Electrifying the First Amendment

by Mark S. Nadel

Columbia Institute for Tele-Information
Graduate School of Business
Columbia University
809 Uris Hall
New York, NY 10027
(212)854-4222

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[Essay]

Mark S. Nadel

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INTRODUCTION

Technologies of Freedom[1] by Ithiel de Sola Pool is a fascinating interdisciplinary exposition of the development of the communications media and their treatment under the first amendment. Utilizing his broad political science background, Pool expertly integrates explanations of technical detail and economic theory with discussions of historical accident and legal precedent, as he explains why distinctly different sets of rights are accorded various forms of expression, depending upon whether communication is made in print, by broadcast, or over wire.

Professor Pool argues that those who have dealt with post-1850 communications technologies have not treated these electronic media with the deference the first amendment requires. Despite the command that "Congress shall make no law . . . abridging the freedom . . . of the press,"[2] lawmakers have *presumed* the authority to regulate the electronic press. Compounding this error by holding "a perception of technology that is . . . often inaccurate, and which changes slowly as technology changes fast,"[3] lawmakers have produced a misconceived set of broadcast regulations. These permit the revocation of broadcasters' licenses if government officials find that a "fairness doctrine" has not been satisfied. While regulation of broadcasting may be tolerable, given the existence of a completely unregulated print media[4] and common carrier regulations that permit open access to the mail and telephone network, Pool is gravely concerned about the future. The offensive regulatory regime that presently applies to broadcasting has already partially been extended to cable, and he fears that the convergence of the media and prevailing intertia soon may affect the independence of printers as they become electronic publishers. It is inevitable that the electronic revolution will trans-

* Adjunct Assistant Professor of Law, Benjamin N. Cardozo School of Law; Media Project Director of the Columbia University Research Program on Telecommunications and Information Policy; B.A., 1978, Amherst College; J.D., 1981, Harvard University.

[1] I. Pool, Technologies of Freedom (1983). Professor Pool died on March 11, 1984.

[2] U.S. Const. amend. I.

[3] I. Pool, supra note 1, at 7.

[4] In fact, the broadcast/print double standard has been praised by some. See Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1 (1976).

form all media, but he warns us to safeguard our first amendment tradition against displacement by misconceived electronic media law.

Pool's thesis is that the first amendment tolerates only two models of media regulation.[5] The first is the traditional print model of no regulation. He contends that all media presumptively must be treated in this manner. Only when economic conditions lead to the formation of monopolies in the media can regulations be introduced, and, even then, the only acceptable regulations for this category of firms are those that have been applied to the common carriers. Armed with this interpretation of the first amendment, he proceeds to explore "[t]he mystery" of "how the clear intent of the Constitution, so well and strictly enforced in the domain of print, has been so neglected in the electronic revolution."[6]

From his vantage at the Massachusetts Institute of Technology, Pool is especially frustrated by lawmakers' frequent ignorance of the technology that they are regulating and the errors that their misunderstandings have produced. His intent, however, is not to assign blame. Rather, he seeks to clarify the technical and economic complexities of the communications industry. Concepts such as "scarcity" and "monopoly" are explored in an historical context for the purpose of explaining the development of media regulation. Broadcast regulations were acceptable in the 1920's and 1930's "because it seemed impractical [to apply the first amendment] in the new technological context,"[7] but when old problems reemerge in the guise of new issues, he hopes that past errors will be corrected—or at least not repeated.

Pool traces the history of communications technology starting with the invention of the first printing press in the second century, continuing through the introduction of censorship by the Roman Catholic Church in the 1500's, and leading to the development of mass media. Pool is confident that printing will survive in the future, but he observes that "[t]he nonprint media are not just passing the print media, but are for the first time showing signs of displacing them in part."[8]

1. Convergence

Pool's description of the shift into the electronic age provides an excellent overview of the convergence of technologies. Data exchanges

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[5] I. Pool, supra note 1, at 246.
[6] Id. at 3.
[7] Id. at 108.
[8] Id. at 21.

between computers are a marriage of telegraphy and telephony, while cellular radio (mobile telephone) is an offspring of telephone and broadcast technologies. The convergence of print and electronics will permit future "writings" to be disseminated without ever entering the world on paper. The old trifurcated system of separate legal categories, with their accompanying regulatory schemes, is cracking badly.

