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Communications Policy Making, Competition, and the Public Interest: The New Dialogue[†]

FRED H. CATE*

I. THE INFORMATION ECONOMY

Mark Fowler, a former Chair of the Federal Communications Commission (FCC or the Commission), wrote more than five years ago that “[t]he world is fast approaching a new Information Age in which a significant portion of productive global resources will be directed to collecting, analyzing, transmitting, and reporting information. The United States can rightly claim at present to be at the cutting edge as we enter the Information Age.”¹

Chairman Fowler was, and is, correct. Communications and related industries are among the fastest growing, most profitable segments of the U.S. economy. In 1991, for example, Walt Disney replaced steel behemoth USX (formerly Andrew Carnegie’s U.S. Steel, the nation’s first billion dollar company) in the Dow Jones Industrial Average and oil giant Mobil Corporation in Amex’s Major Market Index.² While domestic automotive, textile, and manufacturing industries fall victim to lower priced and often higher quality imports, the business of creating and delivering entertainment and information programming is second only to the sale of arms in its positive contribution to the U.S. trade balance.³ The reach and quality of our free, over-the-air broadcast system, the diversity and rapid expansion of our cable systems (which now reach more than sixty percent of American homes), and the creative imagination of our filmmakers continue to be the envy of much of the world.

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1. Mark S. Fowler et al., “Back to the Future”: *A Model for Telecommunications*, 38 FED. COMM. L.J. 145, 149 (1986).

2. Patrick Harverson, *Disney’s Dow Debut No Cartoon Fantasy*, FIN. TIMES, May 4, 1991, at 124; *Walt Disney’s Stock to Replace Mobil in Amex’s Major Market Index*, SECURITIES WEEK, Dec. 23, 1991, at 7.

3. Fred H. Cate, *The Continuing Battle over the EC Broadcasting Directive*, 1991 A.B.A. SEC. INT’L L. & PRAC. 9. Exports of U.S. television programming and films alone returned over \$2.5 billion to the United States during 1988. *Id.* The “information and communication” sector currently accounts for 9.2% of the U.S. Gross Domestic Product, while the historically important construction industry accounts for only 7.2%. Patrick Bloomfield, “New” *Economy Beckons Investors*, FIN. POST, Mar. 3, 1992, at 18.

II. THE ENDLESS POLICY LOOP

This country's extraordinary achievements in the communications and entertainment industries may be outnumbered only by the remarkable proliferation of industry lobbies, special interest groups, attorneys, and congressional, regulatory, and judicial proceedings. Rather than compete in the marketplace, in the laboratory, and on Wall Street, America's communications industries increasingly compete before Congress, the FCC, and the courts. Rather than develop a better product, provide higher quality service at a lower price, innovate, or invest in research, these industries search all too often for the rulemaking procedure or legislative approach that will offer a comparative regulatory advantage over competitors.

The result is what Stuart Brotman has called the "endless policy loop."⁴ Brotman, now Chair of the American Bar Association Section of International Law and Practice Communications Committee, writes:

A typical path involves outside parties presenting adversarial arguments to the FCC in either trial-type or notice-and-comment proceedings. The staff resources and time required to complete such a proceeding, accompanied by the likelihood of an even more time-consuming judicial appeal, frequently represent a formidable barrier to meaningful policy formulation under either type of proceeding.

The result, all too often, is a chain of decision-appeal-reversal-remand-decision; a process that can be characterized as an endless policy loop.⁵

Because of this endless policy loop, communications industries spend more of their time lobbying, testifying, and litigating, rather than improving their operations and planning for the future. Policy makers, too, have become similarly preoccupied with dispute resolution and adjudication among competing industries, rather than addressing the public interest by articulating and implementing a vision of communications for all Americans. Meanwhile, the United States' lead in communications is slipping.

Consider, for example, the ongoing debate before the Commission and in Congress and the courts about cable television. The FCC has pursued an unbelievable array of conflicting and contradictory policies regarding cable; just to list them makes one's head spin. At first, the Commission eschewed jurisdiction over cable.⁶ In 1965 the FCC promulgated must-carry and

4. Stuart N. Brotman, *The Curious Case of the Must-Carry Rules: Breaking the Endless Policy Loop Through Negotiated Rulemaking*, 40 FED. COMM. L.J. 399 (1988).

5. *Id.* at 405.

