

Technologies of Freedom. By Ithiel de Sola Pool.* Cambridge, Mass.: Harvard University Press. 1983. Pp. 299. \$20.00.

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The flowering of the "information age" has been attended by flourishing speculation and commentary about the significance and implications of the new electronic-information media which form the heart of this new age.

The new age promises much, or so we are told by those who dabble in the arcana of electronic science. One author of several popular books on information technology offers the following vision:

Imagine a city ten or twenty years in the future, with parks and flowers and lakes, where the air is crystal clear and most cars are kept in large parking lots on the outskirts. The high-rise buildings are not too close, so they all have good views, and everyone living in the city can walk through the gardens or rain-free pedestrian malls to shops, restaurants, or pubs. The city has cabling under the streets and new forms of radio that provide all manner of communication facilities. The television sets, which can pick up many more channels than today's television, can also be used in conjunction with small keyboards to provide a multitude of communication services. The more affluent citizens have 7-foot television screens, or even larger.

There is less need for physical travel than in an earlier era. Banking can be done from home, and so can as much shopping as is desired. There is good delivery service. Working at home is encouraged and is made easy for some by the videophones that transmit pictures and documents as well as speech. Meetings and symposia can be held with the participants in distant locations.

Some homes have machines that receive transmitted documents. With these machines one can obtain business paperwork, news items selected to match one's interests, financial or stock market reports, mail, bank statements, airline schedules, and so on. Many of these items, however, are best viewed on the home screens rather than in printed form.

There is almost no street robbery, because most persons carry little cash. Restaurants and stores all accept bank cards, which are read by machines and can be used only by their owners. When these cards are used to make payments, funds may be automatically transferred between the requisite bank accounts by telecommunications. Citizens can wear radio devices for automatically calling

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police or ambulances if they wish. Homes have burglar and fire alarms connected to the police and fire stations.

Industry is to a major extent run by machines. Automated production lines and industrial robots carry out much of the physical work, and data processing systems carry out much of the administrative work. . . .

Above all there is superlative education. History can be learned with programs as gripping and informative as Alistair Cooke's *America*. University courses modeled on England's *Open University* use television and remote computers; degrees can be obtained via television. Computer-assisted instruction, which was usually crude and unappealing in its early days, has now become highly effective.¹

Not everyone sees the new age in such a bright light. There is a "dark side" to the force, as we have been reminded more or less continuously for nearly thirty-five years since Orwell's grim depiction in *1984* of the manipulation of information to enslave society.

Ithiel de Sola Pool's *Technologies of Freedom* could not fairly be placed at either end of the spectrum of speculation. He does not hype the wonders of the new age. His description of the uses of new electronic technologies is restrained and matter of fact. Nor does he indulge in quite the apocalyptic scenarios of *1984*. However, Pool is concerned mostly with the negative consequences of the new technologies and presents the negative side in decidedly melodramatic terms.

Despite the title of the book, which suggests that the new information technologies will yield new freedoms, Pool fears they may instead be a kind of Trojan horse introducing government controls that erode old freedoms. The warning is sounded at the beginning under the ominous caption, "A Shadow Darkens":

Civil liberty functions in a changing technological context. For five hundred years a struggle was fought, and in a few countries won, for the right of people to speak and print freely, unlicensed, uncensored, and uncontrolled. But new technologies of electronic communication may now relegate old and freed media such as pamphlets, platforms, and periodicals to a corner of the public forum. Electronic modes of communication that enjoy lesser rights are moving to center stage. The new communication technologies have not inherited all the legal immunities that were won for the old. When wires, radio waves, satellites, and computers became major vehicles of discourse, regulation seemed to be a technical necessity. And so, as speech increasingly flows over those electronic media, the five-century growth of an unbridged right of citizens to speak without controls may be endangered.

Alarm over this trend is common, though understanding of it is rare.²

Near the close of the book Pool reassures us that "[c]alamity is not

1. J. MARTIN, *THE WIRED SOCIETY* 8-9 (1978). Notwithstanding this rather fanciful description, Martin's book is a useful description of current technologies.

2. I. POOL, *TECHNOLOGIES OF FREEDOM* 1 (1983).

foreordained.”³ With a bit more vigilance we can rescue our traditional freedoms from the grasp of government controls; then (and only then) will the new technologies realize their potential as “technologies of freedom.”

Pool is scarcely the first scholar to perceive the existence of different first amendment traditions for electronic and print media, nor the first to perceive that the expanding role of electronic media, and consequent displacement of print, might cause a general corrosion of those robust first amendment values associated with the print media.⁴ Pool himself relies less on prior scholarship than on reporters, on William Paley (chairman of CBS), Senator Bob Packwood, and an unidentified gaggle of “civil libertarians and free marketers.”⁵ Since only Paley and Packwood are identified, the strength of support for Pool’s concern is difficult to evaluate. However, Pool’s attempt to convey the impression of a widespread public concern (“alarm . . . is common”) is quite misleading. Pool is not alone in his concern, but I see no evidence of widespread “alarm” among the citizenry in general or constitution watchers in particular.

Nevertheless, Pool is entitled to have his case judged by the strength of his argument, not the number of his allies, so let us turn directly to that argument.

I

It would be easier to evaluate Pool’s argument if he had more sharply separated his description of trends in electronic media from his evaluation of their legal implications. Nevertheless his description of the media and their histories contains useful information and some interesting insights. Pool’s discussion of technology and its contemporary and future uses is not original, nor is his account of the social-legal history of the media and their institutional environment.⁶ However, his generalization of evolution-

3. *Id.* at 189.

