Essay

THE ELECTRONIC FIRST AMENDMENT: AN ESSAY FOR THE NEW AGE

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Astrologers tell us that the approaching new millennium will be the "age of Aquarius." Social scientists and kindred pundits tell us it will be the "age of information." The new age could be both: an Aquarian age of harmony and understanding produced by pervasive information technologies and services. I know of no astrological authority for such a convergence, but there does seem to be quite a lot of mundane support for it in the current outpouring of writing about the brave new world of bit streams coming our way.[1] The now

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1. Ironically, most of this enthusiasm for bit streams still appears in print, which according to yesterday's forecasts should have gone the way of stone tablets. *See, e.g.*, Robert Lee Holz, *Fragile Virtual Libraries*, L.A. TIMES, Oct. 8, 1995, at A1 (describing Washington University's digital library as a "tentative step toward a time when electronic libraries will make books seem as archaic as clay tablets"). Though some have lamented what they see as the decline of the nonelectronic media, it is striking how resilient those older media have been in the face of what, by some accounts, are impossible odds. Some statistics on the print media in particular will underscore the point. In 1950, when television was an infant medium, there were approximately 11,000 new books (or new editions) published. *See* AMERICAN LIBRARY ANNUAL FOR 1955-1956, at 81 (Wyllis E. Wright ed., 1956). A decade later, when television had become a mature medium, the number had advanced modestly to about 15,000. *See* THE BOWKER ANNUAL OF LIBRARY & BOOK TRADE ALMANAC 79 (8th ed. 1963). By 1970 the number more than doubled to 36,000. *See id.* at 70 (16th ed. 1971). In 1980 the number rose further to more than 42,400. *See id.* at 372-73 (28th ed. 1983). In 1990—by which time the average television household had access to multiple cable channels—the number of new books was slightly more than 46,700. *See id.* at 500 (38th ed. 1993). A similar story can be told for newspapers and periodicals. The decline of the daily newspaper—particularly the disappearance of competitive dailies in major cities—has often worried print enthusiasts, and there has been some modest decline in recent years—from approximately 1740 in 1970 and 1980 to about 1600 in 1990. *See* U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 567

ubiquitous metaphor for these new bit streams is the "information superhighway," a metaphor that promises to transport us into a brave new world of conveniences, with new ways of doing the quotidian tasks of modern life: telecommuting, telebanking, teleducation, telemedicine, teleshopping ("tele-" has become the most overworked preface in the English language). There is a supplemental trope for part of this highway—"cyberspace." This term conveys connotations somewhat different from those of the highway, but the glittering promises made in its name are very similar.[2]

The flip side of every promise is a threat, as the Chinese taught us with their memorable curse about living in interesting times. New technology is always a mixed blessing, and for everyone who says "yea" there seems to be someone who says "woe." The invention of telephony was a breakthrough in communications, but some thought the telephone was just an "electrical toy;"[3] to this day there is probably no one who has not had occasion to curse its unique ability to interrupt our privacy.[4] Television broadcasting intensified the contrast between good news and bad news. The good news: here was a medium that brought entertainment and information into every home.[5]

tbl.916 (1993). However, the overall number of periodicals has increased in this same period: from approximately 9600 in 1970 to 10,200 in 1980, and 11,100 in 1990. *See id.* tbl.915.

2. The sources of superhighway *cum* cyberspace promises are nearly endless. For a small sample, see generally MICHAEL L. DERTOUZOS, WHAT WILL BE: HOW THE NEW WORLD OF INFORMATION WILL CHANGE OUR LIVES 9 (1997) (predicting that "[t]he Information Revolution will trigger a . . . sweeping transformation" in the way we live); BILL GATES, THE ROAD AHEAD xiv, 181 (rev. ed. 1996) (predicting that "today's innovations are just the beginning," and that "[t]he Internet will extend the electronic marketplace and become the . . . universal middleman"); NICHOLAS NEGROPONTE, BEING DIGITAL 7 (1995) (predicting that the "values of the nation-state will give way to those of . . . electronic communities," and that "[w]e will socialize in digital neighborhoods in which physical space will be irrelevant"); GEORGE GILDER, LIFE AFTER TELEVISION *passim* (1990) (predicting that emerging technologies will replace television as the dominant force shaping the world's entertainment and culture).

3. Responding to an offer to buy the rights to the Bell patents, the President of Western Union reportedly replied, "What use could this company make of an electrical toy?" CATHERINE MACKENZIE, ALEXANDER GRAHAM BELL: THE MAN WHO CONTRACTED SPACE 158 (1928).

4.

> "O misery, misery, mumble and moan!
> Someone invented the telephone,
> And interrupted a nation's slumbers,
> Ringing wrong but similar numbers."

Ogden Nash, *Look What You Did Christopher!*, *in* THE FACE IS FAMILIAR 219, 221 (1941).

5. As Edward R. Murrow said of television: "This instrument can teach, it can illuminate, it can inspire." Edward R. Murrow, *Address to the Radio and Television News Directors' Asso-*

The bad news: most of it was bad entertainment, and the information wasn't very good either.[6] Now we have the Internet, a unique combination of telephony and television, assisted with the manipulative, creative power of the computer—a medium that exponentially extends the good and the bad of its electronic predecessors.

Currently, the bright side of the information age holds the upper hand. Orwell's dark vision of new information technologies has revealed itself to be the product of a sensitive but overheated imagination.[7] Even so, many thoughtful social commentators are nervous still about the cultural and social effects of the new tele-world.[8] I do not intend to explore all of the social and cultural consequences of the new age; this Essay is merely about one particular impact—the effect of new age technology, and possibly new age values, on old free speech traditions and culture. I make this distinction mindful that, to some degree, the free speech issue here is merely a lens through which I view the wider cultural and social consequences of the new age. To a degree quite different from free speech discourse centered on traditional media—most notably print—commentary on the "electronic First Amendment" is transparently revealing of underlying attitudes about the technology itself. Perhaps that is what Marshall McLuhan meant when he said of television that the "medium is

ciation, Oct. 15, 1958, *quoted in* NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 174 (1995).

6. In Newton Minow's words: "[W]hen television is bad nothing is worse. . . . [S]it down in front of your television set when your station goes on the air and . . . keep your eyes glued to that set until the station signs off. I can assure you that you will observe a vast wasteland." Newton Minow, *Speech to the National Association of Broadcasters*, May 9, 1961, *reprinted in* MINOW & LAMAY, *supra* note 5, at 185, 188.

7. Orwell was profoundly skeptical of new technology in general. What he missed about information technology, represented by his famous telescreen in *1984*, was that electronic information technology is fundamentally hostile to the kind of centralized control he imagined. *See* PETER HUBER, ORWELL'S REVENGE: THE *1984* PALIMPSEST 236-38 (1994).

8. Theodore Roszak and Neil Postman have written two of the best recent critiques. *See* THEODORE ROSZAK, THE CULT OF INFORMATION: A NEO-LUDDITE TREATISE ON HIGH TECH, ARTIFICIAL INTELLIGENCE, AND THE TRUE ART OF THINKING xvi (2d ed. 1994) (arguing that computer technology should be considered a "reasonably valuable public servant" rather than the door to some "futuristic utopia"); NEIL POSTMAN, TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY xii (1992) (analyzing "when, how, and why technology became a particularly dangerous enemy"). A somewhat breezier critique, by a scientist and technology insider, is CLIFFORD STOLL, SILICON SNAKE OIL: SECOND THOUGHTS ON THE INFORMATION HIGHWAY 4 (1995) (characterizing the Internet as a "soluble tissue of nothingness" and arguing that "the medium is being oversold [and] our expectations have become bloated").

the message."[9] In all events, the electronic media do seem unique in their power to evoke the aspirations and anxieties of the modern age, and the debate over First Amendment protections has become our principal social framework for expressing them.

I want to frame the discussion with a concern raised over a decade ago by political scientist Ithiel Pool in a book with the hopeful title, *Technologies of Freedom*.[10] Pool's book suffers from a poor grasp of First Amendment law,[11] but it makes a provocative argument about the impact of the rise of electronic technologies on First Amendment values. Somewhat simplified, the argument goes as follows: the increasing dominance of electronic media means a diminution in the social role of traditional nonelectronic media (principally print); the electronic media has grown up in a culture of regulation that withholds from them the degree of First Amendment protections accorded their nonelectronic predecessors; as the regulated electronic media either crowd out or marginalize the older media, they also thereby alter the libertarian culture of the First Amendment. Instead of being "technologies of freedom," the new electronic media could be a Trojan horse used to smuggle an army of regulators past the gates of the First Amendment.

Pool assumed that the print model of free speech is the correct baseline for First Amendment analysis. This premise is not self-evidently correct, though it is the reigning assumption of mainstream First Amendment thought. Even accepting Pool's argument that new electronic technologies might change our First Amendment culture, it does not follow that we have to be anxious about it. The emergence of an electronic culture might be a good opportunity to take a fresh look at what our First Amendment values should be in the new age. That fresh look does not necessarily entail special treatment for

9. HERBERT MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964). It is not clear what McLuhan meant by this phrase. What he said it meant is: "the personal and social consequences of any medium—that is, of any extension of ourselves—result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology." *Id*.

10. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983).

11. For critical reviews, see Frederick Schauer, *Free Speech and the Demise of the Soapbox*, 84 COLUM. L. REV. 558 (1984) (book review) (observing that Pool's understanding of the First Amendment can't keep pace with his technological and sociological insights); Glen O. Robinson, *Technologies of Freedom*, 1 CONST. COMMENTARY 350, 357 (1984) (book review) (referring to Pool's discussion of First Amendment jurisprudence as "breathtakingly brief . . . [and] rather incoherent").

electronic media; it might suggest revised treatment of all media.[12] But such First Amendment revisionism calls for high theory which is, for the most part, beyond my ambition here.[13] I have tried to avoid the temptation to formulate a general theory of the First Amendment. I only want to sketch the contours of the new electronic First Amendment and how it compares to the more traditional print model. By "sketch" I do not mean to suggest a purely descriptive account; it is hardly possible to embark on this subject without engaging one's normative biases, and mine are quite evident throughout. As will also be evident, however, my normative judgments fall short of any clear theory about how the First Amendment should relate to media regulation.

I begin in Part I with a short overview of traditional mass media regulation as it bears on the subject. To call mass media regulation "traditional" may seem peculiar, since virtually the entire history of this regulation can be recalled by persons still living. However, within this short history one can easily separate older forms of regulation and older regulatory rationales from newer ones. Electronic media regulation emerged with the development of radio, and more particularly with radio broadcasting. The forms of regulation associated with broadcasting—notably administrative licensing and attendant public service obligations—I call "old." In some measure, these forms of regulation are still in place, but they have a musty odor. The theory on which these forms of regulation rely—resource scarcity—is even more stale, despite the fact that its chief source of constitutional

12. Cass Sunstein's "New Deal view" of free speech appears to be inspired in part by the impact of electronic media, *see* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 119 and *passim* (1993), despite the allusion to a historical tradition inherent in his labeling it a "Madisonian conception of free speech." *Id. at* 132. As an aside, I think Sunstein's attempt to construct a historic civic republican pedigree for New Deal regulation unfairly credits Madison and the other Framers with a lot of mischief they had no reason to anticipate, let alone embrace.

13. Over the course of the past three decades, theories of the First Amendment, and free speech more generally, have grown almost as fast as the national debt. For the best general account of free speech theories, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982). An excellent short critique of contemporary First Amendment theories is found in Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987). *See also* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996) (providing a useful intellectual history of modern First Amendment theory).

authority, *Red Lion Broadcasting Co. v. FCC*,[14] is only thirty years old.

Traditional regulation began to fade in the 1970s. By the 1980s, a Federal Communications Commission (FCC) chairman could publicly ridicule public interest regulation for television by remarking that television was just another appliance, a "toaster with pictures."[15] Though his quip drew criticism from politicians and assorted other true believers in traditional regulation, it reflected a new attitude toward electronic media regulation and a new reality about the electronic media. The new attitude was that the public interest obligations which the FCC had long promoted, albeit had indifferently enforced, were no longer very important. A major reason for the new attitude was the emergence of broadband media, primarily in the form of cable television. Cable was supplanting conventional, single-channel broadcasting—and with it the foundation on which the public interest obligations had been laid. If it had ever made sense to predicate regulation on the theory that media were using a "scarce resource," the radio spectrum, it no longer did.

The end of scarcity did not mean an end to regulation. A world of plenty created new problems for regulators to worry about, which brings me to Part II of this Essay, in which I discuss the relationship of economic regulation to the First Amendment. To an outside observer with no particular stake in the broadcast regulatory system, the emergence of cable as a program distribution medium might seem to be the occasion for a critical rethinking of a regulatory system that had been based on spectrum scarcity. But social policies never work on a clean slate. Policies adopted in 1934 to solve the problem of scarcity—policies to which the FCC had devoted its energy and its affections for more than three decades—became outdated by the early 1960s, when the Commission first undertook to regulate the emerging cable industry. Cable was a double threat to the FCC. Most obviously, it threatened the broadcast industry—at the time the FCC's most important client. It also threatened the regulatory structure that the FCC had created around broadcasting, a scheme of local stations purportedly broadcasting in the public interest, under the watchful eye of the FCC. There is a great irony here: preserving the effective over-air use of the radio spectrum had been

14. 395 U.S. 367 (1969).

15. Caroline E. Mayer, *FCC Chief's Fears: Fowler Sees Threat in Regulation*, WASH. POST, Feb. 6, 1983, at K1.

the basis of regulatory policy, but once the policy was established it became an end in itself, to be preserved even against a new medium that eliminated the need for the policy in the first place. Unfortunately, regulators have many sensibilities, but a sense of irony is rarely one of them. The Commission had so identified its regulatory mission with the character of the broadcasting industry that it necessarily perceived any threat to the latter as a threat to the former.

The story of cable television regulation is only in part a First Amendment story. Most of the regulation is pure economic regulation that only incidentally affects free speech interests because the regulated firms are part of the electronic "press." Such content neutral regulation presumably does not trigger the high degree of concern reserved for "content regulation."[16] Unfortunately for the cause of legal certainty, it is not always easy to tell what counts as "content" or "neutral," as a sampling of Supreme Court opinions will show.[17] In the *Turner Broadcasting* cases, the Court split 5-4 in 1994, and again in 1997, on whether requiring cable operators to carry local broadcast signals on demand (the so-called "must-carry" rules) were content regulation.[18] A majority of the Court found they were not, and sustained the regulations as justified by a substantial governmental interest.[19]

I question the substantiality of the government's interest here, but I do so mainly as a bridge to a larger question about the role of the First Amendment in constraining economic regulation of media. One of the things that all members of the Court agreed upon in the *Turner* cases is that the rationale for regulation of cable "speech," or speech-related activity, could not be the old scarcity doctrine. The Court rejected the application of a scarcity rationale for cable regula-

16. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding that the government may impose reasonable restrictions on protected speech so long as the regulation's purpose is unrelated to the content of the regulated speech, is narrowly tailored to serve the governmental interest, and leaves open alternative channels of communication); United States v. O'Brien, 391 U.S. 367 (1968) (holding that a government regulation is justified if it furthers an important governmental interest, that governmental interest is unrelated to suppressing free expression, and the restriction on First Amendment freedoms is no greater than necessary).

17. On the varied meanings of content regulation, see, for example, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

18. Turner Broadcasting System v. FCC, 512 U.S. 622 (1994) [hereinafter *Turner I*]; Turner Broadcasting System v. FCC, 117 S. Ct. 1174 (1997) [hereinafter *Turner II*].

19. *See Turner I*, 512 U.S. at 662-63; *Turner II*, 117 S. Ct. at 1186-89, 1195-97.

tion in *Turner I*.[20] Although the Court declined to treat cable as a simple electronic newspaper, on the ground that it exercised greater control over public access to information than that analogy would suggest,[21] cable industry representatives took some comfort in the Court's rejection of the scarcity argument, which implied a higher standard of First Amendment protection for cable than for broadcasting.[22] That comfort was not long-lived. In *Turner II*, the Court applied a new standard for cable, based not on scarcity, but on other assumed special properties[23]—which effectively meant that cable would remain a heavily regulated industry.

An electronic First Amendment not based on scarcity originated before the *Turner* cases. The FCC, Congress, and the Supreme Court had previously constructed a new argument for regulating electronic media based not on scarcity but on their pervasive impact and their accessibility to children. This is the third Part of my Essay. The pervasive impact argument, first raised in the *Pacifica*[24] case in 1978 in the rather trivial context of radio talk shows, has now become a central foundation for regulation of program content. In the new world of electronic plenty, the impact and accessibility arguments supplant the old scarcity argument. But not entirely: in the same term as *Turner II*, the Court in *Reno v. ACLU*[25] decided that the most pervasive medium of all, the Internet, did not fall within *Pacifica*'s ambit.[26]

At this point it is hard to resist the old Abbott and Costello line, "who's on [F]irst?" This brings me to Part IV of this Essay, which also serves as a conclusion even though surprisingly few things are concluded. At least part of the Chinese curse of "living in interesting times" is that the times are changing so fast it is hard to keep up. This is a commonplace of the information age. It is not merely a matter of figuring out how new things will change the patterns of our activities; it is also a matter of trying to imagine how they will change the patterns of our thought. New age thinkers tell us that the Inter-

20. 512 U.S. at 636-39.

21. *See id*. at 656.

22. *See, e.g.*, Kim McAvoy et al., *Both Sides Now: Broadcasting, Cable Executives Take a Read on Must Carry*, BROADCASTING & CABLE, July 4, 1994, at 12 (comments of Bert Carp, Vice President for government affairs at Turner Broadcasting).

23. These properties include the large percentage of households served by cable operators (over 60%) and cable operators' monopoly over local communities (less than 1% of communities served by more than one cable operator). *See Turner II*, 117 S. Ct. at 1190.

24. FCC v. Pacifica Found., 438 U.S. 726 (1978).

25. 117 S. Ct. 2329 (1997).

26. I discuss *Reno* in more detail *infra* in the text accompanying notes 220-30.

net in particular will change the way we think about information and communications, and in turn the way we think about the law of information and communications—the First Amendment included.[27] They may be right; given a long enough time span, everything changes. But this is not an essay in futurology. I confine myself here to commenting on Ithiel Pool's anxieties about the First Amendment as we see it unfolding in the present age.

Speaking normatively, I think we can be confident that this near-term future is much less dark than Pool feared it would be. It is also more complicated, and at least part of that complexity can be traced to changes in the character of media. Speaking predictively, Pool's anxiety about the future of free speech is hard to justify. The legacy of the new information age may be more regulation, but in a curious way it may also be more First Amendment intervention, more judicial scrutiny at what were once considered the margins of free speech. I have in mind here the expansion of First Amendment doctrine in areas of economic regulation, as represented by *Turner* for instance.

In recent years, some scholars have urged policymakers to revive of older types of regulation in the name of advancing new-age visions of community, civic virtue and the like.[28] To take that plea seriously requires either amnesia[29] or a very imaginative reconstruction of what those older regulations were and what they did, and did not, accomplish.[30] A look at past regulation, and its contemporary residues, suggests at the very least that there is not a strong political stomach for active regulation of the kind that could make much difference. You can, of course, make of that a good story—regulation won't do much harm—but the other side of that coin is that it won't do much good either.

27. For a sample of perspectives, see Symposium, *Emerging Media Technology and the First Amendment*, 104 YALE L.J. 1611 (1995).

28. *See* SUNSTEIN, *supra* note 12, at 82 (arguing that the FCC should "return to its earlier goals of promoting high-quality programming, attention to public issues, and diversity of view" by designing "more intrusive strategies"); *see generally id*. at 53-58, 81-88.

29. As George Santayana almost said: "[only t]hose who cannot remember the past are condemned to repeat it." 1 GEORGE SANTAYANA, THE LIFE OF REASON 284 (1922).

30. For excellent recent surveys of the FCC's regulatory endeavors in this area, see THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 277-96 (1994) (arguing that all attempts of the FCC, the courts, and Congress to regulate broadcast programming reflect poor regulatory policy); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1110-30 (1993) (critically discussing the history of the United States' broadcast regulatory system and its current structure).

