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Internet Exceptionalism: An Overview from General Constitutional Law

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INTERNET EXCEPTIONALISM: AN OVERVIEW FROM
GENERAL CONSTITUTIONAL LAW

MARK TUSHNET*

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INTRODUCTION

This Article considers First Amendment Internet exceptionalism. I use that term in what I think is a reasonably standard way to refer to the question of whether the technological characteristics of the Internet (and, more generally, twenty-first-century information technologies) justify treating regulation of information dissemination through the Internet differently from regulation of such dissemination through nineteenth- and twentieth-century media, such as print, radio, and television. My aim here is not to provide an answer to that question, but to identify several subquestions whose answers must be part of the larger answer.

I begin with a disclaimer. After thinking and writing about general constitutional law and theory for many years, I began to think about the First Amendment relatively recently, and about the implications of that Amendment for the Internet even more recently. With so much specialized writing about the Internet and the First Amendment already produced, I should note that my reflections on the possibility of Internet exceptionalism might simply be reinventing the wheel—that is, discussing in quite summary form matters that have been discussed in more detail elsewhere.¹ The fact that the term “Internet exceptionalism” is well known in the field indicates that much has indeed been said about the questions I discuss here.² Still, I have not found a crisp statement presenting many of the matters I find of interest in a single place, so the Article

1. Further, in my discussions of doctrine in this Article, I offer rather summary versions of what I believe to be the best understanding of current doctrine, without dealing with a rather large number of qualifications that a more complete treatment would add to deal with a fair number of cases that do (in my view) little more than add some bells and whistles to the core doctrines.

2. A LEXIS search for “Internet exceptionalism” conducted on September 10, 2014, recovered forty-nine items. See, e.g., Mark McCarthy, *What Payment Intermediaries Are Doing About Online Liability and Why It Matters*, 25 BERKELEY TECH. L.J. 1037, 1040 (2010) (“[I]nternet exceptionalism is still a widely held viewpoint.”). Because this is a short Article, I do not address in detail the many good articles dealing with both discrete subissues that arise in connection with Internet exceptionalism, or those dealing expressly with Internet exceptionalism as such. My sense is that the issues I address here have typically been embedded in arguments focused on more detailed questions.

may have some value as such a compilation even if it is not all that original.

Coming to the topic from general constitutional theory and law, I believe that I am somewhat more sensitive than most of those who write on the subject to the question that pervades the entire field. That is the question of the appropriate degree or form of judicial deference to legislative regulatory interventions, whether those interventions occur in the material economy or in the information economy. Not surprisingly, scholars who focus almost exclusively on the Internet and the First Amendment, to the exclusion of general constitutional theory and law, simply assume that relatively intrusive judicial supervision of regulatory decisions dealing with the information economy is appropriate.³ To the extent that the scholarship adverts to the question of judicial deference, I believe that it tends to assume that the question is adequately answered by referring to Footnote Four of *United States v. Carolene Products*⁴ and the scholarship of John Hart Ely.⁵ My view is that such an assumption is not warranted. I defend this view only indirectly by attempting to identify why and how the question of judicial deference is a complex one.⁶

After the description in Part I of some general questions about the structure of constitutional doctrine, Part II examines two strategies that courts have used to deal with technological innovations—one allowing legislative experimentation until experience accumulates, the other imposing existing (or what I call “standard”) doctrine from the outset. Part III looks at some attributes that are

3. For a somewhat more extended version of this point, see Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2237 (2014). There I argue that most scholars who write about the First Amendment “like” the Amendment, meaning that they favor relatively broad limitations on legislative power dealing with speech. For myself, I neither like nor dislike the First Amendment in that sense.

4. 304 U.S. 144, 152 n.4 (1938).

5. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

6. A short general version of my position is this: Footnote Four and Ely are concerned with regulations that, in Ely’s terms, threaten to block the channels of political change. See *id.* at 105 (“Clearing the Channels of Political Change”). But, not all regulation of information dissemination poses such a threat. A more disaggregated analysis of the targets of regulation, one that attends to the extent to which those targets do in fact have much, if anything, to do with enabling political change, is required. For an extended essay on this topic, see Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012).

said to distinguish the Internet from traditional media—norms, scope, cost, and anonymity—with the aim of mapping out how or when Internet exceptionalism might be justified. Part IV discusses several general qualifications to the preceding analysis, involving doctrinal structure yet again, the First Amendment’s bearing on regulation of business models, and the state action doctrine. Finally in a brief conclusion, I suggest that framing the discussion as one about Internet exceptionalism in a broad sense is misleading.

I. WHY—OR WHY NOT—INTERNET EXCEPTIONALISM: SOME PRELIMINARY OBSERVATIONS

Considering the use of sound amplifying equipment by trucks cruising city streets to disseminate a political message, Justice Robert Jackson wrote, “The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself.”⁷ To that, we can now add the Internet. So, for example, the cost of distributing information, whatever its nature, over the Internet is much lower than the cost of doing so in other media, particularly when the distributor uses one of the various social networks as an intermediary. It is somewhat easier to distribute information “anonymously” over the Internet in the sense that the steps one must take to identify the speaker may be more complicated or “techy” than the steps one must take to identify the person responsible for a leaflet or television advertisement.

Justice Jackson’s observation rests on a proposition about the form that First Amendment doctrine takes.⁸ For him, the constitutionality of specific regulations depends upon an assessment of “values, abuses and dangers”—that is, on what his generation would have called a balancing of interests and what today might be called a determination of the regulation’s proportionality.⁹ Whether that

7. *Kovacs v. Cooper*, 336 U.S. 77, 98 (1949) (Jackson, J., concurring).

8. A note about originalist approaches to the interpretation of the First Amendment seems appropriate. To state the conclusion of a complex argument: originalists must deal with the issues of balancing versus categorical approaches as they pursue their inquiries, though the discourse of originalism has developed its own terms to refer to balancing and categorical approaches.

9. The primary expositor of proportionality analysis, including in connection with the

form was the correct one was contested at the time, with Justice Hugo Black notably asserting that First Amendment doctrine should be more categorical,¹⁰ and is even more contested today.¹¹ My argument in this Part is that the alternative forms of regulation—categorical rules or balancing tests—can be indistinguishable in practice, at least when each is done carefully. Essentially, a well-designed set of categorical rules will identify a large range of characteristics whose presence in varying degrees triggers the application of discrete rules within the set, and well-performed balancing will take precisely those same characteristics into account and give them appropriate weights in generating outcomes.

For analytical clarity, we should pry apart the two elements Justice Jackson combined. We might want to develop separate rules for each medium of information dissemination, or we might apply a general balancing or proportionality test to every medium. We might call the rule-based approach one of Internet exceptionalism¹² and the balancing approach a unitary account of the First Amendment.

Balancing can produce the following outcome: a regulation that would be constitutionally impermissible if invoked against print media would be constitutionally permissible when invoked against Internet dissemination.¹³ That might *look* like Internet exceptionalism on the level of outcomes, but it would result from a unified approach to First Amendment problems.

First Amendment, is Justice Stephen Breyer. For a discussion of Justice Breyer's First Amendment jurisprudence, see Mark Tushnet, *Justice Breyer and the Partial De-doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508 (2014).

10. See, e.g., *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'No law ... abridging' to mean *no law abridging*.").

11. See *United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.' As a free-floating test for First Amendment coverage, that sentence is startling and dangerous." (citations omitted)).

12. Note that when transforming Justice Jackson's approach into a categorical one, we might develop—as indeed some suggest we have—"broadcast" exceptionalism, "movie" exceptionalism, and even "book" exceptionalism.

13. And vice versa: a constitutionally permissible regulation of the print media might be constitutionally impermissible if applied to dissemination on the Internet.

One might think that a rule-based analytic approach could not have similar distinct results. Professor Jim Chen provides a useful formulation, in his discussion of regulation of Internet intermediaries, which he calls conduits: “Conduit-based regulation of speech is a constitutional mirage.... Conduit-based regulation raises precisely the same issues as all other decisions reviewable under the First Amendment.”¹⁴ *Reno v. ACLU* exemplified this approach by applying existing rule-based doctrines in a challenge to the constitutionality of the Communications Decency Act (CDA), which restricted the distribution of some sexually explicit but nonobscene materials via the Internet.¹⁵ According to the Court, “the CDA is a content-based blanket restriction on speech, and, as such, cannot be ‘properly analyzed as a form of time, place, and manner regulation.’”¹⁶

Yet, as Chen observes immediately after stating the general point, “distinct conduits raise distinct regulatory concerns, ranging from strictly physical characteristics to economic predictions regarding markets that exploit that conduit. Persuasive free speech jurisprudence considers differences of this sort.”¹⁷ So, we would apply existing, pre-Internet doctrine (no Internet exceptionalism), but with some adjustments, or “tweaks,” to take account of the Internet’s distinct characteristics (Internet exceptionalism).¹⁸ And, as I suggested at the outset, the choice of doctrinal structure need have no impact on the outcomes generated. Internet exceptionalism and standard doctrine with tweaks could produce the same “rules.”¹⁹

14. Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1450 (2005).

