COMMENT

The First Amendment Case Against FCC IP Telephony Regulation

Tuan N. Samahon*

* B.A., Brigham Young University, 1996; candidate for J.D., Georgetown University Law Center (GULC), 2000. Special thanks to GULC Adjunct Professor Daniel Brenner, Vice President for Law and Regulatory Policy, National Cable Television Association, for his insights and feedback; and to my wife, Lindsey, without whose support this Comment would not have been possible.

I. INTRODUCTION

At the present rate of digital innovation, the communications industry promises to be a fruitful one for technocratically adept communications lawyers, not only because digital innovation is so rapid, but because Federal Communications Commission (FCC or Commission) rule making continues to outpace new communications technologies. Notable in this category is a nascent communications technology, Internet Protocol (IP) telephony. In response to concerns about this technology's effect on universal access, the FCC has already crafted two new regulatory regimes.[1]

Yet, in the race to regulate, the FCC may have overlooked the First Amendment. Although new digital "technologies of freedom"[2] allow unprecedented freedom of expression (and at democratic rates), Congress, the courts, and the FCC appear unwilling to acknowledge a First Amendment limit to digital speech regulation.

This Comment argues that IP telephony, like handbills and traditional print media, deserves First Amendment protection against FCC regulatory authority. In Part II, this Comment briefly reviews the IP telephony phenomenon within the larger context of "digital convergence," or the interchangeability of new media, noting both the technological innovations and regulatory advantages IP telephony offers. Part III examines the FCC and Supreme Court's technologically driven First Amendment jurisprudence. In particular, this Comment notes the First Amendment's conspicuous absence from the IP telephony dialogue, and, correspondingly, the prominence of as-

1. *See* Federal-State Joint Bd. on Universal Serv., *Report to Congress*, 13 F.C.C.R. 11,501, 11 Comm. Reg. (P & F) 1312 (1998) [hereinafter *Universal Serv. Report to Congress*].

2. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983). Pool characterizes new electronic modes of communication as twentieth century successors to the printing press, pamphlets, and other traditionally highly protected media. *Id*. at 23.

surances of regulatory forbearance in Congress, the courts, and the FCC. In response to this apparent constitutional lacuna, Part IV offers First Amendment content-based and content-neutral arguments against the proposed telephony regulations. This Comment argues that, at the very least, the affordability and innovation IP telephony offers should constitute nontrivial factors in a court's content-neutral balancing. Finally, Part V proposes divorcing universal access funding from long-distance service. Such a policy alternative would avoid burdening the First Amendment values IP telephony serves as well as sidestep the category difficulties digital convergence creates.

II. DIGITAL CONVERGENCE AND THE IP TELEPHONY REVOLUTION

A. From Data over Voice Lines to Voice over Data Lines

Professor Ithiel de Sola Pool termed the "blurring [of] the lines between media" where a "single physical means . . . may carry services that in the past were provided in separate ways" as the "convergence of the modes."[3] Whereas in the past one means existed to communicate in a particular way, such as telephones for one-to-one voice communication, now multiple technologies exist to carry on personal instantaneous voice communications.[4] Once speakers sent data transmissions over telephone lines built for voice; now the end-user can send voice, along with video, text, or any other message, over lines built for data.[5] Digitalization, or the use of ones and zeroes to represent real world data, has eroded the traditional mapping of one function to one technology by making information transmission interchangeable.[6] Such is the case with IP telephony.

B. IP Telephony Industry Growth

Internet protocol telephony, as its name suggests, originated with software that allowed phone voice transmissions across the public Internet. This early phone client software required that each speaker be connected to the Internet from adequately equipped personal computers in order to make and receive calls. Even if the concerted effort to communicate succeeded, voice

3. *Id*.

4. *See id*.

5. *See* Jeff Pulver, *Pulver Points on the Internet Telephony Industry* (visited Feb. 15, 1999) <http://www.pulver.com/points/index.html>.

6. *See* Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 983 (1997).

quality was typically poor. More advanced offerings improved voice quality and added additional modes of communication, including real-time text or chat.[7] Internet protocol telephony users could not only speak together, but also review the same manuscript together, even at a distance. Still, expensive computer hardware limited widespread Internet phone use.

Since these early internet phones, IP telephony has gone mainstream and no longer remains the sole domain of "miserly geeks."[8] Whereas Internet phone client software once required a simultaneous Internet connection on two or more personal computers, IP telephony eliminates the need to dial from a computer. Instead, a caller dials a "gateway" or computer hardware that connects a speaker's phone-initiated call to an IP network; the caller then dials the desired phone number and the gateway completes the call to a standard phone handset.[9] In order to improve voice fidelity, some IP telephony firms have begun to create private IP networks, allowing better sound quality by transmitting uncompressed voice data.[10] These IP networks route part of the call over the busy public Internet, though calls largely travel on the less crowded private IP data networks.[11]

Internet protocol telephony offers an alternative to traditional analog telephony. Old phone networks require a connection to be constantly established and opened to continue voice communication. Dedicated circuit-switched technology transmits not only discussion content, but also silence.[12] As a result, switched technology inefficiently ties up phone resources. Most phone services do not convert analog voice data into different formats during phone calls; instead, the phone lines carry the analog voice patterns through the switched phone connection uniquely dedicated to the call at hand. Only when the parties terminate their phone call is the circuit-switched network freed. In contrast, the various incarnations of Internet telephony convert analog voice into digital data, compress the data, and split the data into "packets" that are "routed" across different IP network paths and reassem-

7. *See* KEVIN WERBACH, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY 38 (FCC, Office of Plans and Policy Working Paper Series No. 29, 1997). For example, Netscape Conference offers users real-time text in addition to voice.

8. *Internet Telephony: Growing Up*, ECONOMIST, May 2, 1998, at 56.

9. *See Universal Serv. Report to Congress*, *supra* note 1, para. 84 ("Gateways are computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated signaling, control, and address translation functions."). IDT Corporation and Qwest both offer gateway IP telephony. *See* Randolph Court, *Shootout on the Phone Frontier*, WIRED NEWS (visited Feb. 15, 1999) <http://www.wired.com/news/news/business/story/11295.html>.

10. *See Spinning Gold from Glass*, ECONOMIST, Mar. 14, 1998, at 70.

11. *See Internet Telephony: Growing Up*, *supra* note 8, at 56-57.

