Law Quadrangle (formerly Law Quad Notes)

Volume 26 | Number 3 Article 9

Spring 1982

Congressional Testimony: The First Amendment and New Communications Technologies

Lee C. Bollinger
University of Michigan Law School

The First Amendment and New Communications Technologies

Statement of

Lee C. Bollinger,

Professor of Law, The University of Michigan

Before the U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, September 15, 1981

The proliferation of new technologies of communication dazzles us all. Around us is the promise of abundance and diversity; even our vocabulary is expanding, as people talk of "dishes," "dbs," "videotext," and "home information centers." Amidst the confusion that often reigns over discussions about what the future will be, there is an anticipation of a life filled with a superabundance of information and ideas. How much will turn out to be reality and how much airy speculation it is now impossible to say. We can be sure, however, that there will be change, and, to a major degree, the form it will take will depend upon a myriad of choices we will make as we move through this period of technological transition. What fundamental principles, what values, should guide the making of those choices?

The First Amendment to the United States Constitution will set the boundaries of our choice-making capacity. What are those limits likely to be? The First Amendment is more than a negative statement about the limits of state involvement in the domain of expression. It is also for us a positive embodiment of basic social values which can, and should, guide the policy choices permitted us. What, then, are the values embodied in the First Amendment to which we should refer when facing the difficult choices ahead as we define the nature and shape of the American mass media?

These are the subjects of this paper.

I

As we look for guidance in defining the present and future constitutional limits to congressional authority in the communications field, our attention should first turn to our past experience with radio and television. History may occasionally, or even often, be a poor indicator of the future, but, as has been said, it may be one of the few we have. If we can acquire an understanding of the way in which the courts, and especially the Supreme Court, responded to the transition from a print medium to a bifuracted print and electronic mass media, we will be much better prepared to anticipate the role the First Amendment will play in the next stage of technological evolution. However, a simple application of past responses to the future will not work. We must also try to anticipate in what ways the future will diverge significantly from the past and, to the extent that it will, devise new policies which take account of those differences. Finally, we must also reach some judgment about how well the past has worked in fact before we extend its life.

We have only recently begun to appreciate that our half century of experience with government oversight of the electronic media and of the judicial response to that official involvement in the press deserves our serious attention and study. Part of the broadcast regulation experience has been the ignoring of it, partly because it was new and complicated and partly because it diverged so greatly from our inherited tradition of freedom of the press. The recent emergence of a "press" identity within the electronic media has had the salutary effect of leading us to wonder how we got to where we are and what lessons inhere in that experience which might enhance our understanding of the development of new technologies of communication.

As one studies this past half century of broadcast regulation and the First Amendment, many important lessons stand out. The most significant would appear to be the fact that the courts seem generally prepared to permit experimentation with regulation, as we seek to cope with the exigencies of technological change. The courts have not kept the government in a straightjacket of traditional principles but rather have recognized that new problems may demand new responses. This attitude was an especially essential one to take with broadcasting because some degree of government supervision and allocation was imperative given the potential problems of frequency overuse and interference. The government was impelled to enter the field and to engage in an allocating function because chaos was the only alternative. Once this step had been taken, the incremental impact of a more expansive regulatory role on our traditional notions of a free press was significantly lessened. This reality, in a totally new and unexplored medium, seemed to justify a government–press relationship that would not have been tolerated anywhere else.

The relationship was, however, carefully tailored to satisfy many of our traditional principles. One critical limitation on government involvement was embodied in section 326 of the Communications Act, which provided that the government could not "censor" any particular material broadcast over the airwaves. On the other hand, the government could promote "diversity" of viewpoints, establish broad standards of "fairness" to regulate discussion of public issues and insist on general subject-matter categories for programming in order to insure that the "public interests," broadly con-

ceived, were met by the new media. In short, the government's role was severely limited, according to traditional norms, on the "negative" side of censorship, but greatly enlarged on the "affirmative" side of expanding the range of discussion over the airwaves.

