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Freedom of Expression and the 1992 Cable Act: An Introduction

by
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Introduction

On October 5, 1992, Congress passed the Cable Television Consumer Protection and Competition Act[1] (1992 Cable Act) by overriding a presidential veto, the only such occurrence during President Bush's term of office.[2] This followed years of vigorous battles among warring interest groups, contending legislators, and crusading advocacy groups. Yet the clamor of political battle was not matched by a constitutional debate. With economics and politics the main topics, freedom of speech was a side show.

Today, with a bit of distance, with electronic media converging, and with the information superhighway a Washington buzzword, one can resume the questioning. Is it constitutional under the First Amendment to create regulations that restrict a communications medium such as cable television? Looking at the 1992 Cable Act, one can identify numerous free speech issues, including the following:

- Is there a constitutional asymmetry in the treatment of various communications media?
- In what ways does new communications technology affect free speech rights?
- Is it constitutional to mandate preferential access to a physical transmission conduit by some content providers? Can one differentiate between commercial and non-profit voices?
- What is the relationship between common carriage (mandated non-discriminatory access) and free speech?
- Can owners of one medium be precluded from owning another?
- Is it constitutional to mandate the licensing of one firm's program content by competing firms?
- Can a conduit be liable for content transmitted by it under legal requirement?
- Can a multichannel conduit be required to segregate certain programs onto designated channels?
- Is it constitutional to require broadcasters to have their programs distributed by cable operators without permission or compensation?
- Is it constitutional to make the presence of effective competition a condition for free speech?
- Can one require cable operators to prohibit certain programs from access channels, to segregate adult programs onto a single channel, and to make the operator liable for them?

1. Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at scattered sections of 47 U.S.C.) [hereinafter 1992 Cable Act].
2. 138 CONG. REC. S16,676 (daily ed. Oct. 5, 1992).

To address these questions, the Columbia Institute for Tele-Information (CITI) convened a group of noted scholars, each with a perspective of the 1992 Cable Act, and each an expert on speech, communications law, or media economics. Their work was then discussed by noted practitioners, officials, and scholars.

CITI is a nonprofit research center at Columbia University. It seeks to analyze and discuss issues of communications, economics, law, and policy. CITI does not engage in consulting or proprietary studies and takes seriously its independence from interest groups. The project was funded by the following: CITI's general funds; the Freedom Forum Foundation (formerly the Gannett Foundation, with a major stake in the Gannett Company, the owner of newspapers, broadcast stations, and advertising businesses); and Dr. Leonard Tow, Chairman and CEO of the cable and telecommunications firms Century Communications Corporation and Citizens Utilities, together with his cable industry associates from the Entrepreneurs' Club. As agreed from the outset, none of these parties other than CITI played any role in the selection of the topics or authors.

The authors span a wide range of perspectives and conclusions. They were not selected to represent any particular point of view, but rather because of their outstanding reputations in the scholarship of speech and communications. Regardless of the authors' views on any part of the 1992 Cable Act, the reader will find these articles provocative.

I
The 1992 Cable Act

The Cable Television Consumers Protection and Competition Act is a response to the industry conditions that were encouraged by an earlier major piece of legislation, the Cable Television Communication Policy Act of 1984.[3] That law, passed at the height of the Reagan years with bi-partisan support and shepherded through Congress by the Telecommunications Subcommittee Chairman, Congressman (soon Senator) Timothy Wirth of Colorado, substantially deregulated the cable industry from price controls by local governments and largely eliminated the threat of non-renewal of a franchise. Freed from restrictions, the cable television industry developed after 1984 even faster than before. It increased channel capacity (to an average

3. 47 U.S.C. §§ 521-559 (1984).

of thirty-seven in 1993[4]), program diversity (there are over one hundred satellite service channels[5]), reach (passing over ninety percent of households), and customer base (sixty-three percent of television households[6]). Yet cable television's very success also bore the seeds of its subsequent reregulation. Cable's attractiveness raised demand for it, while the high cost of upgrade and the debt repayment of expansion put pressure on the supply side. With only limited multichannel competition, cable rates increased—according to Congress, three times as fast as inflation. At the same time, the quality of service led to many consumer complaints, but local governments across the country lacked regulatory powers to remedy the situation.