6. Inquiring into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Reporters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403 (1959) (report and order).

nonduplication rules for cable signals transmitted by microwave,⁷ which it extended to all cable systems in 1966.⁸ The Commission also required new cable operators in the top 100 markets to obtain a waiver in order to import distant signals,⁹ but it rarely issued those waivers.¹⁰ The Commission modified distant signal carriage rules in 1972,¹¹ and then virtually eliminated them in 1980.¹² In 1968 the Commission recommended retransmission consent as a condition of distant signal carriage,¹³ but Congress refused, and in 1971 the Commission abandoned the concept.¹⁴ In 1970 the FCC considered allowing cable operators in the top 100 markets to import four distant signals from independent broadcasters,¹⁵ but rejected this approach the following year.¹⁶ In 1972 the Commission enacted syndicated exclusivity, modified distant signal carriage, and "anti-leapfrogging" rules.¹⁷ The FCC eliminated the anti-leapfrogging rules in 1975¹⁸ and repealed its syndicated exclusivity and distant signal carriage rules in 1980.¹⁹

7. Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 38 F.C.C. 683 (1965) (report and order).

8. Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725 (1966) (second report and order) [hereinafter Second Report].

9. *Id.*

10. Leslie A. Swackhamer, *Cable-Copyright: The Corruption of Consensus*, 6 COMM/ENT 283, 288 (1984).

11. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 36 F.C.C.2d 143 (1972) (report and order) [hereinafter Report].

12. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980) (report and order) [hereinafter Exclusivity Rules], *aff'd*, *Malrite TV of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

13. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 15 F.C.C.2d 417 (1968) (notice of proposed rulemaking and notice of inquiry).

14. Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 117 (1971) (letter from FCC to Senate Communications Subcommittee).

15. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 24 F.C.C.2d 580 (1970) (second further notice of proposed rulemaking).

16. Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115.

17. Report, *supra* note 11.

18. Amendment of Subpart D of Part 76 of the Commission's Rules and Regulations with Respect to Selection of Television Signals for Cable Television Carriage (leapfrog rules): §§ 76.59(b)(1) and (2), 76.61(b)(1) and (2), and 76.63, 57 F.C.C.2d 625 (1975) (report and order).

19. Exclusivity Rules, *supra* note 12.

The U.S. Court of Appeals for the District of Columbia rejected the Commission's must-carry rules in 1985.²⁰ The FCC responded to intense congressional and broadcast industry pressure by promulgating revised must-carry rules, which the court struck down in 1987.²¹ The following year, the FCC reimposed syndicated exclusivity rules.²² It is little wonder that the Court of Appeals, upholding those rules, referred to "the checkered history of the regulation of cable television by the Federal Communications Commission."²³ Henry Geller, a former General Counsel of the Commission, has written that the "FCC's main contribution to cable TV's development was inadvertent."²⁴

In 1992 the battle over cable returned to Congress. After three years of unsuccessful attempts, the House and Senate in September finally passed a cable bill.²⁵ Although the bill represents the accomplishment of more than three years of unremitting legislative activity, Congress kicked the toughest issue—rate regulation—back to the FCC to determine what constitutes "unreasonable" rates. The bill also requires cable conglomerates to sell their programming to competing services, a notable policy reversal from the FCC's 1969 rule requiring cable companies to generate original programming.²⁶ The third significant provision of the bill (retransmission consent) had been rejected by Congress and the FCC in 1971 as unworkable²⁷ and is directly contrary to the FCC's must-carry rules²⁸ that Congress was still considering as recently as 1987.²⁹ President Bush promptly vetoed the bill,³⁰ and Congress responded by handing the President the first override of his administration.³¹ It remains to be seen what the FCC will do with the

20. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

21. *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

22. Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299 (1988) (report and order).

23. *United Video v. FCC*, 890 F.2d 1173, 1176 (D.C. Cir. 1989).

24. Henry Geller, *Communications Law a Half Century Later*, 37 FED. COMM. L.J. 73, 79 (1985). See generally Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191, 195-202, 215-19 (1990).

25. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.

26. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, 20 F.C.C.2d 201 (1969) (report and order).

27. Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115 (1971).

28. Second Report, *supra* note 8.

29. See *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

30. 138 CONG. REC. S16,666 (daily ed. Oct. 5, 1992)

31. 138 CONG. REC. H11,477; 138 CONG. REC. S16,652 (daily ed. Oct. 5, 1992).

mandate to participate in reregulating cable that it so strongly resisted, and whether the cable and broadcast television industries, much less the American public, will have gained anything in this most recent regulatory round robin.