12. *See* POOL, *supra* note 2, at 203-04.

bled and decompressed as voice output at some distant destination.[13] Digital technology's indifference to analog input allows print, audio, video, and any other sort of data to be transported via the Internet protocol. World Wide Web pages are similarly transmitted as packetized data. Since IP networks divide data into individual packets and send them through the most efficient routes, IP networks allow for more information transmission than traditional circuit-switched networks.[14]

As a result of its low price and its new ease of use, analysts predict IP telephony will boom.[15] Whereas less than a half percent of long-distance telephone calls are presently placed over the Internet, by 2003, the IP telephony market share will have grown to some 10 to 15 percent of domestic long-distance calls.[16]

C. IP Telephony's Regulatory Advantage

Presently, the FCC heavily regulates long-distance phone calls, requiring long-distance companies to pay a local exchange carrier (LEC) for connecting and completing their calls. In turn, the long-distance phone companies pass these "universal service" fees to phone callers as higher costs. Traditional long-distance companies, like AT&T and MCI, pay local phone companies approximately $.05 to $.06 per minute per call for using their local networks to begin and end long-distance calls.[17] Since some competitive long-distance evening rates approach $.10 per minute, $.05 to $.06 per minute in universal service fees represents approximately half of a caller's costs to communicate, excluding federal excise taxes. In short, universal service charges cut in half a phone caller's ability to communicate long-distance by doubling the cost to do so.

13. *Internet Telephony: Growing Up*, *supra* note 8, at 57.

14. *See Universal Serv. Report to Congress*, *supra* note 1, para. 64.

15. *See* Stephanie N. Mehta, *ICG Joins Telephony Price Wars, Plans 5.9 Cents a Minute for Long Distance*, WALL ST. J., Mar. 11, 1998, at B8.

16. *See Internet Telephony: Growing Up*, *supra* note 8, at 57 (noting that IP telephony calls presently account for 0.4% of the long-distance market and estimating that, by 2003, IP will account for 25% of international calls worldwide, and that, by 2005, IP will account for 15% of consumer domestic long-distance); *FCC Considers Fees for Net Calls*, USA TODAY (visited Feb. 15, 1999) <http://www.usatoday.com/life/cyber/tech/ctc428.htm> (estimating that less than 0.5% of telephone calls are placed over the Internet, but that by 2003, such calls could account for 10-15% of the long-distance domestic market).

17. *See* WERBACH, *supra* note 7, at 37 fig.6 (noting that universal service fees add about $.06 per minute to long-distance charges); Mike Mills, *FCC Rule Could Hike Internet Call Costs; Providers Would Face Telephone Firms' Fees*, WASH. POST, Apr. 3, 1998, at D1 (approximating fees as $.05 per minute); *FCC Considers Fees for Net Calls*, *supra* note 16 (estimating fees as roughly $.055 per minute).

In contrast, the Telecommunications Act of 1996 (Act) definition of "information services"[18] allows IP telephony to escape universal service charges by not billing information services and their data transmissions universal service charges.[19] Under traditional categories perpetuated by the Act, telecommunications law conceived of voice telephony as the realm of point-to-point "telecommunications" and data transmission as the realm of "information services"; but now digitalization permits voice to be both telecommunications and digital data. Herein is IP telephony's biggest cost advantage: Since IP telephony transmits voice as digital data like "information services" rather than analog "telecommunications,"[20] users escape the costly long-distance access fees that feed universal service.[21] Consequently, part of IP telephony's attraction is its price.[22] As a result, the FCC and several rural senators have cried foul and sought to remedy the access charge-free phone calling by closing the "loopholes" and making long-distance phone callers meet their "obligations" to universal service[23] by classifying IP telephony as "telecommunications"; those that operate IP telephony firms as "telecommunications carriers"[24] regulated as common carriers; and their offerings as assessable "telecommunications services."[25]

18. *See* 47 U.S.C. § 153(20) (Supp. II 1996).

> "Information service" is defined as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.

Id.

19. *See Universal Serv. Report to Congress*, *supra* note 1, para. 83.

20. *See* 47 U.S.C. § 153(43) (Supp. II 1996) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received").

21. *See* WERBACH, *supra* note 7, at 37-38 fig.6; Douglas Lavin, *Phone-Industry Revolution Is Foreseen as Internet Poses Pricing Challenges*, WALL ST. J., Feb. 2, 1998, at B11.

22. *See* Mehta, *supra* note 15, at B8.

23. *Universal Serv. Report to Congress*, *supra* note 1, para. 4. *But see* Gregory v. Helvering, 293 U.S. 465, 469 (1935) ("The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.").

24. *See* 47 U.S.C. § 153(44) (Supp. II 1996) (A "telecommunications carrier" is "any provider of telecommunications services . . . . A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.").

25. *See id.* § 153(46) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").

III. FIRST AMENDMENT REGULATORY DIVERGENCE AND IP TELEPHONY

A. Regulatory Divergence: Different Media, Different Rules

Although "convergence of the modes" unites media through digitalization, past Supreme Court jurisprudence has fractured the First Amendment along traditional media lines. In *Kovacs v. Cooper*, the Court reasoned that each media was "a law unto itself."[26] Similarly, in *Red Lion Broadcasting Co. v. FCC*, although the Court did recognize the broadcast media's First Amendment interest, the Court created a different rule for that medium.[27] In fact, the Court has defined separate legal regimes governing print publications, telephony, broadcast, and cable television each with differing degrees of media protection because of their differing characters.[28] Rather than create a First Amendment standard covering all expression, the Court has created medium-based rules.[29]

However, more important than an aesthetic complaint about the Court's media driven First Amendment doctrine is a substantive concern about freedom of speech. Substantively, one's rights differ depending on the medium of expression and its corresponding First Amendment status. While the government may not place special tariffs on printed speech, since World War I, phone speech has been subjected to special federal excise taxes.[30] As digitalization continues to create new hybrid media, which First Amendment standard applies will become a nontrivial constitutional question. Does a hybrid IP telephony client, that supports print publishing features like chat in addition to voice, deserve common carriage regulation or the most guarded status of printed publications?

An answer to the question may lie in the recognition of the new medium's function, broadly conceived, over its mechanism.[31] While IP teleph-

26. *Kovacs*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). In *Kovacs*, a street speaker used an amplifier to communicate his message. The Court held the ordinance banning amplifying devices on the street was consistent with the First Amendment. *Id*. at 87.

27. *See Red Lion Brdcst. Co.*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."). The Court found the "fairness doctrine," or a speaker's "right to reply" on broadcast airtime, not only consistent with the First Amendment but also required by it. *Id*. at 375.

28. *See* POOL, *supra* note 2, at 233. Since Pool completed *Technologies of Freedom*, the Court has created additional rules applicable only to the cable television medium. *See generally* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

29. *See* Price & Duffy, *supra* note 6, at 977.

30. *See* POOL, *supra* note 2, at 233.