On the content side, cable's high penetration gave the cable industry increasing gatekeeper power over access to a viewer by a program provider. They had the power to pick and choose program channels and exclude those posing a threat to their own affiliated program channels. Furthermore, they could deny popular program channels to competing delivery media such as direct satellite broadcasters, microwave "wireless cable" operators, telephone companies, and alternative cable systems. With over-the-air broadcasting channels received increasingly over the cable wire and reception antennas dismantled, television broadcasters were worried about not being carried over cable or being placed on unfavorable spots on the dial.

As a consequence of these various concerns, a broad-based coalition of consumer groups, broadcasters, municipalities, and other potential competitive media formed and campaigned for reregulation. Allied with the cable industry were the Hollywood studios, the White House, and some deregulation-minded legislators.

In 1990, a regulatory bill passed the House but failed in the Senate. In 1991, the FCC, under Congressional pressure, adopted a stricter definition of "effective competition." But for Congress it was a matter of too little, too late. Soon, new bills were introduced by Representative Edward Markey and Senators Ernest Hollings, Daniel Inouye, and John Danforth.

At that point, the cable television industry could possibly have averted large-scale regulation by supporting a real opening of multichannel television to much greater competition, substituting market forces for regulation. But the cable industry, confident that a presi-

4. SUSAN TYLER EASTMAN, BROADCAST/CABLE PROGRAMMING: STRATEGIES AND PRACTICES 246 (4th ed. 1993).

5. *Id.* at 247.

6. A.C. NIELSEN CO., NIELSEN REPORT ON TELEVISION (Feb. 1994), *cited in* NATIONAL CABLE TELEVISION ASS'N, CABLE TELEVISION DEVELOPMENTS (Apr. 1994).

dential veto would hold, as thirty-five previous Bush vetoes had, opposed both regulation and greater competition. It lost when rural and moderate Republicans broke rank with President Bush and voted for a regulatory bill. The vote was 74-25 in the Senate[7] and 308-114 in the House.[8]

The sprawling new Act's major provisions sought, among others:

- To reimpose rate regulation by local governments on "basic tier" cable service where a cable system is not subject to effective competition;
- To allow broadcasters to demand payment by cable television operators for "retransmission consent;"
- To adopt "must-carry" requirements, i.e. access rights of broadcasters to the cable network without compensation;
- To require program channel suppliers affiliated with cable companies to license programming to competing distribution media;
- To require cable companies, depending upon system capacity and concentration, to carry leased commercial access channels (subject to regulated rates and substitutable for minority and educational programming) and public access channels;
- To prohibit a cable operator from owning a satellite master antenna television service or a multichannel multipoint distribution service in the same franchise area; and
- To require leased and public access programs of an "adult" nature to be segregated on a separate channel, available only to those who request it in writing, with cable companies subject to potential liability for the programs.

II
The Issues

A major provision of the 1992 Cable Act is the "must-carry" obligation under which cable operators are required to carry the over-the-air broadcast signals available in their area. Within an hour of its enactment, the Turner Broadcasting Corporation challenged the provision in court.[9] Within twenty-two months, the Supreme Court handed down a decision.[10]

The Court's shaky 5-4 decision gave neither side a solid win. There were five separate opinions, and the majority included the retiring Justice Blackmun. Significantly, the must-carry provision remained in place with the Court finding the rules to be content-neutral

7. 138 CONG. REC S16,676 (daily ed. Oct. 5, 1992).
8. 138 CONG. REC H11,487-88 (daily ed. Oct. 5, 1992).
9. Turner Broadcasting Sys., Inc. v. FCC, No. 92-2247 (D.D.C. filed Oct. 5, 1992).
10. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993), *reh'g denied*, 115 S. Ct. 30 (1994).

