New Technology and the First Amendment -
Breaking the Cycle of Repression

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by

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Consider the following scenario:

A federal regulator walks into a room and and is confronted with four television sets, each displaying the same program. The show features a steamy sex scene between a man and a woman, complete with nudity, adult language and lots of sweat. Although transparent to the viewer, each TV is fed via a different transmission source. The first television is receiving a terrestrial broadcast transmission, the second obtains the images by coaxial cable, the third is hooked to a VCR and the fourth is receiving a direct broadcast satellite ("DBS") feed. Leaving aside any questions of federal versus local jurisdiction, and assuming that the images are not obscene, what is the regulator's constitutional authority to control these images?

The answer is, well, it depends.

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For the broadcast transmission, it depends upon whether the images are sufficiently salacious to be considered "patently offensive" based on "contemporary community standards for the broadcast medium."[1] It also depends on whether the telecast is at a time of day when there is a "reasonable risk that children may be in the audience" — a concept that is far from settled.[2] Assuming these conditions are met, the government may require that the telecast be restricted to the appropriate time of day. With respect to the cable connection the government's ability to regulate is far more limited. Various courts have held that indecency regulations are invalid when applied to cable television.[3] As with broadcast television, however, the law remains a work in progress.

The answer is even more murky with respect to televisions three and four. While there is much logic and some case law to suggest that the VCR-originated images would receive the same constitutional protection as the print media,[4] the issue has never been formally resolved by the courts.[5] The appropriate First Amendment standard for DBS transmissions are even further from resolution. To the extent satellite programmers operate as broadcasters, making their transmissions freely available to all receivers, they would be

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[1] *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975), quoted in *FCC v. Pacifica Foundation*, 438 U.S. 726, 731-32 (1978). This notion of community standards specific to "the broadcast medium" may well be a moving target following the success of *NYPD Blue*.

[2] Thus far, the United States Court of Appeals for the D.C. Circuit has rejected the FCC's reasoning regarding the times within which there is a "reasonable risk" that children will be watching or listening. *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*ACT II*") (24-hour indecency ban rejected); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*") (12 a.m. to 6 a.m. "safe harbor" period rejected).

[3] *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D.C. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.* 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 9-10 (D.D.C. 1993); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982). *See generally* Note, *Content Regulation of Cable Television: "Indecency" Statutes and the First Amendment*, 11 RUTGERS COMPUTER & TECHNOLOGY L.J. 141 (1985).

[4] *See Video Software Dealer's Association v. Webster*, 968 F.2d 684 (8th Cir. 1992).

[5] Groskaufmanis, *What Films We May Watch: Videotape Distribution and the First Amendment*, 136 U. PA. L. REV. 1263, 1284 (1988).

subject to the same statutory requirements as terrestrial TV stations.[6] Additionally, Congress has determined that DBS operators shall be subject to many of the same "public interest" obligations as traditional broadcasters.[7] But as a constitutional matter, the spectrum scarcity that has served to justify less First Amendment protection for broadcasters appears inapplicable to DBS operators who may be able to provide hundreds of video channels.

It is likely to take years for our hypothetical federal regulator to know the constitutional limits of his authority with respect to the four televisions. And if case law develops as it has in the past, it is entirely possible — if not probable — that the four transmissions would be governed by distinct First Amendment standards. Moreover, by the time those legal standards are in place, there is likely to be a fifth television, fed by the telephone company's fiber optic network, and perhaps even a sixth, receiving transmissions from some other source such as terrestrial microwaves.[8]

What is Wrong With This Picture?

Certainly there are differences between the various transmission media beyond what may be readily apparent to the casual viewer. Broadcast signals come to the home free of charge and can be received by any television within range of the transmission; cable television requires a physical connection and is provided to customers by subscription; video tapes must be obtained from some external source and require additional hardware for playback; and DBS requires specialized receiving equipment and will be provided, for

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[6] 18 U.S.C. § 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[7] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (West Supp. 1993) ("1992 Cable Act")

[8] Various microwave delivery systems already exist, including satellite master antenna television ("SMATV"), multichannel multipoint distribution service ("MMDS") and local multipoint distribution service ("LMDS"). Each provides customers with programming otherwise available on cable television systems.

the most part, by subscription. But do these differences support constitutional distinctions between the various media?

Printed material comes in many forms and is distributed in a wide variety of economic arrangements. Leaflets, handbills and some newspapers are distributed without charge and are made available to all within the range of the publisher. In addition to such free distribution, newspapers are sent through the government mail system and sold on public rights of way. The same can be said of magazines. Some printed material can be read only with the aid of specialized equipment, such as a microfilm or microfiche reader, or — increasingly — an electronic book or personal computer. Text may be transmitted to the computer screen from a floppy disk or CD-ROM format, from an on-line service or, it is anticipated, from some over-the-air source. Despite these differences, the print media all are subject to the same First Amendment protections (although this proposition is largely untested with respect to electronic texts).

This Paper explores whether the First Amendment standards applicable to various communications media are consistent with settled constitutional principles, and whether such a multi-faceted approach can be sustained in light of rapid technological change. It examines the history of constitutional treatment of new technologies, and how the First Amendment status of communications media generally has corresponded to the regulatory classification scheme established by the government. Initially, new technologies are given little or no First Amendment protection. But as each medium gains cultural penetration and becomes more mainstream, courts are increasingly willing to recognize its First Amendment status. This evolutionary process has become more difficult and less reliable as the pace of technological change has accelerated and as regulatory distinctions among media have blurred. Accordingly, courts have been left with little guidance for developing new standards, as demonstrated by the search for the First Amendment status of broadcasting, cable television and common carriage.

Various theoretical approaches have been formulated to fill this void in judicial doctrine. This Paper separates the theories into three categories: the Incrementalist Perspective, the Revisionist Perspective and the Traditionalist Perspective. Incrementalism defends the existing method of gradual application of free speech rights to new media. Proponents of this approach support having different levels of protection for different media, reserving full protection only for print, and concluding that freedom of expression is maximized in the system as a whole. Revisionism generally supports the expanded use of regulatory power over new media based on a similar utilitarian balancing approach. Government intervention is justified under Revisionist theory, to the extent it results in more speech, thereby serving First Amendment values. By contrast, the Traditionalist Perspective maintains that the First Amendment's principal command is the separation of press and state. It rejects the idea that government may obtain some optimal level of public discourse by intervening in the choices of private speakers. Under this approach, traditional understandings of First Amendment law would be applied to all media.

The Paper concludes that the Traditionalist Perspective provides the only stable method of analyzing new media under the First Amendment. The Incrementalist approach has brought us to where we are today, with different standards for different media and no clear guidelines for the future. Worse still, the constitutional foundations upon which existing regulations are based (such as radio spectrum scarcity) are eroding away, while the underlying premise of Incrementalism — that each medium is a law unto itself — loses meaning as the various media converge. Revisionism, by contrast, elevates policy preferences over constitutional principle. Common among Revisionist theories is the selection of a transcendent First Amendment "value" that overrides the command that "Congress shall make no law. . . ," quite often to the exclusion of other First Amendment values. Such theories tend to overestimate the government's ability to correct perceived deficiencies in the marketplace of ideas and vastly underestimate the dangers of making the attempt. Moreover, when Revisionist theory proposes different First Amendment treatment

based on the medium of communication, it suffers from the same problem that plagues Incrementalism: technology evolves faster than the law can change, thus undercutting the factual predicates of regulation.

The Traditionalist Perspective, on the other hand, should help simplify First Amendment adjudication by ending the seemingly endless search for the appropriate standard for each medium. Instead, well-tested analytic approaches would be brought to bear in each case, such as whether the government's interest is compelling, the regulatory means chosen sufficiently narrow and whether the government's interest is, in fact, served. These and other traditional First Amendment inquiries are easily applied without regard to the medium of transmission. Doing so avoids the confusion of multiple standards and ends the need to constantly reassess the First Amendment as new media emerge. It also allows the law to adapt more quickly to new factual developments, and thus provides more stable and predictable protection for new forms of expression.

Some may characterize the Traditionalist Perspective as simply applying the "print model" of the First Amendment to all electronic media. While it has this effect, a Traditionalist understanding of the First Amendment goes further. It suggests that the search for different models, whether the "print model," or the "broadcast model" or something else, is inherently futile. Any model that is based on the particular characteristics of a given medium becomes obsolete as technology evolves. Moreover, the typically long periods in which courts and policymakers grope for new models lead to confusion as well as the use of interim standards that often undermine free speech values.

I. Cable Television at the Crossroads

The Cable Communications and Consumer Protection Act of 1992 focused attention as never before on the First Amendment status of cable television operators and programmers. As part of a sweeping bid to reregulate the cable industry, the 1992 Act imposed a wide variety of new obligations on cable operators, including must-carry for

commercial and non-commercial broadcasters,[9] retransmission consent,[10] leased-access channel rate regulation,[11] indecency restrictions on both leased-access and public access channels,[12] notice requirements for previews of unsolicited R-rated movies on premium channels,[13] and vertical and horizontal ownership limits.[14] Not surprisingly, a First Amendment challenge was filed the same day the must-carry requirements became law.[15] A broadly-based First Amendment attack also was brought against most other provisions of the Act.[16]

As these cases have progressed, the central question has been the selection of a First Amendment standard for cable television. In *Turner Broadcasting System v. FCC*, argued in the Supreme Court on January 12, the government argued that must carry rules trigger only minimal scrutiny as "a reasonable attempt to correct . . . market dysfunction" that restricts the transmission of broadcast signals.[17] While acknowledging that "cable television is not affected by the scarcity of the broadcast spectrum," the government asserted that cable should be governed by a constitutional standard "comparable" to that applied to broadcasting.[18] Alternatively, the government argued that must carry rules could be upheld under what it described as the "more exacting standard" of *United States* v.

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[9]47 U.S.C.A. §§ 534-35 (West Supp. 1993).

[10]47 U.S.C.A. § 325(b) (West Supp. 1993).

[11]47 U.S.C.A. § 532(c) (West Supp. 1993).

[12]47 U.S.C.A. §§ 531, 532(h) (West Supp. 1993)

[13]47 U.S.C.A. § 544(d) (West Supp. 1993)

[14]47 U.S.C.A. § 533(f) (West Supp. 1993).

[15]*Turner Broadcasting System v. FCC*, 819 F. Supp. 32, 37 (D.D.C. 1993).

[16]*Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993).

[17]Brief for the Federal Appellees, *Turner Broadcasting System v. FCC*, No. 93-44, at 13.

[18]*Id.* at 14, 32-36.

O'Brien which is applicable to content-neutral regulations that have incidental effects on speech.[19] The District Court had upheld the must carry rules using this constitutional standard.[20]

The cable industry, in sharp contrast, argued that First Amendment "strict scrutiny," the standard applicable to printed communications, should be used to analyze the must carry rules. The rules, according to the industry briefs, are content-based because they compel carriage on the grounds that local broadcast signals convey information important to the public interest.[21] On a more general level, however, the industry argued that none of the particular characteristics of cable communications justified a lower level of constitutional scrutiny. Cable television operators do not have power to distort the market for television signals, according to the industry, and such economic power does not justify a different constitutional approach.[22] Nor do such purported factors as a scarcity of physical space to place cables or the receipt of a government benefit via franchise rights support a lower First Amendment standard.[23]

The debate in *Turner Broadcasting System* regarding the applicable First Amendment standard for cable television merely summarizes an ongoing dispute of the past two decades. While the Supreme Court in 1979 described First Amendment concerns about cable access programming requirements "not frivolous" it did not take a position on the

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[19] *Id.* at 37-47.

[20] *Turner Broadcasting System v. FCC*, 819 F. Supp. at 41.

[21] *E.g., Brief for Appellant National Cable Television Association, Inc., Turner Broadcasting System v. FCC*, No. 93-44, at 16-23; *Brief for Appellant Time Warner Entertainment Company, L.P., Turner Broadcasting System v. FCC*, No. 93-44, at 14-21.

[22] *Brief for Appellant Time Warner Entertainment Company, L.P., Turner Broadcasting System v. FCC*, No. 93-44, at 33-36.

[23] *Brief for Appellant Time Warner Entertainment Company, L.P., Turner Broadcasting System v. FCC*, No. 93-44, at 32-33, 36-38.

correct approach.[24] In the years since the Court has expressly avoided articulating a First Amendment standard for cable television.[25] Given this void, lower courts have been forced to find their way as best they can in the constitutional thicket. This led to litigants to "propose clever and flavorful analogies to other corners of first amendment law on which more light has been shed," to help courts decide the necessary threshold question of what law to apply.[26]

At least until the government's current position in *Turner* was set out, most could agree at least that the First Amendment standard for broadcasting was inapposite. In *Home Box Office, Inc. v. FCC,* for example, the U.S. Court of Appeals for the D.C. Circuit noted that "the First Amendment theory espoused in *National Broadcasting Co.*[, 319 U.S. 192 (1943)] and *Red Lion Broadcasting Co.*[, 395 U.S. 367 (1969)] cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent."[27] But while most courts in the ensuing years concluded that the First Amendment standard for broadcasting was inapplicable to cable television, they could not agree on a uniform

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[24] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979). The dispute regarding the First Amendment status of cable goes back even further if one includes those cases in which free speech claims were summarily rejected. *E.g., Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968); *Buckeye Cablevision v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967); *Idaho Microwave v. FCC*, 352 F.2d 729 (D.C. Cir. 1965); *Carter Mountain Transmission Corp.* v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

[25] *Leathers v. Medlock*, 499 U.S. 439 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986). *See also Turner Broadcasting System v. FCC*, 113 S. Ct. 1806 (1993) (denial of application for injunction) ("we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters").

[26] *Century Communications Corp. v. FCC*, 835 F.2d 292, 298 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988).

[27] 567 F.2d 9, 44-45 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). *See also Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *Omega Satellite Prods. Corp. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982); *Cruz v. Ferre*, 571 F. Supp. at 131; *Community Television, Inc. v. Roy City*, 555 F. Supp. at 1168-69.

constitutional approach.[28] Some courts justified even greater regulation of cable television on the theory it is a natural monopoly,[29] while others rejected this proposition.[30]

The debate outside the courtroom has been no less intense. Some have argued that cable television systems are like newspapers, and should be accorded full First Amendment status.[31] Others have focused on some of the particular characteristics of cable technology, or on various public policy goals, and have argued that cable television should be subject to a less demanding constitutional regime.[32] One experienced observer of developments in telecommunications law noted snidely that the courts have begun to recognize "yet another First Amendment right: the right to string wires on poles."[33]

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[28] *See* U.S. Department of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, Appendix C (June 1988). Various courts expressly eschewed any attempt to set a standard for cable. *E.g., Century Communications, Inc. v. FCC*, 835 F.2d at 298; *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985), *cert. denied, sub nom. National Ass'n. of Broadcasters v. Quincy Cable TV, Inc.*, 106 S. Ct. 2889 (1986); *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1327 (N.D. Cal. 1987).

[29] *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Prods. Inc. v. City of Indianapolis*, 694 F.2d at 128; *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976 (D.R.I. 1983),*vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

[30] *Preferred Communications, Inc. v. City of Los Angeles*, 1994 WL 2799 (9th Cir.); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1449-50; *Pacific West Cable Co.*, 672 F. Supp. 1322 (E.D. Cal. 1987); *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986).

[31] *E.g.*, J. Emord, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1991); L. Powe, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 216-47 (1987); G. Shapiro, P. Kurland & J. Mercurio, CABLESPEECH (1983); Cole, *The Cable Television "Press" and the Protection of the First Amendment — A Not So "Vexing Question,"* 28 CAL. WESTERN L.REV. 347 (1991); Saylor, *Municipal Ripoff: The Unconstitutionality of Cable Television Franchise Fees and Access Support Payments*, 35 CATH. U. L. REV. 671 (Spring 1986); Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867 (1983).

[32] *E.g.*, Price, *Congress, Free Speech, and Cable Legislation: An Introduction*, 8 CARDOZO ARTS & ENT. L. J. 225 (1990); Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495 (1989); Brenner, *Cable Television and Freedom of Expression*, 1988 DUKE L.J. 329; Miller & Beals, *Regulating Cable Television*, 57 WASH. L. REV. 85 (1981).

[33] Robinson, *Implications of the Court's Video Programming Decision: Telcos Will Enter the Cable Industry in a Big Way*, THE CABLE-TELCO REPORT (September 13, 1993) at 13.

But this is a somewhat strange statement in the First Amendment context. Logically extending its emphasis on the method of transmission, it suggests that "freedom of the press" is nothing more than the right to spread ink on paper. Lofty statements about a free press being the bulwark of human liberty tend to lose their punch when one is focused on the messy and technical elements of the printer's art. It is strange as well in light of Vice President Gore's insistence that new communications media on the wired network will "entertain as well as inform. [T]hey will educate, promote democracy, and save lives." The Vice President based his vision on the understanding that the various media are converging.[34] If the National Information Infrastructure is to provide this rebirth of free expression and democratic ideals, how could it be that the means of providing it is less worthy of constitutional protection?

The idea of denigrating the First Amendment status of cable by virtue of its means of delivery underscores an essential point that often is obscured in the debate: the outcome of the current controversy will determine not just the First Amendment rights of cable operators, but of all electronic publishers.[35] The constitutional standard for cable television likely will become the rules of the road for the electronic superhighway. Thus, choices made today regarding the right to speak electronically will determine the vitality of the First Amendment in the next century.

II. The Real Issue: Applying the First Amendment to New Technologies

A. Transition to the Multimedia Age

It is entirely likely that by the time the Supreme Court finally takes a definitive stand on cable television's First Amendment status, cable could be a relic of the past. Some

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[34]Speech of Vice President Al Gore at UCLA, Los Angeles, California, January 11, 1994.

[35]*See, e.g., Chesapeake & Potomac Telephone Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993); *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10-11 (D.D.C. 1993) (First Amendment status of DBS operators considered).

people suggest this is already happening with broadcasting. Although broadcasting continues to be a healthy industry, its demise has been predicted with increasing frequency,[36] and broadcasters have become uneasy about being left behind on our nation's trip down the electronic superhighway.[37] At the same time, while many courts have questioned the continuing validity of the scarcity doctrine, they have not been able to bring themselves to revisit a First Amendment standard predicated on the particular technical and market characteristics of the broadcasting industry circa 1969.[38] Certainly by the time the Supreme Court reconsiders *Red Lion*, traditional broadcasting will be an even less potent

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[36] *See* Federal Communications Commission, *Through The Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change* (OPP Working Paper No. 24, November 1988) ("*Through The Looking Glass*"); K. Auletta, THREE BLIND MICE (1990). Some advertising executives have suggested that within the foreseeable future the networks' "days as a mass medium will be over." Levine, *The Last Gasp of Mass Media?* FORBES, September 17, 1990 at 9. *See also* Zoglin, Goodbye to the Mass Audience, TIME, November 19, 1990 ("The era of the mass TV audience may be ending . . . "); Carter, *Little Improvement in Sight As Networks End Bad Year*, NEW YORK TIMES, December 24, 1990 ("a senior network executive, who insisted on remaining anonymous [stated,] 'We're presiding over networks as they head out of business.'"); Werts, *Look Who's Watching*, NEWSDAY, December 23, 1990 ("the networks are dying, and single-interest cable channels are premiering monthly"); Mahoney, *Network Woes Are Barter's Gain*, ELECTRONIC MEDIA, March 25, 1991 at 16 (According to Tim Duncan, executive director of the Advertiser Syndicated Television Association, the networks' ability "to deliver 99 percent of the nation at the flip of a switch . . . isn't the case in many network dayparts anymore. That doesn't exist outside of prime time and shortly will not exist in prime time."); Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B2; Shales, *The FCC and the Threat to Free TV*, WASHINGTON POST, April 8, 1991 at C2. However, reports of broadcasting's demise may be just a bit premature. *See* Foisie, *TV Finances Fare Mostly Better*, BROADCASTING & CABLE, February 7, 1994 at 42.

[37] *See* Stern & McAvoy, *Broadcasters Claim Stake on Superhighway*, BROADCASTING & CABLE, February 7, 1994 at 48.

[38] The constitutionality of broadcast regulation is not an immutable fact; it is based on "'the present state of commercially acceptable technology' as of 1969." *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969). *See Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987). The Supreme Court has noted that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). Both courts and commentators have questioned the continuing validity of the scarcity rationale for the constitutionality of regulating broadcast content. *E.g., FCC v. League of Women Voters of California*, 468 U.S. 364, 376-77 n.11 (1984); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring); *News America Publishing, Inc.*, 844 F.2d at 811 ("The Supreme Court . . . has recognized that technology may render the [scarcity] doctrine obsolete — indeed, may have already done so."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1984). *See* L. Tribe, AMERICAN CONSTITUTIONAL LAW 1005-06 (2d ed. 1988) ("reconsideration [of the scarcity argument for broadcast regulation] seems long overdue").

force in the context of the rise of other new communications technologies. And the same fate may await cable television.

Vice President Gore has proclaimed that, like our Universe,

> current communications industries — cable, local telephone, long distance telephone, television, film, computers, and others — seem to be headed for a Big Crunch/Big Bang of their own. The space between these diverse functions is rapidly shrinking — between computers and televisions, for example, or inter-active communication and video. But after the next Big Bang, in the ensuing expansion of the information business, the new marketplace will no longer be divided along current sectoral lines. There may not be cable companies or phone companies or computer companies, as such. Everyone will be in the *bit* business. The *functions* provided will define the marketplace.[39]

This is not a new insight, but it is an especially important point. Over a decade ago Ithiel de Sola Pool described the "convergence of modes" that is "blurring the lines between media." He noted that "[a] single physical means — be it wires, cables, or airwaves—may carry services that in the past were provided in separate ways. Conversely, a service that was provided in the past by any one medium — be it broadcasting, the press, or telephony — can now be provided in several different physical ways."[40] The Congressional Office of Technology Assessment similarly found that "technology is ushering in a convergence of forms of press publishing that were once partitioned by technology: print publishing, mail, broadcasting, and telephone."[41] This change in the media environment has seriously complicated the once-simple task of regulatory classification.[42]

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[39]Speech of Vice President Al Gore at UCLA, Los Angeles, California, January 11, 1994.