Regulatory problems abound. For example, how is the new teletext[9] service to be handled? Primarily alpha-numeric in composition, it certainly resembles a print publication, especially since it is filled with stories written by wire service reporters or print editors. Yet, when broadcast through the airwaves, it is also a broadcast service and, when it is sent to home terminals over telephone lines, common carrier regulation also seems appropriate. Truly, there is no simple answer. As the old categories of communication merge, it is inevitable that "the one-to-one relationship that used to exist between a medium and its use is eroding."[10]

Further, the convergence of the media is being hastened by the eagerness of media firms to expand across old technological boundaries and offer multimedia services. Magazine publishers as diverse as Hearst and Playboy have produced their own cable network programming based on their magazines' contents.[11] American Telephone and Telegraph (AT&T) and International Business Machines, previously considered to be in different industries, are today in direct competition.[12] With industry boundaries becoming ever more dynamic, the future becomes ever less clear—questions such as which firms will serve what users, when and through which medium, will all be answered with time.[13]

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[9] See Teletext Transmission, 53 Rad. Reg. 2d (P & F) 1309 (1983) (refusing to apply the broadcast fairness doctrine to the service).

[10] I. Pool, supra note 1, at 23.

[11] For a detailed list of the cable network services, see The Cable TV Program Databook (P. Kagan ed. 1983); Cablevision, Jun. 20, 1983, at 344–48; 1984 Field Guide to the Electronic Media, Channels of Communication, Nov.–Dec. 1983 [hereinafter cited as Channels].

[12] "Each can provide customers with the means for sending, storing, organizing, and manipulating messages in text or voice." I. Pool, supra note 1, at 27.

[13] Pool observes that resources eventually might be reallocated so that the over-the-air spectrum is reserved only for those services involving mobile vehicles or satellites, while all communications between stationary points are relegated to using broadband cables. Id. at 38. Despite the technical and economic efficiencies that this might provide, such a reallocation would be very difficult politically because no industry that has been granted spectrum rights has ever surrendered them willingly. See, e.g., the recent decision of the Federal Communications Commission (FCC) to reallocate the underutilized Instructional Television Fixed Service (ITFS) frequencies to Multipoint Distribution Service (MDS). Instructional Television Fixed Service (MDS Reallocation), 54 Rad. Reg. 2d (P & F) 107 (1983).

II. Print

Pool regards the law of the print medium as the paradigm upon which others should be modeled and it is clear why. He is a strong supporter of Justice Black's view that "the command of the First Amendment must be read with the broadest scope."[14] Pool appears to hope that some day the absolutist position of Justices Black and Douglas will acquire the same status in the law as have the dissents of Justices Holmes and Brandeis.[15] His central question, then, is "whether the electronic resources for communication can be as free of public regulation in the future as the platform and printing press have been in the past."[16]

Pool's view of the print media model is, however, a bit too pristine. He spends too little time exploring the assumptions underlying the first amendment's protections, and how changes in those assumptions may alter the application of the amendment. He believes that "perhaps the most important of First Amendment protections for publishers is that against prior restraint, for this bars censorship."[17] But if censorship is the evil, should not the same protection also be offered against private censorship of the kind faced by Jimmy Stewart in the classic film "Mr. Smith Goes to Washington," in which the evil "Taylor machine" used its control of the media to mislead the public and turn them against Senator Smith?

Pool does note that the amendment's proscription against official censorship of the press was a reaction to abuses of the British *government*.[18] More significant than this, however, is a point he makes in his next chapter. "The traditional law of a free press rests on the assumption that paper, ink, and presses are in sufficient abundance that, if government simply keeps hands off, people will be able to express themselves freely."[19] It is doubtful that the framers of the Constitution ever considered that economies of scale and scope could create monopolistic private censors or that wealthy media conglomerates could become gatekeepers of information.[20]

Elsewhere, however, Pool does recognize the ramifications of this economic development. "In one important respect the original imag-

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[14] I. Pool, supra note 1, at 74.

[15] See id. at 74.

[16] Id. at 10.

[17] Id. at 74.

[18] Id.

[19] Id. at 106.

[20] For an excellent discussion of the economic history of the print media and its relevance to the first amendment, see B. Owen, Economics and Freedom of Expression 33-85 (1975).

ery behind the print model has ceased to reflect reality. Publishing is rarely now the expression of just one individual. It is undertaken by large organizations."[21] Under these circumstances, can the amendment continue to be read to require a strict hands-off rule—one that results in guaranteeing media access to only a few?

The answer is no. If the first amendment's protection of print publishing against government regulation was based upon the assumption of equal access to the medium, then rules based on long obsolete economic conditions must be revised. Pool never explicitly states that the newspaper industry may have crossed the line from a regulation-free status to one with duties of a common carrier but, in his final chapter, he does seem to accept that conclusion. There he recognizes that if monopoly newspapers were as opinionated today as they were in the past, "public opinion would have long since acted against their unregulated monopoly."[22] He observes that publishers have, instead, "had the wisdom to defuse hostility by acting in many respects like a common carrier,"[23] running columnists of diverse viewpoints and rarely refusing ads. As he speculates: "One would not require the Roman Catholic *Pilot* to carry ads for birth control or a trade union magazine to carry ads against the closed shop. But these cases assume that diverse magazines exist. A dilemma arises when there is a monopoly medium . . . ."[24]

Many media partisans would condemn the imposition of explicit common carrier regulations on print publications,[25] claiming that to

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[21] I. Pool, supra note 1, at 11–12; see also id. at 4–5 ("new and mostly electronic media have proliferated in the form of great oligopolistic networks of common carriers and broadcasters").