and requiring an intermediate level of scrutiny.[11] But the Court remanded the factual issue of harm to the broadcasters to the lower courts.[12] The majority opinion, written by Justice Kennedy, concluded that the must-carry rules were justified but that the lower court had not adequately shown that broadcasting was "in genuine jeopardy and in need of the protections afforded by must-carry," and, even with such a showing, that must-carry "does not burden substantially more speech than is necessary to further the government's legitimate interests."[13] The majority found the law justified because of the "special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[14] In a dissenting opinion, Justice O'Connor, joined by Scalia, Thomas, and Ginsburg, argued that the rules were clearly content-based and thus called for a strict scrutiny test of compelling state interest and no less drastic means. "[M]y conclusion that must-carry rules are content-based leads me to conclude that they are an impermissible restraint on the cable operators' editorial discretion as well as on the cable programmers' speech."[15] More generally, eight of the Justices concurred that cable operators should have greater First Amendment rights than those of broadcasters but not the same First Amendment protection as the print media.

Analyzing the must-carry question, Burt Neuborne, Professor of Law at New York University and former Legal Director of the American Civil Liberties Union, argues in his article that one must uncouple the constitutional issues of the actual speech from the conduit medium, even if one is supportive of the vertical integration. He points to the "symbiotic relationship" between speech and amplifying technologies that increase its potential audience. He concludes that the conduit can be regulated as a technical entity, while the standard for regulation of content is much higher.

The opposite conclusion is reached by Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies at the Cato Institute. Pilon views the Court's fundamental flaw to be its basic method of constitutional analysis—the application of a multilevel system of scrutiny. "[T]he chances of a law being found constitutional are almost a direct function of the level of judicial scrutiny the law receives—'strict,' 'intermediate,' 'relaxed,' or 'minimal'." Such "scrutiny the-

11. *Id.* at 2469.
12. *Id.* at 2472.
13. *Id.* at 2468, 2470-72.
14. *Id.* at 2468.
15. *Id.* at 2479 (O'Connor, J., dissenting).

ory," Pilon argues, has no basis in the original design of the Constitution.

A third position—must-carry, but for public broadcasters only—is advanced by Donald Hawthorne and Monroe Price of the Cardozo School of Law. They believe that a must-carry requirement for commercial broadcasters is constitutionally invalid because there is no meaningful content basis to give them preferential access to cable over their competitors. On the other hand, the authors argue for the constitutionality of mandated access of non-commercial stations, because their content and status meets congressional objectives.

Another question raised by the 1992 Cable Act is whether the owners of one medium can be precluded from controlling another. The 1992 Cable Act bars a cable operator from owning alternative video delivery systems (such as satellite master antenna systems or microwave "wireless cable") in the same franchise area. Edwin Baker, Professor of Law at the University of Pennsylvania Law School, addresses the cross-ownership rule and its First Amendment basis. He argues in favor of structural regulation to establish a diversity of information from antagonistic sources. To him, a telephone-cable merger would create an undesirable monopoly with market and political power.

In a similar vein, Professor Cass Sunstein of the Chicago Law School argues against First Amendment absolutism: "What seems to be government regulation of speech might, in some circumstances, promote free speech . . . what seems to be free speech in markets might, on reflection, amount to an abridgement of free speech." A communication distribution network, where it is a natural monopoly, could be regulated as a common carrier. To support this position, Sunstein presents a provocative paradigm that he calls a "New Deal for Speech." He reasons that when the government grants exclusive property rights in the form of licensing broadcasters, for example, a broadcaster becomes an agent of the government. The broadcaster's subsequent act of denying access to a programmer becomes, by association, a governmental act. Therefore, the speaker (programmer) can seek First Amendment protection against the restriction of its speech. Sunstein suggests that a strict reading of the First Amendment permits government to grant exclusive ownership rights to communication networks only with the condition of common carriage.