I. MADISON IN THE AGE OF MURDOCH

When Ithiel Pool wrote about the decline of the First Amendment in the electronic age, some of the regulation that vexed him was already in steep decline. Still, from his perspective, in the mid-1980s, there was enough of it yet on the books to give some credibility to his complaint. Electronic communications have always been subject to regulation different from that applied to other forms of communications. Except for early telegraphy, all electronic media have been subject to regulation from their adolescence—indeed, in the case of broadcasting, you could say from its infancy. To be sure, in recent years the burdens of regulation have relaxed for all media, but the basic regulatory framework is still in place, and so is the legal culture that put it there. If the mere existence of regulation is considered a compromise of basic First Amendment values, Pool was correct in his anxiety about the impact of the electronic future on free speech.

A closer look at the past and present character of regulation suggests that regulation has always been less threatening to free speech values than Pool and other First Amendment advocates have made it out to be. In fact, much of the explicit regulation of media speech has been fitful, the product of occasional pressures on the FCC that have run their course in rather short order. Even accepting the traditional protections accorded print media as the baseline norm of constitutional protection, the regulation-driven deviation from established free speech values has been quite limited, more a threat than a reality. Threats by themselves can alter behavior, of course, but only the most morbidly timid would sacrifice anything important to a threat, like this one, that had little chance of being carried out.

A. The Order of Things

The controversy over a distinctive set of First Amendment protections for electronic media was surprisingly slow to develop. Perhaps this slowness simply attests to the fact that the jurisprudence of the First Amendment is itself coevolutionary with the jurisprudence of the electronic media, and that the contrast between the electronic First Amendment and its traditional print counterpart has grown much sharper over time.[31] It may also attest to the fact that the mere

31. Weinberg makes this point. *See* Weinberg, *supra* note 30, at 1136-38. However, he still finds it somewhat surprising that courts and First Amendment scholars were so uncritical of the conflict between electronic media regulation and the First Amendment after the jurispru-

existence of regulation, particularly licensure, can dull the appetite of those who are regulated for freedoms enjoyed by others who are not. There are tradeoffs, after all. A little freedom can go a long way when the regulated community is as handsomely compensated, in the form of regulatory restrictions on competition and corresponding monopoly rents, as the electronic media have been.

Be that as it may, it is striking that the Supreme Court's authoritative declaration of the principle by which broadcasters were subject to content controls did not come until 1969 in *Red Lion Broadcasting v. FCC*,[32] more than fifty years after the Radio Act of 1927[33] authorized broadcast regulation. Even then the Court did not clearly establish the *difference* between broadcasting and print. All the Court said in 1969 was that broadcasters could be required to provide a right of reply to a personal attack[34]—one of several requirements contained in the FCC's fairness doctrine. It was not for another five years that the Court clarified the special nature of broadcasting. In *Miami Herald Publishing Co. v. Tornillo*,[35] the Court summarily struck down a state right-of-reply law[36] that, in broad outline, was similar to the FCC rule contested in *Red Lion* except that it was applied to a newspaper.[37] Though the Court in *Tornillo* did not bother to explain the different treatment (*Red Lion* was not even cited), its primary rationale was that the broadcast media were publicly licensed to use a scarce natural resource, the radio spectrum, while print media were not.[38]

Whatever credibility the scarcity rationale may once have enjoyed, it no longer enjoys it. Today, the scarcity argument for broad-

dence of the latter had evolved to its present form. Weinberg's surprise suggests that he considers the general jurisprudence of the First Amendment to be more coherent than it really is.

32. 395 U.S. 367 (1969). A dictum in an earlier case indicated that the FCC's powers went beyond mere "traffic" control and included "determining the composition of that traffic." National Broad. Co. v. United States, 319 U.S. 190, 216 (1943). However, the context of that decision was the application of the FCC's regulation of network-affiliate relationships, not programming. *See id.* at 193-94. Although a First Amendment argument against the regulations was raised by NBC and briefly considered by the Court, the principal thrust of the challenge (and the Court's opinion rejecting it) was on whether the FCC's regulations were authorized by the statute and were reasonable. *See id.* at 224-27.

33. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (1927) (providing for the regulation of radio commerce).

34. *See Red Lion*, 395 U.S. at 392-95. For a discussion of the fairness doctrine, see *infra* text accompanying notes 95-118.

35. 418 U.S. 241 (1974).

36. *See id.* at 258.

37. *See id.* at 244; *cf. Red Lion*, 395 U.S. at 369-70.

38. *See Red Lion*, 395 U.S. at 387-89.

cast regulation is widely scorned,[39] and it is clear that the "natural" resource limits on broadcasting have been less constraining than the economic limits have been on nonbroadcast media.[40] Even those who advocate some discrimination between print and electronic media do not attempt to support disparate treatment on *Red Lion*'s scarcity rationale.[41]

In 1984, the Supreme Court itself noted this criticism and indicated a willingness to reconsider the scarcity argument if given "some signal from Congress or the FCC" that it was appropriate to do so.[42] Congress has yet to send a signal, but the FCC sent one in 1987 when it suggested that the increased availability of electronic media,[43] "together with the unacceptable chilling effect resulting from . . . the fairness doctrine, form a compelling and convincing basis on which to reconsider First Amendment principles . . . ."[44] In affirming the FCC's decision, the Court of Appeals for the District of Columbia

39. *See* Weinberg, *supra* note 30, at 1106 (reporting on the consensus view of economists, political scientists and lawyers).

40. It would be misleading to treat scarcity in broadcasting as purely a natural phenomenon, because the number of broadcast stations is more a function of regulatory policy choices than a function of radio frequency constraints. Most notable among these choices are, first, the way in which the spectrum has been carved up among different users, *see* 47 C.F.R. § 2.106 (1997) (national and international allocation tables), and, second, the choice of an allotment regime that gives high priority to a wide distribution of stations among localities. *See* Sixth Report and Order on Television Assignments, 41 F.C.C. 148, 151-67 (1952) (stating general considerations for television channel distribution); 47 C.F.R. § 73.606 (1997) (current television allotment plan).

41. In *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976), Lee C. Bollinger, Jr. argues for different First Amendment treatment of print and broadcasting even though he concedes that the scarcity argument does not support such discrimination. His theory is that dual treatment is faithful to the pluralism of First Amendment principles. *See id.* at 2-3. In Bollinger's view, dual treatment fosters public access, at least insofar as broadcast media are concerned, and thereby democratizes free speech opportunity. *See id.* at 27. At the same time, dual treatment limits the costs of such access by confining it to the broadcast media. *See id*. at 32-33. His argument is unconvincing; if access and regulation are generally good things, I see no reason not to enforce them wherever the appropriate benefit-cost calculus would dictate. In any case, the history of media program regulation does not, I think, support Bollinger's confidence in it even on a selective basis.

42. FCC v. League of Women Voters, 468 U.S. 364, 377 n.11 (1984). The occasion for the dictum was a constitutional challenge to a congressional ban on editorializing by public broadcast stations. *See id*. at 366. The Court sustained the challenge on the ground that the ban was an overly broad restraint, *see id.* at 402, a holding that did not require a decision on the continued viability of the scarcity rationale.

43. *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5052-54 (1987).

44. *Id.* at 5054 (citation omitted).

Circuit did not confront the question whether *Red Lion* was still good law, though its approval of the FCC's reasoning on the public interest point at least implicitly cast doubt on the continued validity of *Red Lion*'s rationale.[45]

If the scarcity doctrine is moribund, however, the last rites have yet to be said. A 1996 court of appeals decision held that, in imposing public interest responsibilities on satellite broadcasters, scarcity could still be invoked to fend off constitutional objections.[46] One might see the court's opinion as a confirmation of Yogi Berra's edict, "it ain't over 'til it's over." Nevertheless, for most practical purposes I think it's over for the scarcity rationale.

Though the scarcity argument has been thoroughly discredited in the eyes of most scholars (and, importantly, in the eyes of the FCC itself), there is a school of thought that differential treatment of broadcasters can yet be justified on the ground that, scarce or not, the airwaves are public property.[47] According to this view, the government can condition use of the airwaves just as a private property owner could condition use of her property.[48] The reference to public ownership of the spectrum is a common locution, but it has generally been used as simply another way of articulating the scarcity argument—the notion being that because the frequencies were scarce,

45. Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989) (citing an FCC report that argued the growth of broadcast media reduced need for the fairness doctrine). In a concurring opinion, Judge Starr argued that the FCC's public interest rationale was "inextricably intertwined" with the constitutional grounds, and thus the court's affirmance was necessarily a finding that *Red Lion* was no longer authoritative. *See id.* at 676 (Starr, J., concurring).

46. *See* Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996). Dissenting from a denial of rehearing en banc, Judge Williams, joined by four other members of the D.C. Circuit, argued that the panel decision erred in comparing *Time Warner* to *Red Lion*. *See* Time Warner Entertainment Co. v. FCC, 105 F.3d 723, 724 (D.C. Cir. 1997) (Williams, J., dissenting). He argued that the factual predicate of *Red Lion*—limited channels or sources of programming choices to the public—was not present; although there are technical limits on the number of satellite carriers (because of limits on orbital slots and frequencies allocated to satellite broadcasting) changing technology will allow the finite number of satellites to broadcast more channels. *See id.* at 725 (Williams, J., dissenting). I think this argument has to be right; if it were not, we would have to consider the possibility that economic and spatial constraints on the number of cable operators in a market make cable a scarce medium, a proposition the Court in *Turner I* squarely rejected.

47. *See, e.g.*, *Spectrum Management Policy: Hearings Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 37, 46 (1997) (testimony of Reed Hundt, Chairman of the FCC) (arguing that it is the government's prerogative to impose public interest obligations on broadcast licensees, as well as to sell radio frequencies, on the ground of public ownership, in addition to scarcity).

48. *See id.*

their use had to be licensed and the licensing power was tantamount to public ownership of public property. As a mere trope for regulatory power, the reference to "public property" is innocuous; but if it is allowed to float off by itself as an independent ground of regulation, it becomes a mischievous confusion. The "spectrum" is merely a way of describing the forms of electromagnetic radiation; it is not a thing but a force (or more precisely a "disturbance in the force," to employ Star Wars terminology). Neither the means of radiation—a radio transmitter—nor the medium of conduction—space—have ever been regarded as public property.[49] Saying that the government owns "property" in the spectrum is simply a way of describing the government's control of the uses of radio frequencies, in space,[50] in order to prevent what the common lawyer might call a nuisance and an economist would call an "externality." The government has long had laws controlling such externalities; zoning laws are the classic example. However, as far as I am aware, those laws are never characterized as an exercise of public ownership rights by the government.

The choice of fictions, between "scarcity" and "public ownership," may no longer matter, if indeed it ever did. The so-called "public interest" responsibilities of broadcasters have always been lightly enforced even when they were publicly proclaimed. Today they are scarcely given lip service. I shall not review the FCC's regulatory efforts in detail; a few of the highlights will suffice to make the point.

B. Entertaining Public Needs

There was a time when the FCC went to some pains to give exact instructions to broadcast licensees about their public interest obligations. The most detailed instructions were contained in the so-called *En Banc Programming Statement*[51] in 1960. Like all pronouncements

49. Justice Douglas once confusingly derived a public ownership of the spectrum from the fact that air space is under the "exclusive control" of Congress. *See* WILLIAM O. DOUGLAS, RIGHT OF THE PEOPLE 76-77 (1958). But this so-called "exclusive control" of air space does not imply public "ownership" of the spectrum, because it is merely a power to regulate navigation, not a plenary ownership of airspace—as Douglas himself had earlier recognized in his opinion for the Court in *United States v. Causeby*, 328 U.S. 256, 266 (1946).

50. Note that if the radio spectrum can be described as public property, then public ownership would equally extend to telephone and cable television transmissions which, of course, use the same radio spectrum as broadcasters even though they transmit over shielded conduit rather than in open air. I know of no one who argues that public ownership extends to telephonic or cable transmissions, however.

51. En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

before and since on the general program service obligations of licensees, the 1960 pronouncement emphasized that the licensee must affirmatively seek to ascertain and serve the needs of its community of license. The Commission acknowledged—it could hardly deny with a straight face—that most television programming was produced by networks for a national audience.[52] Nevertheless, it continued to insist that the licensee be responsive to local needs, at least in regard to nonentertainment programming. It identified a laundry list of program categories that it deemed to be part of a balanced portfolio of programming:

> (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.[53]

The list is remarkable for its comprehensiveness, but more so for its irrelevance, for it was never meaningfully enforced. Though the 1960 *En Banc Programming Statement* remains the official statement of programming policy, the Commission has never bothered to bring it up to date, probably because it recognizes that it never was in touch with reality. The Commission no longer requires from licensees, as it once did, a detailed specification of program types and the amount of time devoted to each.[54] Indeed, the only program information currently required on licensee renewal forms is a summary of programming devoted to the educational and informational needs of children.[55] Even information about the licensee's local programming no

52. *See id.* at 2314.

53. *Id*.

54. In the heyday of licensing scrutiny, the Commission asked applicants for new licenses or for renewal or transfer authority to break out past and future programming by eight different categories (such as entertainment, sports, news, public affairs) and four different subcategories (such as educational institution). *See* Television Program Form, 5 F.C.C.2d 175 (1966). Today, applicants for new authority are asked only for a statement of their planned program service, and existing licensees are asked only to summarize programming directed to children's educational needs. *See* FCC Form 301-TV, section IVA (1996) (applications for original TV license); FCC Form 303-S, section III (1995) (renewal applications).

55. On the FCC's deregulation in this area, see Weinberg, *supra* note 30, at 1123-24. Children's programming continues to be regulated pursuant to Congress's mandate in the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§

longer need be provided, despite the fact that locally oriented service has been the central foundation of broadcast frequency allocations and licensing policy, and continues to be invoked whenever the conventional broadcast industry is threatened by other media, as I shall discuss more fully later.[56]

Although the Commission has generally eschewed regulation of entertainment programming on the notion that the market can take care of it, that notion has been challenged by others who have demanded regulatory intervention to correct some perceived market failure. The most noteworthy illustration of such a challenge is the controversy over radio program formats which emerged in the 1970s. In itself, the controversy was a teapot tempest that would scarcely warrant attention but for the fact that it perfectly illustrates how easily the seed of pointless meddling germinates in a regulatory climate. It began when a handful of radio stations sought to change their program format or "style" from one type to another—for instance, from classical music to top 40. The occasion for the change varied; sometimes it involved a change of station ownership, sometimes a reassessment at the time of a license renewal. The reason for the change was always the same: the old format did not attract as much audience (hence advertising revenues) as could the new. As might be expected, the audiences for the old formats were discomfited by the loss of their favorite programming, and where the lost programming was not replicated by other stations in the market, the listeners complained to the FCC about their loss of a "unique" program service. Ostensibly, the listeners wanted the FCC to set the matter for a hearing. The Commission resisted this idea on the simple ground that there was nothing to hear. It maintained that it had no right to interfere with licensee program choices made in response to market demands.

The court of appeals in a series of decisions disagreed; it held that the Commission must hold a hearing to determine whether the old formats were financially viable, and whether the public interest required their continuation.[57] The Commission continued to resist,

303(a)-(c), 394 (1994)). *See generally* Policies and Rules Concerning Children's Television Programming, 6 F.C.C.R. 2111 (1991) (implementing the Children's Television Act of 1990).

56. *See infra* Parts II.B-C.

57. *See* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 250 (D.C. Cir. 1973); Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926, 929 (D.C. Cir. 1973); Citizens Comm. to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263, 272 (D.C. Cir. 1970).

and finally managed to get the Supreme Court to review the issue.[58] The Court agreed with the Commission that, in the area of entertainment programming at least, the market was a better regulator of program choices than the Commission.[59] The Supreme Court's decision effectively brought the decade-long debate between the FCC and the court of appeals to a halt. Today, the episode has been all but forgotten; it is remembered mostly as a quaint episode in the history of broadcast regulation.

And so it was. There was never a great danger that anything consequential would come of it. At most, the quest to preserve unique formats was a desperate attempt by small groups of radio listeners to resist the market forces that imperiled their listening preferences. Yet, as I suggested, the episode illustrates how easy it is to generate preposterous demands for regulation. I should emphasize here that those who demanded continuance of the unique formats were not crazy. The average member of these groups would rank well above the average of the population on all indicators of social respectability and general "soundness;" by and large they were people who preferred Mozart to Michael Jackson—no craziness there. Nor were they silly. They asked only that: one, the Commission should hold a hearing to *consider* the question of economics, and more generally of the public interest; and two, the FCC should consider whether there was a market failure arising from the fact that the market forces that were driving format choices were skewed by advertising which discriminated against "demographically" less desirable groups such as the young, the old, and the poor (the demographic mainstream being the yuppie).[60] Finally, there was some precedent in support of such regulatory intervention, since the Commission routinely intervened to ensure balance and diversity of ideas in nonentertainment programming.[61]

Though the arguments are not silly, they are a little disingenuous and a lot flawed. The process point is superficially appealing, but on

58. *See* FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

59. *See id*. at 604 (holding that the Commission's Policy Statement is not inconsistent with the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934)).

60. *See* WNCN Listeners Guild v. FCC, 610 F.2d 838, 850-51 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

61. Justice Marshall's dissent in *WNCN Listeners Guild* noted the seeming inconsistency between the FCC's willingness to enforce balance and diversity under the fairness doctrine and its unwillingness to intervene in entertainment programming. *See* 450 U.S. at 614-15 (Marshall, J., dissenting).

full reflection it proves to be rather vacuous. There is no point to holding a hearing unless there is some credible basis for evaluating the facts to be disclosed. The court of appeals wanted the Commission to consider the financial viability of the old format.[62] But to what end? The Commission had no regulatory standards by which to judge the superiority of competing program formats.[63] Nor did it have standards to decide whether a radio station was making a reasonable profit. If the Commission were to establish such standards, simple equity would dictate that all stations be treated the same; the FCC could hardly have made a single station bear exceptional financial burdens (lost profit) because it happened to have picked a unique format. The market failure argument is disingenuous since there was nothing to suggest that those who appreciated unique formats were among those disadvantaged by advertising demographics. In any case, the idea that the Commission should correct for demographic skew in audience ratings is pregnant with potential for regulatory mischief. No one would suggest that the FCC should review network television to make sure that it is not being unduly influenced by demographics. But it is hard to see how to resist the logic of the demographics argument once it is accepted as a basis for regulatory intervention. The third argument, from nonentertainment precedent, is more plausible, but it is also off the mark to the extent that it was based on the Commission's general rules governing diversity and program balance. At the time of the unique format cases, the Commission was in the process of abandoning general regulatory surveillance of nonentertainment programming, as the Supreme Court noted in *WNCN Listener's Guild*.[64]

The radio format controversy is interesting in part because it illustrates that the time for correcting asserted market failures and thereby promoting general program diversity has passed. The proliferation of radio stations and the emergence of broadband television via cable and satellite has made it all but impossible to sustain any public passion about the need for bureaucratic promotion of greater entertainment choices. Critics may decry the lack of cultural quality in television programming. They may associate this perceived short-

62. *See WNCN Listeners Guild*, 610 F.2d at 841; *Citizens Comm. to Save WEFM*, 506 F.2d at 262.

63. On the difficulty of devising format choice criteria, see Matthew L. Spitzer, *Radio Formats by Administrative Choice*, 47 U. CHI. L. REV. 647, 656-71 (1980) (enumerating the difficulties in explaining why the FCC prefers a licensee to be unfettered in its choice of format).

64. *See* 450 U.S. at 601-03.

age of quality programming with the lack of choice—the endless repetition of sitcoms, stock World War II film, nature documentaries, sports events and talking-head interview shows. But the reality is that the present array of programming available on television in the course of any given week is quite diverse. There is something for every taste, even if those who have *good* taste do not easily find enough to please their palettes. Whatever may be television's faults, the absence of diversified programming is not one of them.