[22] Id. at 238–39.

[23] Id. at 238.

[24] Id. at 246–47.

[25] See Gore Newspapers Co. v. Shevin, 397 F. Supp. 1253 (S.D. Fla. 1975) (finding unconstitutional a requirement that newspapers charge political candidates the lowest available local advertising rate), aff'd, 550 F.2d 1057 (5th Cir. 1977); Opinion of the Justices, 362 Mass. 891, 284 N.E.2d 919 (1972) (advisory opinion finding unconstitutionally vague a proposed Massachusetts statute that would have required newspapers that published political advertisements for a candidate in a primary, to offer access at equal rates to other candidates or organizations involved in the same primary); see also Opinion of the Justices, 363 Mass. 909, 298 N.E.2d 829 (1973) (advisory opinion discussing a hypothetical newspaper access statute); Annot., 18 A.L.R.3d 1286 (1968) (right of a publisher to refuse an advertisement). But see R. Neustadt, The Birth of Electronic Publishing 58 (1982) (application of equal time rules to paid advertising on over-the-air teletext (electronic newspapers) "would do no harm and would have the benefit of preventing system operators from selling time to favored candidates and excluding others"); Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975). Proposals before Congress have included H.R. 18,927, 91st Cong., 2d Sess., 116 Cong. Rec. 28,582 (1970) (applying the fairness doctrine to certain monopoly newspapers); H.R. 18,928, 91st Cong., 2d Sess., 116 Cong. Rec. 28,582 (1970) (amending the Newspaper Preservation Act,

do so would be unconstitutional. However, they are reading the Supreme Court decision in *Miami Herald Publishing Co. v. Tornillo*[26] too broadly. When the Court held that the right of access to newspapers provided by Florida's particular right-of-reply statute violated the first amendment, it probably meant to prohibit all *contingent* regulations of media content because these regulations force the government to intrude into editorial decisionmaking. The Court, however, never discussed *structural* regulations of print.[27]

The Court clarified this point in *PruneYard Shopping Center v. Robins*,[28] where it explained that the Florida statute had abridged freedom of the press in two ways. First, the statute had " 'exact[ed] a penalty on the basis of the content of a newspaper,' "[29] and, second, "[t]here also was a danger in *Tornillo* that the statute would 'dampe[n] the vigor and limi[t] the variety of public debate.' "[30] Neither of these difficulties would arise if structural regulations, such as a common carrier right of access to the advertising columns of a periodical, were imposed. Nor would readers be deprived of the editorial staff's judgments concerning which messages (news or advertisements) were worthy of a reader's attention, and which were not, since the editors carefully could distinguish between these messages.[31] The usefulness of right of access rules as they have been applied to mail and telephone services seems to "demonstrate[ ] how governmental regulation of [the print media] can be exercised consistent with First Amendment guarantees of a free press."[32]

III. Carriers

Pool's chapter on the first amendment and carriers—the mails, telegraphy, and telephony—is his most enlightening. Despite today's

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Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801 1804 (1982)), by requiring jointly operated publications to provide balanced and complete presentation of issues of public importance); H.R. 18,941, 91st Cong., 2d Sess., 116 Cong. Rec. 28,582 (1970) (requiring publication of editorial advertisements in a newspaper of general circulation).

[26] 418 U.S. 241 (1974).

[27] See generally Price, Taming *Red Lion*: The First Amendment and Structural Approaches to Media Regulation, 31 Fed. Com. L.J. 215, 222–23 (1979) (discussing the flexibility of structural regulation and its harmony with first amendment considerations).

[28] 447 U.S. 74 (1980).

[29] Id. at 88 (quoting *Tornillo*, 418 U.S. at 256).

[30] 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at 257). The statute created the first of the three dangers concerning access rules that Professor Laurence Tribe warned of, i.e. "the danger of deterring those items of coverage which will trigger duties of affording access at the media's expense." L. Tribe, American Constitutional Law § 12-22, at 697 (1978).

[31] Nor do structural regulations raise any of the dangers that Tribe fears. L. Tribe, supra note 30, § 12-22, at 697.

[32] *Tornillo*, 418 U.S. at 258.

dependence on communications by phone and letter—not to mention the economic significance of AT&T—such material is rarely, if ever, discussed by legal scholars. It is an analysis that has been sorely lacking and should be welcomed heartily by legislators and courts as they try to grapple with the application of the first amendment to the new media carriers, particularly cable television operators.