Looking at the issue of a cable operator's liability for indecent programming over its leased and public access channels, Professor Fred Schauer of the Kennedy School of Government at Harvard takes first issue with the frequent assertion that rights entail responsibilities.

He finds the cable operators' lost immunity to be largely symbolic in nature because media producers and conduits have historically been largely protected from liability for indecent, defamatory, and misleading programming. He points to the more important issue associated with a shifting of the cable industry's role in leased channels from that of a passive quasi-common carrier to one with editorial control over leased and public access channels. Schauer has a word of caution to the cable industry as it follows the editorial model of control over indecent programming. He suggests that a more advantageous position for the cable industry would be to follow the telephone model by defining itself as a common carrier of leased and public access channels.

Establishing the basic principles of cable regulation is one thing; implementing them is quite another. From a constitutional perspective, how did the FCC put Congress' mandates into effect? While this is an ongoing process, some early conclusions are possible. Professor Michael Meyerson of the University of Baltimore School of Law looks at the FCC's handling of indecent programming and home-shopping on cable. He finds that the FCC's holding the indecency restrictions constitutionally valid while discounting earlier court cases was without merit and misleading. "The FCC's analysis . . . reveals such an overeagerness to restrict constitutionally protected speech as to call into question the degree to which the Commission was sympathetic to the constitutional concerns its rules raised." But he is also sympathetic to the FCC's dilemma: "As a creature of Congress, an agency is prohibited from second-guessing its creator. It is Dr. Frankenstein, not his monster, who gets the last word."

Congress, deeply distrustful of the deregulation-minded FCC of the Reagan and Bush years, left the FCC with little discretion. For example, in the absence of "effective competition," the 1992 Cable Act required the FCC to develop a methodology, under a tight deadline, to regulate rates for basic cable service. As it turns out, a Democratic FCC was soon at work, creating "benchmarks" against which actual price increases were measured. How well did the FCC do its job? The case of benchmarks is one instance in which the FCC's implementation of the 1992 Cable Act can be subjected to a quantitative analysis. Stanley Besen, author of the FCC's major 1980 Network Inquiry Study,[16] and John Woodbury, both of Charles River Associates, analyze the FCC's statistical methodology to estimate the benchmark rates—first determined at ten percent, and then, with a new chairman

16. FCC, NETWORK INQUIRY SPECIAL STAFF, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION (1980).

and new methodology, seventeen percent—and conclude that it was seriously flawed.[17]

One of the most sensitive free speech issues is the right not to speak. In the cable context, it is the right of owners of a program to use it as they see fit. Yet the 1992 Cable Act includes a "must-license" requirement according to which a cable-affiliated program provider must make its programs available to other multichannel program distributors under non-discriminatory terms. Professor Wendy Gordon and Anne Gowen of Boston University School of Law analyze this issue. They conclude that while those limitations on vendors' property rights may be questioned, they are in line with current practice in statutory intellectual property law as well as in judge-made tort and property law.

Many of these themes are picked up in a central symposium article by Robert Corn-Revere, of Hogan & Hartson, and a former legal assistant to long-time FCC Commissioner James Quello, who served as Acting Chairman during several of the FCC's 1992 Cable Act implementation proceedings. Corn-Revere traces the evolution of speech regulation in various media and describes how we are on the verge of a major shift in First Amendment doctrine in the emerging Multimedia Age. This has legislators, regulators, and courts in a box as they try to maintain the three regulatory models of print, telephone, and broadcast in an environment of converging technology. He argues for a return to the core values of the First Amendment, which he calls the "traditionalist perspective." The traditionalist approach assumes that different media may use a variety of technological means of distribution, but it treats these and other distinguishing characteristics as tools of analysis, not as catalysts for a separate constitutional standard.

III
Common Carriage as a Free Speech Remedy?

