Panel I: The Changing Landscape of First Amendment Jurisprudence in Light of the New Communications and Media Alliances

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Panel I: The Changing Landscape of First Amendment Jurisprudence in Light of the New Communications and Media Alliances

Moderator: James C. Goodale, Esq.  
Panelists: J. Richard Devlin, Esq.  
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         Andrew A. Merdek, Esq.

PROFESSOR GOODALE: Today is a very exciting moment for me because I've taught a course in this area for so long and felt as though there was no one to appreciate some of the policy issues that are involved in the subject that we're talking about today. More of that in a moment.

First, I want to introduce our panelists. On my far left is Rich Devlin, Executive Vice President, External Affairs, Sprint Communications, and he came in from Kansas City for this forum.

Sitting next to him is Andy Merdek, Vice President of Legal Affairs and Corporate Secretary of Cox Enterprises. He came in from Atlanta.

Additionally, from the Department of Justice, we have Ted Hirt,

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d. Vice President of Legal Affairs, Corporate Secretary, Cox Enterprises, Inc., Atlanta, GA; Middlebury College, A.B. 1972 (magna cum laude, Phi Beta Kappa); University of Virginia, J.D. 1978 (Order of the Coif).
sitting on my right, who is the Assistant Branch Director, Civil Division, Federal Programs Branch.

Now, let me tell you how we’re going to organize the panel. I’m going to start off by “setting the table.” In other words, trying to say a little bit about what’s going on with respect to media alliances, because we, after all, are talking about the changing landscape of First Amendment jurisprudence in light of the new communications and media alliances. So to set the table, I’m going to talk a little bit about the media alliances. Let me mention briefly, new communications, because the panel, as you can see, will explain some of the latter to you, following this format.

First, following my “table setting,” so to speak, we’re going to discuss the question of whether the existing regulatory scheme can be appropriately adapted to accommodate the new entity, that is the new merged entities or joint ventures, however you wish to call them, and what role the Federal Communication Commission (“FCC”) should play. Rich Devlin is going to talk about that, and he may also answer the question whether it should be one wire or two.

The second item we want to discuss is how will the Clinton administration’s proposals affect this debate as to what the regulatory scheme should be and also how the Clinton administration is proposing legislation, and Mr. Hirt will explain that to us. More about that in a moment.

Lastly, Mr. Merdek will tell us about broadcast television, cable and telephone—what is the proper First Amendment standard to apply to the converging media entities?

So you will see that we have a very complex subject and not very much time to talk about it. And one of the things we want to do as we go through the panel, and after we finish talking, is talk among ourselves with respect to how the new technology works. You will hear a little bit of it as the speakers make their presentation, and of course, we want to talk with you.

I don’t think there’s anyone I know who knows really how the technology is all going to turn out. And that, of course, is one of the driving forces for the new alliances. The change in technology
is before communication companies, and they do not want to be left in the lurch.

I'd like to discuss some of the new alliances that we've been reading about in the newspaper, and I will refresh your recollection with respect to them. U.S. West has invested in the Time Warner Cable subsidiary. Southwest Bell has bought the Hauser Cable interests. Viacom, that story is so overplayed, I hardly dare mention it, but I will refresh your recollection that NYNEX and Blockbuster, at least—maybe there are others, I've lost track of them all—are venturing with Viacom with respect to its takeover of Paramount.

TCI, which is the largest cable company, is selling out to Bell Atlantic. QVC, that other Paramount bidder, has investors from the Cox Enterprises and from Bell South. Southwest Bell and Cox have a joint-venture going with respect to the cable operations of Cox, and Cox, TCI, Comcast, and Continental have a joint-venture with respect to Teleport.

Why are all these new ventures being put together? The reason is, generally speaking, we are in the middle of the information revolution. In my view, it is probably the greatest revolution since the industrial revolution. Changes are happening every day in our lives so fast that we can hardly perceive them.

I only need to point out the impact that CNN's coverage of the Gulf War had on our lives. It changed the news business, it changed our lives, and of course, computerization has changed our lives too, and more change is in the offing.

These companies want to be part of that revolution and not miss it, and each has something to bring to the others. The cable companies bring expertise in cable communications to the phone companies. The phone companies, candidly, bring cash to the cable companies. The cable companies and the phone companies, at some point in time, want to change their transmission devices from coaxial in the case of cable, twisted pair in the case of phone companies, and that's going to take a lot of money. There are many ways to provide for communications other than through fiber, but the fiber is the information highway of the future, and everyone
wants to participate in it.

