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Questioning Broadcast Regulation,

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SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST. By *Matthew L. Spitzer.* New Haven: Yale University Press. 1986. Pp. xii, 163. $15.

Matthew Spitzer has written an ambitious and unusual book, intended to answer the question whether it is right for our society to "regulat[e] broadcasting more intrusively than print" (p. xi). The book is unusual not because of the question it addresses, which has become commonplace in the communications law field,[1] but because of the roads Spitzer travels in answering it. In part 1 of the book, *Economic Rationales for Treating the Media Differently,* Spitzer draws upon the work of such law and economics movement luminaries as Ronald Coase[2] and Bruce Owen[3] to conclude that ultimately there is no justification for government regulation of broadcast content. The right to broadcast, Spitzer argues, could efficiently be allocated by a market rather than by an administrative mechanism, and nothing in the resulting industry structure would demand the sort of content regulation in place today. In part 2 of the book, *Rationales about Effects on Viewers,* Spitzer examines a variety of studies contained in the psychological literature relating to the effects on viewers of various categories of video programming. There, too, he finds no justification for existing broadcast regulation.

Spitzer's decision to draw on economic and psychological scholarship in evaluating broadcast regulation is tantalizing. Spitzer, however, does not in fact use those disciplines to evaluate broadcasting regulation in any broad sense. With rare exceptions, he does not ask whether particular approaches to regulating broadcasting are good policy or bad. Rather, he asks only whether those approaches for broadcasting are different from those in place for print, and, if so, whether the differences can be justified with reference to differences between the print and broadcasting media themselves. Thus, for example, because we regulate print through a market mechanism,

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1. *See, e.g.,* D. GINSBURG, REGULATION OF BROADCASTING 46-74 (1979).

2. *See* Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1 (1959).

3. *See* B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION (1975); *see also* B. OWEN, J. BEEBE & W. MANNING, JR., TELEVISION ECONOMICS (1974).

Spitzer addresses himself to whether any differences between broadcast and print justify our failure to regulate broadcast through a similar mechanism. In marshalling his arguments that we *could* regulate broadcasting through a market mechanism, just as we do print, he declines to ask other questions: Would this be the best regulatory system we could put in place? Is there anything good about existing broadcast regulation, and why is it there? What goals should we be trying to pursue?

Spitzer also declines to ask other questions. He does not ask, for example, whether content regulation can be justified under our *current* system for allocating the right to broadcast. If we do allocate the right to broadcast by means of an administrative agency, does that fact justify or require content regulation, or are the two issues wholly separate? Spitzer considers the matter irrelevant to his analysis.[4]

These gaps seem to stem from Spitzer's determination to construct a line of argument that, if all its links hold, will get him to his desired result; he seems more intent on doing that than on exploring the issues he meets along the way. He ducks a number of interesting questions through his approach to burden of proof, which he places on the opponents of his position.[5] For example, after Spitzer presents a speculative plan for allocating broadcast rights through the market, he indicates that he is entitled to assume that "the details . . . can be worked out . . . until someone produces convincing data or theories" to the contrary (p. 26). Spitzer rejects localism — the notion that we should encourage broadcast outlets oriented towards local areas — as a legitimate concern for broadcast regulators, on the ground that its proponents have not presented empirical data demonstrating, for example, that broadcast coverage of local political news has positive effects on voting (p. 41). He states that he can discount the argument that a ban on violence, pornography, or profanity in broadcast would benefit society more than a similar ban in print, because nobody has provided "specific data" showing that it would (p. 129).

I found Spitzer's approach disappointing, because the research he cites relates directly to a question I would have preferred to see him address. Our regulation of the mass media is rooted in a basic set of beliefs about the role of communication and media in our society. We believe in a marketplace of ideas in which all members of society have the opportunity to speak and convince others of the truthfulness of their views; we believe that in that marketplace we engage in discourse

4. P. 26. Spitzer does at one point suggest that administrative allocation of the right to broadcast imports political distortion into the licensing process, and thus threatens a pernicious form of content control, but he does not elaborate. Pp. 63-64.

5. Late in the book, Spitzer does explicitly address the question of burden of proof, and recognizes that its placement may determine the answers to the questions he raises in those discussions. Pp. 93-94, 113-14. He does not seem to recognize, however, the relevance of the same point elsewhere in his book.

that is essentially rational. Yet the analysis Spitzer undertakes throughout the book helps to demonstrate, if only incidentally, that most of these beliefs are part of a myth structure that corresponds only incompletely to reality. Spitzer declines to ask what implications this has for our regulation of mass communication. Indeed, under his analysis, the only relevant question is whether the myth structure fails in the same way for print and broadcast media.

In this review I will focus in large part on the first section of Spitzer's book, which contains his economic analysis and was previously published as *Controlling the Content of Print and Broadcast.*[6] I will do so not because I think the psychological issues Spitzer addresses in the latter portion of his book are unimportant, but because Spitzer himself has rather less to say about them. For the most part, Spitzer's second section is devoted not to analytical material but to his summary of a number of psychological studies; he sums up their cumulative impact with the conclusion "not proved." While that conclusion is open to some criticism, I think that the first part contains the more interesting analysis and is more usefully treated at length here.

I

As Spitzer points out, there is no automatic reason why the right to broadcast must be parceled out by an administrative agency using the licensing model. Many rights in our society, after all, are not allocated that way. Instead, we use a property rights model. Under that set of rules, the rights to use and control a thing are bundled up into the concept of "ownership"; the "owner" has fairly absolute control in the first instance over the rights to use a thing, but can distribute them to others through a system based on private agreements. Those rules by now have become fairly complicated, as a glance at the Uniform Commercial Code or any state's probate law demonstrates.

We use a property rights model to regulate the right to speak via the printed word. I do not have the absolute right to write my thoughts on a piece of paper, photocopy the paper, and distribute it to others; I must first own the paper and photocopier, or have permission from their owner(s) to use them. If I go around writing on paper that belongs to others, or otherwise using communications resources that are owned by others, I can be arrested or sued. These are not trivial points. Rather, the system created by property rights regulation is one under which freedom of the press may be available only to those who own one.[7] On the other hand, this market-based approach is our sole

6. Spitzer, *Controlling the Content of Print and Broadcast,* 58 S. CAL. L. REV. 1349 (1985).

7. I heard this maxim long ago, with no attribution; Sanford Levinson, in a recent book review, attributes a similarly worded thought to A.J. Liebling. *See* Levinson, *Regulating Campaign Activity: The New Road to Contradiction?,* 83 MICH. L. REV. 939, 946 (1985).

important mode of regulation of the right to communicate via print; we have, for example, established no rules for parceling out that right by way of an administrative mechanism.

We could use an administrative mechanism to distribute the right to speak via the printed word. This might involve the establishment of a Federal Paper Commission, with the duty of allocating among the citizenry the right to communicate in print. As Spitzer poses the notion, paper is to the written word what broadcast spectrum is to the electronic word: The Federal Paper Commission might use the mode of distributing equal amounts of paper to all American citizens, or perhaps of evaluating the messages that Americans wished to write and distributing the most paper to the applicants with the most worthy messages.