The authors provide fascinating reading. Some of them clearly know more about constitutional law than about cable television, but even that distance can be helpful to those too close to the subject matter of media. Their conclusions are varied. Some, like Sunstein, advocate considerable regulation in order to protect diverse speech and other values. Others, like Corn-Revere, view that approach as precisely the problem. No summary can synthesize these divergent per-

17. Part of their analysis was originally developed on behalf of the cable firm Tele-Communications Inc. (TCI) for submission to the FCC.

spectives without overgeneralizing or trivializing. One issue, however, merits additional discussion—common carriage. It is advocated by several of the authors as the solution to assure free speech. Yet their recommendations on the exact nature of such common carriage remain vague, more in the nature of handwaving than of legal or policy analysis. Given the weight of the common carriage position, at least in the intellectual community, though less in Washington, D.C., it merits further discussion.

Precursors to common carriage go back to the Roman Empire and to the legal obligations of shipowners, innkeepers, and stablekeepers. In England, early common law placed certain duties on businesses which were considered "public callings." Common or public occupations included those of bakers, brewers, cab drivers, ferrymen, innkeepers, millers, smiths, surgeons, tailors, and wharfingers.[18] "Common" in that context meant "open to serving the general public."

The concept of common carriage crossed the Atlantic and became part of the American legal system. Common carriage was broadly applied to railroads and later other transportation as well as telecommunications media. In 1901 the Supreme Court held that at common law—i.e., even without a specific statute—a telegraph company is a common carrier and owes a duty of non-discrimination.[19]

Broadcasters (with the brief exception of an AT&T proposal in the 1920s to serve as a general broadcast service provider under a common carriage obligation) were never common carriers. Cable television, too, was never treated as a common carrier, being viewed at first as essentially a passive antenna system. Cable television companies, in providing most of their traditional services, are not considered common carriers.[20] The 1992 Cable Act did not change that, though "must-carry" requirements for over-the-air broadcasters, as well as public and leased channels, created some access rights.

In the early 1970s, the White House's new Office of Telecommunications Policy proposed a common carrier status; however, the idea never got very far. More recently, regulatory proceedings into the nature of common carriage for video services were undertaken by the New York Public Service Commission,[21] and by the Federal Commu-

18. *See* CHARLES PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 83 (2d ed. 1984).

19. Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 98 (1901).

20. 47 U.S.C. § 541(d) (1984).

21. New York State Public Service Commission, Opinion and Order Adopting Regulations Concerning Common Carriage, No. 89-C-099 (1990). Proceedings initiated by one of the authors when he served as a Public Service Commissioner for New York State.

nications Commission proceeding on video dialtone.[22] Recent legislative initiatives[23] as well as the Clinton Administration's proposal of a new regulatory category for switched interactive digital broadband (Title VII)[24] have pursued the common carrier theme.

In 1994, the Clinton Administration proposed the enactment of a new regulatory category (Title VII of the 1934 Communications Act) under which providers of switched interactive digital broadband services could elect to be regulated under a new system rather than the old.[25] This new system would require interconnection, universal service, payments to local governments, and "open access," a term not specified other than that it would apply to "anyone, including end users and information service providers to transmit information, including voice, data, and video programming, on a non-discriminatory basis."[26] It comes close to common carriage, without using the term.

Yet all these policy proceedings are conducted in a partial-equilibrium setting. They fail to take fully into account the system-wide dynamics of interaction, in this case between common carriers and contract carriers. Those authors in this symposium advocating common carriage fall into the same trap of not recognizing the impact of competition on common carriage.

The institution of common carriage, historically the foundation of the way telecommunications are delivered, will not survive in the long term. To clarify, "common carriers" (the misnomer often used to refer to telephone companies) will continue to exist, but the status under which they operate—offering service on a non-discriminatory basis, neutral as to use and user—will not.[27]

This conclusion is reached reluctantly. Common carriage, after all, is of substantial social value. It extends free speech principles to privately-owned carriers. It is an arrangement that promotes diversity of content services, reduces market forces, promotes interconnec-

22. *In re* Telephone Company-Cable Television Cross-Ownership Rules, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking in CC Docket No. 87-266*, 7 FCC Rcd. 5781 (1992).