[40]I. Pool, Technologies of Freedom 23 (Cambridge, Mass.: Harvard University Press, 1983). *See also* Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium From the Message*, 11 FORDHAM URBAN L. J. 163, 166 (1982); *Media Blur Predicted By Turn of Century*, MULTICHANNEL NEWS (May 2, 1988).

[41]U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 (Washington, DC: U.S. Government Printing Office, January 1988) at 27.

[42]*See generally* Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U. L. REV. 529, 571-76 (1983).

This long anticipated convergence of communications media has begun, and with a vengeance. Announced mergers and strategic alliances in just the second half of 1993 have led federal officials to anticipate "an aggressive movement toward the future multimedia marketplace."[43] This phenomenon is causing extensive changes in communications networks, with trends toward reduced costs, declining sensitivity to distance, faster communications, increasing information traffic, greater channel diversity, increasing interactivity, increasing flexibility and expandability and increasing interconnectivity.[44]

More relevant for purposes of this Paper, however, is the fact that such evolution is changing the very concept of a cable system. FCC Commissioner Andrew Barrett has pointed out that "to pursue the multimedia future, cable companies must replace their existing one-way, coaxial-based networks with optic-fiber based interactive information superhighways."[45] In fact, this transformation is already underway. Since 1989, the use of fiber optics by cable operators has increased by 675 percent and is expected to grow by 25 percent annually through the next decade.[46] Most cable plant installed since 1987 has interactive capability, and certain projects, such as Time Warner's "Full Service Network" in Orlando, are using digital switching to provide such services as two-way video, video

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[43] *See, e.g.*, Barrett, *Shifting Foundations: The Regulation of Telecommunications in an Era of Change*, 46 FED. COMM. L.J. 39, 40 (December 1993). FCC Commissioner Barrett analyzed the probable impact on media development of recently announced mergers, including those proposed by Bell Atlantic and TCI, Viacom or QVC with Paramount Communications, Inc., NYNEX and Viacom, U.S. West and Time Warner, BellSouth and Prime Management, and Southwestern Bell and Hauser Communications. *Id.* at 43-47. He concluded that "[c]urrent developments signal that the broadband infrastructure of the future will evolve as a multimedia marketplace." *Id.* at 48.

[44] W. R. Neuman, *The Technological Convergence: Television Networks and Telephone Networks*, printed in TELEVISION FOR THE 21ST CENTURY: THE NEXT WAVE 3-17 (Aspen Institute, C. Firestone, ed. 1993). *See also* W.P. Dizard, OLD MEDIA/NEW MEDIA 38-56 (New York: Addison-Wesley/Longman 1993); G. Gilder, LIFE AFTER TELEVISION (New York: W.W. Norton & Co., 1992).

[45] *Id.* at 49.

[46] National Cable Television Association, TWENTY FIRST CENTURY TELEVISION 9 (1993).

on demand, interactive full-motion video educational services and interactive video games.[47]

Moreover, it is important to keep in mind that the changes affecting the cable television industry are not occurring in a vacuum. Technology is evolving along various lines, each of which promises to expand individual citizens' access to information. Thus, in addition to the technical advancements in the cable industry, telephone companies are aggressively pursuing the development of video and data networks, both with cable partners and independently;[48] the FCC has authorized PCS service, which promises to add wireless two-way data transmission capabilities;[49] satellites for DBS service were recently launched, opening the door to a competitive method of digital video delivery;[50] interactive information for personal computers and other consumer devices is increasingly available on CD-ROM;[51] and on-line computer services are becoming increasingly popular, delivering, among a great many services, interactive newspapers and magazines.[52]

These developments are quite unlike previous transformations of media technology. For example, the introduction of steam-powered presses and inexpensive pulp paper in the mid-nineteenth century made possible book and newspaper publication on a mass scale, but it was essentially an enhancement of an existing method of communication.[53] The second

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[47]Id. at 15, 33.

[48]Barrett, *supra* at 40-48.

[49]*Amendment of the Commission's Rules to Establish New Personal Communications Services*, Gen. Docket No. 90-314, FCC 93-451 (released October 22, 1993).

[50]*See, e.g., Prices for DBS Programming Launched*, BROADCASTING & CABLE, January 3, 1994 at 47 (DBS service to customers is scheduled to begin in April 1994).

[51]Dizard, *supra*, at 26-29. *See* Langberg, *Gabriel Brings CD-ROM Into the Rock Revolution*, WASHINGTON BUSINESS, January 24, 1994 at 21.

[52]*E.g.*, Shaw, *Inventing the 'Newspaper' of Tomorrow*, LOS ANGELES TIMES, June 3, 1991 at A1; Shaw, *'Electronic' Newspaper Emerging After Slow Start*, LOS ANGELES TIMES, June 3, 1991 at A1.

[53]Dizard, *supra* at p.19.

transformation, brought about by the introduction of broadcasting, introduced a totally new means of conveying information.[54] But it was a means that was not a complete substitute for print or for speech. Each medium continued to play a fairly distinct role in the information marketplace. The current transformation of the media, however, is of a distinctly different nature. Multiple methods of delivering video images are evolving including multimedia forms that combine video and print. Print can be delivered electronically, and, with interactive capability, assumes the attributes of speech. Many examples of convergence can be described, but the point is, the current transformation is not conducive to analyzing new media forms in terms of their particular characteristics.[55]

B. Historical Treatment of New Technologies

1. Cycles of Repression

In many ways, censorship is the bastard child of technology. Before the printing press, government suppression of expression was largely unnecessary and seldom practiced. There was no central authority over scribes, nor was there any need for one. They worked in isolation on individual manuscripts which largely were incapable of causing a major controversy.[56] But the advent of the printing press changed all of that.

Commonly cited examples of censorship of the sixteenth and seventeenth centuries were direct reactions to "a new communications environment in which dissatisfied individuals possessed a capacity for finding allies or reaching others in ways that had not existed previously."[57] Accordingly, it "is no accident that shortly after Gutenberg

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[54]*Id.*

[55]*See, e.g.*, Corn-Revere, *Multimedia and the Future of the First Amendment*, QUICKTIME FORUM, September/October 1993 at 20, 22.

[56]Pool, *supra* note 40 at 14-15. *See also* M. Katsh, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW 136 (New York: Oxford University Press, 1989) ("Writing itself was mainly a means of acquiring and exercising power but was not a threat to power. Those in power did not worry about it or have to censor it.").

[57]Pool, *supra* note 40 at 15-16; Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1467 (1989); *See* R. Smolla, FREE SPEECH IN

invented the printing press, official authorities invented the first censorship bureau."[58] As M. Ethan Katsh explained in his book, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW:

> The spread of printing in the last half of the 15th century created a new communications environment that undermined the authority of powerful institutions. Those whose power derived from their ability to control the written word were threatened by a reduced ability to control the new medium of print. As a result, many censorship laws were enacted, trials held, and punishments meted out. By the late 16th century, 'censorship of the printed word had become the universal practice of the lay and church authorities throughout Europe.'"[59]

Thus, governments employed censorship because of an acute awareness that the authority of the state waned as the power of the press ascended. In particular, press licensing laws were "an attempt to foster only books that promoted the values or interests of the authorities, something the scribal system did automatically."[60]

Yet even as the new technology of print increased the government's need to censor, it thwarted the accomplishment of this state objective. The ability of the press to mass produce books and other works negated most efforts to exert control.[61] In Britain, for example, the government successively attempted the creation of state monopolies, press licensing, taxation and criminal libel as methods of restricting the press.[62] In the end, however, such attempts at control were abandoned, not "due to any philosophical

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AN OPEN SOCIETY 337-338 (New York: Alfred A. Knopf, 1992); L.R. Sussman, POWER, THE PRESS AND THE TECHNOLOGY OF FREEDOM 10-12 (New York: Freedom House,1989); THE FIRST AMENDMENT -- THE CHALLENGE OF NEW TECHNOLOGY 9-11 (S. Mickelson and E. Mier Y Teran eds., New York: Praeger 1989).

[58]Smolla, *supra* note 57 at 338.

[59]M. Katsh, *supra* note 56 at 136, quoting S.H. Steinberg, 500 YEARS OF PRINTING 260 (3d ed. Baltimore, 1974). *See also* Pool, *supra* note 40 at 14-15; Loevinger, *Earl F. Nelson Lecture: Law, Technology and Liberty*, 49 MISSOURI L. REV. 767, 777 (1984).

[60]Katsh, *supra* note 56 at 142; Pool, *supra* note 40 at 15-16.

[61]Katsh, *supra* note 57 at 1469-70. It has been suggested that as new electronic communications technologies become universal, "censors will be overwhelmed, and finally made superfluous." Sussman, *supra* note 57 at 12.

[62]Pool, *supra* note 40 at 15-16.

conclusion concerning the advisability of a free press but primarily to an inability to devise an enforceable system of regulation capable of achieving the results desired."[63]

Consequently, the rise and fall of government regulation over the press has tended to be cyclical. New technologies tend to increase pressure for government control by challenging established state policies and by threatening to undermine official authority. The government responds by enacting measures to reassert its authority and to otherwise regulate the press. Such efforts ultimately fail, however, because of the power of a given technology or because of technological expansion of the means of communication. This evolutionary process reinforces movement toward a system of free expression.

2. The American Experience With New Technologies

By adopting the First Amendment, the United States became the first nation to embrace the new technology as an essential component of its political system. This choice evolved not only from the colonists' experience with suppression but from the Framers' appreciation for "the highly active and uninhibited communications environment" that print made possible.[64] It has been suggested that the nature of the technology and the actual practices of publishers of the period may be a better guide to understanding the First Amendment than attempts to divine the intentions of the Framers by dissecting their words or reading contemporary common law. Thus, while "[t]he particular words chosen for the First Amendment may have been fortuitous or accidental, . . . the evolution of a law that was more protective of expression than anything that existed pre-Gutenberg was not."[65]

But while the new technology of the printing press was "born free" in the United States, this break with tradition was not sufficient to end the cycle of repression. As new

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[63]M. Katsh, supra note 56 at 145 (citation omitted). *See also id.* at 146-65.

[64]*Id.* at 1470.

[65]*Id.*, at 148. *See generally*, L. Levy, EMERGENCE OF A FREE PRESS (New York: Oxford University Press, 1985)

technologies have been introduced, courts and other policymakers have been slow to recognize their First Amendment status. Professor Laurence Tribe has noted that the decisions "reveal a curious judicial blindness, as if the Constitution had to be reinvented with the birth of each new technology."[66] Thus, contrary to the First Amendment tradition, and particularly with the rise of the regulatory state, new technologies now are born in captivity.[67]

Examples are not hard to find. In 1915, film was too new a medium to qualify for constitutional protection as "speech." The Supreme Court in a trilogy of cases[68] upheld the authority of state censorship boards to subject moving pictures to prior restraint. Analyzing the regulatory scheme in terms of state constitutional protections for freedom of speech, the Court found, as a matter of "common sense," that the constitution was inapplicable to cinema.[69] The Court said that the technology of film poses a special danger that "a prurient interest may be excited and appealed to," and noted that "there are some things which should not have pictoral representation in public places and to all audiences."[70] It concluded that "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion."[71]

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[66]Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (San Diego, California, March 26, 1991).

[67]*See generally* Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071 (1985). *See also* Groskaufmanis, *What Films We May Watch: Videotape Distribution and the First Amendment*, 136 U. PA. L. REV. 1263, 1284 (1988).

[68]*Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915); *Mutual Film Co. v. Industrial Comm'n of Ohio*, 236 U.S. 247 (1915); *Mutual Film Corp. of Missouri v. Hodges*, 236 U.S. 248 (1915).

[69]*Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. at 244.

[70]*Id.* at 242.

[71]*Id.*

Courts first confronted the First Amendment status of broadcasting in 1932 and again were reluctant to extend constitutional protection to a new medium of expression. In *Trinity Methodist Church, South v. Federal Radio Comm'n*,[72] the U.S. Court of Appeals for the District of Columbia Circuit upheld against constitutional attack a Federal Radio Commission decision to revoke a radio station license.[73] The FRC argued in its brief to the court that broadcasting is not protected speech under the First Amendment.[74] Although the court did not exclude radio from constitutional protection in the same stark terms used by the Supreme Court in reference to film seventeen years earlier, the result was the same. It described radio as a mere "instrumentality of commerce," and upheld the license revocation as simply "application of the regulatory power of Congress in a field within the scope of its legislative authority."[75]

The "application of regulatory power" at issue was the denial of a license renewal because of a licensee's intemperate attacks on public officials and for broadcasts that were "sensational rather than instructive."[76] The Supreme Court declined to review the holding, even though it had struck down a Minnesota press law a year earlier on srikingly similar facts.[77] When it finally did consider the First Amendment rights of broadcasters, the Court

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[72]62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

[73]The FRC was the predecessor agency to the Federal Communications Commission.

[74]*See* Powe, *supra* note 31 at 16. When placed in historical context, the FRC's position may seem less extreme. *See* Price, *Congress, Free Speech, and Cable Legislation: An Introduction*, 8 CARD. ARTS & ENT. L. J. 225, 230 (1990) ("At the outset, radio was perceived primarily not as a medium for speech, but as a device to aid ships at sea. . . . No substantial body of thought conceived of radio or television in their infancy, as a new form of newspaper.").

[75]*Trinity Methodist Church, South*, 62 F.2d at 850-51.

[76]*Id.*

[77]288 U.S. 599 (1933). *Compare Near v. Minnesota*, 283 U.S. 697 (1931) (scandalous attacks on public officials by newspaper protected from prior restraint). For an insightful comparison of the two cases, *see* Powe, *supra* note 31 at 13-21.

recognized some application of constitutional protections, but at a lower level than to "traditional" media.[78]

Over time, a growing number of courts have questioned the factual predicates underlying the constitutional status of broadcasting.[79] But for more than six decades, the law has allowed greater government intrusion into the editorial processes of broadcasters than traditional media. Courts have continued to be exceedingly reluctant to revisit the First Amendment standard for broadcasting, despite overwhelming evidence that the conditions supporting the weaker constitutional protections have changed.[80] As noted earlier, courts have shown a similar ambivalence about applying First Amendment protections to cable television.

The practice of extending First Amendment rights incrementally has been supported rhetorically by treating different communications delivery methods as being constitutionally distinct. As Justice Robert Jackson wrote in his concurring opinion in *Kovacs v. Cooper* :

> The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself. . . .[81]

This oft-repeated maxim of First Amendment jurisprudence that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them"[82] has been institutionalized through the intermediary of a regulatory classification

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[78] *E.g., NBC v. United States*, 319 U.S. 192 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[79] *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 n.11, 379 n.12 (1984); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993) (Arnold, C.J., concurring); *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1984).

[80] *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, *rehearing en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 F.2d 919 (1987).

[81] 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

[82] *Red Lion Broadcasting Co.*, 395 U.S. at 386.

scheme. Differences in the characteristics of new media first result in some type of categorization and each category is accorded different treatment in constitutional inquiries. Or, as the FCC's Office of Plans and Policy noted, "[t]he regulatory/legal world is ruled by definitions."[83]

3. The Regulatory State and Freedom of Expression

When different methods of communication were created and put to commercial use, the government classified the media according to the types of services provided and subjected them to various levels of regulation. The Communications Act of 1934 set out the basic regulatory models: private radio, broadcasting, common carrier and, with the addition of the Cable Communications Act of 1984, cable television.

Broadcasting, typified by over-the-air radio or television, is defined as "the dissemination of radio communications intended by the public" and broadcast licensees are charged with certain "public trustee" obligations.[84] These include requirements that licensees serve their community needs and interests,[85] that licensees provide reasonable amounts of air time to candidates for federal elective office[86] and "equal opportunities" to appear on air to candidates at all levels whose opponents have appeared,[87] that licensees

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[83] *See* Federal Communications Commission, *Through The Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change* 21 (OPP Working Paper No. 24, November 1988) ("*Through The Looking Glass*").

[84] 47 U.S.C. § 153(o).

[85] *Id.* § 307(b); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 (1968); *Malrite TV of New York v. FCC*, 652 F.2d 1140, 1144 (2d Cir. 1981).

[86] 47 U.S.C. § 312(a)(7).

[87] *Id.* at § 315(a)(1).

not transmit obscene or indecent programming,[88] and that licensees announce sponsored programming.[89]

Common carriers, typified at least originally by standard telephone service providers, are defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy."[90] The Act's definition also stresses that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier.[91] Title II of the Communications Act requires carriers to provide service upon reasonable request therefor, at reasonable rates and without discrimination between customers.[92] Also, unlike broadcasters, common carriers generally have no editorial control over communications, but rather, transmit intelligence of a customer's design and choosing.[93]

Private radio generally covers all users of the radio spectrum that are not involved in broadcasting or common carrier service. The regulatory category is a catchall for "nationwide and international uses of radio by persons, businesses, state and local governments, and other organizations licensed to operate their own communications systems for their own use as an adjunct of their primary business or other activity."[94]

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[88] Id. at § 312(a)(6); 18 U.S.C. § 1464.

[89] 47 U.S.C. § 317.

[90] *Id.* at § 153(h).

[91] *Id.*

[92] Id. §§ 201-202. *See National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[93] *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1203 (D.C. Cir. 1984) ("the sine qua non of a common carrier is the obligation to accept applicants on a non-content oriented basis"); *Frontier Broadcasting Co.*, 24 F.C.C. 251, 253-55 (1958). *See* Note, *Common Carriers Under the Communications Act*, 48 U. CHICAGO L. REV. 409, 428 (1981). *But see Carlin Communications, Inc. v. Southern Bell Telephone & Telegraph Co.*, 802 F.2d 1352 (11th Cir. 1986); *Carlin Communications, Inc. v. The Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987).

[94] 47 C.F.R. § 0.131 (1987).

Eligibility for private carrier status is generally limited to certain well-defined categories, such as public safety radio services, special emergency radio services, industrial radio services and land transportation radio services.[95] But service within a designated category is no guarantee of regulatory treatment as a private operator. If a licensee acts as a common carrier within its range of permissible service, for example, by holding itself out indiscriminately to serve all those who may benefit from its particular offering, it will be treated as a common carrier.[96] The practical consequence of qualifying for private carrier status is exemption from broadcast or common carrier regulations.[97] This is not to say that private radio operators are entirely unregulated. Rather, the Commission imposes various technical and procedural rules to allocate radio spectrum and to ensure its orderly use.[98]

Cable television initially defied classification as either broadcasting or common carriage. To resolve this confusion, Congress created a new but complex regulatory definition in the Cable Communications Policy Act of 1984, defining a "cable system" as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . .[99]

The Act provides guidelines for cable regulation through local franchising, with the proviso that cable systems "shall not be subject to regulation as a common carrier or utility."[100] But

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[95]*See* 47 C.F.R. Part 90 (1987).

[96]*NARUC I*, 525 F.2d at 642-44.

[97]*Id.* at 645.

[98]See 47 C.F.R. Part 90 (1987). *See generally Direct Broadcast Satellite Report and Order*, 90 F.C.C.2d 676 (1982).

[99]47 U.S.C. § 522(6). The Cable Act expressly excludes from the definition (1) a facility that serves only to transmit the signals of one or more television stations; (2) a facility that serves only subscribers in multiple dwelling units under common ownership, management or control (so long as no public rights-of-way are used); (3) common carrier facilities regulated under Title II of the Communications Act unless video programming is transmitted directly to subscribers; and (4) facilities of electric utilities when used solely for operating utility systems. *Id.*

[100]*Id.* at § 541(c).

it is not entirely clear what this statement means. Although the Act avoids imposing certain indicia of common carrier status it treats cable operators as common carriers in other respects. For example, operators are required to set aside channel capacity under reasonable price, terms and conditions for "leased access" by unaffiliated entities, rates in most communities are regulated according to complex formulas and operators are prohibited from exerting any editorial control over the leased access programming.[101]

Particularly with the traditional classifications, designation of a particular regulatory pigeonhole for a given medium has a profound effect on determining the relevant constitutional standard to be applied. For example, courts have recognized sharply different First Amendment rights for broadcasters compared to common carriers. But dictum that "of all the forms of communication, it is broadcasting that has received the most limited First Amendment protection"[102] is somewhat misleading; common carriers are given less protection in terms of operators' editorial control.[103]

This difference was highlighted in the Supreme Court's opinion in *Columbia Broadcasting System v. Democratic National Committee*.[104] The Court held that a broadcast licensee could have a blanket policy of refusing to air paid editorial announcements without running afoul of the public interest mandate of the Communications Act. In reaching this conclusion, the Court examined the legislative history of the Radio Act of 1927 and the Communications Act of 1934 and found that Congress considered and "firmly . . . rejected the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public

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[101] *Id.* at § 532. *See generally* Cable Communications Consumer Protection and Competition Act of 1992, 47 U.S.C.A. §§ 532(c) (West Supp. 1993).

[102] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[103] *But see Chesapeake & Potomac Telephone Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993) (cross ownership restrictions on common carriers struck down using First Amendment rationale).