15. 521 U.S. 844 (1997).

16. *Id.* at 868 (citations omitted).

17. Chen, *supra* note 14, at 1450; see also Richard Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1006 (2000) (“[T]he advent of cyberspace may raise the stakes, but it hardly follows that it also changes the correct solutions.”).

18. I note that the possibility that balancing and rules-based approaches will in practice result in the same outcomes is a general characteristic of those approaches, not specific to the First Amendment. See MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 73 (2014) (arguing that proportionality and rules-based approaches can be extensionally equivalent).

19. I use the scare quotes here to indicate that the formulation does not entail a commitment to a “categorical rules” structure.

II. STRATEGIES FOR DEVELOPING A “LAW OF THE INTERNET UNTO ITSELF”

Here I identify two general strategies²⁰ for following Justice Jackson’s advice to think about a law of the Internet unto itself.

A. *Allowing a Period of Policy Experimentation*

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, Justice John Paul Stevens wrote, “At this early stage in the regulation of this developing industry, Congress should not be put to an all-or-nothing choice.”²¹ The thought here is that individual technological innovations implicate an array of dangers and constitutional values, and that neither legislatures nor courts have any special insights, relative to the other, about the constitutionally appropriate response when the innovations have just been introduced. This counsels in favor of deference to democratically responsible decision making or, as Justice Stevens put it, deference to congressional choices. But, as experience with the innovation and with policy experiments accumulates, legislators and judges learn more about specific dangers and how regulatory responses implicate constitutional values. Our constitutional system assumes that at some point judges’ comparative advantage in implementing constitutional values in an informed way kicks in, and restrictive judicial doctrine can develop.²²

The pattern of judicial deference to legislative choice followed after some time by the development of judicial constraints on experimentation is common.²³ In the early years of motion pictures, the

20. I distinguish between interpretive methods such as balancing or rules, and strategies for implementing either of those methods.

21. 518 U.S. 727, 769 (1996) (Stevens, J., concurring).

22. For a good overview of the historical development of First Amendment doctrine with respect to several media technologies, see Robert Corn-Revere, *The First Amendment and the Electronic Media*, FIRST AMENDMENT CTR. (Nov. 20, 2002), <http://www.firstamendmentcenter.org/internet-first-amendment-overview> [<http://perma.cc/QNU3-CPUF>].

23. *Cf. City of Ontario v. Quon*, 560 U.S. 746, 759 (2010) (noting that in a case involving pager technology and instant messages, “[t]he Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the

Court held that movies were mere “spectacles” and, for that very reason, movies were fully regulable without regard to the First Amendment.²⁴ Decades later, after society had become accustomed to movies, the Court applied standard First Amendment doctrine to their regulation.²⁵ There were similar results with radio²⁶ and cable television.²⁷ Writing in 1996—relatively late in the development of cable television as a communications technology—Justice David Souter observed, “All of the relevant characteristics of cable are presently in a state of technological and regulatory flux.”²⁸ For him, that justified refraining from “announc[ing] a definitive categorical analysis” to deal with the problem at hand.²⁹ The Court is similarly new to the technologies associated with the Internet.³⁰

This strategy would direct one to a form of Internet exceptionalism, at least for some period. But, it is worth emphasizing that the strategy need not lead to a state of permanent exceptionalism. As experience accumulates, judges should be in a position to assimilate regulations of now not-so-new technologies to the general body of First Amendment doctrine, perhaps, as suggested earlier, with some tweaks to deal with truly distinctive features of the technology.

Fourth Amendment implications of emerging technology before its role in society has become clear,” and referring to the Court’s “own knowledge and experience” in developing doctrine).

24. *Mut. Film Co. v. Indus. Comm’n*, 236 U.S. 230, 243-44 (1915).

25. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

26. *Compare Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637-39 (1994) (discussing the evolution of First Amendment doctrine dealing with broadcasting), *with Nat’l Broad. Co. v. United States*, 319 U.S. 190, 227 (1943) (“The right of free speech does not include, however, the right to use the facilities of radio without a license.”).

27. *Compare Turner Broad. Sys.*, 512 U.S. at 660-61 (applying intermediate First Amendment scrutiny to some cable regulations), *with FCC v. Midwest Video Co.*, 440 U.S. 689, 709 n.19 (1970) (finding it unnecessary to resolve the question of what First Amendment standard was applicable to a regulation of cable television).

28. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 776 (1996) (Souter, J., concurring). Professor Christopher S. Yoo refers to *Denver Area* as “experiment[ing] with alternative rationales for subjecting cable operators to a lower level of First Amendment scrutiny.” Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 750 (2010).

29. *Denver Area*, 518 U.S. at 775 (Souter, J., concurring).

30. According to Judge M. Margaret McKeown, between 1996 and 2012, the Supreme Court mentioned the Internet in seventeen cases, and “only seven were actually about the Internet.” M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH. J.L. TECH. & ARTS 135, 152 (2014).

*B. Drawing Inferences from the History of First Amendment
Treatment of Technological Innovations*

In the same case about cable regulation in which Justice Souter defended deference to regulatory experiments, Justice Anthony Kennedy saw the problem differently: “When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.”³¹ That “discipline” arises from the very experience that the first strategy allows to accumulate.

The first strategy counsels deference to regulatory experimentation with each until experience accumulates about that particular technology, at which point the courts can be confident about imposing First Amendment constraints on further experimentation. The first strategy, that is, hopes for wisdom to emerge from the accumulation of experience *within* each technology. Proponents of the second doctrine argue that we can also accumulate experience *across* technologies. They observe the course of doctrinal development about movies, radio, television, and cable, and note that there is a thread running through each area: initial deference followed by the application of standard First Amendment doctrine.³² Medium exceptionalism is regularly replaced by general First Amendment law. So, for example, movies were first outside the First Amendment, then fully within it;³³ the standard for regulating cable television was first left undefined, then controversially became subject to intermediate scrutiny, with strong voices arguing for the application of the usual rules for content-based regulations.³⁴ So, for proponents of the second strategy, existing doctrine has resulted from considering each technology separately, and yet a uniform doctrine has emerged. They infer, from experience, that we would profit from short-circuiting the deference-to-standard-doctrine pathway whenever legislatures attempt to regulate a new communication

31. *Denver Area*, 518 U.S. at 781 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

32. *See supra* Part II.A.

33. *See supra* notes 24-25 and accompanying text.

34. *See supra* notes 27-29 and accompanying text.

medium. We are going to get to standard doctrine eventually, and, they ask, why should society incur the interim costs of regulations that, in retrospect, will seem unconstitutional?

I do not propose to offer any observations about which strategy makes more sense. I note, though, that both strategies rely on experience; the first within technologies, the second across them. That signals a more general issue in connection with drawing inferences from experience, which is that we have to decide what is the domain (or, as it is sometimes put, what is the “reference class”) of the relevant experience. My sense is that the choice of domain is driven by the analyst’s prior commitments: First Amendment “mavens” will look across technologies, First Amendment skeptics—meaning, those who are skeptical about aggressive judicial review of decisions by democratically responsible legislatures—will look within technologies.³⁵ If so, identifying the two strategies may help us understand the structure of debates about Internet exceptionalism, but will not help us come to a judgment about which side has the better case.

III. THE INTERNET’S DISTINCTIVE “NATURES, VALUES, [AND] ABUSES”

What would Internet exceptionalism, either because of the Internet’s distinctive characteristics, or standard doctrine with tweaks to take account of those characteristics, look like? Justice Jackson’s suggestion is that we should examine how the Internet differs from traditional media with respect to its potential values and abuses.³⁶ But, the real question is somewhat different—not what the differences are in some ontological sense, but rather this: to what extent should courts in determining a regulation’s constitutionality defer to a reasonable legislative judgment about those

35. In comments on a draft of this Article, Rebecca Tushnet suggested that First Amendment skeptics may also look across technologies, sometimes finding reasons *against* their skepticism in connection with the dissemination of some categories of material through one technology, but thinking those reasons unavailing in connection with dissemination through another. An example, though rejected by the Supreme Court, might be the thought that regulation of obscene *films* might be justified even though regulation of words-only obscenity would not be. For the Court’s rejection of that proposition, see *Kaplan v. California*, 413 U.S. 115, 118-19 (1973).

