

Converging First Amendment Principles for Converging Communications Media

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For students of telecommunications law and technology, it has become a trivial ritual to observe that telecommunications technologies and media are converging. Neither producers nor purchasers of audio or video information should find much use, in the near future, for such terms as “television,” “computer,” “telephone,” or “radio.” These objects are no longer distinct devices and we believe that any differences among them are ephemeral.

For students of constitutional law and the Supreme Court’s jurisprudence of the First Amendment guarantee of freedom of speech, these observations are likely to trigger a different ritual incantation: “Different communications media are treated differently for First Amendment purposes.”¹ How can one reconcile the fact of technological and media convergence with the legal presumption of distinct treatments?

We argue in this Essay that this dilemma should not be resolved by permitting the First Amendment to be used as a sword to prevent communications convergence or as a shield to permit government agencies to force these technologies into distinct, procrustean categories. Rather, the latest advances in telecommunications provide federal courts the opportunity to discard the inherently silly notion that freedom of speech depends on the configuration of the speaker’s voicebox or mouthpiece.

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1. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) (cable television) (comparing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper) and *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (broadcast television)); *see also infra* note 4.

Further, reflection will show that this step would not be a radical jurisprudential leap. In truth, among all mass communication technologies, only broadcast radio and television have been afforded distinctive treatment. History reveals that the unusual jurisprudence of broadcasting rests on the slimmest foundations. The Supreme Court crafted these rules not so much because the Justices believed broadcasting was distinct, but more because the Court's major free speech cases concerning broadcasting arose when the Justices were deeply conflicted over the relationships between rights of speech and of property² or were deeply divided among themselves over the issue of "obscene" or "indecent" speech.³

Moreover, to achieve the rational goals of those who prefer to tame the broadcast industry, it is not necessary to retain a separate First Amendment jurisprudence for broadcasters. If we look behind the facade of broadcast free speech law, we can discern established, durable, fundamental principles that govern regulation of mass communications without regard to the technology employed, that protect freedom of speech while leaving ample room for sober regulation, and that apply equally well to all mass communication media. We believe that the growing telecommunications convergence should lead the Court to embrace these principles explicitly while discarding the false notion that "broadcasting" (whatever that is) requires or deserves a separate First Amendment jurisprudence.

This Essay proceeds in four steps. We first explain, briefly, the well-known dualism in mass media law today: one rule for broadcasters, another for printers. We then describe the kinds of objections made to broadcast programming today, confident that similar criticisms will be voiced about the program fare offered by emerging video, audio, and data technologies. In step three, we explain how the "print" model is in fact a coherent and complete system of regulatory ideals, built on four well-established and sensible principles, reflecting current regulation of all nonbroadcast mass media. Finally, we conclude that this more general model will adequately serve the goals of the sober broadcast regulator while providing a sound basis for judging regulation of emerging technologies as well. The progressive congruence of telecommunications technologies, then, ought to be the catalyst for two jurisprudential developments: (1) discarding the broadcast model and (2) realizing that traditional First Amendment principles—not yet another set of unique rules—are quite well suited to guide and constrain public regulation of these new technologies.

2. THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 182-89 (1994) [hereinafter REGULATING BROADCAST PROGRAMMING].

3. *Id.* at 196-202.

I. TWO MODELS

No matter how often one repeats the statement, it cannot be true that “[d]ifferent communications media are treated differently for First Amendment purposes.”⁴ Should everything we knew about regulation of books have been discarded once talking motion pictures were invented? Did discovery of the personal computer (or was it the monitor screen?) render obsolete everything the courts said about the First Amendment and broadcasting, or cable, or telephones? Once a free speech jurisprudence is written for computers, must we refuse to employ those rules for a later technology, such as satellites, lest we treat different communications media identically for First Amendment purposes?

Fortunately, it never has been true that each communications medium gets its own free speech rules. Except broadcasting. It is only because of the special status of broadcasting that we can accurately report that constitutional law today reflects two distinct, well-developed models for assessing government regulation of mass communications. The first, and dominant, model is typically referred to as the “print” model but in fact applies to most mass communications media in the United States.

This so-called print model is most neatly encapsulated in *Miami Herald Publishing Co. v. Tornillo*,⁵ with its emphasis on the value of editorial autonomy and the dangers of official censorship. If *The Miami Herald* wished to throw the full weight of its dominant position in the Miami market to preclude the election of a union leader for state representative,⁶ then the First Amendment authorized its action. The media owner decides what is said and how it will be said. As A.J. Liebling quipped: “Freedom of the press is guaranteed only to those who own one.”⁷ Or, as the Court more delicately put it: “For better or worse, editing is what editors are for; and editing is selection and choice of material.”⁸

A second, competing model is aptly termed the “broadcast” model. It stems from six decades of regulation and is most thoroughly elucidated in *Red Lion Broadcasting*,⁹ with its celebration of the values of access and diversity and concomitant fear of private censorship. This model allows governments to intervene to promote First Amendment values by mandating a more diverse programming fare than broadcasters might otherwise choose. Ideas and speakers are thereby afforded access to listeners and viewers.

4. 476 U.S. at 496. The statement has its origins in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (sound trucks); its strongest statement is in Chief Justice Burger's dissent in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 555 (1981) (Burger, C.J., dissenting) (billboards).

5. 418 U.S. 241 (1974) (invalidating right-of-reply statute).

6. L.A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345, 351-62.

7. A.J. LIEBLING, *THE PRESS* 32 (Pantheon Books 1981) (1975).

8. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973).

9. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Red Lion permits—indeed, virtually exhorts—government to override broadcasters' programming preferences to effectuate the right of listeners and viewers "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."¹⁰ Possessed of this authority, federal regulators have wondered (as they need not with print) how to "measure the conflicting claims of grand opera and religious services, of market reports and direct advertising, of jazz orchestras and lectures on the diseases of hogs."¹¹ And a more recent regulator, reflecting on a massive tornado that hit Wichita Falls, Texas, rejoiced that "[y]oung people listening to a rock station" received warnings that they might not have had "if we didn't require the licensee to provide a minimum of news."¹² But, lest broadcasting become too diverse, the model is supplemented by a related power of government to enforce a level of conformity when issues of community morality are implicated.¹³ The extent of this authorization to censor "indecent" broadcasting is largely undefined, although as stated it clearly exceeds the censorship power permitted by the print model.