[104] 412 U.S. 94, 105-14 (1973).

issues."[105] After all, the Court reasoned, the Communications Act specifies that a person "engaged in radio broadcasting shall not . . . be deemed a common carrier."[106] Common carriers, then, would appear to receive the lowest level of First Amendment protection, for they do not have a recognized right to speak on their own and are denied editorial control over their communication traffic.[107]

Broadcasting, at least in some important respects, has been accorded less First Amendment deference than its closest video competitor, cable television. Even without a fully articulated constitutional standard for cable, courts have held that certain regulations permissible for broadcasters could not be applied to cable.[108] This is perhaps best illustrated by the Federal Communications Commission's policy restricting indecent radio and television programming.[109] In 1988, the FCC issued a notice of forfeiture to a Kansas City television station for a prime-time broadcast of the uncut film *Private Lessons*, holding that the movie was "indecent" within the meaning of the U.S. Criminal Code. The film depicted the seduction of a teenage boy by his governess and contained some nudity.

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[105] *Id.* at 105-08.

[106] *Id.* at 108-09, quoting 47 U.S.C. § 152(h).

[107] *See United States v. Western Electric Co.*, 552 F. Supp. 131, 189-90 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Electric*, 673 F. Supp. 525, 586 n.273 (D.D.C. 1987). *But see Chesapeake & Potomac Telephone Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993); *Carlin Communications, Inc. v. Southern Bell Telephone & Telegraph Co.*, 802 F.2d 1352 (11th Cir. 1986); *Carlin Communications, Inc. v. The Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987).

[108] *E.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403-04 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *Quincy Cable TV, Inc.*, 768 F.2d at 1450; *Century Federal, Inc.*, 648 F. Supp. at 1470-75. However, early cases, decided before the cable industry developed as a serious competitor to broadcasting, treated the two technologies as constitutionally indistinguishable. *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968). *See Quincy Cable TV, Inc.*, 768 F.2d at 1443-44 (citing cases).

[109] The FCC's constitutional authority to regulate indecent broadcast programming was recognized in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). However, the Supreme Court has emphasized the narrowness of its *Pacifica* holding. *See Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983).

Although the notice was later withdrawn on other grounds, it was the first time the Commission stated its intention to fine a television licensee for indecent broadcasts.[110]

But "Private Lessons" and other films of the "teen sex comedy" genre have been staples of many premium movie channels on cable television and are routinely transmitted with impunity. Certain local jurisdictions have attempted to ban "indecent" cable programming using almost identical language as that chosen by the FCC to regulate broadcasting, but courts have invalidated these laws.[111] The courts found that "fundamental differences between the broadcast medium and cable television require that [government power to regulate indecency] not be extended to cable television."[112] Of course, in certain other respects described above, such as with FCC signal carriage rules[113] or local access requirements,[114] cable operators have enjoyed less First Amendment protection than broadcasters.

One natural consequence of the role assigned regulatory classifications is that courts must determine the correct category before addressing the substance of First Amendment claims. In *City of Chicago v. Day*,[115] for example, the Circuit Court of Cook County Illinois was asked to decide whether a satellite master antenna television system, or SMATV, should be classified as a cable television system and subjected to franchising requirements under the federal cable act. The court refused to consider First Amendment

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[110]*KZKC Television, Inc.*, 4 FCC 6706 (1989). Virtually all forfeitures for broadcast indecency have involved radio stations.

[111]*Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D.C. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.* 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

[112]*Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. at 1109-10.

[113]*Turner Broadcasting System v. FCC*, 819 F. Supp. 32, 41 (D.D.C. 1993).

[114]*Chicago Cable Communications, Inc. v. Chicago Cable Commission*, 678 F. Supp. 734 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990).

[115]No. 88-MC-313994 (Circuit Ct., Cook Co., IL, May 21, 1990).

defenses, saying "[f]or [defendant's] argument to have any legal merit, it would have to prove that it is a SMATV system. However, this it has failed to do."[116] The court reasoned the the defendant would first be required to submit to regulations appropriate to its regulatory category before sorting out its constitutional status.

Given the overriding importance of regulatory classification to the constitutional analysis, the question necessarily arises as to the level of scrutiny courts should bring to the government's classifications. The Supreme Court addressed this question, although not on First Amendment grounds, in *FCC v. Beach Communications, Inc.*[117] The case involved the same basic question as *City of Chicago v. Day*: whether a SMATV system could be subjected to franchising requirements under the Cable Act. The Court of Appeals had struck down a statutory distinction that exempted SMATV systems from franchising requirements where such systems connected commonly owned or managed buildings (and to the extent no public rights of way were crossed) while subjecting to regulation identical SMATV systems that connected buildings not commonly owned or managed.[118] The court held that the statutory definition violated the implied equal protection guarantee of the Due Process Clause of the Fifth Amendment in that it was "unable to imagine" any conceivable basis for the distinction.[119]

The Supreme Court reversed the D.C. Circuit, holding that the Cable Act's definition of a cable system that excluded certain SMATV systems while including others, was entitled to the presumption of having a rational basis. "In establishing the franchise requirement," the Court noted, "Congress had to draw the line somewhere; it had to

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[116] *Id.*, slip op. at 8.

[117] 113 S. Ct. 2096 (1993).

[118] *Beach Communications, Inc. v. FCC*, 959 F.2d 975 (D.C. Cir.), *aff'd following remand*, 965 F.2d 1103 (D.C. Cir. 1992).

[119] *Id.* at 987. The court expressly declined to address the SMATV operators' First Amendment claims, holding them to be "unripe." *Id.* at 984-85.

choose which facilities to franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally."[120] Like the D.C. Circuit, however, the Court emphasized that it was limiting its review to "the question presented" of whether the regulatory classification is "rationally related to a legitimate government purpose under the Due Process Clause." Whether heightened First Amendment scrutiny should apply — particularly in light of the "burdens imposed on franchised cable systems under the newly enacted [Cable Act of 1992]" — was a question left open for the Court of Appeals to decide on remand.[121]

As the regulatory divisions among the various media become less distinct, it may well be that the government will face an increasing obligation to justify its media classification scheme. Increasingly, broadcasters, common carriers and cable operators are providing the same or similar services. As this occurs, each segment of the industry will gain a more sound basis for arguing that it has been unreasonably singled out for burdensome treatment based on regulatory classifications that have little to do with real world distinctions between the media. In short, convergence of the media will undermine the system of regulatory classifications, which, in turn, will undercut the rationale for different constitutional treatment of various communications technologies.

C. The Cycle Continues

Just as precolonial regulatory schemes faded as it became evident that they were no match for the technology they attempted to control, regulation of new media forms in the United States tends to relax over time. Courts always have seemed somewhat uneasy about the "law unto itself" approach to First Amendment analysis. Perhaps for that reason, once a communication technology is no longer novel they have honored that dictum more in

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[120] 113 S. Ct. at 2102.

[121] *Id.* at n.6.

the breach than in the observance. Media that were pegged with one of the traditional regulatory classifications — particularly broadcasting — have been most susceptible to separate treatment, but even that tendency may be changing.

Courts' ambivalence toward the command to treat each medium differently has been underscored by their recognition of traditional First Amendment values. For example, thirty-seven years after the Supreme Court held that cinema was not "speech," it expressly overruled *Mutual Film Corp. v. Industrial Comm'n of Ohio* and found that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."[122] Although the Court felt compelled to observe that "[e]ach method [of communication] tends to present its own peculiar problems," it more importantly found that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule."[123]

Thus, as a particular medium becomes more commonplace, the recognition of "core values" tends to outweigh the rhetoric regarding its "peculiar problems." At the same time, however, dictum about the uniqueness of each communications medium lives on long after courts have chosen to apply traditional First Amendment doctrine. The Court's rejection in *Joseph Burstyn, Inc. v. Wilson*, of an almost four-decades'-old precedent that excluded film from constitutional protection is a clear example of this phenomenon. Rather than create a new First Amendment theory tailored to the medium, it relied on established First Amendment prohibitions against prior restraint and discriminatory taxation of the traditional press.[124] Although the Court suggested that the constitution does not necessarily require

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[122] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952). *See also United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

[123] *Joseph Burstyn, Inc.*, 343 U.S. at 503.

[124] The Court expressly relied on *Near v. Minnesota*, 283 U.S. 697 (1931) and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *See Joseph Burstyn, Inc.*, 343 U.S. at 503 n.14.

"absolute freedom to exhibit every motion picture of every kind at all times and all places," the exceptions it recognized to First Amendment protection were well-settled at the time for established media.[125]

Even though subsequent decisions suggested that requiring pre-distribution submission of films to "censorship boards" is not necessarily unconstitutional, closer examination belies the notion that films were accorded lesser protection than "traditional media." In *Freedman v. Maryland*, for example, the Court struck down a Maryland film censorship statute as providing inadequate procedural safeguards.[126] In doing so, the Court applied "the settled rule of our cases" and suggested as a model "a New York injunctive procedure designed to prevent the sale of obscene books."[127] In short, the Court removed any basis for treating films differently from print media.[128] It also repudiated precedent that suggested otherwise.[129] Accordingly, the Maryland legislature

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[125]*Id.* at 502-03 & n.13. The Court cited *Feiner v. New York*, 340 U.S. 315 (1951) (threat of violent crowd reaction may justify restricting speech); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (government may regulate decibel level of sound amplification devices); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words" not constitutionally protected); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (government may require parade permits).

[126]380 U.S. 51 (1965). The Court held that certain procedures must be followed where the government seeks to halt distribution of a film. First, the government bears the burden of instituting judicial proceedings and proving that the material is unprotected. Second, any restraint prior to court proceedings is strictly limited to a brief, specified period solely in order to maintain the status quo. Third, rapid judicial determination must be guaranteed. *Id.* at 58-59.

[127]*Id.* at 58, 60. Virtually all of the precedent cited in *Freedman* related to the traditional media.

[128]The one exception the Court allowed was in the time limits prescribed for review of films as contrasted with that for books. It found that the long lead times generally associated with film exhibition may lead to a different standard for what constitutes "prompt judicial determination" of the status of a film as compared to a book. But the Court laid down no "rigid time limits or procedures" and made no concrete findings other than "the statute would have to require adjudication considerably more prompt than has been the case under the Maryland statute." *Id.* at 60-61.

[129]An earlier case, *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) had suggested that the government may require submission of motion pictures in advance of exhibition. But in *Freedman*, the Court limited the holding in *Times Film* to the narrow and very abstract proposition that "a prior restraint was [not] necessarily unconstitutional *under all circumstances*." 380 U.S. at 53-54 (emphasis in original). Indeed, the Court disavowed the notion that *Times Film* had upheld "the specific features of the Chicago censorship ordinance." *Id.* at 54. As Justice Douglas pointed out in his concurring opinion, "the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp. v. Chicago*, 365 U.S. 43, could not survive under today's standards." *Id.* at 62.

disbanded the state film licensing board in 1981 after 65 years of operation. Censorship boards in all other states had been abandoned by the mid-1960s.[130] By 1982, the Court was willing to describe film (at least in dictum) as "one of the traditional forms of expression such as books" that are protected as "pure speech."[131]

The procedural safeguards applied in *Freedman* have been used interchangeably among various media ever since. The Court has required the same protections in cases involving censorship of mail[132] and seizure of imported material by U.S. customs agents.[133] In *Southeastern Promotions, Ltd. v. Conrad*, the Court applied the same procedural requirements to theatrical performances.[134] Despite the application of traditional First Amendment doctrine, the Court nevertheless repeated dictum that "[e]ach medium of expression . . . must be assessed . . . by standards suited to it, for each may present its own problems."[135] But it reasoned that theater generally involves the acting or singing out of the written word and found "no reason to hold theatre subject to a drastically different

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[130]E. DeGrazia & R. Newman, BANNED FILMS 147 (1982). By 1992, Dallas, Texas was the only city in the United States that continued to have a film review board, and it was eliminated the following year. *See* Kastor, *It's a Wrap: Dallas Kills Film Board*, WASHINGTON POST, Aug. 13, 1993 at D1; *'Kuffs' Compromise*, USA TODAY, January 8, 1992 at D1 col.1. It is interesting to note that mainstream films began to include more realistic depictions of reality -- particularly sexual relations -- after the demise of licensing boards. To respond to this trend, the film industry in 1968 established a voluntary rating system (on a scale of G to X) to provide guidance to prospective audience members. *See* Hinson, *The 20-Year Rating Game*, WASHINGTON POST, G1 col. 4, Nov. 6, 1988. Although the rating system does not necessarily pose a First Amendment problem, it has been subject to increasing criticism. *See Miramax Films, Inc. v. MPAA*, 560 N.Y.S.3d 730 (1990) (rating system is "an effective form of censorship"); Masters, *Judge Blasts Movie Rating System*, WASH. POST., July 20, 1990 at A1 col. 2.

[131]*See New York v. Ferber*, 458 U.S. 747 (1982).

[132]*Blount v. Rizzi*, 400 U.S. 410, 419-21 (1971).

[133]*United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971).

[134]420 U.S. 546, 559-60 (1975).

[135]*Id.* at 557.

standard."[136] In short, the rhetoric regarding "peculiar problems" has little effect on the result.

This coincidence of traditional First Amendment protection and cultural penetration of a given medium is more problematic when applied to newer communications technologies. The classification of new media for regulatory purposes tends to institutionalize, and thereby prolong, distinct constitutional treatment. Government control over broadcasting is the clearest example of this. Commercial television existed for more than forty years and had long become a dominant social force before courts began to reconsider their constitutional approach. Most observers have concluded that the original justification for different treatment of broadcasting — the purported scarcity of frequencies — has for years been nothing more than a legal fiction.[137]

Still, the increasing tensions that have taken the luster off the "public trustee" model for broadcasting seem to have persuaded a number of courts to be more concerned about the First Amendment concerns inherent in regulation. Accordingly, they have begun to analyze free speech claims of broadcasters by giving less weight to — or by not relying on at all — the "special" nature of the medium. In *FCC v. League of Women Voters of California*, for example, the Supreme Court invalidated a statutory prohibition on editorializing by public broadcasting stations that received funds from the Corporation for Public Broadcasting.[138] Although the Court expressly upheld the "public trustee" concept of constitutional analysis over strict scrutiny, it subjected the government's asserted

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[136] *Id.* at 557-58.

[137] *See, e.g.*, H. Geller, FIBER OPTICS: AN OPPORTUNITY FOR A NEW POLICY? 15 (1991) ("the broadcast regulatory model is a failed concept" and "the public trustee scheme . . . is a joke"); L. Bollinger, IMAGES OF A FREE PRESS 88-90 (Chicago: University of Chicago Press, 1991) (describing the rationale of *Red Lion* as having "devastating — even embarrassing — deficienc[ies]," as "illogical," and as being based on"the simple-minded and erroneous assertion that public regulation is the only allocation scheme that can avoid chaos in broadcasting"); Lively, *supra*, at 1085; Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207, 221-226 (1982). *See supra* note 39.

[138] 468 U.S. 364 (1984).

interests to a far more rigorous analysis than ever before, and questioned the continuing validity of the scarcity rationale.[139] The Court conducted a thorough review of the purposes of public broadcasting and the legislative objectives, and found that the ban on editorializing was not narrowly tailored and did not serve the asserted governmental interests.[140] As in other cases of the "law unto itself" genre, the Court continued to pay lip service to the "public trustee" concept, but it emphasized that "the broadcasting industry is indisputably a part [of the press]," and supported its ultimate conclusions with precedents involving traditional media.[141]

Lower courts have been more willing to dispense with the public trustee doctrine or to apply its First Amendment precepts in a far stricter way. In *Community Service Broadcasting of Mid-America, Inc. v. FCC*, the D.C. Circuit, sitting *en banc*, emphatically noted that "spectrum scarcity cannot be invoked to support a government attempt to penalize or suppress speech, based on its general content, by some, but not all, broadcast licensees."[142] The court's plurality opinion stated that under either strict scrutiny, or the *O'Brien* test for incidental speech restrictions, a requirement that public broadcast stations make and retain recordings of programs "in which any issue of public importance is

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[139] *Id.* at 374-381. *See also id.* at 377 n.11 (Noting criticisms of scarcity rationale, Court indicated that it would be willing "to reconsider our longstanding approach" if given "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."); *id.* at 378-79 n.12 ("were it to be shown by the Commission that the fairness doctrine '[has] the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis of our decision in [*Red Lion*]").

[140] *Id.* at 384-399.

[141] *Id.* at 382, citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), in which the Court for the first time stated that "[w]e have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *See also id.* at 382-399, citing, *inter alia*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Carey v. Brown*, 447 U.S. 455 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); and *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[142] 593 F.2d 1102, 1111 n.21 (D.C. Cir. 1978) (*en banc*).

discussed," violated the First Amendment.[143] Similarly, in *News America Publishing Co. v. FCC*, the D.C. Circuit demanded "a better fit between the law and its asserted legitimate purposes" than was evident in a congressional restriction on the FCC's ability to grant waivers of the newspaper-television cross-ownership rule.[144] The court pointedly outlined the weakness of separate constitutional treatment based on spectrum scarcity, but noted that even under the public trustee doctrine, regulations must be narrowly tailored to further a substantial government interest.[145] It found the cross-ownership limit at issue to be "astonishingly underinclusive," and therefore unconstitutional.[146]

Even where the Courts have rejected First Amendment claims, they have begun to do so without reference to scarcity. In *United States v. Edge Broadcasting Co.*, for example, the Supreme Court upheld against a First Amendment challenge, a prohibition on the broadcast of lottery advertisements in states that did not have a government lottery. Although the decision is a highly fragmented one in which seven Justices supported the outcome for various reasons, not a single one relied on the rationale of *Red Lion*. Indeed, none even cited it.[147] The Court's decision ultimately rested on the commercial speech doctrine as articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[148]

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[143] *Id.* at 1111-22. Only four judges (Wright, Bazelon, McGowan and Wilkey) endorsed this section of the opinion. Judge Robinson found that the regulation could not survive even minimal scrutiny, and found it unnecessary to apply a stricter test. *Id.* at 1127 (Robinson, J., concurring in part and concurring in the judgment).

[144] 844 F.2d 800, 805 (D.C. Cir. 1988).

[145] *Id.* at 810-812.

[146] *Id.* at 814.

[147] 113 S. Ct. 2696 (1993). *See also Valley Broadcasting Co. v. United States*, 820 F. Supp. 519 (D. Nev. 1993), in which the court invalidated a prohibition of broadcast advertising of casino gambling using the *Central Hudson* test. The court did not mention *Red Lion* or the public trustee standard.

[148] 447 U.S. 557, 566 (1980).

The change in judicial attitudes toward broadcasting is shown even by the language courts use in framing their constitutional analyses. As Dean Lee Bollinger has observed, the *Red Lion* Court "never referred to the broadcast media as the press nor to broadcasters as editors or journalists; they were consistently described as licensees and fiduciaries."[149] But a different view has emerged in later cases. The Supreme Court has stated that "broadcasters are engaged in a vital and independent form of communicative activity" and that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory authority in this area."[150] The recognition of broadcasters as being an essential element of the press has been even more direct among the lower courts. As the D.C. Circuit noted in *Community Service Broadcasting of Mid-America, Inc.*, public affairs programming on broadcast stations "lies at the core of the First Amendment's protections."[151] This rhetorical shift is significant.

As they did with film a generation ago, courts appear to be distancing themselves from the historic justifications for separate constitutional treatment of broadcasting. In certain cases, this has meant increased First Amendment scrutiny of regulations, even as courts continue to recite some of the time-worn dictum about the "special characteristics" of broadcasting. In other cases, courts have directly eschewed reliance on prior justifications. To the extent courts have avoided taking the next logical step of reconsidering *Red Lion*, perhaps it is because they seek to avoid creating legal uncertainty in an increasingly confusing media marketplace. On the other hand, one observer has suggested that courts will refuse to take this step until they have devised a new theory that would continue to

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[149]Bollinger, *supra* note 137 at 91.

[150]*League of Women Voters of California*, 468 U.S. at 378. See also CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (broadcasters are "entitled under the First Amendment to exercise the widest journalistic freedom consistent with [their public duties]").

[151]593 F.2d at 1110 ("noncommercial licensees are fully protected by the First Amendment"). *See also Syracuse Peace Council v. FCC*, 867 F.2d at 654; *News America Publishing, Inc.*, 844 F.2d at 812-813; *Johnson v. FCC*, 829 F.2d 157, 161-63 (D.C. Cir. 1987).

permit government control of the media.[152] Whatever the explanation, it seems evident that courts will have to move beyond their present approach. The same is true of the courts' current treatment of cable television.

D. This Ain't No Way to Run an Electronic Superhighway

All signs suggest that we are on the brink of a major shift in First Amendment doctrine. At the same time, federal policymakers are focused on the development of the National Information Infrastructure. The evolution of such a "network of networks" will have profound implications for future constitutional analyses. Will notions of scarcity continue to play a role, or will the physical characteristics of the network be the most important factor? To what extent will regulatory classifications circumscribe the First Amendment treatment of new technologies? Each of these questions will have to be addressed over time. But if history can teach, the lesson should be this: the gradual evolution of constitutional rights based on regulatory classifications is utterly unsuited to the new media environment.

1. The Glacial Pace of Doctrinal Change

There is a wide and growing chasm between the rate of technological change and that of legal development. The case-by-case legal process by which courts seek to define the appropriate constitutional standard for a given medium typically takes decades, while the communications industry is evolving far more quickly. If anything, the disparity between the two is growing, as the nation moves steadily toward creation of broadband, digital, interactive networks while courts and policymakers continue to debate the

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[152] *See, e.g.*, Lively, *supra*, at 1085 ("What may be evinced is a long-standing mind-set, traceable to *Mutual Film*, that the risk of abandoning control premises, no matter how unpersuasive or irreconcilable with the first amendment, is unacceptable.").

constitutionality of the fairness doctrine.[153] As Professor Rodney Smolla has perceptively pointed out, "[s]cientists move more quickly than lawyers."[154]

This is especially true when the lawyers are judges. The fact that courts are reluctant to resolve the difficult questions raised by new technologies is not a new phenomenon. The Supreme Court delayed taking up cases on the status of radio, perhaps because it found the new medium too intimidating. Chief Justice Taft is reported to have explained his lack of eagerness as follows:

> [I]nterpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural. I want to put it off as long as possible in the hope that it becomes more understandable before the court passes on the questions involved.[155]

If any of these feelings are shared by members of the modern judiciary, who may not have grown up with computers, then the prolonged search for a new constitutional standard becomes more understandable.