This participation includes movie companies, newspaper companies, and the cable companies, to the extent that they have networks bringing the so-called software to the party. In other words, it's great to have all the transmission devices, but if you don't have anything to show at the other end, then it doesn't make much sense in terms of the convergence of all the interests I've talked about. We're not simply talking about the delivery of phone communications, but of course, computer and what we now think of as broadcasting cable communications all as one megillah, as they say here in New York.

In short, there's an increase in capacity with respect to what can be delivered to the viewer, and everyone wants to be part of the action, and no one wants to be left out.

So with that as an introduction, I'd like Rich Devlin to speak to us if he could.

MR. DEVLIN: Good morning, everyone. Jim, I hope we bring more than cash to the table. Other people brought technology and software, and then the telephone companies get to bring cash?

I'd like to say a word about Sprint Corporation so you have some understanding of why our company has an interest in this debate. Sprint Corporation is probably best known through Candice Bergen ads promoting our long-distance service. And we are, in fact, the third largest long-distance company in the United States.

But lesser known is that we are also a very large local telephone company. We tend to serve rural properties—nineteen states we're in—and we've got roughly six million access lines. So we're about one-half the size of a Baby Bell.

We also have very large holdings in cellular, some of which overlap our telephone company, some of which do not. So we are very much a full-service telecommunications provider. We have a very direct interest in a lot of these issues that I'll talk about, because in many respects, it's our future.

I think Jim did a great job on talking about the convergence, what's happening out there in terms of joint ventures. Jim, I
wasn’t sure what you were going to talk about, so I had my check-
list.

PROFESSOR GOODALE: Is that what we agreed upon? Did I take one of your subjects?

MR. DEVLIN: Did you miss Bell Atlantic-TCI or did I miss you saying that?

PROFESSOR GOODALE: I said TCI and Bell Atlantic, yeah.

MR. DEVLIN: I missed that. There is this push for strategic alliances, as Jim talked about, but maybe I would characterize it as the herd mentality—the need to have partners such as telephone companies partnering either through joint-ventures or acquisitions of cable companies. There’s absolutely no question that that’s going on, but there’s something else going on below the surface that doesn’t get a lot of attention. Jim alluded to it in a ten-second reference to Teleport. Teleport is basically a competing local telephone company. It does not compete for most of your business from your home. What it does is put fiber rings around many large cities and basically provides access services to long-distance companies. It directly competes with local telephone companies. Teleport is owned by an unusual group of people: TCI, Time Warner, Cox, Continental, and Comcast. Five cable companies own Teleport and compete directly against telephone companies. Comcast also has a very big cellular presence.

The FCC is in the process of deciding how spectrum will be auctioned for the next generation of cellular services, known as personal communications service ("PCS"). It’s next-generation cellular; it’s micro-cell technology. And we’re going to see a lot of cellular companies and a lot of cable companies competing for PCS. So we’re seeing some indirect competition between cable and telco, and then we’re seeing some very direct head-to-head activities.

Now to the reason why we’re here. My role is to give you a sense of the regulatory models that exist today and provide the

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predicate for the rest of this panel and also for the rest of the day. Maybe this is stating the obvious, but I'll take a shot at stating what the purpose of the First Amendment is and apply it to the kinds of expression today.

The notion underlying the First Amendment is to encourage the widest possible dissemination of information from diverse and antagonistic sources. That’s the Supreme Court speaking in the Associated Press case in 1945.2 And there is the notion that people will reach the right conclusions if they have access to many tongues. That is, the marketplace will decide what’s valuable and meaningful, not the government.

Well, applying that broad principle, we can talk about some models. There’s probably three traditional regulatory models out there. The “print model” is probably the one we’re the most familiar with, and print basically enjoys the greatest freedom from government intrusion. In the print model, the publisher may advance his or her own political views, social views, economic views. There’s no government licensing, there’s no supervision of fairness, and there’s no oversight on judgment. It’s very limited government intrusion, as you all know, and that’s basically on the edges of obscenity and libel. So that’s the print model.

Switching now to a model that I’m very familiar with is the “common carrier” model. The notion of a common carrier model came from the days when a lot of things were thought to be natural monopolies. Telecommunications was thought to be a natural monopoly, and because there was no competition that was thought to be economically feasible, the government substituted regulation in its place. The notion of a common carrier under state and federal regulatory statutes is that the common carrier must provide service to all comers on a nondiscriminatory basis regardless of content. That is, the common carrier is precluded by law from making value judgments or denying access to service because of the underlying content of the message. The common carrier—in this case the telephone company—does not play any role whatsoever in content.

