

The Censorships of Television

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Owen Fiss is a democrat. His concern is the construction of institutions of democracy that make democracy work. Education is one such institution. Only an informed public can meaningfully participate in decisions about matters of public import. Television is one aspect of an informal public education. Thus, Fiss's objective is to advance a conception of the First Amendment that protects and sustains television's educational, and hence democratic, role.

I share Professor Fiss's view about the significance of television—or more broadly, film and television. It is without doubt the single most important influence on the construction of popular culture.¹ Yet among lawyers it is a wildly under-analyzed phenomenon. It is the one space in public life where a narrative can gain the attention of an audience for more than 10 minutes at a time. (Stephen Spielberg can get millions of Americans to spend three hours focusing on the history of the Holocaust. No President has anything close to that power.) And it will continue, I believe with Fiss, to be an important cultural influence.

Thus, I agree that we should understand the threats to this institution of informal education, and should map the role that the First Amendment might have in protecting against those threats. Professor Fiss describes two threats — two forms of “censorship” to which the informal education of television (what for simplicity I will call “democratic speech”²) is vulnerable. These are *state censorship* and *managerial censorship*.

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¹ See NEAL GABLER, *LIFE THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* (1998); SANDRA J. BALL-ROKEACH, ET AL., *THE GREAT AMERICAN VALUES TEST: INFLUENCING BEHAVIOR AND BELIEF THROUGH TELEVISION* (1984); Tannis Williams, *The Impact of Television: A Natural Experiment in 3 Communities* (1986).

² Professor Fiss does not attempt a general definition of this idea, but its contours are clear enough. Democratic speech has two components—one content based, and one related to intent. The content condition is that the speech educate the public about matters of public import. The process of education is informal, or indirect; and it is not necessary that it be

State censorship is the effort by the state to silence or constrain contrary or controversial views.³ Fiss points to Nixon's abuses of the FCC.⁴ And while these examples are timid relative to the era of McCarthy, or the battles against anarchists, that state censorship continues at all is surprising and that surprise itself, significant. Managerial censorship⁵ is the control by owners or controllers of conduits of information — television stations, or broadcasting corporations — of the content of what gets broadcast. Timidity, or commercial interest, we fear, will exclude democratic speech.

Both forms of censorship have been the focus of the Supreme Court's attention, the first more than the second. And both continue, at least Fiss argues, to be a significant feature of First Amendment jurisprudence.

The two are not, however, the only "censorships" that threaten speech. Historically, *norm censorship* — the power of social norms to stifle or silence dissenting views — has been a concern of speech libertarians. It was Mill's primary concern in *On Liberty*, and it should have been our concern when television was just getting born.⁶ And in the future, a fourth kind of censorship will increasingly be our concern — a censorship that I want to focus in this essay responding to Professor Fiss.

This is *architectural censorship*. If state censorship is the constraint that the state might impose upon speech, if norm censorship is the constraint that norms might impose upon speech, and if managerial censorship is the constraint that the market might impose upon speech, then architectural censorship is the constraint the technologies of speech might impose on speech.

unpleasant. Thus some "entertainment" is democratic speech—Schindler's List—but much entertainment is not. The intent condition is that individuals not have complete control over the speech they see—that there be some inadvertence in the selection of speech; that everything not be programmable. Both conditions will become clearer below.

³ Fiss, 6-7.

⁴ Fiss, 7.

⁶ J.S. Mill, ON LIBERTY 66-68 (Hackett, 1978) (speaking of the 'despotism of custom'). On social norms' regulation of television content, see [Powe].

As broadcasting technologies change, the kind of speech that it support will change. My argument is that this change will produce a different kind of censorship, and one that is more threatening to democratic speech than either state or managerial censorship. Yet that this form of censorship is one that we have the least experience in understanding, or correcting.

My claim is not the familiar one — that the quality of television will decline, or even that the quality of serious television will decline.⁷ I don't believe that either claim is true. As I describe more fully below, the changes in television's technology will bring about an extraordinary increase in programming competition, and this competition will produce more great television. It will produce more serious news shows, and more programs that cover public issues in great depth.

What it won't produce is a greater exposure of ordinary citizens to this better quality, or democratic, speech. The range and hence instances of high quality speech will increase, but paradoxically, the exposure of the average citizen to "democratic speech" will decline. There will be more television, even more great television, but on average, less exposure to the kind of television essential to democratic speech.

A comparison to book publishing in the Soviet Union might better make the point. Before the fall in 1989, there was an extraordinary supply of Marxist/Leninist texts available across the Soviet Union. Bookstores were packed with these texts. And every text regardless of its character had some reference to the great theorists of the communist state. Aircraft design, no less than modern cooking, it seemed, was inspired by the writings of the great Marx.

People bought these "propaganda" books, and some actually read them. They read them not so much because they "wanted to" in the sense that they would have had they had the choice to read any book in the world. Instead they read them because they wanted to read, and these were the only books available. Thus by narrowing the range of choice that consumers in Soviet Russia

⁷ See Robert A. Iger, *Entertainment/Information Mergers*, Congressional Testimony, Federal Document Clearing House 7/7/1998; Lawrence K. Grossman, *Beware the New Media*, Government Executive 6/1/1998. See also William F. Baker, *The Lost Promise of American Television: Eyeballs for Sale*, Vital Speeches 9/1/1998.

had, the Soviets were able to assure that a higher proportion of citizens would be exposed to Marxist/Leninist ideals than if totally free choice were permitted. Limited choice increased the market power of these texts that individuals wouldn't otherwise have chosen.

The market in Russia has now changed. Now there is practically no limit on the books that people can buy. The Marxist/Leninist texts are still available, but so too are texts from every major author in the world. Choice has opened up in Russia. And the result, unsurprisingly, is that people choose to read less Marxism than they "chose" before. They are happier; they are reading more; they are reading more of what they want. And it turns out that they don't want to read as much Marx as they wanted before. Marxism is still available — I wouldn't be surprised if the quality of the Marxist texts has improved. But much more is available as well, and it is this much more that the average reader chooses.

As the architecture of television changes, we will see the same pattern with democratic speech on television. Here, Fiss and I play the Marxists. We both want the public to be exposed to a particular kind of speech — democratic speech. At an earlier stage of television's development — a stage of limited choice, and a heavy handed FCC⁸ — there was a significant amount of "democratic speech" on television. But as the technology of television increases the range of choice, the average consumption of this democratic speech will decline. The "democratic speech" that the average person consumed when there were only three to five channels to select among will be more than the democratic speech that the average person consumes where there are 500 channels to select among. More choice, more freedom, greater quality, greater diversity — and a decline in the exposure to the democratic speech that television produces. Thus, while Fiss believes that television will continue to be an important aspect of democratic education these changes notwithstanding, I believe that these changes will diminish television's role, great TV programming of content notwithstanding.

⁸ Lucas A. Powe, Jr., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 121-141 (1987). See also Thomas G. Kattenmaker, Lucas A. Powe, Jr., *REGULATING BROADCAST PROGRAMMING* (1994).