Though enforcement of public interest programming in general has faded into insignificance, the FCC and Congress have persisted in their efforts to extract from broadcasters an affirmative commitment to the needs of children. I say "needs" of children advisedly; it is not a matter of requiring broadcasters to offer what children want—A.C. Nielson does that well enough. What Congress and the FCC want is programming that will edify, a category of programming they have long thought to be in very short supply. For many years, the FCC pursued this objective by cajolery, without success. In 1990, Congress intervened with two directives. The first was a specific limitation on the number of commercial minutes that could be broadcast in children's programming. The second was a directive to the FCC to promulgate specific rules requiring television licensees to present educational programming designed for children.[65] To implement the latter, the FCC sought a voluntary commitment from the industry. The National Association of Broadcasters (NAB) and the major television networks refused to give one. They refused, that is, until the issue became intertwined with the FCC's plan for conversion to digital television.

The digital television story is fascinating in its own right, but it is too complicated to relate here.[66] It is enough simply to summarize those parts that are directly pertinent to children's television.[67] As part of a plan to convert present analog signals to digital, the FCC developed a plan calling for all existing broadcast stations to get a second channel on which to begin simulcasting in digital format for a transitional period, during which there would be a gradual shift from

65. *See* Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303(a), (b), 394 (1994)).

66. For a more complete account of the early part of this story, see DANIEL BURSTEIN & DAVID KLINE, ROAD WARRIORS: DREAMS AND NIGHTMARES ALONG THE INFORMATION HIGHWAY 55-77 (1995).

67. A slightly fuller, and more fully referenced, account appears in Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 293-98 (1996).

analog to digital.[68] As this plan was being developed, the returns from the FCC's newly authorized auctioning of unassigned frequencies (outside the broadcast channel allocations) were coming in, and they were stunning.[69] When the FCC announced its plan to *give* a second television channel to broadcasters to facilitate a move to digital television, eyebrows everywhere lifted. The Commission's staff had itself roughly estimated that the new channel would bring between $11 and $70 billion at open auction.[70]

The FCC could not, at that time, auction the second channel to broadcasters. In 1993, when Congress gave the Commission authority to auction unassigned radio frequencies, it stipulated that those frequencies were to be used in services for which the licensee was to, or was likely to, receive compensation from subscribers.[71] This stipulation precluded the FCC from auctioning channels into use for conventional, free, television service. The law could be changed, however, and deliberations on the Telecommunications Act of 1996[72] provided a timely occasion for doing so. Timely, but as it turned out, not politically convenient.[73] The FCC's chairman sought to mollify

68. The period for completing the transition has changed. Originally the FCC set a period of 15 years, but its current target is completion by the year 2006 (a conversion period of less than a decade from the starting point). *See* Advanced Television Systems, 12 F.C.C.R. 12,809, 12,848-51 (1997).

69. The FCC's most recent report puts the total revenue at $23 billion. *See* FCC Report to Congress on Spectrum Auctions, No. 97-353, 1997 WL 629251 (Oct. 9, 1997).

70. *See Federal Management of the Radio Spectrum: Advanced Television Services: Hearing Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Commerce*, 104th Cong. 82 (1996) (statement of Robert M. Pepper, Chief, Office of Plans and Policy, FCC).

71. *See* 47 U.S.C.A. § 309(j) (West Supp. 1997).

72. Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 18 U.S.C. and 47 U.S.C.).

73. Despite political agitation (most notably from Senator Dole) to sell the second channel, there was a reluctance to hold the sweeping reforms of the 1996 act hostage to this issue. Following enactment of the 1996 act, debate of the question resumed, but broadcast opposition to auctioning the second channel carried the day. Broadcasters were given free use of a second channel to be used during the transition to digital. In August 1997, as part of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, Congress directed that the old analog channels be recaptured after the transition and auctioned, along with portions of the UHF spectrum (channels 60-69) not used for digital conversion. The new law also for the first time gave the FCC authority to use auctions rather than comparative hearings to assign television channels. *See id*., 111 Stat. at 258-66 (amending 47 U.S.C. § 309(j)). The auction saga is narrated in the following (selective) accounts: Christopher Stern, *Budget-cutters Eye Digital-channel Auction*, BROADCASTING & CABLE, Aug. 21, 1995, at 10, 10-11; William Safire, *Stop the Giveaway*, N.Y. TIMES, Jan. 4, 1996, at A21; Doug Abrahms, *Dole Wants Auction for HDTV in Telcom Bill*, WASH. TIMES, Jan. 11, 1996, at B6; Mark Landler, *Capitol Hill Fiat on HDTV Isn't the Last Word*, N.Y. TIMES, July 1, 1996, at D1; John Mintz & Paul Farhi, *TV*

critics of this "giveaway" by insisting that the broadcasters ought to give something in return for the new channel—specifically, educational children's television and free air time for political candidates.[74] The first was forthcoming. Faced with the possibility of having to buy the second channel, the major networks agreed to provide at least three hours per week of children's educational programs.[75]

To date, the children's television episode appears not to have raised any First Amendment concerns, even though the FCC's role in persuading the networks to commit to three hours of children's television is strikingly redolent of the family viewing hour episode of the mid-1970s which did generate such concerns.[76] The family viewing hour was an effort to provide a kind of viewing sanctuary in the early part of the prime time viewing period when parents and their children could watch television together without encountering adult programming deemed unsuitable for family viewing. After exhortation by the FCC's chairman, the NAB and the networks agreed to adopt a self-regulatory restraint on the presentation of such adult programming. The policy was challenged by a group representing Hollywood program writers and a program producer (Tandem Productions, which produced "All in the Family"). This group claimed that the "voluntary" policy was in fact the product of unconstitutional influence by the FCC's chairman. The District Court for the Central District of California found that the FCC chairman's actions implicated the entire Commission, and violated the First Amendment, giving

Broadcast Spectrum Plan is Called Giveaway: Conferees May Kill Deadline for Channels' Return, WASH. POST, July 20, 1997, at A8.

74. *See* Landler, *supra* note 73.

75. *See* Lawrie Mifflin, *TV Broadcasters Agree to 3 Hours of Children's Educational Programs a Week*, N.Y. TIMES, July 30, 1996, at A8. At the time of the agreement the Commission was considering rules which would impose children's program obligations on the broadcasters. *See* Policies and Rules Concerning Children's Television Programming, 11 F.C.C. Rcd 10,660 (1996). At the broadcasters' request, the agreement was made the basis for those rules. Although the industry was quick to agree to the demand for children's programming, it resisted the demand for free air time for political candidates. The Clinton administration and FCC chairman, William Kennard, have continued to press this demand, and the industry has fiercely continued to resist it. *See* Paul Farhi, *GOP Hill Leaders Oppose FCC on Free Air Time*, WASH. POST, Mar. 7, 1998, at A8.

76. *See generally* GEOFFREY COWAN, SEE NO EVIL: THE BACKSTAGE BATTLE OVER SEX AND VIOLENCE ON TELEVISION (1979) (giving a journalistic account of the episode up to the time when the district court ruled that the NAB's family viewing hour code had been unconstitutionally tainted by pressure from the FCC's chairman). Cowan's account is not disinterested; he was a legal consultant to the plaintiffs who challenged the family viewing hour. However, it does provide an accurate account of the controversy, if one that sometimes veers off onto journalistic tangents about network personalities.

rise to an action for damages.[77] The Court of Appeals for the Ninth Circuit vacated and remanded on the ground that, for reasons of primary jurisdiction, the claim should have been first addressed to the FCC, for it to determine whether the chairman's actions went beyond legitimate persuasion to become coercive censorship.[78] On remand, the NAB Code was dropped, and the FCC found the (former) chairman innocent of coercion.[79]

The constitutional issues raised by the family hour controversy and its more recent avatar, the children's hour(s), seem to be the same. The fact that the former was negatively articulated in terms of what should *not* be in prime time, whereas the latter is affirmatively articulated in terms of what should be on the air, is purely a semantic matter. Insofar as each policy influences program choices, each has affirmative and negative effects. The important question for both is whether the fact that the government has produced the influence by means of bargaining, rather than by simple command, eliminates the First Amendment problem with government influence over program choices.

This is a hard question. At the outset, notice that the distinction between "bargaining" and "commanding" is conceptually malleable in a context where regulatory commands are linked to the regulator's control of a valuable resource. For instance, suppose the FCC directs a broadcast licensee to present, or not present, a particular type of program as a condition of its receiving (or keeping) its license to use assigned radio frequencies. Some would see this directive as simply an exercise of ownership, part of a lease or sale agreement governing the disposition of the frequencies. I said earlier that this way of rationalizing the regulatory power is analytically flawed.[80] The government should not be allowed to finesse questions of public rationality and legitimacy by hiding behind a metaphor of ownership.

77. *See* Writers Guild of Am., West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976). Tandem claimed specific injury by reason of being "forced" by the Television Code Review Board to move "All in the Family" to a later time slot because of the use of language and "adult" themes on the program. *See id*. at 1153, 1157-58.

78. *See* Writers Guild of Am., West, Inc. v. American Broad. Co., 609 F.2d 355, 356 (9th Cir. 1979).

79. *See* Primary Jurisdiction Referral of Claims Against Government Defendant Arising from the Inclusion in the NAB Television Code of the Family Viewing Policy, 95 F.C.C.2d 700, 710 (1983).

80. *See supra* text accompanying notes 47-50.

Still, the government surely has *some* bargaining prerogatives. Such prerogatives are, after all, an attribute of power, and within some (poorly defined) domain, the government's power here is indisputable. The government may not really *own* the radio spectrum, but unquestionably it has the power to create a set of use rights—property rights, if you like—to ensure effective use of the spectrum commons. Among other things, this power presumably entails a power to sell those use rights—not as an incident of ownership but simply as means of distributing the rights to the users that value them the most. If it has that power, then does it not also have the power to arrange to take payment in kind rather than in coin, to trade spectrum rights for some form of programming instead of dollars?

It will be seen at once that we have now ventured into an area beyond First Amendment concerns, into the jurisprudence of so-called unconstitutional conditions.[81] This is the true Okefanokee of constitutional law, and if we were to proceed much further into this swamp, we might never emerge. Let me simply raise a few questions and make a few quick comments on them.

First, it is important to emphasize the scope of the question as it bears on regulation of the electronic media. The scope is not limited to broadcast media; it is not about the government as owner, and it is not limited to the creation of things called property. The question of whether, when, and how the government may bargain for certain outcomes can arise in virtually any context where the government has something to give or withhold—employment, welfare benefits, licenses, the risk of varying penalties for public offenses. This is obvious; I mention it only because it is necessary to separate this question of government bargaining from the metaphysics of the radio spectrum and the question of who owns it.

Second, and perhaps equally obvious, government bargaining involving speech is not intrinsically more problematic than bargaining over other protected rights. Granted, speech rights are fundamental; but so is the right to trial, and yet we allow plea bargaining as a matter of course because we believe that it offers mutual benefits for the state and for the accused. This is not to say that all bargains, whether involving speech or due process, are acceptable. It is merely to say

81. For an introduction to the doctrine of unconstitutional conditions, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE, 6-16 (1993); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1340-47 (1984); *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989).

that objections to bargaining between the state and the individual arise not from the nature of the individual rights involved so much as from the way that the state uses its control of public goods (including in this category control of certain private privileges) to gain inappropriate bargaining advantages.[82]

Third, the question of inappropriateness here is not determined by whether the state is using its bargaining power to force citizens to do what they would not otherwise do, or to suffer costs they would prefer not to accept. After all, this is true of all bargains. I would prefer to have a Lexus *and* the $50,000 the owner demands for his; but it would be peculiar to say that he is behaving badly by putting me to a choice between his Lexus and my $50,000. What we have to ask is whether the bargain is reasonably related to a legitimate government activity and whether the individual, and others similar situated, are made better off by the bargain. If both of those conditions are satisfied, I think the case for allowing these kinds of exactions is quite strong. It is a little trickier when one of these is achieved and the other is not.

Which brings me back to children's programs. From the broadcasters' side of the bargain, the deal looks very good. They received the free use of a radio spectrum, whose auction value was estimated to be as high as $70 billion, in return for three hours of children's programs in prime time. Even if you assume the deal will cost broadcasters some advertising revenues, this looks like a bargain unrivaled since Peter Minuit bought Manhattan for $27 worth of beads. Of course, what looks like a great bargain to the broadcasters looks like a pretty poor one to the public when you consider what the public could buy with the foregone market value of the second channel. For a fraction of what the government gave up in auction proceeds, it could have purchased a major network and devoted its entire output to children's television.[83] As the aggrieved are wont to say, "there

82. As Epstein emphasizes, the problem of unconstitutional conditions arises because of the government's use of its monopoly power in bargaining for a party's consent. *See* EPSTEIN, *supra* note 81, at 6. However, recognizing that fact does very little to advance the inquiry into whether or not particular bargains are welfare enhancing. No doubt we could eliminate the bargaining problem by eliminating the monopoly, but in most cases this is tantamount to eliminating the government function itself. Whether that is an attractive alternative ought to be decided independently of the bargaining issue.

83. In 1995, CBS was purchased by Westinghouse for $5.4 billion. *See* Edmund L. Andrews, *F.C.C. Approval Today for Westinghouse-CBS Deal*, N.Y. TIMES, Nov. 22, 1995, at D2. In 1996, Time Warner purchased Turner Broadcasting for $6.7 billion. *See It's Official; Time Warner Ties Knot with Turner*, CHI. TRIB., Oct. 11, 1996, Business, at 3.

ought to be a law . . . ." But whether that law ought to be the First Amendment is not so clear. After all, the purpose of the First Amendment is to protect the public from government restraints on speech, not to protect the public from the government's failure to represent them at the bargaining table.[84]

I do not mean to dismiss casually the concern raised when the government (the FCC, Congress or the President) uses its powers in strategic ways that seek to disguise regulatory demands behind a mask of consent. There is something to be said for requiring the government to exercise its powers in a more formal way, by means of approved public procedures and not through lifted eyebrows or jawboning.[85] However, even accepting that the use of informal persuasion on the media ought to be viewed with a super-critical First Amendment eye, I must emphasize that there has not in fact been much for that eye to see. Apart from the examples just named, concrete examples of attempted influence turn out to be very few, certainly far fewer than are imagined. After the Watergate revelations, it became commonplace to worry about the danger that licensing and related regulatory powers could be used strategically to censor a critical press.[86] Though the Watergate tapes make clear that President Nixon entertained the possibility of silencing the *Washington Post* by threatening to hold up the renewal of the *Post*'s broadcast licenses,[87] the tapes do not show, and so far no other evidence shows, that Nixon's dark ruminations on this possibility ever moved beyond ruminations. No one has yet produced any evidence that anyone in the Nixon administration ever contacted the FCC, which was the essential vehicle for making the threat credible. The absence of such

84. I should emphasize at this point that once one pierces the misleading trope of government "ownership," it is not obvious why the government should sell the frequencies, as opposed to giving them away by lottery. *See* Glen O. Robinson, *Spectrum Property Law 101*, 41 J.L. & ECON. (forthcoming Oct. 1998) (discussing private property rights in the spectrum).

85. When I was at the FCC in the mid-1970s the term "jawboning" was favored over "lifted eyebrow." The former was one of Lyndon Johnson's phrases and conveys more a sense of arm-twisting or cajolery—things for which Johnson himself was renowned. The latter conveys a sense of threat, either by direct sanction or by denial of some benefit. However, in a broad sense both words convey the sense of something vaguely illicit insofar as they rely on a surreptitious form of influence that draws its strength from an asymmetrical power relationship between the government and the citizen.

86. *See* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 121-41 (1987) (providing an account of the Nixon administration's threats against the liberal media—most notably the television networks and the *Washington Post*).

87. *See* STANLEY I. KUTLER, ABUSE OF POWER: THE NEW NIXON TAPES 127, 173-75, 191 (1997).

evidence is important in its own right. It is hard to imagine that any contacts between the administration and the FCC about the *Post*'s licenses would not have been noticed and publicized by someone. As Holmes (Sherlock, not Oliver Wendell) reminds us, the absence of a dog's bark can be important evidence that there is nothing to bark at.[88]

C. Fairly Responsible Journalism

In the hierarchy of public virtues supposedly demanded of spectrum users, fairness in treating matters of public importance probably ranks above diversity of programming. The issue of fairness has generally been associated with news and public affairs rather than pure entertainment programming, though the line between the two is often hard to discern. Justifying regulation of news and public issues programming while eschewing control of entertainment calls for some difficult logical maneuvers. One facile move is to argue that entertainment is not important enough to warrant regulatory interference with market choices, while political and public issues speech is too important to leave to the market. There is some sense in this argument, but it is not attractive from a First Amendment perspective. From that perspective, it is the very importance of political or public issues speech that most powerfully argues against government regulation. Whatever the proper domain of the First Amendment, there isn't much controversy that within that domain speech about political and public affairs has a priority claim to constitutional protection.[89] A second argument for singling out political and public is-

88.

> "Is there any point to which you would wish to draw my attention?"
>
> "To the curious incident of the dog in the night-time."
>
> "The dog did nothing in the night-time."
>
> "That was the curious incident," remarked Sherlock Holmes.

A. CONAN DOYLE, *Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 34 (1902).

89. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (affirming the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"); Harry S. Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 221 (suggesting that it would be natural to extend the First Amendment protections recognized in *New York Times v. Sullivan* from public officials to "public policy [and] matters in the public domain"). Some scholars have argued that political and public affairs issues more or less define the boundaries of First Amendment protection. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948) (emphasizing that First Amendment protection is guaranteed "only to speech which bears, directly or indirectly, upon issues with which voters have to deal—

sues programming is relative *need*, as opposed to relative worth. The theory is that the market does not ensure adequate access or fairness and that administrative standards can be devised to correct the problem. This contrasts with the case of format radio, for instance, where there was neither a well-defined market failure, nor well-defined administrative standards by which the FCC could improve upon market choices. This second argument is coherent, but is it true?

Before trying to answer, we need to rehearse a few simple features of the regulatory law on the subject. The law has ebbed and flowed over time. The most durable regulation in communications law has been the rule requiring that stations accord political candidates equal opportunities for the use of their facilities. The so-called "equal time rule" has been part of the regulatory regime since the Radio Act of 1927, whence it passed to the Communications Act as Section 315.[90] The rule provides that whenever a licensee permits the "use" of broadcast station facilities by a "legally qualified candidate for any public office" it shall afford "equal opportunities" to all other candidates for that office; an exception is provided for appearance of a candidate in a "bona fide newscast."[91] The quoted terms have been the main subjects of interpretive disputes over the years.[92] While these disputes have sometimes ignited a few sparks, the equal time rule has not generated much real fire. The chief complaint against the rule has been that it discourages broadcasters—the major networks in particular—from giving (or selling at low rates) air time to the major political candidates because they would then be obliged to

only, therefore, to the consideration of matters of public interest."); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (concluding that "[c]onstitutional protection should be accorded only to speech that is explicitly political."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300-01 (1978) (proposing that the First Amendment "in principle only protects 'political' speech—speech that participates in the process of representative democracy—and does not in principle protect . . . nonpolitical speech").

90. *See* 47 U.S.C. § 315 (1994).

91. *Id*.

92. For examples, see T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA 178-97 (4th ed. 1996). In addition to the equal time requirement, candidates for federal political office have a right to purchase "reasonable amounts of time." 47 U.S.C. § 312(a)(7). The Supreme Court upheld this "reasonable access" provision in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

provide air time on equal terms to fringe party candidates.[93] Interestingly, however, even this complaint has not prompted constitutional challenge. The Supreme Court has never had occasion to consider whether the equal time rule is constitutional. Although *Red Lion* presumably removed any question on this score, the equal time rule was forty years old by then, and was not thought to be implicated in the constitutional attack on the fairness doctrine.

In any case, controversies over equal time have always been secondary to those generated by the erstwhile fairness doctrine.[94] The life of the fairness doctrine was about 40 years. As a specific set of rules, the doctrine was first defined in a 1949 report articulating a dual obligation of broadcasters to devote a reasonable amount of broadcast time to the treatment of controversial issues of public importance (of interest to the licensee's community), and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.[95] The fairness doctrine was in effect from 1949 until the late 1980s when the FCC abandoned it; it was interred formally in 1989 when the Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision to abolish the doctrine.[96]

The first prong of the "obligation" was exhortatory; with one notable exception[97] the Commission never enforced it. The second prong was only occasionally enforced. But the doctrine did generate increasingly numerous enforcement demands from media watchdogs, which proved troublesome to the Commission.[98] Inevitably the

93. *See* Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 459-64 (1959).