While the print model has been criticized,¹⁴ none of the critics has suggested that its deficiencies result in any way from a failure to consider fully the text, history, traditions, and constitutional structure of the First Amendment. The deficiencies in the model are deemed to arise, not from misguided constitutional interpretation, but from the increasing power of the press and the diminishing quality of news and information produced by those exercising their First Amendment rights. By contrast, critics of the broadcast model have noted that it does not conform to the text, history, traditions, or constitutional structure of the First Amendment and that the results of allowing government to regulate so intrusively create just the abuses that the print model postulates would occur in a system of government supervision: favoritism, censorship, and political influence.¹⁵

Both the print and the broadcast models have attractive features. The appeal of the print model stems from its congruence with the canons of

10. *Id.* at 390.

11. 1 FED. RADIO COMM'N, ANN. REP. 6 (1927).

12. Lionel Van Deerling, *The Regulators and Broadcast News*, in BROADCAST JOURNALISM 204, 206 (Marvin Barrett ed., 1982) (quoting Commissioner Abbott Washburn).

13. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (allowing FCC to channel "indecent" broadcasts to hours in which risk of children listening would be minimized). We do not discuss this censorship power at length in this Essay. One reason is that reflection will show, as subsequent cases are revealing, that *Pacifica* is not really a case about broadcasting. Rather, it is about the problem of semiobscene speech in more-than-ordinarily intrusive media from which children are not easily excluded. REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 199–202, 221.

14. See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329 (1987).

15. See LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987); REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 294–96.

constitutional interpretation: text, history, structure, traditions. The broadcast model is attractive because it recognizes the relationship between speech and the distribution of economic resources, because it encourages a worthy journalistic ethic, and because it posits, as the print model does not, that the freedom of the press (like any other provision of the Constitution¹⁶) may change with the times.¹⁷

The print model strictly confines governmental ability to regulate programming. If applied to new technologies, the practical effect would be an unfettered discretion to program virtually anything except obscenity. By contrast, the broadcast model grants governments ample leeway to affect programming decisions, whether to expand access and diversity or to exact conformity. Indeed, no other area of First Amendment jurisprudence is so deferential to government intervention, and we are aware of no one who has suggested that the government needs more power to regulate the media than this model authorizes.

Those wishing to eschew an either/or choice between a jurisprudence that permits too much or one that allows too little program autonomy (or government power) can easily envision a third model splitting some of the differences. Encased in appropriate formulaic language,¹⁸ a third model could give the government some flexibility, when necessary, to regulate programming, but nothing more. This intermediate model could incorporate the insights of the broadcast model while cutting back on its intrusiveness into areas of programming. Essentially such a third model would attempt to fashion rules appropriate for the technologies regulated that are no more intrusive than necessary to accomplish the government's objectives. Because each technology is perceived as creating its own problems, government is allowed some, but not necessarily complete, leeway to remedy those problems. A bare majority of the Supreme Court has tentatively and uneasily accepted this middle approach in a case concerning freedom of speech and cable television, *Turner Broadcasting*.¹⁹

As communications technologies converge, it will be impossible for the Supreme Court to continue to rely on its bipolar (or tripolar) print-broadcasting models. Which of these models "fits" pictures transmitted through cable TV lines, telephone lines, satellites, microwave? (In fact, today some television

16. *New York Times Co. v. United States*, 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting) ("The First Amendment, after all, is only one part of an entire Constitution.").

17. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* (1991).

18. ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 122-55 (1989).

19. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2449-51 (1994) (requiring government to prove necessity of requirement that all cable systems carry all locally received over-the-air broadcast signals if broadcasters so demand). We believe "tentatively and uneasily" is an apt description of a 5-4 decision where one of the five Justices (Blackmun) retires immediately and there is every reason to believe the Justices in the majority have no idea how little evidence supports the "necessity" of the must-carry rules.

viewers watch programs that, in traveling from producer to the home, have traveled part of that distance on each of these media.) And which of these models fits a scholarly journal that is electronically created and transmitted and only placed on the printed page if some recipient so chooses? Would newspapers and magazines suddenly come within a broader scope of content regulation if they were electronically transmitted to their subscribers?

The two (or three) models would yield different outcomes when applied to program content regulation, but none hinders government in regulating the structure or commercial practices of the industry to foster and protect competition. *Associated Press v. United States*²⁰ held that the antitrust laws fully apply to the print media, and more generally appears to permit government to define and limit ownership rights and commercial contractual relationships in ways perceived to better the functioning of new technologies.²¹ Thus the battle over the appropriate First Amendment model for new technologies is about government's latitude to control what is created and consumed, not about its authority to control the structure or commercial practices of the industry.

II. TRADITIONAL RATIONALES FOR REGULATION

How will the emerging communications industry be structured and what will it deliver? Frankly, we do not know. Twenty-five years ago many of the same predictions we hear today for the infobahn—the interconnected grid of emerging telecommunication technologies—were made for cable television. Americans were told to ready themselves for a communications revolution.²² Network television had been homogenizing the country; cable would decentralize it. Network economics required mass audiences; cable could “affirmatively pinpoint differentiated audiences and serve them economically.”²³ There would now be a means to reach “unrecognizable broadcast interests, financing opera, a different kind of news, or other specialized programming.”²⁴ This glorious future has yet to materialize, as Bruce Springsteen's song, “57 Channels and Nothing On,” laments. The cable

20. 326 U.S. 1 (1945).

21. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (unanimously sustaining rules prohibiting future newspaper-broadcast co-ownership in same community).

22. There were numerous reports, but the most quoted was that of the Alfred P. Sloan Foundation, which, “feeling that a politically-appointed Commission might not reach the wisest results, assembled a distinguished group of more or less elder statesmen, asking them to deliberate for a year and then to formulate a set of resolutions that could aid the [Federal Communications] Commission, Congress or any other relevant decisionmaking body.” Monroe E. Price, *Requiem for the Wired Nation*, 61 VA. L. REV. 541, 553 (1975). The end product was SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971). Price's wonderful article provides a superbly ironical summary of cable's era of hope: “All those channels, all those hopes, the chance for a wholly new communications system—it was a little intoxicating.” Price, *supra*, at 541 (footnote omitted).