4. On different regulatory treatment of the media, see Schmidt, *Pluralistic Programming and Regulation of Mass Communications Media* in COMMUNICATIONS FOR TOMORROW: POLICY PERSPECTIVES FOR THE 1980s 191 (G. Robinson ed. 1978). On the possible corrosion of free speech values as a consequence of electronic displacement of print, see Owen, *The Role of Print in the Electronic Society*, in *id.* at 229, 242.

5. I. POOL, *supra* note 2, at 1-3. Ironically, Pool cites Senator Packwood’s proposed constitutional amendment, intended to eliminate “discrimination” among communications media, as evidence of the common “alarm.” Packwood dropped the idea when it failed to generate any enthusiasm even from the media it was intended to benefit. See BROADCASTING, Apr. 18, 1983, at 39-40.

6. With respect to communications technology and attendant social issues in general, see, e.g., W. DIZARD, *THE COMING INFORMATION AGE: AN OVERVIEW OF ITS TECH-*

ary trends in different media is a valuable addition to the literature.

A major theme in the evolution of modern media is the convergence of once-separate modes of communication. Pool's explanation is central to his concern over the fate of constitutional protection for the new media:

A process called the "convergence of modes" is blurring the lines between media, even between point-to-point communications, such as the post, telephone, and telegraph, and mass communications, such as the press, radio, and television. A single physical means—be it wires, cables or airwaves—may carry services that in the past were provided in separate ways. Conversely, a service that was provided in the past by any one medium—be it broadcasting, the press, or telephony—can now be provided in several different physical ways.

Technology-driven convergence of modes is reinforced by the economic process of cross-ownership. The growth of conglomerates which participate in many businesses at once means that newspapers, magazine publishers, and book publishers increasingly own or are owned by companies that also operate in other fields. Both convergence and cross-ownership blur the boundaries which once existed between companies publishing in the print domain that is protected by the First Amendment and companies involved in businesses that are regulated by government. Today, the same company may find itself operating in both fields. The dikes that in the past held government back from exerting control on the print media are thus broken down.⁷

Pool's description of technological and economic trends is largely unexceptional. One might quibble with his use of the term "convergence" to describe both technological merger of media functions and common ownership of distinctive media, since the latter does not necessarily imply any integration of technological or managerial functions.⁸ Common ownership of distinctive media should not raise the same kind of concerns as functional integration. After all, we have had common ownership of newspapers

NOLOGY, ECONOMICS, & POLITICS (1982). On the social-legal environment of the electronic mass media, a good general historical summary of principal events (with emphasis on broadcasting) can be found in S. HEAD & C. STERLING, *BROADCASTING IN AMERICA* (4th ed. 1982). Individual histories of particular issues (*e.g.*, allocations, program regulation, licensing) appear in countless books, monographs, and articles. *See, e.g.*, the bibliography in E. KRASNOW, L. LONGLEY & H. TERRY, *THE POLITICS OF BROADCAST REGULATION* 286-98 (3d ed. 1982). On telecommunications, *see, e.g.*, G. BROCK, *THE TELECOMMUNICATIONS INDUSTRY: THE DYNAMICS OF MARKET STRUCTURE* (1981).

7. I. POOL, *supra* note 2, at 23-24.

8. When the FCC investigated common ownership of broadcast stations and newspapers in the same community, the evidence suggested that the broadcast stations and newspapers were operated separately with virtually no integration of operations except possibly at the highest executive levels. Of course, the FCC rules presuppose *some* interrelated decision making; that was a necessary condition of its concern about restriction of viewpoint diversity. *See* Multiple Ownership of Standard, FM and TV Broadcast Stations, 50 F.C.C. 2d 1046 (1975), *aff'd sub nom.* FCC v. National Citizens Comm'n for Broadcasting, 436 U.S. 775 (1978).

and broadcast stations for fifty years or more, with no apparent encroachment of broadcast regulation into the newspaper sector. But let me pass over that point for the moment and address the central concern of convergence—the danger of “regulatory creep” into the *sanctum sanctorum* of the first amendment.

Pool’s analysis of how media convergence is conducive to regulatory creep is not very precisely delineated. I take the sense of it to be that regulation is a kind of disease which is transmitted by contact or close association. If unfettered media become too closely associated with regulated media, they will come to be identified with the latter and treated accordingly. Although “contagion” is, I think, a fair metaphor for what Pool suggests, it is perhaps analytically more useful to say that confusion in media functions produces a risk of confusion in legal models.

However described, Pool’s fear of regulatory encroachment is not without substance. Convergence of technologies and/or services does indeed create the potential for confusion of different legal models. A now-classic example is the integration of computers and communications facilities, which brings together the products of an unregulated market (the computer) and a regulated market (the communications facility). Which legal model governs the integrated product? Should the FCC regulate IBM “computer” terminals with communications capabilities or deregulate AT&T “telephone” terminals with data processing capabilities?⁹ This conundrum has now been judicially resolved in favor of the latter option by the 1982 AT&T Consent Decree, but the great concern once generated by this problem lends some credibility to Pool’s thesis. A somewhat similar problem now confronts local regulators. They must decide whether cable systems should be subject to public utility regulation of data transmission and other “telephone-like” services or whether they should continue to be treated as merely conduits for radio and television signals (“broadcast-like”).¹⁰ This problem has not yet been resolved, though indications are that Congress will intervene to insist on the *laissez-faire*

9. The issue is nicely illustrated by *IBM v. FCC*, 570 F.2d 452 (2d Cir. 1978), involving the lawfulness of an AT&T “smart” communications terminal, Dataspeed 40/4. In that case, the FCC decided that the device was a regulatable communications terminal rather than a general purpose computer, but it was forced to concede the line of distinction was a fine one and would inevitably disappear. Subsequently the FCC resolved this problem by deciding to regulate *all* customer premises requirements, however styled. *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1980); *on reconsideration*, 84 F.C.C. 2d 50 (1980), *on further reconsideration*, 88 F.C.C. 2d 512 (1981), *aff’d sub nom.* *Computer and Communications Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

10. See TELEPHONE BYPASS NEWS, May 1983, at 15-19.

option as part of a more general deregulation of cable. Neither example presents a significant first amendment problem.