23. *National Communications Competition and Information Infrastructure Act of 1993: Hearings on H.R. 3636 Before the Subcomm. on Telecommunications and Finance of the House of Representatives Comm. on Energy and Commerce*, 103d Cong., 1st Sess. (1993); S. REP. NO. 1086, 103d Cong., 1st Sess. (1993); S. REP. NO. 1822, 103d Cong., 2d Sess. (1994).

24. Clinton Administration White Paper on Communications Act Reform 5 (issued Jan. 27, 1994), *reprinted in* 18 DAILY REP. FOR EXECUTIVES (BNA), at M1 (Jan. 28, 1994).

25. *Id.*

26. *Id.*

27. For details of the analysis, see Eli Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, TELECOMMUNICATIONS POLICY, Aug. 1994, at 435.

tion, encourages competition, assists the universality of infrastructure services, reduces transaction cost, and limits liability.

Following the late Ithiel de Sola Pool, the noted MIT political scientist of media, it is often observed that telephone companies operate on common carriage, private publishers follow free speech principles, and broadcasters and cable companies operate on some not entirely free basis since they are licensed and regulated.[28] But what happens when the walls separating these realms crumble?

The problem for common carriage is not other competing common carriers but private contract carriers without the need to serve everybody on equal terms. In head-to-head competition between a common carrier and a private contract carrier, the former is at an inherent disadvantage. The reasons are as follows:

- A common carrier cannot use differentiated pricing in the same way that a private contract carrier can, due to its non-discrimination obligation and because it cannot prevent arbitrage;
- A common carrier must provide service to a contract carrier, but not vice-versa. It must provide its competition with its own low-cost segments, but has no access to those of a rival;
- A contract carrier can pick customers and avoid high-risk customers;
- A contract carrier can manage the competition among its customers and benefit from it.

The conclusion is, therefore, that a contract carrier will be economically more profitable than a common carrier, essentially because it has more flexibility in setting pricing, service conditions, and choice of customer.

It is not likely that the common carriers will simply sit by as their competitors prevail. They will also make a differentiation according to customers, partly based on the argument of "meeting competition." The de-averaging of prices would become standard, and negotiated rates would spread. Any non-trivial differentiation means that some potential users or uses can be excluded.

The Clinton Administration's 1994 proposal of Title VII regulation was mindful of the asymmetry in regulation between common and private carriers and of the importance of common carriage's open access. It proposed a unified treatment for new switched interactive digital broadband services, but the voluntary nature of this regulation makes this approach meaningless. Contract carriers are unlikely to

28. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983). *See also* ITHIEL DE SOLA POOL, TECHNOLOGIES WITHOUT BOUNDARIES (Eli Noam ed., 1990).

assume voluntarily the obligations of open access, plus universal service, mandatory interconnection, and local franchise fees.

Could the problem of common carriage's instability under competition be resolved by making everyone a common carrier? That would eliminate any competitive disadvantage relative to private carriage. It would also radically transform all media, because where would one draw the line? Wherever it is, those inside it would be at a disadvantage to those outside. To be consistent, one would have to include broadcasters, private telephone networks, and even enhanced services! It is incorrect to believe—as many do—that one could simply limit common carriage to the transmission conduit and separate it from "upper level" services. The same pressure of private carriage, in a competitive market, would emerge through resale of transmission service and through systems integration. Their advantage is that, given competition, they pay to transmission carriers a price based only on the latter's short-term marginal costs and can pass this low cost on to their customers. As a result of these advantages, resellers and integrators may well emerge in the future as service providers superior to common carriers themselves, even though they use the latter's underlying transmission facilities.