36. See *supra* note 7 and accompanying text.

values and abuses? This is the real question because legislatures enact regulations predicated on their judgments that each regulation is a constitutionally appropriate response to what they understand to be the Internet's distinctive values and abuses.³⁷

Consider some possible regulation of cyberstalking.³⁸ Physical stalking is regulable because it induces fear in its victims and can induce them to take costly protective measures (and because physical stalking is not, in general, an expressive activity covered by the First Amendment or, at least, consists of action "brigaded with" words, to invert Justice Douglas's formulation).³⁹ Cyberstalking takes the form of words and images that induce fear.⁴⁰ Existing doctrine deals with words that induce fear under the doctrinal heading of "threats," and the First Amendment allows punishment of such words only if they constitute a "true threat."⁴¹ One issue that arises in connection with true threats under standard doctrine is whether an utterance is a true threat only when the threatener subjectively intends to carry out the threat when the occasion for doing so arises, or whether an utterance is a true threat when a reasonable recipient would be put in fear.⁴² When a legislature adopts a regulation of cyberstalking that goes beyond its general

37. In framing the issue in this way, I begin with the assumption that we should be thinking in the first instance about regulations specifically targeted at the dissemination of information over the Internet, and not about the application of general regulations of speech to the Internet as well as other media. The issue of deference to legislative judgments arises most clearly in connection with such targeted regulations. I note, though, that the issue of deference to legislative judgment arises in only a slightly different form with respect to general regulations properly interpreted to apply to the Internet.

38. In the discussion that follows I do not discuss any specific regulation, and in particular I do not discuss whether some such regulation might be unconstitutionally vague or unconstitutionally overbroad. I note, though, that the standard for determining acceptable unclarity or breadth might depend on a prior judgment about whether Internet exceptionalism (or a tweak to standard doctrine) is appropriate. My sense is that many invocations of vagueness or overbreadth doctrine in the context of Internet regulation rely without analysis on the proposition that what is vague or overbroad with respect to traditional media is necessarily vague or overbroad with respect to Internet regulation. However, that is precisely what is at issue.

39. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

40. Nisha Ajmani, Comment, *Cyberstalking and Free Speech: Rethinking the Rangel Standard in the Age of the Internet*, 90 OR. L. REV. 303, 304 (2011).

41. *Watts v. United States*, 394 U.S. 705, 707-08 (1969).

42. The issue is pending before the Supreme Court in *Elonis v. United States*, No. 13-983 (U.S. argued Dec. 1, 2014), a case involving cyberstalking but prosecuted under a general threat statute. See *supra* note 37 (discussing the distinction between Internet-targeted and general regulations).

regulation of threats, it implicitly (or perhaps even explicitly) determines that the dissemination of threatening words to victims over the Internet is distinctively harmful—perhaps, for example, because it is easier to ensure that threatening words reach the victim via the Internet than via traditional media. It seems (to me—and so, I think, could reasonably seem to legislators) more likely that a victim will become aware of a threatening Facebook posting than of a classified advertisement. And, the cost of posting on Facebook is lower than the cost of mailing a threatening letter to the victim. In enacting the cyberstalking statute, the legislature has made a judgment about the relative ease of communicating a threat via the Internet. Assume that that judgment is a reasonable one. Should a judge say, though, that the greater ease is not “large enough” to justify distinctive regulation? The answer to that question depends in large part on one’s account of the deference judges should give to legislative judgments.⁴³

With the issue of judicial deference in hand, I turn to several of the characteristics typically invoked in discussions of whether there should be Internet exceptionalism. I depart from what I think is the usual order of presentation, in which scope, cost, and anonymity are said to distinguish the Internet from other media, and begin with norms.

A. Internet Norms Are Fluid or Nonexistent

The fact that in practice anyone can use the Internet as a platform for distributing ideas and information means that it is nearly impossible to generate widely adhered-to norms of appropriate behavior.⁴⁴ The well-known cartoon with the caption, “On the Internet, nobody knows you’re a dog” is a comment not only about the anonymity the Internet affords, but on the fact that nothing—name, reputation, or any other norm—vouches for what appears on the Internet.⁴⁵ The existence of “comment trolls,” and even the existence

43. My experience, for what it is worth, is that men tend to think that the greater ease of disseminating threats is not large enough, whereas (some) women think that it is.

44. I qualify this observation later, in my discussion of the question of intermediaries’ First Amendment rights.

45. The implication is captured in the subtitle of a play by Alan David Perkins: “Nobody Knows I’m a Dog: Six People; *Six Lies*; One Internet.” Alan David Perkins, *Nobody Knows I’m*

of a term for the phenomenon, shows that there are as yet no real constraining norms of Internet behavior, as does Godwin's Law.⁴⁶

Norms may arise within discrete communities, and some of those communities might be quite large. Yet, it is in the Internet's "nature," to use Justice Jackson's term, that material circulated within a community and conforming to its norms will leak into other communities with other, perhaps more restrictive norms.⁴⁷ So, for example, one can readily imagine a subcommunity on the Internet whose members regularly use, and are not offended by, extremely crude and sexually explicit language. Members of other subcommunities who come upon that language might be offended—or, in some cases, psychologically and even materially injured—by it.

More consequential is the question of treating bloggers as members of the news media. That question arises in connection with statutes creating reporters' privileges to conceal their sources from inquiry or to get access to locations closed to members of the general public.⁴⁸ Professor Sonja West, defending special rules for "the press," offers a definition that is in part implicitly norm based. For her, one component of the definition involves "[t]raining, [e]ducation, or [e]xperience" in the field.⁴⁹ Although she does not develop the justification in detail, it appears that training and experience matter because they are methods by which a person becomes acculturated to the field's norms.⁵⁰

a Dog (1995), <http://www.alandavidperkins.com/nkiad/> [<http://perma.cc/3KV6-SXA8>]; see also Michael Cavanaugh, "Nobody Knows You're a Dog": As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows the Joke Rings as Relevant as Ever, WASH. POST (July 31, 2013, 11:35 AM), http://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html [<http://perma.cc/3YZP-BRBB>] (discussing the continuing relevance of the cartoon).

46. Godwin's Law asserts, "As an online discussion grows longer, the probability of a comparison involving Nazis or Hitler approaches one." Mike Godwin, *Meme, Counter-meme*, WIRED, (Oct. 1994), <http://archive.wired.com/wired/archive/2.10/godwin.if.html> [<http://perma.cc/F6R9-U7YW>].

47. *Kovacs v. Cooper*, 336 U.S. 77, 97-98 (1949) (Jackson, J., concurring).

48. For a recent discussion, see Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

49. *Id.* at 2459.

50. *Cf. id.* at 2460 (referring to "independent journalistic activity" in connection with these elements).

Norms or their absence may matter for the issue of Internet exceptionalism because standard First Amendment doctrine may rest on a judgment that norms—of newspapers, broadcasters, and the like—have developed to restrict harmful actions to some significant degree. The New Zealand Court of Appeal noted the importance of norms for developing the rules to be applied in cases involving false statements about public figures: “New Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids.”⁵¹ Because the New Zealand press was “responsible,” imposing liability relatively unrestrictedly would not have had significant effects on how the New Zealand press disseminate information.⁵² When norms operate to limit the damage done across a wide range of information distribution, only normative outliers will engage in harmful dissemination of information and ideas. And perhaps standard First Amendment doctrine assumes that these normative outliers will be few, in part because markets will constrain behavior because relatively few consumers would purchase what the outliers were selling, with the result that the harm they cause will be small. Finally, with few normative outliers, attempting to control their behavior by law (norms having failed) might have undesirable effects on those who generally adhere to appropriate norms.⁵³

Internet exceptionalists might suggest that a world without norms is different from the world in which standard First Amendment doctrine developed. By definition, there are no outliers, ready access to the Internet means that large numbers of “unsocialized” speakers will in fact distribute ideas and information, and the size of the market coupled with relatively low costs of dissemination means that (to overstate a bit) anyone can make a living by disseminating anything. The resulting harm might⁵⁴ be large enough to

51. *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

52. Although the court was developing the common law in a system without judicially enforceable constitutional protection of free expression, the court clearly understood that the common law should be developed in ways responsive to the values of free expression.

53. This is what motivates concern for the “chilling effect” of regulations: even those who comply with the regulations may fear that they will have to defend their actions at some cost and risk being held liable as a result of what are analytically mistaken applications of the regulations.

54. The word “might” here flags once again the question of judicial deference to legislative judgments.

justify regulations of the normless Internet world that would be impermissible for the norm-pervaded world of traditional media.