23. Price, *supra* note 22, at 547.

24. *Id.* at 548.

experience cautions us to avoid technological predictions. We leave to others descriptions of what new communications technology will look like or what programs and information it will deliver.²⁵

We disagree, however, with the Supreme Court that understanding the regulation of an older communications media can offer no guidance to understanding a newer one. We believe that past complaints will be prologue for future complaints about what creators place on, and users receive from, the infobahn.²⁶ Some will complain that an insufficient amount of the appropriate type or quality of information is available, probably supplemented by a further concern that when the right information is available not enough users are tuning in. Others, by contrast, will complain that users may be accessing information they ought not have. These views generated a virtual panoply of FCC regulations of broadcast content in the past six decades, regulations that we have chronicled elsewhere.²⁷

We have noticed that all regulations of broadcast programming share certain features and assumptions. When regulators conclude that viewers and listeners are not tuning in to what the consumers need, regulators tend to counter by attempting to make the merit programming²⁸ available everywhere. In this fashion, all viewers and listeners, even those who will not change channels, should, at least occasionally, encounter and benefit from good programming. Conversely, bad programming commonly seems too popular. Therefore it must be banned, reduced in quantity, or shunted to periods of infrequent broadcast usage lest viewers and listeners change channels and find the disfavored programming somewhere else.

The former type of regulation—diversity or merit regulation—posits helpless or obstinate viewers. The other type—straightforward censorship—posits enterprising viewers. These apparently contrasting views of broadcast consumers as both paralyzed and enterprising are just two convenient interpretations of a simple fact: It is impossible to regulate viewers and listeners. Both types of regulations also rest on a common perspective: Viewers and listeners are incapable of wise choice. Indeed, when given the option of seeing exactly what a regulator or a critic prefers, viewers often watch something else.

We are quite certain that the new electronic technologies will not alter these facts of life. In the new era, viewers will watch or read what critics and regulators like with insufficient frequency and will enjoy too often what

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

26. What follows are criticisms drawn from a much lengthier work. We urge skeptics to read that work before rejecting these conclusions. See REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 59–141, 297–315.

27. *Id.* at 59–141.

28. Merit programming is programming deemed so valuable that broadcasters were required to air it, even if few (if any) viewers or listeners wished to tune it in. See *id.* at 145–46.

commissioners and columnists abhor. It seems all but inevitable that such behavior by viewers, listeners, and readers will generate calls for government action. At this point the search for appropriate guiding principles begins.

III. THE APPROPRIATE SCOPE OF REGULATION

In our recently published book, *Regulating Broadcast Programming*,²⁹ we articulated guiding principles for regulating the mass media that are well established, yet often not recognized for what they are—the cornerstones of a rather consistent pattern of American regulation of the nonbroadcast mass media.³⁰ These bedrock legal principles, as applied to such diverse communications media as books, films, magazines, theater, newspapers, recordings, and speech in public forums, function so well that they are often taken for granted.

As computers, satellites, and telephone lines become readily available alternatives to VHF, UHF, cable, and microwave transmission of radio and television, it should become simpler even for the Supreme Court Justices to realize that only a unitary First Amendment for all media will do. In the remainder of this Essay, we explain these ground rules of constitutional law and regulatory policy, show how and why they shape government's basic stance toward all nonbroadcast media, and demonstrate how these principles encompass emerging technologies.

A. *Basic Principles*

Four principles collectively establish the proper responsibilities of government in regulating the structure and performance of the mass media and in supervising access to, and diversity within, those media. They are the principles that, shaped by carefully considered First Amendment values, govern the legal regulation of virtually all other mass media in the United States. These principles provide government with ample authority to regulate the media in ways that can improve their performance, while assuring that government is responsive to, rather than responsible for, American culture, information, and politics. These ground rules of constitutional law and regulatory policy regarding the nonbroadcast media also help to ensure that laws governing the media are targeted at issues government can manage, while avoiding regulations that are simply naive or directed at foisting particular preferences on a pluralist society.³¹

29. *Id.*

30. *Id.* at 316–22.

31. The principles set out below are not, under current law, fully applicable where government itself is the speaker or where the speech is properly classified as "commercial speech." Consequently, the analysis does not necessarily apply to cases in which the government is the programmer or the information

1. *First Principle*

Editorial control over what is said and how it is said should be lodged in private, not governmental, institutions. Two basic rationales underlie this principle. They are well stated in *Miami Herald Publishing Co. v. Tornillo*,³² and so we only summarize them here.

In the first place, both history and theory clearly teach that the imposition by law of “good journalism” or “fair representation” requirements on speakers operates to chill speech, not to liberate, broaden, or protect it.³³ Telling speakers “if you discuss *x*, you must do (or discuss) *y*” has the principal effect of inhibiting discussion of *x*. Further, such government intervention cannot add more speech; at its very best, that intervention can only substitute speech on one topic for speech on another.

In the second place, editorial control, because it is invariably content-based, is an inherently impermissible government function.³⁴ When government edits, it does so for debatable purposes and with questionable means; that editing necessarily stifles unpopular viewpoints.³⁵ To mention just two well-known examples: *Red Lion* was part of a John Kennedy–Lyndon Johnson Democratic National Committee effort to silence right-wing radio stations that might oppose the Democrats in 1964,³⁶ and the stripping of the Reverend Carl McIntire’s WXUR of its license because of fairness doctrine violations reduced both the amount of controversial programming and the range of available viewpoints in the Philadelphia area.³⁷

The competing principle is drawn from broadcasting: It is regulation in the public interest. As stated by *Red Lion*, government supervision of broadcasters’ programming is essential because “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”³⁸ If broadcasters were left to their own discretion (or insufficiently controlled), they would pander to the lowest common denominator, decreasing the quality of important information while simultaneously increasing commercialization.³⁹ Such programming is not in the public interest and neglects the need to create an

constitutes solely commercial speech. We shall turn, in part, to government speech in our discussion of the fourth principle, *see infra* text accompanying notes 63–66.

32. 418 U.S. 241 (1974); *see also* REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 176–77

33. It is for these reasons that no one would dream of imposing a “balanced coverage” rule on Barbra Streisand, Steven Spielberg, Tom Clancy, or William F. Buckley, Jr.

34. For an extensive demonstration of this point as applied to the fairness doctrine, equal-time provisions, and indecency regulation, *see* POWE, *supra* note 15, at 108–90.

35. *See* THOMAS I. EMERSON, TOWARDS A GENERAL THEORY OF THE FIRST AMENDMENT 16–25 (1966).