While both of these examples involve a recurrent problem in the choice of legal models to govern technologically changing activities, a more serious potential for model confusion might appear to arise from the threatened takeover of traditional print information services by electronic media. The emergence of computerized, on-demand access to electronic data bases ("electronic publishing") illustrates the threat to the print media (particularly newspapers), which many observers (Pool among them) foresee in the not distant future.¹¹ Whether electronic publishing is a threat to the survival of print traditions is not, however, a question of media convergence or of confusion of legal models.¹² Except in a somewhat Pickwickian sense there is no real "convergence" in the substitution of electronics for print. The proper concern is not *confusion* of legal models arising from a melding of media functions, so much as the disappearance of print and with it the print "culture." The problem, if there is one, is not model "convergence" or "confusion," but simply competition.

And this is an old problem. Competition between print and electronic media is not some new outgrowth of "electronic publishing," broadband transmission systems (such as cable, satellite broadcasting), and other such marvels of the "information age." This "electronification" of information media (if I can call it such without offending devotees of the O.E.D.) has been a reality since the maturation of radio and television. The more recent growth in computerization and related technology has enhanced the role of

11. The basic model for what Pool (at 193) calls "on-demand publishing" (the more common argot is "electronic publishing") is videotex, a service still in its experimental stage in the United States though more fully developed in Great Britain. Videotex involves coordinate use of regular telephone or two-way cable services and the television receiver—though eventually it is possible that specialized terminals will be developed for this service. Videotex is to be distinguished from more limited teletext services that involve piggybacking information services onto television signals by use of the vertical scanning interval.

12. I would set to one side the "economic convergence" implied by the cross-ownership of electronic and print media. Pool is generally critical of some regulations that have restricted cross-ownerships involving electronic media. While some of the regulations "seem sensible" others seem "absurdly wrong-headed." I. POOL, *supra* note 2, at 53. Since he does not tell us which is which, I cannot tell whether I agree or not as a matter of policy. However, as a matter of constitutional law, I have a very basic disagreement with his pronouncement that: "useful or not, these requirements [restricting cross-ownership of electronic media] . . . would be totally unconstitutional as applied to print. Yet over the electronic media, government has exercised its authority in ponderous detail." *Id.* Pool offers no authority to support this remarkable statement, and I can think of none. The Supreme Court's decisions involving application of antitrust laws to newspapers indicate that Pool's dogmatic assertion is just wrong. *See, e.g.,* Citizen Publish. Co. v. United States, 394 U.S. 131 (1969); Associated Press v. United States, 326 U.S. 1 (1945).

the electronic media and will no doubt increase its dominance in the future. Whether it will so far displace the print media as to alter our perceptions of media and their social role is not so clear. Plainly enough the print media have survived several decades of electronic growth. In defiance of some forecasts of decline, the print media appear to be remarkably healthy. The growth of electronic media appears even to have helped some print media, as when books become best sellers after being dramatized on television. Indeed, almost all information about the electronic media, from how-to books and periodicals on home computers to social critiques of the information age (such as Pool's book), appears in print.

Moreover, whatever impact electronification may have had on print media, it has not yet visibly affected first amendment attitudes toward the traditional media. As Pool describes events, significant, if still incomplete, media convergence and electronic dominance have already appeared. Yet no "pollution" of first amendment values has been seen. Indeed, the Court's use of different rules for print and electronic media is widely noted and is criticized by Pool himself. Finessing for the moment the question whether such disparate treatment can be justified, it does evince the staying power of the libertarian tradition which Pool perceives to be so vulnerable.

If we scan more generally the jurisprudence of the first amendment in the past quarter century (a period in which the electronic media reached maturity), we see that the libertarian tradition, far from being weakened by the regulatory culture of the electronic age, has become stronger. Consider, for example, the expanded scope of protection for media comment on public affairs since *New York Times v. Sullivan*.¹³ Notwithstanding recurrent complaints about the Court's refusal to go further, the scope of this protection has unarguably expanded since the pre-electronic age. Other examples come readily to mind: press access to court proceedings has expanded even in the face of concern about televised coverage; protection for reportage of sensitive information has not suffered from the regulatory ethic associated with television.¹⁴

This expansion in constitutional protection for the print media at the very time when our constitutional sensibilities were supposedly being dulled by electronic-age values would seem to be a

13. 376 U.S. 254 (1964).

14. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

severe embarrassment to Pool's basic premise. However, Pool takes the "long view" of things. He envisions a time when electronics is so dominant that nothing is left on which to hang traditional constitutional conceptions of the press. This vision of electronic hegemony requires considerable imagination since it does not have strong support in contemporary experience. Still, history has not been kind to timid imaginations. Perhaps it is time for bolder foresight and prediction, to prepare us for the world when it catches up to our vision—or at least to Pool's vision.