Similarly, we could change the rules we now use for regulating broadcast communication. We now distribute the right to broadcast, that is, to use broadcast spectrum, through an administrative mechanism. The Federal Communications Commission allocates the right to broadcast by distributing revocable licenses to do so. It decides who should get the licenses, and whether they should keep them, by making case-by-case public interest determinations.[8] We could, at least in theory, allocate broadcast spectrum through a property rights mechanism instead. We could, as Spitzer explains, "establish[ ] a system of private property in spectrum, creating in effect 'deeds' to certain frequencies during certain periods of time and at certain field strengths. Such deeds would . . . confer[ ] the right to exclude others and would . . . rel[y] on tort, contract, and criminal laws for enforcement" (p. 3). Spitzer devotes chapter 1 of his book to proving that such a system would serve the goal of economic efficiency at least as well as the one we now have in place.[9]

The aspect of Spitzer's analysis deserving most immediate comment is his choice of the criteria a regulatory system should satisfy. Spitzer begins with the notion that various arguments for the current regulatory system "depend, in one way or another, upon the norm of economic efficiency — the value of producing and distributing the mix of goods and services that consumers desire" (p. 9). He attributes to *Red Lion Broadcasting Co. v. FCC,*[10] the foundational Supreme Court decision regarding government regulation of broadcast content, the

8. Our current system, of course, has property rights aspects; licenses once awarded can be bought and sold. Not all countries utilizing an administrative mechanism incorporate this feature. In Japan, for example, broadcast licenses are essentially inalienable. Our system is nonetheless quite different from a true property rights system; *see* text following note 15 *infra.*

9. Spitzer does not address the question of how we might put such a system in place in the first instance. As for that question, see, for example, De Vany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study,* 21 STAN. L. REV. 1499 (1969).

10. 395 U.S. 367 (1969).

notion that "economic efficiency requires that the government own all the spectrum rights" (p. 7). This is a surprising formulation. *Red Lion,* after all, never mentions efficiency as such; it was decided before reference by legal scholars to economic efficiency became fashionable. The opinion in *Red Lion* seems to me to rest most firmly on the notion that if we allocated and regulated the right to broadcast in a manner that gave broadcasters rights analogous to those of frequency "owners," then the nature of the technology involved would limit access to the means of broadcast communication to a few persons or corporations; and that *non*economic, first amendment considerations make such a choice unacceptable. Spitzer clearly understands this argument. He recasts *Red Lion* as primarily concerned with efficiency, however, because he takes it for granted that efficiency should be our first goal in structuring a system of media regulation.[11] Spitzer sees no need to justify his use of the efficiency criterion, and seems insensitive to arguments that might be made against it. He rejects the notion that broadcast scarcity might impede efficient distribution through a market system, pointing out that we commonly "distribute much that is . . . scarce — diamonds, gold, silver, rare paintings, and so forth" efficiently through the market (p. 12). This formulation calls forth its own attack. The key to the economic efficiency norm is that goods are distributed to those willing to pay the most for them. Spitzer gives little attention to the question of whether that norm *should* govern distribution of rights to communicate, as it does distribution of diamonds and gold. We do not, for example, distribute the right to vote according to an efficiency-oriented mechanism. If we did, poll taxes would be required, rather than constitutionally impermissible.[12] Indeed, the most efficient system might well auction the right to vote to those willing to pay the most. The current system, by contrast, is highly inefficient: The vote is given to many for whom it is valueless, while those who would be willing to pay a great deal for the right to cast multiple votes are denied the opportunity to do so. Spitzer ignores the possibility that we might want to structure the right to communicate more like the voting right to which it is related, and less like the right to own diamonds and fine art.

Spitzer's thinking in this regard sometimes seems to reflect the notion that we should prefer regulation through a property rights model because it is not really government regulation at all. This has intuitive appeal; we are all used to the traditional law school curriculum's clas-

11. For another analysis of broadcast regulation that places heavy weight on economic efficiency, see S. BESEN, T. KRATTENMAKER, A. METZGER & J. WOODBURY, MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC (1984) [hereinafter S. BESEN]. Besen, Krattenmaker, Metzger, and Woodbury attempt at the outset to consider the goals of broadcast regulation, and list goals other than efficiency that they feel such regulation should achieve. *See id.* at 21-30.

12. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

sification of legal doctrine into public administrative law, the domain of government regulation, and private contracts and property law, the domain of purely private ordering. Yet it is misleading to think that the modes of social ordering that have come down to us from the British common law are so natural that they are not really regulation. Allocation through an administrative mechanism and allocation through a property based market mechanism are simply different forms of social ordering.[13] Each requires a governmental hand to make it go. Regulation through a property rights model would not work if the government had not promulgated substantive rules allocating rights among owners, and had not established a mechanism to adjudicate those rights. Spitzer thus does not pose a choice between regulation and nonregulation; the only choice he presents is in the modes of regulation we put in place.[14]

Spitzer's own answer to all this presumably would be that we have already made a choice to structure the right to communicate in print by means of a market mechanism and that the goal of his book is simply to determine whether differences between print and broadcast themselves justify a different approach to the right to communicate electronically. The answer, though, seems both unsatisfying and insufficient. It avoids the deeper questions that we might ask as to how to structure our mass media regulation. And to the extent that Spitzer sets aside, as outside the scope of the book, any profound inquiry into what our goals should be in regulating the mass media, whether through administrative or market mechanisms, he disserves even the narrow goal of comparing print and broadcast. He misses the chance for a more nuanced discussion of whether the same regulatory forms in print and broadcast would indeed serve those goals equally well.

II

Spitzer's analysis of how a market-based system for broadcast allo-

13. This point is especially patent where, as here, it requires a certain degree of imagination for the law giver to find and define "property" around which the rights derived from the property rights model can be structured.

14. We could, of course, abstain from regulating broadcasting at all. The closest we have ever come to that position was in 1926-1927, after a court held that while the Secretary of Commerce was obligated to grant a license to each radio license applicant, and had the power to assign each to a frequency, he had no power to enforce that assignment if the licensee chose to ignore it. *See* United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926); *see also* 35 Op. Atty. Gen. 126 (1926) (regulatory powers of the Secretary of Commerce limited to designating normal wave lengths and fixing the times during which stations may operate). This ruling led to rampant interference, chaos in the radio industry, and the Radio Act of 1927. *See* Natl. Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943); *see generally* I. POOL, TECHNOLOGIES OF FREEDOM 112-16 (1983). In contrast, Italy's television industry survived quite nicely — and by some measures flourished — after a court decision struck down regulation of TV broadcasting. *See* Sassoon, *Italy: The Advent of Private Broadcasting,* in THE POLITICS OF BROADCASTING (R. Kuhn ed. 1985). That country is only today moving towards reregulation. *See* Wilson, *Italian TV's Bare Market,* Washington Post, Jan. 23, 1988, at G3, col. 1.

cation might work nonetheless merits careful study. Its relevance for Spitzer lies in the following syllogism: Many arguments supporting government regulation of broadcast content flow from the asserted scarcity of broadcast spectrum, or otherwise from the economic structure of the broadcast industry. If, however, the scarcity of broadcast spectrum (to the extent that it exists) and the current industry structure are in fact the *results* of our decision to leave the right to broadcast in the hands of an administrative agency, then we can sweep away much of current thinking regarding the need for regulation of content.

In talking about a system in which the market allocates the right to broadcast, Spitzer has in mind not merely a system in which broadcast licenses can be bought and sold with minimal governmental oversight. Indeed, as Spitzer points out, we have such a system in place now. The Federal Communication Commission's (FCC) dismantling in recent years of its "anti-trafficking" rules, which restricted resale of broadcast licenses, has largely ended FCC oversight of the process by which those licenses are bought and sold.[15] Nor is Spitzer merely arguing for a system in which the FCC allocates licenses in the first instance on a nondiscretionary basis. Rather, he argues that the market could determine *all* issues involved in broadcast allocation: the use (*e.g.,* radio broadcast or microwave data transmission) each broadcaster could engage in, the bandwidth and power it could use, the times of day it could broadcast, and so on.