36. POWE, *supra* note 15, at 112–16.

37. REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 266–68.

38. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citation omitted).

39. Tracy Westin, among others, argues that this has occurred. *Public Interest in Broadcasting: Hearings Before the Subcomm. on Communications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 117–18 (1991).

intelligent, civically active community where all citizens have access to the full range of information that they need for self-government.

Under the public interest model, government and citizens attentive to civic issues have a role in promoting and improving the community's common values. It is not an adequate response to contend that those who choose to watch, hear, or read information or entertainment that does not further civic values must prefer or enjoy what they choose.

Preferences that have adapted to an objectionable system cannot justify that system. If better options are put more regularly in view, it might well be expected that at least some people would be educated as a result. They might be more favorably disposed toward programming dealing with public issues in a serious way.⁴⁰

Accordingly, for adherents to the public interest model, government may, indeed should, regulate access to the media (whether new or old) so as to improve and inform those among its citizens who are not already attuned to the public interest. From this perspective the Supreme Court's observation that "no one has a right to press even 'good' ideas on an unwilling recipient"⁴¹ is simply wrong.⁴²

Such a public interest rationale for broadcast regulation resulted in FCC rules (or guidelines) designed to create local programming (at the expense of national programming),⁴³ to produce minimum amounts of news and public affairs,⁴⁴ to require balanced presentation of important and controversial issues,⁴⁵ to guarantee access to candidates for federal elective office,⁴⁶ to suppress music that glorified drug use,⁴⁷ to suppress dirty words and discussions of sex,⁴⁸ to limit commercials,⁴⁹ and to increase educational programming that children should watch.⁵⁰ Currently there are advocates who claim that the public interest would also require limiting violence⁵¹ and reducing stereotypes⁵² and maybe increasing the numbers of Hispanics and

40. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 221 (1993). Those who have raised children with specific goals in mind, and lots of one-on-one time over the years to educate and instruct, can only wish that the transmission of preferences was so easy.

41. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

42. One may search SUNSTEIN, *supra* note 14, as well as his contribution to this Symposium, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757 (1995), without finding a single mention of *Rowan*.

43. *REGULATING BROADCAST PROGRAMMING*, *supra* note 2, at 44.

44. *Id.* at 77-79.

45. *Id.* at 61-65.

46. *Id.* at 66-69.

47. *Id.* at 115-18.

48. *Id.* at 104-14.

49. *Id.* at 135-36.

50. *Id.* at 81-84. The FCC has defined children's programming as that which is educational first and entertainment second, thereby seemingly excluding programming watched by the whole family. *Id.* at 84.

51. *Id.* at 120-34.

52. *Id.* at 304-05.

overweight people on the air.⁵³ Unless the public interest is a fixed concept, presumably other programs that the public needs could be added to this list.

The less attractive results of the public interest model are those regulations that smack of overt censorship. A programmer is forbidden to create, stations are forbidden to air, and adults are forbidden to view and hear programming that would otherwise be available in the market because either Congress or a few commissioners believe that adults are incapable of evaluating what they wish to view. It does not matter whether the banning institution represents a permanent majority of Americans, a transient majority, or a minority that has captured the institution (as appears to have been the case with the 1987 FCC indecency decisions).⁵⁴ It does not matter whether the purpose of the regulation is to entrench or change the status quo. In each case, government fiat substitutes for the choices that adult Americans would otherwise make.⁵⁵

While censorship is wrong, mandating a more diverse fare often seems right. Thus a newcomer to this area might be tempted to conclude, for example, that a rule requiring television stations to broadcast more children's programming would be a good thing. Ultimately this rests on the view that any "children's program," no matter how bad, is more likely than not to be better than the alternatives (no matter what the audience may think). Unfortunately, however, true quality comes from a program's substance, not its topic,⁵⁶ and FCC efforts to create quality programs that broadcasters do not wish to air, while sporadic, have been unsuccessful.⁵⁷

There are basic reasons why regulatory efforts to mandate quality are ineffective. First, even with television there is too much time to fill and too few truly imaginative people to fill it.⁵⁸ Second, audiences appear to know what they like and will resist attempts to re-program their tastes. As Jeff Greenfield notes, "when you no longer need the skills of a safecracker to find PBS in most markets, you have to realize that the reason people aren't watching is that they don't want to."⁵⁹

53. *Id.*

54. See John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344-47 (1989).

55. Contrast Justice Robert Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.).

56. Henry J. Friendly, *The Federal Administrative Agencies*, 75 HARV. L. REV. 1055, 1071 (1962) (doubting whether "the Commission is really wise enough to determine that live telecasts . . . e.g., of local cooking lessons, are always 'better' than a tape of Shakespeare's Histories").

57. See REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 70-74, 99-100.

58. See Louis L. Jaffe, *The Role of Government*, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 35, 39 (John Coons ed., 1961). Eric Sevareid put the point succinctly: "Considering the number of hours you had to fill, it's surprising that there's even enough mediocrity to go around." *Quoted in* REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 312.

59. *Quoted in* REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 314.

With newer technologies offering users many more options to watch, hear, or read many more programs and sources of information, these problems will be exacerbated geometrically. Much of the information on the infobahn will be dreck. But users, rather than regulators, will hold the trump cards, because only users can decide how they will spend their time perusing the increased options. Information will have to appeal to users, not government bureaucrats or academic critics, if it is to have a substantial audience. In other words, future users of the infobahn will behave very much like current purchasers of magazines, books, or recordings—and they should be permitted to do so.

2. *Second Principle*

As a matter of policy, government should foster access by speakers to media. Clearly, government has an important role to play in ensuring that the media are not monopolized and in expanding the opportunities of citizens to speak and to be heard. People who own instrumentalities of communication have incentives to reduce their use in order to charge monopoly prices and equally strong incentives to prevent or retard the development of competing instrumentalities. We cannot assume that those efforts will always fail of their own accord. Further, government funding of basic research is often an efficient way of uncovering new communications technologies or new uses for established vehicles, both of which can widen access by increasing the number of available communication channels.

That government should foster speakers' access to the mass media is not a controversial proposition. What has proved quite contestable, however, although usually only with respect to broadcast regulation, is the meaning of access. In broadcasting, access is often defined as replacing the broadcaster's choice of programming with programming chosen by someone not associated with the station.⁶⁰ By contrast, when we examine government's relations to other mass media, it seems reasonably clear that, for purposes of the access principle, access means the ability to reach any willing recipient by any speaker willing to pay the economic costs⁶¹ of doing so (and does not mean that government must or should require others to subsidize the would-be communicator). For example, in book publishing we do not assume that access to book publishers is inadequate if an author is not published because publishers believe her book will not sell enough copies to pay for printing costs.