II

We have yet to consider the underlying foundations of Pool's concerns. His apprehension about the future of the first amendment is based, first, on a perception that the first amendment treatment of print differs from that of the electronic media, and, second, on a normative judgment that the treatment of print provides the appropriate constitutional model for both.

The book's legal analysis is not one of its strengths. The treatment of traditional first amendment jurisprudence is not only breathtakingly brief (about twenty pages) but also rather incoherent, leaving one wondering why one particular topic or another is featured. Quite aside from its lack of clear purpose much of the discussion betrays a weak understanding of constitutional doctrine.

Pool begins, for example, with a discussion of prior restraint doctrine, which he regards as "perhaps the most important of First Amendment protections . . . for this bars censorship."¹⁵ Constitutional lawyers undoubtedly will be surprised to see such importance accorded to prior restraint. By virtually any measure the prior restraint doctrine has to rank among the least important aspects of modern first amendment law. Though prior restraints continue to be singled out as warranting special judicial hostility, the occasions for invoking this doctrine are relatively rare. Moreover, the justification for *any* special treatment is highly questionable.¹⁶ In fact modes of prior restraint sometimes may be less injurious to free speech interests than posterior restraints. In any event, prior restraint cases are hardly the centerpiece of first amendment law. The modern regulatory problems that concern Pool almost invariably fall outside the class of cases that the Supreme Court classifies as prior restraints. Typically the cases

15. I. POOL, *supra* note 2, at 74.

16. For incisive recent critiques see F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 148-53 (1982); Jeffries, *Rethinking Prior Restraint*, 92 *YALE L.J.* 409 (1983).

involve post-speech penalties or burdens which inhibit speech, the model for which is not *Near v. Minnesota*¹⁷ but *New York Times v. Sullivan*.¹⁸ Astonishingly, Pool's only notice of the latter is a passing footnote (of no significance on this point). Yet if any single case is central to modern first amendment treatment of the media, *Sullivan* is that case.¹⁹

Following the discussion of prior restraint, other first amendment concepts are recited: "clear and present danger," the balancing test, the distinction between protected and unprotected speech, and finally, "speech that merges into action." Pool's discussion of these concepts is confused. Given that his concern is to protect certain time-honored values of the "libertarian" tradition, one might have expected some evaluation of which doctrines and precedents are important to that libertarian objective. However, most of Pool's discussion is purely descriptive. The sparse commentary touches on such old clichés as the debate about absolutism-versus-balancing, and on more modern (but still overworked) questions of whether certain classes of speech lie outside the coverage of the first amendment and whether the press has special privileges. In none of these areas does Pool's surface scratching leave any mark. Granted, a full review of first amendment jurisprudence was beyond his purpose. This is, nevertheless, a book about the first amendment, and one might ask for a bit more exploration of the issues. Even if a detailed exploration would be impractical, one might expect more attention to the vast literature on free expression.

While Pool's discussion of constitutional doctrine seems aimless, his libertarian sympathies are not hard to discern. Unfortunately, they are neither clearly articulated nor carefully reasoned. Illustrative is a passing shot at the Burger Court for being "more puritanical than its immediate predecessors,"²⁰ a statement he supports by citations to three decisions upholding rather unusual regulatory controls.²¹ Whatever one thinks of the merits of those

17. 283 U.S. 697 (1931).

18. 376 U.S. 254 (1964).

19. See Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191. The importance of *Sullivan* in the first amendment jurisprudence in the area of communications regulation may be seen by tracing its "self-censorship" concept in cases such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Pool's emphasis on "prior restraint" in this context apparently derives from the fact that the regulatory controls are made in the general context of a licensing regime. However, this fact is largely irrelevant to an examination of the particular constraints imposed by regulation, most of which take the form of posterior burdens. The fairness doctrine, adjudicated in *Red Lion*, is a classic example.

20. I. POOL, *supra* note 2, at 67.

21. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (use of indecent language in

cases, to characterize them as "puritanical" suggests a rather cavalier indifference to the issues raised in each. Nor does it fairly describe the Court's obscenity decisions in this area to call them "puritanical," a label evoking the image of nine (or at least five) Comstockian curmudgeons eager to impose unwanted moral judgments on a hapless public. For one thing, if the Court is of such a disposition, it is altogether remarkable that pornography has flourished as could not have been imagined by those of us who in our salad days could not even buy a copy of such tame fare as *Lady Chatterley's Lover*.²² In any case, a scan of the Burger Court decisions shows no greater disposition in the direction of censorship than its predecessors. It was, after all, the Warren Court, not the Burger Court, that classified "obscenity" as unprotected speech;²³ the Burger Court has mainly tinkered with line-drawing.²⁴

Pool's discussion of traditional law is not only cavalier in its examination of relevant issues and cases, it also provides no basis for judgment as to what must be protected against the corrosive influence of modern media regulation. What significance does Pool attach to the highly artificial distinction between prior and posterior restraint? What lesson do we draw from the artificial debate over absolutism versus balancing? Which (if any) of the various "traditional" obscenity criteria should we seek to preserve in the face of "electronification" of the media?

III

Pool's romanticized (not to say fanciful) image of a libertarian first amendment tradition for print media contrasts sharply with his critical view of the interventionist tradition associated with electronic media—including telecommunications carriers, broadcast stations, and cable systems. Pool correctly perceives that electronic regulation has not been circumscribed by the same first amendment constraints applicable to print media—a fact which has scarcely gone unnoticed in the constitutional literature.

afternoon radio broadcast); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (zoning of adult theaters); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

22. *Kingsley International Pictures v. Regents*, 360 U.S. 684 (1959), invalidating the ban on the motion picture *Lady Chatterley's Lover*, came too late for me.