Spitzer recognizes the complexities involved in such an enterprise. He notes that the job of getting each chunk of bandwidth to an appropriate user in a manner that minimizes interference and thus maximizes value is made harder where there are many parties involved. The costs of simultaneous negotiation among all of the various parties may be high, and some parties may be tempted to hold out for too-high shares of the wealth created or to seek a free ride on the payments of others.[16] We do not leave the analogous (although more simple) job of allocating land among heavy industrial, light industrial, commercial, and residential uses to the market; rather, the institution of zoning recognizes that that task is better handled by an administrative

15. FCC "anti-trafficking rules" until recently barred station transfers, absent extenuating circumstances, if the licensee had held the station for less than three years. The Commission in 1982, however, decided that "the public interest could best be served through elimination of the three year rule and its underlying 'trafficking' policy." *Amendment of Section 73.3597,* 99 F.C.C.2d 971, 972 (1985). Under current FCC rules, Commission scrutiny of any sort of broadcast license transfer is triggered only if the station has been operated by the current licensee for less than a year *and* the current license was awarded after a comparative hearing or by means of a minority ownership preference. *See* 47 C.F.R. § 73.3597 (1987).

16. Spitzer dismisses "the question of whether disputes between many parties might produce litigation costs that exceed the cost of running an administrative agency" (p. 21) by means of a device by this point familiar to his readers; he puts the burden on those who believe that a market system would impose unacceptable transaction costs to offer "convincing data or theoretical arguments" to that effect. P. 22.

body. Spitzer is somewhat grudging about the need for zoning of the broadcast spectrum, noting that spectrum planners could err and that one American city (Houston) has managed to survive without land-use zoning. He does, however, ultimately concede that governmental zoning might be necessary to help allocate broadcast spectrum.

Nor is this the only governmental mechanism that we might need. There are other areas, Spitzer points out, in which "the market may need assistance" (p. 24). Where changing demand or technology calls for the reallocation of a large number of spectrum rights to different uses — for example, where efficiency calls for transmitting Direct Broadcast Satellite programming,[17] requiring a great deal of bandwidth, over frequencies previously occupied by a large number of broadcasters each using only narrow bandwidth — the chances of bargaining breakdown may be extreme. As for this problem, Spitzer suggests that the government might use eminent domain to force holders of broadcast rights to sell to the more efficient purchaser.[18] Spitzer, I think, neglects the difficulties that systematic use of eminent domain would entail.[19] In the land-use context, after all, eminent domain is only rarely used to benefit private construction, and government decisionmakers use the political process — and political criteria — to decide when it should be exercised. Spitzer would presumably find that mechanism unacceptable in the context of allocating broadcast spectrum. An administrative mechanism would have to be established to implement eminent domain; eminent domain by its nature requires a government body to exercise it, and at least traditionally the government sets initial valuations of the condemned property.[20]

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17. *See* text accompanying note 21 *infra.*

18. Spitzer also suggests another function for eminent domain; it could be used to assemble broadcast spectrum for functions such as the citizens' band. Indeed, although Spitzer doesn't discuss the point, the same mechanism would be equally applicable to the task of assembling spectrum for any governmental use; governmental uses today take up about half of the available broadcast spectrum. *See generally* Metzger & Burrus, *Radio Frequency Allocation in the Public Interest: Federal Government and Civilian Use,* 4 DUQ. L. REV. 1 (1966). Under Spitzer's plan, the government presumably would have to assemble spectrum for these uses either by eminent domain or by ordinary purchase. This, however, poses no problems for Spitzer's theory: The efficiency norm requires that the government pay for the resources it uses just like any other user. *See* Coase, *The Interdepartment Radio Advisory Committee,* 5 J.L. & ECON. 17 (1962).

19. He states that "[s]uch a taking of spectrum rights would promote efficient spectrum utilization in the presence of a market failure and would almost certainly be a 'public use' as required by the fifth amendment." P. 24. The constitutionality of this solution, however, seems to me less assured than Spitzer supposes. It is supported by eminent domain cases dealing with slum clearance, in particular the leading case of Berman v. Parker, 348 U.S. 26, 33-34 (1954). The various courts, however, have found invocation of eminent domain for the use of private parties a difficult and contentious issue. *See* R. NEELY, HOW COURTS GOVERN AMERICA 132-36 (1981). *Compare* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 632-33, 304 N.W.2d 455, 458-59 (1981), *with Poletown,* 410 Mich. at 636-45, 304 N.W.2d at 461-64 (Fitzgerald, J., dissenting), *and Poletown,* 410 Mich. at 662-81, 304 N.W.2d at 472-80 (Ryan, J., dissenting).

20. *See* 6 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 25.5 (P. Rohan recomp. rev. 3d ed. 1969).

In an attempt to avoid a discretionary government role, Spitzer suggests that eminent domain might be made available to anyone offering ten to twenty percent above the fair market value of the property sought to be condemned. The opportunities for legal manipulation of such a system, in which all rides on appraisal and valuation, though, seem tremendous. Further, the notion that *any* broadcast spectrum rights would be subject to automatic forced sale to any buyer willing to pay a premium over what its lawyer convinced a court was fair market value, is both frightening and far from the market ideal. Spitzer's answer that ex-broadcasters dispossessed of their frequency rights would be free to purchase the right to broadcast on other frequencies is, I think, not an adequate solution. Banishing a speaker from the broadcast dial until it can, perhaps, hire the lawyers and sink its premium into ousting some other speaker at some other location imposes more than mere inconvenience on the bought-out party, and invites abuse in an area of sensitive first amendment concerns.

I will not spend a great deal of time on this question, since it is always easy to pick on isolated points in an author's presentation. Spitzer himself appears to recognize that his discussion does not solve all problems; he feels, however, that he has done enough so that the burden is shifted onto others to produce "convincing data or theories" showing the unworkability of his approach (p. 26). The problem, though, emphasizes the tenuous nature of Spitzer's carefully posed line of argument. If Spitzer's eminent domain point falls, then his contention that we can use a market mechanism to allocate the right to broadcast may fall with it; and if that falls, then Spitzer's entire argument regarding the lack of economic justification for broadcast content regulation unravels.

III

Once we imagine government mechanisms for spectrum allocation such as eminent domain and zoning, it is not clear how much of a role is left for the market to play. It may be that a system characterized by these institutions would not be radically different from the one we have now, although license renewals would be unnecessary, licenses would be even more freely alienable than they are now, and the government would pay rather less attention than it does now to what licensees do with the bandwidth they are allocated. Assuming, however, that we could institute a system under which frequency uses were substantially less restrained by administrative decisionmaking than they are today, what sort of industry structure might result? Spitzer speculates that the resulting system would be quite different from the one we now have.

As Spitzer sees it, television freed from its existing legal and insti-

tutional constraints probably would be transmitted regionally over Direct Broadcast Satellites (DBS). In a DBS system, video (or other) signals are beamed up from "earth stations" and bounced off satellite transponders directly to individual roofs and backyards. A properly positioned satellite can cast a signal over the entire continental United States.[21] Spitzer argues that, on a cost-per-viewer basis, DBS provides easily the cheapest mode for video transmission.[22]

Faced with competition from more efficient DBS transmission, Spitzer reasons, most conventional over-the-air TV broadcasters would not survive. In each metropolitan area there might be one or two conventional stations offering local news, weather, and sports, and perhaps operating as broadcasters only during peak hours. Cable television might survive playing a similar role on an even more local scale. Most television signals, further, whether distributed via DBS or conventional broadcast stations, would be available only by subscription (that is, on a pay basis). Many of those stations would offer advertising as well.