31. *See id*. at 246. A telephone's function, narrowly conceived, is placing phone calls.

ony is a digital mechanism, the underlying function is communication. Adding chat to IP clients would further illustrate the communicative function by actually including the traditionally highly protected print media. It "would confuse the mechanism with the function to subject data networks and storage devices to legal precedents from the previous electronic media rather than to the law of print . . . ."[32] The First Amendment concern is that digital convergence will diminish protection for functional equivalents of otherwise protected speech.

Conversely, the advent of digital convergence might provide courts with the opportunity to revisit the possibly unintentional effect of diminishing First Amendment protection for those using new technologies. At the FCC, Commissioner Michael Powell recognizes the "need to reconcile conflicting regulatory approaches,"[33] as do Professors Powe and Krattenmaker who hope digital convergence will permit the courts "to discard the inherently silly notion that freedom of speech depends on the configuration of the speaker's voicebox or mouthpiece."[34]

B. Common Carriage and the Universal Service Fund

Common carriage illustrates the Supreme Court's First Amendment jurisprudence that different rules apply to different media. In contrast to print media's highly unregulated status, under the common carriage regulatory scheme, the government may regulate the ownership and the cost of access to phone service.[35] Traditionally, this control has been limited to regulating the conduit, or the actual physical network, not the content. Since local phone service creates "natural" monopolies,[36] telephone companies (telcos) are subject to government pricing restrictions and receive government subsidy. In turn, the government reserves for itself substantial regulatory control

Broadly conceived, the telephone's function (IP or otherwise) is communication. The level of generality a court assumes could affect the outcome of controversies before it.

32. *Id*. at 199.

33. *Opening Statement of FCC Commissioner Michael K. Powell Before the Subcomm. on Commun. Subcomm. of the Senate Comm. on Commerce, Science, and Transp. Comm.*, 105th Cong. (June 10, 1998) (statement of Comm'r Powell), *available in* 1998 WL 12761904 [hereinafter *Reauthorization Hearings*].

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

35. *See* 47 U.S.C. § 203(c) (1994) (providing that a communications provider may not be a carrier unless it first publishes tariffs approved by the FCC); 47 U.S.C. § 214(e)(2) (Supp. II 1996) (requiring a certificate of "public . . . convenience and necessity").

36. *See* POOL, *supra* note 2, at 241 (noting that most so-called monopolies are not natural but result from limited government grants of rights-of-way and other franchises and licenses that impede newcomer market entry).

and disallows telephone companies from regulating speech transmitted over phone lines.[37]

The universal service access fund serves the legitimate government interest of supporting telephone infrastructure interconnectivity by making access affordable throughout the country. Universal service subsidizes local phone service for low-income consumers and, more politically and financially significant, subsidizes local phone companies in remote and sparsely populated areas.[38] Since telcos must attempt to recoup their infrastructure costs with high phone subscription, without universal service subsidies, it would be unprofitable for phone companies to operate in rural areas unless they charged their few customers prohibitively high rates. Phone service would then likely cease in some areas of the country as telcos moved to more fertile, high-volume areas. Therefore, to the extent that rural service depends on subsidy, IP telephony could eventually undermine the present universal service funding mechanism.[39]

In a preemptive strike against such an eventuality, the American Carriers' Telecommunications Association (ACTA) petitioned the FCC asking it to mandate that IP telephony companies and software manufacturers be regulated as common carriers subject to universal service requirements.[40] Specifically, ACTA sought to make these newcomers comply with common carriage requirements; namely, abiding by FCC rate regulation,[41] receiving certifications of necessity,[42] and paying LEC universal service access fees for use of local networks like switchless long-distance resellers do.[43] American Carriers' Telecommunications Association characterized its petition as public-spirited: It was "not in the public interest to permit long-distance service to be given away . . . ."[44]

37. *Id*. at 106.

38. *See Universal Serv. Report to Congress*, *supra* note 1, para. 6.

39. *See* WERBACH, *supra* note 7, at 38.

40. *See* Provision of Interstate and International Interexchange Telecommunications Service via the "Internet" by Non-Tariffed, Uncertified Entities, *ACTA Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking*, RM 8775, para. 3 [hereinafter *ACTA Petition*].

41. *See* 47 U.S.C. § 203(c) (1994).

42. *See id*. § 214(e).

43. *See* WERBACH, *supra* note 7, at 38.

44. *ACTA Petition*, *supra* note 40, para. 3. *But see* Provision of Interstate and International Interexchange Telecommunications Service via the "Internet" by Non-tariffed, Uncertified Entities, *CDT Comments in Opposition to ACTA Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking*, RM 8775, para. 6 (qualifying ACTA's claims that IP telephony users do not pay any connection fees by noting that Internet service providers pass access charges on to customers as higher monthly subscription rates) [hereinafter *CDT Comments on ACTA Petition*].

Cynicism about ACTA's motives aside,[45] IP telephony could potentially harm universal service in the future, and rural senators have vocally voiced their upset.[46] Presently, long-distance access charges fuel the universal fund. But as IP telephony grows in popularity and phone callers pay less and less into universal service, the fund may dwindle and become insufficient for telco universal access needs. Since IP telephony uses data packets to convey voice data, technically an information service unfettered by universal service payments, it avoids definition as a telecommunications carrier and the attached obligation to pay into universal service.[47]

C. Common Carriage of the Internet Protocol Stack

In the phone communication arena, FCC regulation controls the conduit, not how individuals use phone services.[48] Yet, ACTA urged a more intrusive regulation of IP telephony. Rather than proposing the more reasonable regulation of underlying network and transport layer protocols,[49]

45. American Carriers' Telecommunications Association's public-spirited altruism and proposed regulations are suspect as merely self-interested market protectionism. *See, e.g.*, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1767-68 (1995) ("New regulations, ostensibly defended as public-interested or as helping viewers and consumers, will often be a product of private self-interest, and not good for the public at all. It is undoubtedly true that industries will often seek government help against the marketplace, invoking public-spirited justifications for self-interested ends."). In addition to serving government universal interconnectivity goals, ACTA members turn a handsome profit. *See* WERBACH, *supra* note 7, at 38. When a new medium challenges an old medium, an archetypical struggle follows: First, the old medium tries to prohibit or bar the opponent from entry to protect market share. Second, prohibition failing, the incumbent buys heavily into the new industry. *See* POOL, *supra* note 2, at 50. This scenario plays out accurately in AT&T's stormy relationship with IP telephony. Initially, AT&T tried to restrict IP telephony entry; now, however, AT&T has invested in IP telephony as a major player with its AT&T Global Clearinghouse offerings. *See* Randolph Court, *AT&T Opens One-Stop IP Shop*, WIRED NEWS (visited Feb. 15, 1999) <http://www.wired.com/news/business/story/11407.html>.