The shifting legal status of electronic eavesdropping under both constitutional and statutory law further illustrates the problem of evolving technology. In 1928, the Supreme Court considered whether warrantless wiretapping violated the Fourth Amendment prohibition against unreasonable searches and seizures. The Court found no constitutional violation because the surveillance was accomplished without intruding on the physical property of the defendant.[156] By failing to acknowledge that technology permitted the government to intrude on communications in a way that previously was impossible, Chief Justice Taft (still no futurist) was able to conclude that "[t]here was no searching [and

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[153]L. Tribe, AMERICAN CONSTITUTIONAL LAW 1007 (2d ed. 1988); Katsh, *supra* note 57 at 1493; Pool, *supra* note 40 at 7.

[154]Smolla, *supra* note 57 at 321.

[155]Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 40 (1959), quoting C.C. Dill, RADIO LAW 1-2 (1938).

[156]*Olmstead v. United States*, 277 U.S. 438, 464 (1928).

there] was no seizure." The Fourth Amendment "does not forbid what was done here" because "[t]he United States takes no such care of telegraph or telephone messages as of mailed sealed letters."[157]

Justice Brandeis, whose views ultimately prevailed, argued in dissent that constitutional principles were undermined to the extent the Court focused excessively on the method chosen for communication. He argued forcefully that constitutions must be interpreted with technological advancements in mind to preserve fundamental rights. In particular, Justice Brandeis wrote, constitutions must be designed "to approach immortality" and "our contemplation cannot only be what has been but of what may be."[158] Anticipating the rise of a computer-based society, he warned that:

> Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
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> * * *
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> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.
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> * * *
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> Can it be that the Constitution affords no protection against such invasions of individual security?

Justice Brandeis concluded that if the courts did not adapt to new realities, then constitutional principles would be "converted by precedent into impotent and lifeless formulas" and that "[r]ights declared in words might be lost in reality."[159]

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[157] *Id.*

[158] *Id.* at 472-73 (Brandeis, J., dissenting).

[159] *Id.* at 473-74 (internal quotations omitted).

The Court eventually adopted the same view toward wiretapping, but it took nearly forty years to do so. In *Katz v. United States*, the Court declared that the Fourth Amendment "protects people, not places" and held that wiretapping is allowable only after a valid warrant is issued — the same as for any other search.[160] Congress enacted legislation to codify the law as set out in *Katz*, but it soon became outdated and had to be rewritten.[161] The advent of fiber optic communications networks has created pressure for further legal change.[162]

The very nature of law, with its emphasis for creating certainty, makes keeping up with rapid technological development difficult if not impossible. Even Justice Brandeis, the champion of a dynamic constitution in *Olmstead*, wrote that "in most matters it is more important that the applicable rule of law be settled, than that it be settled right."[163] Consequently, the nature of constitutional adjudication makes it easy to understand why it took 37 years for the Supreme Court to change its First Amendment approach to cinema, and why it has continued to spend decades debating the appropriate standards for broadcasting and cable television.

This time-consuming quest for a stable legal standard creates a special dissonance in the dynamic field of electronic communications. Congress created the Federal Communications Commission precisely because the field is rapidly changing; it recognized that legislative changes could not keep up with advancements in radio communication. The Communications Act of 1934 was envisioned as a flexible regulatory system "because the

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[160]389 U.S. 347 (1967).

[161]Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801-804, 82 Stat. 197, 211-25; Electronic Communications Privacy Act of 1986; *See generally*, Fein, *Regulating the Interception and Disclosure of Wire, Radio, and Oral Communications: A Case Study of Federal Statutory Antiquation*, 22 HARV. J. ON LEGISLATION 47 (1985).

[162]*See* Mintz & Schwartz, *Clinton Backs Security Agencies on Computer Eavesdropping*, WASH. POST, February 5, 1994 at A1; *NII Task Force Searches For Privacy Guidelines*, COMMUNICATIONS DAILY, February 3, 1994 at 3-4.

[163]*Burnett v. Colorado Oil and Gas Co.*, 285 U.S. 393 (1932).

broadcast industry is dynamic in terms of technological change." The administrative approach it created is predicated on the assumption that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[164] Yet even in a regulatory system based on this premise, it is difficult for the administrative agency to keep up with changes and adjust its rules accordingly. Consequently, burdensome regulations may live on long after their reason for existence has vanished.[165]

So we are left with an evident paradox. On one hand, the law is criticized for failing to keep up with innovations. On the other, it seems that the purpose of the law is undermined if it changes too quickly.[166] The dilemma is magnified to the extent that the speed with which innovations are introduced is accelerating.

But this is a false paradox. It exists only to the extent that an new legal standard is expected to spring into being with each new transmission technology. Where First Amendment principles are not dependent on the specific communications technology, there will be a greatly diminished perception that the law has not kept pace, for there will be no expectation of a major doctrinal shift with each new invention. Such an approach would also preserve the law's function of promoting certainty. Current conflicts about the appropriate First Amendment standard for broadcasting and cable television have done more to create instability — both from the perspective of the regulator and the regulated industries — than perhaps any other single factor in the law.

2. Breakdown of the Classification Scheme

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[164]*CBS, Inc. v. Democratic National Committee*, 412 U.S. at 102.

[165]*See, e.g., Evaluation of the Syndication and Financial Interest Rules (Report and Order)*, 6 FCC Rcd. 3094 (1991), *rev'd and remanded, Schurz Communications v. FCC*, 982 F.2d 1043 (7th Cir. 1992). *See also Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1455-57.

[166]Katsh, *supra* note 56 at 17-19.

The doctrine that "each [communications medium] is a law unto itself"[167] makes constitutional analysis exceedingly complex in a world of burgeoning technology and proliferating classifications. Courts, policymakers and legal scholars simultaneously are being presented with an expansion and contraction of regulatory options. In the first instance, the variety of delivery systems and media services has multiplied, as have the number of regulatory classifications. This raises the possibility that a separate First Amendment test must be applied to each medium and a new standard developed with each technical innovation. Secondly, with convergence, the discrete functions of the various media are coming together. For example, with the advent of fiber optics it is conceivable that a single transmission medium could become the conduit for newspapers, electronic mail, local and network broadcasting, video rentals, cable television and a host of other information services.[168] The synthesis of form and function vastly complicates segregating the different media for separate constitutional treatment.

Courts and legislators generally attempt to fill gaps in legal doctrine by analogy rather than by developing new concepts.[169] Just as notions of "common carriage" and "public interest, convenience and necessity" in the Communications Act were drawn from 19th century concepts of transportation law,[170] courts usually have borrowed the

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[167] *Kovacs v. Cooper*, 336 U.S. at 97 (Jackson, J., concurring).

[168] *See generally Through The Looking Glass*, *supra*; Geller, *supra* n.137.

[169] *E.g.*, Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 38 (1967) ("Law, it has been said, is determined by a choice between competing analogies."). Policymakers have been forced to develop new analogies as technology and the communications marketplace have evolved. Former FCC Commissioner Patricia Diaz Dennis half facetiously suggested that broadcasters should be regulated as if they were in a "game preserve," as opposed to the unregulated "jungle" advocated by opponents of government control or the paternalistic "zoo" favored by proponents of public intervention. Speech of Patricia Diaz Dennis before the Broadcast Financial Management Association (April 18, 1988). *See Trying a New Policy On For Size*, Broadcasting, April 25, 1988 at 41. Coming up with new concepts to accommodate the rapidly changing communications landscape is no easy task, and Commissioner Dennis was forced to admit, "I am no closer to solving this problem than scientists are to coming up with a unified theory to explain how the universe operates." *Id.*

[170] *See Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 8-9 (1878); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 640-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992

constitutional analysis articulated for established media for application to new technologies. But Ithiel de Sola Pool has cited the weakness of this approach. He explained that "[a] long series of precedents, each based on the last and treating clumsy new technologies in their early forms as specialized business machines, has led to a scholastic set of distinctions that no longer correspond to reality. As new technologies have acquired the functions of the press, they have not acquired the rights of the press."[171]

Courts did create a genuinely new First Amendment standard for broadcasting, but they have failed so far to do the same for cable television or other new video delivery systems. But in the search for a new standard, the debate in most cases comes down to whether the new technology in question has more characteristics in common with broadcasting than with print. If the medium is deemed more like over-the-air television, a standard more forgiving of government intrusion is applied; if it is considered more akin to traditional publishing, full First Amendment rights attach.

A basic problem with this approach is that it lacks a principled or consistent method of application. The similarities among media are in the eye of the beholder, and the resulting answers have been mixed. Another problem is this: what if the real answer is "all of the above?" Multimedia, for example, is "like" newspapers because it transmits text; it is "like" books when presented over a personal player on CD-ROM. But it is also "like" broadcasting or cable because it may transmit video. And it may be "like" common carriers when transmitted over the telephone network. The philosophy that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them" is illogical in the case of multimedia.[172]

(1976); S. Mickelson, J. Opfer & S. Whalen, THE COMMON CARRIER PRINCIPLE 3-5 (1989); Comment, *The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies*, 38 CATH. U. L. REV. 471, 496-97 (Winter 1989); Note, *Common Carriers Under the Communications Act*, 48 U. CHICAGO L. REV. 409 (1981).

[171]Pool, *supra* note 40 at 250.

[172]Corn-Revere, *supra* at 22.

One response at least to the administrative law problem has been the development of "flexible" classification systems. The number of video sources has proliferated in recent years, forcing the FCC to develop various methods of classification. In addition to over-the-air broadcasting, the FCC issues licenses for such services direct broadcast satellites ("DBS"), multichannel multipoint distribution service ("MMDS"), and other microwave video services including operational fixed service ("OFS") and instructional television fixed service ("ITFS"). Not only are each of these services classified differently despite a similarity of function, but an operator may choose among various options to determine its regulatory status.

The FCC first groped for new ways to classify video services in its 1982 order authorizing DBS service.[173] The Commission adopted what it called a "flexible regulatory approach," wherein the service could be regulated either as broadcasting or common carriage. An operator that retains control over the content of his transmissions and provides his service directly to homes was treated as a broadcaster; an operator that leases transponder capacity on a first-come, first-served basis and relinquishes editorial control was treated as a common carrier. "Customer-programmers" who leased satellite capacity were essentially unregulated. The D.C. Circuit rejected this approach and held that the Communications Act definition of broadcasting encompasses most DBS applications.[174] It remanded the issue of regulatory classification for further consideration.

In response, the FCC initiated a proceeding "to determine what criteria may be used by the Commission to determine whether a communications service should be treated as 'broadcasting' under the Communications Act."[175] The Commission determined that

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[173]*DBS Report and Order*, 90 F.C.C.2d 676 (1982), *aff'd in part, vacated in part sub nom. National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984).

[174]*National Ass'n of Broadcasters*, 740 F.2d at 1205. *See also Telecommunications Research and Action Center v. FCC*, 836 F.2d 1349 (D.C. Cir. 1988) (remanding FCC decision to classify nonsubscription use of ITFS capacity as nonbroadcasting).

[175]*Subscription Video, Report and Order*, 2 FCC Rcd 1001, 1003 (1987).

subscription video services should be classified as "non-broadcast" services and freed from broadcast regulation. The appropriate classification hinges on the operator's intent: the service is not broadcasting if the licensee does not intend to serve the public generally.[176] Based on the *Subscription Video* rules, a DBS operator could opt for regulatory treatment as a broadcaster, a non-broadcaster or a common carrier. The D.C. Circuit affirmed.[177]

The Administration's NII proposals take a similar approach. One fundamental principle underlying the plan is to "ensur[e] flexibility so that the newly-adopted regulatory framework can keep pace with the rapid technological and market changes that pervade the telecommunications and information industries."[178] This approach frankly acknowledges that government regulation historically "assumed clear, unchanging boundaries between industries and markets" and that legal rules based on such perceived distinctions "can harm consumers by impeding competition and discouraging private investment."[179] Accordingly, it proposes the creation of a new Title VII of the Communications Act to regulate two-way, broadband, digital transmission services that are offered on a switched basis to end users. Subject to certain conditions, service providers would be able to "opt" for Title VII regulation, and thereby qualify for more streamlined government oversight. The new Title VII classification is intended to provide "a unified, systematic treatment of providers of two-way broadband services" and to "create a regulatory regime that should stand the test of time by providing the FCC with the flexibility to adapt its regulatory approach in light of changes in market and technological conditions."[180]

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[176] *Id.* at 1006. As indicia of intent, the Commission focused on whether the customer needs a special encoder to receive the transmission, the information is encrypted and the operator and subscriber are in a contractual relationship.

[177] *National Ass'n For Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[178] Administration White Paper on Communications Act Reforms, at 1.

[179] *Id.*

[180] *Id.* at 9.

As a matter of regulatory policy, the Administration's proposal may go a long way toward rationalizing the sometimes arbitrary divisions between service providers. However, there is little in the plan — at least as currently articulated — that would appear to facilitate the difficult problem of developing a new constitutional standard. It would retain existing regulatory classifications for providers that do not qualify (or do not opt) for Title VII treatment. But more importantly, Title VII itself would require judicial evaluation for its "special characteristics" to determine the constitutional status of licensees under that title.

It is difficult to predict the timing or outcome of any such evaluation. But it seems clear that the proponents of Title VII assume that the new media qualify for constitutional treatment that is roughly equivalent to that accorded cable operators and common carriers. In additional to the technical rules that relate to common carriage, Title VII would authorize the FCC to adopt rules to "address public interest concerns" such as the transmission of indecent or obscene communications.[181] Additionally, Title VII would be designed to "[e]nsure that delivery of video programming directly to subscribers over broadband facilities is consistent with certain principles now applicable to cable services . . . dealing with: retransmission consent; public, educational, and governmental access; must carry; and protection of subscriber privacy."[182]

The Administration's proposal is one of several plans designed to guide the development of the communications infrastructure. It may or may not be adopted. But it provides some insight into developing approaches to resolve the problem of regulatory classification in an era of convergence. However, courts will still face the problem of setting the appropriate constitutional standard. To the extent judges proceed by trying to

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[181] *Id.* at 10. The Administration specifically cites Section 223 of the Communications Act, which has been used to regulate so-called "dial-a-porn" services.

[182] *Id.*

analyze whether digital broadband services are more "like" telephone service or more "like" cable television service, than little will have been gained by the reclassification.

3. Regulation and First Amendment Traditions

To begin construction of the electronic superhighway with the assumption that access issues and content will be regulated in the same way as previous "new" technologies begs an important question. Proponents of a regulatory approach assume that the justifications that supported a different First Amendment standard for other media, such as broadcasting, can be transplanted and applied to broadband digital networks. Another possible assumption is that additional or new justifications support a different constitutional approach, a question that is explored in more detail in the next section of this Paper. Whatever theory may be used, it is vital to recognize that an important choice is being made, and that fundamental differences exist between a First Amendment model based on press autonomy, and one based on regulation.

In comparing the competing visions of the First Amendment, Dean Bollinger has noted how Supreme Court decisions with respect to broadcasting amount to a "virtual celebration of public regulation."[183] This, he concludes, is "[n]othing less . . . than a complete conceptual reordering of the relationships between the government, the press, and the public that was established with *New York Times v. Sullivan*."[184] To read cases like *Red Lion* is to "step into another world," where the press itself represents the greatest threat to First Amendment values and government intervention in editorial choices is the preferred method of salvation.[185] It is a vision of the First Amendment, in the words of William O.

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[183]Bollinger, *supra* note 137 at 71.

[184]*Id.* at 66.

[185]*Id.* at 72.

Douglas, "that is agreeable to the traditions of nations that have never known freedom of the press."[186]

In this regard it is essential to keep in mind the fact that convergence of the media has significant implications far beyond its effect on the integrity of existing regulatory classifications. Constitutional analysis of electronic media has been tied to the means of transmission. Consequently, regulatory justifications for a lower level of constitutional protection for one medium may well be communicable as traditional media move toward new means of delivery.

Former FCC Commissioner Lee Loevinger predicted that "the computer and the electronic screen will become the printing presses of the next century."[187] Perhaps this was a safe prediction, but it is well on its way to being fulfilled a decade early. Newspapers and magazines across the country have embarked on a wide variety of projects to create electronic publications.[188] It is also significant that traditional presses now use electronic production methods, including computer terminals and local area networks to support writing, editing and production as well as satellite links to transmit copy between

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[186]*Columbia Broadcasting System v. Democratic National Committee*,412 U.S. at 163 (Douglas, J., concurring). *See* Katsh, *supra* note 56 at 138-39 ("It may be . . . that the greatest insight into what will occur over the next 10 to 20 years can be derived from looking back even further, at the period after printing was introduced. This was the era when the modern struggle between individual expression and state control over expression was forming. It may be that more can be discerned about the future of free expression, about attempts by government to control a new medium, and even about the likely direction of Supreme Court decisions by looking at the spread of printing and by comparing the qualities of print and the qualities of the new media than by analyzing either the trend of court decisions or the thoughts or intentions of the framers."). *See also* Baeza, *Safeguarding the First Amendment in the Telecommunications Era*, 97 HARV. L. REV. 584, 590 (1983) ("today we find ourselves at another crossroads as we face a choice between increased freedom and increased repression of speech"); Bazelon, *The First Amendment and the "New Media" — New Directions in Regulating Telecommunications*, 31 FED. COMM. L. J. 201, 212 (1979); Goldberg & Couzens, *"Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COMM. L. J. 1, 40-41 (1979).

[187]Loevinger, *supra* note 59 at 776. *See also* Pool, *supra* note 40 at 224 ("Networked computers will be the printing presses of the twenty-first century.").

[188]*See, e.g., Telcos and Newspapers Fill in New Relationships*, COMMUNICATIONS DAILY, February 17, 1994 at 2; Carmody, *Time's Readers to Talk Back, on Computers*, NEW YORK TIMES, July 26, 1993 at D6; Markoff, *A Media Pioneer's Quest: Portable Electronic Newspapers*, NEW YORK TIMES, June 28, 1992 at F11; Shaw, *Inventing the 'Newspaper' of Tomorrow*, LOS ANGELES TIMES, June 3, 1991 at A1; Shaw, *'Electronic' Newspaper Emerging After Slow Start*, LOS ANGELES TIMES, June 3, 1991 at A1.

remote plants.[189] As new technologies become the predominant forms of communication and distribution of ideas, the overall level of First Amendment protection in society may be diminished, even among traditionally protected media.[190]

This issue was presented squarely in *Telecommunications Research and Action Center v. FCC*,[191] (*"TRAC "*) in which the D.C. Circuit held that broadcast content controls apply to teletext transmissions. Teletext is a means of transmitting textual and graphic material to television screens of home viewers, using an otherwise unused portion of the broadcast signal.[192] In its *Report and Order* authorizing teletext service, the FCC declined to apply political broadcasting controls "primarily [because of] a recognition that teletext's unique blending of the print medium with radio technology fundamentally distinguishes it from traditional broadcast programming."[193] The Court of Appeals reversed the Commission's decision, focusing on the means of *delivering* the printed word. "The dispositive fact is that teletext is transmitted over broadcast frequencies that the Supreme Court has ruled scarce and this makes teletext's content regulable," the Court reasoned. "Teletext, whatever its similarities to the print media, uses broadcast frequencies, and that, given *Red Lion*, would seem to be that."[194]

TRAC suggests that newspapers delivered by electronic means have less constitutional protection than when the exact same stories written by the exact same

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[189]Loevinger, *supra* at 776.

[190]*See* Lively, *supra*, at 1074.

[191]801 F.2d 501 (D.C. Cir.), *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

[192]*Id.* at 503. Teletext or videotext may also be transmitted by way of cable or telephone, but the *Telecommunications Research and Action Center* decision dealt only with over-the-air teletext transmissions.

[193]53 R.R.2d 1309 (1983).

[194]801 F.2d at 508, 509. Nevertheless, the court ruled that the FCC could refrain from enforcing the fairness doctrine for teletext transmissions since the doctrine was an FCC policy and not a statutory requirement. *Id.* at 516-18.

reporters and edited by the same editors are delivered on paper. Consistent with this reasoning, one writer has advocated applying political broadcasting regulations to online computer services such as *Prodigy*, *CompuServe* and *America Online*.[195] To avoid the risk that online services might discriminate between candidates, Congress could require such services to provide "reasonable access" to candidates, "equal time" in the event an opponent uses the service and limit prices to the "lowest unit charge." This could be accomplished constitutionally, according to the article, by assuming that broadcasting provides the appropriate regulatory and constitutional metaphor.[196]

Such a theoretical approach poses an interesting logical question. If traditional media are properly subject to a different constitutional standard when the link between the publisher and the reader is electronic, what is the appropriate standard when the electronic link is between the writer and the publisher? In other words, so long as electronic methods are used *at some stage* in the production process, shouldn't the government have jurisdiction to regulate the content of the publication, just as with broadcasting?

In a 1987 Senate hearing on the fairness doctrine, Professor Robert Shayon of the Annenberg School of Communications appeared to suggest that any use of spectrum in the production process would justify content regulation of the press. Shayon asserted that content controls might constitutionally be imposed on the *New York Times* or the *Wall Street Journal* because they transmit their copy via satellite to printing plants across the country. "I think that the spectrum is limited," Shayon observed, "And if the big users shut out the small users, then the government should act to make fairness the ruling guideline. . . . The government is not only a repressive factor, it represents the total

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[195]Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Services*, 38 VILLANOVA L. REV. 517 (1993).