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Now, let's say that the notion of a natural monopoly is falling by the wayside. For example, in long-distance, there is in this country some four hundred long-distance companies, so it's pretty hard to argue that long-distance is a natural monopoly. Nevertheless, the common carrier model still holds true. So, for example, in a real close-to-home experience for me, when the Alabama Attorney General in 1993 tried to indict Sprint for violations of the state obscenity statute\(^3\) because of the content of phone messages by our customer, we went into federal court and got that indictment enjoined.\(^4\) That is because we did not have a choice; we had to provide the service in question. The FCC still thinks of telephone companies and long-distance companies in the common carrier model. For example, there's the debate before Congress now\(^5\)—and it went before the FCC a couple of years ago\(^6\)—about which is the appropriate role of telephone companies in providing cable services. The FCC opted for what's known as "video dial tone," which is basically that the telco can put in the transmission facility but must offer it to all comers on a non-discriminatory basis and cannot attempt to influence the content. So that's the common carrier model.

The "broadcast model" is probably one that you're very familiar with.\(^7\) The notion there is that the FCC regulates uses of the radio-frequency spectrum. There's a very limited spectrum out there for things like radio and television, cellular, PCS and so forth, so there's a very tight regulation of who gets access to what and the terms and conditions under which you get access.

In the broadcast model, the FCC or Congress could have easily gone with the common carrier notion—which is, have the TV station or the radio station be indifferent as to content and just serve

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5. See H.R. 3636, 103d Cong., 1st Sess., 25-39 (1993) (allowing telephone companies to provide video programming in their telephone service areas subject to strict structural separation requirements and a requirement to provide up to 75 percent of system capacity to unaffiliated video program providers).
as a transmitter. They could have done that, or they could have adopted some notion of rotating among potential users and giving more people access, but they didn't. What they decided to do was give somebody a limited license, subject to renewal, and then use that frequency as a trustee for the public because there wasn't enough to go around for everyone. So that's sometimes known as the "trustee model." And in that model, the government does play some role in content regulation and it does so through the renewal process. Basically, the station owner needs to show that they've served the public interest by putting on informational programs, educational programs—things like that. The government is not involved in viewpoint regulation but wants to make sure that there's that diversity of sources.

Finally, we get to some of the hybrid models, and cable is probably a good hybrid model. Cable has elements of all three. There's the notion of unregulated speech. As you know, for the most part, cable companies have freedom to put whatever program they want to on it. Now, I'm sure we'll get differences of opinion of just how much government intrusion there is and the appropriateness of that intrusion. But the government does require "must carry," which basically says that because you have a lot of channel capacity and because you have a "natural monopoly"—that is, you're the only provider of cable services into a home—we're going to impose on you certain obligations to carry certain types of programs. And there'll be a lot of discussion on that today. The notion there was, again, to encourage diversity of sources, requiring that the public be given access to government public policy, education, and community programming.

There's probably been a lot of criticism of the cable model. In fact, of any model out there in terms of achieving the desired result of diverse and antagonistic sources, the cable model has probably come under the most criticism. That is because today cable is

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largely a monopoly, and because it passes into so many homes, its influence is very large. The cable companies are vertically-integrated companies—they have financial interests in the programs—and there have been allegations in hearings before Congress that the cable companies have used anticompetitive practices. That's why Congress adopted the “must carry” rules. But anyway, these are the three models—I'm sorry, the three models plus the one hybrid.

So what does this mean in terms of the future? I personally think the common carrier models serve the public well. I think it's a good thing that people be able to use their telephone for whatever purpose they want to. I don't think the Alabama Attorney General should be able to say that "adult content" cannot be discussed or transmitted over the telephone. I think the Alabama Attorney General should not—and cannot—ask the telephone companies to regulate content, and that was really the issue in that case. So I think the common carrier model has worked. I'm not sure if it works in the future. We've got a conflict with the cable model and the common carrier model, and increasingly we're competing head-to-head. As Jim mentioned with technology developments, if it's not ready now, within a short number of years it will be possible to provide the exact same communications content over the wire that comes in from the cable companies and over the broadband facility that comes in from the telephone company. Either will be technologically able to meet a customer's total communications needs.

The vision is that you will have a “smart-box” over your TV, in which you can access all forms of communications—not just video. The historically bright line between cable, which is video, and telephone, which is voice—those days will soon be over.