46. *See Universal Serv. Report to Congress*, *supra* note 1, para. 85. Several rural Republican Senators, Rockefeller (R-WV), Snowe (R-ME), Stevens (R-AK), and Burns (R-MT), argued IP telephony should be classified as "telecommunications services" rather than "information services." Under the telecommunications services definition, IP telephony would be subject to common carriage regulation and consequently universal service obligations. *Id.*

47. *See id.* para. 34.

48. *See* POOL, *supra* note 2, at 248 ("[C]ontrol of the conduit may not become a means for controlling content.").

49. *See CDT Comments on ACTA Petition*, *supra* note 44, at fig.1. The Internet's layered architecture features three different levels of information system networking and use: Internet protocol (IP) forms the basis for the network layer over which subsequent "layers" depend; the transport layer and its transport control protocol (TCP) operate "on top" of the underlying network layer; finally, an application layer functions "at the top" of the protocol stack where e-mail, video conferencing, chat, and Internet telephony operate. *Id.*

ACTA sought FCC control of the application layer—where individuals decide how they use Internet-based services.[50] The Center for Democracy & Technology urged denial of ACTA's request, noting first the FCC's traditional domain as solely "the underlying network and communications media and services, not how individuals use those services," and second, the intrusiveness of regulating "computer software at the highest levels of the network protocol stack . . . ."[51]

D. FCC Rules on IP Telephony

Recently, the Commission responded to ACTA and other petitioners' requests to regulate IP telephony by announcing tentative rule making. For the purposes of regulation, the FCC will distinguish between "computer-to-computer" Internet phone client software (clients) and IP telephony gateways that permit "phone-to-phone" IP telephony (gateways).[52] Clients will remain unregulated since Internet service providers (ISPs) cannot be aware of what particular customers are doing with their Internet connections.[53] Gateways, at least on the Commission's present record, could become regulated on a case-by-case basis, owing to their apparent lack of information service characteristics and their telecommunications service flavor.[54]

1. Creating Distinct IP Regulatory Categories

The tentative rules create two different categories, one for each IP telephony: Gateway IP telephony will fall under common carriage requirements, and client IP telephony will enjoy full protection from government

50. *See id*. para. 2.

51. *Id*.

52. *See Universal Serv. Report to Congress*, *supra* note 1, paras. 87-89. Phone-to-phone IP telephony is defined as

> services in which the provider . . . holds itself out as providing voice telephony or facsimile transmission service . . . does not require the customer to use CPE [customer premises equipment] different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network . . . allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and . . . it transmits customer information without net change in form or content.

Id.

53. *See infra* text accompanying note 74.

54. *See Universal Serv. Report to Congress*, *supra* note 1, para. 89. At the time of this Comment's writing, BellSouth announced its intent to assess Internet Telephony Service Providers (ITSPs) access charges "to such [ITSP] traffic as it becomes aware of . . . within its region." BellSouth, *Internet Telephony* (visited Feb. 15, 1999) <http://www.bellsouthcorp.com/issues/telephony/position.html>. BellSouth claims it requires no additional FCC action to assess ITSPs access charges. *Id*.

regulation.[55] In trying to emphasize the limited scope of the FCC regulation, Commission Chairman William Kennard unintentionally highlighted the increasingly ad hoc character of communication regulation. "We are simply identifying a very narrow category of service—IP telephony—that shares many of the characteristics of a telecommunications service."[56] This sort of balkanization has been variously termed as "regulatory apartheid"[57] and "scholastic."[58] Dissenting from the Commission's *Report to Congress*, Commissioner Furchtgott-Roth noted the "artificial and fragile" regulatory framework and characterized the Commission's rule as relying on end-users' psychological state of mind to determine regulatory status: If a consumer believes the technology is a phone, regulate it like telecommunications; if a consumer thinks the technology is a computer, regulate it like an information service.[59]

2. Case-by-Case IP Telephony Regulation

To the extent the FCC determines that a gateway IP telephony service is a "telecommunications service," section 254(d) would govern these providers and would require that IP telephony firms contribute to the universal service fund.[60] Since the Commission's record suggests some gateway telephony lacks information service characteristics,[61] and "information service" and "telecommunications service" are taken to be mutually exclusive categories,[62] some gateway telephony could be "telecommunications service" subject to fees. Consequently, the Commission will need to examine each IP telephony service on a case-by-case basis to decide whether that offering is an information service. Instead of creating a rule for a new technology, the FCC will have no rules, only particular determinations.

E. FCC Nonregulation as Mere Forbearance

First Amendment values have rarely entered the FCC or Supreme Court's recent telecommunications regulatory calculus. The FCC's inaction, such as the decision to only regulate on a case-by-case basis, has rested on free market policy objectives rather than recognized constitutional limita-

55. *See infra* text accompanying note 74.

56. *Universal Serv. Report to Congress*, *supra* note 1 (statement of Chairman Kennard).

57. 141 CONG. REC. S7885 (daily ed. June 7, 1995) (statement of Sen. Pressler).

58. POOL, *supra* note 2, at 250.

59. *See Universal Serv. Report to Congress*, *supra* note 1 (statement of Comm'r Furchtgott-Roth).

60. *Id.* para. 92.

61. *Id*. para. 55.

62. *Id*. para. 13.

tions to its authority. In the Commission's view, no freedom of speech issue is implicated in IP telephony regulation, only an FCC judgment that a "hands-off" approach serves pro-competitive values. "[T]he only thing that leads the FCC to refrain from control is its benevolent judgment."[63] Recent case law, proposed legislation, and Commission statements illustrate this concept of *government qua benevolent despot* refraining from flexing its might.

1. Case Law and the "Wait-and-See" Approach

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court adopted what has been termed the "jurisprudence of the particular," or a highly contextual approach to the First Amendment.[64] This all-things-considered balancing allows a reviewing judge considerable discretion in choosing the appropriate standard for First Amendment protection analysis.[65] Justice Breyer's plurality espouses "a non-categorical 'wait and see' approach to free speech cases involving new technologies."[66] The opinion reasons that given digital technology's dynamism, a First Amendment category chosen today would be obsolete by tomorrow.[67]

However, by not adopting any standard of protection, but making highly atomistic case-by-case decisions on specific technologies, First Amendment values are jeopardized.[68] In fact, if one expects digital technology to stop innovating before crafting an appropriate First Amendment standard to protect speech, one might "wait and see" for a considerable time.