My argument proceeds in four steps. In the section that follows, I sketch the shape that television will take, and the effect on competition this future will have. The conclusion here is familiar — that the future will produce much greater competition in the range of choices that television presents. In the section following that, I develop the argument that this increase in choice will reduce the demand for democratic TV. This, I argue, follows from an under-developed feature of the speech Fiss calls “democratic.” In the third section, I consider a second and more troubling consequence of this competition — that the resulting speech related to public affairs might pervert, rather than simply not inform, the democratic process. And in the final section, I then compare the consequences for democratic speech that this change in architecture produces to the threat that Professor Fiss describes. Architectural censorship, I conclude, is the greater threat.

I. HOW CHANNELS MATTER

Think about the idea of a *channel*. At any moment, in any particular place, we might ask “how many channels does this audience have to select among?” *Channels* — distinct feeds of programming that compete with each other, and that an individual, through a fairly simple action, can *turn to*. So sitting in a canoe (*sans* electronics) in the middle of a lake in a remote part of Vancouver, one has one possible channel — the nature channel that is surrounding the boat. But sitting at a desk at work, with a computer connected to the internet, and perhaps a television on a sideboard, one has a very large number of channels to select among — everyone one could call, the many places on internet one could go, and every channel of television to which one might turn.

It is technology that distinguishes these two extremes. But it is not always technology that determines the range of available channels at any particular moment. If lunch with a friend got boring, I could in principle turn to the New York Times. Norms would deter, or constrain me, from switching. There’s no natural constraint against my setting up a neighborhood radio station, but as the FCC would remind me, a legal constraint does. And there is no law against opera on prime time television; nonetheless, the market appears firmly set against the idea.

Thus more than technology matters. But in the present context, it is technology that is producing the greatest change in

the number of available channels. Channels are changing from a construction that actually *channeled* viewers, to a construction that will enable practically unlimited choice among topics. A child's walkie-talkie has channels in the sense that television was; a telephone has channels in the sense that television will be.

My claim in this essay is that this change in television will matter to the supply, and nature, of democratic speech. More channels will mean less democratic speech. Or more precisely, more channels will mean that television will be a less significant source of democratic speech. That in part, television's power to produce democratic speech derives from the choices it disables, rather than enables. That — to state it in a crudely incomplete way — television's power for democratic speech is an inverse function of the range of channels that it has. The greater the range, the less significant the effect.

Fiss does not account for the role of choice or channels in television's power. While he acknowledges that the technology of television is changing, he insists that these changes “will in no way lessen the importance of television as a public medium.” (p5). Television's power, Fiss believes, comes from its nature. Its “significance”

derives from the fact that it combines audio and video messages; it provides easy and rapid access to the citizenry; it is capable of instantly transmitting information from around the globe; and it pervades every domain, including the most intimate: the home.⁹

But this understanding must be incomplete. There are many “televisions” that fit this description, but only some that have the effect that Fiss describes. In my house, there are two types of boxes that deliver a mix of “audio and video,” and invade every domain of social and personal life. These two boxes are very different, though they often feed the same material. (My computer, for example, feeds me C-Span just as my TV does, yet my computer is not my TV.) The difference is therefore not the content; the difference is the architecture. And rather than simply assuming that these differences won't matter, we should first understand the differences, and consider how they might matter.

⁹ Fiss, at 2.

The aim of this section, then, is descriptive. I want to describe how televisions differ, so as to make possible consideration about how these differences might matter.

Imagine then three versions of “television” — television as it was through the 1960s (call this TV v1.0); television as it is in most major commercial markets today (TV v2.0); and television as it is fast becoming, with essentially unlimited channels (through DirecTV or advanced cable), and other technologies that I will describe below (TV v3.0). These three versions differ in the range of programming choice that each permits. TV v1.0 has a small number of channels; TV v2.0 has an larger but still comprehensible number of channels (10 to 30); TV v3.0 has an essentially unlimited and incomprehensible number of channels. TV v1.0, in this picture, is a small town movie theatre, that runs one show at a time; TV v3.0 is a Barnes & Noble Super Store.¹⁰

The move from TV v1.0 to TV v3.0, then, will increase significantly the range of choice that consumers of television have. But increasing the range of choice does not necessarily increase effective competition among channels. Competition is a function not only of choice, but of the costs of exercising that choice. Consider some examples:

- Unlike American television, BBC in England does not coordinate the start and stop times of the different channels. When a show on BBC1 ends, one would not necessarily be able to switch to the start of another show on BBC2. This lack of coordination reduces the effective competition among these sites. Having 5 channels to choose from with an unsynchronized schedule is less significant than having 5 channels to select from in America.
- TV v1.0 rarely had remote channel changers. Instead, one changed channels on most TVs with a dial that chanced through the available channels. One had to move to the television and turn a dial to locate a different program. And that moving, on the margin, was costly.

¹⁰ As of 1962, 563 stations were on the air (up from 511 five years earlier). In 1992, there were approximately 1,500 television stations on the air with another 200 already authorized. JAMES R. WALKER AND ROBERT V. BELLAMY, JR., EDS., *THE REMOTE CONTROL IN THE NEW AGE OF TELEVISION*, 27 (1993).

Having 100 channels to choose from in this context is less significant for competition than having 100 channels to choose from with a remote.

In these two examples, norms and technology inhibit the choice among channels — scheduling norms, and channel changing technology. They are constraints on competition. But these constraints can be removed. And as we move from TV v1.0 to TV v3.0, especially the second constraint is being removed. Technologies make it easier to exercise choice — the remote channel changer; information makes it easier to exercise meaningful choice — the TV Guide and the channel listing. Both make more effective the competition among channels as the range of channels increases.

The change from TV v1.0 to TV v2.0 in one sense is a virtue for democratic speech. For by increasing the range of choice with improving the technologies of choice, TV v2.0 increase inadvertent exposure. In surfing TV space, the channel changer exposes individuals to other kinds of speech; inadvertent exposure increases the diversity of speech that an individual is exposed to; and diversity in turn reduces the isolation individuals might create.

But this virtue is passing. For the days of surfing TV are as numbered as the days of “surfing” the internet. The future in both contexts is an increase in direction, to help navigate the increasing range of choice. But this direction will not be top down—not CBS, or BBC. This direction will come from technologies that capture an individual’s preferences, and reflect them back.

The internet is the clue here. Unlike TV, the internet began with unlimited channels; it has a long experience in reducing the cost of choice; and some of the most significant developments in the technology of the net are technologies that facilitate more meaningful choice.

The most significant of these new technologies are agents that track revealed preferences, and suggest other choices based on these revealed preferences. Amazon.com is the model here. With millions of books to choose from, Amazon could not depend upon users knowing what they want. Fancy card catalogs would not cut it. A bookstore must push as well as supply, but to push it needs to know something about the consumer. It needs the knowledge of a small bookshop owner — knowledge about her customers, and knowledge about what her customers want. If you like this book,

you might find this interesting. If you're looking for books like this, look at books like that.

Amazon.com creates this knowledge, by watching patterns of consumption among users. It tracks what users buy, so that it can suggest what other users might want. And it does this tracking completely in the background. The user buying a book has no idea about how the information about that user is being used; but the information is being used, to reduce the cost of choice for the next consumer.

This is the future of choice enablers in television. Not a world of Blockbuster Video Stores — huge spaces with endless titles that require endless time to browse and select. Instead, the future will be Amazon everywhere — targeted spaces that know what you want, and suggest to you just what you want.