Where two principles—common carriage and private contract carriage—are fundamentally in conflict, it is natural to seek some reconciliation. But what can that be? There are several possibilities for a hybrid system. None of them is likely to work for long. We have already shown that if some competitors are common carriers while others are contract carriers, common carriage would lose out. Another possibility would be to have an "internal hybridization" within carriers themselves. Here, too, the advantages to a firm that resorts to contract carriage will continue to assert themselves, and thus will invariably lead to a process of "creeping self-privatization."[29]

The conclusion of the analysis is that common carriage will erode in time and that a hybrid co-existence will not be stable. This is not to say that the common carriers *qua* carriers will become extinct; many of them will remain significant players, but they will conduct their business as contract carriers. Common carriage as such will disappear. This will not happen overnight, of course. Intermediate arrangements

29. Still another approach would be common carrier rights of way. A contract carrier would not have to operate as a common carrier, but if it chose to interconnect with or access other networks by taking advantage of common carrier access rights, then it would be required to offer such rights reciprocally on part of its capacity upstream. This system ensures a coexistence of common and private carriage in a static but not dynamic world. Eli Noam, *The Superstructure of Infrastructure: Principles for a Future Without a Public Network*, 13 COMMUNICATIONS & STRATEGIES 109 (1994).

can buy several decades of transition time. The basic dynamics, however, will eventually assert themselves.

If common carriage is on its way out, what are the implications? In most areas where common carriage is held to be important, market competition would serve as well—in the reduction of market power, promotion of infrastructure, and limited liability. On the other hand, competition is less likely to result in optimal solutions in interconnection and free speech access. A diverse carrier system would have room for a large number of voices. However, the diversity of such voices might be narrower, because private carriers might not want to be identified with certain types of uses and users. Competition will not necessarily resolve this problem since all carriers will be under similar pressures. Take as an example birth control information by a hotline of an abortion clinic. Faced with negative publicity and pressure, service providers with discretion in the choice of customer may drop the service as a business decision. It is, of course, likely that "alternative" carriers and systems integrators will emerge to serve such uses. Yet this solves only part of the problem. The need for the various systems to access each other, and for information to travel over numerous interconnected carriers, means that the content restrictiveness of any one of the participants would require everyone else to institute content and usage tests before they can hand over or accept traffic, or they must agree to the most restrictive principles. Information travels across numerous subnetworks until it reaches its destination, and one cannot easily tell one bit apart from another bit. If each of these networks and systems integrators sets its own rules about which information is carried and which is not, information would not flow easily or cheaply.

The juxtaposition of positive and negatives may give the impression that a policy choice exists. But as has been argued above, once the basic choice has been made, correctly and unavoidably, in favor of competitive and non-compartmentalized transmission media and upper level services, the eventual unravelling of common carriage is also inevitable.

This suggests that new policy instruments will have to be found to deal with the negative effect on information diversity and flow. One way to do so is by replacing the principle of common carriage with a new principle, that of *third-party neutral interconnection*. A carrier can elect to be private by running its own self-contained infrastructure and having full control over its content, use, and access. But if it interconnects into other networks and accepts transmission traffic from them, it cannot pick some bits over other bits. While a private carrier

can be selective in its direct customers, whether they are end-users or content providers, it cannot selectively transmit traffic passed on to it by another interconnected carrier by the latter's own customers, based on content, uses, or usage. This does not require interconnection or transmission on equal terms, as in the case of common carriage, but it establishes the possibility of arbitrage if differentiated pricing occurs. All of common carriage's goals of free-flow, low transaction cost, and no liability goals can thus be preserved, within a competitive system.

This new system, and others that will no doubt be proposed, is part of the deregulatory and post-deregulatory agenda. Nostalgia for the tools appropriate to a past media system is no substitute. When the 1992 Cable Act will be reformed—as it inevitably will be—it is necessary to have alternative constructs. One must measure them with a fundamental yardstick, freedom of expression.