94. The literature on the fairness doctrine is huge. KRATTENMAKER & POWE, *supra* note 30, at 237-75, provides a very good introduction to the fairness doctrine, as well as a critique of the highlights (and low points) of its application. *See id.* at 240 (arguing that "the case for leaving the Fairness Doctrine in the dustbin of discarded regulations is clear"). The Commission's own reports discuss most of the cases and review the debate over general policy and implementation detail. *See* Fairness Report, 48 F.C.C.2d 1 (1974), *aff'd sub nom.* National Citizens Comm. for Broad. v. FCC, 567 F.2d 1095 (D.C. Cir. 1977); Fairness Doctrine, 102 F.C.C.2d 143 (1986); s*ee also* CARTER ET AL., *supra* note 92, at 203-23.

95. *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1246 (1949).

96. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989).

97. *See* Representative Patsy Mink, 59 F.C.C.2d 987, 997 (1976) (finding that a local radio station violated the fairness doctrine in not covering a local controversy over strip mining).

98. Perhaps most troublesome for the FCC were cases involving close monitoring of network programs by groups having a political agenda, as *in American Security Council Educ. Found. v. FCC*, 607 F.2d 438 (D.C. Cir. 1979) (rejecting complaint about "liberal" bias in covering "national security" matters). The FCC also had to deal with a fair number of silly complaints, of which my personal favorite is one claiming that dog food commercials "misled the

growing enforcement demands produced some highly questionable decisions, including some the Commission itself came to regret. For instance, the year before *Red Lion*, the Commission applied the fairness doctrine to cigarette advertising on the theory that such advertisements implied a controversial point of view about the benefits of smoking.[99] Though the Commission considered cigarette smoking an exceptional case, not to be replicated in other commercial advertising cases, the court of appeals sensibly insisted that the logic of the doctrine could not be so limited.[100] From that point on, it was only a matter of time before complaints were leveled against viewpoints expressed or implied in entertainment programs, as when programming allegedly contained sex stereotypes.[101] Needless to say, applying the doctrine this broadly would have entailed a large policing job for the Commission. It had no ambition to undertake such a task. It declared both routine entertainment programs and commercial product advertising to be generally out of bounds; only explicit, self-conscious expressions of viewpoint on a matter of public controversy would trigger the fairness obligation.[102]

Even so limited, public complaints about fairness in media proved to be a hard thing to curtail. The purely crank complaints were not such a problem; a form letter response could handle most of them. The real problem was that there were enough legitimate complaints to justify more regulatory monitoring and enforcement than the FCC was ever disposed to provide. By the mid-1980s, the Commission concluded that the game of regulating fairness was not worth the candle, and in 1985 it issued a ruling to that effect.[103] In significant degree, the Commission justified its conclusion on the ground that the growth of competition in electronic media essentially nulli-

public into thinking that dogs are man's best friend when in fact, dogs and other animals carry many diseases harmful to man." Children Before Dogs, 25 Rad. Reg. 2d (P & F) 411, 412 (1972).

99. *See* WCBS-TV, 8 F.C.C.2d 381 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082, 1098-99 (D.C. Cir. 1968).

100. *Cf.* Friends of the Earth v. FCC, 449 F.2d 1164, 1170-71 (D.C. Cir. 1971) (applying the fairness doctrine to advertising high-powered cars on the ground that the ads implied a controversial viewpoint about the virtues of high-powered cars, which caused pollution).

101. *See* National Org. for Women v. FCC, 555 F.2d 1002, 1012-15 (D.C. Cir. 1977) (affirming FCC rejection of fairness complaint that various programs and commercial ads presented a biased view of women).

102. *See* Fairness Report, 48 F.C.C.2d 1, 12 (1974) *aff'd sub nom.* National Citizens Comm. for Broad. v. FCC, 567 F.2d 1095, 1116 (D.C. Cir. 1977).

103. *See* Fairness Doctrine, 102 F.C.C.2d 145 (1985) (concluding that "as a policy matter the fairness doctrine no longer serves the public interest").

fied the spectrum scarcity argument that both it and the Supreme Court in *Red Lion* had relied on to support the doctrine.[104] With a plethora of broadcast and cable voices available to every household, the market would ensure adequate diversity and balance. The Commission also expressed concern that regulatory enforcement of fairness, however deferential to broadcasters, was inherently troublesome from a First Amendment perspective.[105] It declined nevertheless to abolish the fairness doctrine on the ground that it might have been enacted into the Communications Act,[106] a claim that many inside and outside of Congress had made based on some ambiguous language in 1959 amendments to the equal time law.[107]

The Commission obviously could not repeal an act of Congress; nor could it declare such an act facially unconstitutional. Subsequently, however, the D.C. Circuit (in a different case) ruled that Congress had not enacted the fairness doctrine.[108] The effect of this ruling required the FCC to reconsider both its 1985 report and a fairness doctrine ruling the Commission had made against a station that had run a series of advertisements describing a new nuclear plant at Nine Mile Island as a "sound investment in New York's energy future."[109] The Commission initially had determined that the station had violated the fairness doctrine by failing to present conflicting perspectives on the plant.[110] The D.C. Circuit remanded that decision for further consideration in light of its 1985 decision and its later ruling that the doctrine was not congressionally required.[111] On remand, the FCC found the entire doctrine was no longer in the public interest and was unconstitutional.[112] In *Syracuse Peace Council v. FCC*,[113]

104. *See id.* at 197.

105. *See id.* at 156.

106. *See id.* at 246-47.

107. *See* Pub. L. No. 86-274, 73 Stat. 557 (adding exemption for news events and documentary interviews to the equal time provisions of the Communications Act (codified as amended at 47 U.S.C. § 315 (1994)).

108. *See* Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 517-18 (D.C. Cir. 1986).

109. Syracuse Peace Council, 99 F.C.C.2d 1389, 1389 (1984), *remanded sub nom.* Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

110. *See id.* at 1400-01.

111. *See Meredith Corp.*, 809 F.2d at 874.

112. Syracuse Peace Council, 2 F.C.C.R. 5043, 5057-58 (1987). Though the FCC could not declare an act of Congress to be unconstitutional, it could rule on the constitutionality of an agency policy that was made under color of congressional authorization. Indeed, it was obliged to do so. *See Meredith Corp.*, 809 F.2d at 874.

113. 867 F.2d 654 (1989).

the D.C. Circuit upheld the first determination and finessed the second as unnecessary to decide.[114]

In retrospect, it is remarkable that the debate over fairness was able to sustain the passions of its supporters or its critics. The critics claimed that broadcasters might be chilled in the exercise of their editorial discretion by the threat of sanctions if they made a mistake in complying with their obligations.[115] However, the so-called "sanction" was rarely more than a letter from the Commission directing the licensee to correct its error. And even this mild reproof was a truly exceptional event. Enforcement data from the 1980s show that the chances of a licensee being found to have violated the doctrine in any given year were about 1/1000.[116] If a 1/1000 chance of having a mild reprimand from the Commission is chilling, then broadcast editors are a thin-blooded lot indeed. On the other hand, if the risk of an adverse finding and sanction by the FCC was small, then so by exactly the same token were the presumed benefits. The same enforcement figures suggest that one of two things must have been true: either the media were extraordinarily balanced and fair in presenting issues of public controversy, or the enforcement process was incapable of detecting violations. Either possibility suggests that the opportunity for benefit from active regulation was as modest as the associated risk of loss.

Probably, though, the importance of the fairness doctrine was always more symbolic than substantive. For its supporters, the fairness doctrine was the symbol of regulatory aspiration. If the Commission could not regulate fairness, what could it regulate? For its critics, the doctrine represented the hubris of regulatory ambition. By demanding that broadcasters conform to externally prescribed standards of fairness on matters of public import, the doctrine threatened core First Amendment values.

D. Paradigm Passing

A decade after the elimination of the fairness doctrine, it is difficult to find anyone who argues for its reinstatement, though there are some sophisticated thinkers who still believe in the basic regulatory

114. *See id.* at 668.

115. *See* Fairness Doctrine, 102 F.C.C.2d 145, 169-88 (1985) (discussing industry arguments on chilling effect).

116. *See* Democratic Nat'l Comm. v. FCC, 717 F.2d 1471, 1478-79 n.5 (D.C. Cir. 1983).

paradigm on which it rested.[117] Observing the tenacity with which they continue to defend the old ways, one is reminded of Thomas Kuhn's analysis of scientific revolutions.[118] Kuhn showed that change in scientific conceptions is not a simple thing. For a new idea to replace an old idea requires more than a scientific proof of its superiority. The marketplace of ideas is not quite like the market for products; people are more resistant to changing their ideas about things than they are about changing their consumption of things. The exact process of change is a bit mysterious, but Kuhn supposed that new scientific theories often take hold only after a generational shift, when young scientists who have no intellectual commitments to the old conceptions replace the older scientists.[119] Without implying that there is any science involved in beliefs about regulation, it is possible that something similar is happening here.

To be sure, there remains some detritus from the old regulatory paradigm, such as the equal time rule, the requirement for reasonable air time to federal political candidates, and the children's television rules. However, insofar as regulatory oversight was based on spectrum scarcity *cum* public ownership, there is little to sustain new regulatory initiatives. The new children's television rules are not really predicated on scarcity; they are the product of a deal between the broadcasters and the FCC in which three hours of children's television is exchanged for an exemption from the emerging movement for selling radio spectrum.[120]

The demise of the scarcity paradigm is not so much a product of the growth of the broadcast media as of the fact that broadcasting itself is no longer the dominant electronic medium. Broadcasting has become an increasingly marginal component of the electronic mass media industry. Cable television is now ubiquitous. The latest available data indicate that cable is available to 96.7% of American television households, and that more than 67% of the households having access to it subscribe.[121] For cable subscribers, conventional broad-

117. *See, e.g.*, SUNSTEIN, *supra* note 12, at 107-08 (suggesting that "modest regulatory efforts," such as the imposition of a right of reply, should be upheld to "build on the judgment that government has a legitimate role to play in encouraging the creation of a civic culture").

118. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Univ. Chicago Press 2d ed. 1970) (1962).

119. *See id.* at 151-52.

120. *See supra* text accompanying notes 69-79.

121. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 F.C.C.R. 4358, 4368 (1997).

casting (i.e., single-channel terrestrial broadcasting) is nothing more than a means of distributing programs to the front end of a pipe. The dominance of a wired medium obviously makes it difficult to continue *spectrum-based* arguments for regulating broadcast speech.

However, the passing of spectrum-based arguments for regulation has not meant the passing of regulation. While one regulatory paradigm was passing, another was being born.

II. REGULATION IN THE AGE OF PLENTY

One might suppose that the emergence of cable as a mature medium would make it difficult to continue regulation of electronic media generally, insofar as that regulation had originally been tied to the perceived need to manage the spectrum. But that supposition would ignore the extraordinary adaptability of both regulators and regulatory theory. When cable first appeared on the scene in an important way in the early 1960s, the FCC saw it as a threat and proceeded to construct an ever more complex set of regulations to contain that threat. Since virtually all of these early regulations were designed to protect the broadcast industry, it is tempting to interpret the FCC's regulatory program as a straightforward example of agency capture by the subjects of its authority. But that interpretation is incomplete. The FCC was not simply protecting a favored industry client, it was also protecting its own investment in a regulatory modus vivendi. The Commission had devoted a great deal of energy and affection to an elaborate scheme of frequency allocations, individual station licensing, and an array of regulations governing broadcaster responsibilities. Cable television threatened the entire scheme.

For example, cable undermined the frequency allocation and allotment[122] plans insofar as those plans had locked away a vast amount of spectrum to accommodate broadcasting. Perhaps more importantly, cable put at risk the policies that rested on these allocation/allotment plans. It took dead aim on the Commission's policy of promoting free and locally oriented service: cable was not free, and much of its programming was imported from distant markets. In

122. In the argot of frequency regulators, the term "allocations" refers to designations of frequencies according to different services (e.g., broadcasting, land mobile, maritime, radio navigation, etc.) whereas "allotments" refers to geographic location of use. Since 1952 television broadcast frequencies have been allotted to specific localities as part of a policy of promoting local service. *See* Sixth Report and Order on Television Assignments, 41 F.C.C. 148, 167-212 (1952) (setting forth assignment principles).

short, it was not simply because cable brought unwanted competition to the Commission's premier client, but also because cable challenged the Commission's conception of the natural (regulated) order of things that the Commission responded with new regulatory constraints.

A. Remodeling Regulation

There is no need to recount here the entire history of cable regulation; for my purposes it is relevant only for what it reveals about the way in which the electronic media had blunted First Amendment sensitivities. Beginning from scratch in the early 1960s, the FCC proceeded over the course of the next decade to construct one of the most elaborate schemes of regulation imaginable with scarcely anyone pausing to ask whether the First Amendment had anything to say about the matter.[123] The First Amendment was not lost forever, though; after a decade in limbo it made a strong reappearance in the 1970s—curiously, just about the time when the FCC began to consider deregulatory measures on its own initiative.[124] In

123. In five court of appeals cases in the late 1960s, First Amendment objections to FCC regulations were summarily rejected. *See* Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238, 242 (9th Cir. 1969) (rejecting challenge to FCC restrictions on importing distant signals); Total Telecable, Inc. v. FCC, 411 F.2d 639, 641 (9th Cir. 1969) (same); Black Hills Video Corp. v. FCC, 399 F.2d 65, 69 (8th Cir. 1968) (same); Titusville Cable TV, Inc. v. United States, 404 F.2d 1187, 1189 (3d Cir. 1968) (rejecting challenge to nonduplication rules); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 225 (D.C. Cir. 1967) (same). The first Supreme Court decision on cable regulation (involving the FCC's freeze on cable carriage of distant market signals) does not even mention the First Amendment. *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Four years later, the Supreme Court, again without mentioning the First Amendment, sustained the FCC's order requiring cable operators to originate a certain amount of local programming. *See* United States v. Midwest Video Corp., 406 U.S. 649 (1972). Finally, in 1979 the Supreme Court acknowledged in a footnote dictum that a First Amendment challenge to a new FCC order requiring cable operators to provide access channels for public, educational, governmental, and leased-access users was "not frivolous." FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979). However, the Court did not have to reach the constitutional issue because it found the rules were beyond the FCC's statutory authority. *See id.* at 708. At that time, indeed, Congress had not legislated at all on the subject of cable regulation, and would not do so until 1984 with the passage of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.). Prior to that time, FCC regulation rested on the agency's general authority over radio communications.

124. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), the court found the FCC's restrictions on pay cable violated the First Amendment. *See id.* at 49. The court's opinion was an important step towards loosening some of the shackles on cable, but it should be noted that the pay cable rules involved in *HBO* were actually a relaxation of previous pay

time, the First Amendment became a favored instrument of cable operators for challenging regulation at both the local and federal levels.[125] The results of the challenges have been mixed, but at least the force of free speech concerns has been recognized.

This recognition reached a high point with the Supreme Court's decision in the first *Turner Broadcasting* case (*Turner I*) in 1994.[126] *Turner I* involved the so-called "must-carry rules," which obligated cable operators to carry, on demand, the signals of local broadcast stations.[127] Mandatory carriage of local broadcast signals was part of the first set of obligations the FCC imposed on cable in 1965.[128] Cable operators had long accepted the requirement without protest. Then in the 1980s the must-carry rules began to impose significant constraints on the ability of small systems with limited channel capacity to add economically attractive program sources. In two successive court of appeals decisions in 1985 and 1987, cable operators successfully challenged the must-carry rules.[129] In striking down the rules, the court of appeals left open the possibility of a constitutional justification for a limited form of must-carry, narrowly tailored to the purpose of protecting local broadcast stations that are dependent on cable carriage for their economic survival.[130] The FCC decided that the game was not worth the candle and removed the rules.[131] However, in 1992, as part of a more general "reregulation" of cable television, Congress reinstated the must-carry requirement.[132] The reinstated requirement was again challenged, but this time was affirmed

cable rules. *See id.* at 17. Moreover, at this time the FCC was considering other deregulatory moves, most notably removal of the restrictions on distant-signal carriage by cable operators.

125. The seminal case is *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), where the Supreme Court found a "colorable" First Amendment argument against Los Angeles's refusal to franchise competitive cable systems and directed the city to justify its monopoly franchise policy. *See id.* at 494-95. Subsequently, the court of appeals found the city's purported justification wanting. *See* Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327, 1331-32 (9th Cir. 1994).

126. *Turner I*, 512 U.S. 622 (1994).

127. *See id.* at 630.

128. *See* First Report and Order on Microwave-Served CATV, 38 F.C.C. 683 (1965).

129. *See* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1463 (D.C. Cir. 1985); Century Communications Corp. v. FCC, 835 F.2d 292, 293 (D.C. Cir. 1987).

130. *See Century Communications*, 835 F.2d at 304.

131. *See* Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broad. Signals by Cable Television Sys., 4 F.C.C.R. 4552 (1989).

132. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 614, 615, 106 Stat. 1460, 1471-81 (codified at 47 U.S.C. §§ 534, 535 (1994)).

by the split decision of a three judge district court,[133] only to be reversed by the Supreme Court in *Turner I*.

The Court in *Turner I* began by affirming that cable programmers are fully protected by the First Amendment and by rejecting the government's argument that the applicable standard was the same as for broadcasting under *Red Lion*.[134] At the same time, a majority of the Court rejected the cable industry's contention that must-carry was a form of content regulation requiring the strictest form of scrutiny and the most compelling government justification of purpose.[135] Because there was no intent to discriminate on the basis of program message or speaker identity, the Court found that the appropriate scrutiny was the intermediate level of scrutiny applicable to content neutral restrictions that impose an incidental burden on speech.[136] Four justices joined an opinion by Justice O'Connor arguing that the must-carry rules were not content neutral inasmuch as they were premised on supporting a particular type of content (*local broadcast* speech).[137] On this ground, O'Connor reasoned that the standard of review should require a showing of compelling government interest.[138]

Applying either standard, the entire Court found the government's justification wanting in *Turner I*. The government's justification rested on essentially two propositions. The first was that unless cable operators were compelled to carry broadcast stations, significant numbers of broadcast stations would be refused carriage on cable systems; the second was that the stations denied carriage would either deteriorate to a substantial degree or fail altogether.[139] Neither of these predictions had been adequately supported. Moreover, the government had not made *any* findings concerning the effects of must-carry on the speech of cable operators and cable programmers—that is, the extent to which cable operators would, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers would be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators could satisfy their must-carry obliga-

133. *See* Turner Broad. Sys., Inc. v. FCC, 819 F. Supp. 32, 48 (D.D.C. 1993).

134. *See Turner I*, 512 U.S. 622, 636-40 (1994).

135. *See id.* at 652.

136. *See id.* at 661-62.

137. *See id.* at 676.

138. *See id.* at 680.

139. *See id*. at 666.

tions by devoting previously unused channel capacity to the carriage of local broadcasters.

On remand, the district court heard extensive evidence on these questions,[140] but adhered to its earlier decision (again by a split vote).[141] The Supreme Court this time (*Turner II*) affirmed the district court's findings and decision.[142] Again the Court was divided, with four justices arguing that the restrictions were not content neutral but in any event were not justified even under the standards of intermediate scrutiny.

Without a doubt, the Court's decision in *Turner II* undercut what many thought to be the effect of *Turner I*, the recognition of First Amendment rights for cable that were closer to the print model than the broadcast model. The Court would not permit newspapers to be subjected to requirements comparable to those at issue in the *Turner* cases, as *Tornillo*[143] demonstrates. One might question the wisdom of *Tornillo*'s summary rejection of a limited access right as a remedy for those attacked by media,[144] but I will let that issue pass. I merely want to note that the rejection of such an access right remains the accepted baseline for a print-based model of the First Amendment, and in that respect *Turner II* does not match the promise some saw in *Turner I*. Indeed, *Turner II* shows a tolerance for speech-relevant regulatory constraints that is not far from the standard of *Red Lion*, notwithstanding the Court's earlier holding that the *Red Lion* standard was inapplicable to cable.[145]

I do not say that must-carry should have been assessed by reference to the kind of strict scrutiny conventionally given to content

140. *See* Turner Broad. v. FCC, 910 F. Supp. 734, 740-50 (D.D.C. 1995), *aff'd sub nom.* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997).