More choice, more efficient choice enablers: This is what TV is becoming. The model is the internet, where at every moment there is an endless range of options and where competition is as much competition among choice enablers — “portals” — as it is competition among content. TV v3.0 will be the internet with real time and real quality video. Infinite choice, with very low transaction costs.

Now the essence of these changes — the net of the progress from TV v1.0 to TV v3.0 — is a world where the competition among channels increases dramatically, and where any *channeling* that there may be moves from *channeling* imposed by others (broadcasters) to *channeling* imposed by the individual (as the reflection of revealed preferences.) In antitrust terms, the market power of any particular channel will fall. More options will exist, more options will be selected among, which means the power of any particular channel to control what people consume will decrease. Channels will become commodities.¹¹ Again, the model

¹¹ One might be skeptical about the change. One might argue that television has always had competition. If one didn't like what TV v1.0 produced, one could read a book, or go to a movie. But it seems clear that television as a category of activity has a strong pull regardless of its content. Bad TV doesn't seem to push everyone to pick up a good book; bad TV seems to push most people simply to watch bad TV. No doubt this is because TV itself is so compelling to most. And because it is so compelling, in the world of TV v1.0, the controllers of the few channels that there were had relatively strong market power. The owner of one of the three channels in a market has more

is book publishing in post-Soviet Russia: Much greater competition, much greater selection, and much higher quality for at least some of the books in this market.

Competition here will function as competition does

in any market. It will produce a range of products, from high quality to low quality; it will provide these diverse products in a range of different contexts. And while at that same moment, there may be more low quality material around, at any particular moment, there will also be more high quality material around. As it is hard to say that book publishing in Russia has gotten worse (though the Marxists clearly think so), so too will it be hard to say that TV v3.0 is worse (though as I'm about to argue, from the standpoint of "democratic speech" it will be).

II. CHANNELS COMPETITION AND DEMOCRATIC SPEECH

I have argued that the range of channels is about to increase dramatically, and that the competition among these channels will increase as well. The consequence, I argue, will be a fall in the average consumption of democratic speech. More speech will mean less exposure to the speech that Fiss thinks most important.

To see the point, we should distinguish between the supply of democratic speech and its consumption. It may well be that the supply of high quality democratic speech will increase — in the sense that at any given time, there will be a channel where high quality democratic speech is occurring. But for democratic speech to be significant, it must be consumed by the average citizen in the speech market. The relevant question therefore is not whether there is democratic speech out there, but whether people are consuming it.

My claim is that this increase in choice will mean fewer people on average will consume democratic speech. One might think that this conclusion follows statistically — that more choice is likely to mean smaller market shares. But consumption is not randomly distributed; at least some TV viewers select what they want to watch; and if high quality democratic speech were out there, and people wanted to watch it, they would. Numbers alone won't

power to set programming as it wants than the owner in a market with 30 channels.

make the argument. The argument must hang upon something particular about this speech. Why would more choice mean proportionately less consumption of democratic speech?

The answer, I suggest, turns in part on the nature of this speech. More particularly, upon the nature of the demand for such speech. Demand for democratic speech is different from, say, demand for *I Love Lucy* because democratic speech is different.

In public choice terms, democratic speech is a public good. More precisely, the consumption of democratic speech is a public good. When one consumes democratic speech, one is educating oneself about matters of public import. But the benefit of that education is to the public as a whole, and not just to oneself. Any individual alone doesn't reap the full benefit of democratic speech; thus for any individual alone, there is a systematic to under-produce (which in this context means under-consume).¹² As the range of choices opens up, the opportunity for under-consumption increases. And as the opportunity to defect from the production of a public good increases, the supply of that public good — all things being equal — should fall. As Anthony Downs noted forty years ago, there is a kind of rational ignorance when it comes to democratic speech, and as the competition for attention increases, we should expect this ignorance to increase as well.¹³

The point is familiar in the context of activities, such as voting. It is less familiar in the context of speech (even though speech, and especially the consumption of speech is equally an activity). Voting is a public good: we all gain a benefit from living in a "democracy"; a functioning democracy depends on people voting; so assuming I want to live in a democracy, what precisely is the incentive I have for engaging in the act of voting? My vote won't change anything. I therefore have no incentive to vote. Thus the paradox of voting: Why, notwithstanding, do people vote?

¹² The literature here is endless. For a recent discussion, see, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1657 (1996); Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1749 (1996); Richard L. Hansen, *Voting Without Law*, 144 U. PA. L. REV. 2135, 2137 (1996).

¹³ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-259 (1957).

There are many solutions to this “paradox”;¹⁴ my aim is not to rehearse them here. Rather, my point is simply to link this paradox about voting to expectations about the consumption of democratic speech. For as with voting, we might as well ask with democratic speech: Why would people engage in democratic speech, if the consumption of democratic speech is a public good?

Now again, by “engage in democratic speech,” I mean consume the sort of speech that Fiss believes central to the informal education of a democracy. And as with voting, the question isn’t answered simply by imagining some who very much like to engage in such speech. Some people vote because for them, voting is a private as well as public good; there is no paradox in explaining their behavior. Likewise, some people engage democratic speech because for them, democratic speech is a private as well as public good (news junkies, C-Span addicts, etc.). For them, there is no paradox in their engaging democratic speech.

But for the rest of us, the solution is not so simple. For the rest of us, consuming democratic speech is not a private good. And so for the rest of us, we must still ask, why would we engage democratic speech when there seems to be no payoff for us from engaging democratic speech? Why when there is so much else that we might do?

The answer, I take it, is that most won’t. Absent constraints, we are unlikely to engage sufficient democratic speech if indeed democratic speech is a public good. Absent constraints, individuals will more efficiently choose to do what they “want” to do. And what they want will be consumption where they get the full benefit of the consumption. Thus, less democratic speech.¹⁵

¹⁴ Richard L. Hansen, *Voting Without Law*, 144 U. PA. L. REV. 2135, 2137 (1996).

¹⁵ This is not the same as saying that ordinary sorts will want less “news.” I don’t doubt that the consumption of a category of programming called “news” has increased. But I do believe that the content of this “news” has changed — the format, and the objective. I discuss this more in the section that follows. Suffice it for now that the common complaint that news has become entertainment is just another way of stating the point of this section. Even if people are consuming “news” it does not follow that the content is democratic speech in the sense Fiss means.

Absent constraints: For constraints are the ordinary solution to the collective action problem that a public good presents. Ordinarily, to assure a public good's supply, we modify the incentives (we change the constraints) to resolve this conflict between individual and collective choice. Incentives can be changed in any number of ways. Laws might ban the defecting behavior: In some countries, the law requires that people vote; that is an incentive that might overcome the collective action problem with voting. In some countries, the law requires that stations carry political broadcasts. That constraint on choice is another way that incentives are changed to support the public good.

So too might norms be used to change the incentives an individual faces: Citizenship norms might dun people into voting, or into keeping a park clean. So too the market might be used to change the incentives individuals face — taxes on defecting behavior, incentives for cooperation.