2. Proposed Legislation

Legislation before the House evidences a similar zeal for deregulation accompanied with a presumption of authority to regulate without constitutional bar. H.R. 2372 espouses several good public policy reasons for not regulating the Internet and the data packets that travel along it: increased

63. POOL, *supra* note 2, at 222.

64. *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. 727 (1996) (plurality opinion); *see also* Price & Duffy, *supra* note 6, at 996.

65. *See* Price & Duffy, *supra* note 6, at 1005.

66. Mark S. Kende, *The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-maiden*, 14 CONST. COMMENT. 465, 466 (1997).

67. *Id*. at 467.

68. *See Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 781 (Kennedy, J., dissenting) (The Court "applies no standard, and by this omission loses sight of existing First Amendment doctrine. 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."); Fred H. Cate, *Telephone Companies, The First Amendment, and Technological Convergence*, 45 DEPAUL L. REV. 1035, 1064 (1996).

competition; the novelty of the industry; and the innovation of the industry.[69] But a constitutional First Amendment bar is absent. Congress's statutory language only suggests forbearance and procompetitive goals as reasons for not regulating, without any mention of free speech values. On the contrary, the bill presumes a dormant power to regulate. For instance, section 231(a)(2)(B) reserves to Congress "the authority to determine when and if . . . regulation of Internet information services is in the public interest."[70] Aside from language reserving to Congress the authority to regulate, H.R. 2372 also implicitly grants the FCC authority to regulate by acknowledging the agency's need to forbear from regulating. Section 231(c)(1) requires that the "Commission shall forbear from applying any regulation,"[71] noting that "forbearance is consistent with the public interest."[72]

3. FCC *Report to Congress* and Other Statements

When the IP telephony community expressed anxiety at the seemingly borderless Commission case-by-case approach to regulation, a senior FCC staffer reassured that the agency has "the discipline and the foresight and the wisdom to not fall down the [regulatory] slope."[73] Although the Commission has not as yet enforced its tentative IP telephony regulations, FCC rule making to regulate gateway IP telephony on a case-by-case basis provides no principled basis on which to determine First Amendment speech rights. The FCC's assertion of authority over the Internet's data packets in the context of gateway IP telephony creates regulatory concern because protected print content is impossible to distinguish from voice content when packetized as data. All information, print, voice, or otherwise, travels the Internet as indistinguishable data packets. Even if the different data packets could be distinguished in transit, it would seem somewhat arbitrary to disfavor voice data packets by taxing them. Moreover, with respect to IP client software, the FCC only noted ISP obliviousness to end-user application use, not a First Amendment bar, as a reason for not regulating.[74] This justification leaves open to the FCC future regulation of all Internet phone telephony.

In the April 1998 *Universal Service Report to Congress*, Commissioner Powell expressed Justice Breyer-like *Denver Area* concerns about

69. *See* H.R. 2372, 105th Cong. § 231(a)(2)(B) (1997).

70. *Id*.

71. *Id*. § 231(c)(1).

72. *Id*. § 231(c)(1)(D).

73. Louis Trager, *FCC Regulation of Net Telephony Possible*, INTER@CTIVE WEEK (visited Feb. 15, 1999) <http://www.zdnet.com/intweek/print/980413/306725.html>.

74. *See Universal Serv. Report to Congress*, *supra* note 1, para. 42.

creating a standard by which IP telephony would be regulated.[75] Like Justice Breyer, Commissioner Powell argued digital innovation would likely frustrate new categories, and therefore, no standard at all should be adopted.[76] Yet, in failing to adopt a standard, the FCC also admitted no limits to its authority to regulate. A standardless standard could permit the Commission to burden communication otherwise protected by the First Amendment. During FCC reauthorization hearings, Commissioner Powell cited the need to reconcile regulatory regimes in a procompetitive approach, but again the First Amendment was not mentioned.[77]

IV. FIRST AMENDMENT CASE AGAINST REGULATION

A. Need for Constitutionally Entrenched Protection

Since public policy rationales can change with congressional moods and interest group politics, there is a real value in establishing an entrenched First Amendment protection as opposed to relying on mere governmental forbearance or grace. For example, in Congress, free-market speak has become fashionable, but much of this talk is empty rhetoric. Recently, Senator Conrad Burns (R-Montana) lambasted the FCC for increasing universal service taxes (the "Gore" tax)[78] while Burns simultaneously urged the FCC to classify ISPs as "telecommunications services" subject to universal service contributions rather than their present universal service exempt status as "information service."[79] Given such detachment between "do as I say" and "do as I do," a First Amendment constitutional bar to IP telephony regulation could entrench civil liberties against present as well as future government whimsy.

The First Amendment presumes freedom of speech and freedom of the press: "Congress shall make no law . . . abridging the freedom of speech, or of the press."[80] In *Kovacs*, Justice Black argued that "[t]he basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition."[81] Yet, courts have occasionally turned the presumption upside down. For example in *Hawaiian Telephone*

75. *See id*. (separate statement of Comm'r Powell).

76. *See id*.

77. *See Reauthorization Hearings*, *supra* note 33 (statement of Comm'r Powell).

78. *See Statement of Senator Conrad Burns Commun. Subcomm. of the Commerce, Science and Transp. Comm. Hearing on Reauthorization of the FCC*, 105th Cong. (June 10, 1998), *available in* 1998 WL 12760973.

79. *See Universal Serv. Report to Congress*, *supra* note 1, para. 42.

80. U.S. CONST. amend. I.

81. Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting).

Co., the Supreme Court construed the common carriage statute to *limit* the offering of a new telephone service without the FCC's prior approval; *Hawaiian Telephone Co.* held that the FCC must first find that "the public convenience and necessity dictate a new [phone] service" before authorizing it.[82] By analogy, if IP telephony is in fact a technology of freedom, and licensing the right to make IP telephony service available is based on whether the FCC "dictates" or "requires" it, a First Amendment challenge of the regulation might allow the court to revisit and reconsider the issue of phone common carriage, this time in the IP telephony incarnation. Since human ingenuity leads to new modes of communication, courts examine new phenomena by analogy with old. However, there are both good and bad analogies, and one may fear that courts fail to recognize the new digital mechanism's underlying communicative function.

B. Standards of Review

Most threshold arguments in First Amendment cases concern the standard of review. If a petitioner can establish that a regulation is content-based, strict scrutiny and its fatal review will invalidate almost any regulation.[83] However, noncensorial content-neutral restrictions invoke either a deferential rational basis review[84] or an intermediate scrutiny.[85] Typically, these content-neutral regulations limit communication irrespective of the message conveyed.[86] Content-neutral review involves judicial weighing of First Amendment interests against legitimate government interests. The greater the interference with opportunities for free expression, the greater the burden the government carries in establishing the regulation's constitutionality.[87] "[T]he first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression."[88] To the extent that a content-neutral restriction excessively burdens IP telephony, the courts could still find the new regulations violative of First Amendment values.