60. *Id.* at 243, 244–45.

61. Economic costs are the costs (including opportunity costs) of resources employed in communicating, not necessarily the prices charged by (perhaps monopolistic) owners of those resources.

3. *Third Principle*

Government policies should foster diversity in the media marketplace. If government adheres to the first and second principles, this third principle will follow automatically because it is the opposite side of the coin. Properly understood, the quest for diversity does not require government to provide people speech that they do not value as much as its costs of production and distribution. And, quite obviously, the quest for diversity does not justify censoring some programming upon a theory that the censorship will necessarily generate some different programming.

Instead, diversity is achieved when people are allowed to bid for any information or entertainment they desire—no censorship—and to receive what they seek, so long as they are willing to pay the economic costs of receiving it. That is, the diversity principle dictates that there be no artificial government-imposed barriers to transmission or reception of speech.

This principle, too, is evident in our settled expectations regarding legal control of the nonbroadcast mass media. For example, the magazine market is regarded as diverse because people are free to subscribe to magazines on any or all topics. We do not regard diversity in the magazine market as incomplete if some topics or formats that might lend themselves to magazine treatment are not published because to do so would cost more than subscribers (or advertisers) are willing to pay.⁶²

4. *Fourth Principle*

Government is not permitted to sacrifice any of the three foregoing principles to further goals associated with either or both of the others. Where such sacrifice is not needed, however, government may extend the goals associated with any of those principles. Put another way, the Constitution does not mandate subsidies for those seeking access to, or diversity from, the mass communications media;⁶³ neither does the Constitution prohibit such subsidies.

62. One might make precisely the same points about the theatrical film market as well. Movies provide diversity in the sense that people are free to make, to exhibit, and to attend any movie whose costs of production can be covered by expected box office (and tape rental, cable licensing, and other) receipts. We do not regard the movie market as nondiverse, and in need of further government intervention, even though we can easily imagine films that we might like to see but whose costs of production cannot be recaptured by the expected income from selling tickets, and other sources.

63. See *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (holding First Amendment does not mandate citizen access to airwaves); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (sustaining exaction of fee "incident to the administration of the [licensing] Act and to the maintenance of public order in the matter licensed"). We recognize that there is a subsidy inherent in the mandate that government allow speakers to use the public streets and parks to communicate. We are aware of nothing comparable in the area of mass communications.

One of the newest technologies traces its rapid growth to the application of this principle. The federal government has borne most of the costs of establishing the infrastructure that is the Internet, thereby increasing the diversity of the fare available and the accessibility of this medium without favoring any speaker or viewpoint.⁶⁴ Antecedent similar examples abound. During the era before cable, we were all the richer for the decision to create and subsidize PBS. Perhaps the benefits of PBS did not exceed its economic costs, but government financing of PBS did no damage to the system of freedom of expression. We cannot know how many magazines have been created and continue to exist because of second-class mailing privileges, but, again, we are better for their existence, because more information is better than less.

Indeed, to the extent the marketplace is perceived as impoverished, subsidies may be an effective way of correcting its inadequacies, so long as these are true subsidies rather than extractions from media competitors.⁶⁵ Furthermore, as Mark Yudof's seminal, award-winning work, *When Government Speaks*,⁶⁶ explains, the policy issues, while rich and complex, are largely freed from the restraints that the First Amendment otherwise imposes on government actions.

B. *Sources of the Basic Principles*

For those familiar with basic First Amendment law and general American regulatory policy toward the mass media, reflection will reveal that virtually all First Amendment rules and regulatory policies toward the mass media—other than broadcasting—rest on the four principles set out above. Consider the print media. With little or no controversy, we recognize (or tolerate) the following four propositions. First, a regulation that provides, "If you write about *x*, you must behave according to specified journalistic norms," puts a chill on writing about *x*. Second, print media are "accessible" platforms to speakers, even if no one gets published at no cost. Third, the print media provide "diversity," even if we are not assured that every worthwhile view will be offered for sale. Fourth, the First Amendment divested government of power over, or responsibility for, the behavior of editors. Indeed, we might well say that these are the premises underlying *Tornillo*.

We believe American citizens and policymakers embrace those propositions not because they slavishly agree to anything the Supreme Court says, but because of our society's shared belief in the following three empirical

64. See Ralph Vartabedian, *Colleges Fear Research Cuts by Pentagon*, L.A. TIMES, July 22, 1994, at A1, A20; Aaron Zitner, *A Quiet Leap Forward in Cyberspace*, BOSTON GLOBE, Sept. 11, 1994, at A85.

65. To be a subsidy the costs must be spread generally. The earlier principles preclude taking from A to give to B or silencing A to let B speak.

66. MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983).

assumptions. First, governmental control over editorial policies typically will be exercised in a discriminatory fashion, privileging that which is in vogue, mainstream, and safe while handicapping that which is not. Second, recipients—readers, listeners, viewers—are capable of judging the quality of a speaker's presentation and abandoning those speakers who do not measure up to the recipients' standards. Third, speakers compete within and across media for potential recipients, so that the public is constantly presented with a variety of viewpoints from which to choose. Further, it is only because we believe that markets for ideas and values operate in this fashion that we have chosen to place constitutional constraints on government's authority to regulate speech.

We do not blush to admit that we believe these empirical assumptions are true.⁶⁷ Another reason we treat these beliefs about politics, markets, speakers, and listeners as a sound basis for erecting principles to govern legal regulation of the media is "the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."⁶⁸ If, for example, we build legal rules on the assumption that recipients can discriminate among speakers and speeches, this should tend to become a self-fulfilling prophecy. Recipients will need to develop the ability to discriminate.