Today, broadcasters want rules or laws requiring cable operators to carry their signals. Without such rules, broadcasters argue that "they would lose audience" and "the resulting lower revenues would pose a threat to the viability and existence of many stations."³² "So what?," cable operators retort. In the rapidly changing modern market, new technologies frequently make older technologies obsolete. These same cable operators, however, continue to press Congress and the Commission to keep telephone companies out of the cable business. "We just want a level playing field," say the phone companies, "and oh, yes, the continuation of our local monopolies over the provision of telephone service." Each industry has demonstrated itself ready to use the Commission, Congress, and the courts to win a competitive advantage.

One is reminded of the insightful words of the U.S. Court of Appeals for the Second Circuit, ruling on the fourth set of appeals of the Copyright Royalty Tribunals' dispersal of fees paid by cable operators for the use of copyrighted programming.³³ Reviewing the earlier litigation among various programming groups, the court wrote:

Each distribution was affirmed in substantial part by a court increasingly critical of "the claimants' studied tack to date of 'boundless litigiousness,'" and increasingly unwilling to engage in detailed analysis of "the various nooks and crannies of the Tribunal's decisions." Thus encouraged either to forgo the usual automatic challenge to the Tribunal's determinations, no doubt an unthinkable alternative in the "highly litigious copyright-owner subculture," or to seek a different Court of Appeals, claimants to the 1983 Cable Royalty Fund petitioned us [the Second Circuit] for review of the cable royalty distribution. With the exception of two issues, however, only the circuit is new, and the petitions raise the usual array of noisily contested minutiae concerning the precise allocations of cable royalty fees.³⁴

32. Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd. 864, 869 (1986) (report and order).

33. *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172 (2d Cir. 1986) (appealing the 1983 CRT royalty distributions); *see also* *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986) (appealing 1980 and 1982 CRT royalty distributions); *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295 (D.C. Cir. 1983) (appealing the 1979 CRT royalty distributions); *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982) (appealing the 1978 CRT royalty distributions).

34. *National Ass'n of Broadcasters*, 809 F.2d at 174 (citations omitted) (quoting *National Ass'n of Broadcasters*, 772 F.2d 922 (quoting *Christian Broadcasting Network*, 720 F.2d 1295)).

III. THE NEW DIALOGUE: THE MEANING OF PUBLIC INTEREST

The endless policy loop, industry in-fighting, and lack of foresight by policy makers squander scarce resources on the specific interests of existing communications companies and ignore the legitimate interests of the public. While broadcasters, cable operators, and telephone companies fight over who can provide what entertainment or information service in the home, the French have enjoyed more than a decade of Minitel³⁵ and the Japanese are rapidly deploying an all-fiber network.³⁶ The technology which has driven the rapid expansion of communications industries inherently poses challenges to regulators. Keeping up has proven difficult, but just keeping up is not enough; our policy makers must get ahead of the technology curve. As Stuart Brotman has noted, "action and not reaction is needed in this area."³⁷ It is time for America's communications industries, policy makers, and regulators to collectively develop a new perspective about the issues which currently ensnare communications and about those larger, often ignored issues which should concern us.

In 1934 Congress provided communications industries and communications regulators with a simple yet compelling vision for the promise of communications in this country: "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communications service with adequate facilities at reasonable charges."³⁸ The Commission's regulations were to be guided by "public convenience, interest, or necessity."³⁹ The technology's capability was virtually unlimited and largely unknown, but without federal action the spectrum was in chaos and the public was not being served. Congress stepped in and required regulation of the radio frequency spectrum as a scarce public resource to serve the public interest. With this little guidance, the FCC embarked on the creation and regulation of the largest, most advanced communications system in the world.

Fifty-seven years later, Commission Chair Newton N. Minow encouraged broadcasters to share in the commitment of the newly inaugurated Kennedy Administration to give new meaning to the concept of broadcasting in the public interest. Calling television a "vast wasteland," Minow asked American

35. Patrick Oster, *France Widens Frontiers in At-Home Phone Service*, WASH. POST, Sept. 15, 1992, at D3.

36. HENRY GELLER, *FIBER OPTICS: AN OPPORTUNITY FOR A NEW POLICY?* 29 (1991).

37. Stuart N. Brotman, *Executive Branch Communications Policymaking: Reconciling Function and Form with the Council of Communications Advisers*, 42 FED. COMM. L.J. 51, 52 (1989).