This chapter contains a chart which relates "monopoly status" to "the right to regulate content" and illustrates the courts' refusal to permit a single entity to have both.[33] This chart captures Pool's thesis clearly and concisely. All media entities must be accorded an unfettered right to regulate content unless they enjoy a monopoly status. If they enjoy a monopoly status, however, they may no longer claim a right to monopolize the regulation of content. This is the simple dichotomy which Pool's theory illustrates and which forms the basis for his position that cable/broadband communication must be regulated as a carrier.

In his discussion of the legal status of telegraphy and telephony, Pool repeatedly expresses astonishment at the lack of reference in court decisions to the first amendment, blaming it on an initial failure of lawmakers to understand the nature of the technology.[34] This lack of understanding, he suggests, occurred because people originally thought of the telegraph as a business machine, rather than as a medium of expression.[35] Primarily because of expense, "[n]o one used telegrams initially for debate and self-expression,"[36] and this murky perception regarding expense has continued to survive, long after the press corps began making extensive use of this medium. Pool notes that the misperception has been so strong that even his heroes, Justices Black and Douglas, "did not . . . recognize that the issues being dealt with [in a 1952 radio telegraphy case] related to the precedents of First Amendment law. This silence, more than the finding itself, was extraordinary."[37]

Despite his shock over the lack of explicit reference to the first amendment, Pool does recognize that the common carrier "rules against discrimination . . . designed to ensure access to the means of communication"[38] are the proper rules under the amendment for the telephone as well as for the mails. The economic characteristics of

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[33] I. Pool, supra note 1, at 81.
[34] Id. at 103-05.
[35] Id. at 98.
[36] Id.
[37] Id. at 105.
[38] Id. at 106.

such carrier monopolists place them in his second category of media firms.[39]

What he does not acknowledge is that the Court's failure to mention the first amendment in its electronic carrier decisions simply may reflect an implicit understanding that the amendment does not protect the owners of the transmission technology, except insofar as they act on behalf of those who compose and receive messages. If a distinction between the rights of medium owners and message composers is recognized, then the first amendment can be interpreted as protecting an open system of free communication for senders and receivers of messages.[40] The amendment protects the actions of speakers, writers, editors, and their audiences. The government is permitted, if not encouraged, however, to facilitate access to any and all transmission media, if and when there are economic barriers that restrict those who desire to express themselves.

This would help explain the constitutionality of requiring new carriers to satisfy a "public convenience, interest, or necessity"[41] test before they are licensed—a process which Pool finds distressing.[42] Claiming that this licensing standard would never be accepted in print, he asserts that the "Constitution has been turned on its head."[43] The first amendment, he believes, creates a presumption that entry by new media cannot be blocked, absent strong government interests, while the present licensing system permits incumbents to use their political power and legal expertise with the administrative process to delay or block the entry of new competitors.[44] Pool suggests that the government must show that the technology has natural monopoly characteristics before any regulations can be imposed.[45]

Yet if it is communication and not technology which is protected by the first amendment, the Federal Communication Commission (FCC) may not be wrong. The introduction into the market of a new company or technology does not further the interests of those who compose messages unless it provides a more efficient transmission

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[39] See supra text accompanying note 33.

[40] See Nadel, A Unified Theory of The First Amendment: Divorcing the Medium from the Message, 11 Fordham Urb. L.J. 163 (1982).

[41] Communications Act of 1934, ch. 652, § 307(a), 48 Stat. 1064, 1083 (current version at 47 U.S.C. § 307(a) (1976)); see FCC v. RCA Communications, 346 U.S. 86, 90–91 (1953).

[42] See I. Pool, supra note 1, at 106.

[43] Id. at 3.

[44] For a good discussion of these industry tactics, see G. Brock, The Telecommunications Industry (1981).

[45] See I. Pool, supra note 1, at 136, 246–47.

medium or expands capacity to meet unsatisified demand. When the FCC refuses entry to a new common carrier because it does neither of these, it does not muzzle a single speaker or foreclose access to a single idea. It therefore would appear to abridge neither freedom of speech nor freedom of the press. As for requiring the review *prior* to entry, this can easily be explained by the need of the government to prevent interference among users of public resources.

Pool's complaint about an entry barrier for new technologies also may be a bit alarmist. He interprets a 1974 decision by the Court of Appeals for the District of Columbia[46] as requiring new entrants to do more than satisfy the public interest standard: "Now the court asks if public convenience and necessity 'dicate' a new service, or . . . 'require' more or better service."[47] If these words are read as presuming the power to abridge communications, then they are indeed dangerous; yet they are more likely an aberration. Witness the actions of the same circuit, in its two decisions forcing the FCC to grant MCI Telecommunications Corporation permission to enter the ordinary long distance telephone service market.[48]

A more interesting issue concerning the regulation of carriers—one that Pool does not explore in depth—is the taxation and cross-subsidy question. Special taxes levied on telephone service clearly burden communication. Do they not abridge the first amendment? When applied to newspapers, such taxes have been struck down.[49] Also, while it may be that on the whole nationwide communication is enhanced by our present structure of rates for mail and telephone service, clearly some communicators are being burdened with overcharges to allow others to communicate more cheaply.[50] Does the first amendment permit the government to burden one class of communicators with a special tax, even if the revenues produced are used to enhance the communications of other classes?[51]

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[46] Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974).