23. See *Roth v. United States*, 354 U.S. 476 (1957).

24. I am mindful that my objections to Pool's first amendment discussion might themselves be compared to his passing shot at the Burger Court. There is also the risk that someone might misinterpret my comments as a general defense of the Burger Court; I quickly disavow that purpose. The point of my critique is not to quibble with Pool's treatment of this or that doctrine, but to raise questions about his judgment concerning the basic constitutional tenets he wishes to preserve.

The most celebrated illustration is the Supreme Court's different treatment of broadcast and print media in regard to mandated "fairness" or right-of-reply obligations, allowing such obligations to be imposed on broadcast stations but not on newspapers.²⁵ The traditional rationale has been that the number of broadcasters is limited by spectrum scarcity whereas no such "natural" conditions constrain print media. It is now a common ground of constitutional commentators that the scarcity rationale simply will not wash. On that point Pool has plenty of company—including me. I agree with Pool that the real spectrum constraint is more an artifice of regulatory policy than of physical limits.²⁶ Moreover, even within the confines of that policy, the "natural" limits on the broadcast media are less confining than the economic constraints applicable to print and nonprint media alike. The advent of cable, which eliminates any possible spectrum scarcity, effectively undermines the whole edifice of such special treatment.²⁷ Finally, even if spectrum scarcity did justify some special regulations, it is far from obvious that it justifies the kind of controls imposed.²⁸ One must be particularly skeptical about program controls, such as the fairness doctrine, which are tolerated only because they are not enforced with sufficient vigor or rigor to cause the media serious discomfort.²⁹

25. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

26. Of special importance is the FCC's spectrum allocations scheme for television broadcasting. To promote local outlets and local service priorities, the Commission in 1952 devised a channel assignment plan that imposed severe limits on the number of stations that could be accommodated. To deal with the consequences of that regulatory "scarcity" the commission has pursued a number of proposals, but with very limited success. For an extensive treatment of this problem, see Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, 54 S. CAL. L. REV. 875 (1981). On the scarcity rationale generally, see Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

27. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 699 (1978). The Supreme Court has yet to recognize the point in the context of either broadcast or cable regulation. The closest it has come is a passing note in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979), that first amendment objections to the FCC regulations requiring cable systems to provide access channels were "not frivolous." Because the Court invalidated the regulations on statutory grounds, it did not reach the constitutional issue.

28. See Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 37 (1967). As far as allocation of resources is concerned, this requires no regulatory scheme other than the minimal one of defining and enforcing property rights, which could be distributed by auction or lottery. See Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV., 169, 240-43 (1978), and sources cited therein.

29. See Dissenting Opinion of Commissioner Robinson in *Fairness Report Reconsideration*, 58 F.C.C. 2d 691, 708 (1976); see also R. CASS, *REVOLUTION IN THE WASTELAND: VALUE AND DIVERSITY IN TELEVISION* 50 (1981).

Recently, a majority of the Court has discovered another rationale for regulation, which is presumably applicable to all radio and television programming whatever transmission medium is used. In the *Pacifica* case the Court sustained FCC regulation of "indecent" programs on the ground that radio and television media are "uniquely pervasive" in society inasmuch as they intrude into the "privacy of the home."³⁰ It is yet premature to predict how this "pervasiveness" notion will be applied, but manifestly it has the potential for expansive application to electronic media quite independent of conditions of scarcity.

Pacifica has had few admirers.³¹ With characteristic hyperbole, Pool labels it a "legal time bomb" and its rationale an "aberrant approach [that] could be used to justify quite radical censorship."³² I do not dispute that *Pacifica* contains the *potential* for mischief (though not as much as Pool supposes). As an FCC commissioner I concurred in the FCC's decision in *Pacifica*, but I confess that my concurrence now makes me uneasy. In retrospect it seems to me the facts of the case did not provide the right vehicle for the general principle of regulation that the FCC and the Court adopted.³³ Indeed, it is regrettable that the issue was raised in the context of radio and television, for I do not think the problem of indecency or offensiveness is *uniquely* a problem of the electronic media (though I think the characteristics of every media are relevant variables in constitutional analysis).

I nevertheless continue to think the general concept of "nui-

30. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court also relied on protection of children as a rationale for regulating the time and manner of broadcasting "offensive" program matter. The Court's pervasiveness rationale has been freely interpreted by some as an "impact" theory. See Geller & Lampert, *Cable Content Regulation and the First Amendment*, 32 CATH. L. REV. 603, 615-16 (1983). I think that stretches the majority's opinion a bit too far. Apart from protecting children the Court showed no particular concern about the influential power of broadcasting (and in the case of radio at least it would be hard to imagine any such power). The Court's focus is on invasion of privacy, not on influence.

31. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 67-68 (Supp. 1979); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981).