Each of these tools of regulation has a role in solving what public choice theorists call the public goods problem. But my aim in this essay is to emphasize the role of a fourth constraint — architecture. For my point is that *on the margin*, removing the constraint of architecture will reduce one important constraint favoring the consumption of democratic speech. Citizens in countries without cable TV, and a heavy-handed role of the government in controlling the content of TV, watch more “democratic speech” than Americans, not so much because they are more committed to citizenship values, but instead because there's little else for them to watch. But increase the range of options, and decrease the cost of switching, and I suggest they, like us, would reduce their consumption of democratic speech.

Increasing the range of choices, and decreasing the cost of selecting alternatives, reduces a constraint that helps solve this collective action problem. Though its meaning is different, the effect is the same as a decline in norms favoring the consumption of democratic speech, or as a reduction in ads about democratic speech, or as a decline in the force of a law directing people to democratic speech. To the extent that an architecture might limit the range of choices, it undermines the competition that might push me away from doing what I “collectively” want (the consumption of democratic speech); to the extent that an architecture enables a wider range of choice, it enhances the competition that might push me away from doing what I “collectively” want.

This point is not limited to democratic speech. Marshall Van Alstyne and Erik Brynjolfsson, for example, make a related point about the “Balkaniz[ation of] science.”¹⁶ As they write,

Working with information requires time and attention. A wealth of information leads to a poverty of attention, creating a need to allocate attention efficiently.¹⁷

This necessity mothers invention — the development of technologies that facilitate the filtering out of “irrelevant” information, and the targeting or linking of “relevant” information. These in turn increase “scientific productivity” as well as “scientific insularity.” The technologies make it easier to link with highly productive contacts, and hence easier to block out contacts that are perceived to be less productive.

An [information technology] telescope that brings distant colleagues into focus can inadvertently produce tunnel vision and peripheral blindness. Geographical balkanization, which might have separated scientists into physical space, can give way to electronic balkanization which separates them into “topic space.”¹⁸

The authors provide a formal model, then, for this increase in specialization, and in turn, balkanization.

Thus the conflict between, as the authors put it, “private incentives” and “social incentives.” As technology improves the ability for individuals to select out, “individual preferences largely determine whether balkanization increases or decreases.” To combat balkanization, scientists would need to act on a preference for diversity.

Why? What reasons are there that a scientist individually, or “science” collectively, might prefer diversity?

The consequence of balkanization is specialization. And there are strong private incentives for balkanization. The individual

¹⁶ *Widening Access and Narrowing Focus: Could the Internet Balkanize Science?*, 274 *Science* 1479 (1995).

¹⁷ *Id.*

¹⁸ *Id.*

return, that is, from specialization is far greater than the individual return from interaction. Yet, as the authors argue, there is a significant social return from interaction. Some of the most important advances in science come from inadvertent spillovers between fields. “In general,” they conclude, “the insularity of sub-populations negatively affects the speed at which new ideas percolate through an entire population.”¹⁹

This is the same dynamic that I have described with democratic speech. It is conceivable that individuals would have an individual preference sufficiently strong to prefer democratic speech over *I Love Lucy*. But that is contingent. And given the strength of private incentives (for entertainment over citizenship work), the increase in technologies of choice can be expected to increase the balkanization of speech consumption. The result, as in science, would be a decrease in democratic speech.

Notice that in both cases, this decrease in democratic speech, or scientific diversity, is not unambiguously what the population at issue “wants.” In both cases, there is a mix of preferences — scientists who want both cross-pollination of ideas and individual specialization, citizens who want both democratic speech to be engaged and the opportunity to watch plenty of *The Simpsons*. The inferior result in both cases results simply from the mix of private and public preferences. If the strength for the private is too strong, then the collective does not get what it “wants.” It wants both (specialization and cross-pollination; *Lucy* and democratic speech); it gets just one (specialization; *Lucy*).

A second example can be drawn from television. Consider data that law professor Lani Guinier has long pointed to as a symptom of an increasing social problem in the United States.²⁰ America has a collective good in achieving a racially integrated culture.²¹ One element in the construction of that culture — as Fiss has reminded us — is television. Indeed, whatever the significance of

¹⁹ *Id.*

²⁰ Lani Guinier, *More Democracy*, 1995 **U. Chi. L. Forum** 1, 4 (1995) (in 1994, “there [was] not even one show that both whites and blacks put on their top-ten list.”)

²¹ Some individuals share that collective end; for them it is an individual good as well. But for most, this goal is a collective goal only (which would not mean most oppose it, just they would individually gain nothing from it).

television's role for democratic speech, it is wildly more significant for constructing cultural attitudes about, among other things, race. Yet as the range of choice has increased on television, a pattern in programming has emerged: programming that is targeted more specifically to social segments in society, with a resulting gap in television preferences between the races. As the New York Times reported,

Last year, "Seinfeld," the top rated television show in white households, ranked 50th in African-American homes ... while the comedy "Between Brothers," No. 1 in black households, ranked 112th among whites.²²

Now plainly, one needn't believe that there is a racist conspiracy here to understand what is going on. There is individual choice about which shows to watch, based on programming that is designed to attract the audience that watches, and these individual choices yield this collective pattern. Nor need one believe that it was a better world where that choice was restricted, such that African Americans were channeled to shows they otherwise wouldn't have selected. Instead of simple moralisms, one can admit the complexity of the story: That there is something good (from an individual perspective) in more people getting to choose what they want, even if there is something bad (from a collective perspective) if the results of such a choice in turn construct a more racially divided society.²³

²² James Strengold, *A Racial Divide Widens on Network TV*, THE NEW YORK TIMES, December 29, 1998, at A3.

²³ There is an increasing literature on television's role in construction of social attitudes. See, e.g., Michael A. Shapiro and Annie Lang, *Making Television Reality: Unconscious Processes in the Construction of Social Reality*, 18 COMMUNICATION RESEARCH, 685 (1991). (arguing that television may confuse a "reality-monitoring process"); L.J. Shrum and Thomas C. O'Guinn, *Processes and Effects in the Construction of Social Reality: Construct Accessibility as an Explanatory Variable*, 20 COMMUNICATION RESEARCH, 436 (1993) (arguing that individuals consistently use the most accessible information in memory as a basis for judgment; subjects who watch more television not only overestimate frequency or probability, but also give faster responses to various questions.); R.P. Hawkins and S. Pingree, *Television's Influence on Social Reality*, in TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES, vol. 2 Technical reviews, 224-247 (1982) (National Institute of Mental Health).

With all three examples (of democratic, scientific, and cultural speech), two different points can be made. One is about how the change in what I have called “architecture,” and what Van Alstyne and Brynjolfsson call “information technology,” changes demand — how more competition changes the type of material that people demand. People choose to view something different from the expanded set of options than what they viewed when options were narrower.

Now my objective in this essay is not to make some static claim about whether the gain in each of these contexts will necessarily be less than the loss. My aim is to identify the shifts, and to underline one cause. It is enough that you see the role of architecture in this dynamic, and link that role to important public values. For to the extent that architecture on the margin matters, it pushes us to ask whether there is anything we could do in response.

I address that question in the last section of this essay. In the next section, I describe a second and perhaps darker feature of this change. It bears emphasis that the conflict that I have described is perfectly consistent with a model of rational choice. The collective action problem is a problem that exists assuming perfect individual rationality. It is at the core of public choice theory.²⁵ But it is not limited to rational choice. The phenomenon that I’ve described with respect to democratic speech is psychologically general. It is familiar in any context of individual as well as collective choice. Whenever we must make a choice, we face the risk that one choice will displace another preference. In many contexts, our desires conflict, and our ability to select the outcome that we most fully want is often constrained by the very context of choice.