However, it is incorrect to think that the Supreme Court has responded with a carte blanche to the government in its efforts to regulate the electronic media even in affirmative ways. While it is true that the Court has been extremely tolerant of the broadcast regulatory scheme, it is also the case that its tolerance has been of a special variety. In general terms I would characterize the Court's response to broadcast regulation as one infused with ambiguity and even confusion. Its tolerance was most often one of Delphic silence: while decades passed and the Court was erecting an imposing edifice of First Amendment doctrine, it chose largely to ignore the efforts of Congress and its administrative agency, the Federal Radio Commission, and then the Federal Communications Commission to arrive at a viable federal communications policy. Silence is, of course, an act of extreme ambiguity. It can be interpreted as tacit approval or endorsement, as temporary uncertainty as to the proper response, or as a mere biding of time until the moment is ripe for definitive reversal. The Court waited 16 years until it gave a summary constitutional approval to the general regulatory system (in *National Broadcasting Co.* v. *United States*, 319 U.S. 190) in 1943, and then another 26 until it affirmed the constitutionality of the most important regulation in the overall scheme, the fairness doctrine (in *Red Lion Broadcasting Co.* v. *F.C.C.*, 295 U.S. 367) in 1969.

Even when the Court did speak on the constitutional issues raised by regulation and extended the constitutional imprimatur, it did so in a peculiar way. In *National Broadcasting Co.* Justice Frankfurter wrote for the Court and treated the First Amendment question as so obvious as to merit little consideration. In one sense such a positive endorsement of the constitutionality of broadcast regulation

CONGRESS SHALL MAKE NO LAW

would seem the most encouraging to its proponents; but in another sense it suggests a lack of studied examination or appreciation of the real issues at stake, a failure on the part of the Court to see and grapple with the problems raised by regulation. Decisions that find difficult questions "obvious" are never very secure as precedents.

In *Red Lion* the Court did finally engage in a full-scale consideration of the constitutionality of one major form of regulation. There the Court did extend what appeared to be an unconditional approval. In words that seemed to solidly entrench and legitimate the entire regulatory scheme, the Court said:

> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in section 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Not long after the Court spoke these words, however, it spoke others which seemed to convey the sense that it was moving in precisely the opposite direction from that begun in *Red Lion*. First came *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). There the Court rejected a claim that the First Amendment compelled broadcasters to permit private individuals or groups to purchase airtime in order to broadcast their political viewpoints. The FCC had refused to require broadcasters to sell commercial airtime for editorial advertisements, and the Court declined the invitation to reverse the Commission's decision on First Amendment or statutory grounds. On this basis alone one would not have expected the underlying principles of *Red Lion* to undergo any erosion, but the path of reasoning which the Court took in reaching its result in *CBS* did cut against them. For the first time the Court spoke of broadcasters in terms familiar to the print media: they were referred to as "editors" and "journalists," and their role was envisioned as akin to their counterparts in the print media. In another famous Supreme Court dictum, the Court remarked that "editing is what editors are for," thereby conveying the idea that broadcasters were to be thought of as similar to editors and journalists in the print media. Much is in a name, and it is an important indicator of judicial attitudes whether a broadcaster is referred to as a "public trustee" or as a "journalist."

One year later the Court decided *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Florida had adopted a statute requiring newspapers to grant political candidates a right to reply to criticisms of them appearing in the newspaper. The Supreme Court struck down the statute as unconstitutional because it infringed on the First Amendment freedom of the press. Recognizing the existence of serious problems of concentration and monopolization in the print media, the Court nevertheless found no constitutional room for a policy allowing states to compel what goes into a newspaper. Their language indicated an unyielding, inflexible resolve to preserve a totally free press:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or

RESPECTING AN ESTABLISHMENT OF RELIGION, OR

PROHIBITING THE FREE EXERCISE THEREOF; OR

unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

Though this perspective on the meaning of the freedom of the press concept was enunciated only with respect to the print media and though the Court did not even refer to its earlier decision in *Red Lion*, it was impossible for the Court's statements to read as having no import for the question of legitimacy of broadcast regulation. Not surprisingly, the passage of time since the *Miami Herald* decision has brought forth a variety of comment the general tenor of which has been to take that decision as casting a substantial shadow of doubt over the *Red Lion* decision itself.

The process we can observe in the sequence of cases from *Red Lion* to *Miami Herald* reflects an underlying and profound ambivalence in attitude towards government regulation of the technology of broadcasting. The Court has been prepared to tolerate certain forms of "affirmative" regulation as the new technology emerged and developed, but the Court's tolerance was infected with a considerable degree of anxiety. Sometimes this ambivalence has been expressed through a stony silence; but even when the Court spoke out and, in some cases, appeared to give its wholehearted endorsement to the enterprise of regulation, it then felt the necessity of cutting back on that approval and undermining its own endorsement by making it appear something of an anomaly.

