; the historical facts would have served as the basis for the relief, and those historical facts would not (indeed could not) have changed."). Sometimes, however, cases turn on facts regarding the state of the world as it presently exists: facts including market structure, technology, demographics, social mores, and legal norms. *Id.* at 277. Often these are cases in which parties ask for declaratory relief. According to Benjamin, "declaratory relief seems to focus not on future or past acts but instead on the present. The Declaratory Judgment Act, after all, is couched in the present, providing that a court 'may declare the rights and other legal relations of any interested party seeking such declaration.'" *Id.*

10. *See, e.g.*, Time Warner Entm't Co. v. FCC, 105 F.3d 723, 725 (D.C. Cir. 1997) (Williams, J., dissenting from the denial of rehearing *en banc*) (criticizing the majority for failing to examine the contextual facts surrounding the direct broadcast satellite industry and failing to contrast these with the facts of *Red Lion* and ultimately arguing that *Red Lion* may not serve as a valid precedent for a direct broadcast satellite case).

11. Benjamin, *supra* note 9, at 270. ("[R]apid change in cyberspace is widely accepted; indeed, it has become a cliché to assert that the computer and telecommunications industries—and particularly the Internet—are changing rapidly and continually."). Benjamin supports this assertion with several sources in his notes 4 and 5.

12. *Id.*

13. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1133–34 (2001); T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE 954 (8th ed. 2001); Sirius Satellite Radio, About Sirius, *at* http://www.sirius.com (last visited Nov. 8, 2002).

their networks to expand into all kinds of information services. Each of these innovations alters the relative strength of each telecommunications company's voice, and consequently alters the landscape to which various governmental regulations apply.

What happens if contextual facts change such that the outcome of a previously decided case would differ if adjudicated at a later time? Theoretically, a court could retry the case. If a law is declared constitutional and a change in contextual facts later makes the law unconstitutional, an injured party could then raise the issue for reconsideration.[14] At least one commentator notes, however, that courts rarely overturn themselves based upon changed circumstances.[15] If, on the other hand, an unconstitutional law subsequently becomes constitutional, no law will exist to generate the necessary case or controversy upon which to litigate.[16] Either situation presents a problem. In a First Amendment case involving the Internet, Justice Scalia summed up this dilemma by asking: "is it possible that this statute is unconstitutional today, or was unconstitutional two years ago when it was examined on the basis of a record done about two years ago, but will be constitutional next week? . . . Or next year or in two years?"[17]

Although First Amendment analysis will always be sensitive to changing facts, this Comment proposes some techniques to keep telecommunications regulations in compliance with the First Amendment. Specifically, this Comment proposes to place the burden of evaluating constantly changing market and technological conditions on the body best able to keep abreast of these changes—the Federal Communications Commission (FCC). First, this proposal calls for Congress to draft telecommunications laws in the form of enabling statutes rather than detailed laws. These enabling statutes should set forth goals and general guidelines that direct the FCC to create detailed regulations necessary to achieve these objectives. These ena-

14. Benjamin, *supra* note 9, at 283 ("[T]he standard litany of bases upon which the Court will reject one of its precedents includes changes in underlying facts.").

15. *Id.* at 285 (The Supreme Court "has never relied on such factual changes as the dispositive factor commanding a reconsideration. Federal courts of appeals have done so on occasion.").

16. *Id.*

17. *Id.* at 270 (quoting Transcript of Oral Argument, Reno v. ACLU (No. 96-511), *available at* 1997 WL 136253, at *49 (Mar. 19, 1997).

bling statutes should also require the FCC to review and modify its detailed rules periodically to ensure that they are always as narrow as possible. Second, the FCC should create a detailed record justifying each rule and update this record periodically. Third, when these rules are challenged under the First Amendment, courts should not decide the level of scrutiny by comparing the technology at hand to prior cases. Instead, the courts should choose the level of scrutiny by deciding whether the challenged law is content-neutral or content-specific. Finally, courts should require a complete and current administrative record and rely on this record to review constitutionality *de novo*. This proposed approach would help ensure the constitutionality of telecommunications regulation while reducing the courts' burden of evaluating dynamic contextual facts upon which constitutionality is based.

Part I of this Comment describes existing First Amendment law in the realm of telecommunications, including some instances in which changing facts have undermined the constitutional analysis. Part II proposes a new framework to minimize the effect of changing technology on First Amendment analysis. Part III contains a case study to illustrate how Congress and the FCC can work together to keep laws narrowly tailored to constitutional purposes. Finally, Part IV lists the benefits of the proposed approach.

I. THE FIRST AMENDMENT AND TELECOMMUNICATIONS

A. First Amendment Overview

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[18] With the addition of this constitutional amendment, the Framers of the Bill of Rights ensured the government would not engage in the heavy censorship of historical England and Eighteenth-century America.[19] Since the First Amendment's ratification, however, this seemingly simple precept has been molded and stretched. Accordingly, the First Amendment does not protect all speech. For instance, the Supreme Court has held that some speech, such as that

18. U.S. CONST. amend. I.

19. KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 28–32 (3d ed. 2000).

evoking a "clear and present danger," must be limited;[20] some forms of speech, such as commercial speech, enjoy only partial protection;[21] and other speech, such as "fighting words"[22] and obscenity,[23] is not protected at all. On the other hand, laws prohibiting speech ("prior restraints"),[24] laws that prefer one speaker over another,[25] and laws that affect editorial content[26] are presumptively unconstitutional and subject to strict scrutiny.

Hence, the right to free speech is not absolute.[27] Instead, as with most fundamental rights, the government has the prerogative to balance the right of free speech against governmental interests and limit that right when necessary.[28] This balancing act is the impetus behind the three steps of First

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20. Abrams v. U.S., 250 U.S. 616, 627 (1919) (Holmes J., dissenting). Now speech advocating "abstract doctrine" is protected, while speech advocating "direct action" is not. Yates v. U.S., 354 U.S. 298 (1957).

21. *See* Central Hudson Gas and Elec. Corp. v. Public Utilities Comm'n, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

22. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

23. *See* Roth v. United States, 354 U.S. 476, 485 (1957) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene.") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

24. *See generally* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) ("Any system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.'") (quoting Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). A historical example of a prior restraint is the law passed by the Governor of colonial Virginia requiring that any printing first receive "royal approval and proper license." ROBERT W.T. MARTIN, THE FREE AND OPEN PRESS: THE FOUNDING OF AMERICAN DEMOCRATIC PRESS LIBERTY, 1640–1800, at 2 (2001).

25. *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266, 268 (1964), Assoc. Press v. United States, 326 U.S. 1, 20 (1945), and *Roth,* 354 U.S. at 484).

26. *See generally* FCC v. League of Women Voters, 468 U.S. 364 (1984) (overturning a ban on editorializing by television and radio stations that receive public funding even though regulations pertaining to radio and television are ordinarily only subject to rational basis review).

27. *See* Dennis v. United States, 341 U.S. 494, 503 (1951).

28. *Id.*; CARTER ET AL., *supra* note 13, at 70.

Amendment analysis.[29] First, a court chooses the level of scrutiny it will apply.[30] Second, it determines whether the governmental interest is sufficient to justify infringing free speech.[31] Third, it ensures the law is narrowly tailored.[32] Each of these steps is dependent upon contextual facts, and as described below, fast-paced change has undermined the courts' analyses at each step.

B. Choosing the Level of Scrutiny

First and most importantly, a court engaging in First Amendment analysis must decide how closely to examine the contested law.[33] Some laws require strict scrutiny and consequently must be justified by a "compelling" governmental interest, some warrant intermediate scrutiny and require an "important" governmental interest,[34] and others are only subject to rational basis review, which simply requires a "sensible" governmental interest.[35] The level of scrutiny is pivotal because some laws that fail under strict scrutiny survive under

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29. The description of First Amendment analysis that ensues is a generalization. Some cases do not specifically include all three steps, but instead execute a general balancing test between government interest and amount of speech affected. *See generally* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996). Some employ the *O'Brien* test for content-neutral regulations. *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (setting forth a four prong test for content-neutral regulations to survive First Amendment review); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) (holding that cable must-carry regulations are content-neutral under the *O'Brien* test). Some simply analogize to prior decisions with very little independent analysis. *See* Sinclair Broad. Group v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002), *rehearing denied* Aug. 12, 2002. The goals of these analyses are ultimately the same: tread on the least amount of speech possible in light of the importance of the government interest at hand—but a framework is useful for the purposes herein.