38. 47 U.S.C. § 151 (1988).

39. *Id.* § 307(a).

broadcasters: "Is there one person in this room who claims that broadcasting can't do better? . . . Gentlemen, your trust accounting with your beneficiaries is overdue."⁴⁰

Today, communications industries and regulators face great challenges involving infinitely more powerful forces, including globalization, optical fiber, computers, and advanced satellite technology. As the United States celebrates the quincentennial of Columbus's voyage of discovery, Commission Chair Alfred Sikes has aptly observed, "[t]oday we can see the new world."⁴¹ If the United States and its communications industries are to be significant players in that new world and if the public is to have the benefit of innovative communications technologies, we must reexamine the meaning and applicability of public interest.

Historically, Congress, the Commission, and courts have interpreted "public interest" to mean the universal provision of basic communications services at a minimum price. The phrase "universal service" was reportedly first coined by Theodore Vail, President of AT&T, in 1910.⁴² Universal service is the touchstone of Congress's mandate to the FCC in the Communications Act of 1934.⁴³ In the context of broadcast television and radio, universal service has resulted in a system that provides entertainment and information to the American public without direct charge. Anyone with a television or a radio can raise an aerial and bring in whatever signals there are to receive. Further, the Commission has identified, as its primary criterion in granting broadcast licenses, that every geographic location in the United States have access to radio and television signals.⁴⁴

In the context of common carriers, universal service is reflected in the goal of placing at least one telephone with private line service in every home in America.⁴⁵ The FCC has identified "[t]he preservation of universal service" as "a basic goal of this Commission."⁴⁶ The primary regulatory vehicle for

40. NEWTON N. MINOW, *HOW VAST THE WASTELAND NOW?* 24 (1991) (quoting address by Newton N. Minow to the National Association of Broadcasters, Washington, D.C., 1961).

41. *Id.* at 16.

42. KENNETH GOIRDON & JOHN R. HARING, *THE EFFECTS OF HIGHER TELEPHONE PRICES ON UNIVERSAL SERVICES* (Office of Plans & Policy, FCC, Working Paper No. 10, at 2, 1984).

43. 47 U.S.C. § 151 (1988).

44. Amendment of Section 3.606 of the Commission's Rules and Regulations, 41 F.C.C. 148, 167 (1952) (report and order).

45. March, 1986, U.S. Census Bureau data show a national telephone penetration rate of 92.2%. See also 47 U.S.C. § 201 (1988) (it is the "duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore" and "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . .").

46. *In re* MTS and WATS Market Structure 4 FCC Rcd 3634 (1989) (decision and order).

implementing universal service is a federal assistance program, "Link-Up America," "designed to encourage low-income households, which are not on the telephone network, to subscribe to local exchange service by reducing initial service and installation charges."⁴⁷

In addition to requiring the universal provision of basic communications services at a minimum price, the new dialogue must examine the broader range of components that "public interest" might include. For example, "public interest" might be defined to include technological innovation. "Public interest" might also be expanded to include quality programming and service. In the case of programming, while Congress and the Commission have stressed the importance of every American having access to "free" over-the-air broadcast television, they have taken few steps to ensure or even encourage quality and diversity of programming. Once you turn the tube on, you get what you pay for, regardless of how mediocre, repetitive, or even harmful it may be. Similarly, in the case of service, communications industry in-fighting and government deregulation have left consumers all too frequently at the mercy of monopolistic and largely unregulated telephone and cable companies.

"Public interest" might also be defined to include access to the communications media and the provision of new, innovative services (perhaps, for example, pay-per-view television, news and information services, hand-held telephones, and caller identification and other telephone services). Each of these potential components of a new definition of "public interest" raises serious issues: What is the cost? Will new services and technologies be made available to the public irrespective of ability to pay? If so, who will pay? Is personal privacy compromised? Are vital First Amendment rights of free expression implicated?

IV. THE NEW DIALOGUE: THE VALIDITY OF THE PUBLIC INTEREST CONCEPT

The resolution of these and other issues may substantially affect the way in which "public interest" is defined. In fact, a frank appraisal of what "public interest" means in an age of rapidly advancing technology may lead to the conclusion that the concept itself is overextended or outmoded.