In these contexts, we often choose to build in constraints on choice so as to assure that we “choose” what we want to choose. At the most extreme case of children with attention deficit disorders, we structure the context of their behavior to block out other options. A child who can’t read because of the distractions surrounding him is put in a room where there are no distractions, and sometimes given a ruler that isolates the text he is to read, and

²⁵ For a recent and extremely useful collection, see **Maxwell L. Stearns, ed., *Public Choice and Public Law* (1997).**

blocks out any thing except that text. And the same technique is used in less extreme contexts: We don't let our kids do their homework in a room with a TV; we take a book into a room without a telephone; we put the alcohol where it is not convenient to get; we put chocolate in a cabinet, away from the TV. All these are lessons that we have learned; and there are many lessons we are just beginning to learn. Think about email, which for many has become an extraordinary burden on interrupted time, as it pesters us with its insistent notification that new mail has arrived. All these contexts are places where we have learned the point that I am making about democratic speech: That multiplying the choices at any one time can crowd out a choice that we otherwise ex ante would want to choose.

Why we choose what we don't want to choose is a complicated question. Philosophers call it *akrasia*,²⁶ or weakness of the will. Psychologists have more interesting descriptions.²⁷ But whatever its cause, my point is its effect: That a collective, or reflective, good that we otherwise would want disappears. Pressing the question, is there anything we might do in response?

And here, then, is the point about how architectures are regulating. In the less perfect architecture for choice, choice is disabled. But we choose to disable choice in this way all the time. The point is that sometimes disabling choice is what one would choose. And one can disable choice either by resisting the options presented, or by putting oneself into a context in which one doesn't have to resist. Architectures, in other words, can do our resisting for us, and sometimes it is plainly the case that we want help resisting.

²⁶ See Aristotle, *Nicomachean Ethics* (W.D. Ross, trans.) from Richard McKeon, ed. *THE BASIC WORKS OF ARISTOTLE* Bk. VII 1145a15-1154b33 (1941). The type of *akrasia* I am speaking of Aristotle calls weak, rather than impetuous *akrasia*. See *id.*, 1150b19-1150b29/

²⁷ The point is familiar in studies about attention deficit disorder. See CAROL A. DOWDY, ET AL, *ATTENTION-DEFICIT/HYPERACTIVITY DISORDER IN THE CLASSROOM* 79-85 (1998) (describing how the physical environment of a classroom has impact on behavior, and recommending techniques (such as study carrels) to reduce external stimuli, both auditory and visual.); JANET W. LERNER, ET AL, *ATTENTION DEFICIT DISORDERS: ASSESSMENT AND TEACHING*, 110 (1995) (recommending a limitation in the choice of tasks, topics and activities).

III. OTHER CONSEQUENCES OF INCREASED CHOICE

I have argued that increased competition will mean that more get what they want, and that it is a feature of democratic speech that given that choice, most would choose something else. Reducing the architectural constraints pushing people to watch will mean a reduction in the number of people who watch.

In this section, I want to suggest a second, more troubling consequence. It too flows from the abundance of riches that TV v3.0 represents. For again, this consequence is the product of giving more people “what they want.” But again, giving more people what they want individually may be to deny more people what they want collectively.

We can see the point by thinking about a category of speech that is a subset of Fiss’ “democratic speech.” This is speech about matters of public import — the news, for example. My argument in this section is that we should expect the differences in architecture to change the character of news, and in ways that will not only not properly inform, but positively misinform.

My argument grows out of an example suggested by Justice Antonin Scalia. At a talk to a group of Harvard Law students, Justice Scalia was asked why he opposed television cameras in the Supreme Court courtroom. His answer was this: That if he were convinced that people would watch from the start of an argument to the end, then he would have no objection to cameras in the courtroom. But that’s not how the video would be used. Instead, only snippets of the argument would be seen—only the most dramatic, or the most extreme—with the result, Scalia said, that there would be less understanding about what the Court did, rather than more. Less speech, in this case, was better than more.

There are two parts to Scalia’s prediction. One is a claim about the audience — that outside of the Supreme Court courtroom, one would expect that few will stay tuned to the full scope of an argument. If other channels were available, many would switch. The other is a claim about the editor — if arguments were available on C-Span, then news editors would use snippets from the argument when reporting on the argument rather than the full argument. In either case, arguments in their entirety would not be seen. And in Scalia’s view, partial arguments would not be informative. More sharply, they would be mis-informative. Thus

arguments are best kept within the Court so that views about the work of the Court are not distorted.

In the terms of the previous section, Supreme Court arguments are one channel events. The Supreme Court courtroom is a relatively small room; there are no uncurtained windows; one is not permitted to read while court is in session; nor may one speak; telephones are not permitted. Attention during an argument is focused on an argument; that argument has a monopoly over the attention of the audience. People may day dream — there is no technological solution to that (yet); but beyond day dreaming, the audience is not allowed to tune into another channel.

Any educator — and not just bad educators — will recognize Scalia's intuition. Any educator will recognize that some speech suffers in the face of competition: boring speech, difficult speech, challenging speech, speech about unfamiliar topics, speech about remote topics — all these are challenged by the opportunity to switch channels. More non-opera lovers will watch an opera from start to finish in a theatre, rather than on television, *in part* because there are other channels on television, not so in the theatre.²⁸ Some topics are difficult; they require real attention and real work. If at every turn when presenting such topics, one could simply turn to any number of other channels with content not as difficult, many would. Thus one setting the stage where others are to learn would be advised to choose — if he or she can — a space that constrained the choice of other channels. And often a physical space — a classroom, or a lecture hall — will effect that constraint. Often, that is, it will be the architecture of the classroom that censors to the end of assuring focus, and hence at times, understanding.²⁹

²⁸ I say *in part* because I don't want my argument confused with the claim that channels are the only determinant here. They are not. But they are one.

²⁹ So consider the lunacy built into recent proposals to add internet connections at the desks of students in law school classrooms, so that they can connect to the internet during class. The argument in favor of such connections is that it would enable professors to use material on the net in their teaching, and no doubt there is that benefit. But there is also a cost (if the default is that the connections are live). The cost is the competition for attention that these ports present. The devil of solitaire is already competition on most laptops. With the internet, that competition would increase to include email, and chat channels (including chat channels with others in the classroom) and web brokers where the students could trade stock. I don't

Now obviously, the kind of “censorship” that is involved in architectural censorship is censorship of a special sort. Its aim is not to silence a particular message, or hide a particular idea.³⁰ Instead, its aim is to focus attention, or to assure that a matter is considered without interruption from other channels at the same time. It uses a constraint on alternative channels as a way to induce attention to the primary channel. And my claim is that sometimes this focus is necessary if understanding is to be achieved.