30. *See, e.g.*, *Turner*, 512 U.S. at 637.

31. *See, e.g.*, *id.* at 662.

32. *See, e.g.*, Republican Party v. White, 122 S. Ct. 2528, 2530 (2002) (Rehnquist, CJ. dissenting) (applying strict scrutiny); Watchtower Bible and Tract Soc'y v. Village of Stratton, 122 S. Ct. 2080, 2094 (2002) (applying intermediate scrutiny).

33. Fed. Election Comm'n v. Christian Coalition, 52 F. Supp. 2d 45, 53 n.5 (D.D.C. 1999) ("Under the rhetoric of modern constitutional adjudication, establishing the level of judicial 'scrutiny' is an essential first step.").

34. Am. Soc'y of Assn. Executives v. United States, 23 F. Supp. 2d 64, 68 (D.D.C. 1998).

35. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 802 (1978).

intermediate scrutiny, while almost all laws withstand rational basis review.[36]

There are at least two methods of determining the level of scrutiny. In some cases, courts have applied the content-neutral/content-specific test.[37] Content-neutral laws are those in which the justification for the law is unrelated to agreement or disagreement with the message conveyed.[38] Content-neutral laws receive intermediate scrutiny.[39] On the other hand, content-specific laws directly target the content of speech and receive strict scrutiny.[40] Some First Amendment telecommunications cases have employed this analysis to determine the level of scrutiny. For example, in *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court held the FCC's requirement that cable companies carry all local television channels constitutional.[41] The Court based its decision that these "must-carry regulations" are constitutional on an in-depth determination as to whether the regulation was content-neutral or content-specific. In a splintered opinion, the Court ultimately held that the government's justification for the rules—to ensure the survival of free broadcast television stations—was not an attempt to influence the message conveyed by the cable companies, and thus warranted intermediate scrutiny.[42]

Alternatively, courts have also determined the appropriate level of scrutiny by examining the technology at issue rather than the purpose of the challenged law.[43] More traditional modes of speech, such as print, elicit the strictest scrutiny, whereas newer methods, such as sound trucks, cable television, and over-the-air television and radio, warrant less scrutiny.[44] As Justice Jackson wrote in *Kovacs v. Cooper*, "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing na-

36. CARTER ET AL., *supra* note 13, at 68.
37. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).
38. *See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989).
39. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997).
40. *See generally, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803 (2000).
41. 512 U.S. 622.
42. *Id.* at 661.
43. *See, e.g.*, Sinclair Broad. Group v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002).
44. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386–88 (1969).

tures, values, abuses and dangers. Each . . . is a law unto itself . . . ."[45]

In the area of telecommunications, courts most often adopt this technology-centric approach.[46] Generally, rational basis review applies to over-the-air communications,[47] intermediate scrutiny applies to cable regulations,[48] and strict scrutiny applies to Internet content regulations.[49] This approach requires courts to analogize the technology of the case to the technology of prior cases[50]—sometimes known as "pigeonholing" the technology. Interestingly, even though the *Turner* court decided the must-carry *regulation* warranted intermediate scrutiny based on its content-neutral nature,[51] courts in subsequent cases interpret *Turner* to hold that cable *technology* warrants intermediate scrutiny.[52] Hence, *Turner* serves as precedent for applying intermediate scrutiny to cable television cases.

The trouble with choosing the level of scrutiny based on the technology rather than the policy objective is that telecommunications technologies change so rapidly.[53] For example, *Comcast Cablevision, Inc. v. Broward County* involved Internet data (usually subject to strict scrutiny) traveling over a cable network (usually subject to intermediate scrutiny).[54] There the court could have employed either approach. Instead, the court analogized to newspaper delivery to choose strict scrutiny.[55]

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45. 336 U.S. 77, 97 (1949) (Jackson, J., concurring); HUBER, KELLOGG & THORNE, *supra* note 2, at 1277–79; Fred H. Cate, *Telephone Companies, the First Amendment, and Technological Convergence*, 45 DEPAUL L. REV. 1035, 1058 (1996).

46. Ross, *supra* note 3, at 297–98. *But see generally* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (employing a general balancing test between government interest and amount of speech affected).

47. *See, e.g.*, *Red Lion*, 395 U.S. 367; HUBER, KELLOGG & THORNE, *supra* note 2, at 1279.

48. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994); HUBER, KELLOGG & THORNE, *supra* note 2, at 1279.

49. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997).

50. *See* Corn-Revere, *supra* note 8, at 260. According to the dictionary, the verb "pigeonhole" is synonymous with categorize. Pigeonholes are small compartments in pigeon lofts for nesting. The verb pigeonholing often has a negative connotation and means to categorize somewhat *arbitrarily*.

51. *See generally Turner*, 512 U.S. 622.

52. *See* Comcast Cablevision, Inc. v. Broward County, 124 F. Supp. 2d 685, 696–97 (S.D. Fla. 2000) (describing the similarities and differences of cable, broadcast, and broadband technologies and industries in order to establish level of scrutiny); *see also* HUBER, KELLOGG & THORNE, *supra* note 2, at 1279.

53. *See, e.g.*, Corn-Revere, *supra* note 8, at 254.

54. *Comcast Cablevision*, 124 F. Supp. 2d at 685.

55. *Id.* at 692–94.

Nevertheless, the judge felt compelled to differentiate between the technology at hand (Internet service over cable networks) and traditional cable television and broadcast television.[56]

Using a technology-based system to decide what level of scrutiny to apply leads to obvious problems. As courts examine new regulations, the analogies will become even less clear. One could easily imagine the complications, for instance, of trying to categorize a law that affects a program created by a cable company that resides on the Internet but is delivered to the consumer over a satellite network.[57] A court in this hypothetical case could analogize to traditional cable regulation (intermediate scrutiny), Internet regulation (strict scrutiny), or broadcast regulation (rational basis review).[58]

Another example of choosing the level of scrutiny based upon the technology at hand is the spectrum scarcity rationale. According to this argument, all over-the-air communication is only subject to rational basis review.[59] The rule originated in *National Broadcasting Co. v. United States*.[60] There, the Supreme Court reasoned that the airwaves are public property, and since there are more people who wish to broadcast than there is space on the spectrum, the FCC was entitled to impose limitations on how broadcasters utilize the spectrum.[61] The court held that this power extended to the authority to make ownership and franchising rules for radio stations.[62] The practical implication of this doctrine is that any law targeted at over-the-air communications is *de facto* constitutional.

This spectrum scarcity doctrine has received widespread criticism and exemplifies the weaknesses of the categorical ap-

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56. *Id.* at 696–97.

57. Such as the instance in which an end-user subscribes to satellite-delivered Internet service and uses his connection to view a clip from the Discovery Channel website. Another confusing factor is that some satellite providers' networks use a dial-up phone connection to carry data from the user's home to the ISP (the uplink)—that situation adds yet another factor to consider when choosing the level of scrutiny via technology categorization.

58. For a historic account of the courts applying special analysis to new technologies, see Corn-Revere, *supra* note 8, at 259–95.

59. Jody S. Schaeffer & M. Bryan Schneider, *Constitutional Law*, 1999 L. Rev. M.S.U.- D.C.L. 479 n.213.

60. 319 U.S. 190 (1943).

61. *Id.* at 226 ("Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.").

62. *Id.* at 226–27.

proach.[63] Although scarcity of available broadcast frequencies once justified minimal First Amendment review, new technologies continue to allow more and more speakers to transmit over the broadcast spectrum.[64] Also, commentators point out that the government's inefficient licensing scheme, and not the laws of physics, causes spectrum scarcity. Unless the government can demonstrate it has allocated the spectrum as efficiently as possible, commentators argue scarcity should not justify further government regulation.[65] Finally, some commentators emphasize that even if the number of potential broadcasters exceeds the number of available licenses, this scarcity does not warrant heightened regulation and relaxed First Amendment review.[66] To the contrary, most resources are scarce, yet are not subject to government licensing schemes. In the case of real property, for example, the private market has worked in conjunction with government regulations, such as zoning, to manage land ownership.[67]

Although these academic arguments have been gaining momentum, most courts have dismissed them and followed Su-

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63. *See, e.g.*, Thomas W. Hazlett, *The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 481–83 (2001); Stephen J. Shapiro, *How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, MEDIA L. & POL'Y, Fall, 1999, at 1; Phil Weiser, *Promoting Informed Deliberation and a First Amendment Doctrine for a Digital Age: Toward a New Regulatory Regime for Broadcast Regulation*, *in* DELIBERATION, DEMOCRACY, AND THE MEDIA 11, 11 (Simone Chambers & Anne Costain eds., 2000).