Of all communications media, only over-the-air broadcasting is subject to regulation in the "public interest." That regulation is premised upon the

47. *Id.*

physical scarcity of the electromagnetic spectrum, which permits the operation of only a finite number of broadcast stations. In 1943 the Supreme Court concluded: "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. . . . *Because it cannot be used by all, some who wish to use it must be denied.*"⁴⁸

The rationale that the Court was referring to has become known as the scarcity rationale: because there is insufficient electromagnetic spectrum for everyone to broadcast, the government may legitimately deny some people's free expression rights. Twenty-six years later, the Court reiterated and reaffirmed its scarcity argument in *Red Lion Broadcasting Co. v. FCC*.⁴⁹ As a result of electromagnetic scarcity, the Court concluded that the government should be permitted to ensure that the public received "suitable access to social, political, esthetic, moral, and other ideas and experiences."⁵⁰

But the very proliferation of media technologies that argues so forcefully for a reexamination of "public interest" may undermine the justification for such a concept. Spectrum scarcity has been widely challenged by Supreme Court Justices,⁵¹ the U.S. Court of Appeals for the District of Columbia,⁵² the FCC,⁵³ and many commentators.⁵⁴ Each of these groups has called for the elimination, once and for all, of the notion that scarcity in the broadcast spectrum warrants a lower level of constitutional protection for broadcast expression or justifies a higher level of intrusion into the operation of America's electronic communications industries.

According to the FCC, "the extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*."⁵⁵ The Commission noted the explosive growth in radio and television since *Red Lion* was decided in 1969: a 48% increase in

48. *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943) (emphasis added).

49. 395 U.S. 367 (1969).

50. *Id.* at 390.

51. *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 144 (1973) (Stewart, J., concurring); *id.* at 149 (Douglas, J., concurring).

52. *See, e.g., Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987); *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

53. *See, e.g., In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, 2 FCC Rcd 5043, 5048 (1987) (mem. opinion and order).

54. *See, e.g., David L. Bazelon, FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

55. *In re Syracuse Peace Council*, 2 FCC Rcd at 5048.

radio stations and 44% increase in television stations.⁵⁶ In addition, with the development of UHF television, cable television, and new video delivery technologies (including low power television, video cassettes, and home satellite dish antennae) the number of information outlets had increased and the structure of the industry had become far more competitive than in 1969. The Commission concluded: "[T]he individual's interest in free expression and the societal interest in access to viewpoint diversity are both furthered by *proscribing* governmental regulation of speech."⁵⁷

The U.S. Court of Appeals for the District of Columbia shared this view. In 1986 the court addressed the fallacy of relying on scarcity to differentiate between broadcast and print media, a concept that the court called a "distinction without a difference":

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.⁵⁸

In addition, the court noted that an argument for a distinction between broadcast and print media based on the degree of scarcity found in each was unpersuasive.

There is nothing uniquely scarce about the broadcast spectrum. Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Co. v. United States*, and it appears currently "the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried." Indeed, many markets have a far greater number of broadcasting stations than newspapers.⁵⁹

The scarcity justification for regulating the electronic media in the "public interest" certainly requires reexamination. If scarcity no longer affords a principled justification for treating electronic and print media differently, then Congress and the Commission, subject to oversight by the courts, need to

56. *Id.* at 5053.

57. *Id.* at 5057 (emphasis added).

58. Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) (footnote omitted), *cert. denied*, 482 U.S. 919 (1987).

59. *Id.* at 509 n.4 (citations omitted) (quoting *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983) (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943)).

consider what "public interest" might mean today and whether it should guide the government's treatment of all forms of media or of none. Moreover, the public now has access to a multiplicity of new voices and electronic information outlets, such as cable, video tapes and disks, satellite receivers, and computer bulletin boards. In the face of rapidly advancing communications technologies and the varied sources of information and entertainment programming they make possible, what, if any, role should the government play in guaranteeing for the public "suitable access to social, political, esthetic, moral, and other ideas and experiences"?⁶⁰ This, not the comparative regulatory advantage of one communications industry as opposed to another, should be the business of policy makers and regulators and the subject of the new dialogue.

V. A REDEFINED ROLE FOR POLICY MAKERS AND REGULATORS

Collectively, the Commission, the Administration, Congress, the courts, the communications industries, and the attorneys who represent them all must be part of a new dialogue about the impact of new communications technologies on society, the goals of U.S. communications policy making, and the applicability and meaning of "public interest."