[47] I. Pool, supra note 1, at 106.

[48] MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), cert. denied, 439 U.S. 980 (1978); MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978).

[49] See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983).

[50] It is also interesting to note a paradox here, for the same policy used to justify a subsidy from long distance to local telephone service is used to support uniform postal rates which overcharge local letter writers so that long distance letters can be subsidized.

[51] In United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981), the Court upheld the U.S. Postal Service monopoly, thus burdening communication by those

Presumably, Pool would answer no, for the only way that cross-subsidies can be preserved is by refusing entry to firms who seek to "cream skim"[52] by serving only the overcharged profitable customers. The firm providing the cross-subsidy must be given an exclusive monopoly.[53] Pool thus opposes the regulation of small private cable systems that do not cross public rights of way[54] even though these satellite master antenna television (SMATV) systems facilitate "cream skimming" and undermine the subsidy for universal service.[55] While the goal of universal service may well be in the public interest,[56] this does not necessitate that it be financed through the use of cross-subsidies. The Constitution may require instead that general revenues be used to provide subsidies.

IV. Broadcasting

Pool provides a clear and concise picture of the situation at the time of the origin of broadcasting law—a view early decision makers apparently lacked. Throughout his chapter on broadcasting, Pool emphasizes that "it was policy, not physics, that led to the scarcity of frequencies,"[57] and it was policy which distorted both supply and demand. As to supply, in the 1920's, "political decision makers were neither aware of what existed in laboratories nor willing to consider using expensive technology for multiplying channels."[58] The small number of channels that were available cheaply were considered to

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desiring to deliver messages without paying postage. This subsidy issue is raised in the context of rates for cable television public access channels in Lee, Cable Franchising and the First Amendment, 36 Vand. L. Rev. 867, 908–13 (1983), and G. Shapiro, P. Kurland & J. Mercurio, CableSpeech (1983). Both argue that the forced cable subsidies violate the first amendment rights of cable operators.

[52] See I. Pool, supra note 1, at 82.

[53] Although the Supreme Court upheld the postal monopoly in 1851, United States v. Bromley, 53 U.S. (12 How) 88 (1851); see I. Pool, supra note 1, at 82–83, many states have barred the award of exclusive cable contracts, see, e.g., Okla. Const. art. 18, § 7; Hawaii Rev. Stat. § 440C-8 (1976); La. Rev. Stat. Ann. § 33:4361 (West 1983); Mass. Gen. Laws Ann. ch. 166A, § 3 (West 1976); Minn. Stat. Ann. § 238.05 (West 1981); Miss. Code Ann. § 21-27-1 (1972); N.Y. Exec. Law § 815 (McKinney 1982); N.D. Cent. Code § 40-05-01 (1983); Wyo. Stat. § 15-1-103 (1980). A California court has held that the state consitution precludes such monopolies in the field of communications. TM Cablevision v. Daon Corp., 6 Media L. Rep. (BNA) 2576 (Cal. Super. Ct. 1981).

[54] See Pool, Letters to the Editor, N.Y. Times, March 10, 1983, at A26, col. 3.

[55] The FCC recently preempted nonfederal regulation of SMATV. *In re* Earth Satellite Communications, Inc., F.C.C. No. CSR-2347, slip op. (Nov. 8, 1983), appeal docketed sub nom. New York Comm'n on Cable TV v. FCC, No. 83-2160 (D.C. Cir. Nov. 8, 1983).

[56] See 47 U.S.C. § 151 (1976).

[57] I. Pool, supra note 1, at 141.

[58] Id. at 114.

set the technical limit. It is as if one decided to buy a low-priced radio and then complained that the radios available at that price were unable to pick up all the distant signals clearly. One's budgetary constraint often determines a technical limitation, but this technical limitation is really only an economic one, for it can be removed by spending more for better equipment.