Perhaps the Internet is now normless. But, things could change and norms could develop to regulate substantial amounts of the information distribution on the Internet informally, without legal intervention.⁵⁵ An Internet exceptionalist might rely on that observation to support the pursuit of the first regulatory strategy, allowing experimentation with regulation until experience accumulates about whether or the extent to which acceptable norms come to characterize behavior on the Internet.⁵⁶ One might wonder, though, about the possibility that norms could develop so that judges could eventually enforce constraints on legislative experimentation pursuant to the first strategy. The issues of scope and cost, discussed next, may be both part of the Internet's nature and important causes of normlessness on the Internet. If so, norms will never develop. An Internet exceptionalist might conclude that courts should never attempt to constrain legislative experimentation with Internet regulation, although that conclusion is in some tension with the rhetoric typically associated with the first strategy. And, once again in contrast, the proponent of applying standard First Amendment doctrine to the Internet might give permanent normlessness as the very reason for following the second strategy.

B. The Internet Is a Bigger and Better System for Amplifying "Sound"

Consider the classic First Amendment case *Debs v. United States*.⁵⁷ Eugene V. Debs, a powerful orator, made an antiwar speech and was prosecuted for interfering with the war effort.⁵⁸ The

55. Section 230 loosens legal regulation in part to encourage the development of norms by protecting intermediaries against state tort law liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A) (2012).

56. *Cf.* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) ("[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of *new* and available devices." (emphasis added)).

57. 249 U.S. 211 (1919).

58. *Id.* at 212-14.

Court upheld his conviction,⁵⁹ but under a doctrine it has since repudiated.⁶⁰ One reason—not the only one, I emphasize—is that the risk was relatively low that Debs’s speech would actually lead to interference with the war effort. His audience was a small fraction of the national population, so even if he persuaded some listeners to act on what he said, not much damage to the war effort would occur. Give Debs a bigger bullhorn—that is, a means of disseminating his message much more widely—and the risk of actual harm increases.⁶¹ As the Court put it in *Reno v. ACLU*, “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther *than it could from any soapbox*.”⁶²

United States v. White presents a variant on the “bigger bullhorn” argument.⁶³ The defendant operated a white supremacist website, with many postings praising assassinations and other violent acts, and often identifying people who, White said, deserved to be killed.⁶⁴ He posted detailed information on his website, including the name, address, and phone numbers of the foreperson of a jury that convicted another white supremacist of soliciting harm to a federal judge (the judge’s husband and mother had been murdered, though not by the defendant in the case over which she presided).⁶⁵ White was charged with soliciting a violent crime against the juror.⁶⁶ The court of appeals held that White did not have a valid First Amendment defense:

59. *Id.* at 216-17.

60. *Brandenburg v. Ohio*, 395 U.S. 444, 449-50 (1969) (Black, J., concurring) (“[T]he ‘clear and present danger’ doctrine should have no place in the interpretation of the First Amendment.”).

61. *Cf.* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 13 (2006) (referring to “the exponential increase in the number of speakers with potential access to broad audiences”).

62. 521 U.S. 844, 870 (1997) (emphasis added); *see also* *United States v. Am. Library Ass’n*, 539 U.S. 194, 207 (2003) (“As Congress recognized, ‘[t]he Internet is simply another method for making information available in a school of library.’ It is ‘no more than a technological extension of the book stack.’” (citations omitted)).

63. 698 F.3d 1005 (7th Cir. 2012).

64. *Id.* at 1009.

65. *Id.* at 1009-10.

66. *Id.* at 1010.

Though the government did not present a specific “solicitee,” it was unnecessary to do so given the very nature of the solicitation—an electronic broadcast which, a reasonable jury could conclude, was specifically designed to reach as many white supremacist readers as possible so that *someone* could kill or harm Juror A.⁶⁷

There are of course distinctions between *Debs* and *White*.⁶⁸ Yet, both involved a risk that someone would commit a crime as a result of listening to (or viewing) some words and images. The court of appeals’s reference to “as many white supremacist readers as possible” suggests that imposing liability on *White* was constitutionally permissible because he had a particularly susceptible readership large enough to make the risk that violence would occur significant enough to support regulation.⁶⁹

Internet exceptionalism would allow legislatures to make the judgment that the substantially larger audience available for communications over the Internet increases otherwise acceptable levels of risk beyond a tolerable threshold. Proponents of applying standard First Amendment doctrine would disagree. They might argue, for example, that the concern in standard First Amendment doctrine is not with the size of risk, but the mechanisms by which risk is realized. *Brandenburg v. Ohio* holds that a person can be convicted of uttering words that increase the risk of violence only if—among several other criteria—the words are words of “incitement.”⁷⁰ The theory is that such words bypass the listener’s deliberative capacities, effectively turning the listener into a weapon in the speaker’s hands rather than an autonomous decision maker. The broader First Amendment theory on which *Brandenburg* rests, according to one prominent account, is that the First Amendment bars liability for harm that results when a speaker persuades someone else to take unlawful action.⁷¹

67. *Id.* at 1016.

68. Primarily, that the crime in *Debs* was not a specific intent crime, whereas the crime in *White* was. *See id.* at 1012 (quoting the jury instruction requiring that the government must prove beyond a reasonable doubt “with strongly corroborative circumstances, that the defendant intended for another person to commit a violent federal crime”).

69. *See id.* at 1010.

70. 395 U.S. 444, 447 (1969).

71. *See, e.g.,* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91

In addition, one might note that just as the risk of resulting harm increases, perhaps dramatically, as the size of the audience increases when material is distributed over the Internet, so does the harm caused by suppressing the distribution of that material. Shutting down White's website, for example, prevents the rest of us from learning about the positions being taken by real white supremacists. Which is the more important risk? Here too the general issue of deference to legislative judgments arises. Saying that judges should apply standard First Amendment doctrine implies that judges rather than legislatures should decide what the balance of risks should be.

C. Disseminating Information over the Internet Is Dramatically Less Costly than Other Modes of Dissemination

WikiLeaks and data-mining are standard examples of the fact that a combination of non-Internet technology and the Internet has made it substantially easier to assemble information and disseminate it.⁷² As Neil Richards puts it, "a number of recent technological advances and cultural shifts have enabled the easier dissemination of [personal] information and the creation of larger, more detailed, and more useful data-bases."⁷³ For any level of cost, the Internet user can compile and distribute a much larger amount of information than he or she could through other technologies.⁷⁴ As Jack Balkin observes, "social media lower the costs of informing and organizing people quickly."⁷⁵

COLUM. L. REV. 334, 337-39 (1991).

72. The computers used to compile information for data mining and the thumb drives used to download information from the Web are not necessarily linked to Internet technology—someone with two computers, neither of which are linked to the Internet, could use a thumb drive to transfer information from one to the other computer—but obviously the existence of the Internet makes those technologies much more useful.

73. Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1150 (2005).

74. As an analytic matter, scope and cost are closely related (perhaps even the same), but distinguishing between them seems to me useful for expository purposes.

75. Jack M. Balkin, *The First Amendment Is an Information Policy*, 41 HOFSTRA L. REV. 1, 11 (2012). Balkin uses the observation to identify some of the benefits of lower costs. For a judicial observation referring to possible drawbacks of lower costs, see *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (blending cost and scope concerns, the Court referred to "[t]he near instantaneous possibilities for the dissemination of information by millions of different information providers around the world to those with access to computers").

The cost of inflicting harm always constrains doing so: In a world in which libelous statements can be distributed only through a newspaper, there will be fewer such statements than in a world where they can be distributed via the Internet, simply because it is cheaper to log on to the Internet than to purchase a newspaper with its editorial offices and publishing plant. The same goes for all forms of regulable harms—invasions of privacy, copyright infringement,⁷⁶ or damage to national security.

Lower cost means that constraints on inflicting harms (to national security or by invasion of privacy, for example) are weaker than they are in connection with traditional media. Standard constitutional doctrine deals with liability for *distributing* information that is both truthful and harmful in two branches. First, the First Amendment protects the distributor against liability if the information is produced without violating the law and the distributor acquires it without breaking the law. For example, in *Florida Star v. B.J.F.*, the Court held unconstitutional a statute prohibiting the publication, in a medium of “mass communication,” the name of a victim of a sexual offense, in a case in which a reporter found the victim’s name on a police report, which was available to anyone who walked in at the police department’s press room.⁷⁷ The second branch of the doctrine deals with information that is “produced” illegally—as the Court put it, “[w]here the ... publisher of information has obtained the information ... in a manner lawful in itself but from a source who has obtained it unlawfully.”⁷⁸ In such cases, the Court balances the harm done by the disclosure against the public interest in providing access to the information.⁷⁹

76. For an example of this reasoning in practice, see *Universal Studios v. Corley*, 273 F.3d 429, 453 (2d Cir. 2001) (upholding the constitutionality of an injunction issued under the Digital Millennium Copyright Act prohibiting the publication of a decryption code, and observing that “[t]he advent of the Internet creates the potential for instantaneous worldwide distribution of the [decrypted and] copied material”).

