CONGRESS, FREE SPEECH, AND CABLE LEGISLATION: AN INTRODUCTION

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The history of congressional dealing with cable shows several themes: 1) Congress as a place to compromise disputes among industrial competitors; 2) Congress as visionary and arbiter for the public interest; and 3) Congress as a place where sandbags are filled against the flood of future technological developments. It is fairly clear that the first function, in which Congress validates deals cut outside the marble halls, predominates; that the second most comfortable role is as preserver of some version of the status quo against technological change; and that the weakest aspect of the congressional contribution is as a framer of vision.

The Symposium contained in this hefty issue of the *Cardozo Arts and Entertainment Law Journal* is testimony to this dismal set of facts. It may well be that technological change, both on a national and global level, virtually dictates the nature of the telecommunications industry two or three decades hence. The Cable Communications Policy Act of 1984 ("Cable Act")[1] and whatever modifications ensue during the next session or two of Congress may be merely ways of postponing the inevitable. Industry responses to new satellite technology may drown out the best compromises among cable and broadcast interests. The power of the telephone sector may ultimately vanquish the market divisions that have been carefully erected with the blessing of courts and government. The scraps of public interest intervention by Congress—leased channels, the potential for public access—are totally at the margin, often at risk, and only unclearly productive. What is left is association bargaining: the National Cable Television Association, the National League of Cities, the motion picture industry, the telephone, and other common carriers. They summon their political muscle, clothed as often as possible in magic principles, to obtain compromises which provide the cer-

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[1] Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-559 (Supp. V 1987)).

tainty necessary for investments to be made and business to proceed.

My posture in this introduction is not to address the proper resolution of the competing business interests. Nor is it to suggest a reformed role for Congress and the Commission, though that may be desirable. Rather, I address an element of the debate that has become more intensive this time around than during the debate on the 1984 Cable Act, namely the uses and abuses of the first amendment. Here is one of the principles that is being used to clothe and enhance political muscle. Here is a trump card that is designed to preclude bargaining and eliminate the last element of congressional functioning by withholding from congressional power validation of inter-industry agreements on market division, that can be construed, quite broadly, to have speech-related consequences.

My belief, much at odds with the belief of many others, including contributors to this Symposium, is that something is wrong, very wrong, with the current debate over telecommunications policy. The first amendment, so central to our culture, is being wheeled out not to nourish full and open debate, but as a decisive force in structuring the communications industry. "Free speech" is becoming a controlling force in federal communications antitrust law. Reverberations of the first amendment determine the shape of local franchising, prohibit the fulfillment of a national public broadcasting system, and eliminate the designation of channels for particular purposes, including educational purposes.

The victory of Tom Paine is being corporatized. True, giant entities need protection too. But I fear that in the new first amendment order, the real Paines of the world may be ill-served. The soapbox is being replaced with the mall. We may be creating a plastic freedom in which the logic of the first amendment becomes the enemy of the realization of a multitude of speech. The argument becomes that everything—stations, telephone companies, hardware stores that string cable—is a speaker and every mandate directed at every speaker is suspiciously abridging. We become flooded with images, but poorer in public debate.

It is not clear how far the new logic goes. Each seemingly reasonable step may have its own extended dangers. The Supreme Court has held that educational stations, at least under present law, cannot be prohibited from editorializing. But can they be structurally maintained as part of a public system? Un-

less there is a need that meets a specified standard, can a radio or television station be limited in the engineering of range of signal? Should we examine the policy which forbids foreigners, beyond a certain percentage, from holding television licenses? Can the first amendment tolerate a rule that limits the power of television networks to produce programs, since they are speakers too? Compulsory copyright could easily be held to abridge speech because it is a requirement that a speaker speak to a particular audience, whether that speaker wishes to or not. Cross-ownership rules, prohibiting newspapers from owning television stations in their markets discriminate against a speaker in ways that smack of constitutional violation. Undoubtedly there are other instances of abridgment that would be swept away as part of the new first amendment jurisprudence.

These examples make it clear that the entire structure of telecommunications law in the twentieth century has developed with the assumption that the first amendment does not "mean" what it has come or is coming to mean. Perhaps the change in first amendment interpretation should be attributed to altered technology or a better understanding of existing technology. In this view, our half century sense of the relationship between the first amendment and the new technology is based on a special idea of scarcity of channels. The scarcity rationale is now in full retreat and some claim that it was a casual and erroneous basis for regulation even at its conception.

The shift in first amendment interpretation has a far more profound basis. The emphasis shifts from a vision of society as a whole, from a focus on government effect on content to government effect on structure. To put it differently, the last half century, and more, can be read as a long seminar on what the shape of federal regulation of the ever new telecommunications technology should be. That seminar has been informed by the sense of democratic values, technologies of freedom, as Ithiel de Sola Pool called the innovations.[2] But it has taken place in an environment where there was no trump card—no first amendment ukase that terminated debate because its "meaning" controls outcome. As the first amendment becomes a stronger definer of the structure of telecommunications, one consequence is that courts, not the Commission or Congress, make telecommunications policy. One can look back at the history of radio and television regulation prior to the mid-1970's, virtually in vain, for a

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[2] I. POOL, TECHNOLOGIES OF FREEDOM (1983).

decision in which the constitution limited congressional or Commission decisions as to structure. Clear channels, channel reservations, the table of allocations, limitations on group ownership, regulation of network-affiliate relationships all took place often with only glancing reference to the possibility of first amendment constraint.