What would be the consequences of such an industry structure for choosing the proper mode of regulation? For Spitzer, the striking thing about such a structure is its similarity to that which today characterizes the print media. Like print, broadcast uses valuable resources that are "scarce" in the economist's sense of the term: There is a finite amount of resource available, and if you set its price at zero, then demand will exceed supply. Like print, broadcast uses resources whose supply can be increased if we are willing to sink money and effort into the job. Like print, broadcast uses resources that could be efficiently distributed through a market mechanism.

As with print, Spitzer continues, broadcast of entertainment programming (though not news) involves no significant economies of scale in the creation and editing phases, but encounters substantial economies of scale in the transmission phase, leading to natural monopoly unless a common carrier transmission medium is made available.[23] As with print, a broadcast industry freed from administrative

21. *See* L. GROSS, THE NEW TELEVISION TECHNOLOGIES 17 (1983). Spitzer contemplates that DBS satellites will serve as regional broadcasters, covering "entire time zone[s]." Pp. 34-40.

22. Others, as Spitzer concedes, have strongly questioned this conclusion. They argue convincingly that given the cost of the dishes needed to receive DBS signals, a system relying on satellite transmission of video signals to community antennas and cable transmission of the signals to individual residences will almost always be cheaper. *See* Anderson, *The Economic, Legal and Scientific Implications of Direct Broadcast Satellites,* 7 COMM. & L. 3 (1985); Pool, *Technological Advances and the Future of International Broadcasting,* 13 [NHK] STUD. BROADCASTING 17, 26-31 (1977). Indeed, the system described in this footnote is precisely how premium cable television programming such as Home Box Office (HBO) is distributed today.

23. Spitzer at one point speculates that it might in appropriate circumstances be a good idea to require DBS satellites to operate as common carriers, offering transmission to all who are able to pay. Pp. 36-37. As it happens, domestic communications satellites have traditionally been operated on a common carrier basis; a satellite's transponders (its key radio equipment) were typically leased on a first-come, first-served basis, pursuant to "just and reasonable" cost-based

allocation might develop into a structure in which nationally and regionally oriented media coexist with smaller, local media.[24] Finally, as with print, most media in such a broadcast industry would depend economically on a mix of advertiser and reader/viewer payments, although a few might depend solely on one or the other.

The reader may have difficulty with a number of these characterizations. In general, I find that Spitzer strains too hard to find broadcast and print identical. Thus, for example, Spitzer describes the transmission phases in print and broadcast to be essentially similar. Spitzer points out that in the print media today, the nature of the transmission (that is, delivery) phase helps compartmentalize the market into newspaper, periodical, and book components. In the newspaper sector, speedy newspaper delivery within a metropolitan area is quite close to a natural monopoly, a factor that has contributed to the death of competition among major newspapers in our nation's cities.[25] In the periodical sector, low-cost common carrier transmission through the United States Postal Service has allowed the creation of a lively marketplace of ideas and information populated by some fairly small publishers. And in the book sector, a different transmission mechanism has also yielded favorable results.

Spitzer notes the economies of scale that characterize broadcast transmission, and argues that broadcasting is just like print in that it is characterized by "a naturally monopolistic bottleneck" in the transmission phase; he concludes that therefore "market structures for print and broadcast, absent regulatory shaping, would probably resemble one another considerably" (p. 40). Though I am not trained in economics, the existence of such a bottleneck for broadcast is much less clear to me. The cause of the bottleneck in print lies in the fact that low-cost, large-scale delivery to a large number of homes in a given area is a true natural monopoly; it is inefficient to have more than one entity doing the job.[26] Even if we accept Spitzer's conclu-

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tariffs. *See* 47 U.S.C. §§ 201, 202, 203 (1982). Notwithstanding the common carrier legal scheme, however, because leases were awarded on a long-term basis and satellites were in short supply, transponder service was not in fact available to all who were willing to pay cost-based rates. *See* Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1470 n.8 (D.C. Cir. 1984). In 1982, the FCC authorized domestic satellite owners to offer transponder service on other than a common carrier basis. *Id.* at 1471-73.

24. Spitzer implicitly concedes to his opponents the fact that the current broadcast industry is dominated by local media. While this adequately describes the formal law of broadcast regulation, it seems a curious description at least of television. The vast majority of television programming today, after all, is distributed nationally, either through the over-the-air networks or on cable. Broadcasting is not coming to resemble print by developing overarching national media, as Spitzer states; rather, today's media news is that print is developing national media such as *USA Today* and is thus coming to resemble broadcast.

25. *See generally* P. BENJAMINSON, DEATH IN THE AFTERNOON: AMERICA'S NEWSPAPER GIANTS STRUGGLE FOR SURVIVAL (1984).

26. The point, however, should be approached with caution; in Japan, for example, four mass-oriented, largely politically undifferentiated, national newspapers with circulations in the

sions about economies of scale in broadcast, however, those economies of scale do not a natural monopoly make. Under existing technology, each transmitting station or satellite can carry only a limited number of signals. The industry therefore demands a fair number of stations or satellites engaging in broadcast transmission; yet I am aware of no particular structural reason why it should be more efficient for one entity to control multiple stations or satellites. The problem, then, is not so much natural monopoly as simple entry barriers caused by the cost of access to transmission facilities. As our experience with domestic communications satellites has shown,[27] common carrier regulation may not significantly lower those barriers. Indeed, if Spitzer is wrong about the role that would be played by DBS, then the role of cable systems, supplying communities with programming that they themselves receive by satellite, may well present a natural monopoly bottleneck; but that would be a problem quite different from any existing in the print media today.[28]

One thing this analysis demonstrates, though, is that it is hard — and pointless — to make comparisons between the two media in a vacuum. In comparing existing print media and hypothetical broadcast, it is necessary to know what one is looking for, and thus what differences between the two industries are relevant. Indeed, print and broadcast are different in at least one obvious respect: one uses paper and the other uses broadcast spectrum. Is that difference relevant in structuring a regulatory system? The answer to that question depends on the criteria one wishes the regulatory system to satisfy.

IV

Spitzer's answers to the question of what criteria a regulatory system should satisfy are more reassuring on some occasions than on others. His performance is disturbing when he is forced to consider the relevance of one key difference he finds between broadcast and print: that the broadcast entities one would be likely to see in a property rights system would likely be larger than existing newspaper publishers (pp. 40-41). There are a variety of reasons one might consider the sheer size of dominant broadcasters to be a problem. For those concerned today about the media power of large publishers and broadcasters, size is itself a concern. Certainly FCC policy has historically been marked by a desire to limit the geographical reach of media entities so as to limit their media power.[29] For those concerned about ease

millions are distributed in the same service areas through home delivery. *See generally* Y. KIM, JAPANESE JOURNALISTS AND THEIR WORLD 5-8 (1981).

27. *See* note 23 *supra.*

28. As for that question, see Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd.*, 476 U.S. 488 (1986).

29. *See, e.g.*, 47 C.F.R. § 73.3555 (1987).

of entry into the industry, similarly, the size of its existing members is a key issue.

Spitzer does not address any of these arguments. He implicitly sees regional broadcasters, transmitting signals covering major portions of the country, as presenting no efficiency barrier nor any threat of oligopoly more worrisome than that already existing in the print media. He does mention the argument that the regulatory system should encourage local (*i.e.*, metropolitan area) broadcasters in the interests of fostering a sense of community in the cities the broadcasters serve and educating their populations about local political issues.[30] Largely without analysis, he rejects those arguments as unproved. The burden is on the "proponent of regulation," he states, to demonstrate convincingly that local broadcasting would have positive influences on voting behavior, or that it would better foster a sense of community than regional broadcasting (pp. 40-41). He sees no hard evidence that it would.