Whether you buy Scalia’s argument about Supreme Court arguments or not (and I confess to being one who buys it), we can generalize his point with the following abstraction. Imagine that for a given topic X , an attention span (AS) O is necessary for an accurate understanding of X . (For X = arguments in the Supreme Court, Scalia’s argument is that O must be the full argument, or close to a full argument.) But for a given market (“average viewers”), the AS for the topic X is A . The first question we should ask is whether:

$$(1) \quad AS^O < AS^A$$

If it is, then there is no problem — or at least there is not the problem that I want to discuss. If $AS^O < AS^A$, then attention span is not a constraint on the accurate transmission of some truth. There are many examples: If some nation declared war on the United States, and bombed a US port, then one expects that the attention span of the average view would be greater than what is necessary. People would stay tuned to the news; the existence of *I Love Lucy* on channel 33 would not have much effect.

But if:

$$(2) \quad AS^O > AS^A,$$

deny that this competition may be a nice incentive for boring and bad professors to improve their presentation. But it would also interfere with not boring, but simply difficult topics, or subjects. These, I believe, require contexts where “multitasking” is not allowed. Desks with internet ports are not such contexts.

³⁰ It could be. If a state bans all broadcasts except for state run TV, then that may well be a way of silencing other views. But in the contexts I am imagining, the market power of any particular context is slight. Alternative views will be available; just not during the time when one kind of speech is being pushed.

then we have a very different concern. For this is the constraint that Scalia suggests Supreme Court arguments face. If one believes that the actual attention span is less than the necessary attention span, then one believes that “accurate understanding” will not be conveyed.

Two responses are possible. One is to do nothing. This response says, let the attention span change to fit what is necessary. Or it is to say, my concern is to convey the truth, not to worry about whether it is understood. An example from magazine journalism is relevant here.

In 1993, the *New Republic* ran a story about a Harvard Law Review decision to publish the tenure piece of Harvard Law Assistant Professor Charles Ogletree.³¹ If one read just the first part of the story, one would have had the impression that the decision was driven by political correctness, and not by merit. If one read the full story, one would understand that the meaning the author intended to convey was precisely the opposite — that the decision was grounded in merit, but that most discussed it as if it were political correctness. Indeed, the author’s intent was more complex than this — for by creating this “mis-impression” early in the story, the author intended to suggest something about the cause of this mis-impression — namely, that people didn’t pay attention to the full story. Thus the author’s meta-argument was very similar to my primary argument — that misunderstanding is generated by this constraint on attention span.³²

But this meta-purpose didn’t relieve the author from criticism.³³ For regardless of the meta-purpose of the article, she should have been aware that the article would mislead. Responsible journalism, some argued, required an accounting for the average attention span. The article should have been written with this attention span in mind — and thus written in a way different from the way the article was actually written. Responsible journalism required, that is, an article that did not achieve these

³¹ See Ruth Shalit, *Hate Story*, *THE NEW REPUBLIC*, June 7, 1993, at 11.

³² The ordinary structure of news stories of course assumes this, for the main points of a story are placed at the top of the column, and details get layered on later on.

³³ See Letters, *THE NEW REPUBLIC*, July 5, 1993 (letter from Dean Robert Clark).

two ends — a story about the tenure decision, and a story about how stories like this are misunderstood — when achieving these two ends would so directly risk defaming the target of the story.

Complaints like this lead to the second response to the relation “ $AS^O > AS^A$ ”: that the author or broadcaster simplify or contract the story to fit AS^A . If the attention span of the average viewer is 15 seconds, then write the story so it can be understood in 15 seconds.

This response would be fine if every idea, or argument, or truth, could be reduced to a 15 second version. If the Cliff Note version of reality, that is, were a faithful reflection of reality, then reduction would be a fine response. But for the same reason that English teachers object to Cliff Notes in literature classes, or for the same reason that Scalia objects to C-Span, one could well object to the view that every story could be reduced to fit any arbitrary attention span constraint without loss of fidelity. As with software compression routines, there is a limit to how compressed an argument can be. This is not to say that no compression is possible; it is only to say that there is a limit.

There are plenty of examples. Think about the war in Bosnia. Coverage of this story has been extensive. Yet to understand the history that makes understandable the conflict requires an $AS^O > AS^A$. The same with trade policy, or many aspects of foreign policy — all these are matters of public import, but they are not matters that will be understandable in sound bites.

For those stories that can't faithfully be compressed, one response might be to not carry the story. I've heard reporters say precisely that: That they can't write a story about X because there is no way to accurately represent the facts about X within the constraint of the length of a news story. This response is an acknowledgment of the constraint of attention span, and it respects that constraint. One might argue that it manifests a responsible restraint.

But increasingly, this is not journalism's response. Rather than not covering a story, our 24 hour a day news culture will cover the story, subject to the same constraint on attention span. So Bosnia will be covered, in 2 minutes of TV footage. Or the battle over open trade, covered in 800 words in an op-ed column.

In one sense, one might believe this effect quite benign. Ok, so most have a superficial understanding of matters of public import, and the news contributes to the superficial character of that understanding. So what? Isn't it marginally better that people have some understanding than that they have no understanding? Would it really be better if they watched more of *The Simpsons* than *Headline News*?

But I do believe that there is a harm here, as the effect of this speech winds its way through our (or any sufficiently democratic) political system. For this partial coverage creates the impression of knowledge; people believe they know something about a subject.³⁴ Partial coverage creates a view. Without a view, when people are asked what they think about X, there is at least hope that they will say, "I don't know." But with a view, they are likely to express it. And their expression will have an effect. People are fed sound bites; after grazing for a sufficiently long time, they believe that they know something about the subject; and soon thereafter, they are quite willing to express their views about what ought to be done. The thought "I don't know enough to know what ought to be done" escapes them because, in fact, they "know" plenty.

I am certain that anyone this far into an essay published in a law review knows what I am talking about. I'll give one example that I am quite familiar with. At the time of this writing, there is a trial in federal district court about whether Microsoft has violated the antitrust laws. This is a story that is reported by the media.

³⁴ Political scientists have long noticed a phenomenon called "non-attitudes" or "phantom" opinions. "Non-attitudes" was coined by Philip E. Converse, "The Nature of Belief Systems in Mass Publics," in *IDEOLOGY AND DISCONTENT* 245 (Ed. David E. Apter 1964), and refers the phenomenon of individuals reporting a view about a non-existent matter. For example, psychologist Eugene Hartley conducted a survey in 1946 about racial attitudes. The questions probed the views of students about attitudes towards various racial groups. Included among the groups were the "Wallonians" and "Pireneans"—obviously fictitious groups. Nonetheless, the students expressed strong views about whether immigration should be permitted for either, and about whether they should be permitted to be integrated into local neighborhoods. JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* 80-84 (1995).

My point here takes the non-attitude problem one step further. However confidently people might express views about matters that they have not heard anything about, my assumption (admittedly untested) is that they would be more confident about matters they've heard something about.

The events from the case are distilled into the space such reports allow. And the world comes to have a view about Microsoft's behavior, and whether the law should be invoked against it. So when asked, a very high proportion of those asked will say whether Microsoft should be found guilty or not.

Now I am struck by this phenomenon of people expressing their view one way or another. For if anything is clear about this case, it is that it is a wildly difficult case. The facts are highly contested; the interpretation of the facts extremely difficult. And when one adds into the mix these salient yet systematically misunderstood sources such as email, anyone with any sense of responsibility about the case should say, when asked, "I don't know." Or more directly, anyone who knows something *knows* that most people don't know anything about the case — or don't know anything sufficiently complete about the case to be able to say one way or another. Yet say they do, in poll after poll, as people genuinely believe they know something when in fact they don't.