82. Hawaiian Tel. Co. v. FCC, 498 F.2d 771, 774 (D.C. Cir. 1974).

83. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 53 (1987).

84. *Id*.

85. *Id*. at 52.

86. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

87. *See* Stone, *Content-Neutral Restrictions*, *supra* note 83, at 52.

88. *Id*. at 58. For example, content-based regulations of billboards advocating nazism are less intrusive of the quantity of free speech than content-neutral regulations barring billboards altogether. *Id*.

1. The Case for Strict Scrutiny

To establish that a regulation is content-based and thereby trigger strict scrutiny analysis, one must establish "a governmental preference for one set of speakers over another based on the content of their speech."[89] The government rules must evince a preference for a "particular type, format or content of speech."[90]

In the case of IP telephony, it might be argued that a new requirement to pay into universal service—functionally the equivalent of a tax on speech, since costs are expected to be passed on to consumers—is a tax[91] on long-distance speech. The speech is content-based because through taxation it disfavors one set of speakers, long-distance urban speakers, while simultaneously subsidizing another group, local rural speakers. The situation might be akin to past legislative malapportionment where rural voters had a more effective voice than others due to an apportionment mechanism that gave rural states greater House seats than justified by population.[92]

Turner I and *Turner II* provide a relevant analogy for this strict scrutiny claim. In the *Turner* cases, Congress required cable programmers to carry local broadcast content in preference to cable editorially selected content.[93] This "must-carry" provision benefited local broadcast content over cable programming's editorial discretion.[94] In her *Turner I* dissent, Justice O'Connor argued that a government interest in "localism" is insufficient justification for must-carry's burden on cable editorial control.[95] "It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one."[96] In effect, the government regulated the content of speech, local being preferred to national.

89. Allen S. Hammond, *Regulating the Multi-Media Chimera: Electronic Speech Rights in the United States*, 21 RUTGERS COMPUTER & TECH. L.J. 1, 59-60 (1995).

90. *Id*. at 76.

91. *See* POOL, *supra* note 2, at 15-16 (noting taxation, prior restraint, and licensing requirements as mechanisms of government speech control).

92. *Cf*. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (Malapportionment gave rural voters a voting advantage disproportionate to their numbers and amplified their voice as compared to urban voters.).

93. *See* Turner Brdcst. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1184 (1997) (*Turner II*).

94. *See* Hammond, *supra* note 89, at 67.

95. Turner Brdcst. Sys., Inc. v. FCC, 512 U.S. 622, 680 (1994) (O'Connor, J., dissenting) (*Turner I*).

96. *Id.*

	RURAL (high cost, sparsely populated)	URBAN (low cost, densely populated)
LOCAL SERVICE	Most heavily subsidized by universal service fund, not assessed for universal service	Intermediate tax burdens and benefits from universal service
DOMESTIC LONG-DISTANCE SERVICE	Intermediate tax burdens and benefits from universal service	Most heavily taxed by universal service assessments, least likely to receive subsidy

The above table illustrates the most favored class of speakers (rural, local speech) and the most disfavored class (long-distance urban speech), with the latter subsidizing the former under present universal service funding.

In opposition, it could be argued that "local, rural speakers" is simply a technical group, and that there really is no particular type of speech being favored when burdening urban, long-distance speakers. In the different context of differential newspaper speech taxation, *Grosjean v. American Press Co.* held that differential media taxes only invoke strict scrutiny when taxes are seen to be "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[97] *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue* further clarified the *Grosjean* holding by explaining that newspapers *can* be made subject "to generally applicable economic regulations without creating constitutional problems."[98] Moreover, in *Leathers v. Medlock*, the Supreme Court updated the differential press taxation rule to hold that "[a] tax is . . . suspect if it targets a small group of speakers"[99] and "that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition,"[100] making censorial intent less likely. Since universal service charges are generally applicable to long-distance calling and are not specific to urban speakers, one might conclude that these taxes do not unconstitutionally burden speech.

97. *Grosjean*, 297 U.S. 233, 250 (1936).
98. *Minneapolis Star & Tribune Co.*, 460 U.S. 575, 581 (1983).
99. *Leathers*, 499 U.S. 439, 445-47 (1991).
100. *Id.* at 445.

However, beyond taxes of general applicability like federal excise taxes,[101] universal service access charges are truly disparate in their effect on particular classes of speakers. In particular, access charges are more than double those for long-distance.[102] Since urban local speech is high volume, the universal access services do not widely benefit urban speakers. Rural, local callers are the most heavily subsidized speakers who pay no universal access charges yet benefit from low-cost subsidized services. Urban long-distance callers pay the heaviest universal access fees as none of the funds subsidize their relatively low-cost local service.

Realistically, though, it is unlikely a court would recognize universal service's potential burden on IP telephony as grounds for strict scrutiny. In a recent case, Laurence Tribe argued on BellSouth's behalf for strict scrutiny of the Act's section 151(a) provisions barring the Bell Operating Companies from entering electronic publishing.[103] The D.C. Circuit denied content-based strict scrutiny review and instead granted intermediate scrutiny of what it termed as "content-neutral structural regulations."[104] The court ruled that strict scrutiny was unwarranted because there was no legislative intent to discriminate.[105] The court's unwillingness to strike section 151(a) makes it all the more unlikely that courts would concede a rigorous review standard and strictly review tax classifications such as categorizing IP telephony under common carriage and obligating universal service payments.[106]

2. The Case for Intermediate Scrutiny

Even if a strict scrutiny argument against IP telephony regulation fails, a content-neutral argument for intermediate scrutiny remains. In *United States v. O'Brien*, intermediate scrutiny was cast as a balancing of multiple factors, including noncensorial government interests and the incidental restriction of First Amendment freedoms no greater than essential to further the government interest.[107] Relevant to this balancing is the Court's "rock-paper-scissors" hierarchy of competing constitutional provisions: Whereas

101. *See, e.g.*, *Reauthorization Hearings*, *supra* note 33 (statement of Sen. Burns).

102. *See supra* text accompanying note 17.

103. *See* BellSouth Co. v. FCC, 144 F.3d 58, 69 (D.C. Cir. 1998).

104. *Id.*

105. *See id.* at 68. *But see* Leathers v. Medlock, 499 U.S. 439, 445-47 (1991) (making explicit that "[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment").