64. *See* Hazlett, *supra* note 63, at 394–98. This is the case regarding digital technology, which can effectively utilize compression techniques to carry the same amount of information as analog communications, but in a narrower bandwidth. This is also true with new technology that automatically finds unused spectrum and broadcasts in that channel. Finally, there is spread-spectrum technology, in which many people could transmit signals over the same frequency, and the recipients of the signals use codes to figure out which signal to receive on that frequency. Michael K. Powell, Broadband Migration III: New Directions in Wireless Policy, remarks at the Silicon Flatirons Telecommunications Program at the University of Colorado at Boulder (October 30, 2002) (transcript on file with author).

65. Hazlett, *supra* note 63, at 481–88.

66. Time Warner Entm't Co. v. FCC, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from the denial of rehearing *en banc*) ("All economic goods are scarce . . . . Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.").

67. *Id.*

preme Court precedent.[68] For its part, the Supreme Court has stated that absent a sign from Congress or the FCC, it will not reevaluate the spectrum scarcity doctrine.[69] Many, including the current FCC chairman Michael Powell, however, anticipate the day the Supreme Court will revisit this contentious topic.[70] In 1998, Powell stated that "the time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace."[71] By evaluating the purpose of a law under the content-neutrality test rather than attempting to pigeonhole a technology into an unsuitable category, courts could accomplish Powell's objective and reduce the confusion surrounding today's First Amendment law in high technology industries.

These examples demonstrate the risks of basing the level of scrutiny upon the technology at issue in the case.[72] Instead, basing the level of scrutiny upon the government's justification for the law rather than upon technology is a superior approach and a necessary first step for accommodating the dynamic telecommunications industry. Yet it is just one component of ensuring the constitutionality of telecommunications regulation. As the next section argues, we must also account for shifting

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68. *Id.* at 724 (arguing that spectrum is not scarce in regard to Direct Broadcast Satellite, so that segment of the industry should be subject to more than rational basis review. "*Red Lion* has been the subject of intense criticism.... While *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death, we can think twice about extending it to another medium."); *see also* Sinclair Broad. Group v. FCC, 284 F.3d 148, 167, 169 (D.C. Cir. 2002).

69. FCC v. League of Women Voters, 468 U.S. 364, 376 (1984) (acknowledging that "[c]ritics including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete" but saying "[w]e are not prepared . . . to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399 (1969).

70. Weiser, *supra* note 63 at 11.

71. Michael K. Powell, Willful Denial and First Amendment Jurisprudence, Remarks before the Media Institute in Washington, D.C. (Apr. 22, 1998), *available at* http://ftp.fcc.gov/commissioners/powell/mkp_speeches_1998.html.

72. *See generally, e.g.*, Corn-Revere, *supra* note 8; Weiser, *supra* note 63; Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, Geo. L.J. (forthcoming Jan. 2003), *at* http://ssrn.com/abstract_id=319123.

contextual facts when evaluating the strength of the government's interest.

C. Evaluating the Ends: The Governmental Interest

Once a court has selected the level of scrutiny, it must decide whether a law's underlying governmental objective is important enough to withstand that scrutiny. This step generally requires that the court answer the following questions: 1) Does the law correct an actual harm? 2) How much speech does the law restrict? 3) Does the importance of correcting the harm justify the degree to which the law inhibits speech?[73] The answers to the first two questions directly depend on contextual facts such as market conditions and available technology. The third question, which ultimately decides constitutionality, depends upon the answers to the first two questions. Consequently, this phase of the analysis, like the others, rests heavily on contextual facts.

The first question of the analysis—whether the law attempts to correct an actual harm—is sometimes affected dramatically by changing contextual facts. In 1964, for example, broadcast ownership restrictions attempted to promote diversity by increasing the number of editorial voices in each locale.[74] These rules prohibited someone from owning more than one television station in a single market.[75] At that time, local television, radio, and newspaper owners were the only speakers widely heard. The ownership limits, however, are probably not

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73. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994); CARTER ET AL., *supra* note 13, at 70–71.

74. Sinclair Broad. Group v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002). There have been and still are a number of other cross-ownership restrictions:

> For example, in 1953, the Commission promulgated the first of its multiple ownership rules, the "fundamental purpose" of which is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints." Initially, the multiple ownership rules limited only the common control of broadcast stations. The Commission's current rules include limitations on broadcast/newspaper cross-ownership, cable/television cross-ownership, broadcast service cross-ownership, and common control of broadcast stations. The Commission has always focused on ownership, on the theory that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest."

Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (internal citations omitted).

75. *Sinclair*, 284 F.3d at 152.

so imperative in the United States today, where one hundred percent of homes can be reached by satellite television, one hundred percent of cars can receive satellite radio if properly equipped, sixty-six percent of homes subscribe to cable, and fifty-eight percent of homes have access to the Internet.[76] In fact, in *Sinclair Broadcast Group v. FCC*, the District of Columbia Circuit Court of Appeals remanded the case to the FCC to consider the impact of new media on the number of voices in the marketplace and whether television station ownership limits were still necessary to ensure diversity.[77] Thus, changing technology and markets greatly affect the importance of a speech-infringing law.

The second question a court asks (often implicitly) is how much speech the law affects. Laws that regulate indecent content on the Internet are examples in which the answer to this question has changed over time. In *Reno v. American Civil Liberties Union* (*Reno I*), for example, the Supreme Court invalidated the Communications Decency Act because publishers of electronic pornography had difficulty determining whether the recipients were children or adults.[78] If the publishers could not determine which recipients were minors and which were not, the Court reasoned, the law would force the publishers to cease publishing to everyone simply to avoid publishing to minors.[79] This technical difficulty, the Court held, would deter some speakers from speaking at all.[80] The Court's decision entailed a detailed analysis of the Internet, the "current" technical state of email, chat rooms, news groups, age identification mechanisms, and various content screening techniques.[81] The Court relied not only on technical facts, but also on facts sub-

76. FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, EIGHTH ANN. REP. 8, 12, 29 (2002), http://www.fcc.gov/mb/csrptpg.html.

77. *Sinclair*, 284 F.3d at 165. The court said that until the FCC completed this analysis, it could not rule on the issue of whether the ownership rules were arbitrary and capricious under the Administrative Procedure Act. This is interesting in light of the court's ruling that under the spectrum scarcity rationale, the ownership rules pass First Amendment muster. Apparently, in this case, the court deemed the First Amendment scrutiny lower than APA review and hence lower than the Supreme Court did in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

78. *See* Reno v. ACLU, 521 U.S. 844, 855–56 (1997).

79. *Id.* at 857.

80. *Id.* at 876–77.

81. *Id.* at 849–53, 855–57.

ject to strong debate and/or frequent change. Indeed, critical facts were obsolete by the time the Supreme Court decided the case,[82] and now there are on-line age verification techniques to efficiently limit content to an adult audience.[83] Later, in *American Civil Liberties Union v. Reno* (*Reno II*), the Third Circuit Court of Appeals specifically acknowledged this problem of changing contextual facts, stating: "[I]n light of rapidly changing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible."[84]

Unlike the proposal to eliminate the technological classification scheme, which currently determines the level of scrutiny, commentators have not settled on a solution for the problem of dynamic contextual facts changing the answers to the governmental interest inquiry. One commentator suggests allowing appellate courts to consider changes in contextual facts in First Amendment decisions.[85] This suggestion, however, only addresses a portion of the issue and leaves unanswered the question of how to reevaluate laws following a case's closure.[86] In proposing a way to ensure a continuously correct set of facts, Part II of this Comment suggests requiring the FCC to answer questions of whether there is an actual harm to correct and the extent of speech affected, and also to periodically reevaluate the answers to these two questions. Then, the courts will have a solid foundation on which to answer the third question: whether the law corrects a problem important enough to justify intrusion on the right to free speech. More is necessary,

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82. Benjamin, *supra* note 9, at 292–94 (noting that after a district court ruled on *Reno*, but before the Supreme Court heard the case, push technology changed the nature of the Internet, converting it, at least partially, to an invasive technology rather than a passive one, yet the Supreme Court adopted the district court's findings without reevaluating their continued validity).