Of course, we cannot prove that those empirical assumptions are generally truthful reflections of reality, and we know that they are not always so. But, for purposes of our argument, it is quite important to note a fact that is not contestable. That fact is that these assumptions about politics, markets, speakers, and listeners underlie virtually every facet of First Amendment law and nonconstitutional regulatory policy toward the (nonbroadcast) mass media. Constitutional and statutory rules aimed at not only the print media, but all mass media other than broadcasting, are premised on the notion that, although government has important duties or opportunities to expand access and diversity through content-neutral actions, the goals of an open, stable democracy are best advanced by relying on recipients to choose from among competing speakers unconstrained by government. "To many this is, and always will be, folly; but we have staked upon it our all."⁶⁹

IV. APPLICATION TO CONVERGING TECHNOLOGIES

As we noted at the outset, emerging technologies erase any tenable line delineating that which is broadcasting and exempt from these principles and

67. Especially if we add "for the most part and in the long run," which are the conditions that really matter.

68. *Cohen v. California*, 403 U.S. 15, 24 (1971).

69. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.); *see REGULATING BROADCAST PROGRAMMING*, *supra* note 2, at 175–79.

that which is not. The principles just discussed offer broadcasters and those employing emerging media technologies the full protection of general media law while leaving ample room for progressive and helpful regulation.

What specific forms of regulation should be considered for the era of technological convergence? Three central points emerge: Content control should be forbidden; entry barriers should be reduced and eliminated whenever possible; and common carrier status must be carefully evaluated.

A. *No Content Controls*

This regulatory strategy flows automatically from our first principle stated earlier. It applies equally to emerging technologies, which must, after all, compete for users' attention, in the same manner that magazines, newspapers, and books seek readers.

B. *Reduce Entry Barriers*

To help assure that new communications technologies are user friendly rather than centrally controlled—whether by government or by industry—the most important policy government could adopt is a commitment to foster as much competition as possible among would-be speakers for audience attention. This obligation, rooted in free speech concerns, mandates reducing barriers to entry that confront potential speakers. This includes those who wish to employ established technologies, such as television stations broadcasting in the VHF spectrum. For example, long ago the FCC made many decisions that substantially constrict the number of VHF stations that can now be licensed.⁷⁰ Those decisions can be reversed.⁷¹ The obligation should extend also to potential speakers desiring to employ new technologies—such as communications networks that link up portable computers. Federal regulation has effectively delayed the entry of, first, portable cellular telephones and, later, portable interactive minicomputers, by failing to establish fluid mechanisms for allocating and reallocating spectrum in response to emerging technologies and consumer demand. That omission can and should be remedied.

Reducing entry barriers and extending the spectrum available for communication of information and entertainment serve the goals of both access and diversity by lowering the costs of communicating and expanding the

70. Several of these choices are detailed in Thomas L. Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875 (1981).

71. This might, however, be a second-best solution today. It might be preferable to free up VHF spectrum for other communications uses and move television to cable and satellite transmission, where it would not block so many other valuable uses.

opportunities for doing so. In this fashion, readers, listeners, and viewers are empowered, without governmental censorship to control what is offered and what is consumed. By simply determining what (if any) materials to access, users of the infobahn can force programmers to serve their interests and desires.⁷² To the sober media critic who understands the modest possibilities of achieving real change through regulation, such a program ought to be vastly more appealing than the kinds of clumsy and usually ineffective content controls that were at the center of the fairness doctrine⁷³ and that underlie present regulation of children's television.⁷⁴

Perhaps the point seems so obvious that to emphasize it is to belabor it. We emphasize it because history teaches a consistent lesson regarding the introduction of new communications technologies: Government should be wary of private barriers to communication and equally wary of public barriers. Indeed, if the past is prologue, entrenched private interests will use public policy to achieve their goals of limiting competition.

Surely, the FCC has known that erecting or maintaining entry barriers is counterproductive. Even Congress has realized this. A key section of the Communications Act of 1934 directs the Commission "to encourage the larger and more effective use of radio in the public interest."⁷⁵ Yet, although the FCC has always had available the option to reduce barriers to entry and thereby expand the number of broadcast outlets accessible to the public, Commission policy from the agency's inception through at least the next fifty years was to retard the growth of broadcasting.

A principal reason Congress created the Federal Radio Commission (FRC) was to reduce competition among existing stations.⁷⁶ One of the first decisions the FRC made was not to follow the European example of broadening the broadcast band.⁷⁷ Listeners would thus not be troubled by having to choose between retaining their old sets limited to stations already

72. Pulitzer Prize-winning playwright Robert E. Sherwood, in a remarkably prescient article written in 1929, stated:

I can state, on the best authority, that all television sets will be equipped, as all radio sets are now equipped, with control switches. Thus, when any one decides that he has been fed to the teeth . . . he has only to turn the little switch and shut the darned thing off

Robert E. Sherwood, *Beyond the Talkies—Television*, SCRIBNER'S MAG., July 1929, at 1, 8. All too often the on-off switch is forgotten in discussions.

Similarly, government regulation fosters diversity when it helps people make and enforce choices. Thus, no basic principle is violated if government requires that consumers be offered computers or receivers that are engineered so that channels can be permanently or selectively blocked or so that a very wide range of channels can be received. (Where, however, government mandates that only such receivers be offered, it risks reducing access and diversity by increasing the costs of the receivers beyond the willingness of low-income viewers to pay for the sets.)

73. REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 237-75.

74. *Id.* at 81-84.

75. 47 U.S.C. § 303(g) (1988).

76. REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 21-22; Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 170 (1990)

77. Hazlett, *supra* note 76, at 155.

available on them or purchasing newer ones that could receive added stations made available by broadening the band.

Following World War II, the Commission set about to structure the nascent television industry. After a lengthy hiatus, the FCC adopted a comprehensive station allocation plan that put relatively little weight on affording most Americans a large number of television signals.⁷⁸ Instead, the plan gave great weight to factors such as placing at least one transmitter in as many communities (and, therefore, congressional districts) as possible. Consequently, the plan did not even attempt to maximize the number of television stations available to American households and for almost forty years guaranteed that there would be but three national networks.⁷⁹ The allocation plan sacrificed viewer interests in access and diversity to narrow political concerns and entrenched industry goals.