106. *See* Benjamin Lombard, Note, *First Amendment Limits on the Use of Taxes to Subsidize Selectively the Media*, 78 CORNELL L. REV. 106, 108 (1992).

107. *See O'Brien*, 391 U.S. at 377 (1968); Stone, *Content Regulation*, *supra* note 86, at 190.

the First Amendment trumps the Common Carriage Clause,[108] the Revenue Clause[109] can trump the First Amendment and vice versa.[110] Since universal service falls within the Common Carriage Clause, First Amendment interests take priority. However, since the Revenue Clause is also implicated in universal service access charges, a balancing of relevant factors would decide the outcome of IP telephony regulation. On one hand, government has a legitimate interest in encouraging universal interconnectivity through universal access funding. On the other hand, there is a certain First Amendment value of cheap communication with IP telephony in an immediacy one can only presently attain by phone. Although universal service does not ban long-distance speech, the charges burden speech by making it twice as expensive.

One important First Amendment value is quantity of expression,[111] and therefore by implication, affordability of expression. "[T]o the extent that content-neutral restrictions actually reduce the total quantity of expression, they necessarily undermine the 'search for truth,' impede meaningful participation in 'self-governance,' and frustrate individual 'self-fulfillment.'"[112] Prohibitively expensive expression reduces the quantity of expression, thereby undermining an important First Amendment value.

Since money makes more speech possible in many contexts, governmental universal service taxation limits speech. In *Buckley v. Valeo*, the Court invalidated a federal election expenditure ceiling as violative of the First Amendment.[113] The Court held that such a limitation placed "direct and substantial restraints" on the ability of citizens to engage in protected political expression.[114] *Buckley* is especially apropos in this setting. Universal service taxation palpably reduces the monetary ability of long-distance urban speakers to communicate:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[115]

108. The Common Carriage Clause provides that Congress has the power "[t]o establish Post Offices and post Roads." U.S. CONST. art. I, § 8, cl. 7; POOL, *supra* note 2, at 83.

109. The Revenue Clause provides Congress with the authority "[t]o lay and collect Taxes, Duties, Imposts and Excises . . . ." U.S. CONST. art. I, § 8, cl. 1.

110. *See* POOL, *supra* note 2, at 82-83.

111. *See* Stone, *Content Regulation*, *supra* note 86, at 193.

112. *Id*.

113. *Buckley*, 424 U.S. 1 (1976) (per curiam).

114. *Id.* at 39.

115. *Id.* at 48-49.

Even though a restriction is content-neutral, it can still reduce the quantity of speech so substantially as to jeopardize individuals' opportunities to engage in free speech.[116]

One of IP telephony's advantages as speech is the novel mode of inexpensive communication it permits. In First Amendment cases for market entry, a would-be competitor could overcome legislative obstacles to entry by relying on the novelty of its new services.[117] A new service could "brigade" with content providers or consumers demanding the novel service.[118] For example, IP telephony software clients permit voice, video, and chat transmission. These services might be made available through gateway-like systems that support voice and video.[119] Other innovations include one-to-many interactive IP telephony services, mimicking real-world public forums that traditional telephone service is unable to offer affordably.[120]

But beyond its novel offerings, IP telephony's greatest advantage is the affordability it brings to long-distance speech. This reduced cost could factor into a court's First Amendment intermediate scrutiny balancing as the low cost dramatically reduces the cost of speech, thereby increasing the quantity of speech. This is borne out on the Internet, but also in older settings. When England reduced newspaper taxes, circulation boomed.[121] As paper cost decreased in early printing, communication increased.[122] Alternatively, because of telegraphy's and telephony's initial expense, they were not at first viewed as a medium of expression.[123] To be sure, the *Kovacs* majority did not find inexpensive speech part of the First Amendment. "That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection . . . ."[124] Yet, this position leaves little communicative alternative if other modes of speech are prohibitively expensive.[125]

116. *See* Stone, *Content-Neutral Restrictions*, *supra* note 83, at 59-60. *See also supra* text accompanying note 88.

117. *See* Daniel Brenner, *Telephone Company Entry into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 135 (1991).

118. *Id.*

119. *See, e.g.*, Jeff Pulver, *The Pulver Report for April 19, 1998* (visited Feb. 15, 1999) <http://pulver.com/reports/reqapr1998.htm>.

120. *Cf.* Hammond, *supra* note 89, at 21.

121. *See* POOL, *supra* note 2, at 19, 255 n.27.

122. *Id*. at 19-20.

123. *Id.* at 91.

124. Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949).

125. *See* William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 766 (1986) ("[A]lternative means of communication, which are always available in theory, are of little value to those who cannot afford them.").

Low cost seems to be a relevant First Amendment interest, even if IP telephony is not entirely new and duplicates some functions of standard telephony.[126] Lower long-distance costs could serve the First Amendment by lessening the "constraint to do business, consult, debate, and socialize within one's own region only."[127] Additionally, new IP telephony services support democratic ideals of access. Previously disenfranchised groups can now benefit from inexpensive participation in the marketplace of ideas.[128] Since IP telephony lowers cost barriers to speech, courts should consider affordability when balancing First Amendment differential tax burdens against government interests.[129]

V. POLICY PRESCRIPTION

Digital convergence strains the Commission's present regulatory regime because new technologies with multiple communicative modes defy neat, traditional telecommunications categories. Moreover, new digital offerings, such as the increasingly varied forms of IP telephony, will unlikely become simpler to categorize. On the contrary, new IP telephony offerings will permit digital transmission of highly protected print speech and support voice transmission in digital fora, all of which raise an important question: What law will govern the new technology—print, broadcast, or common carriage? Technologies that are classifiable by a unique communicative mode will increasingly become things of the past as digitalization multiplies the ways by which one may communicate with one technology.

Assuming, *arguendo*, the government's interest in protecting universal connectivity is legitimate, exploring a policy alternative that will support universal access without jeopardizing the First Amendment seems reasonable. One possible solution to the present means of fueling universal service is to detach its funding from regulatory assessments on the usage of particular services. Instead, federal general budget appropriations could provide the funding universal service requires without relying on revenues derived from taxing particular technological categories that may become outdated. Noted below are several possible benefits, as well as possible difficulties, with this approach.

126. *Cf.* Brenner, *supra* note 117, at 144 (inquiring whether there is a First Amendment interest in duplicate, but cheaper, cable service).

127. POOL, *supra* note 2, at 229.

128. *See Kovacs*, 336 U.S. at 102 (Black, J., dissenting); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1847 (1995).

129. *See* Brenner, *supra* note 117, at 150.