But here again, the response might be, so what? Judge Jackson is not going to consult the USA Today poll before deciding the case. Who cares if the public comes to have a solid yet baseless view of the case? And certainly, that response to this example is perfectly correct. I have no doubt that the actual decision in the Microsoft case will be unrelated to discussion outside the case.

But I've used this example as a shell to first make the point before pointing to the context where it most directly applies — policy making by democratically elected officials. For here, the misunderstanding is significant. The Impeachment notwithstanding, the fact that 70% believe X is, for more politicians, regardless of whether or not the 70% are misinformed. The only significant point is the perception. And as any politician knows, truth has very little relation to this perception. Sound bite news produces an understanding of an event; that understanding has weight regardless of the veracity or fidelity of the understanding.

The nomination of Lani Guinier to be Attorney General for Civil Rights is a perfect example of the phenomenon I am describing. Guinier's nomination was attacked because she was said to favor quotas. No fair reading of her writings, however, could conclude that she favored "quotas." The problem, however, is that a fair reading of her writings — writings within the genre of this essay — required real work. To the average reporter, it was

extremely difficult to understand the point and significance of Guinier's arguments in law reviews. To the average Senator, there just wasn't time. So instead, her argument was collapsed to the account that might fit within the two minutes' coverage that any such story would get. But her views were not amenable to such a two minute rendering. Thus it was the cartoon of her views, and not her views, that were represented. And hence opposition to that cartoon in the Senate remained strong.

When President Clinton withdrew her nomination, he did so with a fabrication that speaks volumes to the current state of understanding. Clinton representatives told a television audience that he had read her writings in one morning.³⁵ This was, he said, the first time he had done so, and he had concluded from that reading that he just didn't agree with what she said. But of course, no one who knew anything about law review articles believed that he had devoted the time necessary to understand the 273 pages of writings that Guinier had produced. It was an obvious falsehood to say that he had.³⁶ What he had done — quintessential politician that he was — was to conclude that there was no way to convey the substance of Guinier's writing in a way that would sell. Again, not necessarily because the substance was flawed, or too controversial, *when properly understood*, but because, given the attention span constraint, it could not be properly understood.³⁷

Now there are many qualifications that I must make to make this argument even plausible, and only some of those will I sketch here. First, my claim again is not about every topic of public import — there are any number of news blockbusters that capture a

³⁵ *White House Press Briefing by George Stephanopoulos*, U.S. NEWSWIRE, June 4, 1993 ("And as you know, he spent much of yesterday morning reading her writings.").

³⁶ There is a suggestion that he focused on only one article, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich.L.Rev. 1077 (1991), *id.*, though the impression is that he read the whole.

³⁷ This is not to say things are hopeless. Guinier then published two books, LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); LANI GUINIER, *LIFT EVERY VOICE* (1998), that explained her views quite forcefully, and distinguished her position from quotas quite effectively. In the end, the controversy might have done more to push understanding of her subtle and powerful position than anything else could have done.

sustained attention from the public. The impeachment of President Clinton, the affairs of President Clinton, the death of Princess Diana, the downing of TWA 800 — these are all events that by their nature capture the attention of an audience, and all events where the speaker might expect a greater span of attention. The point is not, therefore, that only context determines attention span; obviously subject matter does as well. For again, as I suggested at the very start film is a context where the subject matter often succeeds in focusing the attention of an audience for an extraordinarily long period of time.

Second, any harm caused by what we might call the attention span constraint can over time be corrected by frequent if partial exposures. As a complex painting can be produced by many thousands of tiny brushstrokes, or a complex problem in a well designed computer program solved by chopping the problem into many small parts, so too a complete understanding of a complex story might be understood by frequent and repeated exposure to different facets of the story over an extended period of time. Even those who paid no attention to the facts surrounding the impeachment of President Clinton can't help but to have absorbed much about the story. With millions of stories broadcast about the case, at some point even those consciously avoiding the story will have absorbed much about the case.

Thus any problem there might be with this constraint of attention span is not a problem that will affect every aspect of democratic speech. But my point is that it will affect some. How many depends upon empirics beyond the scope of this essay. However many, my argument is that there are more than there would be were the constraint of attention span recognized responsibly.

Finally, my claim is not that things were great in the past, and are just getting worse over time. I don't believe that I am captured by the golden age fallacy. Again, I believe we are seeing an increase in news coverage, if one considers the full range of broadcasting, and an increase in the range of topics being discussed. More importantly, we are seeing an increase in the exposure of average Americans to newsworthy topics. A great, and egalitarian, change has occurred in the exposure of people to matters of public and international import.

But my point is that the consequence of egalitarianism is not necessarily an improvement in understanding. There may be

greater exposure, and less understanding, for before the exposure, more would be likely to say, if asked about some subject, “I don’t know.” Instead, there is a troubling (for an egalitarian, at least) conflict between greater access and greater understanding. As more people are exposed, more people have views about the matters to which they are exposed; they express these views; these views get reported (“65% of Americans believe blah blah blah”). Yet if the understanding shaping these views is crude, then we should at least wonder about the advantages that this egalitarianism has produced. Are we better off in a world where the recommendations of policymakers must compete with strong but ill informed views of the public? And if we are not better off, then what possible remedy to this “problem” could we imagine?

For here in the end is the real trouble that this emerging architecture for speech creates. It is not just that there will be less exposure to democratic speech — the conclusion of part I above. It is also that the exposure that there is, for many of the most important issues that government faces, will be an exposure that creates less understanding, rather than more. The stories will be reported; some sort of understanding will be created; but the understanding that is created will not necessarily have any fidelity to the truth, or the true complexity of the facts. Yet this understanding — in this age of democracy — will matter to democrats. Policymakers and politicians will be affected by this misunderstanding — it too will become a constraint on decisions. And the constraint, to the extent it is a product of misinformation, or incomplete information, or ignorance, will be a compromise in the policymaking process.

This is not a point that others have failed to notice. It is a commonplace to criticize the press, for example, for failing to capture the truth they report, or a commonplace to notice that one trusts most of what the press reports, except those things one actually knows something about. But the mistake is to blame the press. The author of a story faces real constraints;³⁸ a newsreporter who told her editor that a particular story could not be reported in less than 4,000 words would be told to find another job. Every story can be told in 700 words — whether told accurately or not. But the constraint of 700 words is real — it is formed by a market

³⁸ Online publications face less of a constraint. This is a virtue of publications such as C|Net which can afford to be more complete in its coverage.

of publications, and cannot simply be remade by saying that it should be different. The constraint is real, and my argument is that the constraint has an effect on the understanding that the audience gets about these matters of public import. On balance, it is likely to reduce the value of democratic speech on television.

IV. CENSORSHIPS COMPARED

I have picked this example of the architecture of television, and this suggestion of how it will change, and the effects this change will have on the supply of democratic speech, to set it against the threat to democratic speech that Fiss has described. For as compelling as Professor Fiss's account is, I can't help but feel that he is arranging the deck chairs on the Titanic. In his deeply optimistic view about the potential for Brandeis-ism in the current Supreme Court (a court, we should remember, that has nine justices, not one; a court, we should remember, that could not muster but one justice to join the only strongly Fissian opinion in the recent broadcast cases — Breyer's opinion in *Turner II*³⁹), he has missed the most important feature about how the medium of television is changing, and how that change will matter to the problem that is at the center of his concern.