[196]*Id.* at 519 & n.9, 521, 542-45 ("The assimilation of computer-based communications is remarkably similar to the process by which radio became an accepted medium of communication."). *See also* Computer Professionals for Social Responsibility, SERVING THE COMMUNITY: A PUBLIC INTEREST VISION OF THE NATIONAL INFORMATION INFRASTRUCTURE 22-23 (1993) (advocating government policies to promote diversity in content markets).

community and sometimes can be used constructively."[197] In other words, based on the choice of distribution media, the "total community" may gain the ability to tell the *New York Times* and the *Wall Street Journal* what is "fair" and to enforce any such determination. Former FCC Chairman Charles Ferris, a staunch supporter of the fairness doctrine, has raised a similar question.[198]

In short, the choice of a First Amendment standard for cable television or for the NII is not a simple decision that will determine how a particular new technology will be regulated. Because the media are converging, the constitutional approach selected now could well determine the nature of the First Amendment for the 21st century for all media. The choice might represent a fundamental shift in the relationship between the government and the press. Some would regard such a change as a welcome event because it would allow far greater flexibility in the realm of public policy. Others view it as a threat that would undermine the central purpose of the First Amendment — to free the press from government oversight. The next section addresses the relative merits of the competing views.

III. A Traditionalist Approach to the First Amendment

"What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question."[199] Most theorists agree that some new analytical approach is needed to cope with changes in the media marketplace and to replace judicial doctrines with increasingly obvious deficiencies. But there is little agreement about what that approach should be. The debate on this issue in the courts typically has pitted

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[197]*Fairness in Broadcasting Act of 1987*, S. Hrg. 100-48, 100th Cong. 1st SESS. 73-74 (March 18, 1987. *See Licensing Broadcasters: Just What the Framers Feared?*, CATO POLICY REPORT 6, 8-9 (January/February 1988).

[198]Pool, *supra* note 40 at 1.

[199]*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. at 160 (Douglas, J., concurring).

advocates from each side of the dispute proposing competing analogies for how the technology at issue should be treated; whether it should be analyzed under a "print model" or a "broadcast model" of the First Amendment. But these points are simply specific questions that are part of a larger debate. The central issue revolves around the appropriate relationship between the government and the press.

The principal arguments in this debate fall generally into three categories: that the First Amendment is best served by allowing regulation of new media as constitutional protections slowly evolve, an approach I have labelled Incrementalism; that government intervention is necessary to promote First Amendment "values," an approach I refer to as Revisionism; that the First Amendment requires a separation between press and state, an approach I describe as Traditionalism. This section describes these three approaches, and evaluates the likelihood that a given theory can resolve the issues currently creating First Amendment strains.[200] The Paper concludes that Traditionalism is most likely to provide lasting First Amendment protection for the media.

A. Alternative Visions of the First Amendment

1. Incrementalist Perspective

One prominent theory holds that the First Amendment is strengthened by the gradual approach taken by the courts in which "full" constitutional rights are initially denied to new technologies. In an influential article, Dean Lee Bollinger argues that a system of "partial regulation," in which traditional speakers are fully protected and new technologies are subject to a lesser standard, may best serve constitutional purposes.[201] Bollinger's thesis is essentially a compromise between proponents of "absolute" constitutional protection (to

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[200]This is not intended to be an exhaustive survey of all existing First Amendment theories. Rather, it identifies the broad issues raised regarding new technologies and the First Amendment and predicts which approach seems most likely to serve the interest in free expression.

[201]Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976). *See also* Bollinger, *supra* note 137 at 133-51. Professor Powe noted that Bollinger's theory "swept the legal academy" and became "the standard citation in any discussion of the topic." Powe, *supra* note 31 at 5.

the extent any such thing exists) for all media and advocates of a "new" First Amendment that would accord government more expansive power over the press. At opposite ends of this spectrum stand *Miami Herald Publishing Co. v. Tornillo*, in which the Supreme Court denied a right of access to newspapers, and *Red Lion Broadcasting Co. v. FCC*, in which it upheld a limited right of access to broadcast stations via the fairness doctrine. Bollinger reasons that "the Court reached the correct result in both cases."[202] It is an argument that, from a constitutional perspective, we are living in the best of all possible worlds.[203]

Bollinger accepts the arguments on both sides of the First Amendment debate. He agrees that the usual justifications for treating new technologies differently from traditional speakers are "weak and illogical," "embarrassing" or even "simple-minded."[204] Despite these deficiencies, he suggests that there is a strong perception that there are differences between the media, and that this belief may justify a variable constitutional approach.[205] Bollinger acknowledges the risk of entangling the government with the press, and cites the usual examples indicating how the regulatory system has been abused to serve political ends.[206] But at the same time, he suggests that there is a "general view" that the FCC has been "extraordinarily circumspect" in its use of power over the broadcast press.[207] On the other side of the debate, while Bollinger notes the dangers inherent in mandating access to the mass media, he concludes that such regulation "both responds to constitutional

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[202]Bollinger, *supra* note 137 at 109.

[203]*Id.* at 110 ("there is nothing in the First Amendment that forbids having the best of both worlds.").

[204]*Id.* at 89, 90, 93.

[205]*Id.* at 90-99.

[206]*Id.* at 111-113.

[207]*Id.* at 97, 115; Bollinger, *supra* note 137 at 33 ("The Commission has, on the whole, been extraordinarily circumspect in the exercise of its powers."). The one exception to this restraint, in Bollinger's view, is its enforcement of rules regulating broadcast indecency. *Id.* at 33-34 n.103; Bollinger, *supra* note 137 at 197 n.21 ("The only area, it seems, where the commission can perhaps be charged with having seriously ignored important free speech interests is that of indecent speech.")

traditions and cuts against them." Accordingly, he would permit the government to require public access "*somewhere* within the mass media but not throughout the press."[208]

There are several advantages to this approach according to Bollinger. First, it ensures public access based on the understanding that democratic debate "is too critical a matter" to leave in the hands of a few.[209] At the same time, by focusing such requirements only on certain media, the system of partial regulation allows experimentation with public policy while at the same time preserving an "unregulated sector" to act as a check upon government.[210] The system should yield a net gain in the amount of speech, and, perhaps more importantly, encourage print journalists to live up to the principle of fairness embodied in the regulatory model, while stimulating the broadcast press to emulate their autonomous brethren.[211]

This very brief description of the partial regulation theory does not attempt to fully explain the many nuances contained in Bollinger's argument. It merely seeks to identify the balance struck between the First Amendment rights of the autonomous media versus the First Amendment "interests" that represent the aspirations of public regulation. The theory recognizes the inherent risk to free expression presented by government regulation, but concludes that the "unregulated sectors" will prevent any long term damage to the First Amendment. Such unabashed defenses of the status quo are rare among First Amendment theorists, but they do appear from time to time. Consistent with this view, Professor Frederick Schauer has written that "the history of first amendment doctrine provides considerable cause for optimism." He added that "[w]hile the reactions have not been as

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[208]*Id.* at 111-112 (emphasis in original).

[209]*Id.* at 117.

[210]*Id.* at 114-115.

[211]*Id.* at 115 ("the juxtaposition of the autonomous print media, represent[s] continued respect for the ideal of a free press, against the regulated broadcast media"), 118 ("the value of mixed [regulatory] systems [is] in yielding the most information"), and 119 ("one of the advantages of public regulation is that it is a way to instruct other branches of the media (i.e., print) in proper journalistic standards").

fast as many would like . . . the courts have in the past demonstrated the ability to adapt first amendment doctrine to new forms of technology."[212]

2. Revisionist Perspective

Unlike the measured approach of the Incrementalists, adherents of Revisionism argue that the common understanding of the First Amendment as a barrier against government action is obsolete. In this view, the changing nature of American society, including the growth of large corporations and the reduction of the state as a repressive force, suggests that government should take an active role in promoting First Amendment values. Contrary to traditional interpretations, an unregulated press rather than government involvement poses the greatest threat to free expression. As a result, the government must act to ensure that First Amendment values are preserved. The Revisionist approach requires a radical shift in perspective from the free speech concepts articulated in such cases as *New York Times v. Sullivan* or *Miami Herald Publishing Co. v. Tornillo.*

Justice William O. Douglas has written that a shift to this perspective would require the adoption of "a new First Amendment."[213] Some Revisionists whole-heartedly agree. Professor Cass Sunstein, for example, has written that his theory (a "New Deal" for speech) "would produce significant changes in our understanding of the free speech guarantee. It would call for a large-scale revision in the view about when a law 'abridges' the freedom of speech."[214] In particular, he suggests that press autonomy "may itself be an abridgement of the free speech right." But he acknowledges that to reach this

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[212]Schauer, *Free Speech and the Demise of the Soapbox*, 84 COLUMBIA L. REV. 558, 572 (1984). *See also* Baeza, *supra* at 594.

[213]*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. at 160 (Douglas, J., concurring). *See also* Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243

[214]C. Sunstein, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xix (New York: The Free Press 1993). It is interesting to note, however, that Sunstein denied any intent "to ignore the First Amendment or to call for a new constitutional amendment." *Id.* at xvi. Rather, he describes current First Amendment concerns as "strange," and labels present trends as "The New First Amendment." Sunstein, *Free Speech Now*, 59 U. CHIC. L. REV. 255, 257-58 (1992).

conclusion, "it will be necessary to abandon or at least to qualify the basic principles that have dominated judicial, academic, and popular thinking about speech in the last generation."[215]

This radical difference in perspective, which Dean Bollinger has characterized as coming from "another world," demonstrates that the Revisionist Perspective is not concerned with technology per se.[216] Rather, its focus is on the achievement of First Amendment "goals" or "values," however they might be defined, and on the need to allow government broad latitude in bringing them about. Technology does play a role, however, in that judicial decisions regarding new media decisions are viewed as reinforcing Revisionist theory. For example, Dean Jerome Barron, who has been described as "the intellectual godfather of compulsory access to the press,"[217] wrote that *Red Lion* "represents a look at the First Amendment in the light of new social realities of concentration of ownership and control in a few hands that has been produced by the twin developments of media oligopoly and technological change."[218] Similarly, concerns regarding private abuses by broadcasters or other new media practitioners are used to bolster arguments in favor of government intervention.[219]

A primary concern of Revisionism, then, is to preserve freedom to make public policy. Like law and order advocates who complain that constitutional safeguards are mere "technicalities" that protect the guilty, some Revisionists argue that the First Amendment is becoming an impediment to developing necessary communications policies. Dean Monroe

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[215]*Id.* at xix, xx.

[216]Bollinger, *supra* note 137 at 72. *See also* Powe, *supra* note 31 at 252 (the concept that modern media present serious threats to democracy "jumps off the page").

[217]Powe, *Tornillo*, 1987 SUP. CT. REV. 345.

[218]Barron, *Access — the Only Choice for the Media?* 48 TEX. L. REV. 766, 772 (1970).

[219]*Red Lion Broadcasting Co.*, 395 U.S. at 387-88.

Price of the Benjamin N. Cardozo School of Law has written that judicial decisions on the First Amendment rights of broadcasters, cable operators and telephone companies "can throw complex federal compromises . . . into a cocked hat" and make "[l]awyers, not economists or political scientists" the arbiters of "what is possible, what the competing values are, how they should be measured, how they should be weighed and validated." The proper role for the First Amendment in this debate, according to Price, is "in the background, informing, but not controlling the debate."[220]

A necessary corollary to this view is that the government no longer presents a significant threat to freedom of expression. Or, at least, comparing the relative threats posed by government and big business, Revisionists would prefer to take their chances with the government. For some, this is a simple choice. As stated in one article, current First Amendment theory is based on "eighteenth century fears of government's tyrannical censorship." Current First Amendment is skewed, in this view, because "the evils against which the law was directed no longer prevail." But in the new cultural environment, a more serious threat is presented by the "consumptive thrust of unchecked capitalism [which] affects all public discourse."[221] In this scenario, "we cannot retain our old constitutional prerogatives."[222] Or, as put more mildly by Professor Cass Sunstein, "[w]e should not be so reflexively opposed to 'government regulation.'"[223]

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[220]Price, *Congress, Free Speech, and Cable Legislation: An Introduction*, 8 CARD. ARTS & ENT. L. J. at 228, 230. *See id.* at 231 ("Structural policies advocated by first amendment zealots may be the best ones for the society. But they should be justified for their overall value to the community, not insisted upon only as required by the constitution."). *See also* Sunstein, *supra* note 214 at 81 ("the First Amendment should not operate as a talismanic or reflexive obstacle to our efforts to experiment with different strategies for achieving free speech goals"); Sunstein, *Free Speech Now*, 59 U. CHIC. L. REV. at 257-58.

[221]Collins& Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1088, 1107 (1990).

[222]*Id.*

[223]Sunstein, *supra* note 214 at 34.

Although there are variations, and some goals overlap, Revisionist theory generally seeks government intervention in the service of three First Amendment values. Common goals include requiring public access to the mass media, preserving the relative power of various speakers by reducing excessive concentrations of power and improving the quality of public discourse. Each of these goals can be characterized as serving an overriding purpose of promoting democracy. And, to a certain extent, each may reinforce the other. Access requirements, for example, may tend to reduce the effects of concentration of power by giving voice to the powerless; ownership limits are another way to attack concentration, and in doing so, may increase public access by extending the franchise across a broader range of the public. Both of these goals seek to improve the quality of public discourse by encouraging more speech from diverse and antagonistic sources. The "quality" goal is more problematic, and often is served by proposals to delete certain objectionable ideas from the marketplace of ideas. However, there have been attempts to compel the media to improve their product, such as the affirmative fairness doctrine requirement that broadcasters air controversial issues of public importance.[224]

The most common Revisionist theme involves requiring mass media to provide some form of public access. Such access rights may take various forms, including responsive access, selective access and universal access to the media. The fairness doctrine and personal attack rules, right of reply statutes and "equal opportunities" requirements in political broadcasting law are examples of "responsive access" rights.[225] "Selective access" regulations include cable franchise requirements for PEG channels,[226] must carry

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[224]*Red Lion Broadcasting Co.*, 395 U.S. at 385.

[225]*Id.*; *Miami Herald Publishing Co.*, 418 U.S. 225; 47 U.S.C. § 315(a).

[226]1992 Cable Act, 47 U.S.C.A. §§ 531(c).

rules,[227] the noncommercial/educational channel set-aside for DBS[228] and "reasonable access requirements" for federal candidates on broadcasting stations.[229] "Universal access" is based on the common carrier model, whereby the owner of a distribution medium is legally obligated to serve all customers without discrimination. Proposals for a common carrier model generally focus on cable television, such as with "leased access" requirements,[230] or on broadband communications networks.[231] Some Revisionists, however, would enforce common carrier requirements on print publishers.[232]

Jerome Barron probably is the most influential of Revisionist theorists. His article, *Access to the Press — a New First Amendment Right*, became the intellectual model for successive theories supporting public access to the media.[233] His central thesis is that constitutional theory is corrupted by the "romantic conception" that the marketplace of ideas is freely accessible, and he concludes that legal intervention is needed "if novel and

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[227]*Id.* at §§ 534-535. Must carry rules were upheld in *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32.

[228]The 1992 Cable Act requires operators of DBS service to set aside four to seven percent of their channel capacity for "noncommercial programming of an educational nature." *id.* § 335. However, this requirement is one of three provisions of the Act that the U.S. District Court for D.C. held is "clearly unconstitutional." *Daniels Cablevision, Inc.*, 835 F. Supp. at 8. The court said that "[i]n the absence of a record identifying a valid regulatory purpose or some other legitimate federal interest to be advanced by conscripting DBS channel space, there is no justification for any First Amendment burdens occasioned by Section 25." *Id.* at 8-9. The same court found the public and leased access provisions to be constitutional. *Id.* at 6 ("Enabling a broad range of speakers to reach a television audience that otherwise would never hear them is an appropriate goal and a legitimate exercise of federal legislative power.").

[229]47 U.S.C. § 312(a)(7).

[230]1992 Cable Act, 47 U.S.C.A. § 532(a).

[231]Hammond, *Regulating Broadband Communication Networks*, 9 YALE J. REGULATION 181 (1992); Geller, *supra* note 137.

[232]*See, e.g.*, Nadel, *A Technology Transparent Theory of the First Amendment and Access to Communications Media*, 43 FED. COMM. L. J. 157 (1991); Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium From the Message*, 11 FORD. URBAN L. J. 163 (1982).

[233]*See generally* Caristi, *The Concept of a Right of Access to the Media: A Workable Alternative*, 22 SUFFOLK U. L. REV. 103 (1988); Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Karst, *Equality as a Central Principle in the First Amendment*, 43 U.CHI. L. REV. 20 (1975).

unpopular ideas are to be assured a forum."[234] Barron wrote that "when the soap box yields to radio [or television] and the political pamphlet to the monopoly newspaper," the First Amendment problem becomes the accumulation of private power, for which a public remedy is necessary.[235] Although he was concerned with all media, including newspapers, Barron emphasized that problems of attaining access have been increased by new mass media technologies.[236]

Barron's access theory appeared to be vindicated when the Supreme Court decided *Red Lion*, upholding the FCC's personal attack rule and fairness doctrine. The Court described the special circumstances that distinguish broadcasting from print media and noted that the First Amendment "does not embrace a right to snuff out the free speech of others."[237] Justice White's opinion for the Court stated that it is the right "of the viewers and listeners, not the right of the broadcasters, which is paramount," and that "there is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[238] The broad promise in the dictum of *Red Lion* was cut short four years later when the Supreme Court decided that broadcasters may refuse to sell time to private entities wishing to sell editorial advertisements.[239]

The following year, the Court struck an even more stunning blow to the theory in *Miami Herald Publishing Co. v. Tornillo*, holding that a state right of reply statute was unconstitutional. Barron was the losing counsel, and the Court spoke directly to his access

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[234]Barron, *Access to the Press — a New First Amendment Right*, 80 HARV. L. REV. 1641, 1642 (1967).

[235]*Id.* at 1643.

[236]*Id.*

[237]395 U.S. at 390.

[238]*Id.* at 389.

[239]*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. at 110 ("Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act.").

theory: "However much validity may be found in these arguments," creating an enforceable right of access "at once brings about a confrontation with the express provisions of the First Amendment."[240] The Court concluded that a "[g]overnment enforced right of access inescapably dampens the vigor and limits the variety of public debate.'"[241]

Despite these setbacks, the access movement has found expression both in theory and in federal policy for the electronic media. In one proposal, every commercial radio and television station in the United States would be required to set aside one hour of prime time programming each day for broadcasts by an "Audience Network." The Audience Network would be a national non-profit membership organization established by statute. It's objective would be "to put daily, civic function behind the principle that information is the currency of democracy."[242] Another theory would subject all media that the government deems to be economically "scarce" to common carrier requirements.[243]

Recent attention devoted to the creation of an electronic superhighway has moved the focus of the access discussion to its application to broadband communication networks. For example, the Clinton Administration's NII proposal is predicated on a policy of "universal access," both for programmers and for end customers.[244] In a thoughtful analysis, Professor Allen Hammond advocates applying a variation of the public/private forum doctrine to broadband networks.[245] His model is an attempt to "move beyond the

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[240]418 U.S. 241.

[241]*Id.*.

[242]Nader & Riley, *Oh, Say Can You See: A Broadcast Network for the Audience*, 5 J. LAW & POLITICS 1, 86 (1988).

[243]Nadel, *supra* note 232 at 160-164.

[244]Administration White Paper on Communications Act Reforms.

[245]Hammond, *supra* note 231 at 222-235.

regulatory morass which could result from an attempt to regulate the new communications media under the old regulatory schemes."[246] At the same time, it seeks to avoid "the specter of censorship" both by the government and by private entities.[247]

Under this theory, public fora would consist of transmission providers possessing monopoly power or essential facilities, or entities that elect public forum status. Their ability to exclude access to their facilities would be sharply limited, in the same way that the government may not restrict access to streets, parks, sidewalks and other traditional public fora. Nor would public fora networks be able to control the content of communications on their networks.[248] Private fora would also exist, providing service to "distinct, specialized users."[249] There would not be the same right of access to private fora, except to the extent they interconnect with public fora facilities. To reduce the danger of censorship, government determinations regarding access and speech entitlement would be limited to "relatively objective, noncontent oriented, evidentiary considerations of whether a firm possesses monopoly power or essential facilities."[250]

Henry Geller has proposed a similar approach. Like Hammond, he concludes that "our present regulatory models for electronic media have failed." However, a fiber optics network holds "great promise for video publishing over a common carrier (telco) distribution system," representing "an opportunity for a successful media regulatory policy."[251] Geller would eliminate the "public trustee" concept that has been applied to

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[246] *Id.*

[247] *Id.* at 227.

[248] *Id.* at 223-225. The model proposes that "public fora exchange their access and content controls for substantially limited business and speech liability."

[249] *Id.* at 222.

[250] *Id.* at 225.

[251] Geller, *supra* note 137 at 25.

broadcasting, replacing it with a system of subsidies for public interest programming, funded by a combination of spectrum and cable franchise fees.[252] The broadband network would be operated as a common carrier, thus ensuring nondiscriminatory access and an absence of content control by the carrier.[253] At the same time, however, for both economic and First Amendment reasons, the Geller model would permit common carriers to control the content on a limited number ("perhaps as many as five") channels on its network. This content restriction would be removed once competitive alternatives developed.[254]

Other Revisionist theories are concerned with the content of communications. In an article entitled *The First Amendment in an Age of Paratroopers*, Ronald Collins and David Skover argue that the "business of television" undermines democracy. They assert that "[w]ith entertainment as the paradigm of most public discourse, traditional first amendment values — which stress civic restraint and serious dialogue — are overshadowed."[255] Collins and Skover assert that the nature of television, with its focus on image and absence of context, "allows people to experience more and understand less."[256] Because television "appeals more to the senses than to the intellect,"[257] and is tainted by commercialism, it "inhibits the important first-amendment value of diversity of subject and opinion."[258]

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[252]*Id.* at 15. Based on his long experience with the FCC, Geller concluded that "the public trustee scheme itself — behavioral regulation to ensure that the broadcaster acts as a fiduciary for its community — is a joke."