77. 491 U.S. 524, 527-28 (1989).

78. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (quoting *Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

79. *Id.* at 534 (“In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance.”). I assume for present purposes that the same approach would be taken with respect to harms to national security, though the balance might be struck differently.

Standard doctrine involves the traditional media—in the cases discussed above,⁸⁰ a newspaper and a radio station—and perhaps it implicitly rests on an evaluation of the harms of suppression *given* likelihood of harm to other interests in light of the cost constraints associated with those media. What are those costs? First, there is the cost to the originator of acquiring the information. In *Bartnicki v. Vopper*, the information was gleaned from overhearing a cell phone conversation on a device that intercepted the conversation.⁸¹ The cost is that of obtaining and using the interception technology, a cost that I will characterize as moderate rather than low. Sometimes, the cost to the originator will be low—for example, downloading information to a thumb drive in the Bradley Manning WikiLeaks case.⁸²

Second, there is the cost to the distributor of obtaining any specific piece of information. In *Florida Star*, that cost was having a reporter who had the time to go to the police station's press room to look at the police reports there,⁸³ again what I will characterize as a moderate cost. In *Bartnicki*, in contrast, this cost was quite low, as the originator basically dropped the tape recording into the radio station's lap.⁸⁴ For the Internet, I suspect that this second cost is almost always going to be low.

Third, though, there is the cost of maintaining an organization that is in a position to get and use the information. There has to be a newspaper or radio station for the problems in *Florida Star* or *Bartnicki* to arise. Similarly, there has to be an organization like WikiLeaks to acquire information from Manning. I will assume that the cost of maintaining these organizations, whether traditional or Internet, is relatively large. But, it probably is worth noting that the costs of maintaining traditional media organizations include rather large costs of a relatively immobile physical plant, such as printing machines, whereas the costs of a physical plant for businesses that distribute information and ideas over the Internet are relatively

80. See *supra* notes 77-79 and accompanying text.

81. *Bartnicki*, 532 U.S. at 518.

82. See Marc Ambinder, *WikiLeaks: One Analyst, So Many Documents*, NAT'L J. (Nov. 29, 2010), <http://www.nationaljournal.com/whitehouse/wikileaks-one-analyst-so-many-documents-20101129> [<http://perma.cc/ZFB-882T>].

83. *Florida Star v. B.J.F.*, 491 U.S. 524, 527-28 (1989).

84. See *Bartnicki*, 532 U.S. at 519.

low—computers that can be rather easily transported and office space that can be rented.

We also need to focus on what precisely the organization is—that is, on its business model. The business models in *Florida Star* and *Bartnicki* were ones in which the information distributor engaged in some screening of, or editorial judgment about, what it would disseminate. Internet distributors might have a similar model, in which case the cost of maintaining the Internet organization would be comparable to that of maintaining traditional media. An Internet distributor might have a different business model, though, as WikiLeaks reportedly does. The Internet distributor could simply take what it receives and send it out, leaving it to others to evaluate its content. Relative to traditional media, this is a low-cost business model (the cost of maintaining the organization aside).⁸⁵ Other business models, of course, might depend on the use of additional screening mechanisms, the use of which might increase the cost to a moderate level.

I have provided this sketch of various costs because standard doctrine might have been developed with an implicit understanding of the costs associated with acquiring and disseminating information. Perhaps the Court assumed that overall, the costs were reasonably high. The Court might have implicitly considered that those costs would in themselves limit the amount of harmful information distributed by the traditional media. Then, the Court might have asked, “In light of what we think is the likely amount of harmful information these media can distribute consistent with their business models, what may legislatures add by law consistent with the First Amendment?” Were the costs lower, the amount of harmful information distributed would be different, and the Court’s interpretation of the First Amendment might be different as well. The obvious pressure point is the balancing test in the second branch of standard doctrine, but even with respect to the first branch, the Court might come to think that a categorical rule was undesirable.

85. According to Julian Assange, WikiLeaks’s founder, in 2010 the organization had five full time employees and relied on about 800 volunteers. Stefan May, *Leak-o-nomy: The Economy of WikiLeaks (Interview with Julian Assange)*, MEDIEN-ÖKONOMIE-BLOG (Jan. 4, 2010), <http://stefanmey.wordpress.com/2010/01/04/leak-o-nomy-the-economy-of-wikileaks> [<http://perma.cc/K3M4-XNPX>]. The *Florida Star*’s website identifies a staff numbering twenty-eight. *The Florida Star Staff*, THE FLORIDA STAR (Aug. 11, 2014), <http://www.thefloridastar.com/about-2> [<http://perma.cc/Y74A-2SMS>].

Internet exceptionalism—or standard doctrine tweaked to deal with lower costs—might then develop.

D. The Putative Anonymity of the Internet

Finally, I return to the “nobody knows you’re a dog” meme. Holding the cost of acting constant, perhaps it is easier to operate anonymously on the Internet. For example, it might be more difficult to determine who is cyberstalking you than to determine who is physically doing so: the technology of detecting physical stalking can be relatively simple—just keep your eyes open⁸⁶—whereas the technology of identifying a cyberstalker may require sophisticated techniques of tracking IP addresses, penetrating security walls, and the like.⁸⁷

The additional cost may sometimes matter. Consider threat liability again. Standard First Amendment doctrine allows the government to impose liability for making true threats.⁸⁸ The case law involves liability imposed through the criminal law,⁸⁹ but a legislature could unquestionably create a civil cause of action by a victim against a person who sent her a true threat. If the cyberstalking cause of action imposes liability only on the cyberstalker himself, the anonymity afforded by the Internet is irrelevant: the victim can recover only if she identifies the cyberstalker. Or, put another way, a cyberstalker who remains anonymous is free from liability under such a cause of action.

As the *White* case shows, the government may have the resources to track down a person who threatens via the Internet.⁹⁰ Ordinary civil litigants, though, might not be able readily to identify their cyberstalkers. A legislature creating a civil cause of action for cyberstalking might take that fact into account in structuring liability. The obvious way to do so is to make Internet intermediaries liable

86. Of course there are more complex technologies, such as installing surveillance cameras, and some more expensive ones, such as hiring a private detective.

87. See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 434 (2009) (“Much speech on the Internet is anonymous, it may be difficult to find the person who is speaking.”).

88. *Watts v. United States*, 394 U.S. 705, 708 (1969).

89. See *supra* note 41 and accompanying text.

90. *United States v. White*, 698 F.3d 1005 (7th Cir. 2012). Though in *White* the defendant made no real efforts to conceal his identity on the Internet. See *id.* at 1011.

for distributing true threats (or other material that can be regulated under standard First Amendment law). Alternatively, it can impose liability for refusing to turn over information that would enable the victim to determine who was issuing the threat—a refusal, I emphasize again, that would flow from the business model the intermediaries adopted.⁹¹ Would that be permissible under the First Amendment?

Here I sketch a map of the possibilities. The starting point, perhaps oddly, is *New York Times Co. v. Sullivan*, which held that an intermediary can be held liable for publishing a false statement made by another person, if the intermediary transmitted the statement with knowledge of the statement's falsity or with reckless disregard for its truth or falsity.⁹² There, a group of supporters of the civil rights movement drafted an advertisement and paid the newspaper to publish it.⁹³ The newspaper was simply an intermediary for the transmission of the advertisement's message. But, had standard First Amendment requirements of knowledge or reckless disregard been satisfied, the newspaper could have been held liable for publishing libelous statements.⁹⁴ *Sullivan* showed that an intermediary does not automatically have First Amendment protection for statements it transmits.⁹⁵ What matters is whether substantive First Amendment requirements are satisfied.

Satisfying such requirements is similarly necessary for establishing liability for threats.⁹⁶ Suppose that the substantive requirement for threat liability is that a reasonable person would take the utterance to be a true threat. With respect to that objective standard, and subject to a qualification I introduce in a moment, the threatener and any intermediary who transmits the threat are in the same position, each putting the victim in fear.⁹⁷ It might seem

91. Congress has immunized intermediaries from liability under the Communications Decency Act. 47 U.S.C. § 230 (2012). The question I consider in the text is whether, in the absence of statutory provision, intermediaries have a First Amendment immunity from liability.

92. 376 U.S. 254, 279-80 (1964).

93. *Id.* at 256-57.

94. *Contra id.* at 279-80.

95. *See id.*

96. *See Virginia v. Black*, 558 U.S. 343 (2003).