141. *See id.* at 751-52.

142. *See Turner II*, 117 S. Ct. 1174, 1203 (1997).

143. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional a Florida statute which forced newspapers to run the "reply" of any candidate for office who had been assailed by the newspaper).

144. I am not here suggesting a more general right of access of the kind proposed in Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Even less do I mean to suggest that such an access right could be derived from the First Amendment itself, a proposition for which Barron has argued. *See id.* at 1676. All that I mean to imply by the text comment is that a right of reply to personal attacks is a reasonable condition to impose on those who exercise editorial choice in publishing such attacks. In this respect the erstwhile personal attack rules of the FCC have always seemed to me defensible, except insofar as they were embedded in a more general fairness obligation that could not be enforced effectively without unacceptable intrusion into editorial judgments.

145. *See Turner I*, 512 U.S. 622, 622 (1994).

controls. Justice O'Connor's opinion notwithstanding, must-carry is content regulation only in an artificial, formalistic sense. Granted, must-carry favors one medium over another. That is the whole protectionist purpose of the rule—to protect broadcasters against their cable competitors. You could say, I suppose, that this implies a preference for a kind of speech—local broadcast programs over nonlocal broadcast or cable-originated programming. However, it is hard to work up much First Amendment lather over that preference since it does not express any particular preference for viewpoint or message, or even subject matter unless you treat local broadcast messages as a kind of subject. Whatever the rationales for giving heightened scrutiny to content regulation,[146] this concern does not seem to me to fall within them.

Treating must-carry as content neutral still leaves room for a more demanding review than that normally accorded social and economic regulation, as *Turner I* had suggested. As it turned out, however, the Court's review in *Turner II* was remarkably tolerant. Congress' expressed purpose was the preservation of local broadcast service.[147] This purpose was linked to two others: promoting widespread dissemination of information from multiple sources, and promoting fair competition in the market.[148] These latter purposes reflect congressional concerns about the market power of cable operators, the fact that most cable systems operate as local monopolies, and the fact that many are affiliated with cable program suppliers (which gives them an incentive to favor those suppliers over local broadcast stations).[149] However, these latter concerns about market power are relevant to must-carry only because Congress assumes it is important to protect broadcasting as an independent medium, and preserving broadcasting is important primarily because it provides local service.[150]

146. For a discussion of possible rationales, see Stone, *supra* note 17, at 197-233.

147. *See Turner II*, 117 S. Ct. at 1186.

148. *See id*.

149. *See id.* at 1187.

150. Of course, cable operators can themselves originate local programming, but the FCC has always considered this to be an inferior option to local broadcast programming because it is not free to those who cannot, or do not want to, subscribe to cable. Considering that we do not have a national policy of providing other communications or information services (or other essential utilities such as electricity) free, trying to support regulation on this ground makes no sense to me. However, even accepting the free service argument, it is not credibly implicated by must-carry, for Congress did not assume that viewers were threatened with the complete

The premises of must-carry are plausible only if you do not pause to think about them. Congress found (and the Supreme Court approved its findings as credible) that without must-carry many local broadcast stations would be denied carriage by the local cable system.[151] Stations denied carriage would suffer great financial loss, perhaps to the point of ruin, and as a consequence local service would suffer.[152] There is not much doubt about the first finding. The period between the FCC's abandonment of must-carry and Congress' reinstatement of it provided a market test of this premise, and the test results support the assumption that, left to their own devices, cable systems would decline to carry a number of local stations. The second finding is fairly easily derived from the first, since the stations that were dropped were typically marginal stations—most of them UHF stations unaffiliated with a network and in a very precarious position in competition with other local broadcast stations.[153] It is the third finding that is questionable. The loss of some local broadcasters does not mean the loss of local service. Even Congress did not quite equate the two losses. As the Court noted, Congress did not assume that localism would be lost entirely; it merely concluded that a significant loss of some local stations would mean a significant loss of local service.[154] Unfortunately, no one bothered to examine just how much local programming was imperiled by the possible loss of a few marginal broadcast stations. There were no reported findings and no reported speculations on this issue. If the preservation of local programming is the principal desideratum for must-carry, it does not seem too much to ask for proof that there is a significant quantum of local programming at risk.

In fact, must-carry is not well designed to prevent the loss of local programming, because the must-carry obligation does not depend on the local station's offering local programming. Indeed, the FCC has interpreted the must-carry obligation to require cable carriage of broadcast stations that present nothing but national home shopping

loss of broadcast signals. It merely assumed that there would be *some* loss of broadcast service, most notably from economically marginal local stations.

151. *See Turner II*, 117 S. Ct. at 1187, 1195-97.

152. *See id*. at 1191-97.

153. In the early years of cable regulation, the preservation of fledgling UHF stations was a prominent justification for the must-carry and nonduplication rules. *See, e.g.*, Second Report and Order on Microwave-Served CATV, 2 F.C.C.2d 725, 736, 770 (1966).

154. *See Turner II*, 117 U.S. at 1187.

programs![155] Whatever one thinks of home shopping channels, it is hard to maintain with a straight face that ensuring their carriage on cable television promotes localism.

Imagine nevertheless that must-carry does give a boost to some local programming that might otherwise be lost; so what? How many local news programs must there be in a community in order to satisfy the public interest? The cable system actually has good reason to carry most local stations—at least those affiliated with a major network or those that provide popular syndicated programming. It is therefore likely that the local programs of those stations would continue to receive carriage. That much was demonstrated by the fact that during the three year period after the FCC's old must-carry rules were eliminated, and before Congress reinstated them, cable systems continued to carry most local signals. The most that can be said of the downside risk of some local broadcast stations being cut off the cable system is that the public might lose a few minutes of mostly duplicative local news each day.

B. The Old Order Redux: Localism as a Regulatory End

The must-carry controversy in the *Turner* cases was about the connection between means and ends. The legitimacy of the ends—preserving localism—was not debated by the Court. The Court's acceptance is understandable given that no one was seriously challenging localism. But it is a pity that the very detailed inquiry into must-carry as a means of promoting localism did not prompt some inquiry into the value of localism itself. After all, if the First Amendment has an important role to play in this regulatory domain (more on this shortly) it would seem to be that of forcing a hard look at underlying policies.

Localism is the most sacred cow of communications regulatory policy. More sacrifices have been laid at the alter of this beast than at that of any other in the history of communications regulation. I will not pause to discuss the sacrifices in detail. They include most notably: inefficient allocation of television channels and corresponding loss of viewing choices;[156] constraints on competition in video de-

155. *See* Home Shopping Station Issues, 8 F.C.C.R. 5321 (1993).

156. The sacrifice of viewing options in the form of additional channels which could have been engineered without the constraint of local television allotments has been well documented. *See, e.g.*, ROGER G. NOLL, ET AL., ECONOMIC ASPECTS OF TELEVISION BROADCASTING 116-20 (1973); Thomas L. Schuessler, *Structural Barriers to the Entry of Additional*

livery services;[157] and wasted administrative energies.[158] For present purposes, I take the sacrifices as an inevitable product of the Commission's localism policy in order to ask a question about the coher-

Television Networks: The Federal Communications Commission's Spectrum Management Policies, 54 S. CAL. L. REV. 875 (1981) (describing the role of FCC spectrum management in limiting the entry of new networks into the marketplace); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 259-61 (1978) (arguing that FCC regulation has imposed artificial restraints on competition in the television industry). Cable regulation has continued this sacrifice. For more than a decade, cable operators were restricted in the number of "distant" signals they could import into a market in order to protect and preserve localism. *See* Cable Television Report and Order, 36 F.C.C.2d 141 (1972) (lifting an earlier freeze on all distant signals and replacing it with an elaborate set of regulations governing the number and type of distant signals that could be carried). The distant signal rules were finally eliminated in 1980. *See* Malrite T.V. v. FCC, 652 F.2d 1140, 1144, 1152 (2d Cir. 1981) (upholding the FCC's deregulation). However, localism is still at the heart of much of cable regulation, as the must-carry rules demonstrate. Must-carry, of course, continues the sacrifice of viewing choices insofar as it requires capacity-constrained cable systems to carry a local broadcast signal in preference to one from a distant market, even if the latter would give the consumer new and preferred program choices.

157. The most important current example is the constraint on direct-to-home satellite broadcasting. Unlike cable television operators, satellite broadcasters have not been given a general compulsory copyright license for retransmitting broadcast signals. Under the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949, satellite broadcasters have a general compulsory license to retransmit "superstations" (any nonnetwork broadcast station carried by satellite) and a limited license to retransmit television network signals to "unserved households" (defined as those outside the Grade B signal contour of any broadcast station and those which have not subscribed to cable television for 90 days). *See id.* § 119(a), (d) (codified at 17 U.S.C. § 119(a), (d) (1994)). This means that satellite broadcasting cannot compete effectively with cable because satellite broadcasters are unable to negotiate retransmission rights. Though it is common to talk about this as a problem of not being able to retransmit local broadcast channels, the local channels are mainly important simply as a source of network programming. Proposals have been made to extend compulsory licenses to satellite broadcasters, but so far these proposals have been successfully opposed by the cable industry, which insists that such licenses would be unfair unless satellite broadcasters are required to shoulder the same must-carry obligations as cable. *See Copyright Licensing of Broadcast Signals: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, Fed. News Serv., Oct. 30, 1997, *available in* LEXIS, News Library, Fednew File (testimony of Decker Anstrom, President and CEO, National Cable Television Association). As the cable industry knows very well, with current satellite technology there is not enough satellite transponder capacity to carry all the local signals within the footprint of a broadcast satellite. *See* Bryan Gruley, *Here's Why it's Hard to Get Local Channels on Your Satellite Dish*, WALL ST. J., Mar. 3, 1998, at A1.

158. The FCC has wasted its own resources as well as those of the industry in various licensing endeavors devoted to maintaining the fiction of locally responsive broadcast service. Perhaps the most obviously silly endeavor was its erstwhile policy of requiring licensees to engage in a process known as "ascertainment of local needs"—a largely ritualistic exercise the sole redeeming benefit of which was to give the agency an excuse for not looking at licensees' actual programming. *See* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 460-63 (1976) (Robinson, Comm'r, dissenting). It was abandoned in the early 1980s. *See* Revision of Programming and Commercialization Policies, 98 F.C.C.2d 1076, 1097-101 (1984).

ence of the policy objective itself. The question really divides into two. First is the question of whether a policy of localism is needed to ensure the kind of entertainment, news, and other information services that consumers *want*. Second is the quite distinct question of whether a policy favoring localism is required to give consumers what they *need*.

The first question is easily answered: the Commission itself has never supposed that its localism policy is a response to unmet consumer preferences. Apart from various structural regulations designed to prevent undue concentration in media markets, the Commission has generally accepted the classical economic assumption about the incentive of profit-oriented suppliers to give consumers what they want. (This is why it resisted being dragged into a controversy over radio program formats, as I noted earlier.)[159] In terms of viewer preferences, therefore, there is no need to promote localism; if enough consumers want to watch local news or, implausibly, local entertainment, that is what suppliers (more precisely, distributors) will give them. Also, it should make no difference in how local programming is delivered, whether over the air or by cable. All else being equal, the market-driven incentives of suppliers and distributors are the same across different modes of delivery.

The only plausible explanation of localism ties it to information *needs* rather than preferences, to radio and television as a public good. Radio and television have been supplied mostly by private enterprise, of course, but it has always been supposed that there is a significant public component to the service—hence, the public interest ideology always embraced more than just managing the distribution and enforcement of frequency rights, as the Supreme Court acknowledged in 1943.[160] Regulatory critics have had a field day making fun of this ideology, as well as the Commission's implementation of it,[161] but for present purposes I want to bypass that issue to get to another one—namely, why public service has been tied to localism. The standard explanation is to point to the importance of local news and related information service. If you want the news about Charlottes-

159. *See supra* text accompanying notes 57-64.

160. *See* National Broad. Co. v. United States, 319 U.S. 190, 215-17 (1943) (stating that the Commission does more than simply police the airwaves in order to serve the interests of the entire listening public).

161. Immodestly, I offer my own general critique of the FCC as an example. *See generally* Robinson, *supra* note 156 (evaluating the FCC as a "regulatory watchdog"); KRATTENMAKER & POWE, *supra* note 30 (providing a critique of program regulation).

ville's latest zoning decision, tuning into a channel that carries only programs from New York, Chicago and Atlanta will not deliver it. Against the possibility that a local cable system might choose such a menu of entirely nonlocal signals, Congress mandates that the cable system carry all local broadcast stations that are significantly viewed.[162] This requirement is not conditioned on local stations presenting any particular quantity of local news (and, as I said earlier, the FCC does not enforce any such obligation on local broadcasters). By the same token, must-carry precludes cable operators themselves from exercising any judgment about the quantity or quality of local news or other local programming by preventing them from selecting the local signals it thinks will attract local subscribers or appeal to local advertisers.

One might argue that the costs of excess localism can be ignored if we have reason to think that the general assumption underlying localism is true; if there is a large gap between what people need in the way of local information and what they can get on their own, then there might be a good case for regulatory impositions even when they go beyond what is strictly necessary. That view essentially defers to congressional discretion—that is, to the inherent democratic prerogative to err in pursuit of legitimate ends. But that view also assumes that there is some plausible case to be made that the market will not assure local service sufficient to provide what the public needs in addition to what they want. Without that assumption, the critical premise of localism as a government mandate collapses into naked protectionism.

At this point, advocates of regulatory intervention will invoke some theory of market failure. A conventional move in this direction is to say that information is a public good and, as everyone knows (it is virtually definitional) public goods cannot be left (entirely) to the market because it will not supply them in sufficient quantity or quality.[163] Accounts of public goods theory are numerous, but in the classic model the problem is that the benefits of the good are enjoyed by large numbers of people and there is either no way to aggregate their

162. There are a large number of conditions and qualifications on the must-carry obligation. For instance, there are ceilings for systems with very limited capacity; a cable system is not required to carry the signals of commercial stations where there is a substantial duplication of programming, nor is it obliged to carry more than one affiliate of the same network. *See* 47 U.S.C. § 534(b)(5) (1994).

163. *See, e.g.*, SUNSTEIN, *supra* note 12, at 68-71 ("Because of the 'public good' features of information, . . . [t]he market will produce too little [of it]").

preferences or no way to extract payment from them without invoking coercive governmental power.[164] The assumption that information is such a good underlies the current hype about the need to ensure that everyone has access to the new information superhighway.[165]

There is not likely to be much dispute (least of all among anyone reading this Essay) that information is a matter of high public importance. However, there is likely to be considerable debate about just how much government involvement is required to sustain its adequate supply. Markets do not seem to be visibly failing to provide information services. I do not want to delve into this debate here, for even if there is a public goods aspect to information that calls for government involvement, it is not obvious that any part of it can be linked to localism. Quite the contrary; most of the current information-age theorizing stresses the importance of national and international networks that are the very antithesis of localism.[166] The "National Information Infrastructure" and to a lesser extent the "International Information Infrastructure" are the banners under which government and industry have pushed for more public investment in information services. So far as I am aware, no one has yet coined the phrase "Local Information Infrastructure." For good reason: in a world where information can be pulled or pushed[167] from

164. This is an extremely simplified summary of a complex, multi-faceted and controversial concept. Extended treatments are available in any standard intermediate economics text, but for a summary account, see GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 25-34 (1991).

165. In 1996, Congress expanded the rather modest universal service mandate that has been a fixture of telephone regulatory policy from earliest times into a mandate to ensure "affordable" access to all communications and information services. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, Title I § 101(a), 110 Stat. 71 (codified at 47 U.S.C.A. § 254 (West Supp. 1997)). Implementation of the mandate is still a work in progress. *See* Federal-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776 (1997). However, if the ubiquitous promotional literature is taken at face value, electronic information services will be the new welfare entitlement of the information age. *See, e.g.*, U.S. ADVISORY COUNCIL ON THE NATIONAL INFORMATION INFRASTRUCTURE, A NATION OF OPPORTUNITY: REALIZING THE PROMISE OF THE INFORMATION SUPERHIGHWAY 31-36 (1996) (stating that new information services must be available to everyone to avoid a "society of information haves and have nots").

166. In large measure, this reflects the influence of the Internet model, which is intrinsically national or international. *See, e.g.*, DERTOUZOS, *supra* note 2, at 281-94.

167. In the new-age rhetoric of cyberspace, it has become common to distinguish between "pull" technologies that allow the user to search and extract information from remote databases and "push" technologies that allow information distributors to gather information for the user. *See, e.g., Push! Kiss Your Browser Goodbye: The Radical Future of Media Beyond the Web*, WIRED, Mar. 1997, at cover, 12. The former describes conventional Internet methodology, while the latter supposedly is the coming trend being pioneered by a number of content providers. Of course, those who still watch television will recognize it as a "push" technology.

every corner of the planet, there is something almost quaint about the idea of linking localism and modern information services.

I grant as an abstract matter there is something alluring about the idea of localism as a concept; it resonates with our social ideals of community and our political ideals of a republican government close to the people. But when it comes to constructing practical policy we have to think clearly about what it is we are after. Unfortunately, when it comes to regulatory policy, clear thinking is usually the first casualty of political convenience. To the FCC and Congress, localism isn't about protecting community or preserving republican virtue. It is about protecting settled economic interests (most notably those of the conventional broadcasting industry) and preserving a regulatory structure that is comfortable to the regulators. In the name of localism an entire structure of regulation has warped the industry, retarded new competition, slowed the development of new technologies, and otherwise inflicted needless sacrifices on the public's access to better information services.

C. Localism, Lochnerism and the First Amendment

It is one thing to say that localism is a contestable basis for public policy and another thing to say that the contest should take place in the courts. I suggested earlier that it was a pity that the *Turner* cases were not seen as an occasion for a critical look at the ends part of the means-ends inquiry.[168] But that suggestion raises a deeper question about the degree to which the Court should push the First Amendment into the realm of social policies that incidentally affect speech. One could reasonably ask why the must-carry policy should be singled out from countless other forms of regulation. Without a doubt, the *Turner* majority was indulgent in accepting congressional claims about the need to protect local broadcasters, and even more indulgent in accepting the need to preserve localism itself; but in fairness to the Court, any more vigorous review of means or ends would have led it down the path of taking on the entire regulatory enterprise.

At this point I risk entering the realm of high First Amendment theory which I earlier said I would not do. In truth, I am deeply ambivalent about what the First Amendment role here should be. I regard must-carry as simply a form of economic protectionism and lo-

168. *See supra* notes 152-57 and accompanying text.

calism as a combination of industry protectionism and bureaucratic ossification. But in neither respect is communications regulation unique. Economic protectionism and bureaucratic ossification are so commonplace that some people think they are synonyms for "government regulation." Unfortunately or fortunately, depending on how you view the post-*Lochner* world of judicial review, there is not much that can be done about this in courts of law, absent some accepted constitutional handle like (procedural) due process or equal protection—or the First Amendment.

There is a speech interest in all of these cases, of course. We are, after all, dealing with media, and under current constitutional doctrine media are "speakers" entitled to invoke the First Amendment. They have done so with increasing regularity. First Amendment arguments were once the exception in the field of regulated communications; now they have become routine. Indeed, it sometimes appears that the First Amendment has become the first line of challenge for virtually all forms of regulatory initiatives, including rate regulation of monopoly cable systems—the premise being that a constraint on earnings is a "tax" on speech.[169] Even nonmedia communications firms have come to acquire a keen appreciation for the First Amendment as a vehicle for challenging restrictions on their business activities, whether or not any editorial functions (that is, "speech") are involved.[170] Though most of the challenges are unsuccessful, some have been dramatically effective.[171] The success rate,

169. *See* Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 962 (D.C. Cir. 1996). The challenge was denied, but was given more respectful consideration than would have been imaginable twenty years ago.