83. *See* Cybersource Age Verification System, http://www.cybersource.com/products_and_services/verification_and_compliance_services/age_verification ("The CyberSource Age Verification service is a real-time age authentication system that validates the Internet user's age based on U.S. and foreign government-issued identification and public records. It enables online businesses to more easily and confidently conduct age-restricted commerce, worldwide.").

84. 217 F.3d 162, 166 (3rd Cir. 2000).

85. *See generally* Benjamin, *supra* note 9.

86. Benjamin does address this point briefly, but concludes simply that courts should revisit their decisions when a formerly constitutional law later might be unconstitutional, and that there is no good solution to the opposite problem of an unconstitutional law that later becomes constitutional. *Id.* at 285–86.

however, because changing contextual facts are also a problem in the third step of First Amendment analysis: evaluating the means. The following section describes that analysis and its related problems.

D. Evaluating the Means: "Narrowly Tailored"

The final step of First Amendment analysis determines whether the speech-infringing law suppresses the proper amount of speech to achieve its purpose. An overbroad law limits more speech than necessary and an underbroad law does not affect enough speech to achieve its goals.[87] A court may strike down a speech-infringing law for either reason.[88] In conducting this analysis, a court assesses whether the government chose the narrowest feasible solution.[89]

Legislators have difficulty crafting laws and regulations narrowly enough to withstand judicial scrutiny. For example, in the Carlin series of cases, courts repeatedly struck down the FCC's attempts to regulate adult telephone messages. There, the FCC prohibited companies from sending adult telephone messages to minors, but enacted safe harbor provisions, by which the companies could show that they had made good faith efforts to verify that the recipients of the messages were adults.[90] The Second Circuit first remanded time-of-day restrictions on indecent telephone recordings and required the FCC to examine narrower alternatives.[91] Next, the same court remanded the FCC's second attempt, which required the message providers to limit their messages to those who obtained an access code or paid by credit card in advance.[92] The court again held that the rule was not narrowly tailored and required the FCC to examine the possibility of customer premises blocking as an alternative to the other two safe harbors.[93] Finally, on the third attempt, the Second Circuit upheld the FCC's safe

87. R.A.V. v. City of St. Paul, 505 U.S. 377, 416–17 (1992) (Stevens, J., concurring in judgment).

88. *Id.*; FCC v. League of Women Voters, 468 U.S. 364, 396 (1984).

89. *R.A.V.*, 505 U.S. at 395.

90. Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984).

91. *Id.* at 121 ("We held those regulations both overinclusive and underinclusive; the time-channeling regulations denied adults access to dial-a-porn messages during daytime hours but did not prevent minors from calling the service during nighttime hours.").

92. Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986).

93. *Id.* at 855–56.

harbors.[94] The safe harbors were 1) prior payment by credit card, 2) an access code previously issued by mail, or 3) scrambled messages, which could only be understood with a descrambling device.[95] The court added the caveat that the agency must reopen the proceeding *if more effective methods of protecting children while facilitating adult access became available.*[96]

This example illustrates the frustration that ensues when a court must examine telecommunications laws in a world of constantly changing circumstances. When contextual facts (such as the technology at hand) change, the courts must repeatedly evaluate the same or similar laws and often start the analysis from scratch each time. The overall process is not only cumbersome and expensive, but yields uncertainty for all involved. In a dynamic industry, it is possible that shortly after a court finds a statute constitutional *or* unconstitutional, the industry may develop a new, more efficient solution that would have affected the outcome had it been available at the time the case was decided. In the event a law is upheld, the lawmaker should ideally redraft the law to incorporate the new, narrower mechanism for achieving the governmental interest, but currently no process exists to ensure that this happens. In the event that a law is struck down, the lawmaker has no way of reinstating the law.[97] The following Part proposes a solution to these problems as they apply to telecommunications law. This proposed framework aims to help the government achieve its policy objectives while treading on as little speech as possible.

II. A PROPOSED FRAMEWORK

As the previous Part demonstrates, changing contextual facts endanger the validity of First Amendment reasoning. In

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94. Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988).
95. *Id.* at 549.
96. *Id.* at 556:
When such a device or any other less restrictive technology becomes available, we direct the FCC to reopen its proceedings to consider the costs and benefits of adding its use as an optional defense. In this way, the Government can fulfill its 'heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.'(quoting *Carlin*, 749 F.2d at 121).
97. Benjamin, *supra* note 9, at 286.

the most serious cases, technical progress or market transformation may render constitutional laws unconstitutional or vice versa. If a court has already ruled a law constitutional, but as a result of contextual changes the decision is called into question, the court should take the matter up once again.[98] In practice, however, the Supreme Court has never reconsidered an issue solely based on a change in contextual facts.[99] Furthermore, a court can only reconsider a law still in effect, so a court cannot enforce laws that were originally held unconstitutional, but that later become constitutional.[100] Law enforcement cannot enforce an invalidated law, the courts cannot spontaneously declare a law to be constitutional absent a case or controversy, and the legislature cannot reenact the same law.[101] In an attempt to address these problems, this Part proposes a process by which an administrative agency, specifically the FCC, might assist Congress and the courts in ensuring telecommunications regulations conform to the dictates of the First Amendment.

A. Congress

First, when Congress enacts a telecommunications law, particularly one that may affect First Amendment rights, it should draft legislation in the form of an enabling statute. This statute should not be targeted at communicators, but should instead call upon the FCC to implement detailed rules on the subject at hand. It should also require the agency to periodically review those new rules to ensure they infringe as little speech as possible. Importantly, the enabling statute should also allow the agency to rescind existing unnecessary rules altogether (forbear from regulation).

Some readers might be wary of this delegation of power; however, precedent exists to support this approach and it is

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98. *Supra* note 14.

99. *Supra* note 15 (explaining that the Supreme Court has never been so blatant as to acknowledge that critical contextual facts have changed and still declined *certiorari*, but has never solely relied on different facts to revisit an issue either despite opportunities to do so).

100. Stuart Minor Benjamin refers to this phenomenon as "springing constitutionality." Benjamin, *supra* note 9, at 285.

101. Benjamin, *supra* note 9, at 285–86. Benjamin does, however, offer up the possibility that the executive branch could announce that, at some future date, it would begin enforcing the law. Possibly the FCC could do the same.

quite appropriate in an industry with a dedicated expert regulatory agency. In fact, the Communications Act delegated tremendously broad power to the FCC by giving it the authority to regulate "all interstate and foreign communication by wire or radio"[102] and to "perform any and all acts, make such rules and regulations, and issue such orders" to effect that regulation.[103] After cable television emerged, for instance, the FCC enacted cable regulations absent an enabling statute from Congress.[104] The Supreme Court held that cable television fell within the FCC's jurisdiction because Congress established the Commission to regulate *all* communications, including cable television.[105] As a result of this precedent, the FCC's power to regulate communications is only circumscribed by specific limiting statutes.[106]

Thus, technically, the FCC has the power to regulate most aspects of telecommunications, despite the absence of enabling statutes. However, Congress's role includes directing the activities of the agency.[107] It should pass laws directing the FCC's efforts to areas that, in its view, receive too little attention and limiting the FCC's authority to regulate certain segments of the industry. Broad enabling statutes will give much more flexibility to the agency than narrow statutes—flexibility that is needed to address changing contextual facts. Narrow

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102. 47 U.S.C. § 152(a) (2000); United States v. Southwestern Cable Co., 392 U.S. 157, 167 (1968).

103. 47 U.S.C. § 154(i)(2000).

104. *Southwestern Cable*, 392 U.S. at 164–65 (The FCC had previously decided that it lacked authority to regulate the cable industry, and sought clarifying legislation from Congress. This legislation, however, never emerged, so eventually, the FCC promulgated cable rules in order to protect the broadcast industry, which *was* clearly part of FCC jurisdiction.).