97. Importantly, the threatener and the intermediary are equally subject to “chilling effect” concerns. *See supra* note 53. The substantive standard is designed with those concerns in mind. *But cf. Kreimer, supra* note 61, at 27-28 (arguing that the risk of error is larger for intermediaries than for originators, in part because “intermediaries have a peculiarly fragile

that the outcome should be different if the substantive standard requires a subjective intent to threaten. The threatener might have the requisite intent, but the intermediary would not. So, it might seem, intermediaries might have some First Amendment protections that cyberstalkers and the like might not, depending on the substantive First Amendment rules.

The analysis becomes slightly more complex when intermediaries object that as a practical matter they cannot check every message they transmit to determine (in the case of libel) whether it was false or (in the case of true threats) whether the message would put a reasonable recipient in fear. With respect to libel, the objection might prevail if the intermediary made some, possibly cursory, effort to check truth.⁹⁸ With respect to true threats under the objective standard, intermediaries can use algorithms to identify potentially threatening messages and then can inspect those messages to see if they are objectively true threats.⁹⁹

Internet intermediaries have argued that the First Amendment ought to bar the government from requiring that they use some method for inspecting the messages they transmit, on the ground that inspection would be too expensive and that users rely on assurances that whatever they originate will reach its destination.¹⁰⁰ That argument must be unpacked. What it asserts is that the intermediaries have adopted business models that are profitable only if victims of unprotected speech¹⁰¹ bear costs that could in principle be shifted to the intermediaries. It is not clear that the First Amendment should be taken as a restriction on the government's ability to

commitment to the speech that they facilitate"). Kreimer continues, "revenue from the marginal customer brings only a small payoff, a benefit that can easily be dwarfed by threatened penalties." *Id.* at 28. One response is the availability of insurance, the cost of which is taken into account in designing a business model. *See infra* note 103 and accompanying text.

98. For example, perhaps a statement in the intermediary's terms of service that those who originate statements warrant their truth would be sufficient to show that the intermediary did not act with reckless disregard for truth.

99. For example, an algorithm could pull from the stream all messages with the words "I'd like to kill" (and more, of course). Some statements that are objectively true threats might not be caught by the algorithm, but one can imagine a First Amendment standard that would protect intermediaries who used reasonable algorithms to identify threatening messages.

100. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 754, 830 (1996).

101. These include people whose reputation is damaged by the dissemination of false statements about them or people who are put in fear and perhaps take costly protective measures after receiving true threats.

regulate business models.¹⁰² That observation also suggests that threat liability might be imposed on intermediaries without violating the First Amendment even if the substantive standard for true threats is subjective. The reason is that intermediaries can, at least in principle, obtain insurance against liability. On this view, the First Amendment does not guarantee that intermediaries can choose whatever business model they want, without regard to the harms produced by using one rather than another model.¹⁰³

Introducing the idea of business models helps us understand another argument against intermediary liability. The person who makes a true threat gets something—a sense of satisfaction, perhaps—out of making the threat; the intermediary who transmits it does not. No matter what the content, a rule imposing liability on the intermediary will induce the intermediary to suppress more speech than would the same rule applied to originators. This is because the intermediary, or so the argument goes, does not lose anything from “overcensoring” speech—that is, refusing to transmit speech in circumstances in which the originator is in fact protected by the First Amendment.¹⁰⁴ But, the argument fails to take into account the fact that the intermediaries do gain something from transmitting the message. It would not be the psychological satisfaction that the originator gets, of course, but the financial returns from adopting a business model in which they transmit whatever is presented to them. Intermediaries, that is, do lose something by overcensoring speech.¹⁰⁵

102. *Cf.* *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (rejecting the proposition that the First Amendment provided the Associated Press with a defense to an antitrust action). For a somewhat more extended discussion, see *infra* Part IV.B.

103. I think the fact that, in principle, insurance is available for all forms of liability for disseminating harmful speech argues rather strongly against the proposition that the First Amendment restricts intermediary liability, at least if the First Amendment does not constrain government regulation of choice among business models. For a discussion of that proposition, see *infra* Part IV.B.

104. For presentations of versions of this argument, see Kreimer, *supra* note 61, at 95-100, and Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2011).

105. Kreimer argues that intermediaries' financial losses are unlikely to be large enough to eliminate (or perhaps even reduce substantially) overcensorship, in part because users are unlikely to read or understand disclosures contained in terms of service. Kreimer, *supra* note 61, at 33-40. In addition, market structure might matter: intermediaries who have something close to a monopoly need not fear loss of business. But monopoly-like power is a traditional basis that justifies regulation, even in the context of the distribution of ideas and information.

The argument so far is that intermediary liability, when properly constructed, is compatible with standard First Amendment doctrine with some tweaks. Subject only to those tweaks, originators of statements and those who transmit them can equally be held liable under the applicable substantive First Amendment standards.¹⁰⁶ And, I doubt that Internet exceptionalism for intermediary liability would be defensible because of the anonymity associated with the Internet.¹⁰⁷ Internet exceptionalism here would mean this: the First Amendment would protect a statement's originator but not the intermediary who transmitted it. I find such a rule difficult to understand or justify.

IV. SOME ADDITIONAL QUALIFICATIONS

The preceding examination of the doctrinal terrain mapped out by claims for and against Internet exceptionalism has revealed that both the competing theses—exceptionalism and standard doctrine with tweaks—are defensible only when the claims are qualified in connection with specific sub-doctrines. This Part deals with some qualifications that are somewhat more pervasive: a question about the structure of constitutional doctrine, a question about the First Amendment's applicability to business models, and a question about state action that lurks in the discussion of intermediary liability.

A. Doctrinal Structure

Part I argued that the idea of Internet exceptionalism makes sense only with a categorical doctrinal structure because a balanc-

That bandwidth was limited, for example, was the rationale for finding regulation of broadcasting constitutionally permissible. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (referring to "the scarcity of radio frequencies").

106. At this point, I think it appropriate to note once again that I am here considering whether judges would be justified in using the First Amendment to constrain legislative choices to impose liability, not whether such choices would be good ones. For example, in some settings, good policy might impose a regime of notice-and-takedown, though I doubt that such a policy would be adequate in the case of true threats.

107. I insert the "because of anonymity" qualification because the argument about the broader scope of transmissions over the Internet, discussed above in Part II.B., might support intermediary liability when the originator might be protected by the First Amendment—for example, in cases where the originator did not intentionally use the Internet to broaden the audience for his or her message.

ing structure can take account of everything that is said to make the Internet distinctive. There is, however, one complication: the possibility of categorical balancing. Categorical balancing has this structure: one identifies some relevant domain of speech—commercial speech, sexually explicit material, political speech—and initially conducts a balancing inquiry over all cases within that category.¹⁰⁸ One then examines the outcomes of that balancing and comes up with a categorical rule applicable to all cases within the domain, or with a set of rules and subrules that covers the domain.

As I observed in an analogous context in Part II, the critical step in categorical balancing is identifying the domain within which one is to do the balancing. Scholarship on Internet exceptionalism or new technologies of speech more generally offers two candidates for the relevant domain. For the moment, I will call the first one a traditional domain definition. We identify the domains by the characteristics of the regulations. We ask: Does the regulation deal with a specific subject matter for regulation, such as political speech, commercial speech, and the like? Then, within each subject-matter domain, does the regulation deal with the content of the speech, or the viewpoint it expresses? Alternatively, is the regulation neutral as to the speech's content or viewpoint?

I call this the “traditional” domain definition because we already know the outcome of the balancing within each category. It is what I have called standard First Amendment doctrine, with its requirements, with respect to some domains, of narrow tailoring, compelling governmental interest, and the like.

The second candidate for domain-definition is, as Justice Jackson might be taken to have suggested, based on the medium.¹⁰⁹ We examine proposed regulations dealing with the press, with broadcasting, and now the Internet, do the required balancing and come up with appropriate rules. Perhaps those rules will map quite precisely onto standard First Amendment doctrine, but there is no reason a priori to think that they will—that is, no reason to think from the outset that medium-based rules will use criteria like content-neu-

108. “Initially” here can refer to a temporal sequence, as in the first, “experimentation” strategy for dealing with innovative speech technologies, or a purely analytic process in which one does the balancing in one’s head.

109. See *Kovacs v. Cooper*, 336 U.S. 77, 98 (1949) (Jackson, J., concurring).

trality and the like.¹¹⁰ Perhaps, for example, the distinction between content-based and content-neutral rules makes sense regarding dissemination of information and ideas through print, but makes less sense with respect to such dissemination via broadcasting or the Internet. One cannot know without going through the process of categorical balancing.