170. The latest example is a claim by SBC Corporation that Section 274 of the Telecommunications Act of 1996 violates the First Amendment. *See* SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997). Section 274 forbids, until the year 2000, the Bell Operating Companies from providing "electronic publishing" services (such as advertising, sports or entertainment information, legal notices, etc.) except by means of a separate subsidiary. *See* Telecommunications Act of 1996, § 274, 110 Stat. 56, 100-05 (codified at 47 U.S.C. § 274 (West Supp. 1997)). Electronic publishing services are certainly "speech" within the modern, expansive definition of that term. But it is a bit of a stretch to think that this speech is seriously "abridged" by the requirement of a separate subsidiary, a requirement that had been part of the antitrust decree that the 1996 Act terminated. The district court did not reach the First Amendment claim because it ruled that it and other provisions of the act were an unconstitutional bill of attainder insofar as they imposed special restraints on the Bell Operating Companies. *See SBC Communications*, 981 F. Supp. at 1008.

171. The most noteworthy example is the remarkable set of lower court decisions in the mid-1990s invalidating the ban on local telephone company provision of video programming service. *See* Chesapeake & Potomac Tel. Co. v. National Cable Television Ass'n, 42 F.3d 181 (4th Cir. 1994), *vacated and remanded*, 516 U.S. 415 (1996); US West, Inc. v. United States, 48

though, is less important than one might think; it is not necessary for such claims to be accepted for them to shift the baseline of regulatory norms. The cable industry might have lost the must-carry battle, but in obtaining an important hearing on the First Amendment question it gained a clear victory in the long-term struggle with regulators. The strategy here plainly is to achieve a degree of judicial scrutiny that would not be accorded by employing standard administrative law rationality tests, and would be quite beyond the pale using the due process minimal rationality standard applied to social and economic legislation. The First Amendment has become, in short, a vehicle for selectively reviving *Lochnerian* review within the domain of electronic media regulation.[172]

Of course, this development is not unique to regulated media. It is an inevitable product of the application of First Amendment scrutiny to any form of content-neutral, indirect restraint on speech activity. In this respect, even the earlier case *United States v. O'Brien*[173] is a partial revival of *Lochner*. What makes media regulation distinctive is the range of activity that now falls within the ambit of constitutional scrutiny. An entity that is in the *business* of speech can almost always make a plausible link between some regulatory burden and a speech interest even if the directly regulated activity is not itself speech. The *Lochner* problem is not avoided by saying that such in-

F.3d 1092 (9th Cir. 1995); Southern New England Tel. Co. v. United States, 886 F. Supp. 211 (D. Conn. 1995); Bellsouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, No. 95-CV-1827, 1994 WL 779761 (D. Me. Dec. 8, 1994). For more background on the ban and the cases, see Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1018-24 (1997) (discussing "open video systems").

172. Twenty years ago, Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-33 (1979), argued that First Amendment protection of commercial advertising was a revival of *Lochner*. However, protection of commercial advertising is probably the least important extension of the First Amendment to the economic sphere when one considers the range of economic activities that are potentially within the reach of at least intermediate scrutiny under the precedent of the *Turner* cases. For a general criticism of *Turner I* along these lines, see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57. It is important to distinguish the *Lochner* characterization I am making from that made by Morton J. Horwitz. My reference to *Lochner* is not intended to suggest any general ideological critique of the Court then or now; I use the term in its simplest referential meaning, denoting a fairly rigorous constitutional review of economic and social legislation. Horwitz, on the other hand, sees the Court linked to *Lochner* in its invocation of spurious claims of equality and liberty to invalidate liberal legislation protecting minorities against hate speech. *See* Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32, 109-16 (1993).

173. 391 U.S. 367 (1968).

direct impact cases are judged by an intermediate standard of review less exacting than that applied to speech content regulation; that much could be said of *Lochner* itself.

The *Lochner* problem can be avoided by one strategy: by stretching the concept of "content regulation" to cover these cases, it is possible to apply a robust First Amendment scrutiny without being charged with reviving *Lochner*. On at least a superficial level, this is the attractiveness of Justice O'Connor's dissent in *Turner I*. O'Connor offers a convenient handle to strike down a poorly justified regulation; it vindicates the First Amendment, and at least formally it avoids being stigmatized as *Lochnerian*. On close examination, however, O'Connor's approach looks like a strategy of expedience, not an application of real principle.[174]

III. FAMILY VALUES IN THE AGE OF AQUARIUS

As my discussion of cable regulation demonstrates, regulatory theory is remarkably adaptive to changing circumstances. The change from a condition of scarcity to one of plenty required some changes in underlying rationales as well as some changes in the style of regulation. Nevertheless, the overall program for regulating the electronic media has continued as though guided by some giant gyroscope designed to keep it steady despite the turbulence of the surrounding environment. In the *Turner* cases, the Court was not forced to confront a radically different regulatory regime from that it had validated three decades earlier, when it accepted far harsher restrictions on cable than the must-carry requirement imposed.[175] The Court then showed itself to be as flexible as regulators and politicians in adapting regulatory theory to popular demand for regulation. That flexibility was never better illustrated than by the shift from the scarcity argument endorsed in *Red Lion* to the "pervasiveness" argument endorsed in the *Pacifica* case,[176] an argument that proceeds from a premise very nearly the opposite of scarcity.

174. *See supra* notes 138-51 and accompanying text (criticizing O'Connor's opinion).

175. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 172-73 (1968) (sustaining the FCC's authority to order a total freeze on cable systems' importation of distant signals into major markets).

176. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

A. Ethereal Intruder

Though the *Pacifica* case is as well-known as *Red Lion*, a few words of introduction still might be useful. In the 1970s, the FCC was prompted by public complaints, and by the threat of political chastisement from Congress, to take action against a type of radio talk show that earned the label "topless radio"[177] by reason of its focus on matters sexual. The FCC took action against one particular station that carried a smarmy talk show in which women callers discussed their sex problems with the host. The Commission cited the station for obscenity; the court of appeals affirmed, giving special attention to the fact that the program was presented in a "titillating and pandering" way and to the fact that it was broadcast during daytime hours when children might hear it.[178]

The latter aspect became the keystone of a whole new jurisprudence that soon developed to justify regulation of programs that were not obscene, but which were "indecent" by reason of their "offensive" language.[179] The pioneer in this category of programming was a group of stations owned by Pacifica; the occasion for the next Commission action was a radio routine by comedian George Carlin, a master of off-center and off-color humor. The program was a monologue called "Filthy Words"—the subject being seven words that "you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever."[180]

Carlin was half right: the Commission ruled that his seven words—which "depicted sexual and excretory activities in a patently offensive manner"—could not be said in daytime hours when young ears might hear them.[181] Essentially, the Commission held that such nonobscene words were a kind of nuisance and were subject to regulation even if not total prohibition. The Supreme Court agreed, to

177. The first reference to this term in a federal court opinion took place in 1976. *See* Writers Guild of Am., West, Inc. v. FCC, 423 F. Supp. 1064, 1121 (C.D. Cal. 1976).

178. *See* Illinois Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 404 (D.C. Cir. 1975). The Supreme Court in other contexts has indicated that commercial exploitation by "titillating and pandering" is a relevant consideration in determining whether material is obscene. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463, 474-76 (1966) (affirming defendant's conviction for "pandering" through the production, sale, and publicity of "titillating" books despite finding that the books were not themselves obscene).

179. The emergence of the indecency concern is wryly summarized in KRATTENMAKER & POWE, *supra* note 30, at 103-14.

180. *Pacifica*, 438 U.S. at 729 (quoting Carlin).

181. *Id.* at 732. The words can be read in the appendix to the Supreme Court's opinion in *Pacifica*, where I assume they are also safe from children's eyes. *See id.* at 751-55.

the surprise and dismay of many—including at least one commissioner.[182] The Court had earlier implied that a ban on "indecent" speech by means of nonbroadcast media had to be construed as merely banning "obscene" speech, in order to avoid unconstitutional vagueness.[183] However, in the *Pacifica* case, which of course involved a statute specifically limited to broadcast speech, it held that indecent speech could at least be regulated as to time, place and manner.[184]

Explaining why broadcast indecency could be regulated in a way other modes of indecent speech could not presented an obvious difficulty. The Court could not draw on the old *Red Lion* resource-scarcity argument. That argument would be quite irrelevant in this context. Indeed, the Court's opinion, written by Justice Stevens, comes close to standing the scarcity argument on its head. The Court found broadcasting to be a "uniquely pervasive presence"[185] which was an "intruder" into the home.[186] Because broadcasting was so pervasive, and "uniquely accessible to children," homeowners deserved and needed (police) protection.[187] The Court was quick to say, however, that these factors did not warrant freewheeling surveillance of the electronic media.[188] The case did not involve "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy."[189] Under the nuisance rationale, a host of variables must be considered in determining whether regulation is

182. Me. As an FCC commissioner I concurred in the FCC's decision, but I was surprised to see the Supreme Court do so as well. *See* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 103-10 (1975) (Robinson, Comm'r, concurring). I confess my complicity in this episode is the occasion for present embarrassment. The idea of this kind of time-and-place regulation of offensive speech appealed to me then, at least as an alternative to the all-or-nothing choice between suppression and laissez faire that the Supreme Court's obscenity law required. I continue to believe that the distinction between what is "obscene" and what is "indecent" is epistemologically so thin that it cannot support the doctrinal weight that the Court has rested on it outside the electronic speech realm. Nevertheless, whatever merit there might be for such an intermediate solution, I now see that this was not an appropriate case for it. Moreover, I think I now appreciate better than I did then the difficulty of developing and applying meaningful standards to this type of offense.

183. *See* Hamling v. United States, 418 U.S. 87 (1974).

184. *See Pacifica*, 438 U.S. at 726.

185. *Id.* at 748-49.

186. *Id.* at 748. In this case, it was a car that was invaded, but I suppose that is an adventitious detail.

187. *See id.*

188. *See id.* at 748-49.

189. *Id.* at 750.

appropriate—time of day, kind of language, composition of the audience, and other factors.[190]

It would be an understatement to say that *Pacifica* has not met with much favor in the community of First Amendment scholars. Critics emphasized the vagueness of the nuisance rationale and its potential for validating all kinds of regulatory intrusions into programming.[191] Ithiel Pool feared that it would start a reign of regulatory terror in the name of cleaning up offensive programs.[192] As it happened, what followed *Pacifica* was less a reign of terror than a season of silliness. If *Pacifica* did license a potentially broad policing of broadcast programming, the FCC was loathe to undertake it. For nearly a decade after the case, the Commission refused to extend the indecency concept to any indecent language other than those involved in *Pacifica*—George Carlin's famous seven words. It was, I think, the agency's way of saying it was sorry about the whole episode.

In 1987, however, three cases involving broadcasts that were intended to push the envelope of this genre of programming forced the FCC to reconsider its hands-off policy.[193] The most noteworthy of the three involved so-called "shock radio" shows.[194] The Commission warned the stations in April, but took no other immediate action. Then, eight months later, after granting a rehearing in all three cases together,[195] the FCC codified the definition of "indecency" estab-

190. *See id.* at 751 n.2 (listing the four factors that subject broadcasting to "special treatment").

191. *See, e.g.*, Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 294 (1981) ("Moreover, a subcategory based in part on offensiveness will be notoriously vague. Vagueness probably cannot be completely eliminated, but that is no excuse for failing to recognize degrees of vagueness."); Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1278 (1978) ("In no other first amendment area could the Court fashion a definition so vague that if a legislature had drafted it no one would pause before holding it unconstitutional.").

192. *See* POOL, *supra* note 10, at 134 (describing *Pacifica*'s nuisance rationale as "a legal time bomb").

193. *See* Infinity Broad. Corp., 2 F.C.C.R. 2705 (1987); Pacifica Found., Inc., 2 F.C.C.R. 2698 (1987); Regents of the Univ. of Cal., 2 F.C.C.R. 2703 (1987). Among the offending elements of the broadcasts were "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." Infinity Broad. Corp., 2 F.C.C.R. at 2706.

194. *See* Infinity Broad. Corp., 2 F.C.C.R. at 2705 (concerning complaints over broadcasts of the "Howard Stern Show").

195. *See* Infinity Broad. Corp., 3 F.C.C.R. 930, 934 (1987).

lished in *Pacifica*[196] as including all "'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience.'"[197] The Commission formally applied the new definition to the controversial shows, and also extended the period during which programming would be subject to indecency provisions—that is, when it would assume that children (defined to extend to age 17) might be in the audience—to midnight.[198] From midnight until some unspecified morning hour, there would be a "safe harbor" in which broadcasters could anchor their indecent programs without facing the wrath of the FCC. (In other words, the FCC would rely on parental control in the safe harbor period).

The Court of Appeals for the District of Columbia Circuit responded to the FCC's new enforcement policy in a three-*ACT* comedy that ran for seven years, with a shifting ending.[199] The comedy began in 1988, when a group called Action for Children's Television petitioned the court to review the enforcement policy set forth in the FCC's order. In *ACT I*, the court first remanded the case and asked the FCC to further justify it decision to curtail the hours during which programs with indecent language could be broadcast.[200] Before the FCC could act, however, Congress enacted legislation directing the Commission to promulgate regulations enforcing the statutory ban on obscene and indecent language (the same statute involved in *Pacifica*) on a twenty-four hour per day basis.[201] When the Commission dutifully complied, its regulations were again challenged and remanded by the court in *ACT II*.[202] While the agency was reconsidering its regulations Congress again intervened, this time by directing the FCC to promulgate regulations prohibiting the broadcasting of indecent programming on commercial stations between 6 A.M. and midnight, and between 6 A.M. and 10 P.M. on public broadcast sta-

196. *See* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975), *aff'd sub nom.* FCC v. Pacifica Found., 438 U.S. 726, 738-41 (1978).

197. *Infinity Broad.*, 3 F.C.C.R. at 930 (quoting *Pacifica*, 56 F.C.C.2d at 98).

198. *See id.* at 937 n.47.

199. *See* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (ACT I); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (ACT II); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (ACT III).

200. *See Action for Children's Television*, 852 F.2d at 1332.

201. *See* Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988) (codified at 18 U.S.C. § 1464).

202. *See Action for Children's Television*, 932 F.2d at 1504.

tions that stopped broadcasting at or before midnight.[203] The Commission, again, dutifully complied with regulations. Predictably, its regulations were challenged for the third time. In *ACT III*,[204] the court, en banc, generally affirmed the statute and the regulations based on a finding that there was a compelling governmental interest in protecting children against indecency on the airwaves.[205]

Perhaps the most striking thing about the course of *Pacifica* was that until the ACT litigation there had not been a single occasion for applying it to a television program.[206] Presumably the explanation was that the television network censors and the stations themselves were not tempted to test the limits of tolerance. Programs that might test those limits—uncut R-rated movies for instance—were relegated to the safe harbor of late-night time slots. Cable television programming, on the other hand, did test the indecency limits, particularly in the context of access channels that were outside the control of cable operators. The FCC, however, had never attempted to regulate cable programming. There was even some question whether *Pacifica* applied to cable television. Several lower courts thought it did not.[207] In 1992, the Supreme Court itself gave some support to that notion when, in *Sable v. FCC*, it ruled that *Pacifica* could not be used to support a congressional ban on "dial-a-porn"—services involving indecent or obscene telephone messages.[208] But the *Sable* decision was basically an overbreadth case; Congress had not tried to *regulate* telephone porn but had tried to ban it altogether, something that *Pacifica* did not sanction. There was, moreover, a marked difference between children's access to dial-a-porn and their access to television indecency.

203. *See* Public Telecommunications Act of 1992, § 16(a), 106 Stat. 949 (1992) (stricken down by the court in *ACT III*).

204. *See Action for Children's Television*, 58 F.3d at 654.

205. *See id.* The court struck down the provision that imposed a more restrictive ban on indecent programming on commercial broadcast stations, making the prohibition of indecent material apply equally to both commercial and public broadcasting stations from 6 A.M. to 10 P.M. *See id*. at 656.

206. In 1989, the FCC finally found a television broadcast station that violated its indecency rules, but held that the then-pending appeal in *ACT I* precluded any sanction for the violation. *See* Kansas City Television, Ltd., 4 F.C.C.R. 6706 (1989).

207. *See* Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985) (invalidating state statutory ban on cable indecency); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164, 1167-69 (D. Utah 1982) (invalidating city ordinance); *Action for Children's Television*, 58 F.3d at 660 (suggesting, in dictum, inapplicability of *Pacifica* to cable).

208. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115 (1992).

Four years after *Sable*, the Court in *Denver Area Telecommunications Consortium v. FCC*,[209] held *Pacifica* applicable to cable television as well as to broadcasting. The complicated details of the *Denver* case (which produced six different opinions) need not detain us. Briefly, the case involved a constitutional challenge to provisions of the Cable Television Consumer Protection and Competition Act of 1992[210] which sought to deal with indecent programming on leased commercial access channels and on public access channels. For both types of channels, Congress had previously barred cable operators from controlling content. The 1992 Act lifted that ban to the extent of *allowing* operators to prohibit programming that they reasonably believed depicted sexual activities or organs in a patently offensive manner. For leased channels (but not for public access channels), if cable operators chose to allow patently offensive programming, they were *required* to place it on a single channel and to block that channel from viewer access until they received a written request from the viewer to unblock it. The Supreme Court held that two of the three provisions violated the First Amendment. A majority of the justices agreed that it was overly restrictive to require operators to segregate and presumptively block offensive programming. As to the permissive controls, a majority thought, for different reasons, that the operators could control leased access programming but not public access programming.

The latest chapter in the protect-the-children saga involves the Communications Decency Act of 1996 (CDA),[211] which had been enacted a few months before the *Denver* case. The CDA had two distinctive ambitions. One was a direction to television set manufacturers to equip all future television sets with a so-called "V-chip"—a piece of programmable software that will enable parents to block violent or otherwise offensive programming with the aid of a program coding scheme. Congress directed that television program distributors have the opportunity to develop a voluntary coding scheme, but if they failed to develop one to the satisfaction of the FCC, a special advisory group appointed by the FCC was to develop one.[212] The

209. Denver Area Educational Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996).

210. Pub. L. No. 105-385, §§ 10(a)-(c), 106 Stat. 1460, 1486.

211. *See* Communications Decency Act, Pub. L. No. 104-104, §§ 501-61, 110 Stat. 56, 133-43 (1996) (codified in scattered sections of 47 U.S.C.A. and 18 U.S.C.A.). The CDA was part of the Telecommunications Act of 1996.

212. *See id.* §§ 551(b)(1), 551(e)(1) (codified as amended at 47 U.S.C.A. §§ 303(w), (x), 330(c) (West Supp. 1997)).

second goal of the CDA was to criminalize the use of telecommunications devices or computer services to transmit obscene or indecent material—provisions that cover both ordinary telephone messages and, more controversially, Internet communications.[213]

I want to pass over the V-chip/ratings provisions of the CDA. The attempt to create an effective ratings scheme presents numerous problems, not least of which is a high risk of classification errors that will cause the ratings to fail to satisfy their intended purpose.[214] Given that both the ratings scheme itself and the basic criteria were imposed by Congress, such errors could raise First Amendment problems. However, it seems unlikely that the mere possibility of erroneous classifications would cause the system to fail to pass First Amendment muster.[215] In any case, the more important issue to get

213. *See id.* § 502(1)-(2) (codified as amended at 47 U.S.C.A. § 223(a), (d)).

214. For an insightful examination of these problems, see J.M. Balkin, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1165-75 (1996) (exploring three main problems encountered when forming ratings categories: salient characteristics of the rated content, breadth of categories, and equivalency of disparate content falling within the same category).