And well the Court should. For it is certainly the case that official intervention, even of an "affirmative" variety, carries with it significant risks. It represents a major departure from our traditional libertarian notions towards the concept of freedom of the press. Stability of traditions has social value independent of its particular applications, but it is also the case that government regulation of the press, even in the name of the "public interest," can be used in authoritarian, repressive ways, both obvious and subtle. Even when applied and enforced in an even-handed, fair-minded way, such regulations invariably reflect a particular attitude, or set of attitudes, about such fundamental issues as: what is the proper function and role of the press in American life; what should the American public be interested in listening to and thinking about; and a host of other value-laden issues about which people may reasonably disagree. In short, any government regulation is much more than simply the sum of the particular consequences emanating from the application of the rules to particular cases; it is also, and this may be the more important point, an injection into the arena of public debate, through the very act of reshaping it, of a set of values, or a particular philosophy, about the basic structure of American life.

It is also the case, and this is what leads to a willingness to tolerate regulation in the first instance, that the problems we perceive as justifying regulation are very real in themselves. Concentration, whether the result of physical or economic factors, within the mass media raises serious concerns about the successful operation of the "marketplace of ideas," as serious as those arising from government intervention itself. We cannot accept the facile conclusion that private enterprise in the mass media acts merely to "give the public what it wants." It does that in part, to be sure, but it also, we may reasonably assume, shapes the very tastes to which it claims to be responsive. How much is one and how much the other will remain always a mystery to us, but our inability to decipher the line between the two should not lead us naively to ignore the common feeling of dissatisfaction at having to choose among the limited array of choices offered by the marketplace. Not in every instance do we feel we fully know what our "wants" are, and even on those occasions when we do and even when they are shared by substantial numbers of people, it may be years, if ever, before any market rises to meet them. In a medium that provides a limited and standardized fare, whether or not dictated by economic considerations of a mass market, we may properly worry about the unmet needs of diverse groups whose interests place them on the periphery of general public tastes. These considerations, and others that might be mentioned, provide a forceful case for intervention.

ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE

However, the costs of intervention are real, and consequential. The upshot has been, in terms of the role played by the First Amendment, that affirmative regulation has been tolerated but only as an anomaly in a broader system otherwise free from intrusion.

II

The development of cable television and the judicial treatment of the regulation of it have been especially revealing about our acceptance and fears of government regulation under the First Amendment. One often hears the argument that, since the legitimacy of broadcast regulation has been premised on the scarcity of the electromagnetic spectrum and since cable virtually eliminates the problem of scarcity (because cables may carry as many channels as may be wanted), government regulation of cable is unconstitutional. It is only a short extension from this to the conclusion that regulation of all broadcast media is now (or soon will be) unconstitutional—not because the electromagnetic spectrum is no longer scarce but because the abundance of cable channels eliminates the problem of scarcity in the *medium*, that is to say, television, and it is the medium and not the partiuclar methods of reaching the medium that should be the relevant consideration on the constitutional issue. I reject this analysis.

First, it is true that, since the *NBC* case in 1943, the Court has espoused the scarcity rationale as the principal justification for government regulation of broadcasting. Justice White in *Red Lion* spoke in these terms: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Though there have been other efforts to distinguish broadcasting from the print media, thereby justifying the imposition of regulation on the former and not the latter (such as the fact that broadcasters must use the "public" airwaves in order to

broadcast or that "impact" of broadcasting on its audience is sufficiently overwhelming to justify oversight) the scarcity rationale has been the dominant point of departure for justifying regulation.

The best that can be said of the scarcity rationale, however, is that it has been a convenient, if invalid, basis for upholding the regulatory enterprise. The potential chaos of a totally unregulated, unallocated, medium surely did, and continues to, justify minimal government intervention to establish guidelines for effective use of the airwaves. This in itself could be achieved by the issuance of licenses, along with other technical restrictions; but, as various economists and legal theorists have now pointed out, these technical considerations do not alone justify the added measure of government supervision regarding the content of the medium. Rather than giving away licenses free and insisting that certain programming requirements be satisfied by the licensee, the government could have imposed some technical restrictions necessary to minimize or eliminate interference but allowed market forces to regulate content, in the same way that we rely on them to exert pressure on the content of other media throughout the society, most notably of course, the print medium.