105. "The Commission was expected to serve as the 'single government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone telegraph, cable, or radio.' It was for this purpose given 'broad authority.'" *Id.* at 168 (quoting President Roosevelt's message to Congress and Senate Reports). "The House Committee added that 'the primary purpose of this bill is to create such a commission armed with adequate statutory powers to regulate all forms of communication.'" *Id.*

106. Such is the case of the Internet—a segment of the industry that Congress wishes to remain "unfettered" by regulation. 47 U.S.C. 230(b)(2) (2000) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . . .").

107. *See* Edward J. Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 DUKE L.J. 967, 967–68 ("While protective of our role as creator, members of Congress, out of necessity, must remain vigilant overseers.").

statutes are too cumbersome to change, whereas if the FCC does not adhere to Congressional intent under the broad statute, Congress still has other means of convincing the agency to do what it wants.[108]

The area of advanced technology provides an example of an enabling statute. The Telecommunications Act of 1996 directs the FCC to conduct regular inquiries to "determine whether advanced telecommunications capability is being deployed to

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108. *Id.* at 970–71:

> How does Congress attempt to assert its views in the development of administrative law? Ideally and most obviously, Congress announces its views clearly and unambiguously in the initial crafting of a statute. Omniscient and precise directions would render administrative agencies accountable to congressional intent when these agencies acted beyond the scope of their rulemaking authority. However, the scenario in which Congress provides precise, unchallenged direction is more or less impossible in today's world. First, it is practically impossible to anticipate all future changes in the external landscape that affect implementation of a statute. Second, Congress may choose to leave some issues unaddressed, either preferring to rely on the expertise of experienced agency personnel to resolve difficult questions or finding it easier to line up votes by obscuring some differences. Finally, even if Congress did have specific and unambiguous intent, one must never doubt the ability of regulators, litigants, and courts to find congressional ambiguity in any conceivable situation. . . .
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> But in response to agency intransigence, Congress may utilize a variety of tactics to press its own views on agencies. For example, Congress can pass a new law and more clearly state its position on an issue previously seen as unaddressed or ambiguous. This method is not always effective or desirable. Often there are ponderous difficulties in trying to enact a new statute.
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> Short of passing an endless series of ever-less ambiguous statutes, Congress can invoke a range of measures to inject its views into the administrative law process. For example, Congress can use its power over the budget to effect changes in the spending of appropriated money. Congress can hold oversight hearings to increase public pressure on a wayward agency and impress upon the agency's staff the importance of following Congress's view. At a lower level, Congress can inundate agencies with letters that press its point of view. Alternatively, these can be approached through more informal personal contact between staff on the Hill and agency staff and between members of Congerss and agency heads. All of this activity moves an agency toward the achievement of Congress's own view of Congressional intent.

all Americans in a reasonable and timely fashion."[109] Where this is not the case, the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[110] This provision requires the FCC to focus its attention on broadband networks and to take steps it deems necessary to promote their timely rollout, but gives virtually no details as to how to accomplish this goal.

The 1984 Cable Act provides another example of an appropriate enabling statute.[111] There, Congress gave the FCC the power to pass "regulations as may be necessary to enable a cable operator . . . to prohibit the use . . . of [public, educational, or governmental] channel[s] . . . for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[112] Thus, Congress delegated the FCC power to develop the details of the regulations rather than designing the detailed regulations itself.

In contrast, Congress should not pass laws that require telecommunications companies to comply with precise requirements. The cable "must-carry" law exemplifies an overly detailed statute.[113] The Communications Act states:

> (A) A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.
> (B) A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local

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109. Pub. L. No. 104-104, Title VII, § 706(b), 110 Stat. 153 (codified as 47 U.S.C. § 157 (historical and statutory notes)) [Pub. L. No. 104-104 hereinafter referred to as Telecommunications Act of 1996].

110. *Id.*

111. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. § 521–559 (2000)).

112. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, §§ 10(c), 28, 106 Stat. 1486, 1503 (codified as 47 U.S.C. § 531 (historical and statutory notes)).

113. 47 U.S.C. § 534 (2000).

> commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.[114]

This statute directs the actions of the cable companies rather than the FCC.[115] To truly ensure constitutionality, Congress should revisit these numbers as the cable industry evolves so that the provisions continue to impose only necessary restrictions. As it stands, however, this law sets forth specific numeric requirements that Congress is not equipped to revisit on a regular basis.[116] Congress passed the Act in 1984 and it has not changed since.[117] Instead, the details set forth in this provision are more appropriate for an expert agency to determine. The FCC could apply its expertise to reevaluate the numbers on a regular basis as technology and the industry change.

In addition to the primary enabling language, a model statute under this proposal should direct the FCC to periodically reevaluate the regulations and amend them if appropriate. For example, Congress could ask the FCC to reexamine the underlying need for the regulations, evaluate alternative regulations, and either repeal or revise the rules as needed to ensure the smallest possible infringement on speech given the circumstances. Congress should provide a suggested period for review (e.g. every two years), a maximum duration for the review itself (e.g. 180 days), and an additional requirement that the FCC review the rules immediately upon any change that would alter the need for the regulation, regardless of when the next evaluation is scheduled.

This mandatory review appears elsewhere in telecommunications statutes. Indeed, the law directing the FCC to monitor and assist broadband rollout[118] requires the agency to examine the state of broadband technology "within 30 months after

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114. § 534(b)(1)(A)(B).

115. The Supreme Court held that these laws are subject to intermediate scrutiny analysis under the First Amendment because they are content-neutral. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994). Congress intended the must-carry regulations to protect the broadcast television market, and the Supreme Court held that governmental interest to be content-neutral. The dissent, however, thought that these provisions are directly aimed at increasing local television content, and thus content-specific.

116. *See supra* note 108 and accompanying text.

117. § 534.

118. *Supra* note 109 and accompanying text.

the date of enactment of this Act, and regularly thereafter."[119] When the FCC undertakes this review, "it shall complete the inquiry within 180 days after its initiation."[120] In another example, Congress instructed the FCC to review its ownership rules biennially and to "determine whether any of such rules are necessary in the public interest as the result of competition."[121] As these examples demonstrate, providing for regular review of agency rules ensures that these rules are appropriate in light of changing circumstances. Thus, mandatory review allows FCC regulations to be flexible and effective in carrying out their objective, whether that objective is to ensure the steady progress of broadband rollout, to facilitate deregulation, or to ensure compliance with the First Amendment.

The proposed statute should also empower the FCC to forbear from regulation altogether if the government's interest cannot justify infringement on speech. The Telecommunications Act of 1996 already includes a forbearance provision. Under that Act, the FCC may forbear from applying portions of the 1996 Act to one or more telecommunications providers if such law is unnecessary.[122] But under the 1996 Act's definition of telecommunications providers, the existing forbearance section does not apply to television, radio, and cable providers, applying only to companies that transport signals from one point to another without changing them.[123] Consequently, to broaden forbearance as this proposal suggests, Congress should either modify the existing forbearance section or include a forbearance provision in each new enabling statute. A new forbear-

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119. Telecommunications Act of 1996, § 706(b) (codified as 47 U.S.C. § 157 (historical and statutory notes)).

120. *Id.*

121. Telecommunications Act of 1996, § 202(h).

122. 47 U.S.C. § 160(a)(2000). Specifically:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or a telecommunications service, or a class of telecommunications carriers or services, in any of its or their geographic markets, if the Commission determines that—
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. . .
> (3) enforcement of such regulation or provision is not necessary for the protection of consumers; and forbearance from applying such provision or regulation is consistent with the public interest.

123. 47 U.S.C. § 153(43), (44), (46) (2000).

ance section should include language such as the following: "The Commission shall forbear from applying any regulation or provision of this Act if such regulation restricts more speech than is appropriate to achieve the government's objective in furthering the public interest." If Congress later disagreed with the FCC's conclusion, it could pass another, perhaps stronger, directive to reopen an inquiry or impose other informal methods of persuasion.[124]

Ultimately, this type of statute casts Congress in the role of maestro, directing the FCC's energy and expertise toward areas of Congressional concern. Congress must still justify the laws with evidence of problems needing attention; however, the burdensome task of crafting the detailed regulations appropriately falls on the agency with the expertise, the FCC.

B. The Federal Communications Commission

After Congress passes an enabling statute, the FCC should begin the process of making appropriate rules. The FCC should open an inquiry, solicit comments, and promulgate rules just as it would in any rulemaking proceeding. The Administrative Procedure Act (APA) mandates this general approach, and the FCC's standard operating procedure requires it.[125] This proposal does not aim to change this basic process, but instead suggests that the FCC should answer a standard list of First Amendment-related questions when making any rules affecting speech. This process will ensure that rules are narrowly tailored initially, and that they remain necessary and narrow as contextual facts change.