Fiss's concern is the power of those who exercise control over conduits. That was the concern of Justice Breyer in *Turner II*, where he asked whether Congress could balance the interests of cable operators with the interests of citizens in receiving free TV. But both Fiss and Breyer presume a feature of the market that we cannot take for granted. This is the continued market power of conduits. Whatever competition may or may not now exist in the context of conduits, my sense is that that problem is short lived. The market power of broadcasters is dying. We are moving to a world not of powerful broadcasters, but a world, as Professor Eugene Volokh described four years ago, of cheap speech⁴⁰ and cheap choice. Not a world where CBS gets to think about a "line-up," but a world where content is constantly available for the choosing. Television is moving from the model of the radio that so

³⁹ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 225-229 (1997).

⁴⁰ Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

captured Justice Stevens in *Pacifica*,⁴¹ to the model of the jukebox; from a place where channels *channeled* people, to a place where channels are just a metaphor for a mechanism of choice. And when channels are replaced by choice, a very different “censorship” problem will be presented. Not the censorship of management, and certainly not the censorship of the state, but the censorship of architectures. And here, paradoxically, the censorship comes not from the suppression of speech; the censorship comes from the surplus of speech. It is the competition and cacophony that yield the loss that this form of censorship remarks.

And what will that then mean?

For those who think about censorship in the sense that Fiss, and Sunstein,⁴² and Meiklejohn⁴³ do, this will shift the locus of concern about “censorship” once again. In the 19th century, the concern may have been social norms; at the birth of the 20th, it was state censorship; at the height of TV in the 1970s, it was managerial censorship. But soon, I want to argue, the focus will be architectural censorship. In each case, the concern, from the Fiss/Sunstein perspective, is that these censorships not inhibit dialogs of citizenship. But the remedy for that concern in each context is different. The response to norm censorship is not necessarily the response to state censorship; as Fiss and Sunstein have discovered, the response to managerial censorship is not necessarily the response to state censorship. Or more problematically, the best response to one form of censorship might be inconsistent with the response to another. It might be that the best way to deal with state censorship disables the best way to deal with managerial censorship. Or that the best response to architectural censorship is inconsistent with the response to state censorship.

And here, then, I want to suggest, we will confront a problem. For think about the “architectural solution” that Scalia recommends — the architectural solution to the problem of

⁴¹ *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 727 (1978).

⁴² CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

⁴³ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948).

attention span that justifies keeping cameras out of the court room. Scalia's solution is less speech, not more. It is the opposite of Brandeis in *Whitney*,⁴⁴ it is the embrace of a regulation that puts speech in its place, where speech in its place means speech limited to those places where the dynamic of its consumption fit the character of the speech. If it takes an attention span of 30 minutes to understand the workings of a court, then put the speech in a box where people are forced to listen for 30 minutes, or not at all.

Now generalize a bit from that particular. Imagine we distinguish speech on this metric — separating speech that can be grasped in 10 seconds (we call that prime time television) from speech that requires 10 minutes of attention (we can call that speech about public issues). What possible remedy could we constitutionally have for reconstructing the constraints that Scalia can rely upon? What are the possibilities for regulating here?

My suggestion is that we understand that Scot Powe⁴⁵ has won the debate about managerial censorship. The court is not about to move us back to a world where regulators control speakers; it is not about to move us back to a world where government monitors value. We are moving to an architecture for broadcasting that is the architecture of the internet. Anyone with 5000 dollars today can become a television broadcaster.⁴⁶ Anyone can set up their own channel. Perfect competition in the speech market is our future, and that perfection will have its costs. For as I see it, perfect competition in the field of broadcasting will mean that television, contra Fiss, will become the least important domain of social or political thought. It will become (become?) a place that produces less, rather than more, understanding — at least of issues not at the center of public attention, or issues that require 3 steps of thought. When broadcasting becomes this completely egalitarian space of speech, when choice is maximized and transaction costs are eliminated, this speech will be useless for the ends that Fiss has.

⁴⁴ *Whitney v. People of State of California*, 274 U.S. 357, 375-78 (1927).

⁴⁵ LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 121-141 (1987). See also Thomas G. Krattenmaker and L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 *YALE L.J.* 1719 (1996).

⁴⁶ See <<http://www.real.com/solutions/rbn/index.html>>.

And so what will he do then? Can we even imagine a regulation that would reverse this trend? Could we conceive of a constitutional law that aimed at less speech when it is speech about certain issues? Is there anything in our constitutional tradition that would give us resources for even thinking about this problem?

My sense is not. My sense is that here we will hit an anomaly that under present first amendment law, we cannot digest. That might be too narrow, or too pessimistic. Anomalies, in Kuhn's mind,⁴⁷ are the opportunity for a new way of thinking. Perhaps, but in Kuhn's view, it would follow that I, as a normal scientist, would be incapable of seeing from here what that new way of thinking will look like there. And in this at least, Kuhn is right.

Whether Fiss's hope that concern for managerial censorship is growing is correct or not, it seems to me that a far more significant threat to television's role in producing democratic speech is on the horizon. And that threat—architectural censorship—is not one that our tradition would resolve.

There may be hope. To say that TV doesn't produce sufficient democratic speech is not to say that there are no devices for producing useful democratic speech, or for generating useful views from the public. The work of James Fishkin is most relevant here.⁴⁸ Fishkin has described what he calls a "deliberative poll." Rather than asking ignorant (or ill-formed) citizens about their views, the deliberative poll takes a random sample of citizens, and brings them to a single place, where over the period of a day or two, the citizens are exposed to information about some matter, and then given a chance to deliberate about it. Fishkin's research shows both that the initial views of the population change dramatically after this experience, and that the final views from the poll are, over time, more stable. The process produces a meaningful view about some matter of public import, and as a by-product, produces citizens who perhaps for the first time have the sense of what it means to deliberate to some conclusion about a matter of public affairs.

⁴⁷THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 52-65 (3rd ed. 1996).

⁴⁸See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* (1995).

Every feature of Fishkin's model fits with the ideals of democracy. Ordinary citizens, not experts, decide on the basis of real information and an opportunity to deliberate. And as Tocqueville remarked 150 years ago, the process of deliberation produces a practice of citizenship. It creates the habits of mind that are necessary to overcome Downs' rational ignorance.

One might imagine over time that Fishkin's model proves itself—in contexts unrelated to direct democratic politics, but nonetheless significant. One might imagine people coming to view the product of deliberative polling to be more significant than flash polling. And as that view grew, the incidence of deliberative polling would increase as well. Policy makers starved for sensible views from the public might begin to help generate such sensible views.

But however hopeful this future might be, television's role will be slight.⁴⁹ The deliberative poll requires people, not cameras; it requires education, not sound bites. The contrast in what TV might produce and what deliberative polling might produce will increase the pressure for TV to move away from democratic speech, and more firmly into the world of entertainment.

⁴⁹ I am thus disagreeing with Fishkin's hopefulness in James S. Fishkin, *The Televised Deliberative Poll: An Experiment in Democracy*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 132 (1996).