In addition to establishing regulations based on that low-priced technology, Congress also discouraged future technical developments in broadcasting by arbitrarily fixing the number of licenses available and setting a zero license fee. There was, therefore, little incentive for broadcasters to develop better technologies in order to permit a greater number of channels. In fact, when technological developments permitted ten percent more channels to be fit into the AM radio spectrum, broadcasters were able to block the development.[59]

Not only was the supply of broadcast channels constrained by Congress, but demand was artificially, though probably accidentally, inflated. "[M]issing in 1927 was any realization that radio spectrum was a priceable resource like any other, that its scarcity was a function . . . of its low price . . . ."[60] Pool cannot see how this congressionally created scarcity can be used to justify the regulation of broadcasting.[61] Unfortunately, there is little reason to believe that his clear denunciation of the scarcity concept will alter the behavior of the courts. They continue to favor precedent over the concrete technical and economic facts provided by a long list of experts.[62]

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[59] See *In re* 9 kHz Channel Spacing for AM Broadcasting, 88 F.C.C.2d 290 (1981).

[60] I. Pool, supra note 1, at 142. Of course, there was and is a shortage of free spectrum. Presumably, there would be a similar shortage of paper if the government gave away the paper produced from forests on government land to anyone who desired to print messages.

[61] See id. at 142–44.

[62] The long list of experts who have pointed out that scarcity is a myth includes former Assistant Attorney General for Antitrust William Baxter, who stated, " 'There is no spectrum scarcity. That's a myth,' " Television Digest with Consumer Electronics, Dec. 6, 1982, at 9 (quoting Baxter's response to a question on deregulation of the telecommunications industry), and the National Telecommunications & Information Administration (NTIA), see NTIA, Print and Electronic Media: The Case for First Amendment Parity 40–41, reprinted by Senate Comm. on Commerce, Science and Transportation, 98th Cong., 1st Sess. (Comm. Print 1983). See also Bazelon, FCC Regulation of the Telecommunication Press, 1975 Duke L.J. 213, 223–26 (scarcity is the result of a limited number of frequencies, but with the advent of cable television, this limitation is no longer significant); Bollinger, supra note 4, at 6–12 (the scarcity rationale does not explain treating the newspaper industry differently from the broadcast industry when the newspaper industry has similar natural monopolistic tendencies resulting from economic restraints on the number of companies that can enter a market); M. Mueller, Property Rights in Radio Communication: The Key to Reform of Telecommunications Regulation 6–12 (CATO Institute, Wash., D.C., June 3, 1982) (scarcity is the result of the government mistakenly treating the spectrum as a natural resource rather than as a medium for communication).

Pool admits that the chaos in broadcasting in the 1920's necessitated congressional intervention. Some form of ownership had to be established to permit efficient use of the spectrum resource. Yet, he finds the current public interest standard is not nearly the least intrusive solution. He catalogs some early examples of censorship and the chill created by such governmental licensing, explaining how two less drastic means were, and still are, available for managing the spectrum.

First, Pool discusses the broadcast common carrier system that was actually proposed by AT&T in the 1920's.[63] The system would have allowed different broadcasters to lease time periods on available channels. It was initially rejected by the marketplace[64] and then by congressional opinion,[65] but Pool sees its failure more as a commentary upon the fear of an AT&T broadcast monopoly than a disagreement in theory. In fact, Pool observes that in France and Holland the control of transmission is divorced from control over programming.[66] A similar common carrier structure is in use in the United States for multi-point distribution service (MDS).[67]

Second, Pool explains the concept of a free market in spectrum. Apparently, the option was never considered by the Congress that wrote the Communications Act of 1934,[68] but today it is gaining increasing support. In addition to endorsement in the legal and technical articles by scholarly commentators,[69] the option has been endorsed by the present chairman of the FCC, Mark Fowler.[70] Yet, the

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Nevertheless, courts continue to hold that there is scarcity in the media. See, e.g., FCC v. National Citizens Comm. For Broadcasting, 436 U.S. 775, 799 (1978) ("In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized."). But see Loveday v. FCC, 707 F.2d 1443, 1458–59 (D.C. Cir. 1983).

[63] I. Pool, supra note 1, at 136.

[64] See id.

[65] See 67 Cong. Rec. H5484 (1926) (statement of Rep. Davis); I. Pool, supra note 1, at 136.

[66] I. Pool, supra note 1, at 137–38.

[67] See 47 C.F.R. § 21.9 (1982). In fact, 30,000 applications have been filed for multichannel MDS. See Comes the Deluge in MDS, Broadcasting, Sept. 12, 1983, at 23, 23. One direct broadcast satellite applicant also has announced that it plans to voluntarily act as a common carrier. *In re* CBS (DBS Systems), 92 F.C.C. 2d 64, 71 (1982). Such a common carrier structure actually existed in broadcasting. See Owen, Structural Approaches to the Problem of Television Network Economic Dominance, 1979 Duke L.J. 191, 223–26.

[68] Ch. 652, 48 Stat. 1064 (current version in scattered sections of 47 U.S.C.).

[69] For some of the most recent proposals, see Barron, There's No Such Thing as a Free Airwave: A Proposal to Institute a Market Allocation Scheme for Electromagnetic Frequencies, 9 J. Leg. 205 (1982); M. Mueller, supra note 62; D. Webbink, Communications Airwaves: The Private Sector Option (The Heritage Foundation New Federalism Task Force Report No. 224, 1982).