32. I. POOL, *supra* note 2, at 134.

33. With the luxury of hindsight, a couple of aspects of the case now make me think this was the wrong case for the principle involved. One is the fact that the speech in that case—George Carlin's monologue on "seven words you cannot say on radio" (Carlin knew his radio law) was probably not sufficiently "offensive" to warrant any regulation. In any case it is not clear that a simple time-shift in the broadcast or a warning (the two principal remedies endorsed by the FCC) would make much difference. Another is the whole "pervasiveness" rationale in both the Commission and Court opinions as applied to a radio broadcast which can be easily controlled or avoided. As Schauer, *supra* note 31, at 294, has observed, it was easier for the listener in *Pacifica* to tune out Carlin than it was for the viewer in *Cohen v. California*, 403 U.S. 15 (1971), to avert his eyes from Cohen's jacket.

sance" regulation, which both Court and commission adopted, is defensible. In this regard I am unrepentant—and plainly at odds with Pool to the extent he embraces traditional jurisprudence as applied to nonelectronic media. Under the classic *Roth* model of obscenity, the issue of constitutional protection is a categorical all-or-nothing determination: things defined as "obscene" receive no protection and can be totally suppressed (they are "nonspeech"); things defined as "nonobscene" cannot be touched at all, except for "compelling" government justification. It is, I think, precisely this approach to the problem that has made the law of obscenity so unsatisfactory. Any legal rule that frames legal choice in terms of polar opposites with the middle ground omitted, and then makes that choice depend on vague and rather artificial criteria, is bound to induce a lot of manipulation in order to produce outcomes closer to the midpoint where greater social consensus is likely to be found. This is, I think, exactly what has occurred as the Supreme Court has struggled to avoid the unacceptable extremes which its categorical framework invites. The result is a set of legal precedents that defy easy explanation in terms of that framework.

Pacifica offers a middle ground insofar as it permits some degree of control over the time, place, and manner of offensive speech while avoiding the extreme of total tolerance or total suppression. This need not be interpreted as a rule special to electronic media. Indeed, there is some precedent for such an approach in nonelectronic media cases.³⁴ However, the Court has been unwilling to develop the precedents into a coherent principle, possibly because it has been unable to agree on what social values are at stake in the control of offensive speech.³⁵

34. One obvious precedent, cited by the Court in *Pacifica*, is *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (approving city zoning controls on "adult" movie theatres). It is countered by *Cohen v. California*, 403 U.S. 15 (1971) (invalidating statute under which defendant was convicted of disturbing the peace by wearing, in a public building, jacket with "Fuck the Draft" written on the back), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (invalidating ordinance which prohibited the showing of film containing nudity on outdoor screen, visible in public). However, neither *Cohen* nor *Erznoznik* involved carefully drawn time, place, and manner controls. *Cohen* is especially distinguishable because it involved suppression of political expression, which has always been thought to command the greatest protection from government interference.

35. Though the basic problem is one of the Court's own making, I am sympathetic with the Court's search for a flexible doctrine. In particular I think the emphasis on "prurience" suggests a naive concern with the behavioral effects of obscenity—that it induces sex offenses—or a Victorian prudery about sex. Concededly, both the concern about inducing sex offenses and the more general concern over public morals may underlie public, and judicial, antagonism. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 3-4; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). However, for me, the overriding concern with obscenity is not a matter of

No doubt Pool would find my suggested interpretation and application of *Pacifica* intolerable. His simpler and somewhat romanticized picture of the first amendment does not tolerate much flexibility in regulating matters affecting speech.

I say "matters affecting speech" because Pool is concerned not merely about controls that *directly* restrict or burden speech. His conception of the first amendment appears to extend to virtually *any* regulatory interference with a communications medium, including not only "the press," but also purely transmission conduits such as the telephone. This indiscriminating approach to first amendment application is unsound. Even if one accepts this expansive concept of first amendment coverage, the degree of constitutional protection cannot be the same throughout the range of its possible application.

One must distinguish regulations aimed at the editorial function of the speaker from regulation of the transmission function—or to use the pop argot, between "medium" and "message."³⁶ Even though both functions come within the general purview of the first amendment, they do not invite the same degree of judicial scrutiny or demand the same degree of protection.³⁷ It is difficult

public morals or prevention of sex offenses but of maintaining a minimum level of decorum in the social and cultural environment. See A. BICKEL, *THE MORALITY OF CONSENT* 73-74 (1975).

36. One commentator has recently attempted to make this distinction the touchstone for defining first amendment coverage. See Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 *FORDHAM URBAN L.J.* 163 (1982). As a criterion for defining first amendment coverage, the distinction cannot be accepted. As a criterion for defining the level of protection, the message-medium distinction parallels—and might even be subsumed within—the broader distinction between "content-based" restrictions, and "content-neutral" actions that burden the exercise of speech, the former calling for stricter scrutiny than the latter. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482 (1975); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 *GEO. L.J.* 727 (1980). Although the distinction—in general terms—is now quite conventional, it is not without its problems given the vagueness and variable interpretation of "content-based" and "content-neutral." See Redish, *The Content Distinction in First Amendment Analysis*, 34 *STAN. L. REV.* 113 (1981) (criticizing the distinction as "theoretically questionable and difficult to apply"). However, distinguishing among government actions on the basis of whether they focus on message (what Ely calls "communicative impact") or on means/opportunity of communications seems to me a useful tool of first amendment analysis. Pool's analysis certainly would have benefited by considering such an approach.

37. Whatever the difficulties of relying on either the "message/medium" or "content-based/speech affecting" distinctions (see Redish, *supra* note 36), it makes no sense to ignore the difference between regulations targeting a particular type of message, or even category of speech, and general regulatory burdens on a medium of communications. Redish proposes that all "government regulations of expression" should be subject to a "compelling interest" standard of justification. *Id.* at 150. The ambit of that proposal is unclear, but if it is intended to apply to any regulation that imposes, directly or indirectly, a burden on communications activity, his proposal would call for an unacceptable degree of constitutional restraint on social regulation.

to imagine applying the usual rigorous test of first amendment justification to every regulation that affects—even substantially—communications. Unfortunately, Pool's failure to distinguish between coverage and degree of protection (the level of judicial scrutiny demanded for regulatory constraints) leaves us only to guess at what media regulations he would allow.