While I think the common carrier model has served us well, I don't think it's possible to have two people competing head-to-head for the same customer and being regulated differently. I just

don’t think that works. I don’t have a great answer. I can tell you where I think public policy is going. Public policy is going toward letting telephone companies provide cable service—it’s letting cable companies provide telephone service. That is, the state and federal restrictions—largely state restrictions—would be preempted, and cable companies could provide telephone service, thus allowing head-to-head competition. But right now, the notion still is the telephone companies must function as a common carrier. Maybe you could make the argument, Jim? Should we stop?

PROFESSOR GOODALE: If you want to. I think we’ve got a bridge on which to come back. I think we’ve raised the key issue for this panel and I thought it was an excellent, clear presentation on items that I find very difficult to explain to other people as clearly as you have.

But as I was saying, I think that presenting the issue you have as to whether the common carrier model will work in the future is a nice way to turn this over to Ted. Not that he’s necessarily going to answer that question, but implicit in any bill that the Clinton administration comes up with or Congress comes up with will be an answer to the question posed—whether common carrier regulation is appropriate as we go forward. And I will say just before Ted speaks that he really has the most difficult assignment of all, because we’ve asked him to explain to us what the Clinton “position” or the Gore “position” is on this subject, and very candidly, it’s very difficult to figure out with any particularity what the Clinton administration position is. And I think that’s intentional, because it would be my view anyway—and I’m trying to make it a little easier here for my next speaker—that the Clinton administration would like to see some of the thinking develop in Congress. Anyway, I don’t want to take everything away from Ted Hirt, and you’re on.

MR. HIRT: Thank you. I want to express my thanks, first of all, to the Law School and to the Journal for all of us being given the opportunity to speak here today, from both myself and my colleagues from the Department of Justice. My first caveat is that what I am going to say does not purport to be official Department of Justice policy or, for that matter, administration policy, so the
views that I and my colleagues from the Department who follow
me express are really our own and should not be taken to be official policy. They may or may not be coincident with such policy. That probably gets me off the hook to some extent from Professor Goodale's question to me as to whether I can state the Clinton administration position. I'm not trying to do so, since I'm not a legislative representative from the administration. However, my goal in this brief time period is to try and explain what I think are the operating principles that the administration has endorsed, talk just for a few minutes about some of the bills that are already before Congress, and give you a little insight as to those provisions.

First of all, there is to my knowledge no "administration bill." There has been, however, testimony by administration representatives, some of which is in your materials. Most recently, during the last week of January, Assistant Secretary of Commerce Larry Irving testified on the two pending bills from the House side which are H.R. 3626 and H.R. 3636. The nomenclature of the bills is enough to confuse one right there, to make sure we know which topics are at issue. However, I think that the starting point, before I get to the "nuts and bolts" of regulation or to what Rich Devlin is talking about—what model might ultimately be embraced by a legislative solution—is to talk very briefly about the principles, because the administration has been quite clear in both of the speeches by the Vice President—the December speech and the January speech—both of which are in your materials, that any proposal in the telecommunications field should be guided by some

13. H.R. 3636, supra note 5.
15. Vice President Al Gore, Remarks to the Superhighway Summit (Jan. 11, 1994).
overriding principles. I think that they are consistent with the First Amendment model that Mr. Devlin identified, including his citation from Associated Press.

These overriding principles are as follows. First of all, encouraging private investment in the national information infrastructure, also known as the information superhighway. Second, promoting and protecting competition. Third, the concept of open access to the telecommunications field by not only the ultimate consumer—the telephone subscriber and the cable subscriber—but also by those who wish to connect or interconnect with the existing telecommunications network. So the principle of open access is very important.

The administration also has as a goal promoting and, indeed, enhancing the concept of universal access. As I first read this, I said to myself, well, what they’re trying to say is that everyone has a telephone, and that’s what 94 percent of the country’s households should continue to have if they want a simple telephone, if they don’t want necessarily to go for something more sophisticated. However, as I’ve read the administration’s positions—and this is in some of the testimony in your materials—it’s clear to me that the administration is looking more broadly, to the extent that the premise of the information superhighway should be that consumers—whether we’re talking about students, the elderly, or other segments of the population—should benefit from all of the enhancements that these respective industries are going to present to us in the near future. So it’s not simply a question of preserving, if you will, the status quo of telephone service, but also enhancing that with all of these products and services that the industries are coming up with.