Now, the Ninth Circuit can throw complex federal compromises concerning franchising policy into a cocked hat.[3] The Court of Appeals for the D.C. Circuit can beat the Commission about the ears for its efforts to determine the mode of competition between broadcasting and cable.[4] First amendment doctrine has the potential to undo the Bell consent decree,[5] reverse ancient Commission policy and even the codification of that policy into law. Lawyers, not economists or political scientists, become the arbiters of what is possible, what the competing values are, how they should be measured, how they should be weighed and validated. They are the keepers of the first amendment flame and, these days, in their hearts, the flame burns intensely indeed.

Are there dangers, one might ask, in this new emphasis on the first amendment, on the prohibition against abridgment as an encyclopedia of antitrust policy? The political context is tricky for even asking this question; it is unfashionable to seem to be against what is asserted as freedom of speech. Indeed, the great success for the cable companies is the recasting of the debate over regulation as being a debate about constitutional rights. No longer is the question of regulation one of weighing equities, of trying to determine the proper role of over the air broadcasting compared to cable, or localism versus great national networks. The entire litany of communications doctrine has been raised to a constitutional level. The danger is in the loss of flexibility, a loss in the ability of society, through government, to fashion a structure of telecommunications that magnifies the possibility of speech. The debate is between power and access. The debate asks whether, in the common metaphor of the bazaar, government has an interest in assuring that a marketplace exists—in helping to construct a marketplace—so that the marketplace of ideas can flourish.

Indeed, here is one of the ironies of the first amendment de-

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[3] City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

[4] Home Box Office, Inc. v. FCC, 567 F.2d 9, 49-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[5] United States v. American Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982) (Greene, J.), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

bate. For most of our history, at least in my version of the past, speakers were self-created, not the consequence of massive government patronage and protection. The new technology, even the changed nomenclature tells of a watershed, required vast government partnership to become established. New communications technologies, massive and expensive, have depended on government subsidy, favorable regulation, and protection from competition. These "speakers" are not so virginal as their soapbox antecedents. Unlike their adopted forbearers, they have embraced the power of the state to obtain their own force and, often, depended on the state to provide them with a protected zone for growth. It is after this period of close relationship that the new technology asserts, on first amendment grounds, an immunity from the power of the state so as to maintain and enlarge their position. In cable, for example, the industry and its individual participants successfully persuaded the government to guarantee access to telephone poles and compulsory licenses to broadcast television programming, for access to easements across private lands.[6] Having achieved power of national proportions, in large part through a structure of government policy, cable now asserts that it is a speaker, with full first amendment protection, forgetting the nature of its birth. Not only because it is a *quid pro quo*, not only because public resources are used, but rather because there is a long partnership in the evolution of the industry, does government have an interest in the new technology and a stake in its future.

These are arguments about law. But there is another way of exploring the debate over how to characterize—for speech protective purposes—cable television operators and telephone companies. We must ask, to borrow jargon, how a community arrives at perceptions of structure, how, in this case, it determines who to privilege in terms of the power of speech. In those ancient days of innocence, in the hills of Pennsylvania, the hardware store owners who strung wire from hilltop to household did not consider themselves "speakers," nor did their neighbors. The process of determining whether these purveyors would have the ritual anointing of first amendment protection would be the consequence of evolution and debate. Twenty years ago, early in cable's regulation, the FCC debated, in fact, whether community antenna television systems should be compelled to originate pro-

[6] Pub. L. No. 97-130, 95 Stat. 1687 (codified at 47 U.S.C. § 214 (1982 & Supp. V 1987)).

grams, forbidden to originate them or merely permitted to originate. And so confused was the issue that the Commission at one time hewed to each of these positions.

There is nothing inherent in the inert wire that dictates the social organization that accompanies it as the service is delivered. *A priori*, from the wire forward, the pattern for achieving a television program in the home is not found in nature. Physics controls what goes before, social interactions determine what goes thereafter. The first amendment does not dictate the structure of organization that follows upon the laws of science. Think of the early radio days. At the outset, radio was perceived primarily not as a medium for speech, but as a device to aid ships at sea. In its commercial first blooming, broadcasting was an auxiliary to the sale of radio sets. Radio, and television after it, was considered a government medium in most western democracies. No substantial body of thought conceived of radio or television in their infancy, as a new form of newspaper. A new form of regulation sprung up because of the perception of the medium, its place and evolution. It is in the context of a sharp difference with the prevailing model, in Great Britain and other western democracies, of radio and television as a government monopoly that the conflict and debate over the shape of broadcasting in the United States must be understood.

Our sense of who is a speaker protected from government abridging regulation is one that is culturally bound. Neither radio nor television were deemed to be speakers, in the most protected sense, at their founding. And two decades ago, few would have had the ambition to call cable operators speakers. The same would be true of the Bell system. Change follows from a complex interplay between government and private action. To use a term from modern technology, characterization is itself interactive. Prior to the moment when the ritual award of speech privileges is afforded, government may intervene to shape the structure. Indeed, it is possible that the moment of irreversible privileging should never truly occur with respect to the new technologies. Perhaps, the dialogue over structure must continue with the first amendment in the background, informing, but not controlling the debate.

It is more frequent, now, to assert the rights of cable operator and telephone company. Courts have demonstrated that they are increasingly sympathetic to these assertions. I have my doubts. By placing these complex institutions under the mantle of the first amendment, the traditional modes this society has

used to fashion telecommunications policy are seriously affected. Structural policies advocated by first amendment zealots may be the best ones for the society. But they should be justified for their overall value to the community, not insisted upon only as required by the constitution.