Although Pool gives little guidance as to what kinds of social interests might justify regulatory interference, he does challenge some of the conventional rationales for regulating electronic media. In the case of broadcasting, he tells us, the scarcity rationale is not only inadequate to support direct program controls, it is inadequate to justify general licensing as well. Regulatory restrictions on entry are largely unnecessary given the availability of "less intrusive means"—lotteries or auctions—for achieving the legitimate purpose of allocating the radio spectrum.³⁸

The FCC's former restrictions on cable television must similarly fail, according to Pool. Although he notes that the issue has been partly mooted by the FCC's abandonment of most of its former regulatory scheme, he regards this step as insufficient, particularly given the bad precedent it established. Appealing again to the print paradigm of media, he observes that the "print tradition is not one of deregulation; it is outlawry of regulation."³⁹

I am not quite sure what to make of this. Again, sweeping edicts are capsulized in sweeping, fustian phrases that beg for clarification. To begin with, we may dismiss Pool's characterization of the "print tradition" as one of "outlawry of regulation." The first amendment does not "outlaw" all regulation even of the print media. Though the Court has invalidated laws that single out the print media for *special* legal exactions, it has also insisted that the media are not immune from the same general legal burdens and regulatory restraints that apply to other, less exalted enterprises. Regulations may be specially suspect when they are targeted on message content or impose significant and distinctive burdens on the press function. None of this amounts to "outlawry of regulation." The present state of the law on press freedom from regulation is simply not reducible to such simplistic labels. Instead, it involves an evaluation of the purposes and effects of regulation measured against the particular burdens it imposes. Pool unfortunately does not often get down to a level of specificity that permits such evaluations to be made. Consider, for example, the practical question of common-carrier or like controls, which looms large in

38. I. POOL, *supra* note 2, at 138-50.

39. *Id.* at 166.

much of the contemporary debate over "what to do" with new communications media—cable, broadcast satellites, and related broadband delivery services. Does the first amendment restrain the regulation of rates for, say, cable television service? Pool questions the wisdom of traditional rate controls here but does not address the constitutional issue. He would not preclude all regulatory controls, for he approves of local governments' mandating access to monopolistic cable systems; at the same time he believes forcing cable systems to be purely passive carriers would be unconstitutional.⁴⁰

Pool's comments on regulation in this and other areas are interesting and informative, as a discussion of social and economic policy. My difficulty comes with his tendency to merge sound regulatory policy with constitutional *grundnorms*. Not only is he vague as to where the line between the two is drawn, he appears to be quite indifferent to the distinction. I must confess at this point I am myself a little ambivalent. On the one hand, I count myself among the skeptics who think of government regulation in general as Mies van der Rohe thought of art: "less is more." Government regulation is a mischief to be tolerated only where reasonably demonstrable gains outweigh the resulting inefficiencies and constraints on individual freedom. The number of instances where that condition is met in the field of communications is, I believe, far fewer than the number of regulations in place.⁴¹ On the other hand the case against such regulation does not warrant the moral fervor of a constitutional crusade.

Concededly, special constitutional problems are presented by zealous regulation when it impinges directly and substantially on communications activity, even if the controls are not targeted on message content. Even so, I do not see every issue of regulatory control in this field as raising a first amendment issue merely because it affects a medium of communication. Pool, by contrast, seems to see a first amendment issue behind every telephone pole and in every typewriter and radio circuit. At some points in the book he prompted me to wonder whether he believes Forest Service restrictions on the harvesting of trees would raise first amendment problems inasmuch as they burden the production of pulpwood used for newsprint.

Pool is not satisfied by the substantial movement towards deregulation of communications. He wants deregulation encapsulated into a constitutional commandment that cannot be readily

40. *Id.* at 176-88.

41. My skepticism is set out more fully in Robinson, *supra* note 28, at 236-62.

amended as social and economic circumstances dictate. This is, I think, a questionable conception of the proper province of constitutionalism. Traditionally, courts avoid constitutional adjudication if there are nonconstitutional grounds for decision. It is, to be sure, a principle sometimes breached by high court and low court alike, but it still has the strength of principle if not of a firm rule. And it is a sensible principle.

For one thing, a constitution that is dragged into debate over social and economic policies that only faintly implicate constitutional norms is bound to suffer some wear and tear from the encounter. The strength of the Constitution—or any constitution—depends on its ability to claim a degree of social acceptance of the underlying norms it expresses. A constitution invoked willy nilly where it is not needed—where sensible resolution of the controversy is possible on nonconstitutional grounds—is apt to become so routinized as to lose its special stature. I do not say that the Constitution—including but not limited to the first amendment—should not be invoked in matters of ordinary social and economic policy. The Court may well have gone too far in its refusal to impose even minimal constitutional constraints on economic and social legislation.⁴² In particular the Court has been excessively indulgent in allowing Congress to avoid political accountability for its action by delegating broad, ill-defined legislative authority to executive or “independent” agencies, such as the FCC.⁴³ But “first” principles ought not be casually put on the line lest they cease to be regarded as *first* principles.