[253]*Id.* at 6-7, 12.

[254]*Id.* at 36. Common carriers, however, would not be permitted to acquire cable television systems.

[255]Collins and Skover, *supra* note 221 at 1088.

[256]*Id.* at 1096.

[257]*Id. Compare Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.), *cert. denied*, 113 S. Ct. 659 (1992) (overturning District Court ruling that *2 Live Crew* album is obscene because it appeals to "the loins, not to the intellect and the mind"). See *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 591 (S.D. Fla. 1990).

[258]Collins and Skover, *supra* note 221 at 1097-98.

But while they reject traditional First Amendment approaches, particularly as they apply to new technologies, Collins and Skover also reject most Revisionist solutions. Thus, they applaud efforts to "wrestle prime time from the commercial 'haves' and to place it in the hands of the public 'have nots,'" but ask, "once reformists have created their Audience Network to caution the public to the dangers of commercial broadcasting, the question will be: Who wants to watch it?"[259] A good question, really. In any event, the authors put off offering a solution for another time, and conclude that their analysis presents a paradox: "The first amendment cannot save itself without destroying itself."[260]

Sunstein agrees with many of the symptoms identified by Collins and Skover, but more constructively offers some proposed solutions. Calling his approach a "New Deal for speech," Sunstein argues that "government controls on the broadcast media, designed to ensure diversity of view and attention to public affairs, would help the system of free expression."[261] Such controls would include public interest requirements for television, rights of reply, children's advertising limits and restrictions on advertiser control over programming content.[262] Unlike Barron, Sunstein is concerned with broader problems than monopolization of the media. Accordingly, he proposes measures that would force people to pay attention to serious public affairs programming.[263] The mechanism for

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[259] *Id.* at 1122. *See id.* at 1116-24.

[260] *Id.* at 1116. The authors promise to provide more insights in a forthcoming work entitled *The Death of Discourse.*

[261] Sunstein, *supra* note 214 at xix, 16. He also advocates increased government power to regulate commercial speech, libel, scientific speech with potential military applications, speech that invades privacy, hate speech, certain forms of pornography and disclosure of rape victims' names. *Id.* at xviii. Such an ambitious reworking of the First Amendment is beyond the scope of this Paper.

[262] *Id.* at 35. Sunstein would not limit his regulations to television. He suggests, for example, that a fairness doctrine or other content controls could be applied to the print media. *Id.* at 108-114 ("narrow regulatory initiatives — including controls on advertisers and right to reply laws — might well be upheld as applied to newspapers").

[263] *Id.* at 73. Sunstein is understandably cautious about this approach and suggests that "a requirement of media attention to public affairs" might appropriately be adopted by the people "acting through their elected representatives." But he adds that if people's current TV viewing patterns conflict with a more

implementing such a requirement is not made clear. On the other hand, Sunstein advocates a more active role for the FCC in promoting programming quality, such as by issuing non-binding guidelines, recommending to candidates that they "deliver substantial speeches on national and local television" and participate in "a set number of debates," and by offering the networks an antitrust exemption as a means of reducing violent programming.[264]

An undercurrent of the much of Revisionist writing is a McLuhanesque notion that the medium of television has unique characteristics, such as its power or its reach, that call for greater government control. The "pervasive presence" idea, embraced by a plurality in *FCC v. Pacifica Foundation*, represents one aspect of this view.[265] Another is the idea that the video medium itself may be entitled to less constitutional protection because of its subliminal influence. While this view has not been widely accepted by the courts, the U.S. District Court in D.C. stated in *Banzhaf v. FCC*:

> [T]he broadcasting medium may be different in kind from publishing in a which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which can be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[266]

It is not entirely clear the extent to which such attitudes toward video programming play a role in defining the medium's First Amendment status. However, Former FCC Commissioner Glen O. Robinson believed that the "unarticulated assumption" of most

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active promotion of public affairs, then "the democratic judgments should prevail, so long as they do not intrude on anything that is properly characterized as a right."

[264] *Id.* at 82-83.

[265] 438 U.S. 726, 748 (1978). *See also CBS, Inc. v. Democratic National Committee*, 412 U.S. at 127-28 (captive audience theory weighs against rule requiring broadcasters to carry editorial advertising). But it is difficult to say how much more "captive" the broadcast audience is compared to those who view other video services.

[266] 405 F.2d 1082, 1101-02 (D.D.C. 1968).

arguments supporting greater control over broadcasting was the belief that broadcasting is a "uniquely influential and powerful . . . medium of communication."[267] This factor most likely will continue to be a tacit part of any debate about whether a new First Amendment should apply to the electronic media.

3. Traditionalist Perspective

Traditionalists believe that the First Amendment to the United States Constitution is predicated on protecting new communications technologies. By incorporating the Free Press Clause as a structural provision of the Constitution, the Framers consciously extended protection to the only organized mass medium of their age. Justice Potter Stewart has written that the First Amendment protects an "institution," and that the publishing industry is "the only organized private business that is given explicit constitutional protection."[268] It is possible to argue that the Framers intended to extend freedom of expression only to technologies of which they were aware, yet even proponents of the so-called doctrine of "original intent" have urged that courts "must never hesitate to apply old values to new circumstances, [such as when] those circumstances are changes in technology."[269] Thus, although "the first amendment's guarantee of freedom of the press was written by men who had not the remotest idea of modern forms of communication," it is nevertheless imperative that judges "find the values of the first amendment . . . to encompass the electronic media."[270]

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[267]Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 154 (1967).

[268]Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633 (1975). While it is true that the Supreme Court has refused to create special First Amendment rights for the press, the point here is that the First Amendment specifically recognized the institution of the press. *But see Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1401-02 ("compelling state purpose" supports placing fewer restrictions on a media corporation because such entities fulfill a "crucial societal role").

[269]*Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (Bork, J., concurring).

[270]*Id.*

Over a decade ago, Ithiel de Sola Pool examined the historical development of communications technologies and their relation to freedom of expression. He concluded in TECHNOLOGIES OF FREEDOM that the First Amendment "applies fully to all media . . . not just the media that existed in the eighteenth century."[271] Instead of focusing on the means of transmission, constitutional protection should center on "the function of communication."[272] Additionally, publication — even on electronic media — should be unlicensed by the government and free from prior restraint. Finally, presumption would disfavor regulation unless the government could demonstrate that its chosen means was narrowly drawn to serve a significant end.[273] Pool's theory contained one significant caveat: common carrier regulation should be used, rather than direct regulation, where "resources for communication are truly monopolistic."[274]

Although Pool was not the first to suggest that electronic media fit within traditional First Amendment protections,[275] his work was very influential. A growing number of scholars and public officials began to call for an end to the regulatory cycles that subjected new technologies to lower levels of constitutional protection. Professor Powe examined

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[271]Pool, *supra* note 40 at 246.

[272]*Id.*

[273]*Id.*

[274]*Id.* However, Pool noted that "the communications monopolies that exist without the privileged enforcement by the state are rare." *Id.* at 247. While he maintained that entities — and particularly publishers — should not be made common carriers involuntarily, and that carriage obligations were reasonable for government-created monopolies. In that circumstance, several other requirements would be allowed, including mandatory interconnections, disclosure of accounting methods and a time limit on the monopoly franchise. As to content control, Pool argued that both the government and the carrier "should be blind to circuit use." *Id.* at 247-248.

[275]*E.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 207 (1982); Bazelon, *The First Amendment and the "New Media" — New Directions in Regulating Telecommunications*, 31 FED. COMM. L. J. 201 (1979); Goldberg & Couzens, *"Peculiar Characteristics": An Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COMM. L. J. 1 (1979); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959).

the history of FCC regulation of broadcasting and described a wide variety of political abuses. He concluded that the "lessons of licensing, whether in seventeenth century England or twentieth-century America" should cause courts and policymakers to look away from government, not to it, for solutions to the problems of new technologies.[276] Jonathan Emord proposed a "preservationist perspective" on the First Amendment following a comprehensive examination of constitutional and regulatory history. Under this theory, courts should interpret the First Amendment so as to impose "static barriers" against government intervention but to allow "adaptive definitions" of the terms speech and press to account for new technologies.[277]

Professor Laurence Tribe has proposed a new constitutional amendment designed to preserve traditional constitutional rights for new communications technologies. It would provide:

> This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.[278]

The point Tribe made by offering an amendment was to underscore the importance of the issues, not to suggest that the First Amendment as drafted was somehow inadequate.[279] Rather, he described the constitution as "an astonishing document" applicable to "all times

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[276]Powe, supra note 31 at 256. Another comprehensive analysis of broadcast regulation is found in M. Spitzer, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST 46-47, 50 (New Haven: Yale University Press, 1986). Revisionist accounts of the history of broadcast regulation, which conclude that political factors rather than spectrum scarcity explain the move toward regulation, appear in Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. Rev. 990, 1043-1048 (1989) and Emord, *supra* note 31 at 137-165.

[277]*Id.* at 128-129. See also Emord, *The First Amendment Invalidity of FCC Content Regulations*, 6 NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 93, 206-211 (1992); Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989).

[278]Tribe, *supra* note 66.

[279]He suggested that the amendment could ensure protections for technology that the Ninth Amendment was intended to do for the Constitution's text.

and technological landscapes." He disputed the assumption underlying Revisionist theory that the First Amendment should be employed to prevent "private censorship."[280] Regardless of technology, the point of the First Amendment is "restraining *government* above all else" and "protecting *all* private groups *from* government."[281]

So much for theory. How would traditional First Amendment principles be applied to new technologies in practice? The following paragraphs suggest some analytic approaches to this question, based on previous cases using established First Amendment principles. Some of the points seem almost too obvious to mention, but they often are overlooked in cases involving new communications media.

First, it is important to acknowledge that the various media may in fact have different physical characteristics. These characteristics may be relevant to the government's regulatory interest. For example, amplified sound can cause excessive noise and may be regulated accordingly,[282] whereas print provides no similar basis for government intervention. Printed matter, on the other hand, unlike aural communications, may cause litter or be distributed via physical means such as newsboxes that may be regulated.[283] Face-to-face communications, compared to the other methods of spreading ideas, can tie up traffic or cause other problems that require some type of control.[284] These considerations may result in a somewhat different First Amendment *analysis* for each medium of communication, but they do not require different First Amendment *standards*.

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[280] *Id.* Like Pool, Tribe suggested that the government might require some form of access to technologies that become "socially indispensible."

[281] *Id.* (emphasis in original).

[282] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

[283] *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

[284] *Frisby v. Schultz*, 487 U.S. 474 (1988).

Second, the analysis must compare the characteristic of the regulated medium with the government's regulatory justification to determine if the two are sufficiently related. The basic approach is set out in *Nollan v. California Coastal Commission*, in which the Supreme Court struck down a state condition on the issuance of a building permit. Although the state had the authority to issue or deny the permit, it could not condition its decision on a concession by the applicant that was unrelated to the government's interest. To illustrate the point, Justice Scalia wrote that the state could forbid "shouting fire in a crowded theater," but it could not "grant dispensations to those willing to contribute $100 to the state treasury."[285] In other words, there must be an "essential nexus" between the government's use of its authority and the problem to be solved.

Third, the importance of the "nexus" analysis suggests that there should be a close fit between ends sought and means chosen when the government seeks to regulate speech because of some special characteristics. In this regard, the generic test of *United States v. O'Brien* is inappropriate to gauge the congruence between means and ends. As explained in more detail below, *O'Brien* is a symbolic speech case that has been extended incorrectly far beyond its original context.[286] The inadequacy of *O'Brien*, as well as the meaning of this third analytic step, is best understood by examining First Amendment cases involving less-protected speech. Like the electronic media, certain types of speech, such as commercial speech and fighting words, have received a lower level of constitutional

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[285]483 U.S. 825, 836-37 (1987).

[286]Using the *O'Brien* test is cases involving direct regulation of the media (as opposed to general business regulations applicable to all) commits the fallacy described above that calls First Amendment rights for cable operators "the right to string wires on poles." Certainly government may regulate paper production, but when the commodity is used by a publisher to produce a newspaper, regulation has First Amendment consequences. The District Court opinion in *Turner Broadcasting System* is based on this fallacy, claiming that the government was merely regulating"the means of delivery of video signals to individual receivers." 819 F. Supp. at 40. The court was unconcerned by the fact that "video signals have no other function than to convey information." *Id. But see Preferred Communications, Inc. v. City of Los Angeles*, 1994 WL 2799 (9th Cir.) ("without the signals transmitted along the wires, cable is basically like any other utility;" "all regulations — even those which relate only to the construction of the plant — are subjected to demanding First Amendment scrutiny because of their direct impact on programming").

protection. But while such speech may be subjected to more regulation, the government may not do so without matching the rule with the characteristic that permits greater government involvement. Thus, recent decisions establishing limits for the regulation of "low value" speech are particularly relevant.

In *City of Cincinnati v. Discovery Network, Inc.*, the Supreme Court invalidated a municipal ordinance regulating the distribution of commercial handbills via newsracks on the city's rights of way.[287] The city had justified its regulation by pointing to its valid regulatory interest in promoting safety an aesthetics on the streets and on the fact that the newsracks at issue were used to disseminate commercial speech. It argued that it could promote this interest one step at a time without violating the First Amendment. The Supreme Court disagreed. It found that the city's emphasis on the nature of the publication to be regulated illustrated the difficulty of treating commercial speech as a distinct category.[288] The Court concluded that without "some basis for distinguishing between 'newspapers' and 'commercial handbills' *that is relevant to an interest asserted by the city*," it would not uphold a ban on newsracks for handbills simply because commercial speech can be regulated more extensively.[289] In other words, there must be an "essential nexus" between the characteristic of the medium that permits government action and the specific rule in question. Moreover, there must be a reasonable fit between the government's purpose and the means chosen to advance it.[290] Thus, the Court found that the regulatory

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[287]113 S. Ct. 1505 (1993).

[288]*Id.* at 1511.

[289]*Id.* at 1516 (emphasis added).

[290]Some might suggest that this case is distinguishable from one that examines the constitutional status of a transmission medium because *Discovery Network* involved content discrimination. But this misses the essential point. The City of Cincinnati was not censoring commercial speech; its rules were based on the physical means of distribution — the placement of machines on public rights of way. The editorial content of the handbills was not affected and no restrictions were placed on distribution by other means. *Discovery Network*, then, stands for the proposition that the government cannot regulate a means of speech distribution unless there is a close connection between the regulatory purpose and the method chosen to advance it.

interest did not match the solution, and therefore did not justify restricting the distribution technology.[291]

The Court employed a similar analysis in *R.A.V. v. City of St. Paul.* That case involved a municipal ordinance that prohibited "disorderly conduct" that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[292] The Court struck down the ordinance because it was content based, but the opinion by Justice Scalia made another important point. Unprotected speech such as "fighting words," he wrote, may not be freely regulated without regard to "their distinctively proscribable content."[293] In that regard, he compared fighting words to a "noisy sound truck." Each is a "mode of speech."[294] The Court's reasoning, essentially, was that regulating a "medium" for reasons unrelated to its special category violates the First Amendment.

This is not to suggest that new communications technologies should borrow a First Amendment standard from the area of commercial speech or the fighting words doctrine.[295] The point of these cases is that the First Amendment requires close scrutiny of

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[291]Another commercial speech case, *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), provides further support. The Court in that case struck down a Florida ban on in-person solicitations by CPAs. The issue there was not the message, but the method of communication. *Id.* at 1797 ("This case comes to us testing the solicitation, nothing more."). The Court found that "[e]ven under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech," this regulation of the chosen medium did not advance the state's interest in a direct or material way. *Id.* at 1802, 1804.

[292]112 S. Ct. 2538, 2541 (1992).

[293]*Id.* at 2543.

[294]*Id.* at 2545.

[295]However, it is clear from the cases just discussed that the Court is beginning to apply stricter scrutiny to ensure that First Amendment interests are not infringed even where speech has traditionally received less protection. In many ways, the important question is not which test the Court will use, but the rigor with which it will apply the test. Consequently, the more stringent scrutiny now being applied in commercial speech cases is interesting in that the *Central Hudson* test has its roots in the *O'Brien* analysis. *O'Brien*, however, has been notorious for the "lax and deferential way it has been used." Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 647 (1991); Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 787-88 (1985). While it would clearly be appropriate simply to abandon the use of *O'Brien* in cases involving direct regulation of communications media, one scholar has suggested that *O'Brien* could be rehabilitated to be "essentially equivalent to strict scrutiny." Williams, *supra* at 707. Recent experience

speech regulation to ensure that the government's reach does not extend beyond the special needs that give rise to the state's concern. This is true even for areas of First Amendment law that historically have received less protection. However, for some reason, these very basic principles can be overlooked in cases involving new communications technologies. It is often the case that, after concluding that a given medium receives less protection, courts do not examine whether government regulations are in any way related to the "special" characteristic of the technology.

This certainly has been the case for cable television. As lower courts have awaited the Supreme Court's pronouncement on the appropriate standard for the technology of cable, they have nevertheless had to decide the cases before them. Predictably, they have differed on the proper analytic framework, and, just as predictably, have provided varying levels of constitutional protection. Some courts, citing "differences between cable television and the non-television media"[296] adopted a defacto, albeit unarticulated, standard that accorded less constitutional protection for cable television than for other media.

The most common justification for different constitutional treatment of cable television is that it uses public rights of way for the distribution of its signals.[297] The level of "physical disruption" involved in constructing a cable system, in this view, gives local authorities a legitimate need for some control. Other courts have focused more on economic characteristics attributed to the cable medium and concluded that "natural monopoly" characteristics provide constitutional justification for extensive franchising regulation.[298]

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with commercial speech indicates that this approach is not implausible. *Compare also Schenck v. United States*, 249 U.S. 47 (1919) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[296]*Omega Satellite Prod. v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982). *See also Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-80 (10th Cir. 1981), *cert. dismissed* , 457 U.S. 1001 (1982).

[297]*Id.* at 1374, 1377. *See generally* Albert, *The Federal and Local Regulation of Cable Television*, 48 U.COLO.L.REV. 501, 508-13 (1977).

[298]*Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 715-17 (8th Cir. 1986); *Omega Satellite Prod.*, 694 F.2d at 128 ; *City of Boulder*, 660 F.2d at 1377-80.

In *Chicago Cable Communications v. Chicago Cable Commission*, for example, the Seventh Circuit held that the local government could compel the cable operator to telecast four and one-half hours per week of "local origination" programming on the theory that "[c]able programming, like other forms of the electronic media, is an economically scarce medium."[299] At least one court has held that the commercial aspects of the cable television business supports a lower level of constitutional scrutiny. In *Erie Telecommunications, Inc. v. City of Erie*, the District Court found that First Amendment protection was "diminished" because "distribution of cable signals is performed for the realization of profits" and held that the local government could charge the cable operator franchise fees for the purpose of raising municipal revenue.[300]

Ultimately, however, the various rationales are tied to use of public rights of way. As Judge Richard Posner explained the natural monopoly theory, the local authorities have an interest in establishing an exclusive franchise to the extent the market will support only one operator. Where this is the case, the government may prevent repeated disruption of the streets.[301] Other courts have been skeptical of the analysis. The Ninth Circuit has described the natural monopoly theory as "just another way of expressing the city's interest in avoiding traffic disruption and visual blight" which are "no more compelling under the rubric of natural monopoly."[302] In any event, a monopoly created by a system of local franchising is not very natural.

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[299]879 F.2d 1540, 1550 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990).

[300]659 F. Supp. 580, 597 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3rd Cir. 1988).

[301]*Omega Satellite Prod.*, 694 F.2d at 128.

[302]*Preferred Communications, Inc. v. City of Los Angeles*, 1994 WL 2799 (9th Cir.).

The common thread in these decisions is their tendency to apply a First Amendment theory akin to the broadcast model without expressly adopting a new standard.[303] The holdings are diametrically opposed to the traditional First Amendment position that economic conditions affecting media access are irrelevant to the speaker's constitutional status.[304] The *Erie* court simply confused the concept of commercial speech, which receives less constitutional protection, with speech that is sold commercially, which is fully protected.[305] The decisions also are typified by a failure by the courts to analyze specific characteristics of cable television markets and to identify a nexus with the governmental controls approved.

Courts using a Traditionalist Perspective, on the other hand, have proceeded from the premise that "the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed."[306] In *Quincy Cable TV, Inc.*, the D.C. Circuit examined "the distinctive features" of cable television and rejected the argument that cable operators' use of public right of way to attach wires justifies a lower level of constitutional scrutiny:

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[303]In at least one case, the court was more forthcoming about its use of a different constitutional standard that "split the difference" between the level of protection provided to broadcasting and print. In *Preferred Communications, Inc. v. City of Los Angeles*, CV 83-5846 (CBM) (C.D. Cal. January 5, 1990), the court stated:

> The programming of a cable television network, like the publishing of a newspaper, involves editorial discretion. Moreover, unlike broadcast, cable television does not require use of the airwaves. However, the Court recognizes the potential for disruption of the public domain inherent in stringing cables along the City's utility poles and conduits. Accordingly, the Court places the medium of cable television in between the broadcast media and the print media on the governmental regulation continuum, however closer to the print media.

[304]*Tornillo*, 418 U.S. at 251. *See* W. Van Alstyne, INTERPRETATIONS OF THE FIRST AMENDMENT 73-75 (1984).