To discount the scarcity rationale does not leave us without any justification or rationale for the choice to regulate broadcasting so as to achieve a more diversified and fair discussion of political and social issues. I have already identified what to many is a critical problem with the broadcast media, as they are presently composed—namely, that of excessive concentration. While it is true that the print medium is characterized by a similar problem, some might say even more seriously afflicted, that in itself does not establish the necessity of either extending regulation throughout the media or disallowing it entirely. A sensible solution to dealing with the underlying problem of concentration and power has been the one we have, in fact, employed, albeit perhaps inadvertently—that is, imposing corrective regulation in one segment of the media (the new technology of broadcasting) while retaining a traditional hands-off posture with respect to the other (the traditional technology of print). This limited, restrained approach to remedying perceived defects in the structure of the marketplace of ideas has proved effective both in terms of enhancing public debate and in reducing the risks commonly associated with government intervention, and for that reason—not because of such artificial differences between the media as the idea of scarcity—the regulatory enterprise has, in my judgment, proved acceptable to the courts when challenged under the First Amendment.

RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE,

This means that we should find the development of cable and its enlarged channel capacity will not in itself fundamentally alter the regulatory system as it has heretofore existed. As long as the phenomenon of concentration, of audience domination, continues, the basic underlying issue, which has in the past justified regulation, will continue to do so.

The Supreme Court appears to be following this path. In the Court's first decision concerning FCC regulation of cable, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court upheld the Commission's "local carriage" rule which prohibited some cable systems from importing broadcast signals without Commission approval. The purpose of the rule was to protect the economic viability of local broadcasters. The Court found the rule to be "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting." Subsequently, in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), the Court divided on the question whether to uphold the statutory validity of the Commission's "program orientation" rule, which provided that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." Justice Brennan, writing for a plurality of four justices, found that the "effect of the regulation . . . is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming," an effect which those justices believed consistent with the basic rationale of the Court's earlier broadcasting decision. The four remaining justices dissented on the ground that the Communications Act did not empower the FCC to order anyone "to enter the broadcasting field."

These decisions strongly suggest that the Court will not be inclined to insist as a matter of constitutional principle that the government deregulate broadcasting because of the emergence of the new technology of cable. On the contrary, they indicate that the regulatory system over broadcasting is secure and itself provides the justification for at least some extension of regulation over the cable medium itself. It is true that in neither of these decisions did the Court consider a First Amendment challenge to the Commission's regulations regarding cable. The Court is certainly free later under these precedents to reject the entire statutory scheme as unconstitutional; but, as a practical matter, it seems less than likely to occur given the Court's handling of the cases.

All this is not to say, however, that cable and its associated technologies will not or should not affect the Court's general treatment of the regulatory system. The new issues raised by the emerging technologies and their potential for achieving diversity and fairness also suggest a need for *congressional* reevaluation, which the Court should encourage. This need was recently recognized in the Court's latest cable decision, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), where the Court found the FCC without statutory authority to require cable operators to provide channels and equipment for public, educational, governmental, or leased access users or to insist upon a specified channel capacity. We might well expect, as the new technologies develop, the Court to demand that Congress periodically reassess its regulatory policies. It is also possible that the Court will go even further and intimate at, or even openly pronounce, a general First Amendment obligation on the part of the government to encourage, or at least not to inhibit, the development of these new technologies, which at least in theory offer the

AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

potential of diversity without government regulation. This, in fact, may be the implicit motivation behind the 1979 *Midwest Video* decision. Surely one of the more unfortunate consequences of the early Commission regulatory scheme regarding cable was its serious inhibition of cable's economic development.

For the moment and the foreseeable future, however, one must conclude that the basic structure of the regulatory system, both with respect to broadcasting and to the new technologies, is constitutionally permissible. That in any event, is the recent message of *Columbia Broadcasting System, Inc.* v. *FCC*, 49 USLW 4891 (1981), where the Court upheld the statutory and constitutional validity of the Commission's interpretation of Section 312(a)(7) of the Communications Act.

In summary, regulation in the interest of promoting diversity of opinion and fairness in public discussion will continue to be a stepchild of the First Amendment concept of a free press, never fully embraced, always uncertain of its precise status and pedigree but still kept comfortably within the general home. The general problem which characterizes the electronic media and which justifies regulation in the "public interest," that is to say, concentration of power, and not the fiction of "scarcity" will continue to provide the central if underlying rational for regulation, both of broadcasting and of the newer electronic technologies.