[70] See Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 244–56 (1982).

broadcasters would prefer not to pay for the spectrum, and their lobby is probably strong enough to block such a plan.[71]

As for the fear that a spectrum auction would accrue to the benefit of the wealthy, Pool denies this and holds to the contrary.[72] Markets would not favor the rich any more than do markets in food, clothing and paper.[73]

V. Cable

Before discussing cable television, Pool presents a lucid technical explanation of how present technology permits the number of television channels to be multiplied even without cable. He then reviews past and present cable regulation and the issue of jurisdiction to illustrate once again that,

> [p]ast confusions and errors cannot easily be overturned or disregarded. . . . [G]iven how strongly ensconced in precedent are the notions of broadcasting as regulatable because of the physical shortage of spectrum and of cable as an extension of television, the courts have continued asserting the legitimacy of cable regulation in general, despite the First Amendment.[74]

The basis of the FCC's justification for regulating cable was the perceived economic harm that cable could cause to broadcasters,[75] an economic basis that courts had accepted in the broadcast medium.[76] Lawmakers seemed to have noble intentions—to protect the availability of television for the maximum number of viewers—but a *policy* decision cannot override a *constitutional* mandate. As Pool points out, never before has the desire to protect some groups with vested interests

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[71] Coase, The Federal Communications Commission, 2 J. L. & Econ. 1, 24 (1959).

[72] I. Pool, supra note 1, at 142–43.

[73] As Ronald Coase has noted:

> [R]esources do not go, in the American economic system, to those with the most money but to those who are willing to pay the most for them. The result is that, in the struggle for particular resources, men who earn $5,000 per annum are every day outbidding those earn $50,000 per annum.

Coase, supra note 71, at 19; see Parkman, The FCC's Allocation of Television Licenses: Regulation with Inadequate Information, 46 Alb. L. Rev. 22, 32–40 (1981); Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 240–43 (1978).

[74] I. Pool, supra note 1, at 165.

[75] Upon actual examination, however, the FCC found that it overestimated the harm done to broadcasters by cable. See *In re* Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663, 671–75 (1980); *In re* Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 714 (1979).

[76] See Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

justified first amendment abridgements. "The rise of magazines hurt book publishing. The rise of television hurt movies. But no one suggested that those situations required Congress to make exceptions to the First Amendment."[77]

While Pool makes no secret of his preference for the print model, he is an ardent advocate of common carrier treatment of cable television. He believes that the medium exhibits the economic characteristics of a natural monopoly.[78] Although he agrees that a common carrier regime would have been impractical in cable's early years,[79] he predicts that "[a]t the maturity of cable, it cannot in a free society be other than a carrier."[80] Common carrier status is compelled, he believes, because of the conflict between the economic interests of an unregulated monopolist system operator and the goal of pluralism.[81] Accordingly, Pool predicts a rough transitional decade or two as the cable industry fights this outcome. He is not very sympathetic to the industry's position that it has no monopoly characteristics because of the proliferation of so many new media. He analogizes this argument to that of a railroad owner in the nineteenth century denying its status as a monopolist because it faced competition from the horse and buggy.[82] Despite Pool's opposition to cable operators on this point, he adamantly defends their right against a "strict separation" requirement. That rule would deny the operators their first amendment right

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[77] I. Pool, supra note 1, at 163 (footnote omitted).

[78] Id. at 170–74; see also Touche, Ross & Co., Financial and Economic Analysis of the Cable Television Permit Policy of the City and County of Denver (Jan. 20, 1984) (due to economies of scale cost advantages, companies other than the first to enter the cable market will be at a disadvantage with the result that competition will be severely limited). For studies finding significant economies of scale in cable services, see E. Noam, Economies of Scale in Cable Television: A Multi-Product Analysis (Columbia Univ. Graduate School of Business, Oct. 1983); B. Owen & P. Greenhalgh, Competitive Policy Considerations in Cable Television Franchising (Economists, Inc., Wash., D.C., Oct. 1982)

[79] I. Pool, supra note 1, at 169–70. Although Pool and the other experts he mentions believed that common carrier status– regulating program producers as common carriers– would have been uneconomical, it is interesting to observe that most of the cable industry's multiple system operators (MSOs) voluntarily chose to forego vertical integration and operate merely as carriers. See Channels, supra note 11, at 26; cf. id. at 19, 22–23, 39; see also Majority Staff of the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess., Telecommunications in Transition: The Status of Competition in the Telecommunications Industry 290 302 (Comm. Print 1981) (ranking and breakdown of the top cable operators as of 1980 and a discussion of the characteristics of the MSOs).

[80] I. Pool, supra note 1, at 172.