More recently, as soon as cable television became more than a device to expand the reach of existing broadcasters, the FCC took actions to stop it dead in its tracks.⁸⁰ When the Commission finally decided to let cable grow somewhat, it shackled the new medium with programming requirements that it never dreamed of imposing on broadcasters.⁸¹ To execute both maneuvers the FCC adopted, with the ready assent of reviewing federal courts, a very broad reading of its jurisdictional reach.⁸² In a like vein, before telephone companies even dreamed of expanding into offering television services, the Commission prohibited them from doing so.⁸³

Finally, at present, cable operators assert that telephone companies are employing state regulations to prevent cable systems from offering audio services that compete with telephony.⁸⁴ Meanwhile, telephone companies assert that they are handicapped by federal law from offering wired television services that would compete with cable.⁸⁵

Proliferating electronic communications technologies make even more compelling a regulatory approach that, resting on the four basic principles, relies on competition rather than direct governmental oversight to discipline firms and to force them to respond to consumer desires. Expanding technologies bring lower access costs and wider opportunities for diversity, thus diminishing the appeal of most proposals to expand government oversight.

78. REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 87-88.

79. *Id.* at 88, 283-84.

80. See POWE, *supra* note 15, at 220-23; Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 85-91 (1981).

81. See POWE, *supra* note 15, at 223-26; Besen & Crandall, *supra* note 80, at 92-98.

82. See Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403, 435-40 (1982).

83. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849 ¶¶ 3-4 (1988).

84. Ted Hearn, *NCTA Takes Up Battle with States*, MULTICHANNEL NEWS, Oct. 17, 1994, at 1.

85. "Equal Protection" Sought, COMM. DAILY, Sept. 12, 1994, at 4.

More recent government actions suggest reason to hope. Broadcast satellites have been launched with comparatively little governmental control. The federal government constructed the infrastructure of the Internet, a communications technology that permits rather easy and nondiscriminatory access.

C. *Common Carrier Regulation?*

At some point in the evolution of any new communications technology, some important group is sure to argue that the industry should be conducted on a common carrier basis. For example, when cable was in its infancy, a much-debated question was whether cable systems should be required to act as common carriers.⁸⁶ The tendency of analysis to gravitate toward the common carrier approach is not surprising. Common carriage is likely to appeal to one who grasps the point of *Tornillo* that editorial control should be left in private hands, but also appreciates the premise of *Red Lion* that a powerful unregulated medium may exclude valuable information and entertainment.

Reflection reveals that nothing in the basic principles of mass media regulation specifies who must exercise the editorial function. Our traditions, as well as the specific language of the First Amendment, only tell us who must not be the editor. Editing is not government's job. Speakers edit free of governmental control or interference, but they need not own the facilities over which they speak. Printing presses, sound stages, recording studios, cable systems, and broadcast stations could all be operated as common carriers.⁸⁷ They would behave like existing communications common carriers, that is, for example, like local telephone exchange carriers and mobile radio service producers and most long-distance microwave services and satellite carriers.

We should make clear that the common carriage discussed here must be consistent with our four principles outlined above. In particular, the regulation must be content-neutral, not targeted at particular viewpoints or ideologies. For example, imposing common carrier requirements on all Democrats who own electronic communications facilities would violate the free speech guarantees of the First Amendment. Similarly, randomly choosing one in ten of all AM radio stations for common-carriage status would, at least presumptively, lack the rational basis required by the Fifth Amendment.⁸⁸

86. For example, the ACLU unsuccessfully argued, in *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975), that certain Commission rules were flawed because they did not impose sufficient common carrier obligations on cable systems.

87. Indeed, there exist markets for renting each of these facilities in the United States today.

88. One might understand our first principle to suggest that imposing common carrier status necessarily violates that principle because government thereby denies someone the right to be an editor. That is, for example, if a telephone company is told to operate as a common carrier it loses its right to be an editor. This argument is incorrect for two reasons. First, no principle of mass communications law holds that one has a right to be an editor simply because one owns or controls a communications facility. Our principle of content neutrality simply holds, as illustrated in the text, that one cannot be punished because of the

In some instances, imposing common carrier obligations can be an effective way to ensure that all speakers receive nondiscriminatory access to platforms. Where this occurs, diversity, as we have defined it, is also enhanced. In simple terms, the appeal of common carrier regulation is that it seems directly responsive to sober claims for content regulation. If, for example, the claim is that we need a fairness doctrine for radio to permit access by speakers whose views are antithetical to advertisers and so would not be carried by advertiser-funded radio stations, one might offer the common carrier alternative. Under such a regime, any speech by a speaker willing to pay the costs of speaking should be carried (access) and can be received by anyone willing to pay any additional costs of receiving it (diversity).

Common-carriage regulation, however, should not be viewed as a panacea. Just because it can be implemented lawfully does not mean it will work well. Indeed, we suspect that, for most media, a thoughtful policy analyst will reject the common carrier model.

First, such regulation is not costless. At a minimum, government resources must be devoted to defining and enforcing the rules. To assure that common carrier prices reflect only the true costs of access may require extensive (and expensive) public-utility-type regulation.

Further, especially as applied to mass communications media, common carrier obligations can prevent the achievement of substantial efficiencies. Magazine publishers and broadcasters do not simply publish articles or air programs. They package groups of articles or programs into a coherent whole. This whole package is often more valuable than the sum of its parts because the package itself communicates. It describes the mix and quality of data or entertainment that the recipient will receive.

To illustrate, a newsmagazine run on a common carrier basis might, in a given week, contain ten stories on health care policy and none on foreign policy, depending on which authors showed up first or bid the highest amounts for available space. Moreover, the stories may reflect very different standards of care in research and writing. Readers might (indeed, probably do) prefer a magazine edited by a single publisher because this tends to ensure a greater variety of topics, balanced coverage, and a uniform level of quality. The single publisher can also provide an overarching point of view, which recipients may prefer to obtain as well.

content of one's speech. Second, imposition of common carrier status cannot entail denial of the right to speak. Telephone common carriers, for example, retain the same right to freedom of speech, on their or anyone else's facilities, as all communications corporations. The ability to impose common carrier obligations on a telephone company does not carry with it the ability to prevent that company from transmitting its own messages over its own facilities (although, in extraordinary circumstances, such a requirement might be justified by antitrust principles rooted in a legitimate concern for protecting equal access rights).

Finally, it is not self-evident that common carriers will provide greater access opportunities or diversity of style or viewpoint than will publisher-editors. Where an editor—whether of a newspaper, a broadcast station, or a cable system—has the capacity to add a speaker whom audiences wish to receive, it is usually in that editor's best interests to provide that speech so long as the audiences are willing to pay the (marginal) costs of transmitting it.⁸⁹ If a cable system can add a channel at the cost of \$5 per month, we expect it will do so for anyone willing to pay that amount.