215. In *Meese v. Keene*, 481 U.S. 465 (1987), the Court rejected a First Amendment challenge to the Foreign Agents Registration Act of 1938, 22 U.S.C. § 611-621 (1994). That Act requires that agents of foreign principals who disseminate material deemed to be "political propaganda" provide the Attorney General with a copy of the material, that they report the extent of the dissemination, and that they label the material with a notice that it has been registered under the Act. *See Keene*, 481 U.S. at 469-71. The First Amendment challenge rested on the argument that the registration and labeling would place on the material an unfavorable connotation that was "'a conscious attempt to place a whole category of materials beyond the pale of legitimate discourse,'" and was therefore "an unconstitutional abridgment . . . of speech." *Id.* at 479 (quoting Keene v. Meese, 619 F. Supp. 1111, 1126 (1985)). While the label affixed to the material did not include the words "political propaganda," the plaintiffs argued, and the district court agreed, that this could be inferred from disclosure of the registration. However, the Court found that mandatory disclosure did not prohibit dissemination, nor did it prevent disseminators from addressing any inference of audience disapproval in either the registration or the labeling. *See id.* at 480-81. Disclosure, argued the Court, simply provided information that the audience might judge useful in evaluating the message. Not only was disclosure *not offensive* to the First Amendment, the Court found it was *in the spirit* of the First Amendment because the First Amendment should not be used to protect the public from too much information. *See id.* at 481-83 (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

Dissenting from the Court's view of the purpose and effect of the act, Justice Blackmun pointed out that the identification of material as "political propaganda" clearly conveyed an official opinion of disapproval that burdened speech in much the same way that the Court had earlier recognized in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). *See Keene*, 481 U.S. at 491-92 (Blackmun, J., dissenting in part). In *Bantam Books*, the Court struck down a Rhode Island statute authorizing a private commission to designate morally objectionable material on the ground that the purpose of the statute was to suppress the distribution of such material. However, *Bantam Books* involved more than public dissemination of information about books,

out of the way before one can get a handle on the ratings issue, is what kinds of programming are subject to *direct* restraints on distribution, which brings us to the CDA provisions governing the obscenity and indecency on the Internet.

The CDA contained two overlapping provisions for dealing with Internet indecency. The first prohibited the use of any telecommunications device to send obscene or indecent speech or images to any person knowing that person to be under age 18.[216] The second forbade the knowing use of an interactive computer service to make available to any person under age 18 speech or images that "depict[ ] or describe[ ], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[217] The CDA provided a defense for persons who have taken reasonable measures to restrict or prevent access by underage persons, by requiring identification by credit card or by other means.[218]

In *Reno v. ACLU*[219] the Supreme Court declared that the provisions covering nonobscene speech were facially unconstitutional. The ACLU did not challenge the obscenity provisions, perhaps assuming that they did not extend the scope of existing obscenity law.[220]

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and the focus of the Court's opinion there was less on labeling than on the commission's efforts to pressure book distributors not to deal in books that it deemed "objectionable." *See Bantam Books*, 372 U.S. at 61-63, 66-67. These efforts took various forms, notably police "visitations" and veiled threats of prosecution. The Court in *Bantam Books* saw the Rhode Island scheme as an informal means of censorship operating outside the regular channels of law enforcement; as such it violated due process as well as free speech rights. *See id*. at 70-72.

216. *See* Communications Decency Act, § 502(1), 110 Stat. at 133 (codified as amended at 47 U.S.C.A. § 223(a)).

217. *Id.* § 502(2), 110 Stat. at 133-34 (codified as amended at 47 U.S.C.A. § 223(d)).

218. *See id.*, 110 Stat. at 134 (codified as amended at 47 U.S.C.A. § 223(e)(5)).

219. 117 S. Ct. 2329 (1997).

220. I think that assumption is correct, though it ought to be mentioned in passing that there has been some controversy about how obscenity law should apply to the Internet as a consequence of *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996). In *Thomas*, the court upheld the prosecution of a couple who maintained an Internet bulletin board in Milpitas, California. *See id.* at 705. Obscene images maintained on the Milpitas server were downloaded by a postal inspector in Memphis where the prosecution was made. The government's selection of Memphis over Milpitas as a venue might be thought to be inappropriate forum shopping for a community with conservative values, but since the images were available to others in Memphis, one could view this as the virtual equivalent of a physical delivery of the materials there. That point aside, it should be noted that in complaining about the venue, the Thomases did not argue for application of the community values of Milpitas, their home town. The relevant community was, according to them, the virtual community of the Internet itself. *See id*. at 711. To me the idea of a virtual community is just new-age hype. In any case, the controversy over where obscenity should be prosecuted, and what community values get applied, is something of a sideshow.

As the ACLU's complaint suggests, the real controversy about offensive materials on the Internet is centered not on obscenity, but on indecency. The CDA defined the latter in terms that the FCC developed in the wake of *Pacifica*: depicting or describing, "in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[221] In *Reno*, the Supreme Court held that such a standard was unconstitutional when applied to the Internet. Speaking for the Court's majority, Justice Stevens distinguished *Pacifica* (which, recall, he authored) on several grounds, most of them not very convincing.[222] One ground for distinction was that *Pacifica* involved an administrative order of the FCC which was not punitive and which targeted a radio program that was a "rather dramatic departure from traditional program content."[223] However, the FCC's order in *Pacifica* rested on a criminal statute banning the use of obscene or indecent language on radio,[224] and was enforceable by fines[225] or possibly even by revocation of a license,[226] penalties not significantly different from those of the CDA. Though the Court in *Pacifica* reserved judgment on whether criminal fines would be constitutional, only the most exquisitely fine splitting of hairs can separate criminal sanctions from regulatory sanctions in this type of situation. Indeed, a regulatory sanction, such as the (admittedly unlikely) lifting of a license, would in reality be a far larger sanction than any penalty that could conceivably be exacted by criminal prosecution.[227]

221. Communications Decency Act, § 502(2), 110 Stat. at 134 (codified as amended at 47 U.S.C.A. § 223(d)).

222. The government relied on three cases to support its defense of the CDA: *Ginsberg v. New York*, 390 U.S. 629 (1968); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *See Reno*, 117 S. Ct. at 2341. The Court found them all distinguishable. I think the constitutionality of the CDA turns on *Pacifica*, so I limit myself to the Court's treatment of that case.

223. *See Reno*, 117 S. Ct. at 2342.

224. *See Pacifica*, 438 U.S. at 732 (citing 18 U.S.C. § 1464 (1994) (originally enacted as Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769)).

225. *See* 18 U.S.C. § 1464 (stating that broadcasting obscene language over the radio could result in fines up to $10,000).

226. *See* 47 U.S.C. § 312 (1994) (stating that violation of 18 U.S.C. § 1464 will permit the FCC to revoke a station's license).

227. The FCC has yet to propose lifting a license for indecent broadcasts, but it has imposed fines. In 1995, Infinity Broadcasting agreed to pay $1.7 million as settlement for fines assessed by the FCC on account of various Howard Stern broadcasts. *See In re* Sagittarius Broad. Corp., 10 F.C.C.R. 12,245, 12,252 (1995). According to the FCC's chairman, the fine was the "largest amount ever contributed to the U.S. Treasury by a broadcast station licensee." *Stern's Employer Pays Fine*, TIMES-PICAYUNE (New Orleans), Nov. 9, 1995, at C3. Although

As for Justice Stevens's suggestion that a regulatory agency should have greater latitude to enforce conformity in radio programming than government prosecutors may have to enforce conformity in Internet messages: This view implies that bureaucratic censorship is less dangerous than prosecutorial censorship. That is possible, I suppose, but given the conventional animus against bureaucrats and bureaucratic discretion, one could reasonably ask for more explanation of this counterintuitive assumption.

Justice Stevens also found the Internet less "invasive" than the radio broadcasts in *Pacifica* based on the district court's findings that the Internet does not enter the home "unbidden" and the odds of an accidental encounter with an offensive message are slim.[228] Again, most dubious: though it is true that the average Internet user does not stumble over offensive material,[229] neither does the average radio listener. One could, I suppose, accidentally hear George Carlin's

the chairman no doubt intended to suggest that the FCC had imposed a substantial penalty, one should note that all things are relative. Considering Stern's huge popularity and the advertising revenues he earns for Infinity, a million dollars "tax" on several years of profits is, as they say, "chump change." *See, e.g.*, Kristin A. Finch, Comment, *Lights, Camera, and* Action for Children's Television v. FCC*: The Story of Broadcast Indecency, Starring Howard Stern*, 63 U. CIN. L. REV. 1275, 1312 n.208 (1995) (noting that Infinity's revenues for 1993 alone were estimated to be $205 million, with profits of $2.7 million).

228. *See Reno*, 117 S. Ct. at 2343 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)). Justice Stevens's distinction between the "unbidden" radio message and the accepted, wire-based Internet message reminds me of Chief Justice Taft's reaction to the radio. Senator Clarence Dill, one of the authors of the Radio Act of 1927, recalled a conversation with then-Chief Justice Taft about the first radio case that had reached the calendar of the Court. *See* CLARENCE C. DILL, RADIO LAW: PRACTICE AND PROCEDURE vii-viii (1938). As reported by Dill, Taft thought it uncertain whether radio could be commerce in the same way that telephony was:

> He [Taft] added that he understood that the radio waves can not be stopped, but are everywhere present. "All we need is a receiving set to select a dozen different programs from the air of this room, I am told."
>
> "I can see the telephone wire that brings the message into this room. I can keep it out by taking away the wire, but with radio it is different. It is here whether I want it or not."

Id. at ix-x. Taft went on to say that "interpreting the law on this subject is something like trying to interpret the law of the occult." *Id.* at x (emphasis omitted). Today, sixty years on, some might say nothing has changed.

229. Even so, one does not need to engage in a deliberate search to find them. Some time ago I was searching for Internet sources on "PICS," an acronym for "platform for Internet content selection"—a software program designed to provide a common language for different kinds of content screens (screens mostly for indecent content). I casually typed "pics" into one of the standard Web search engines (Excite). I invite the reader to do this, to see the ease of casual encounters. Of course, I am of an age that not even the Supreme Court could imagine needs protecting.

"seven words you can't say on radio," but one would have to concentrate to hear the entire twelve minute monologue.

Justice Stevens's distinction underscores a fundamental flaw in his own prior opinion in *Pacifica*, which is the notion that indecency regulation seeks to prevent juvenile misadventures, where someone of tender age suddenly encounters, unawares, an indecent word or image. Though the Court had given some support to that notion in *Sable* to distinguish radio broadcasts from dial-up pornographic telephone messages, the more substantial distinction relied on by the *Sable* Court was the fact that the dial-a-porn statute imposed a flat ban on such messages instead of adopting a less drastic alternative.[230] The FCC had earlier sought to require the use of credit cards, an access code or a scrambling technique to defeat children's access.[231] The Court appeared to think that these less drastic means would have been satisfactory,[232] which shows that the real objective underlying indecency controls is simply to make it more difficult for juveniles to access indecent material, wittingly or not. That is the only sensible way to understand the Court's concern—as a desire to protect against juvenile immaturity, not juvenile accidents.

Perhaps most peculiar of all the reasons for distinguishing *Pacifica* is Justice Stevens's argument that in contrast to the broadcast spectrum, "the Internet can hardly be considered a 'scarce' expressive commodity."[233] Indeed it cannot, as I remarked earlier. But spectrum scarcity was never the source of authority for regulating electronic indecency, a fact that a plurality of the Court acknowledged in the *Denver Area* case.[234]

The only credible basis for holding *Pacifica* inapplicable rests not on media invasiveness, but on the fact that the CDA, like the dial-a-porn statute in *Sable*, was simply overbroad in imposing a flat ban.[235] If Justice Stevens had simply rested on that point, the Court's decision would have been more soundly grounded. Of course, the CDA's ban was not entirely complete, for Congress provided a safe harbor for content providers who take "reasonable, effective, and appropri-

230. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 128-31 (1989).

231. *See id.* at 121-22.

232. *See id.* at 130-31.

233. *Reno*, 117 S. Ct. at 2344.

234. *See* Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2388 (1996) (plurality opinion).

235. *See Reno*, 117 S. Ct. at 2346.

ate" steps to restrict access.[236] However, the Court found that no existing technology or method could meet the requirements of the CDA.[237] The government claimed that providers could "tag" material, coding it in such a way as to allow it to be blocked by computers with the requisite software. The Court rejected the claim on the ground that providers could not be assured that users would have the software necessary to block the material; it emphasized that providers were protected only if their actions were "effective" in blocking children's access.[238] The alternative of requiring credit card identification was also found to be ineffectual, most notably because many of the offending communications are provided without charge.[239]

The foregoing may too harshly criticize the Court's analysis in *Reno*. The bottom line is sensible enough, even though Justice Stevens engages in some fairly tortuous logic to reach it. But bottom lines are not enough. We need to have a better idea of where this indecency jurisprudence is headed, and *Reno* does not provide it. Instead, it simply adds another subcategory to the subject. We don't need more categories; we need some reflective thought on what we are trying to achieve, who and what we are trying to protect by regu-

236. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133 (codified at 47 U.S.C.A. § 223(e)(5)(A) (West Supp. 1997)). The safe harbor defense makes the CDA's Internet provisions somewhat similar to its V-chip requirement. Both have the effect of inducing the deployment of technology to give adults control over children's access to indecent material. *See* Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMMLAW CONSPECTUS 181, 186 (1997). The two sets of provisions are not equally effective, however. The V-chip provisions mandate the installation of access restricting technology in future television sets. That technology will allow parents to use the program coding mechanisms to bar access. There is no comparable mandate for software in computers accessing the Internet, and therefore there is no assurance that merely tagging the material (which is what the government suggested that providers ought to do) will do any good. Nevertheless, software programs that block access are now marketed. Hence, some combination of efforts by the provider and the user could effectively screen material. If Congress were to rewrite the statute so that the burden of effectiveness did not rest entirely on the provider, it would seem that the Court's concern over the lack of an assured safe harbor defense would be answered.

237. *See Reno*, 117 S. Ct. at 2346-50.

238. As a matter of fact, the Court's conclusion that effective rating and blocking methods are not available is probably wrong. The combination of the new PICS formatting and different filtering software programs seem to provide a very effective and widely available means for such filtering. *See* Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT. L.J. 453, 454-55 (1997) ("This software can do an impressive job at blocking access to sexually explicit material . . . ."). Nevertheless, if one accepts the Court's statement as accurate, it would provide a credible basis for viewing the CDA as imposing something close to strict liability, and for striking it down on that account.

239. *See Reno*, 117 S. Ct. at 2349.

latory controls, and—equally important—on who and what we are trying to protect *against* regulatory controls.

B. Victoria's Secret

There is no doubt that decency as a regulatory policy responds to a genuinely popular set of concerns. Unfortunately, those concerns are confused and conflicted, as are the policies that are supposed to reflect them. The official mantra for contemporary censorship of electronic media speech and images is, as we saw, "protect the children." The question is, from what? From the seven dirty words of George Carlin's monologue? That is a quixotic ambition, unless we are to establish speech monitors in every playground and on every street corner. From a sustained monologue of dirty words, racial slurs and sexual innuendo—in other words a Howard Stern monologue? Quixotic as well. Images of people having sex? Perhaps a more realistic possibility, though one should not underestimate just how many blindfolds we would need to accomplish this object.

Of course, deciding what to protect children against requires us to specify who "children" are. The CDA put the benchmark at 18.[240] Selecting that benchmark must have been simply a matter of legislative convenience: you are deemed old enough to hear or view indecent things when you are old enough to do them with legal impunity. As anything other than a desperate attempt to fix a bright line, it is hard to make sense of a benchmark so plainly out of touch with reality. Even in the innocent era of my adolescence, when *Lady Chatterly's Lover* was considered cutting edge pornography, anyone who had not encountered "adult" material well before the official age of "maturity" was considered socially retarded.

Fixing limits requires us to consider not just who "children" are, but also what it is that we are trying to accomplish in limiting their exposure to obscenity and indecency. When the Court first declared obscenity to be unprotected speech in *Roth*,[241] it paid little attention to the harm being regulated. That is the consequence of categorical analysis which removes the need for justifying individual decisions. Categorical analysis is not necessarily bad; categories are simply a special form of rules, the general point of which is to avoid the costs of individual justification beyond making clear why a particular case

240. *See* 47 U.S.C.A. § 223(a) (West Supp. 1997). This extends by three years the age of the "child" in *Pacifica*. *See* POWE, *supra* note 86, at 186.

241. Roth v. United States, 354 U.S. 476, 485 (1957).

belongs within the category.[242] However, the goodness of rules or categories depends on there being some prior justification for the rule or category itself. The Court never made such a justification in *Roth*. The Court defined the categorical limit that placed "obscenity" beyond the pale of protection, without explaining why such "outlawry" was needed.

What the Court saw no need to do in its *Roth* opinion, Harry Kalven attempted in a commentary on the case. Kalven saw, in existing obscenity cases, four articulated evils: "(1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values."[243] Kalven's list is somewhat casual insofar as it is derived from bits and pieces of judicial opinions and not from any attempt, by him or by the courts, to develop a clear theory of harm. The second and third "evils" are incoherent; to be a credible basis for legislation they have to be tied either to behavior—item one—or a socially accepted norm—item four.

The first evil clearly has been the main target so far as public explanation is concerned. The 1970 Commission on Obscenity and Pornography (the Lockhart Commission) focused almost exclusively on this kind of harm.[244] Although the 1986 Attorney General's Commission (the Meese Commission) considered a broader array of harms, including physical, cultural, moral, and aesthetic harms,[245] its primary concern was with pornographic material that depicted sexual violence, on the ground that such material increased the likelihood of sexual aggression.[246] The Lockhart and Meese Commissions reached very different conclusions about the link between obscenity and sexual aggression and about the need for government controls—the Lockhart Commission found insufficient empirical evidence to sup-

242. On First Amendment categories generally, Schauer, *supra* note 191, is essential reading.

243. Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 3-4.

244. *See* REPORT OF THE PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY 217 (1970) [hereinafter LOCKHART REPORT]. Finding inadequate evidence of a link between obscenity and sexual violence, the Commission recommended repeal of legislation barring adult access to obscene material, though it did approve of controls on public display. *See id*. at 51. The Commission noted the public concern that obscenity had deleterious moral effects, but it took the view that the effects were not important and in any case were not an appropriate basis for legislation. *See id.* at 51-64.

245. *See* 1 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 299-306 (1986) [hereinafter MEESE REPORT].

246. *See id*. at 323-25.

port obscenity legislation,[247] while the Meese Commission found the contrary.[248] Though these different findings might be partly explained in terms of the underlying ambiguity of the empirical data, one ought not overlook the importance of the different views the respective commissioners took into their studies. I do not intend this as a criticism; given the nature of the question it seems heroic, if not just silly, to imagine that it could be settled by scientific investigation.

The lack of empirical support for the "obscenity leads to sexual violence" argument is not really surprising, for it is not at all clear that obscenity legislation is really about curbing incitement to vicious behavior. Obscenity was first censored in England and the United States because of its association with anti-religious thought, not because of its explicit sexuality.[249] In the nineteenth century the focus shifted away from distinctly religious objections to a more general objection to the immorality of sexually explicit material.[250] *Roth* did not explicitly recognize morality as a basis for censorship. But six years after *Roth*, Louis Henkin argued quite convincingly that obscenity legislation was really morals legislation in disguise, that underneath the arguments about harmful behavior the real concern was the effect of obscenity on moral values.[251]

The behavioral and moral arguments have been refined over the ensuing three decades. Catherine MacKinnon and Andrea Dworkin have given a distinctive twist to the behavioral theory by arguing that obscenity fosters a degraded view of women as sex objects, which in turn exposes them to sexual harassment and discrimination as well as direct sexual assault.[252] The Meese Commission basically endorsed that view.[253] Alexander Bickel tweaked the morals argument by arguing that control of obscenity was a matter of public decorum and social environment, which suggests a kind of aesthetic argument that is distinct from subjective morality insofar as the emphasis is on pub-

247. *See* LOCKHART REPORT, *supra* note 244, at 51.

248. *See* MEESE REPORT, *supra* note 245, at 355.

249. *See* LOCKHART REPORT, *supra* note 244, at 296-300.