The FCC, charged with serving the "public interest" and not that of any particular industry, is the logical focal point of that dialogue. As Henry Geller recently noted with regard to fiber optics: "At this critical moment in our national history, it is imperative to assess our basic tools as the United States goes forward into the new century to communicate and compete in the global marketplace."⁶¹ In addition to sparking and facilitating that dialogue, the Commission must strive to serve the public by facilitating the creative and rapid implementation of new communications technologies. The Commission must work *with* communications industries, encourage them, cajole them, and offer them forums for meeting to work out standards and protocols for the implementation of fiber optics, high definition television, and other advanced communications services.

The executive branch, the National Telecommunications and Information Administration (NTIA), Bureau of International Communications and Information Policy, and many other agencies that play a role in formulating and implementing U.S. communications policy must cooperate more fully in creating and articulating a coherent, forward-looking communications policy.

60. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

61. GELLER, *supra* note 36, at 7.

Stuart Brotman's call for the creation of a President's Council of Communications Advisers is a good place to start.⁶² Until the Council or its equivalent is created, the Administration will continue to face questions like that asked in 1984 by former House Telecommunications Subcommittee Chair Tim Wirth (D-Colo.) about the delay and inconsistency among NTIA, the Commerce Department, and the State Department over licensing competitors to Intelsat: "How do we turn this mush into something that's real?"⁶³

Congress and the courts must get out of the way of industry and expert policy makers. Newton Minow tells the story of his first visit to Capitol Hill after being appointed chair of the FCC by President Kennedy. According to Minow, House Speaker Sam Rayburn put his arm around the young chairman and said: "Just remember one thing, son. Your agency is an arm of the Congress; you belong to us. Remember that and you'll be all right."⁶⁴ But, Minow adds, while the Speaker warned of a lot of pressure and trouble, he neglected to say that most of the pressure would come from Congress itself. One need only review former Commission Chair Richard Wiley's essay, "*Political*" Influence at the FCC,⁶⁵ to see that pressure from Congress did not end with Speaker Rayburn.

Obviously, the Congress and the courts have an important role. Much of the new technology poses challenges that most likely cannot be met without new legislation. Likewise, special vigilance by the courts is always necessary where First Amendment issues are involved. However, micro-management of the Commission's operation is unnecessary and inappropriate.

Finally, in the context of a special law journal issue celebrating the sesquicentennial of the Indiana University School of Law-Bloomington, a comment on the unique position of attorneys is appropriate. Communications lawyers play a special role in the conduct of communications industries and the evolution of U.S. communications policy. It is often said that Washington boasts more lawyers than people; an increasing number of those lawyers are somehow involved in the profitable and growing communications segments of the U.S. economy. President Bush's lament about the proliferation and impact of lawyers aside, there is nothing wrong with being an attorney. But if clients are to be truly successful, if the agencies are to operate in the public interest,

62. See Brotman, *supra* note 37.

63. Wirth Criticizes Administration for Foot-Dragging in Developing Policy on Intelsat Competition, BROADCASTING, July 30, 1984, at 33. Intelsat is a Washington-based international consortium in which member countries cooperate in launching and operating communications satellites.

64. Richard E. Wiley, "*Political*" Influence at the FCC, 1988 DUKE L.J. 280, 282 (footnote omitted).

65. *Id.*

if the nation is to have any hope of competing internationally, communications attorneys must be more than hired guns.

Broadcasters, cable operators, telephone company executives, and program creators must compete head-to-head in American homes, not in the Commission hearing room; in laboratories and test sites, not in courts; and on Wall Street, not on Capitol Hill. The voices of those who represent these industries have an important role to play in the new dialogue, and in raising that dialogue from the level of who is going to own the wire to what type of wire, if any, is it going to be; what quality and diversity of programming is that wire going to carry; and what is the proper role of the government in realizing the promise of communications technologies.

Former FCC Chair Mark Fowler has argued forcefully that America's communications policies must reflect

a recognition of the heavy opportunity costs of failing to address the novel and rapidly changing aspects of American telecommunications. Contrary to what some would argue, the primary question today is not how to use regulation to carve up the telecommunications pie among competing interests, but how to take advantage of rapidly developing competition to increase the size of the pie and benefit society as a whole.⁶⁶

We must not fail to heed these wise words.

66. Fowler et al., *supra* note 1, at 199.