Answering First Amendment-specific questions requires fact-specific determinations, but it also calls for legal judgment. The FCC should ask and answer the following questions:

(1) Does the problem that Congress sought to correct still exist, and if so, to what degree?
(2) What are the various regulatory solutions for addressing this problem?
(3) How much speech does each of these solutions infringe?

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124. *Supra* note 108.

125. ALFRED C. AMAN, JR. & WILIAM T. MAYTON, ADMINISTRATIVE LAW 453 (2d ed. 2001). The APA is principally codified at 5 U.S.C. §§ 551–59, 701–06 (2000).

(4) How effective is each option at fixing the problem?
(5) Is the problem large enough to warrant one of the possible solutions?
(6) If so, which is the narrowest solution that can adequately fix the problem?
(7) How fast are contextual facts changing?
(8) How soon must the FCC repeat the above analysis?

The answers to questions one through four and seven are exercises in fact-finding. The FCC frequently asks questions such as these in notices of inquiry (NOIs),[126] which solicit public comment on FCC's areas of interest—often areas in which the FCC plans to make or revise rules.[127] When the FCC issues an NOI, the public has a predetermined amount of time to respond to these questions.[128] After the FCC has gathered the relevant comments, it should answer questions five, six and eight according to its best judgment, and set forth the proposed rules in a notice of proposed rulemaking (NPRM). The public then has the opportunity to comment on the NPRM before the FCC issues the final rules.[129]

Procedurally, this proposal reflects the FCC's current activities.[130] Substantively, however, it differs. Instead of placing the focus on creating rules that solve a particular problem, the mandatory questions listed above require a balance between solving a problem and protecting speech. Although the FCC has generally regarded the First Amendment as an afterthought in its rulemaking process,[131] the FCC should address

126. *See* 47 C.F.R. § 1.430 (2002). *See generally, e.g., In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Aug. 9, 2001, FCC 01-223.

127. *See, e.g., In the Matter of Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, Feb. 19, 2002, FCC 02-57.

128. 47 C.F.R. §§ 1.413, 1.430.

129. § 1.430.

130. *See generally* 47 C.F.R. §§ 1.399–1.430.

131. *See, e.g., In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Sept. 12, 2002, FCC 02-249. The broadcast ownership rules clearly tread on free speech, *see* Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002), yet the FCC relied upon the court's use of rational basis review, dedicated just three paragraphs of a sixty-five page document to the First Amendment issues, and twisted the term First Amendment to mean viewers' rights to diverse programming rather than broadcasters' rights to free speech.

First Amendment concerns as an integral part of the process. The ultimate result will not only protect free speech, but also generate FCC rules that are more likely to be upheld in court.

After the FCC promulgates rules that affect speech, Congress should require the agency to reexamine these rules on a regular basis.[132] The frequency of this reexamination should depend on the rate at which relevant contextual facts change. Congress might set a default time period for review, but should require the FCC to accelerate or decelerate the rate of review when appropriate. The FCC could either decide to permanently alter the schedule or execute an ad hoc evaluation if contextual facts materially change. When the date of review arrives, the agency should once again solicit comments from the public and revise the rules if relevant facts have changed. Each agency review should presume that the rule needs to be narrowed or eliminated.[133] If the agency does not decide to narrow a speech-infringing rule, it should carefully document the continuing justification for the rule.

The FCC's answers to the mandatory questions will not only ensure the constitutionality of telecommunications regulations over time, but will also provide the underpinning for subsequent court analysis if and when these rules face a First Amendment challenge.

C. The Courts

When a law impacts free speech, the affected person or company can challenge the constitutionality of the law under the First Amendment. In the framework suggested in this Comment, that challenge could implicate the enabling statute, the agency rule, or both.

1. Choosing the Level of Scrutiny

The three steps to First Amendment analysis are choosing the level of scrutiny, evaluating the government interest, and ensuring the impact on speech is as narrow as possible. As previously discussed, courts sometimes choose the level of scrutiny by comparing the technology in the current case to tech-

132. *See, e.g.*, 47 U.S.C. § 161 (2000); Telecommunications Act of 1996, § 202(h).

133. *See, e.g.*, § 202(h); *Sinclair*, 284 F.3d at 1042.

nology in past cases.[134] This approach poses two problems. First, courts may struggle to categorize new technologies that do not sufficiently resemble technologies from prior cases.[135] As different courts create different analogies, these courts may apply inconsistent levels of scrutiny to similar regulations.[136] Second, as technologies change over time, their corresponding regulations may be subject to different levels of scrutiny.[137] To reduce these risks, courts should focus on the underlying reason for the regulation, not the target technology. Ideally, the Supreme Court should renounce the notion that the level of scrutiny should vary for different types of media and concentrate on whether the law in question is content-neutral (subject to intermediate scrutiny) or content-specific (subject to strict scrutiny).[138]

Courts can account for different characteristics of technology later, during the analysis of the governmental interest and the degree to which the law is narrowly enough crafted. For example, the government may have a greater interest in imposing ownership limitations in the broadcast industry than in the cable television industry. The technological differences of the two media, however, should not affect the level of scrutiny, but only whether the governmental interest is sufficient to survive the applicable level of scrutiny. Most importantly, the Supreme Court should reexamine the spectrum scarcity rationale. Instead of lowering the level of scrutiny whenever spectrum licensing is involved, the court should examine the governmental interest spurring the laws and determine whether that interest is content-specific. If so, the court should apply strict scrutiny, and if not, intermediate scrutiny.[139]

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134. *Supra* notes 43–62 and accompanying text.

135. *Id.*

136. *Compare* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1131–36 (2001) (applying intermediate scrutiny to cable ownership limits), *with Sinclair*, 284 F.3d 148 (applying rational basis review to broadcast ownership limits).

137. Consider the not-so-hypothetical case of a cable television provider that begins to deliver programming to new (perhaps rural) customers via a wireless method—either by erecting microwave towers or by launching a satellite.

138. An increasing number of commentators argue for the Supreme Court to abandon its method of choosing the level of scrutiny based on technology. *See supra* note 63 and accompanying text.

139. Throwing out the spectrum scarcity argument would not be a deathknell to broadcast regulation. Undoubtedly, Congress and/or the FCC would find alternative ways of shaping broadcasters' behavior. One persuasive approach is to reframe the spectrum license as a conveyance of governmental property and the regulations as an easement on that property. *See generally* Weiser, *supra* note 63.

2. Evaluating the Government Interest

a. Enabling Statutes

This more consistent way of choosing the level of scrutiny should apply to all telecommunications laws—Congressional statutes as well as agency rules. The next step in the analysis, evaluation of the governmental interest, however, is and should be different for enabling statutes than for the associated FCC rules.[140] When evaluating an enabling statute, the court first decides whether Congress's stated purpose satisfies the appropriate level of scrutiny: compelling interest for strict scrutiny, important interest for intermediate scrutiny, and sensible reason for rational basis review. To do this, the court often reviews the reasons offered in the legislative history. In addition to the ostensible reason for the law, the amount of evidence Congress had to support its interest in legislating is crucial. Congress need not possess extensive evidence. Instead, the Supreme Court has required Congress to have "empirical support or *at least sound reasoning* on behalf of its measures" and to base the statutes on a "reasonable" belief that a problem needs to be corrected.[141] The court evaluates the government interest based upon the contextual facts at the time the statute was passed.[142] Given the fairly low threshold for evidence of a government interest and the use of a static set of contextual facts, broad enabling statutes likely will not fail First Amendment analysis.[143] Upholding these statutes does not directly tread on the First Amendment because the broad statutes do

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140. This comment does not propose a change in the way courts evaluate Congress's stated governmental interest. This section simply summarizes and approves the current method of analysis for the sake of completeness.

141. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (citing Century Communications Corp. v. FCC, 835 F.2d 292, 304 (D.C. Cir. 1987)).