III

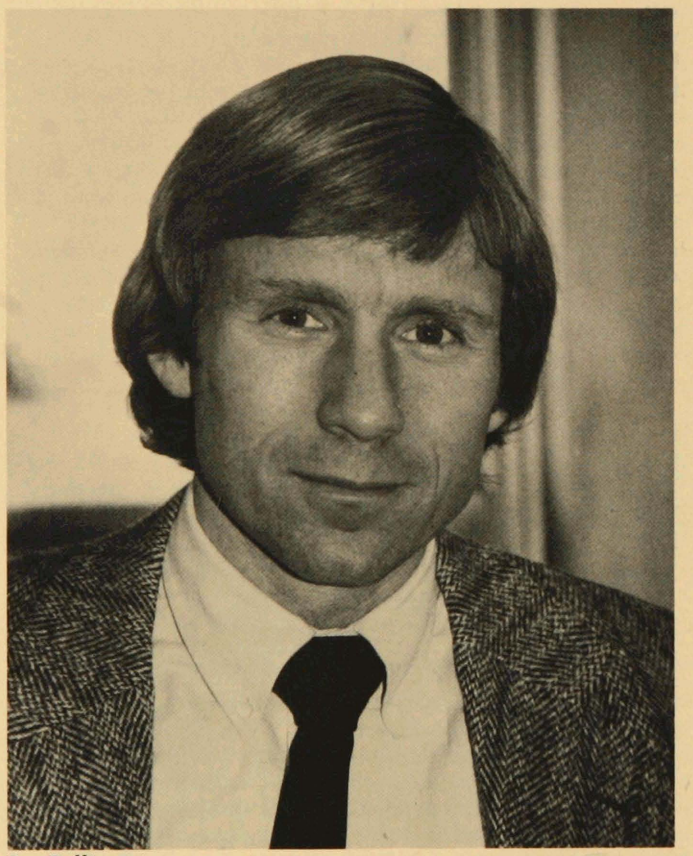
I have thus far argued that the radical departure from traditional libertarian notions of freedom of the press represented by the American experiment in broadcast regulation has been possible only because there has existed a sharp delineation between the two branches of the mass media. It was important that regulation was introduced in a new discrete technology at a time when the traditional libertarian model was coming under increasing question as the sources of news were growing fewer in number. In the bifurcated system that developed, one branch of the media was treated as "unique" and "special" and accordingly subject to regulation in the "public interest" while the other branch was regarded as representing the embodiment of traditional notions of the press and hence left completely unregulated. We thus preserved tradition while experimenting in the face of changed circumstances. To many, including myself, this method of dealing with the evolution of the mass media and the concept of a free press has seemed eminently sensible.

Yet a further change in technology looms on the horizon that may well call into serious question the system of regulation we have developed. I have in mind here the use by the print media of television and video screens as a means of disseminating their news and information. The technology goes by such names as "videotext" and "teletext." Though it is now in its most rudimentary, experimental stages, many foresee it as the principal method of distribution in the next decade. What are the implictions of this technological change for a system of regulation that has been constructed on a principle of partiality and duality?

For several reasons, it would appear to be undesirable at any future stage of technological merger between the print and electronic media to continue with a system of partial regulation. Singling out only some channel users for regulation would probably seem in that context too anomalous. Moreover, no viable distinction could be drawn between, for example, communication through words or through visual images and sound. We will feel compelled to choose whether or not to regulate at all. Though it is difficult now to assess how that choice should, or will, be made in the distant future, the presumption should be, I think, against, rather than for, total regulation. Total regulation would remove the checks inherent in a system of partial regulation, and we might lose in the process that intangible but nevertheless vital sense within the press of being independent and to some degree "unaccountable" to anything but journalistic standards. This is not to say, however, that the government would be completely foreclosed from pursuing other avenues of promoting diversity and encouraging vigorous debate. Channels might be reserved for public use, and financial support might be provided for alternative programming, along the model of the public broadcasting system.

Conclusion

The new technologies of communication demand that we be prepared to reappraise some of our policies with respect to regulation of the electronic media. They are also entitled to a favorable environment in which to develop, but their emergence does not for the near future entirely undermine the system of affirmative regulation of the electronic medium in the "public interest." The same principles which have guided the development of broadcast regulaton—promotion of diversity and fairness in public discussion—continue to provide meaningful and legitimate goals within this discrete branch of the mass media.



Lee Bollinger