As I suggested in Part II, there is generally no policy-independent way of choosing the domains within which we conduct categorical balancing. It remains true that there is no need for Internet exceptionalism in a regime of pure balancing, but it might emerge from the process of categorical balancing.¹¹¹

B. Business Models and the First Amendment

Professor Rebecca Tushnet has observed that in *Sullivan*, the Supreme Court invoked the First Amendment to limit an intermediary's liability for actions taken consistent with its business model. As she pointed out, "What the actual malice standard protected was ... [the newspaper's] business model—accepting the speech of others with only limited fact-checking."¹¹² One might interpret the decision as constructing First Amendment doctrine with an eye to the newspaper's business model: given the fact that their business model is one in which they can do only limited fact checking,¹¹³ what should First Amendment doctrine be? An alternative, and I think better, reading is that the existence of limited fact checking showed that New York Times Co. did not act with reckless disregard for the truth. On that reading, *Sullivan* does not stand in the way of business-model regulations adopted for reasons other than the

110. Chen concludes that differences among media are not large enough for us to expect that categorical balancing done with media as the relevant domains will yield rules differentiated by medium. Chen, *supra* note 14. I take no position on that question.

111. To the extent that categorical balancing is a process that extends over time, it might well be the way in which we pursue the first "experimentalist" strategy for dealing with innovative speech technologies, but I do not think that there is an analytic connection between categorical balancing and the experimentalist strategy.

112. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1005 (2008).

113. Here "can do" means that the cost of more extensive fact checking would make the business unprofitable in its current form.

suppression of the dissemination of information, either generally or through specific business models.

As is widely understood, the adoption of one section of the Communications Decency Act—now 47 U.S.C. § 230—makes it unnecessary to consider (today) whether a legislature could impose intermediary liability for distributing harmful material originated by others.¹¹⁴ Suppose, though, that § 230 were replaced by a regime requiring that intermediaries do something to limit the distribution of harmful material—that they adopt a different business model. The question is whether such business-model regulation would be constitutionally permissible, even though the regime might be described as one in which the regulation was adopted for the purpose of restricting the dissemination of harmful information.

In initially discussing intermediary liability, I assumed that the First Amendment placed few constraints on a legislature's power to prescribe or ban business models, even if the business is the dissemination of information and ideas. Clearly, however, the First Amendment must place *some* constraints on that power. For example, it would be unconstitutional for a legislature to require that newspapers be “printed” by scribes using quill pens. It is less obvious that a legislature could not require that newspapers be printed on newsprint manufactured in the United States.¹¹⁵ And that would be true even in the face of a newspaper's claim that its business model requires that it use non-U.S. manufactured paper—even if, that is, complying with the requirement would drive the newspaper out of business.¹¹⁶

114. See Tushnet, *supra* note 112, at 1008 n.95 (“Before the CDA, the assumption in the law reviews tended to be that the *Sullivan* standard was the best to be hoped for as a constitutional matter.”). Rebecca Tushnet also observes that it was “not much argued” that there was “a constitutional right to operate a search engine free of liability for the indexed content.” *Id.* at 1008.

115. At the state level, preemption questions aside.

116. *But cf.* *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (holding unconstitutional a state statute that imposed a sales tax on newspapers with large circulations). I believe that *Grosjean* is best understood as holding that a statute, general on its face, that is adopted for the purpose of suppressing an information-providing business (or, even more narrowly, that is targeted at such business because of the content of what they distribute) is unconstitutional: a legislature cannot escape the limits the First Amendment places on content-based or viewpoint-based regulation by “gerrymandering” a statute so that it affects only the disfavored content or viewpoint.

What is the difference between the two requirements?¹¹⁷ Probably that the only imaginable reason for adopting the first statute is to limit the distribution of information by newspapers, whereas the second statute has or could have other purposes. Now consider a regulation whose purpose is to require that a business internalize the harms it inflicts on others. One example is ordinary tort liability for damages caused by negligent operation of the trucks used to distribute the business's products. I think it clear that a newspaper could not claim First Amendment protection against that regulation when its delivery trucks cause harmful accidents, and that would be true even if the newspaper claimed that its business model required that its trucks regularly operate at dangerous speeds.¹¹⁸ Intermediary liability of the sort I have discussed has the same analytic structure: it imposes liability on a business for the harm the business helps cause.¹¹⁹ In the absence of reasons to think that a legislature required businesses engaged in speech activities to internalize harms they cause for the very purpose of driving them out of business, I find it difficult to see a valid First Amendment objection to a cost-internalization statute. I acknowledge, however,

117. For a discussion of the application of the First Amendment to methods of producing speech, see Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029 (2015).

118. *Cf. Pizza Chain Loses Lawsuit over Wreck*, KY. NEW ERA, Dec. 18, 1993, at 1D, available at <http://perma.cc/Y45L-LFDM>. The news story deals with pizza deliveries, but I seriously doubt that the result would differ were the business involved a newspaper.

119. I note two qualifications. First, that the intermediary is only one of the causes of harm—the other being the originator—which seems to me irrelevant for purposes of assessing legislative power. At least in modern times, legislatures have the power to impose liability on “but for” causers of harm, not only on proximate causers. *Cf. N.Y. Cent. Co. v. White*, 243 U.S. 188 (1917) (upholding the constitutionality of a workers’ compensation statute that imposed liability without fault on employers); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989) (imposing “market share” liability on a defendant who could show that the plaintiff had not used the defendant’s product). Second, equally irrelevant would be the fact, were it to be true, that the legislature imposed “but for” liability only on Internet intermediaries. A legislature is entitled to address problems as they arise, and need not make what Justice Stevens called an “all or nothing-at-all” choice. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 769 (1995) (Stevens, J., concurring). *But compare* *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding as constitutional a general sales tax, which cable providers had to pay, but from which newspapers and magazines were exempted), *and* *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (finding it constitutional for a legislature to proceed one step at a time in the context of nonspeech businesses), *with* *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983) (holding unconstitutional a state sales and use tax imposed on ink and paper used in producing newspapers and magazines, when small publishers were exempt from the tax).

that the state of the law and of scholarly discussions of the issue limits my confidence in that conclusion.

Some of the cases hint at an additional concern, that business-model regulation would be a disguised method of content-based regulation.¹²⁰ As always in such situations, the courts have a choice between two strategies, parallel here to Internet exceptionalism and standard doctrine with tweaks. They can ask in each specific case whether there is substantial reason to think that a statute not framed in content-based terms was adopted for the purpose of regulating content and whether that purpose is reasonably likely to actualize in practice, that is, that content regulation will in fact occur. Or, they can adopt a prophylactic rule banning the use of some regulatory approaches. Such a rule would single out some characteristics of the regulatory approach to identify a class of regulations in which the risk of disguised content-control measures is high enough. At this point, and partly because of the effect of § 230 in blocking the development of Internet regulations, I think it difficult to say more—for example, to identify the characteristics that would be built into a prophylactic rule.

C. The Lurking Problem of State Action

So far this Article has considered the possibility of Internet exceptionalism in connection with regulatory rules that might impose liability on those who disseminate information over the Internet when the First Amendment precludes the imposition of liability for disseminating the same information through traditional media. It has paid some attention to the concern for “censorship by proxy.”¹²¹ Censorship by proxy occurs when regulatory rules that operate appropriately when applied to originators and traditional media, by creating an acceptable mix of information dissemination and resulting harm, have a greater chilling effect when applied to Internet intermediaries.¹²² My expository strategy has been to try to present some ideas in the simplest legal context—when the government acts

120. See Chen, *supra* note 14, at 1360, 1450-51 (“[C]ourts should remain wary of disguised efforts to control content.”).

121. Kreimer, *supra* note 61, at 17.

122. See *id.* at 65 (discussing how internet intermediaries’ typical prophylactic response to regulation may lead to users self-censoring protected speech).

as regulator of speech itself rather than as the regulator of the media transmitting speech.¹²³

There is, though, another area in which Internet exceptionalism (or standard doctrine with tweaks) has featured prominently. The discussion so far has not dealt with information and ideas that the intermediary *wants* to transmit, but those which the government seeks to suppress because of the harms they cause. Or, more precisely, the discussion so far has dealt with intermediaries whose business model rests on transmitting everything that originators want distributed.