142. *See* Time Warner Entm't Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000). There, the court asked "whether in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 1319 (quoting *Turner*, 512 U.S. at 664). This question necessarily examines the propriety of Congress's conclusions, not whether Congress could draw the same conclusion today as it did at the time it passed the statute. Consequently, the court examines the contextual facts *at the time the statute was passed rather than at the time the statute is challenged.*

143. *See, e.g.*, *Time Warner Entm't Co.*, 211 F.3d at 1319 ("Our review of the Congress's predictive judgments is deferential . . . .").

not directly affect speech—they simply direct the FCC to implement rules.[144]

b. Agency Rules

The deference that courts currently apply to speech-infringing agency rules is less clear. Under the APA, courts generally review an agency's factual determinations under a "substantial evidence" standard,[145] under which courts generally look for "relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[146] Generally, courts defer to the agency, citing expertise, and rarely reverse agency findings.[147] Courts, however, may examine the facts more closely if the case involves a weighty issue.[148] For example, some courts undertake a *de novo* review of the facts in First Amendment cases.[149] Because agencies do not concern themselves with constitutional issues, courts are expected to uphold fundamental liberties by checking agency power.[150]

Some courts review agency decisions under the "arbitrary and capricious" standard.[151] Using that approach, the courts defer to the agency under the theory that it is particularly suited to make policy decisions in its area of expertise.[152] Generally, courts only check to make sure that the decision rested on some documented basis.[153] Courts do not like to substitute their judgment for that of the agency, and thus they presume regularity.[154] Consequently, courts tend to look only for clear errors in judgment or records completely lacking in reason.[155] Courts, however, generally depart from the arbitrary and capricious standard in cases where the agency shifts its position

144. Obviously, if the statute in question limits speech directly, the problem is more troubling. In those cases, the courts should apply current contextual facts and require hard, fast evidence of the harm being corrected, not merely conjecture.

145. AMAN & MAYTON, *supra* note 125, at 453; 5 U.S.C. § 706(2)(E) (2000).

146. AMAN & MAYTON, *supra* note 125, at 456 (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

147. *Id.* at 458–59.

148. *Id.* at 460.

149. *Id.* at 471.

150. *Id.* at 471–72.

151. *Id.* at 510; 5 U.S.C. § 706(2)(A) (2000).

152. AMAN & MAYTON, *supra* note 125, at 512–13.

153. *Id.* at 513.

154. *Id.*

155. *Id.*

180 degrees.[156] In those cases, courts will look for "reasoned decision-making" to ensure that public interest and not simply a change in political alignment motivated the agency's sudden change of direction.[157]

This Comment proposes that in First Amendment cases challenging the FCC's rules, courts should apply the *substantial evidence* standard to the agency's *factfinding* activities.[158] This standard is stricter than the arbitrary and capricious standard, but less strict than *de novo* review. It is also stricter than the review of the enabling statutes discussed in the previous section. Under this proposed standard, the challenging party may draw the court's attention to instances in which the FCC ignored facts (or material public comments) or did not adequately develop the answers to the mandatory questions listed in Part II.B. The court has the duty to ensure that the FCC created a thorough record but should not recreate the FCC's factual analysis.[159]

The court, however, should review the question of constitutionality *de novo*. This analysis implicates questions five, six, and eight.[160] These are the questions that require the FCC to exercise its discretion in adopting the best way to achieve the government's interest with the minimum impact on free speech. This is the type of analysis for which courts are best suited.

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156. *Id.* at 519.

157. *Id.* at 527.

158. Specifically, the agency's factfinding activities include answering questions one through four and seven: Does the problem that Congress sought to correct still exist, and if so, to what degree? What are the various regulatory mechanisms for addressing this problem? How much speech does each of these mechanisms infringe? How effective is each option in fixing the problem? How fast are the contextual facts changing?

159. In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1142–43 (D.C. Cir. 2001), the D.C. Circuit adopted this substantial evidence standard and remanded the FCC's elimination of a single majority shareholder to the cable ownership rules. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), decided by the same court, however, stated in dicta that broadcast ownership rules would probably withstand First Amendment review even though the FCC had not yet even met the lower arbitrary and capricious standard. The court stated that the rule was allowed because the FCC could exercise its judgment based on experience. *Id.* (upholding the general rule but throwing out the specific implementation because the maximum number of stations allowed was not well justified).

160. These questions are: Is the problem large enough to warrant one of the possible solutions? If so, which solution is the most appropriate to fix the problem? How soon must the FCC repeat the above analysis?

Unlike the arbitrary and capricious standard, which presumes the agency's decision is reasonable, in First Amendment cases the presumption should be that the agency should narrow or eliminate a speech-infringing rule during the regular review process.[161] The agency should bear the burden of justifying the existence of a speech-infringing rule. This burden ensures that the agency's speech-infringing laws are kept as narrow as possible given current market and technical conditions. Congress should specify this burden in the enabling statute.

So, under this proposed framework, a court's analysis of an FCC rule should proceed as follows: First, the court should choose the level of scrutiny based upon the agency's reason for passing the rule and whether that reason is content-neutral or content-specific. Second, the court should evaluate the government's interest according to that level of scrutiny. As discussed above,[162] this second inquiry requires that the court answer three questions: 1) Does the law correct an actual harm? 2) How much speech does the law restrict? 3) Does the importance of correcting the harm justify the degree to which the law inhibits speech? I refer to these questions as judicial questions because they are being answered *ex post* by the court. The first judicial question corresponds to agency question number one[163] (factual), the second judicial question corresponds to agency question three (factual), and the third judicial question corresponds to agency question five (judgment call). Consequently, the court should verify that the agency had substantial evidence supporting the answers to the first two judicial questions but should answer the third *de novo*.

The third step in the court's analysis is to decide whether the law is narrow enough. As discussed in Part I.D, the court must ask what alternative solutions exist and whether the regulation employs the narrowest method for achieving the

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161. *See, e.g.*, *Sinclair*, 284 F.3d at 164.

162. *See supra* Part I.C.

163. I recreate the agency questions here for convenience:

1. Does the problem that Congress sought to correct still exist, and if so, to what degree?
2. What are the various regulatory solutions for addressing this problem?
3. How much speech does each of these solutions infringe?
4. How effective is each option at fixing the problem?
5. Is the problem large enough to warrant one of the possible solutions?
6. If so, which solution is the most appropriate to fix the problem?
7. How fast are contextual facts changing?
8. How soon must the FCC repeat the above analysis?

government's interest so as to ensure that the regulation is not overbroad or underbroad. These judicial questions correspond to agency questions two (factual), three (factual), four (factual), and six (judgment call). The court should verify the evidence supporting the agency's findings for answers to questions two, three, and four, but answer six *de novo*.

Finally, after the court has decided the level of scrutiny, the importance of the government interest, and whether the law provides the appropriate remedy, the court should generally address the record by asking whether the agency's record is current and complete. In answering this question, the court should verify that substantial evidence exists to support the agency's answers to its questions seven and eight. The court, however, should consider parties' arguments that contextual facts have materially changed since the agency's previous rulemaking. If the court agrees that the facts have materially changed, the court should remand the case to the FCC for further analysis.

This proposed framework for analysis shifts the factfinding burden to the agency, but relies upon the courts to reexamine the discretionary questions that ultimately determine constitutionality. This division of responsibility suits each body's strengths and purpose.

III. *FOX TELEVISION STATIONS, INC. V. FCC*

Fox Television Stations, Inc. v. FCC illustrates several of the points discussed above.[164] It serves as a demonstration of how Congress and the FCC can work together to keep laws narrowly tailored to constitutional purposes. In April 2002, the District of Columbia Circuit Court of Appeals remanded the National Television Station Ownership (NTSO) rule to the FCC for reconsideration.[165] The FCC originally promulgated the NTSO rule in the early 1940s to limit the number of stations that a broadcaster could own nationwide.[166] In 1984, the FCC recommended repeal of the NTSO rule, reasoning that "technological changes in the mass media" made the rule unnecessary because plenty of voices existed nationally and diversity issues

164. 280 F.3d 1027 (D.C. Cir. 2002), *opinion modified on rehearing by* 293 F.3d 537 (D.C. Cir. 2002).

165. *See generally Fox*, 280 F.3d at 1027.