Later on, Spitzer more extensively addresses values other than economic efficiency. Relying on a well-known article by Lee Bollinger, he identifies those values as access and diversity.[31] He defines access as "the ability of any individual in a particular market to place his message within the reach of the audience," and diversity as "the heterogeneity of material produced in any given market" (p. 51).

Spitzer's treatment of these issues bypasses some interesting points. Spitzer divorces diversity from the notion that a free battle of differing ideas will aid the search for truth, and ties it instead to economic concerns; diversity, he reasons, serves consumer welfare by making many

30. "Localism" has been a key FCC regulatory goal for some decades. *See, e.g., Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 395 (1965); *cf.* S. BESEN, *supra* note 11, at 27-29 (discussing and rejecting several possible justifications for a policy favoring local broadcasters).

31. *See* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,* 75 MICH. L. REV. 1 (1976). Bollinger in this article suggested that the first amendment might be well served by imposing regulation designed to ensure "access" to either print or broadcast, and leaving the other free from such regulation. Society would thus have the benefit of both a medium marked by safeguards against the arbitrary use of private media power on the one hand, and a medium free from the potentially choking hand of the government regulator on the other. Spitzer rejects Bollinger's argument in part on the ground that it

> skews the distribution of values served in favor of those people who strongly prefer receiving one medium or the other. For example, those who cannot read . . . will be confined to the values of fair but homogenized communication. Conversely, those who live in areas unserved by broadcast may be confined to interesting but biased publications because none are subject to the fairness doctrine. Because millions of people cannot read and many own no television set, these effects are very important.

P. 46 (footnotes omitted). Spitzer notes as well that the current system fails to protect many newspapers from government interference, because the government can exercise leverage over broadcasters that are linked to the newspapers by ties of corporate affiliation. Pp. 50-51. This is certainly true, but it is hardly a telling blow against Bollinger's theory; Bollinger might simply respond that we should therefore ban corporate affiliations between newspapers and broadcasters.

types of programs available and thus making it more likely that viewers will be able to watch the types of programs they value most. The diversity Spitzer seeks appears to relate to the types of programming produced (such as news, sports, and situation comedies), rather than the range of ideas and values being put forward. Emphasizing consumer welfare, Spitzer implicitly denigrates approaches seeking to advance goods such as, say, improvement in the quality of public discourse, or informed voting, or participation in public affairs, as "castor oil" regulation, imposing what is seen as "good for the people regardless of their pleasure" (p. 52).

Spitzer's inattention to the social policy concerns animating our first amendment norms enables him to leave unexamined some of the predicates of his own argument. Access and diversity are important precisely because they advance first amendment values; indeed, to my mind, the only legitimate justification for any system of communications regulation is that it promotes first amendment values better than do other approaches.[32] Spitzer's analysis takes as a given that our regulation of the print media adequately achieves those values, and thus is an appropriate model for broadcast. Yet thinking about Spitzer's economic analysis helps lead to the conclusion that our first amendment beliefs are incompletely realized even in the print medium. That disparity between the ideal and the actual casts some doubt on his proposals for broadcast.

As Spitzer acknowledges, our society prizes the right to individual self-expression.[33] This might suggest the desirability of working towards a system in which as many people as possible have the option to engage in mass communication on a meaningful level. Our first amendment mythology is premised on the notion that almost everyone does have that option: We are confident that even the most impoverished proponents of unpopular causes have the right and the ability to distribute pamphlets to the masses, and thus ultimately to win acceptance of their ideas.[34] We bottom our thinking about the first amendment, in the print context, on that basis.

Yet this mythology, at best, seems to describe reality incompletely. In the marketplace of ideas, the better-funded voices speak louder than others,[35] and the ability of the average citizen, no matter how commit-

32. *But cf.* CBS v. Democratic Natl. Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (stressing the dangers we invite "when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values' ").

33. Pp. 45-46; *see, e.g.*, Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941) (first amendment protects "the need of many men to express their opinions on matters vital to them if life is to be worth living").

34. Some of our most elegant rhetoric about the importance of the first amendment was inspired by such hopeless causes. *E.g.*, Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

35. *See, e.g.*, Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

ted, to speak in any but the softest of voices is limited. Furthermore, that problem intuitively seems even more pronounced with regard to broadcast than to print, and Spitzer's proposal, at least superficially, seems designed to accentuate it. The existence of that gap between myth and reality poses an initial question: Is it possible or desirable for a regulatory system to level that playing field?

Another concept stressed in our first amendment jurisprudence is that of the "marketplace of ideas." It is at the core of our jurisprudence that mass communication should provide a forum in which important ideas can be thrashed out, and through which individuals can decide for themselves what is true and right.[36] If we were to take this idea seriously, then ideally we would want our mass media to be a forum where all, or most, important ideas were in fact discussed; we would want a diversity of viewpoints to be presented; and we would want ideas to prevail in that forum on the basis of reasoned argument, not on the basis of some voices simply drowning out others. Our dominant mythology provides that, by and large, all speakers and ideas indeed do have access to the communications marketplace, and that truth does win out in the end.[37] Further, to some extent, the system does work: While their circulation is not high, national magazines do provide a wide range of ideas and argument on a wide variety of issues.

Yet again, the ideals I have set out are in many ways far from our current reality. Scholars have documented the extent to which some ideas are not seriously discussed in our mass society at all,[38] and it is hard to deny the role played, in our consideration of various political questions, by the level of funds available to each side.[39] It is largely in response to the notion that the print model could not engender a proper marketplace of ideas in the broadcast arena that the FCC created "fairness" regulation in the first place.[40] Yet that regulation has

36. Thus Justice Holmes's famous pronouncement in *Abrams v. United States:* "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385 (1969). *But see* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting):

> [I]dentification of speech that falls within [first amendment] protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.

37. We have thus, for example, rejected as "wholly foreign to the First Amendment," Buckley v. Valeo, 424 U.S. 1, 49 (1976), the notion that there is any need to restrict corporate power to speak, though that power has been challenged "as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas." First Natl. Bank v. Bellotti, 435 U.S. 765, 810 (1978) (White, J., dissenting).

38. *See* C. LINDBLOM, POLITICS AND MARKETS 201-13 (1977).

39. *See* Wright, *supra* note 35.

40. For early expressions of Commission views, see *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949); *In re* United Broadcasting Co., 10 F.C.C. 515 (1945); *In re* The Mayflower Broadcasting Co., 8 F.C.C. 333 (1940); *In re* Young People's Assn. for the Propagation of the

obvious and serious defects: Not only does it inject governmental content regulation into broadcasting, but forcing people to talk about important issues and ideas, on pain of losing their licenses, seems a flawed method of achieving worthwhile discussion in the first place. These too are questions for the regulatory system: How can we set a system in place under which such "free and open encounter"[41] between opinions can take place?

We often speak of the first amendment as fostering the goal of political self-government. "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[42] This suggests that, in an ideal system, broadcasters would supply the community with the information it needs to govern itself. Yet that raises a point I have skimmed over in the last few pages: While the print media in large extent do cover news and political issues, television for the most part provides not news and opinion but entertainment, the relevance of which to the pressing issues of the day may be attenuated at best. Indeed, many broadcasters have traditionally provided the little news and public affairs programming that they have only because the FCC, through the fairness doctrine and attention to local programming, required them to do so.[43] How should the regulatory mechanism address this issue?