A. First Amendment Values Served

If speech affordability is in fact an implicit consideration in First Amendment analysis, then funding universal service by a mechanism other than taxing (and thereby increasing the cost of long-distance) could serve important First Amendment values. As noted previously, universal service places a substantial regulatory burden on long-distance speech.[130] Even if a First Amendment analysis did not conclude differential taxation of long-distance merited strict scrutiny, the government-imposed reduction of urban long-distance speech's affordability—sometimes increasing the cost by a factor of two—challenges the First Amendment's supposition that more speech is better than less speech.

To be sure, tax revenues would still continue to fund universal service. However, because the costs of universal service will be more evenly borne by all, the burden such taxation imposes on long-distance speech would be more attenuated and less differential than that imposed by direct taxation of phone speech, IP telephony or otherwise. Rather than one class of speakers (urban, long-distance) heavily subsidizing another class of speakers (rural, local), universal service would come out of Congress's general coffers. Under this plan, universal service's total cost might not differ, but the cost to any one group of speakers would be less than that where one group of speakers disproportionately bears the costs.

B. Funding Irrespective of Technological Usage

At present, universal service taxes callers in relation to their long-distance phone usage. But with digital convergence and universal connectivity charges, flight from the taxable ordinary telephony to the untaxable IP telephony will increase.[131] This flight, in turn, reduces universal service's tax base. In this context, Chairman William Kennard recently repeated two primary, and at present competing, FCC goals: "(1) safeguard universal service support, including that needed for high-cost areas, and simultaneously (2) avoid stifling the development or deployment of innovative new information services."[132] Under the present tax scheme, one of the two goals must fail: Either universal service will eventually need to be funded by taxing new digital offerings, or new digital technologies will prosper while access supports languish.

Instead of an approach that yields stark either/or results, the Commission might attain its connectivity goals by funding universal service *inde-*

130. *See supra* Part III.

131. *See Universal Serv. Report to Congress*, *supra* note 1, para. 85.

132. *Id*. (statement of Comm'r Ness).

pendently of a particular technology use. Rather than taxing IP telephony or some other new innovative information service each time someone calls long-distance, Congress could appropriate funding for universal service from its general budget, perhaps as revenue generated from income tax. As for the FCC's first goal, this approach would safeguard universal service support by removing funding contingency. At present, the Commission finds itself in the reactive position of the little Dutch boy plugging holes in the dike with his fingers: The FCC funds universal service by trying to capture new technologies such as IP telephony under traditional taxable categories (telecommunications service) in order to furnish universal service with an adequate common carriage tax base.[133] Consequently, the Commission is obligated to plug leaking holes in its system by increasingly stretching its statutory constructions to fit new technologies under old regulatory classifications. In the FCC's *Report to Congress* on universal service, Chairman Kennard frankly confessed his agency's new hermeneutic premise: "It is critical . . . [in classifying IP telephony] to make sure that our interpretation of the statute, to the extent legally possible, will continue to sustain universal service in the future."[134] However, the FCC's best exegetical efforts notwithstanding, rational, cost-evading innovators will likely once more outmaneuver *a priori* line drawing. If Congress made universal service supports independent of technology usage, then technological categorization as either a "telecommunications service" or "information service" would no longer matter for universal service purposes. Sufficient funding would no longer depend on a contingent technology remaining a static tax base, and category problems would not affect funding.

Second, by deriving universal service funding directly from Congress and not through phone tariffs, the FCC could "avoid stifling . . . new information services"[135] with burdensome regulatory charges. Internet Protocol telephony could attain its full potential as a tool for distance learning, democratic political participation, and social intercourse.

C. Greater Accountability

A collateral benefit of a direct congressional universal service grant might be greater decision-maker accountability. Recently, the so-called "Gore tax" billed long-distance phone users $2.02 billion through hidden incremental rate increases.[136] Although it is not clear that congressional proceedings are substantially more transparent than administrative agency rule

133. *See* 47 U.S.C. § 254(d) (Supp. II 1996).
134. *Universal Serv. Report to Congress*, *supra* note 1, para. 98.
135. *Id*. (statement of Comm'r Ness).
136. *Reauthorization Hearings*, *supra* note 33 (statement of Sen. Burns).

making, congressional control of purse strings might allow greater political accountability by placing responsibility with an institution that is regularly and directly elected rather than an administrative agency that may be either politically-insulated or industry-captured. In *West Lynn Creamery, Inc. v. Healy*, Justice Scalia in a nonlegal policy aside noted that taxes placed into a general fund are less likely to be abused than those placed in a segregated fund.[137] Were universal service's segregated funds placed in a general revenue fund, abuse of funding might be less likely as "citizens perceive that the money (in the general fund) is available for any number of competing . . . purposes."[138] These competing purposes, in turn, would serve to ensure that universal service funding was efficiently achieved.

D. Concerns: Diminished Innovation and Inequity

Although detaching universal service financing from long-distance phone usage would burden long-distance speech less than at present, it is uncertain what effect direct appropriation for universal service would have on innovation. For example, such appropriations might have a *negative* impact on IP telephony. If there is no longer a regulatory and therefore cost advantage to using IP telephony over ordinary telephony, investors might not be willing to sink the money to develop digital replacements for cheap analog service. At the same time, beyond its regulatory advantages, IP telephony is an innovative technology permitting reliable data transmission in addition to voice.[139] Any innovative technology inviting investment returns will likely attract financing.

Finally, would such a directly financed universal service fund be equitable? Would rich people pay less and poor people pay more as the government distributes universal service burdens among all taxpayers on a general basis rather than differentially taxing long-distance callers? Inequity might be less a question of the poor paying more than at present than a question of local speakers in sparsely populated areas paying more than at present. To the extent that the poor are rural local speakers, inequity could become a real issue requiring redress.

VI. CONCLUSION

Internet Protocol telephony and other technologies of freedom deserve First Amendment protection against FCC regulatory authority. The First Amendment's conspicuous absence from the IP telephony dialogue and the prominence of reassurances of regulatory forbearance in Congress, the

137. *West Lynn Creamery, Inc.*, 512 U.S. 186, 211-12 (1994) (Scalia, J., concurring).
138. *Id*.
139. *See Spinning Gold from Glass*, *supra* note 10, at 68.

courts, and the FCC should create cause for concern. However, tenable First Amendment content-based and content-neutral arguments exist against the proposed IP telephony regulations. Moreover, the affordability and innovation IP telephony offer should constitute nontrivial factors in a content-neutral balancing act. An improved policy alternative to the present means of funding universal service is to detach universal service funding from long-distance or any other mode of communicative function. Instead, direct federal grants could provide the funding universal service requires without relying on a particular technology that may become outdated or burdening speech that is First Amendment protected.