166. *Id.* at 1034.

exist only at the local level.[167] Congress subsequently blocked the repeal, but allowed the FCC to loosen the restrictions.[168]

Then, in the spirit of deregulation, the Telecommunications Act of 1996 directed the FCC to further loosen the rule and to biennially reexamine *all* of the cross-ownership rules to ensure that they remained "necessary in the public interest."[169] In 1998, the FCC dutifully opened a proceeding seeking comments on the ownership rules, including the NTSO rule.[170] When the Commission had not made a finding by November 1999, Congress instructed the FCC to finish by mid-2000.[171] Congress further directed the FCC to include "full justification" for any rules it left unchanged.[172] The FCC did not alter the NTSO rule but instead claimed that there was not yet enough information, and said it would wait before taking action.[173] Fox challenged the decision, and the D.C. Circuit held the NTSO rule arbitrary and capricious under the APA.[174] The court reasoned that in calling for biennial review, the 1996 Act required prompt repeal or modification of any rule not "necessary in the public interest" and the Commission's "wait-and-see approach" was not in line with this statutory mandate.[175]

The court, however, recognized that the FCC probably could justify the rule upon reconsideration and proceeded with First Amendment analysis.[176] In holding the rule constitutional, the court viewed the rule as targeting broadcasters and thus subjected the rule to rational basis review under the spectrum scarcity doctrine.[177] The court declined to question that well-established doctrine and found the rule rationally related to promoting diverse voices over the airwaves.[178]

This case demonstrates how the interaction between Congress, the FCC, and the courts should operate under the periodic review approach proposed above. The Telecommunica-

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167. *Id.*
168. *Id.*
169. *Id.* at 1035 (quoting the Telecommunications Act of 1996, § 202(h)).
170. *Id.* at 1036.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 1044.
175. *Id.* at 1042.
176. *Id.* at 1045.
177. *Id.* at 1045–46.
178. *Id.* at 1045–47.

tions Act of 1996[179] mandates that the FCC evaluate all of its ownership rules every two years and "determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."[180] Although this example was meant to foster deregulation rather than to protect speech, this same concept should be applied to any rules implicating the First Amendment.[181] Congress could reword the statute to require the FCC to "repeal or modify any regulation so as to achieve the smallest possible imposition on free speech necessary to further the public interest." Instead of a two-year mandate, perhaps a statute could set a two-year default but allow the Commission to change the time period with the changing pace of the industry.

Fox also demonstrates the rationale that a court should narrow or eliminate a rule if contextual facts do not justify it. In *Fox*, the court stated that the agency could not employ a "wait-and-see" attitude while studying the matter. Instead, the agency must justify the law or eliminate it. If this is the appropriate presumption for deregulation, it is also surely appropriate for free speech. This presumption would force the agency to produce good reasons for treading on First Amendment rights.

Finally, this case demonstrates the real impact of applying rational basis review to broadcast regulations. Here, the court found the law arbitrary and capricious under the APA but upheld the law under the First Amendment. In effect, the court held that content-neutral broadcast regulations survive First Amendment review no matter what.[182] First Amendment review *lower* than "arbitrary and capricious" is disturbing. Under the current regime, First Amendment analysis is irrelevant to broadcast regulations; challengers are better off arguing that the agency's rule is "arbitrary and capricious," a very low standard indeed.

179. Telecommunications Act of 1996, § 202(h).

180. *Fox*, 280 F.3d, at 1033–34.

181. *Id.* at 1033.

182. The court limited this holding to content-neutral broadcast regulations by mentioning *FCC v. League of Women Voters*, 468 U.S. 364 (1984). *Id.* at 1046.

IV. BENEFITS OF THE APPROACH

Most importantly, this new framework would keep telecommunications laws within the confines of the First Amendment without increasing the burden on the courts or Congress; instead, it would shift much of the burden of compliance to the agency. This makes Congress's and the courts' jobs easier. The FCC's role, although substantively more important, is not procedurally unique. The agency regularly opens dockets, requests comments, drafts orders, asks for additional comments, and issues final orders.[183] The proposed process does not modify those procedures; it simply requires the agency to reevaluate speech-infringing rules on a regular basis and fully document the circumstances which make them necessary. The agency already has expertise to apply to this task.

Some might argue that the FCC is arcane and archaic and should not receive any increased responsibility.[184] Further, they may argue that the current trend is toward deregulation, and this proposal sounds like more regulation.[185] My response is that Congress continues to rely on the agency's expertise and independent viewpoint. If the agency has comprehensive problems, those problems should certainly be addressed one way or another, but these problems do not alter the fact that the agency can assist Congress and the courts in ensuring the ongoing constitutionality of laws in dynamic industries. Faults or no, the agency is still best suited for the task.

Moreover, the presumption for narrowing or eliminating rules at each review cycle is completely in line with the deregulatory trend. This presumption should have the effect of deregulating areas that might otherwise be regulated indefinitely. If the telecommunications industry is less regulated, the FCC should theoretically have more time and staff to conduct the remaining periodic reviews. The more frequent periodic reviews for the most dynamic segments of the industry may burden the agency, but the risk of treading on free speech is the highest in these areas.[186] A high burden discourages

183. *Supra* notes 126–29 and accompanying text.

184. Brett Pulley, *Commander of the Airwaves*, FORBES, Apr. 29, 2002, at 78 (giving evidence that, in Pulley's mind, the FCC is generally an outmoded, lumbering bureaucracy).

185. *Id.*

186. *See* Corn-Revere, *supra* note 8, at 264–66.

regulation of the more dynamic aspects of telecommunications—the areas in which changes in market forces or technology will most likely render laws unconstitutional. This is the correct, efficient outcome. If the cost of ensuring constitutionality of a regulation is greater than the benefits derived from the regulation, then the agency should rescind the regulation.

By its nature, this proposed solution will centralize the factual analysis into one body, the administrative agency. This centralization will yield more consistent results and standardize the analysis. The courts will inspect the agency record to ensure that the FCC is providing proper justification for any ongoing, speech-infringing rules, but will not engage in redundant fact-finding. Instead, the courts will stick to their areas of expertise and ensure that sufficient government interest exists to justify the law given the facts in the record and that the law is narrowly crafted. Once the courts are no longer chasing technical facts or artificially pigeonholing the technology of the case, the decisions will yield stable precedents.

Finally, this approach will harmonize the standards of review of telecommunications regulations under the First Amendment and the APA. Currently, courts apply both of these analyses to telecommunications regulations, but the level of deference varies and thus yields strange results. As discussed earlier, First Amendment analysis in this area is unpredictable. APA review also varies between requiring a substantial basis and applying the arbitrary and capricious standard to administrative rules. This standard is lower than the substantial evidence standard but does require some justification for agency decisions, however slight. Under the proposed framework, however, courts need only apply the First Amendment analysis. If the First Amendment tests fail, then courts declare the rule unconstitutional and no further analysis is needed. If the rule survives the First Amendment, it has already survived closer scrutiny than under the APA, so it necessarily passes that test as well. Overall, this framework is simpler, cleaner, and more accurate than prior methods of analysis.

CONCLUSION

Changing contextual facts will always complicate constitutional analysis. This Comment, however, proposes one way that the three branches of government can work together to help keep telecommunications law in line with First Amendment rights. This proposal calls upon each branch of government to exercise its strengths. It suggests changes to Congressional statutes, administrative factfinding, and judicial reasoning. Yet the changes are not drastic. Each suggestion has been previously implemented elsewhere. This proposal simply brings together preexisting practices in a way that will help ensure the ongoing constitutionality of telecommunications law.

Assuming that this approach is achievable, a valid question remains. How does the government transition from the disparate regulatory regime of today to this new framework? It is questionable whether Congress and the FCC will spontaneously migrate to this new approach, so courts should provide the necessary catalyst for change. First, courts must choose the level of First Amendment scrutiny according to whether a law is content-neutral or content-specific. Once the courts eliminate rational basis review for broadcast regulation, courts will apply a higher and more consistent standard of review across the board. Next, the courts, specifically the Supreme Court, must remain open-minded in cases involving laws that were previously upheld under differing contextual facts. In those cases, the courts should require current analysis from the lawmaking body. The courts should not embark on this factfinding mission themselves. Instead, the courts must force lawmakers to maintain a current record and modify the laws accordingly, or risk invalidation on constitutional grounds. Then Congress and the FCC will be forced to migrate to a scheme in which the more flexible and expert body regularly reevaluates the laws—the enabling statute approach.

In conclusion, the burden is on the courts to give more attention and weight to the trend of quickly changing contextual facts. By recognizing this trend and reevaluating cases previously decided, the courts can begin the process of implementing a more flexible framework.