But, of course, intermediaries might have a whole range of different business models. One business model might filter out messages of which the business owners disapprove, without regard to whether the government does— for example, sexually explicit but nonobscene images. Another business owner might inspect incoming messages and refuse to transmit those expressing “extreme” political views, as defined by the intermediary in its terms of service. Those and others might be viable business models. Can the government direct that intermediaries adopt a particular business model? Specifically, can the government require that intermediaries transmit everything they receive, preserving the government’s power to punish the originators of speech whose regulation is consistent with the First Amendment?¹²⁴

Here too I aim only to identify the lines of argument available about Internet exceptionalism and standard doctrine with tweaks. In general, the arguments fall into two closely related categories. First, some argue that the government has the power to treat intermediaries as common carriers. At common law, a common carrier, is an entity that is required to adopt an “all-comers” policy that does not discriminate (“unjustly,” in the usual formulation) among those

123. Particularly by focusing on legislative and judicial assumptions regarding the nature and unique aspects of the Internet, such as the exponential accessibility of broad audiences, Kreimer, *supra* note 61, at 13, and lower transaction costs in communicating, Balkin, *supra* note 75, at 13.

124. Section 230(c) immunizes intermediaries whose business model is an “all comers” model from liability for disseminating information and ideas where the originator can be punished without violating the First Amendment, but it does not require any intermediary to adopt such a business model. 47 U.S.C. § 230(c) (2012).

who seek to use its service.¹²⁵ Railroads and hotels are classic common carriers.

Putting the common-carrier obligation in another way leads us to the second type of argument. The property rights that common carriers have are more limited than the property rights of other businesses, who are entitled (absent otherwise permissible statutory regulations) to refuse to serve whomever they choose. The state action doctrine is at its base about the limits the Constitution, rather than statutes, places on property rights. Consider the classic case of *Shelley v. Kraemer*, which found that judicial enforcement of a property right created by a racially restrictive covenant violated the Equal Protection Clause even though judicial enforceability is a defining characteristic of property rights.¹²⁶

Standard doctrine holds that the government cannot require that the print media act as common carriers.¹²⁷ Unreversed precedent, highly controversial and probably unlikely to be followed by the Supreme Court were the issue to be presented to it today, allows the government to treat the broadcast media differently.¹²⁸ The *Turner Broadcasting* decisions adopted intermediate scrutiny to assess whether certain government “must-carry” requirements for cable television were constitutionally permissible, and ultimately upheld the ones at issue.¹²⁹ The “must-carry” requirements treat cable systems as limited common carriers. Notably, the four dissenters in the first *Turner Broadcasting* case acknowledged, though I suspect without fully thinking the question through, that “if Congress may

125. See *N.J. Steam Navigation Co. v. Merchs.’ Bank*, 47 U.S. (6 How.) 344, 382-83 (1848) (finding that a common carrier is in effect a sort of public office and is obligated to carry and transport all goods offered to it).

126. 334 U.S. 1 (1948). The case is controversial, but, as I have argued in detail elsewhere, the controversy is ultimately not about whether there was state action but whether the standards usually relied upon in finding equal protection violations were satisfied. Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

127. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a state statute requiring that newspapers publish replies to editorials that “assail” a political candidate’s character).

128. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (holding that an FCC policy requiring that broadcasters make time available for replies to personal attacks did not violate the First Amendment).

129. *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (rejecting the constitutional challenge to the “must-carry” requirements); *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) (holding that the appropriate standard was intermediate scrutiny).

demand that telephone companies operate as common carriers, it can ask the same of cable companies.”¹³⁰

If Congress can demand that cable companies operate as common carriers, can it ask the same of Internet intermediaries?¹³¹ We might get some guidance from thinking about why legislatures cannot impose common-carrier obligations on newspapers but can do so on cable operators. The most obvious reason is that newspapers adopt what I call “high editorial intervention” business models—the business model is one in which the publisher supervises editorial content quite closely—whereas cable operators use a “moderate-to-low editorial intervention” business model. According to the Supreme Court in *Turner Broadcasting*, the must-carry requirements implicated the First Amendment because cable operators had a business model in which they exercised some editorial discretion in choosing which channels to include in their packages, but not a lot of discretion.¹³² Whether Congress could impose common-carrier obligations on Internet intermediaries might then depend on the precise business model each intermediary adopted: the First Amendment would bar imposing those obligations on intermediaries that exercised high levels of editorial intervention, by extensive screening for example, and would permit doing so on intermediaries that exercised significantly lower levels.¹³³

Finally, if we pursue the pure state action route, we will almost certainly end up with Internet exceptionalism. The difference between common carrier regulation and regulation pursuant to the

130. 512 U.S. at 684 (O'Connor, J., dissenting).

131. I believe that there is no threshold question under modern law of whether a business has some traditional characteristics associated with common carriers as identified at common law—those characteristics included that the business provide a socially important service and that competition in some geographic areas was likely to be limited, though not that the businesses have a monopoly in the area. Under modern law, legislatures are free to impose service obligations on any business subject only to the First Amendment and perhaps some other discrete constitutional limitations on legislative power. The foundational case on this is *Nebbia v. New York*, 291 U.S. 502, 552 (1934) (holding that the Constitution permitted the New York legislature to treat an ordinary business, there supplying milk, as a business “affected with a public interest,” without regard to traditional definitions of the latter phrase).

132. *Turner Broad. Sys.*, 512 U.S. at 643-44 (noting that “the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations”).

133. I think the implication of *Turner Broadcasting* is probably that the relevant distinction is between high and low levels of editorial intervention, not between business models with high levels and those with no editorial intervention at all.

state action doctrine is that the former is legislatively optional—Congress can choose to treat intermediaries as common carriers—whereas the latter is constitutionally required. Under a state action approach, the First Amendment not only does not bar legislatures from regulating intermediaries as common carriers, it affirmatively requires that courts develop common-carrier-type regulations.¹³⁴ A state-action analysis would ask, “Is the rule of property that allows people to adopt the business model at issue consistent with the First Amendment?” Under standard First Amendment doctrine, the answer might well be, “Yes.” The property rule is the content-neutral rule that private owners of resources have the right to choose any business model that does not involve systematic violations of other provisions of law. The tests used to determine whether a content-neutral rule is consistent with the First Amendment are usually quite tolerant of such approaches, to the point when one might fairly characterize the doctrine as finding constitutionally permissible any rule that is a rational method of allocating property rights.¹³⁵ Invoking the state action doctrine to impose common-carrier obligations on intermediaries would be a dramatic departure from standard First Amendment doctrine understood in this way.

But, as always, there is an alternative interpretation available. The first move would be to focus not on “private property” generally, but on the property law rules applicable to media enterprises or even more narrowly to Internet intermediaries.¹³⁶ With the property rule narrowed, we would look to standard doctrine. And, at least as a matter of formally stated doctrine, content-neutral regulations can be unconstitutional if they have a troublingly large disparate impact on those who have few private resources of their own to disseminate

134. Note that the state action route changes regulation from being optional to being required, and it also (subject to some wrinkles not worth exploring in this Article) changes the institution doing the regulating from the legislature to the courts.

135. See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (holding that government restrictions on commercial speech need not be by the least restrictive means, but only be a reasonable “fit” between the government’s ends and means); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding the constitutionality of a municipal regulation designed to protect residents from excess noise by requiring performances in public band shell use city provided sound system and technician).

136. This is another version of the question of identifying the relevant reference class, see *supra* note 35 and accompanying text, and as before there is no policy-independent way of identifying that class.

their message.¹³⁷ A rule of property law that allows intermediaries to choose whatever business model they like *might* have that kind of disparate impact.¹³⁸ If so, we would once again have a rule for the Internet that was standard doctrine with tweaks.

CONCLUSION

The foregoing set of arguments about the Internet's distinctive nature, values, and dangers supports only a rather weak conclusion. I doubt that we can say either that the Internet's nature, values, and dangers justify Internet exceptionalism or that they justify only the application of standard First Amendment doctrine with appropriate tweaks. My predisposition is to say that in such a situation, judicial deference to legislative choices would require deference to a legislatively chosen regime of Internet exceptionalism. On reflection, though, I think that saying so would be mistaken because the "judicial deference" concern is built into the analysis of specific regulations and cannot be generalized across regulations.¹³⁹ The lesson, I think, is that the question, "Internet exceptionalism or standard doctrine with tweaks?" may be badly posed. The real question is, "Internet exceptionalism or standard doctrine with tweaks in connection with this specific regulation of this specific problem?"

137. The basic cases, which remain good law, are *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939), and *Schneider v. Town of Irvington*, 308 U.S. 147 (1939).

138. Note that the analysis is on the level of the general property rule authorizing choice of business model, not on the level of asking whether a particular business model has a troublingly large disparate impact.

139. For example, compare *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002), which illustrated the absence of judicial deference by holding unconstitutional the application of bans on child pornography to "virtual" child pornography, with *United States v. Williams*, 553 U.S. 285 (2008), which illustrated judicial deference by upholding the constitutionality of a prohibition on "pandering" child pornography when the defendant did not actually possess child pornography.