[81] A large number of channels would promote pluralism, but would also encourage price competition among the networks and thereby possibly decrease total cable revenues.

[82] I. Pool, supra note 1, at 173; see Browne, Borts & Coddington, The Impact of Competitive Distribution Technologies on Cable Television xii (Mar. 1982) ("It is our judgment that cable

of free speech on their own channels.[83] He objects to AT&T's exclusion from electronic publishing[84] on similar grounds.[85]

Pool expects that the development of an integrated service digital network (ISDN) eventually will allow the telephone company to compete with the cable operator and thus ensure open access to all, whatever the service—computer data, electronic mail, videotex, information bases, education or security—but he feels that there is no need to delay open access until then. A common carrier structure is the best way to insure the optimal development of cable's uses today, both for narrowcasting by local groups and for pay television opportunities.[86]

VI. Electronic Publishing

In his penultimate chapter, which examines electronic publishing, Pool observes that the concept of "publishing" will undergo drastic modifications in the near future. As the costs of electronic input, storage, output and delivery continue to decline, paper may be used only for temporary display of output. Instead of selling hard copies of a final version of a publication, one might sell *access* to the current draft. Much writing will be sent by electronic communication rather than transported by motor vehicle. The FCC recently deregulated the enhanced services provided by the value-added networks that connect consumers to data banks.[87] But even though this is a movement towards the result favored by Pool, he is not pleased.[88] He believes that the FCC does not even have the right to make such a decision:

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television will remain the dominant technology for distributing video programming even if multichannel STV, MDS and DBS develop as planned."); Pearce, Cable and the Competition: The Future Isn't What It Used To Be, View, Sept. 1982, at 55 ("[f]ive leading Wall Street analysts agree that cable will remain the dominant force in non-[traditional] broadcast entertainment").

[83] I. Pool, supra note 1, at 186.

[84] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 186 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 103 S. Ct. 1240 (1983).

[85] I. Pool, supra note 1, at 207–08.

[86] The common carrier structure he supports, though, would neither include rate regulation nor preclude operator involvement in programming. It would permit the operator to set a 3-part tariff: "One uniform charge would be levied for the raw channel regardless of what was carried, another charge for the use of the billing computer, and a third charge in the form of a royalty on all revenues gained from advertiser or viewer payments for a program." Id. at 186. This structure resembles the COMCAR proposal of this commentator. See Nadel, COMCAR: A Marketplace Cable Television Franchise Structure, 20 Harv. J. on Legis. 541 (1983).

[87] *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 79 F.C.C.2d 953 (1980) (codified at 47 C.F.R. § 64.702 (1982)).

[88] I. Pool, supra note 1, at 220.

The founding fathers already made that decision and embodied it in our Constitution long ago.[89]

One constitutional provision that will require reexamination, however, is the copyright provision. Just as photocopying and home taping have played havoc with the copyright laws,[90] so will electronic publishing. Copyright laws can only be enforced effectively when there are a limited number of bottleneck facilities for dispensing copies. Printing presses served that purpose initially, and book stores or large copy centers have permitted reasonably effective enforcement,[91] but a new bottleneck must be found for electronic publishers. Previously the sale of material could be administered by the sale of copies, but with a terminal one may provide access to material without storing a copy. Pool suggests that access services may provide the practical bottleneck and that copyrights may evolve into "service-marks."

Pool concludes by pointing out trends and placing them in historical context so that recurring issues need not be considered anew each time they are clothed in a different technical garb. For example, the present concern that anti-competitive tactics may be used by a vertically integrated AT&T against competing electronic publishers or by a vertically integrated cable operator against competing program suppliers is actually the same issue that the telegraph industry faced in the mid-1800's. At that time, news reporters in both the United States and Europe battled the telegraph companies over the issue of who would supply and control the news carried over telegraph wires.[92]

After offering a final review of the important economic concepts of marketplace allocation and monopoly, and their relevance to future technologies, Pool presents a set of principles as guidelines by which future policymakers can reconcile first amendment values with the developing electronic communications industry. One can only hope that his words will be available via all media so that whether by textbook, from computer terminal, or by word of mouth, all lawmakers will be able to digest the words of this excellent communicator.

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[89] Pool is similarly troubled by the decision to deregulate receive-only satellite earth stations. Id. at 222–23.

[90] 17 U.S.C. §§ 101–810 (1982); see Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979), aff'd in part, rev'd in part, 659 F.2d 963 (9th Cir. 1981), rev'd, 52 U.S.L.W. 4090 (U.S. Jan. 17, 1984).

[91] See Addison-Wesley Publishing Co. v. New York University, No. 82 Civ. 8333 (S.D.N.Y. filed Dec. 14, 1982) (this was a copyright infringement action brought by a publishing company and was settled in 1983).

[92] I. Pool, supra note 1, at 92–94.