250. *See id.* at 300-02. The canonical formulation was given in the leading case prior to *Roth*, Regina v. Hicklin, 3 L.R.-Q.B. 360, 371 (1868) (defining obscenity as matter which tends "to deprave and corrupt those whose minds are open to such immoral influences").

251. *See* Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 391 (1963).

252. *See* CATHERINE A. MACKINNON, ONLY WORDS 67 (1993); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 9 (1985).

253. *See* MEESE REPORT, *supra* note 245, at 329-35.

lic appearance rather than private thought.[254] Reverend Bruce Ritter, a member of the Meese Commission, offered still another slant. Reprising (inadvertently I surmise) an argument by D.H. Lawrence,[255] Ritter argued that the greatest harm of pornography is that it degrades sex itself.[256]

Apparently, like the proverbial elephant that presented different parts of its anatomy to its blind handlers, obscenity is a complicated animal. So is indecency. Indeed, depending on what one thinks the problem is in each case, it is not clear there is any meaningful distinction to be drawn between these two beasts. The now canonical protect-the-children rationale for regulating "indecency" even where it does not ripen (decay) into "obscenity" provides a convenient cover for a deeper objection to what many see as cultural coarseness in public images and communications. From a Bickelian perspective, I don't see any difference between obscenity and indecency. Both intrude on our sensibilities, and do so moreover *in public* where, presumably, everyone is invited. Unfortunately, from this perspective the rationale the Court gave in *Pacifica* gets it quite backward when it suggests that the regulatory interest is based on protecting privacy—the privacy of one's home—against offensive "intruders."

It is noteworthy that the Court chose to focus on invasion of the *home* in a case where the broadcast was heard in a car, a venue where expectations of privacy are surely lower. That detail of the case might be thought inconsequential to the bigger picture—after all the same broadcast *could* invade the home—but the problem with that bigger picture is twofold. First, virtually all occasions for enforcement have involved radio programs that are more likely to be heard by young people outside the home by means of car radios, portable "boom boxes," or hand-held compact radios. Second, the premise that the home sanctuary should be protected *by* the government rather obviously conflicts with the idea that the home is equally if not more a place to be protected *from* the government.[257] The Court in *Pacifica* attempted to get around that awkward tension by shifting to the invasion metaphor. But one person's invasion is another's invitation, and in this case there is no way to stop the first without stopping

254. *See* ALEXANDER BICKEL, THE MORALITY OF CONSENT 73-74 (1975).

255. *See* D.H. Lawrence, *Pornography and Obscenity*, *in* THE PORTABLE D.H. LAWRENCE 646, 653 (Diana Trilling ed., 1946).

256. *See* MEESE REPORT, *supra* note 245, at 99.

257. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the First Amendment protects possession of obscene material in the home).

the second. In other words, where the nature of the regulation precludes selective interdiction, in order to protect one person's sanctuary against invasion it is necessary to invade another person's sanctuary in the same degree.[258] The same tension arguably affects public displays of indecency. However, it is precisely the nature of public space that persons with different sensibilities are entitled to enjoy it equally. This being so, no individual is entitled to claim a "sanctuary" in which to enjoy his or her particular tastes in public space.[259]

No doubt there is a certain Victorian hypocrisy in this insistence on maintaining a public decorum so markedly at odds with our private predilections. In our Aquarian age, there is supposedly no room for such hypocrisy. Nevertheless, there is something to be said for it. As Gertrude Himmelfarb tells us, the "Victorians thought it no small virtue to maintain the appearance, the manners, of good conduct even while violating some moral principle, for in their demeanor they affirmed the legitimacy of the principle itself."[260]

Unfortunately, those who argue for control of electronic indecency have a tendency to confuse this public-private distinction by treating electronic mass media, at least radio and television, as intrinsically public by reason of its broadcast character. Of course, the Court knows better; but as I suggested earlier in discussing the public ownership conception, imagery and metaphor have a way of floating free from their moorings and taking on a life of their own. In this context, the metaphor of "public space" that is supposedly being con-

258. Amy Wax has suggested to me that the Court's nonelectronic jurisprudence is saying, in good Victorian fashion, that pornography, being shameful, must be kept from public view. If you put it in a brown paper bag, however, you could take it home to enjoy. Essentially, this is *Stanley v. Georgia.* Unfortunately, the paper bag option is an empty one in this case. The only way to put electronic messages in a paper bag is to reduce them to tapes or compact discs. Any attempt to import them by means of broadcast or cable bumps up against the *Pacifica* assumption that the very same acts of private enjoyment are acts of offensive invasion.

259. Of course, from this perspective there is nothing peculiarly dangerous about electronic speech. Quite the contrary, a greater concern would be warranted for publicly visible indecency, such as publicly visible porn shops, adult theaters, and appurtenant promotional material. Outside the electronic speech area, there is some support for this view. *See* Barnes v. Glen Theater, Inc., 501 U.S. 560, 567 (1991) (upholding local ordinance requiring nude dancers to wear pasties and a G-string); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 50 (1986) (upholding local zoning of adult theaters); Young v. American Mini Theaters, 427 U.S. 50, 62 (1976) (same). *But see* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 140-76 (1994) (providing a general critique of the distinction between private and public display of pornographic speech).

260. GERTRUDE HIMMELFARB, THE DE-MORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES 23 (1995).

taminated serves as a cover for a different regulatory purpose which is difficult to embrace openly in a liberal society—the protection of morals in a deep sense, not of merely behaving in public but of being "good." Modern Victorians who worry about a debasement in the culture as a consequence of indecent speech, or depiction of violence, are not soothed by the thought that it will be kept out of public view: out of sight is not out of mind. Indeed, being out of sight might well make the problem worse by making it more difficult to monitor and counter this debasement. And for these new Victorians it is definitely no comfort that these bad influences are the product of individual choice. Individual choice is merely another part of the problem, a problem that worsens precisely in proportion to the expansion of choices. From this perspective, the Internet is almost the ultimate threat insofar as it not only offers a rich menu of choices, but quite literally allows individuals to shape their own program content to their own preferences.[261]

It is easy to see how obscenity and indecency have come to be central to the wider political debate between liberals and communitarians, for they go right to the heart of what a political society should strive to be and do.[262] If it were merely a matter of public appearances, for the sake of accommodation even liberals would probably accept some kinds of controls. If the concern were simply about facilitating *adult* choice, I think one could at least confine the range of debate by focusing on a limited array of options designed to facilitate parental supervision. It is when the controversy betrays its roots in fundamental cultural terms that the differences between liberals and communitarians become irreconcilable.

This *Kulturkampf* puts a heavy strain on traditional First Amendment analysis, at least if the model for First Amendment analysis is that presented by the *Turner* cases on the one hand or *Reno* on the other. Both of those cases, in their different ways, applied a means-ends analysis (*Turner* perhaps more clearly than *Reno*)

261. George Gilder envisions celebrities or other notables selling interactive software that will enable the viewer to chat with Henry Kissinger, Kim Basinger or Billy Graham. *See* GILDER, *supra* note 2, at 24. I assume he chose the particular names to illustrate the eclectic preferences that this new medium will accommodate. What I predict is something more on the model of dial-a-porn, for which there is solid statistical proof of popularity. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 120 n.3 (1992) (reporting that in New York City alone some 6 to 7 million dial-a-porn calls were reported in a six-month period ending in April 1985).

262. *See, e.g.*, MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICAN IN SEARCH OF A PUBLIC PHILOSOPHY 75-90 (1996). Sandel's treatment of pornography is very shallow, but it illustrates the importance communitarians attach to this subject in their critique of liberalism.

that presupposes a reasonably defined (and assumedly legitimate) ends by which the efficacy and precision of the means can be judged. Whether the end is localism, or is protecting children against unwitting exposure to indecent messages, it is possible to make some kind of reasoned assessment about this efficacy and precision: will the means secure the end? Will they secure it with least cost to free speech, etc.? But redefine the end as preserving "culture" and the formerly reasoned assessment reduces to a brute political contest of competing preferences. There simply is no way to evaluate what means will secure that end. Indeed, there is hardly even a way of articulating what the end means in terms that can be reconciled with the liberal premises of the First Amendment.[263]

IV. 2001

It is time to take stock. The end of a decade is often taken as the occasion for both a wrap-up of the past and a forecast of things to come. Even more so is the end of a century, which has always been a convenient metric for historical generalization. But both decade and century pale by comparison to the end of a millennium, a time frame equal to the largest canvas used by social historians. (Anything larger and we are into archeology.)

Unfortunately, large time frames are not meaningful for a First Amendment that is a little more than 200 years old. Indeed, even a centenary time frame seems rather grand, since for all practical purposes modern First Amendment jurisprudence is less than 100 years old. Narrowing the subject still further to the "electronic First Amendment," the relevant time period reduces to half a century at most. So, despite the various literary reference to "ages" in this essay, I take it no one will be deceived into thinking that we are talking about age-old lessons here. Looking back or looking forward, our perspective is quite limited—a few years in either direction.

Mindful of that limited perspective, I want to return to Ithiel Pool, who got us started on this inquiry,[264] to see how his concerns have held up, a few years after he articulated them, and to speculate what might happen a few years on. Plainly, one source of Pool's concern has been largely removed from the picture. *Red Lion*, which troubled him greatly, is at best a crippled precedent for the new age.

263. I am indebted to Vince Blasi for discussion on this point.

264. *See supra* note 10 and accompanying text.

In any event, there is very little active regulation being promulgated in its name. The fairness doctrine is dead; general program scrutiny by the FCC has been abandoned. There is still some degree of intermeddling via government bargaining for children's programming, but perhaps the most noteworthy thing about that bargaining is how ineffectual it has been.

The indecency crusade continues. *Pacifica*, which Pool despised even more than *Red Lion*, is still alive and well in the world of radio and television, but not for telecommunications and not for cyberspace. Pool would have celebrated the *Reno* case: Just as Alexander Meiklejohn celebrated *New York Times v. Sullivan* as "an occasion for dancing in the streets,"[265] Pool no doubt would have found *Reno* an occasion for dancing in the information superhighway.

On the other hand, although the Court in *Reno* did move the electronic First Amendment a little closer to the print model, it would be a mistake to think that the Court has simply applied the print First Amendment simpliciter. In fact, "simpliciter" is the last word one should apply to our modern First Amendment. The modern First Amendment has become a confusing, complex assemblage of doctrines, considerations, and ad hoc factors. Some of the Court's modern opinions read like the Restatement of Torts, with its characteristic laundry list of factors to be weighed in some unspecified fashion to determine liability.[266]

Not all of this complexity can be attributed to complexities added by electronic media, of course. Much of the complexity is surely due to a simple expansion of First Amendment protection to hitherto unprotected forms of speech, the effect of which has been to induce new conditions, limitations and doctrinal fine points about the scope of that protection.[267] However, no small part of the new complexity has been added as the Court has attempted to devise distinc-

265. Quoted in Kalven, *supra* note 89, at 221 n.125 (internal quotation marks omitted).

266. Justice Breyer's plurality opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996), comes most prominently to mind as an example. In fairness to Justice Breyer, I must note that the bewildering uncertainty of the decision as precedent can only be appreciated by reading the six different opinions the case produced.

267. G.E. White argues that the recent expansion of First Amendment protection to what he calls "unexpected beneficiaries" (notably those engaged in commercial advertising, hate speech, campaign spending, and pornography) is the product of a fragmentation of free speech theory brought about by its severance from democratic theory. *See* White, *supra* note 13, at 368-76. I agree with White's assessment; it is necessary here to add merely that the result is not a *simple* expansion of First Amendment coverage. Each of these newly benefited categories of speech have called forth new doctrinal rules, conditions, and limitations.

tive rules for new media technologies, under a kind of McLuhanesque medium-is-the-message theory[268] that sees each distinctive medium as a distinctive form of speech.

All this complexity may be unnecessary. The Court has long been in the habit of saying that each medium of mass expression raises particular First Amendment problems.[269] No doubt that is true, but it is not clear that there are important differences between electronic media as far as indecency, for example, is concerned. In *Denver*, the Court approved in principle that limited control of indecent content could be extended to cable television, its premise being that there is no relevant distinction between the words and pictures delivered over the air and those delivered by coaxial cable.[270] By the same token, there is no relevant distinction between words and pictures delivered by coaxial cable and those distributed by the Internet. Indeed, with the adoption of broadband delivery media such as cable modems and satellite broadcasting, the Internet may soon become an alternative mode of delivery for full motion video that is identical to standard cable television programming.

I don't want to sound like a purist. There is something to be said for nuance, for context, for differentiation in constitutional adjudication even if it does undermine the crystalline quality of rule-bound principles. In all events I must admit that the Court is not entirely to blame for this complexity. If its First Amendment jurisprudence is incoherent,[271] at least some of that incoherence is simply the Court trying to giver proper effect to our inconsistent, ambivalent, and am-

268. *See generally* MCLUHAN, *supra* note 9.

269. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997); *Turner I*, 512 U.S. 622, 657 (1994); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

270. *See Denver*, 116 S. Ct. at 2388 (noting that while the distinction between cable and broadcast television may be relevant "for structural regulations at issue [in *Turner*], it has little to do with a case that involves the effects of television viewing on children").

271. Robert Post blames the incoherence of First Amendment doctrine on the Court's attempt to find an abstract First Amendment principle in the fact of speech, rather than in the varied social contexts in which speech, and expressive activity generally, is employed. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995). Of course, any attempt to fit a single principle to the extraordinarily varied social contexts in which speech activity is found will produce doctrinal difficulties—unless the "principle" is one of deciding every case according to its own distinctive merits. Post is thus correct that a more nuanced evaluation of context will produce more "coherence" by eliminating or at least minimizing the importance of fixed reference points by which the decisions can be measured for consistency. In fact, as I suggested earlier, that is the direction the Supreme Court seems to be moving with its Restatement approach to the First Amendment. *See supra* text accompanying note 266. As I also suggested, I am not sure this movement is to be applauded; it may achieve coherence (in Post's sense) but only by sacrificing intelligible general principles.

biguous social norms. Needless to say, these conflicts and ambiguities are most pronounced in times of rapid social change.

If we look outside the area of direct speech restraints, we see that the reach of the First Amendment is now closer to what Pool believed it should be than it was when he wrote. Pool believed in an aggressive First Amendment that was not confined to matters affecting editorial judgments but extended to all government regulation of communications activities, whether it was the government's protection of the Postal Service's monopoly of first class mail or its regulation of telephone and telegraph carriers.[272] These are greater ambitions for the First Amendment than the Supreme Court has yet embraced. Nevertheless, in an ironic twist to Pool's anxiety about a contaminated First Amendment, there seems to be a movement in this direction. Whereas Pool feared that creeping regulation would be the occasion for a First Amendment retreat, we may be seeing just the opposite—with regulatory creep we may be getting First Amendment creep as well.

This is a development that we would not expect to occur in the print media, where First Amendment constraints have prevented regulation other than by nondiscriminatory laws applicable to media and nonmedia enterprises alike. The case of electronic media has been different, of course; that was the source of Pool's complaint. His complaint came too soon, however, to see that once the First Amendment gained a beachhead in the electronic industry, as it did with the emergence of cable television, it would at once confront an array of targets that could not have been imagined in the days of print media. As I suggested earlier, the application of First Amendment scrutiny to content neutral regulation of speech-related activity is hardly unique to the regulated electronic media.[273] But these media are, in the argot of the military, a target-rich environment for such First Amendment assaults. Unlike other media or other arenas of speech-related activity, the electronic media are pervasively regulated, and such regulation presents widespread opportunities for First Amendment claims. In retrospect, then, it is not surprising that regulatory creep would produce First Amendment creep.

It is unlikely that either of these creeps will overwhelm the other. In a curious fashion, the electronic First Amendment and electronic regulation have become almost symbiotic, each providing

272. *See* POOL, *supra* note 10, at 75-107.

273. *See supra* notes 173-74 and accompanying text.

the other with an important means of sustaining itself. Each new deployment of information technology seems to generate some kind of regulation designed to guide and constrain it. This in turn prompts a First Amendment challenge designed to guide and constrain the regulation. The evidence to date suggests that neither has had a huge practical impact on the other. As I have said, the electronic First Amendment has clearly been given an expanded application over the past couple of decades, but there are relatively few regulatory programs that have been seriously handicapped by it. On the other hand, most of this regulation has had a rather ephemeral and incidental effect on electronic speech. In those few areas where regulation has specifically targeted speech, it is remarkable how limited its ambition, and how little its effect, have been. For all the *Sturm und Drang* about indecency, the airwaves contain more of it than ever before. The seven words that George Carlin said can't be heard on radio can be.[274] Viewers have access to televised depictions of nudity, sex, violence, and all the other things that would were once considered unmentionable, let alone displayable in living color. There is, of course, the warning—the small label that flits across the television screen thanks to Congress. And there will come the V-chip device, and similar rating/filtering software programs for the Internet.[275] Some First Amendment advocates believe these methods, even if controlled by private choices, may present just as much a threat to free speech as government censorship. In their view, the risk of excessive, uninformed, or erroneous rating of material could distort private choices.[276] We should be concerned about such mistakes. Still, those are risks that even now inhere in editorial judgments made by private publishers—electronic and print. Since those judgments are themselves constitutionally protected as free speech choices, it is hard to see how they can be disallowed without standing the First Amendment on its head.

The new information age can only lead to more, not less, private filtering—"censorship" if you will—of content, because the volume of information now available raises the threat of "overload." Some of this screening might be prompted by concerns to block "offensive"

274. *See supra* notes 181-83 and accompanying text.

275. So far, of course, the Internet screening programs, unlike the television V-chip device, are not governmentally mandated. *See supra* text accompanying notes 213, 237-40.

276. *See, e.g.*, Lawrence Lessig, *Tyranny in the Infrastructure* (July 1997) <http://www.wired.com/wired/5.07/cyber_rights.html>; ACLU, *Fahrenheit 451.2: Is Cyberspace Burning?* (visited Mar. 1, 1998) <http://www.aclu.org/issues/cyber/burning.html#Rethinking>.

material, but that will be the least of it. Already the world of cyberspace has become so clogged with information that, as Esther Dyson puts it, "the new wave is not value-added; it's garbage-subtracted."[277] The "garbage" to which Dyson referred is not indecency, but merely content of low value. The point, though, is the same: increasingly it will be necessary to rely on third persons (or, what amounts to the same thing, software programs) to serve as information-selection agents for us. If such agents make mistakes, we may lose valuable information, but it is hard to see a serious threat to freedom of speech in attempts to optimize the value of the information.[278]

In any case, neither private or public controls seem likely to have a large impact on the free flow of information and ideas. In the age of electronic information there is something almost Canute-like in the ambition to order the airwaves to behave.[279] To be sure, there will always be some occasions where censorship can have at least short-term success, and since we live in the short term—as Keynes famously reminded us[280]—it is a good thing to have a constitutional constraint on the ambitions of modern Canutes, however vain their ambitions may be in the long run. Still, looking back on the relatively short history of electronic speech, we have achieved a remarkable degree of free speech with only the most modest First Amendment interventions, and the information age is still in its infancy.

277. Esther Dyson, *Intellectual Property on the Net* (visited Mar. 1, 1998) <http://www.eff.org/pub/Publication/Esther_Dyson/ip_on_the_net.article>.

278. Despite the concerns that have been raised about automatic blocking software and third-party screening by major service providers (such as AOL), I think the risk of censorship "mistakes" (deletion of material that is not what the viewer wanted to delete) here is smaller than that presented by the traditional editorial controls exercised by major mass media providers—program producers, networks and individual station/system operators.

279. Holinshed's account suggests that Canute entertained the conceit that he could halt the tide. *See* 1 HOLINSHED'S CHRONICLES: ENGLAND, SCOTLAND AND IRELAND 731 (photo. reprint 1976) (1807). Wordsworth suggests the more conventional interpretation that Canute was simply trying to show his subjects that he lacked such powers, which belonged only to God. *See* William Wordsworth, *Canute and Alfred, on the Seashore, in* THE COMPLETE POETICAL WORKS OF WILLIAM WORDSWORTH 559-60 (London, MacMillan 1898).

280. "But this *long run* is a misleading guide to current affairs. *In the long run* we are all dead." JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923).