Finally, we might plausibly state that all persons possess a right to receive mass communication;[44] the Communications Act of 1934 states as its basic goal the provision "to *all* the people of the United States a rapid, efficient, Nation-wide . . . wire and radio communica-

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Gospel, 6 F.C.C. 178 (1938); *see also* Trinity Methodist Church, South v. Federal Radio Commn., 62 F.2d 850 (D.C. Cir. 1932), *cert. denied,* 288 U.S. 599 (1933); *In re* Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32, 33 (1929), *revd. on other grounds,* 37 F.2d 993 (D.C. Cir.), *cert. dismissed,* 281 U.S. 706 (1930).

The FCC held this past August that it would no longer enforce the fairness doctrine; that complex of rules, it held, "contravenes the First Amendment and thereby disserves the public interest." *In re* Syracuse Peace Council, 2 F.C.C. Rcd. 5043, ¶ 98 (Aug. 6, 1987). It is not yet clear as of this writing whether that ruling will stand.

41. J. MILTON, AREOPAGITICA (1644 & photo. reprint 1927).

42. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *quoted in* Note, *The Right to Know in First Amendment Analysis,* 57 TEXAS L. REV. 505, 506 (1979).

The Supreme Court has frequently identified self-government as the central social goal the first amendment serves. *See* First Natl. Bank v. Bellotti, 435 U.S. 765, 771, 776-77 (1978); Buckley v. Valeo, 424 U.S. 1, 14 (1976); Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

43. Regarding the fairness doctrine, see note 40 *supra.* Until a few years ago, informal Commission guidelines strongly encouraged broadcasters to program at least five percent local programming and at least five percent news and public affairs programming between 6 a.m. and midnight. The FCC abandoned those guidelines for radio in 1981, *see Deregulation of Radio,* 87 F.C.C.2d 797 (1981), and for television in 1984, *see Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations,* 98 F.C.C.2d 1076 (1984).

44. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965).

tion service with adequate facilities at reasonable charges."[45] But in a world characterized by the increasing importance of fast, easy, and cheap distribution of and access to information,[46] the prospect of creating a new class of the information-poor holds open the threat of further stratifying our society. This concern is not addressed by efficiency-oriented analyses of broadcast regulation; on the contrary, the essence of efficiency is that goods and services go to those ultimate consumers willing to pay the most for them. Yet the notion of a regulatory system that would provide an ever greater diversity of speech, at ever increasing prices, only to those listeners able to pay, may raise new threats to our basic beliefs and our basic values. This provides a final problem that no regulatory analysis can fail at least to address: Stephen Carter has warned of a "New First Amendment, with . . . guaranties of freedom of speech for those who can afford it, and freedom to listen for those who cannot."[47] Can we afford a system under which the poorer of us cannot afford even to listen?[48]

V

The coin of access and diversity may buy almost all of the goods set out above. Indeed, Spitzer would explain, the notion that as many people as possible should have the option to engage in mass communications is but the goal of access renamed; and, he might continue, the marketplace of ideas is just another reflection of the same concept. The most reasonable way to encourage the marketplace of ideas, he might argue, would be to structure our mass media around the initial goal that all speakers with an interest in presenting their views to the public through the mass media have the capability of doing so. Such a system would require a multiplicity of media outlets, and (I would add) would further require that those who control those outlets not have too great an incentive to avoid political issues on the ground that avoidance would attract greater audiences and better please advertisers.[49] But those factors in turn could be assured by achieving wide access to the means of mass communication. If all speakers primarily concerned with conveying political messages (as opposed to those pri-

45. 47 U.S.C. § 151 (1982) (emphasis added).

46. For a little-read perspective on this phenomenon, see Bowes, *Japan's Approach to an Information Society: A Critical Perspective,* 2 KEIO COMM. REV. 39 (1981).

47. Carter, *Technology, Democracy, and the Manipulation of Consent* (Book Review), 93 YALE L.J. 581, 607 (1984).

48. Spitzer questions whether we need to worry about some of these matters. Thus, so far as the goal of political self-government is concerned, he asks, "Do watching television and listening to the radio inform voters? If so, is it in a good way? Do voters alter their voting behavior based on this information? Do they vote more often? Are the changes, if any, good ones?" P. 41. He does not answer the questions he poses, explaining that they are "expressly beyond the scope of this book." *Id.*

49. *See* T. GITLIN, INSIDE PRIME TIME 252-60 (1983).

marily concerned with commercial success) in fact have access to the means of mass communications, the "marketplace of ideas" is assured.

As for broadcast's role in disseminating political information and ideas, it may be that broadcast is held back by the inherent limitations of the medium: A newspaper can choose to cover public affairs in depth, simply by adding additional pages. A single television signal, on the other hand, can devote additional time to one matter only by taking it away from another. The upshot is that to the extent that any given broadcast signal wishes to capture a large segment of the market, it must ration its programming and offer no more public affairs programming than the average viewer is interested in watching.

Yet here too, access — or at least multiplicity of media outlets — would help provide an answer. Our experience with both radio and cable television suggests that the greater the number of media outlets in a market, the greater the degree to which many of those speakers can and will direct their programming to special or fringe interests, and news and public affairs are a special interest that we can rely on at least a few speakers in such markets to cover fairly extensively. Thus if we achieve ease of access into the media marketplace, the problem of public affairs programming takes care of itself.[50]

And the problem of pricing some listeners out of the market? Here Spitzer's analysis would not provide a solution.[51] Yet if a property rights approach would achieve all of the other goals just discussed, that it falls short of perfection perhaps should not be considered fatal. It is worth moving on, therefore, to the question whether regulation of broadcasting through a property rights system would in fact achieve those goals.

Unfortunately for Spitzer's argument, his conclusion that a property rights system would best foster access and diversity does not follow smoothly from his earlier premises. Spitzer finds that the best source of both diversity of voices and access to the market for fringe speakers is the existence of a large number of media outlets, and concludes: "the crucial issue with respect to access and diversity is whether there are enough broadcasters in the market" (p. 62). Spitzer does not go on, however, to argue for a property rights based system on the ground that such a system would maximize the number of broadcast speakers. He fails to do so presumably because his analysis

50. The argument does not provide an answer to the objection that public affairs programming, competently done, may cost more to produce than its producers can receive in terms of the advertising or pay-TV value of the audiences they attract. For Spitzer, however, that fact would suggest that the programming (since it is not valued by the consumer) is not worth producing in the first place.

51. Some economists might suggest that a problem of this nature is best solved by providing the poor with information subsidies modeled after food stamps (or tuition tax credits). Much public policy today, however, is based on the realization that while such solutions are theoretically pure, that purity as a general matter does not justify the unwieldiness, layers of bureaucracy, and real-world problems they entail.

of market structure under a property rights system fails to convince him that that would be the case. Spitzer, after all, identifies economies of scale bottlenecks as the system's most prominent feature, and characterizes that system — in the absence of some sort of indistinct common carrier regulation — as dominated by national media giants.

Rather, Spitzer argues, if we take as a given that there are many broadcasters in a market, then because existing FCC rules in fact discourage diversity, a property rights based system will generate greater access and diversity than our existing one. If there are few broadcasters in a market, Spitzer argues, the existing system so badly serves access and diversity that there is no reason to believe that a property rights based system would not do as well. In that situation, a property rights based system should be preferred, since administrative allocation leads broadcasters to censor themselves to avoid offending powerful elected officials (p. 63). In any case, Spitzer argues, if we indeed wish to encourage access and diversity, a better answer is to require broadcasters to act as common carriers in the transmission phase, increasing both access and diversity by offering broadcast time to any speaker willing to pay for it.