[305]*Discovery Network, Inc.*, 113 S. Ct. at 1512; *New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc.*, 343 U.S. at 501.

[306]*Quincy Cable TV, Inc.*, 768 F.2d at 1448.

> No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid.[307]

The court also determined that the purported natural monopoly characteristics of cable television would not support a lower level of First Amendment protection.[308]

A number of courts have applied traditional concepts to local franchising controls — regulations that go to the heart of the differences between cable television and other media.[309] For example, the Ninth Circuit in *Preferred Communications, Inc. v. City of Los Angeles* held that an exclusive franchising arrangement violated a prospective cable operator's constitutional rights.[310] Various additional franchising requirements, including an exclusive franchising policy, public access requirements, service and channel requirements were held to be invalid under the First Amendment in *Group W Cable, Inc. v. City of Santa Cruz*.[311]

The basic presumption of these cases is that there must be some essential nexus between an asserted governmental interest and the unique characteristics of cable television. The analysis begins with the premise that "unless cable television differs in some material respect from the print media, the First Amendment standards that apply to newspapers apply with equal force to cable."[312] Although the courts acknowledged some of the obvious

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[307] *Id.* at 1448-49.

[308] *Id.* at 1450. The court took the same approach toward must carry rules in *Century Communications, Inc. v. FCC*, 835 F.2d at 298.

[309] To the extent cable television constitutes a media monopoly, its impact is felt in the local franchise area. Moreover, problems of physical disruption of public rights of way occasioned by cable installation are uniquely local in nature. Thus, if a separate constitutional standard should be applied to cable television, franchising issues provide the necessary governmental interest.

[310] 1994 WL 2799 (9th Cir.). District Courts reached the same conclusions in *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986) and *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987).

[311] 669 F. Supp. 954 (N.D. Cal. 1987).

[312] *Group W Cable, Inc.*, 669 F. Supp. at 961; *Century Federal, Inc.*, 648 F. Supp. at 1470.

physical differences between the media, for First Amendment purposes they found that the government bears the burden of demonstrating that the characteristics of cable support greater governmental intrusion.[313] Even with some type of demonstration, permissible franchising requirements were limited by the principle that "a particular characteristic of a given form of expression can only justify government regulation aimed at addressing that particular characteristic."[314]

One implication of this analytic approach is that First Amendment analysis varied according to the nature of the franchising restriction under consideration. Thus, rules that affected the editorial control of the operator, such as public access requirements, were subjected to strict constitutional scrutiny.[315] Similarly, franchise fee requirements were subjected to the stringent review accorded discriminatory taxation of newspapers.[316] On the other hand, the more lenient *O'Brien* test was applied to franchise requirements that controlled "non-speech elements of First Amendment conduct."[317] But the choice between strict and fairly lenient scrutiny was made with the understanding that cable television is a First Amendment medium and that its communicative abilities can be impaired by excessive regulation. Thus, the court in *Group W Cable, Inc.* strictly scrutinized technical regulations relating to channel capacity, signal quality, mix of programming, institutional service, and service extension to outlying areas as analogous to "legislation requiring a newspaper to print a minimum number of pages, use paper and ink of only a certain quality, cover a specified range of subjects, print information and data of interest to government and

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[313]*Group W Cable, Inc.*, 669 F. Supp. at 961; *Century Federal, Inc.*, 648 F. Supp. at 1477.

[314]Century Federal, Inc., 648 F. Supp. at 1474-75; Group W Cable, Inc., 669 F. Supp. at 961; Pacific West Cable Co., 672 F. Supp. at 1332.

[315]Group W Cable, Inc., 669 F. Supp. at 968-69.

[316]*Century Federal, Inc.*, 65 R.R.2d at 881. *But see Group W Cable, Inc.*, 669 F. Supp. at 973 (less restrictive *O'Brien* test applied to determine validity of franchise fee).

[317]Group W Cable, Inc., 669 F. Supp. at 962, 966.

institutional readers free of charge, provide free subscriptions to government and institutional readers, and offer home delivery to any subscriber residing anywhere in the community at a price fixed by the government."[318] Such requirements, the court ruled, are invalid under traditional First Amendment analysis.

This discussion is not intended to endorse every aspect of these decisions. It is simply to illustrate the ways in which traditional First Amendment principles can be, and have been applied in the cable television context. The following section weights the relative merits of the competing perspectives.

B. Evaluating the Alternatives

1. Incrementalism and the End of History

To the extent the Incrementalist Approach has not been refuted already by experience, it has been the subject of a continuing academic debate. In his book AMERICAN BROADCASTING AND THE FIRST AMENDMENT, Professor Scot Powe compiles numerous examples of political abuses of "the licensed half of the press" that he concludes are "wholly inconsistent with a concept of freedom of expression."[319] Another critic, Matthew Spitzer, also cites the problem of governmental abuse, and argues further that regulating one medium but not another "skews the distribution of values served in favor of those people who strongly prefer receiving one medium or the other."[320] Bollinger published his answer to these criticisms in his book, IMAGES OF A FREE PRESS, and reaffirmed his rather immodest belief that "the partial regulation thesis [is] the best means of

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[318] *Id.* at 970.

[319] Powe, *supra* note 31 at 248. Powe regards Bollinger's thesis that the government may treat broadcasting differently because "*we think* there are differences" as representing "the Walter Cronkite school of regulation — 'that's the way it is.'" *Id.* at 213 (emphasis in original).

[320] M. Spitzer, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST 46-47, 50 (New Haven: Yale University Press, 1986).

understanding both the rationale for and the nature of the system of the press freedom that has evolved during this century."[321]

It is beyond the scope of this Paper to reargue the points that have been made in this on-going debate. It certainly is possible to dispute some of the conclusions, such as the claim that the government's proper role is "to instruct other branches of the media . . . in proper journalistic standards," but the most important concerns are the effects of Incrementalism on the development of First Amendment law, and its prospects for the future.[322] The fact that the law has developed in fits and starts under the Incremental Approach has led to a general devaluation of the First Amendment as courts experiment with "intermediate" theories. As a general matter, the theory of partial regulation tends to vastly underestimate the loss to freedom of expression. Moreover, the convergence of media represents something of an "end of history" for Incrementalism, as it tends to make partial regulation more difficult to implement.

First, however, it is impossible to pass beyond these prior arguments without noting Bollinger's rather detached attitude toward possible abridgements of constitutional rights. It is permissible for the government to single out broadcasters or other electronic speakers for special disfavored treatment, he concludes, because society generally is allowed to choose some of its members "to bear the burdens of needed, but only partial, reforms."[323] Although Bollinger is correct that legislatures are allowed to address one portion at a time of a general problem, they are barred from doing so at the expense of fundamental rights.

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[321]Bollinger, *supra* note 137 at 116. Bollinger set out a six-point response to Powe, arguing that his concern over government censorship was overstated, that failed to consider alternatives short of abolishing public regulation, and that it did not consider the effects of private censorship. *Id.* at 128-131. With respect to Spitzer's concerns about the "crossover audience" between media, Bollinger argued that more empirical data was needed to assess this concern, but that it did not detract from the benefits that public regulation brings to the marketplace of ideas. *Id.* at 198-99. For a further critique of Bollinger's thesis, see Emord, *The First Amendment Invalidity of FCC Content Regulations*, 6 NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 93, 206-211 (1992).

[322]*Id.* at 119.

[323]Id. at 118.

To extend this logic, Congress may have a compelling interest in reducing crime, but would not be permitted to accomplish this goal by passing legislation that placed special burdens on a specific socioeconomic group.

Despite Bollinger's perceptive discussion of the dangers to free speech inherent in regulation, he rather curiously treats the courts' use of "a conception of [the First Amendment for broadcasting] thoroughly rejected elsewhere" as if it were no big deal. For example, he dismisses Powe's meticulous documentation of governmental abuses by saying that the government did not always accomplish its censorial purposes, but even if it did so in the past, there is no evidence it will attempt to subvert the press in the future. Of course, in a broader discussion of the First Amendment these same points could be made about the trial of John Peter Zenger. But that is no reason to relax the constitutional bar against government control over the press.[324]

Bollinger is exceedingly tolerant of other clear examples of political overreaching. Presented with the well-documented campaign by the Democratic National Committee to silence certain right-wing radio personalities (something we know could *never* happen again), he merely notes that the purpose of the fairness doctrine is to provide balance through a system of listener complaints.[325] Perhaps so, but it hardly seems a victory for free speech when government scrutiny of programming content causes hundreds of radio stations to drop shows to avoid the complaints.[326] In addition, Bollinger forgives FDR's efforts to keep newspaper owners from acquiring radio stations. While he acknowledges that Roosevelt acted for the "wrong reasons," that is, the anti-New Deal policies of the publishers, Bollinger describes the government's action as "not inherently bad" because

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[324]*See, e.g.*, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON xix-lxxix (L. Levy, ed., Indianapolis: Bobbs-Merrill, Co., 1966).

[325]Bollinger, *supra* note 137 at 130.

[326]F. Friendly, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 41-42, 78-83 (New York: Vintage Books, 1976); Powe, *supra* note 31 at 112-117.

current cross-ownership rules are "widely applauded for increasing diversity of media ownership."[327] Somewhere, Huey Long is smiling at the thought that the ends justify the motives.[328]

Bollinger concedes that the government has gone too far in regulating broadcast indecency,[329] but apparently fails to recognize that this is no small concession. The FCC's regulation of indecent broadcasts has entered a new stage of unprecedented aggressiveness. Just this month, the Commission grudgingly approved the transfer of KRTH(FM) to Infinity Broadcasting Corporation, an owner of multiple radio stations and employer of radio personality Howard Stern.[330] But it did so only after delaying the $110 million acquisition beyond the closing date, fining the broadcaster $400,000 for Stern's "indecent" broadcasts, and warning Infinity that "further violations might provoke more stringent penalties than monetary forfeitures."[331] The FCC also stressed that the decision "is without prejudice to any actions the Commission may deem appropriate should Infinity broadcast indecent material in the future." In other words, the licenses of the nearly twenty

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[327]Bollinger, *supra* note 137 at 130. In fact, ownership rules were relaxed after the FCC concluded that most radio stations were losing money and that the multiple ownership rules were not helping to preserve the medium. Congress is now considering relaxation of the radio-newspaper cross-ownership rules.

[328]*See Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (imposition of a tax only on larger newspapers in a state, presumably based on their opposition to the Governor's policies, held to violate the First Amendment).

[329]Bollinger, *supra* note 137 at 131 ("I agree, for example, that the commission and the courts, including the Supreme Court, have been insensitive to freedom of speech and press interests in the area of regulation of 'indecent' language.").

[330]*In re: KRTH(FM), Los Angeles, CA, Assignment of License*, FCC 94-24 (released February 1, 1994).

[331]*Id. See also Infinity Broadcasting Corp.*, FCC 94-26 (adopted January 31, 1994); *Infinity Broadcasting Corp.*, 8 FCC Rcd. 6740, 6741 (1993). The delay of the closing reportedly increased the price of the station by more than $6 million. *See Six-Million-Dollar Man*, BROADCASTING & CABLE, February 21, 1994 at 82.

Infinity-owned stations are on the line.[332] All together, the Commission has issued Notices of Apparent Liability for Infinity approaching $1.7 million,[333] and lesser amounts for a growing number of other radio licensees since it announced a more proactive enforcement policy in 1987.

The broadcast experience with indecency enforcement should be considered carefully, since Congress has extended its reach to telephone communication[334] and (to a lesser extent) cable television. Plus, the Clinton Administration has proposed applying the same regulatory restrictions on the National Information Infrastructure. Bollinger generally disparages the camel's-nose-in-the-tent argument for "suffer[ing] badly from overuse" although he acknowledges that it can have "powerful force."[335] This is such a case. Not only has the government generally expanded its anti-indecency policy across various media, it also is seeking to expand the subject matter. Case law supporting indecency enforcement has been the centerpiece of justifications for regulating televised violence.[336]

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[332] *In re: KRTH(FM), Los Angeles, CA, Assignment of License*, FCC 94-24. The assignment of license was approved by a very shakey 2-1 vote. Commissioner Ervin Duggan issued a concurring statement with the reservation that absent the need to clarify a recent court decision on the Commission's indecency enforcement policies, "I would have denied the grant of this application [and] would have supported the launching of an administrative hearing at the Commission to determine whether the pattern of enforcement actions incurred by Infinity Broadcasting Corporation raises fundamental questions about Infinity's fitness to remain an FCC licensee." *Id.* (Concurring Statement of Commissioner Duggan). Commissioner James Quello dissented, writing that "it is antithetical to the public interest to authorize additional stations for probable dissemination of gross indecency and possibly obscene broadcasts by Stern." *Id.* (Dissenting Statement of Commissioner Quello).

[333] *Id. See also Infinity Broadcasting Corp.*, FCC 94-26 (adopted January 31, 1994); *Infinity Broadcasting Corp.*, 8 FCC Rcd. 6740, 6741 (1993); *Sagittarius Broadcasting Corp.*, 8 FCC Rcd. 7975 (1993); *Sagittarius Broadcasting Corp.*, 8 FCC Rcd. 3600 (1993); *Cook Inlet Radio Licensee Partnership, L.P.*, 8 FCC Rcd. 2714 (1992); *Infinity Broadcasting Corp.*, 8 FCC Rcd. 2688 (1992). *See FCC OKs Infinity Station Purchase*, BROADCASTING & CABLE, February 7, 1994 at 47.

[334] 47 U.S.C. § 223(b). *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989); *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991); *Dial Info. Servs. Corp. of New York v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).

[335] Bollinger, *supra* note 137 at 112-113.

[336] Speech by FCC Chairman Reed Hundt at the NATPE/INTV Convention, Miami, Florida, January 24, 1994; McAvoy and Coe, *TV Rocked by Reno Ultimatum*, BROADCASTING & CABLE, October 25, 1993 at 6.

Moreover, the FCC's special concern for the needs of children — the bedrock principle underlying the indecency policy — has also been used to support an obligation that television stations add more educational programming. While having access to more educational shows probably is a good thing, it is easy to see the trend in content controls based on the indecency rationale. It is not so easy, however, to see any limits.

The theory of partial regulation is predicated upon dividing up First Amendment rights for different media, but does not appear to be based on a clear or consistent understanding of how the law applies to the various technologies. Bollinger asserts, for example, that there is little danger with experimenting with regulation because — with the print media as a "benchmark" — any departure from traditional First Amendment principles must be carefully scrutinized and justified. "The message," he concludes, "is one of adjustment rather than wholesale revision."[337] But this is unsupported by either by history or by Bollinger's own assessment of the cases. For example, he made the point that the Supreme Court has been exceptionally enthusiastic in its approach to regulation as shown by its "almost totally uncritical posture" and "the weakness of the arguments" it has employed to distinguish the media.[338]

As described in Section II above, the period of "adjustment" as courts assess the First Amendment status of new technologies tends to be quite long and not very hospitable to First Amendment questions. Given the unexamined acceptance of the "law unto itself" dictum, most courts gravitate toward some sort of interim judicial test until the Supreme Court issues an authoritative pronouncement on the proper placement of a new medium along the First Amendment continuum. The test of choice has become the generic standard for examining "indirect" speech abridgments articulated in *United States v. O'Brien*. This

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[337]Bollinger, *supra* note 137 at 115.

[338]*Id.* at 104.

development, which has led to a general "*O'Briening*" of many free expression questions, is perhaps the most unfortunate product of Incrementalism.[339]

In *United States v. O'Brien*, the first Supreme Court case to use the term "symbolic speech," the Court upheld the conviction of an individual who burned his draft card to protest the Vietnam War. Chief Justice Earl Warren's opinion for the Court did not dispute that the defendant was engaged in expressive conduct, but said "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[340] The Court then gave life to the assumptions underlying its former speech "plus" cases, stating that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[341]

The *O'Brien* standard has proven to be a remarkably flexible and useful test for situations in which speech and action are combined. But it is a "relatively lenient standard"[342] that is far more forgiving of government intervention.[343] Moreover, courts

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[339] Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635 (1987).

[340] 391 U.S. 367, 376 (1968).

[341] *Id.* A regulation will be upheld where: (1) it is within the constitutional power of government; (2) it furthers an important or substantial government interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than essential to further the governmental interest. *Id.* at 377.

[342] *Texas v. Johnson*, 491 U.S. at 406.

[343] Various commenters have criticized the *O'Brien* test, suggesting that in its application it has become virtually a rational basis test. *See* Williams, *Content Discrimination and the First Amendment*, 139 U PA L. REV. 615, 644 (1991); Schauer, *supra* at 787-88; Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635; Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 110-111 (1987) (exhaustive study revealed no examples in which *O'Brien* balancing resulted in the invalidation of an incidental restriction of speech). Even Jerome Barron has complained about the tendency of courts to use "the clumsy and unsuitable O'Brien standard for the resolution of cable problems." Barron, *On Understanding the First Amendment Status of Cable: Some Obstacles in the Way*, 57 GEO. WASH. L. REV. 1495 (1989). Barron, however, complains that the *O'Brien* standard is too strict a test. *Id.* at 1508-1511.

must determine when the conduct element inherent in all speech acts triggers this less exacting test. And, unfortunately, there is no logical method "for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct."[344] Without such a guidepost, the Court has been left to grapple with this issue case by case in response to such issues as sleep as symbolic expression,[345] political contributions,[346] flag burning[347] and nude dancing.[348] The resolution of these matters provides scant guidance for how the Court may treat future questions with which it may be presented.[349]

With new media, this uncertainty has led courts to focus on the extent to which physical activity is involved in the process of communication.[350] In *City of Los Angeles v.*

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[344]*Cowgill v. California*, 396 U.S. 371, 372 (1970) (Harlan, J. concurring).

[345]*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984) and *id.* at 304-08 (Marshall, J., dissenting).

[346]*Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

[347]*United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

[348]*Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

[349]The Court has not been entirely consistent in distinguishing pure speech from that speech "plus." Moreover, the Court's continuing quest to apply a different standard to speech that includes some action component sits uneasily next to its precedents involving charitable solicitations. Such solicitations obviously involve conduct and have as their main object the transfer of money. But because such action is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues," it is treated as a fully protected activity under the First Amendment. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). Moreover, the Court has expressly eschewed any attempt to distinguish protected expression from less-protected expression, holding that "where . . . the component parts of a single speech are inextricably intertwined we cannot parcel out the speech, applying one test to one phase and another test to another phase." *Riley v. National Federation for the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2677 (1988). *But see Valentine v. Christensen*, 316 U.S. 52 (1942) (regulation of speech is permissible where "primary purpose" is commercial).

[350]*See* Werhan, *supra.* ("Regardless of the health of first amendment theory, cases must be decided. This imperative places the appeal of *O'Brien* in sharp focus. It offers an approach to decisionmaking that avoids the normative uncertainty plaguing first amendment theory and confusing free speech methodology.").

Preferred Communications, Inc.,[351] the Supreme Court noted that installation of a cable system involves "the stringing of nearly 700 miles of hanging and buried wire and other appliances necessary for the operation of its system."[352] Echoing *O'Brien*, the Court explained that "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests."[353] Given this focus — and largely because the Supreme Court has not yet come up with the "real" test for applying the First Amendment to new technologies — lower courts have used *O'Brien* as the operative standard by default.[354]

Reliance on *O'Brien* as an interim test has perpetuated the general uncertainty surrounding the First Amendment status of new communications technologies. In *Quincy Cable TV, Inc. v. FCC* and *Century Communications Corp. v. FCC*, for example, the D.C. Circuit held that must carry rules violate cable operators' First Amendment rights using an O'Brien analysis.[355] But the U.S. District Court for D.C. reached the precise opposite conclusion about must carry rules in*Turner Broadcasting System v. FCC*, a decision now being considered by the Supreme Court.[356] Most other provisions of the 1992 Cable Act were similarly upheld by the District Court in *Daniels Cablevision, Inc. v. United States*,

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[351]476 U.S. 488 (1986).

[352]*Id.*

[353]*Id.* The opinion cited *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) and *United States v. O'Brien*, 391 U.S.367 (1968), thus equating cable television as "expressive conduct" with draft card burning and posting handbills. But the Court stopped short of weighing the various factors until "we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." 476 U.S. at 488.

[354]*E.g., Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d at 1548; *Century Communications Corp. v. FCC*, 835 F.2d 298; *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1454; *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. at 4-5.

[355]*Quincy Cable TV, Inc.*, 768 F.2d at 1454-1462; *Century Communications Corp. v. FCC*, 835 F.2d at 298-304. In both cases, however, the court emphasized that it was not selecting *O'Brien* as the appropriate standard; only that the must carry rules failed to satisfy "even the less-demanding [*O'Brien*] test." *Id.* at 298; *Quincy Cable TV, Inc.*, 768 F.2d at 1454.

[356]819 F. Supp. 32.

once again using *O'Brien* as the relevant standard.[357] With respect to local franchising requirements, the Seventh Circuit has held that the content-neutral test of *O'Brien* permits local authorities to compel cable operators to transmit local origination programming to subscribers.[358] In short, the outcome of using this balancing test depends almost entirely on which court is doing the balancing.

Moreover, the implication of relying on *O'Brien* in these cases is that cable television should be subjected to some sort of First Amendment balancing because cable systems require construction. But it is difficult to understand how this fact would dictate a different approach than that applied to newspapers, which are printed in plants that also must be built and distributed daily over public rights-of-way.[359] Installation of a cable system, like construction of a printing plant, undoubtedly involves some temporary disruption that requires a degree of government oversight. For example, local governments require the issuance of building permits before significant construction projects may commence in order to protect health and safety interests. There is little to suggest, however, that a legitimate concern with local health and safety should also allow the government to promote other "competing societal interests" where the construction involves the relatively unobtrusive process of laying cable for purposes of communications.