Aside from possible erosion of basic constitution values, a more powerful reason for caution in constitutionalizing matters of social and economic policy lies in the simple fact that it overrides the majoritarian process of lawmaking. Even where constitutional choice does not directly override majoritarian choice it tends to encapsulate the social, economic, and political norms of a particular period, and to retard their change.

We may grant that much of the regulatory activity in this area of communication has been unsound; much of it is positively mischievous. One might specifically note that insofar as the argu-

42. For incisive critiques of the Court's virtual abdication of responsibility for overseeing social and economic legislation (with which I agree in all essentials), see Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (arguing for judicial scrutiny to determine whether legislation is minimally “public regarding”); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (disparate treatment of “economic rights and other civil liberties” unjustified by general conceptions of liberty or of judicial restraint).

43. See Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORN. L. REV. 1 (1982).

ment for constitutional restraint rests on the need to allow ordinary legal policies a necessary flexibility in adjusting to change, one of the vices of such "ordinary" legal policies is that they often prevent change. This is precisely one of the strongest indictments made against the FCC's regulation of new communications services—such as cable. A vigorous application of first amendment "laissez-faire" might thus be rationalized as a necessary antidote to the heavy hand of regulation.

But this argument, while not without appeal, simply misconceives the proper limits of constitutionalism. The Constitution may require governmental (legislative) action to be "rational"; sometimes it requires it to be "compellingly necessary." But neither the Constitution in general nor the first amendment in particular is a guarantor of optimal efficiency. If, as Holmes once wrote, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*,"⁴⁴ neither does the first amendment enact Adam Smith's *Wealth of Nations*.

IV

Setting aside the objection to what I see as an overly aggressive constitutionalism implicit in Pool's argument, I am inclined to be somewhat more agnostic than he is about the constitutional norms being embraced. I mentioned earlier that Pool is unclear in identifying which particular features of traditional first amendment doctrine must be preserved against the regulatory encroachments associated with modern electronic media. But his general bias is plain enough: he wants minimal interference with speech and associated activities. This is what he conceives to be the tradition of the print media. If it is somewhat romanticized as a description of traditional first amendment doctrine, it at least indicates his view of what the right principles of free speech protection ought to be. He deplors the modern distinction between electronic and print media not only because it is artificial, but because it implies a departure from the "right" free speech principles.

I earlier agreed with Pool about the artificiality of this distinction. Eliminating that arbitrary distinction, however, does not axiomatically tell us which set of rules should survive when the distinction is gone. Traditionalists like Pool will argue that the more restrictive norms associated with the older print medium should prevail. I am disposed to agree. There should be a presumption in favor of any established norm. This presumption es-

44. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

pecially applies to constitutional principles where historical conformity and stability are essential to the value of constitutionalism. But even the most vulnerable, time-honored constitutional norms must periodically undergo fresh examination in light of contemporary circumstance.

And they have. Despite the Supreme Court's occasional invocation of the Constitution to resist social change, constitutional jurisprudence has adapted itself to contemporary social mores (sometimes perhaps too easily). Protection of free speech has not been immune from such adaptive change. Even within the "print tradition" that Pool extols there has been substantial change, as I indicated earlier. Despite Pool's evocation of an ancient print tradition, most of the relevant constitutional law on the subject has been developed within the adult memory of living lawyers.

For the most part, this modern evolution of the first amendment has been in the direction of *expanding* its ambit and degree of protection. However, for me the important lesson of the evolution is the fact, not the direction, of change in conceptions of basic constitutional doctrine. Though my own personal taste runs rather more in the libertarian direction than otherwise (possibly as much as does Pool's), I reject any notion of a metaconstitutional principle that requires all constitutional change, including first amendment change, to be expandable only.

Pool is well aware that there have been changes in judicial conceptions of the first amendment. Past and possible future alteration of first amendment principles in response to the emergence of electronic media is, indeed, the central concern of his book. But he scarcely considers the possibility that such alterations might be more than *special* adaptations for distinctive, new media; they might also reflect a changing perception of basic first amendment principles. I alluded to this possibility earlier in arguing that *Pacifica* should not have rested on the uniqueness of a particular medium but should have articulated a more widely applicable concept of time, place, and manner controls. Perhaps the electronic media most clearly dramatize the nature of the underlying concern. If so, it is not inappropriate that the electronic media should provide the initial context in which the new ideas about constitutional protection are exposed. I do not mean by this to suggest that the new media should be used as guinea pigs. I suggest only that the emergence—and dominance—of the new media may expose new problems, or new perspectives on old problems, that require us at least to think afresh about "venerable"

traditions.⁴⁵

Pool shows little disposition to think such heresies. While he is boldly imaginative about the ways in which new technologies will alter our conception of information and communication, he shows no similar boldness in contemplating changes in our basic constitutional conceptions. If his basic norms are not beyond change, at least they stubbornly resist it.

His view is not, I concede, unattractive; it offers a degree of value stability that is hard to find elsewhere in society outside of religion. At the same time this view does demand extraordinary faith in the abiding wisdom of a particular time-bound perspective on constitutional values. Would that I could share such a faith. It might reintroduce the comfort of "some of that old time religion" into the law.

45. My point is similar to but quite distinct from that of Bollinger. *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 17-26 (1976), who observes that new media technologies have generally evoked new apprehension about unregulated speech, and thereby fostered less liberal attitudes about the scope of first amendment application. What I am suggesting is something more than caution in extending print media traditions to new and "different" media. I am suggesting that the new media might prompt new thoughts about the character and degree of protection for *all* media. This is, of course, the very possibility Pool fears—fears about which I am *dubitante*.