Spitzer for the most part fails to support these conclusions. While he discusses a number of specific FCC rules that he states discourage the broadcast of diverse programming, he doesn't seem to argue that the problems he identifies are basic to any system that allocates the right to broadcast through an administrative agency.[52] To the extent that these are merely incidental mistakes marring our current system, they hardly support Spitzer's broader theoretical generalizations. Nor does Spitzer provide support for the view that under our current system, access is so difficult, and so skewed to certain segments of society, that a property rights based system in a concentrated market would do no less well. That may be true; yet there is some reason to believe the opposite.

The lesson of our antitrust laws is that, absent government intrusion, the market works particularly badly where ownership is concentrated and entry barriers are high. The newspaper industry presents a concrete example of that in the media context. Almost all areas of our country are served by newspaper monopolies,[53] with competition existing for the most part only at the very high ends of some markets (the *Wall Street Journal* and *New York Times*), and at the bottom end of the rest (the *National Enquirer* and its competitors).[54] Nor is the

52. Nor, I must confess, do I understand all the points that he makes. Spitzer's argument relating to multiple station affiliation, in particular, eludes me completely.

53. Of the top fifty media markets — those areas of the country most able to support competing daily newspapers — only eleven in fact do so. Packwood, *Let Newspapers be Newspapers,* Washington Post, Feb. 9, 1988, at A23, col. 1.

54. The position of *USA Today* on this scale is open to some discussion.

quality of any but a very few of these newspapers anything to write home about. Creative antitrust remedies, such as treating newspaper printing plants and distributorships as "essential facilities" to which all competitors must be given access,[55] might have created more competition within the industry (or, alternatively, might have thrown it into chaos). But we did not choose such remedies.

We avoided the print model in broadcast regulation in part because we feared that technical limitation entry barriers in that medium would stifle access.[56] The relative scarcity of broadcast frequencies suggested that the cost of access to those frequencies would be high, and that, even more so than in print, the principle of freedom of the press guaranteed to all who own one would provide an illusory freedom. The system we instituted instead, however, is also flawed from the perspective of access and diversity.[57]

What, then, is the solution? There has been no shortage of commentators pointing out recently that the current system works rather badly.[58] The FCC has demonstrated its own view of the regulation in place just a few years ago by dismantling most of it.[59] And indeed, the government content regulation, potential for political favoritism, and capability to still — rather than encourage — controversy inherent in the current system make it worth considering any practical alternative.

I have no definitive answers to offer here. This is perhaps the luxury of the book reviewer, that one can critique the work of others without supplying all of the answers oneself. Yet it seems to me that if we hope to bring our first amendment mythology and its reality closer together, the road to a workable answer could lie in Spitzer's reference to common carrier regulation. That regulation alone may not prove to be the tool best suited to our needs; Spitzer does not discuss how a common carrier system would work, and there is some reason to believe that it might not.[60] But Spitzer's economic analysis at least sug-

55. *See* Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978).

56. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376-77, 392 (1969); *see also* note 40 *supra* and accompanying text.

57. The FCC has undertaken some noteworthy initiatives designed to increase access to broadcasting. One such initiative was its focus on low-power television (LPTV) stations. These are television stations broadcasting with very low power and covering service areas roughly forty miles in diameter. The FCC first authorized LPTV in 1980, largely exempting it from regulation and hoping to allocate licenses to groups and individuals, especially minorities, who had not traditionally been part of the broadcasting scene. By 1985, there were about 80 stations on the air in the continental United States. License allocation, however, has been slow, and LPTV's future is unclear. *See* L. GROSS, THE NEW TELEVISION TECHNOLOGIES 141-45 (1983); *see also* Halpern, *Adirondack TV: A Low-Power Gamble,* N.Y. Times, Jan. 11, 1988, at B1, col. 2 (discussing a particular LPTV station).

58. *See, e.g.,* L. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

59. *See, e.g.,* notes 40 & 43 *supra.*

60. *See* note 23 *supra.*

gests that one way to promote more meaningful access, and thus the first amendment values we want to serve, could lie in creative structural regulation of the industry, perhaps with common carrier features, based loosely on the antitrust model.[61] The advent of new technology may give us the opportunity to put a new regulatory scheme in place, and such a scheme might allow the elimination of many of the features of the regulatory structure we now maintain. The fact that we don't now so regulate print should not be a dispositive bar; this may be our chance to try again and do a better job.

VI

I will have rather less to say about the second part of Professor Spitzer's book, in part because Spitzer himself has rather less to say in the second part of his book than he does in the first. In this part of the book, Spitzer examines a number of studies found in the psychological literature relating to the psychological effects of television watching generally, and of exposure to sexually explicit and violent programming in particular. Without engaging in extended theoretical analysis, he concludes that the studies for the most part do not justify different treatment of print and broadcast. He does conclude, however, that some regulation, on the zoning model, may be appropriate to shield children from profanity, pornography, and violence on the airwaves.

The psychological studies Spitzer canvasses in this part of his book relate to an attack on our "marketplace of ideas" mythology wholly different from any I have discussed so far. This attack, a deeper one, challenges the psychological premise of that metaphor. That premise is that we respond to communication on a rational level, and thus can fairly treat new ideas and information on the level of rational discourse: that is, "that there is on the whole a preponderance among mankind of rational opinions and rational conduct,"[62] and thus that we can properly treat speech as a competition of ideas in the metaphorical marketplace.

Much of the psychological literature Spitzer cites, however, tends to call that mythology into question. Spitzer discusses, for example, a study indicating that male college students who had watched a short movie of a gunpoint rape later showed greater propensity to give women targets electric shocks on a "Buss aggression machine" than did students who had watched movies of a talk show interview or movies of consensual sex.[63] Such a study might suggest that the students, on a

61. On the other hand, the recent controversy regarding a cross-ownership waiver allowing Rupert Murdoch to maintain ownership of both newspapers and television stations in New York and Boston demonstrates that the administration of even "neutral" structural rules can import political distortion into the regulatory mechanism. *See* N.Y. Times, Jan. 11, 1988, at A13, col. 1.

62. J.S. MILL, ON LIBERTY 17 (R. McCallum ed. 1946) (1859).

63. Each subject was told that he could use the machine to shock another person described to him as a fellow subject. The shocks were usually described as part of an evaluation of the other's

nonrational level, "learned" aggression against women from the films, almost as a conditioned response.[64] This raises questions that are especially troubling in light of the pernicious nature of the messages conveyed here: To what degree do people "learn" on a wholly nonrational level from the messages they receive? How far is the gap between that reality on the one hand, and the mythology that I have described on the other? Do we base our policy conclusions on views of the world that are not in fact accurate, and does it make sense to do so?

These are much the same sort of questions as those that I posed regarding the first part of Spitzer's book. Our regulation of the mass media is built upon a Lockean image of people as free, equal, rational agents, but the economic and psychological insights Spitzer draws upon call that image into question. As in the first part of his book, however, Spitzer does not address the question whether the models through which we think about speech fail us by being too far divorced from reality. Rather, he asks whether they fail us *in the same way* in print and in broadcast, and thus whether their failure can justify different regulation.

I have trouble with several of the steps Spitzer takes in travelling that road. First, as Spitzer acknowledges, he labors under a serious handicap in answering the question he does pose: whether we react to sexually explicit or violent material differently when it is presented in print or in video form. Almost none of the studies Spitzer examines were designed to answer that question.[65] Indeed, the difficulty in deciding what to use as "comparable" depictions of sex or violence in the various media suggest that no study could reliably answer that

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performance on some sort of test. In fact, the machine merely recorded the number and intensity of shocks that the subject tried to inflict. Pp. 77-80.