The final principle—and this gets us to some extent to the legislative solution or, if you will, the legislative conundrum—is flexibility. The administration, as reflected in the White Paper, the fact sheets, and the Vice President’s speeches, wants to emphasize flexibility. I think from what has already been said to you by the

panel—and what you’ll hear the balance of the day—is that we’re all facing, as we’ve said, a revolution, and the concern is that a legislative solution, if it becomes too rigid, will actually not meet what goes on in the marketplace or react to it. So I think that the administration testimony indicates that they would want there to reside, somewhere, a fair amount of flexibility to deal with issues.

I don’t want—in the limited time I have—to go through each of the bills laboriously because they are in your materials, but I think that the principles, if you will, that the administration has endorsed are evident in the bills. The caveat that I have to add—if I haven’t said it before—is that we may well see the administration work with Congress from existing bills or we may well see the administration have its own bills that work from the bedrock principles of the two bills. I, in part because I’m not a legislative policy person, could not tell you, nor would I be authorized to try to predict that.

This is clearly a rapidly moving issue, and in the legislative process, one just has to see how it evolves. But if you look at the bills—and H.R. 3636 is a good example—it represents some of the same principles that we’ve talked about. Equal access is a big principle to anyone who wants to provide so-called information services or competing telecommunications service. Section 102, for instance, says that it would be a duty of a Title II common carrier to furnish such service and also to do it in an “unbundled” way, and as I understand it, it means that if you’re going to offer a service, it should be a distinct service, so that people—whether you’re talking about the telephone subscriber or someone who seeks access to the system—will pay for, or transact for, a specific service and not other services.17

Another issue—which goes back to the common carrier model—is raised by the Markey-Fields bill,18 which is whether the FCC would regulate these new common carrier access systems through a tariff-type system, in which case there would be rates filed which

17. See H.R. 3636, supra note 5, at 5-7.
18. H.R. 3636 was co-sponsored by Rep. Markey (D-Mass.) and Rep. Fields (R-Tex.).
the FCC could review.\textsuperscript{19}

An important issue which will be the subject of the third panel is the entry of the telephone companies into the cable field. Here I think is where you will see, as the next panels will tell us, the debate that becomes very concrete over allowing industries to merge or cooperate. One of the big issues is, if a telephone company is allowed entry into the cable business, to what extent should it be able to do so directly or, as the Markey-Fields bill suggests, through some sort of separate affiliate?\textsuperscript{20}

As I understand the administration's views of this type of bill, they would endorse that aspect of having a separate affiliate for the cable company—by that I mean the telephone-cable company operation. There would be a question, however, from the administration standpoint about to what extent to put that in the statutory language—the exact restrictions of that affiliate. In other words, do you want to have a very structured affiliate and regulate each of the transactions between the telephone company parent and the affiliate, or do you want to leave that to FCC regulation? And that can include marketing of the new business—the cable business. That can include making sure there are no cross-subsidies, so that the telephone rate-payers do not bear the cost of this new cable-telephone feature—again going back to the theory that one is preserving the notion that a telephone rate-payer can still pay only for the telephone service, if that is the household's choice.

I think that the emerging debate is to some extent whether the administration will want to reside in the discretion of the agency—the FCC—much of the "nuts and bolts" or the implementation of how an affiliate might operate.

Another good example—to address the competition issue—is the extent to which the bill would restrict a telephone company from purchasing an existing cable operation—in other words, imposing a five-year moratorium.\textsuperscript{21} Is that a good idea? The administration might say, maybe we should let the FCC look at the issue.

\textsuperscript{19} See H.R. 3636, \textit{supra} note 5, at 10-12.
\textsuperscript{20} See \textit{id.} at 25-34.
\textsuperscript{21} See \textit{id.} at 32.
As you know, there already are, in much of the telecommunications industry, regulations which contain waiver provisions. To the extent we go back to the other principle that I talked about—that of competition—if we are trying to create this national information infrastructure, we want to look at the question of competition: Is there competition in a marketplace? If there is, maybe restrictions are not necessary. If there is no competition, we should have to ask whether the consumer should be protected in terms of there being only one provider of this type of communications service.

Just very quickly on H.R. 3626. This comes back to the issue which Mr. Devlin has talked about, of more competition in the telephone business, in terms of access—whether you’re talking about long-distance access or local access—and I would refer you to the bill. Again, to some extent, what I think we might see—and this goes to the convergence theory—is the idea of the so-called “level playing field.” In other words, we could be looking at these two businesses, if you will, merging. There is concern, I’m sure, that there be a symmetrical regulatory treatment of whatever the function or business is.