To the extent that symbolic speech cases provide a useful analysis, the conceptual difficulties just noted suggest that courts would gain more insight by looking to later cases decided after *O'Brien*. For example, in *Spence v. Washington*, the Court focused on the communicative intent of the act involved, not the level of physical activity needed to convey

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[357]835 F. Supp. at 3-7.

[358]*Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d at 1550-51.

[359]Other than construction of the system, the Court did not suggest, and logic would not dictate, that transmission of cable television signals constitute "action" rather than "speech." The closest comparable argument is Professor Emerson's conclusion that wartime broadcasts made by the enemy in time of war should be classified as action rather than expression. T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 61 (1970). This analysis has been criticized as a "subjective judgment" that leads to "arbitrary classifications." NIMMER ON FREEDOM OF SPEECH at 2-7.

the message. Speech was found to be protected so long as there was an intent to convey an understandable message and, in context, the message was likely to be received.[360] Thus, in *Texas v. Johnson*, the Court held that the act of burning an American flag, in the context of a political protest, was "conduct 'sufficiently imbued with elements of communication' . . . to implicate the First Amendment"[361] and subjected the government's actions to "the most exacting scrutiny" regardless of the degree of conduct involved.[362] The Court emphasized that to justify "*O'Brien's* less demanding rule . . . the governmental interest in question [must] be *unconnected* to expression."[363]

There is no question in the case of the media that there is an intent to communicate and that the message will be understood. To the extent the regulation is designed in some way to improve the content or quality of information conveyed, extend its reach or increase the number of people who participate, it cannot be considered "unconnected to expression." Therefore, any governmental measure designed to regulate a medium because of its status as such should not be considered an "incidental" restriction on speech subject to *O'Brien*.[364] But so long as courts continue to apply *O'Brien's* "conduct" analysis to new communications technologies, there will continue to be a general devaluation of free speech interests and an overriding uncertainty from case to case. This is the legacy of Incrementalism.

One final point is essential. Incrementalism is predicated on the ability to divide the media into discrete categories, such as the regulatory classifications that have served as a

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[360] 418 U.S. 405, 409-411 (1974) (per curiam) ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").

[361] 491 U.S. at 410, quoting *Spence v. Washington*, 418 U.S. at 409.

[362] *Id.*

[363] *Id.* (emphasis added).

[364] *See, e.g.*, Cole, *The Cable Television "Press" and the Protection of the First Amendment — A Not So "Vexing Question,"* 28 CAL. WESTERN L.REV. at 359-365.

primary vehicle for First Amendment analysis. But even Bollinger has exhibited some uncertainty about how this is to be accomplished. He acknowledges that a system of partial regulation "would be foolish in a world of extensive cross-ownership between newspapers and broadcasters; or, in a world . . . of near total domination by the electronic medium."[365] Pool argued, for example, that government control of new media, such as computer networks, would undermine the First Amendment even if "traditional" media remain free. In his view, mechanical presses, lecture halls and messages on hand-delivered paper "may become no more than a quaint anachronism, a sort of Hyde Park Corner where a few eccentrics can gather while the major policy debates take place elsewhere."[366] For this reason, Bollinger has "moved away" from the position that partial regulation "could be applied to any portion of the media." Now, he argues that "there are special advantages to limiting regulation to new technologies" and to retain a pure First Amendment for the technology of print, "where press freedom was born and has flourished."[367]

Although Bollinger's willingness to acknowledge the flaws in his theory is admirable, his response is wholly inadequate. The point that Pool and others have made is that, except for marginal cases, there will be no difference between the print media and the electronic media.[368] Consequently, once the government has a jurisdictional "hook" by which to regulate print, there will be no vehicle for "limiting regulation to new technologies."[369] It is small comfort to have a "benchmark" by which true free speech

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[365]Bollinger, *supra* note 137 at 120 (footnotes omitted).

[366]Pool, *supra* note 40 at 224-25. *See also* Katsh, *supra* note 57 at 1483 ("It is even possible that 'full' First Amendment protection, whatever that may mean in the future, will not be enjoyed by any medium other than, perhaps, the spoken word.").

[367]Bollinger, *supra* note 137 at 120.

[368]Pool, *supra* note 40 at 42 ("In the coming era, the industries of print and the industries of telecommunication will no longer be kept apart by fundamental difference in their technologies. The economic and regulatory problems of the electronic media will thus become the problems of the print media too.").

[369]Hammond, *supra* note 231 at 215; Nadel, *supra* note 40 at 160 n.9.

rights are measured if most communication occurs in a regulated system. England still has a Queen, but that does not mean that the Monarch rules.

2. Revisionism and the Triumph of Politics

It is somewhat ironic that a central thesis of Revisionism is that there is an overly romanticized idea of free expression in the United States. It is suggested that "[n]ames such as John Peter Zenger, Jacob Abrams, Irving Feiner, and Paul Robert Cohen resonate with the Madisonian principle of free expression," but that "neither Thomas Paine's *Common Sense* nor *The Federalist Papers* would play well on network television."[370] Instead of the lone pamphleteer dedicated to fighting the tyranny of the Crown, the mass media is comprised of multinational corporations dedicated to converting television into "the soma tablet of modern society."[371]

This view is ironic because it mischaracterizes the past as well as the present, and offers up its own overly romantic view of modern government. It is important to keep in mind, for example, that those paragons of freedom were, in their day, considered by mainstream society to be cranks, outcasts or worse. Only in retrospect is it possible for most to conclude that a raggedy protester with his "Fuck the Draft" jacket played an important role is preserving essential freedoms.[372] On the other hand, it is not unreasonable to treat *MacNeil-Lehrer, Nightline, All Things Considered,* CNN, C-SPAN or a host of other current examples as a natural extension of America's free press traditions.[373]

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[370]Collins and Skover, *supra* note 221 at 1090, 1094.

[371]*Id.* at 1093.

[372]It is revealing to recall, for example, that Justice Blackmun's dissent in *Cohen v. California* described the episode as an "absurd and immature antic [that] was mainly conduct and little speech." 403 U.S. 15, 27 (Blackmun, J., dissenting). *See also Texas v. Johnson*, 491 U.S. at 421 (Rehnquist, C.J., dissenting).

[373]*See* Redish, *Killing the First Amendment With Kindness: A Troubled Reaction to Collins and Skover*, 68 TEX. L. REV. 1147, 1149 (1990). Professor Redish noted that with "friends such as Professors

Just as the size and nature of mass media has changed since 1791, so has government. It now touches every aspect of life in the United States, and, if current plans are approved, will be further expanded to manage the health care of every American. To suggest that the Framers of the Constitution could never have foreseen such developments is a double understatement. But they did understand that "governments have a gravitational attraction for power." As a result, once power is ceded to the state, it tends to "expand continuously, regardless of original purpose or ostensible limitations."[374] Nor is it possible to relax our constitutional guard on the theory that the government's intentions in the past were "bad" but now they more "benign." As Lee Loevinger has observed:

> [T]hroughout history tyrants have proclaimed worthy objectives as the reason for their tyrannies. The inquisitors did not torture and burn their victims because of sadistic satisfaction in watching the suffering of others but because of an avowed, and probably sincere, concern to save the souls of heretics.[375]

There are few areas where the government has more good intentions than the field of communications. Even apart from an ever increasing desire to create federal jurisdiction over communications industries, the government has shown an intense interest in controlling content for the good of society. The enforcement against "indecent" broadcasting described above is one example, and the Administration is proposing that such enforcement similarly be applied to the information infrastructure. Regulations of this sort tend to breed. Ten bills have been introduced to control televised violence, and have been justified by their proponents as falling within *Pacifica* and other indecency

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Ronald Collins and David Skover, the first-amendment right of free expression surely needs no enemies." *Id.* at 1147.

[374]Loevinger, *supra* note 59 at 778, 786.

[375]*Id.* at 787. *See also* Powe, *Tornillo*, 1987 SUP. CT. REV. 345, 392 ("It has long been assumed that civil liberties are not lost wholesale, but rather retail, at quite good prices and therefore, initially at least, for the best of reasons.").

precedents.[376] Legislation to codify the fairness doctrine has again been introduced, as well as a bill to limit beer and wine advertising — another perennial favorite.

Despite the end of the Cold War, national security continues to be a time-tested method of exerting government control over information. The CIA has proposed restricting the ability of U.S. satellite firms to sell high resolution photographs to news organizations and others. Among its innovative ideas: entering partnerships with satellite firms "so the CIA would have some say in their operations."[377] Not only is the idea of vesting such authority over news coverage in the intelligence community a fairly sinister notion — as military control over Desert Storm news coverage demonstrated — it also is shortsighted. International companies and certain foreign governments, including Russia, offer similar remote sensing services, thus undermining domestic security measures.[378]

The growth in the importance of computer networks has provoked a similar governmental response. Laurence Tribe has described operations in 1990 that involved up to a quarter of the U.S. Treasury Department's investigators engaging in eavesdropping on electronic bulletin boards in an effort to track down certain hackers.[379] The government's control impulses are perhaps best illustrated by its proposal for the "clipper chip," an FBI

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[376]S. 943 would require warnings prior to programming depicting "violence or unsafe gun practices." S. 973 and H.R. 2159 would require the FCC to evaluate and publicly report on violence contained in TV programs. S. 1383 would prohibit the telecast of violent programming at times when children are likely to be in the broadcast audience. S. 1556, would require oversight of violent commercials and program promotions. H.R. 2609 would create a presidential commission to investigate and propose solutions to reduce broadcasting of violence on television. H.R. 2756 would require the FCC to establish a toll free telephone number to collect complaints regarding televised violence. H.R. 2837 would require the FCC to prescribe standards to reduce violent programming on broadcast stations and cable systems and would require license revocation for repeated violations. H.R. 2888 would require new television sets to be equipped with circuitry to block the transmission of violent programs (the so-called "V-chip").

FCC Chairman Reed Hundt and Attorney General Janet Reno have taken the position that TV violence legislation would be constitutional. Both have cited *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) as support for their conclusions.

[377]Mintz, *Whose Are the Eyes That Spy?* WASHINGTON POST, February 8, 1994 at D1.

[378]Katsh, *supra* note 56 at 157.

[379]Tribe, *supra* note 66.

plan that would require that all telecommunications and computer equipment be designed and manufactured to allow government monitoring. The government would hold the "key" to control monitoring. Not surprisingly, the proposal has drawn strong criticism from civil liberties groups.[380] Additionally, as with remote sensing satellites, international developments would undermine government efforts. If implemented, the clipper chip most likely would succeed in making U.S. exports less competitive.[381] As John Gage of Sun Microsystems recently joked, it would be like trying to export computers with the label "J. Edgar Hoover Inside."[382] Despite these concerns and the obvious practical problems, the Clinton Administration recently endorsed the clipper chip proposal.[383]

Given this enormous growth in the scope and power of government — not to mention its willingness to manipulate the press — strong private media institutions are necessary to serve as a counterweight. The suggestion that media has become too powerful, either because of the size of the entities engaged in the enterprise, or because of the pervasiveness of the medium, is antithetical to the First Amendment's spirit and purpose. The printing press had been licensed in Europe precisely because it was a powerful medium of mass communication. Its freedom was enshrined in the First Amendment for the same reason.

But those who dislike the idea of private control should recall the efforts of the Nixon Administration and others to intimidate and control the press. To whatever extent an

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[380]Electronic Frontier Foundation, *An Analysis of the FBI Digital Telephony Proposal* (September 18, 1992); Adams, *Clipper Tech Draws Fire*, FEDERAL COMPUTER WEEK, June 14, 1993 at 1; Markoff, *Comunications Plan to Balance Government Access With Privacy*, NEW YORK TIMES, April 16, 1993 at A1.

[381]General Accounting Office, COMMUNICATIONS PRIVACY: FEDERAL POLICY AND ACTIONS, GAO/OSI-94-2 (November 4, 1993).

[382]Luncheon Address, Freedom Forum First Amendment Center and National Emergency Civil Liberties Foundation Conference, Can Democracy Survive New Technology? Arlington, VA, January 26, 1994.

[383]Mintz & Schwartz, *Clinton Backs Security Agencies on Computer Eavesdropping*, WASH. POST, February 5, 1994 at A1.

imperfectly competitive market creates risks to democratic ideals it is important to consider the alternative of centralized authority. In any event, it seems ironic to complain about media monopolies in the regulatory state when the government has been the prime mover in creating concentrations of power.[384] Three television networks dominated American television for decades because of the allocation scheme created by the FCC.[385] Similarly, exclusive cable TV franchises grew out of local franchising policies.[386]

Beyond the "state monopoly" problem, one of the central flaws of most Revisionist theories is the unpredictable blank check it gives to the government. In this sense it is the triumph of politics over constitutional principle. One need only examine the various proposals to understand the problem. Barron would allow some form of access, while Nader and Riley would compel every broadcaster in America (and, for that matter, every viewer and listener) to cede an hour of prime time to its Audience Network. Sunstein would grant a right of reply, limit advertiser influence and reinforce existing broadcast regulations. More sensitive to the risks posed by government intervention, Geller and Hammond propose common carrier-type approaches.

Each of the proposals is a sincere and genuine attempt to address a perceived problem. But there is only one catch: none of the theorists controls the political process. And, since they proceed from a common premise — that government ought to exert greater control over communications media in service of a specified value — none is in a position to complain when eager politicians with well-honed instincts for publicity step forward with ever-growing lists of values to be served.

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[384]Pool, *supra* note 40 at 247.

[385]*Television Service and the FCC*, 46 TEX. L. REV. 1100 (1968); Note, *UHF and the FCC: The Search for a Television Allocations Policy*, 28 U. FLA. L. REV. 399 (1976).

[386]*See, e.g., Preferred Communications, Inc.*, 1994 WL 2799.

Well documented failures of the regulatory state at times inject a note of caution into the debate. Sunstein, for example, proposes a "New Deal for speech," but without the "enthusiasm for large administrative agencies." This is a bit like asking for water without the wetness. Be that as it may, Sunstein emphasizes that he "certainly do[es] not mean to argue that large national bureaucracies should be overseeing our system of free expression for 'political correctness' or good content."[387] Good to his word, he prefers incentive-based strategies over command-and-control regulation. Therefore, to reduce the problem of televised violence, he endorses Senator Paul Simon's antitrust exemption, adopted in 1990, that permitted the networks to meet and discuss collective measures to reduce violent content.[388]

There is only one problem. Senator Simon's earlier approach is universally regarded as a failure — a fact that led Simon and a host of other lawmakers to threaten the networks and to propose new legislation designed to stop TV violence. One bill, H.R. 2837, would empower the FCC to prescribe standards to reduce violent programming on broadcast stations and cable systems and would require license revocation for repeated violations. Sunstein may not believe in command-and-control regulation, but Congress does.

3. Traditionalism and Enduring Principles

The problem of new technology predates the Constitution. Indeed, the First Amendment was a response to the problem of new communications technologies. It was a direct reaction to the historical tendency of governments to seek control over the press when mass dissemination of information threatened to extend power to those outside the state

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[387]Sunstein, *supra* note 214 at 23, 35. However, these cautious statements sit uneasily next to Sunstein's awareness that the New Deal "created the modern regulatory state." *Id.* at 29. He adds that the New Deal "self-consciously rejected the system of laissez-faire. It gave rise to an extensive national government, with a wide array of regulatory agencies displacing market arrangements." *Id.*

[388]*Id.* at 83.

apparatus. New issues that have been raised by the development of electronic media could be resolved by invoking this core principle.

Among the most pressing legal problems currently facing electronic media are how they should be classified and, by virtue of the classification, how they should be treated under the Constitution. Determining the First Amendment status of the various media would, in turn, determine how deeply Congress can intrude in broadcasters' editorial decisions, how heavy a hand regulatiors can place on the cable television industry and how quickly telephone companies can enter the video marketplace. But if there is any certainty arising from our experience with these questions, it is that the assignment of constitutional rights based on ephemeral classification schemes has been a failure. And to seek new ways of classifying the media in an attempt to enable the law to keep up with technology would be a futile gesture.

The current debate is not so much whether to retain or abandon prior approaches to analyzing new technologies. Most agree that a new approach is needed. The question is whether to keep in place the traditional relationship between the government and the press. This Paper attempts to describe a process for doing just that. The analysis proceeds along very familiar lines, which is precisely the point. Traditional First Amendment doctrine is up to the task of evaluating cases involving new communications technologies. The approach assumes that different media may have different qualities, but treats the characteristics as tools of analysis, not as catalysts for a separate constitutional standard.[389]

This Traditionalist Perspective has been criticized as "an abdication of responsibility which leases the problem of private censorship unaddressed."[390] As debate progresses on the NII, a central theme has been the need to avoid creating a nation of information-haves

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[389]Thus, contrary to Revisionist claims, the Traditionalist approach recognizes "dissimilarities in the effect of different media types." Collins and Skover, *supra* note 221 at 1112.

[390]Hammond, *supra* note 231 at 224.

and have-nots.[391] Professor Hammond has written that "the most important First Amendment issues facing American society concern the ways that disparities in economic resources affect access to the marketplace of ideas."[392] Accordingly, "the value of freedom of expression cannot be confined to an unchecked liberty interest."[393]

Such complaints miss the point. It is not that Traditionalists necessarily believe that the First Amendment is based on an "unchecked" liberty interest. But the Amendment does contain an *undeniable* liberty interest that cannot be manipulated to serve favored social goals without fundamentally changing the nature of the Constitution. Moreover, the criticism, as stated, begs a very important question: What "checks" are called for, and who should impose them?

It is sometime suggested that checks should be imposed on television because of its mindlessness and rampant commercialism. Such concerns tend to be overly generalized, however, and oddly anachronistic.[394] They are directed almost exclusively against some of the practices of network television, and all but ignore the trends toward greater choice of programming services, multimedia and interactive services. But to complain that "there isn't anything good on TV" is not a reason to restrict the freedom and choice of those who generally like what they watch.

With respect to the problem of economic disparities, it is important to understand that there are many First Amendment "values" that are not necessarily addressable through the application of First Amendment law. Democracy is a primary value served by the First Amendment, and it is a value that would be difficult to attain without an educated electorate.

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[391]Farhi and Sugawara, *Will the 'Information Superhighway' Detour the Poor?*, WASH. POST, December 19, 1993 at H1.

[392]Hammond, *supra* note 231 at 201.

[393]Collins and Skover, *supra* note 221 at 1120.

[394]Lerner, *Some Reflections on The First Amendment in the Age of Paratroopers*, 68 TEX. L. REV. 1127, 1134-35 (1990).

This does not mean, however, that people have a constitutional right to an education. It does mean, however, that there is an important role for public policy. The creation and support of schools, universities and libraries are affirmative acts that are appropriate for government to take that directly serve this First Amendment value. This legitimate role extends as well to electronic communications, and the government has responded through the creation of the public broadcasting system.

It is often said in response, however that government does not always provide consistent or reliable support for these institutions. Worse still, political influences can taint government decisions regarding support. The controversy over funding the National Endowment for the Arts is a clear example, and public broadcasting has had its share of problems, as well. But the point is a revealing one. If government cannot be trusted to fund supplemental programs without succumbing to darker impulses, why would anyone choose as the alternative allowing greater intrusions into the realm of free speech? To put it another way, if you cannot trust your doctor to fill a prescription, why would you permit her to do brain surgery?

Access to the means of communication is an important value and an essential component of public policy. In this regard, the nation's common carrier system has been a vital link. It is unclear why it is sometimes assumed that this aspect of the telecommunications system will change as technology advances and more types of services are available. But to the extent companies show a reluctance in the future to continue acting as common carriers, Professor Hammond has proposed that government could take an active role in providing appropriate incentives. If a guaranteed rate of return is not enough, liberal tax and financing incentives could also be used to "encourage the development and maintenance" of common carrier systems.[395]

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[395]Hammond, *supra* note 231 at 221.

Ultimately, the Traditionalist idea is that the First Amendment is predicated on certain core values that are unaffected by the means through which messages are communicated. A unified First Amendment theory based on traditional understandings would dispense with the quest to develop a different level of protection for each medium, and instead should protect these core values within each technological context presented. As Judge David Bazelon noted, vital rights are lost when courts stray from the "print model" of the First Amendment which "has proven more durable and more congenial to our national political values than the 'different' First Amendment standards endorsed in *Red Lion.*"[396]

Conclusion

The mass media are on the verge of a fundamental shift into the Multimedia Age. With it, the system of regulatory and constitutional classification that has defined the First Amendment status of electronic media will be torn asunder. That system, badly frayed and stretched to the breaking point, simply will not be able to withstand the simultaneous explosion and implosion that is to come. Courts will not longer be able to delay making a decision about the First Amendment status of new technologies. Events will compel action. But this means the cases now pending on the constitutional status of cable television operators and telephone companies may well establish the rules for decades to come.

This analysis concludes that the Traditionalist Perspective is best suited to accomodate this shift to the Multimedia Age. By abandoning the "law unto itself" approach, it eliminates the need to develop new standards in response to new technologies. The time tested analytical tools of traditional First Amendment analysis are flexible, and are readily adaptable to new situations. As a result, the Traditionalist Perspective avoids the paradox

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[396]D.L. Bazelon, *The First Amendment and the "New Media" — New Directions in Regulating Telecommunications*, 31 FED. COMM. L. J. 201, 212 (1979).

created by the need to keep up with technological change, while at the same time providing certainty.

Finally, the Traditionalist Perspective best preserves the First Amendment promise that expression will remain free from official control. Any other alternative creates too great a risk that fundamental rights will be placed at the mercy of the latest political fashions. Government has a vital role to play in bringing informational, educational and participatory opportunities to those least able to participate in democratic institutions. But if it cannot sustain the necessary political will to perform this role, then it certainly cannot be trusted to show the necessary restraint if given a more regulatory role.