There is substantial reason to doubt whether studies of the performance of college students on Buss aggression machines say very much about the real world. Spitzer acknowledges this point, but dismisses it: "The resolution of this question is irrelevant for the purposes of this book, so long as it is resolved in the same way for print experiments and broadcast experiments." Pp. 143-44 n.12. For an exposition of the view that experimental data is useless in this area, see Wilson, *Violence, Pornography, and Social Science*, 22 PUB. INTEREST 45 (1971).

64. The study as described does not necessarily demonstrate nonrational learning on the students' part. The study was fairly complex, involving both subjects whom the experimenter had intentionally made angry before showing the films, and subjects who had not been made angry. The study also involved both male and female targets. When the target was male, both the consensual sex and the rape movies increased aggression (at least in angered subjects), and by roughly the same amount. When the target was female, only the rape film increased aggression. Pp. 78-79. Different aspects of the experiment might support a variety of explanations, including the one set out in text, or conversely, the notion that subjects in some cases became sexually aroused but, through what some psychologists call an arousal mislabeling mechanism, mistook their arousal for increased anger. Which hypotheses we come to accept, needless to say, can have implications for the policy conclusions we draw.

65. Spitzer does discuss one elaborate study designed to examine the relationship between London boys' propensity to engage in violence and their exposure to reports and stories of violence through television, newspapers, movies, and comic books. The study was financed entirely by the CBS television network. Pp. 107-10.

question.[66]

Further, one of Spitzer's conclusions — that "print [depictions of sexually explicit matter] may be slightly more potent than video" (p. 86) — seems to me almost wholly unrelated to the studies from which he purports to draw it.[67] Spitzer bases this conclusion on his statement that "sexually explicit print material may increase aggression regardless of whether or not subjects are angered, and regardless of whether or not they are disinhibited from aggression against women" (p. 86). When one pulls the jargon out of this sentence and tries to figure out the inference Spitzer has in mind, he is apparently saying two things. First, he is apparently saying that sexually explicit print material is more likely than video to lead to aggressive behavior in men who have *not* first been made angry by the experimenter. Second, he is apparently saying that sexually explicit print material is more likely than video to lead to aggressive behavior in men who have not been "disinhibited," that is, who have *not* been given repeated chances to aggress against women or been shown material whose message is that women invite or enjoy rape (p. 85).

The problem is that the studies Spitzer cites do not support these conclusions. He cites only one study that addresses the effect of sexually explicit print material on subjects who have not first been made angry, and criticizes that study as methodologically flawed.[68] He cites a study concluding that showing men video depictions of rape does increase their aggression against women even when they have not been first made angry.[69] Indeed, he cites studies indicating that the effect of showing at least some sexually explicit video material to angry male

66. Spitzer states, with reference to sexually explicit material, that "[p]hotographs and stories about the same explicitly erotic acts depicted in films or television could be used. A study employing such graphic printed material could test for the differential effects of the two media." P. 93. Yet this blinks the fact that movies and printed matter are different media, and a depiction in one can be transformed to the other only through a creative process. One depiction may be more skillfully done than another; a particular story may translate more effectively into one medium than to another. Thus if, for example, experimenters seek to make a movie out of a given (print) story, the results might well rest entirely on how expert a job of movie-making they do.

67. In examining the link between sexually explicit material and aggressive behavior, Spitzer walks through a fairly large number of studies exploring the effects of films, pictures, and short stories depicting rape and consensual sex on test subjects' proclivity to aggress and on their attitudes towards aggression in general and rape in particular.

> Print, television, film, radio, slides, and live readings were all employed.
>
> . . . Subjects were exposed to a broad range of sexually explicit matter, everything from consensual behavior to forced sexual contact which the victim detested to forced sex which the victim ultimately enjoyed. Some researchers added an anger variable, insulting or electronically [sic] shocking their subjects, while others did not. P. 77.

The test subjects were almost always men.

68. Spitzer criticizes the study on the ground that it did not distinguish between material depicting consensual sex and that depicting rape; he also states that the study "contradicted the findings of earlier works." P. 89.

69. The same study concluded that exposure to sexually explicit video material did not otherwise significantly increase aggression in subjects who had not been made angry. P. 85.

subjects was to increase their aggression, but that the effect of showing (print media) pictures of attractive nude or seminude women to such subjects was to make them *less* aggressive, perhaps by distracting them from their anger. The overall effect of the studies Spitzer cites, I believe, is ambiguous and unhelpful on the question he poses. But whatever those studies show, they do not show that sexually explicit print material is more "potent" than video.

Similarly, Spitzer's studies do not support the notion that print may increase aggression more than video where subjects have not been given repeated chances to aggress against women or shown material whose message is that women invite or enjoy rape. No print studies cited by Spitzer address the link between these factors and aggression at all. Some video studies tend to demonstrate a link between these factors and aggression. That is, one study indicates that angering male test subjects, showing them sexually explicit films, and then giving them the opportunity to aggress repeatedly against women, tends to lead to increased levels of aggression on the Buss aggression machine. Another indicates that showing male test subjects films that depict women as ultimately enjoying rape tends to increase those subjects' aggression against women. But if Spitzer is reasoning from these studies that *print* is more "potent" because it increases aggression "regardless of whether or not [the subjects] are disinhibited," (p. 86) then his conclusion does not follow at all.

Spitzer ultimately puts forward his own proposal for protecting listeners from unexpected objectionable material on the broadcast airwaves, and allowing parents to keep such material from their children. "[B]roadcast stations that transmit objectionable matter could be allowed to broadcast anything that would be legal if printed, but such stations would be concentrated in one section of the spectrum."[70] Adults scanning the broadcast spectrum could avoid that "adult" section if they chose. Further, retailers would not be allowed to sell devices receiving that portion of the spectrum to minors, and television locks would allow parents to disable their sets entirely.

Spitzer does not discuss, but I wonder, what the implications of this further zoning requirement would be for his plan for market allocation of spectrum. Spitzer argues early in the book that on the "quite plausible assumptions" that "telecommunications will continue to enjoy rapid technological development and that bureaucratic planners would be slow to modify zone assignments[,] . . . the zones would always be wrong" (pp. 23-24). As a practical matter, it seems to me that a rule relegating objectionable speech to specified spectrum zones would likely either impede the market's ability to allocate to other uses spectrum so zoned, or impose a substantial ban on such speech in the broadcast medium.

70. P. 126; *see also* p. 123.

VII

Spitzer's analysis of what he terms the economic justifications for content regulation of broadcast suffers from a lack of focus on the issue of content regulation, but Spitzer does advance engaging theses on what broadcasting might look like if we regulated it by means of a property rights model. While those theses are vulnerable to a number of attacks, the resulting analysis helps demonstrate the wide range of choices we have in shaping communications regulation. It also helps point up an economic insight we often lose sight of in thinking about communications regulation: Mass communication today is not a game that all can play, and indeed even receiving speech may increasingly prove too expensive for some.

Spitzer's analysis of the effects of various forms of programming on viewers even more directly points up a psychological insight we generally ignore in thinking about communications regulation: We process speech on nonrational levels, and to that extent "more speech" may not be the counter to pernicious messages that our system assumes that it is.

Spitzer's analysis thus brings fresh perspectives to the old question of how to regulate broadcasting. While many may quibble with Spitzer's conclusions and reasoning, the argument serves splendidly in stimulating the reader to new insights and ideas. Unfortunately, Spitzer seems to have no interest in answering some of the most important questions his analysis raises. Spitzer ultimately concludes that "anyone who cherishes the free market in print must regard the regulation of broadcasting as unjustified" (p. 131). But the "free market in print" has flaws as well as virtues. Before imposing it uncritically on broadcast, we might think further about whether the rules governing our print media are necessarily the best way to achieve the free speech we believe in.