If the problem is lack of capacity, the preferred government response, as outlined above, is clear: help to increase capacity, to reduce entry barriers. If the cable system cannot or will not add a channel, the better response is to be rid of any rules that constrain cable channel expansion and to provide alternative means—e.g., by microwave or satellite—of transmitting multiple video signals. If the problem is incompatible ideology, the preferred response is the same. By reducing entry barriers and preventing monopolization, government facilitates competition among editors of diverse ideologies, and thus, fosters access to competing viewpoints.

Common carriage, then, should not be viewed as the preferred basis for organizing or regulating the mass media in the United States. In most cases, its costs will exceed its benefits. But, in the unusual case, common carrier regulation can be a cost-effective means of attaining access and diversity goals without engaging in content regulation. For those reasons, a common carrier regime that comports with the four principles described above cannot be said, on *a priori* or philosophical grounds, to impose a threat to civil liberties comparable to that created by empowering government to displace the decisions of private editors.

Common carrier regulation appears to have been a wise choice for common, interactive, wireline audio communication (telephony). With telephones, people largely wish to communicate directly with each other and so little is lost by denying the phone company an editorial voice over these communications. Further, giving telephone companies an editorial discretion would be quite risky. The local telephone loop may well be a natural monopoly; so one would not expect a rival phone company to come into existence to carry messages that the entrenched phone company refused to carry. This suggests, additionally, that a common carrier approach toward the Internet is equally sensible, for the same reasons. People who use the Internet to establish data bases or accessible bulletin boards, however, should not be required to carry all comers, because it is possible to establish many such data bases or bulletin boards along the Internet.

89. STANLEY M. BESEN & LELAND L. JOHNSON, AN ECONOMIC ANALYSIS OF MANDATORY LEASED CHANNEL ACCESS FOR CABLE TELEVISION (1982).

V. CONCLUDING OBSERVATIONS

In this Essay, we make explicit two points that were implicit in our larger work, *Regulating Broadcast Programming*.⁹⁰ We wrote the book against a jurisprudential backdrop that is centered around the view that broadcasting through the electromagnetic spectrum was a means of communication so different from any medium yet employed that preexisting rules could not be safely applied to broadcasting.⁹¹ We intended the book to prove just the opposite: that the general principles of law and regulation underlying all nonbroadcast mass media would be just as workable, and should be fully applied, to the broadcast media. To make that point unmistakably clear, we intentionally excluded consideration of newer technologies (even cable) from our discussion and analysis. In this sense, the book is backward looking and deliberately so.

Implicit in our argument, however, were two points that ought to be made explicit on the occasion of this Symposium, with its emphasis on the future. First, the advent of new telecommunications technologies, and their convergence with the now traditional electronic media of AM, FM, VHF, and UHF broadcasting, make even less tenable the view that these traditional media require or justify a distinct regulatory jurisprudence. Second, the general principles underlying regulation of the nonbroadcast mass media should apply fully to the new as well as the old electronic communications media.

Most proponents of increased government control of broadcast-program content have not responded to the arguments advanced in this Essay because they have never considered them. That failure may continue with newer technologies. In the past, critics rushing to impose their value system on broadcasters, listeners, and viewers, have not paused seriously to consider whether the faults they perceive in broadcasting could be remedied by means fully consistent with the regulatory policies we employ toward all other mass media. With those critics, we agree that it is too expensive to get on television, and that television offers fare that is both too bland and too vexatious. And we agree that similar problems may arise on the infobahn and other newer means of mass communications. But we should all be equally able to agree that those problems do not require that government employees metaphorically sit as gatekeepers on the infobahn. Rather, those government officials ought to be reducing entry barriers and expanding access opportunities for programmers and viewers.

For other critics, our arguments must seem hopelessly naive. These are the new brand of media critics, the ones who believe that the arguments we have just advanced cannot make sense in a world where the distribution of wealth

90. REGULATING BROADCAST PROGRAMMING, *supra* note 2.

91. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969).

and resources is badly skewed.⁹² How can we talk of programmer choice, competition among media, or the sovereignty of the listener-viewer when very few people have the wealth to create visually appealing programs, when outlets have traditionally been restricted in number and reach, and when so many telecommunications consumers are too poorly educated to make wise choices, too impoverished to be able to make their choices count, or lack the resources to access the expanding new technologies?

To be quite honest about it, we find it rather easy to continue to talk about these things. Even if these problems are not alleviated by emerging communications technologies,⁹³ what other choice do we have? A society in which one governmental entity dictates standards of taste and value lest thousands of unrestricted, competing programmers or Internet gophers “dictate” those same things? A medium with only one definition of “children’s programming” rather than the same medium operating with several such definitions? Mass media journalism or computer bulletin boards governed by the White House’s view of balance and fairness rather than the views of several networks or hundreds of bulletin board operators competing for viewers’ and readers’ attention?⁹⁴ A federal agency that agonizes over “measur[ing] the conflicting claims . . . of jazz orchestras and lectures on the diseases of hogs”?⁹⁵

We are not persuaded that the “public interest” rephrased in the rhetoric of civic republicanism reduces the force of these questions. We have witnessed and documented over six decades of public interest regulation of broadcasting⁹⁶ and do not believe that a newer group of concerned regulators, animated by civic republicanism, can outperform their forebears.⁹⁷ Nor, for the reasons discussed above, do we see any need for them to try.

To be sure, our commitment to the bedrock principles of media regulation described in this Essay rests on assumptions that are not always true about the capacities of recipients of speech and of the speechmakers themselves. Interestingly, however, those principles are directly responsive to such inadequacies, wherever they occur. The principles teach that government can and should play important roles in regulating access and fostering diversity. Those techniques, not the methods of the censor, are the appropriate response to the imperfect world of electronic communications, no less than to the imperfect worlds of book and law review publishing.

92. See sources cited *supra* note 14.

93. As it appears they should be. See Volokh, *supra* note 25.

94. See POWE, *supra* note 15, at 121–42; see also REGULATING BROADCAST PROGRAMMING, *supra* note 2, at 294–96.

95. See 1 FED. RADIO COMM., *supra* note 11, at 6.

96. See generally REGULATING BROADCAST PROGRAMMING, *supra* note 2.

97. Despite the record of regulatory failures, those forebears are not an undistinguished group by any standards. They include James Lawrence Fly, Clifford Durr, Paul Porter, Newton Minow, Kenneth Cox, Nicholas Johnson, and Richard Wiley.