Which brings me to my final point on what we might see from the administration proposal. Again, Assistant Secretary Irving emphasized that what might emerge is a new Title VII to the Communications Act and I will try to quote from a paper that came out that’s not in your materials—“a new Title VII would provide a unified symmetric treatment of providers of two-way broadband services in contrast to the present disparate treatment of common carriers and cable operators under Titles II and VI of the Act.”22 So this is something that may well be fleshed out—should there be a brand new model, in a sense, a dynamic model, that will allow for an option to look at a whole new way of treating the converging businesses?

Whatever emerges, we’ll have to keep in mind the five principles that I spoke about earlier, and we’ll have to see how this session of Congress sees those being manifested in the actual bill

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that might emerge. Thank you.

PROFESSOR GOODALE: Thanks very much. That gives us some basis for coming back and talking about the various issues with respect to those bills. But before doing this, Andy Merdek has volunteered to answer the sixty-four dollar question, which no one yet has been able to answer who has thought about it, as to what is the proper—appropriate, I guess, is what that means—First Amendment standard to apply to the converging media entities. We await your views breathlessly.

MR. MERDEK: And they probably will be delivered breathlessly. I want to thank the Law School for putting on this program and I want to thank Jim Goodale for chairing this panel. Jim and I both have newspaper backgrounds, and he’s always been one of my heroes.

He started out by telling you this is a confusing subject. Then Rich Devlin and Ted Hirt very quickly gave us very simple and even well-organized presentations—three First Amendment models and five points under the two statutes in draft form. So I fear it’s up to me to uphold the obligation to confuse you because this is confusing, and I think I need to do that.

This would be a simple business were it simply an economic issue as to how you get from the current separate technologies of cable and telephone to the merged technology of what, in essence, would be two-way interactive, broadband, digital-switched communications. That’s quite a mouthful.

The reason it isn’t a simple business is that it’s not just an economic issue for two reasons. Number one, Congress has a role in it, and ultimately when Congress has a role in things, it often creates entities that have roles, like the FCC. Back when I was a newspaper reporter, we used to have a sign that said, “No man’s life, liberty or property is safe when Congress is in session,” and I think they’re proving that. The other reason is because there’s this hundreds-of-years-old thing called the First Amendment, which actually confers some rights and obligations on people and limits the activities of government. Yet here we are trying to figure out what the role of government is going to be.
What are they going to be looking at? Well, the mouthful I said before—two-way, interactive, broadband, digital-switched communications. "Two-way." That part of it is easy, right? You send it out, something else comes back. "Interactive." You can manipulate the system, you can send information into it rather than just receiving it as you do with a television signal now. "Broadband." I guess the hot buzz-word for it is 500-channel; it may be more than that by the time it ultimately gets built—it may be less—but there are going to be a lot of choices in the video world. "Digital." The signals are going to be sent through electronic 1's and 0's—a digital, multiplexed system which makes a lot of things possible, like maybe encrypting some things so that you have some privacy. That becomes important because it's switched like a telephone system—you can call Rich Devlin, you can call Ted Hirt, you don't have to call the world and hope no one else will see it. If any of you has Prodigy or CompuServe or any of those other computer networks now, imagine that technology being merged with and superimposed on your television and then merged with your telephone, so that someday—assuming that either the couple of hundred year-old First Amendment doesn't get in the way, or Congress and the FCC don't get in the way—you will have "The Box," in fact probably two of them, one at home and one on your wrist or your belt, which will be a combination telephone-computer-television—you name it—one electronic full-service communicator.

Now to the issue Jim has charged me with responding to—the First Amendment. Rich was nice enough to tell us there are basically three flavors of it, and since you didn't look confused enough, I wanted to suggest that there are at least six. But before I do that, I have to tell you where I'm coming from, because working for Cox, which is a privately-held company some of you may not be familiar with, we have at least five viewpoints on this. Just as Ted was saying, the federal government has its own policy, but what he says doesn't necessarily reflect that. In fact, these days I wonder if what anybody says, including Al Gore, necessarily reflects the policy of the federal government. Let me tell you where Cox is coming from.
Cox is a newspaper, broadcast, cable, automobile auction, and other things company. They have television, radio—basic broadcast properties—which, in the context of the First Amendment issue, puts us under Rich’s broadcast model. We’re licensees of the public airwaves because of the limited spectrum, and therefore we’re subject to renewal and sanctions and fines and what have you.

In the *Turner* case,23 which the next panel is going to talk about, you’ll recall that the broadcasters basically said the “must carry” rules that require that cable systems carry local broadcasters are a great thing for broadcasters. They therefore deserve a very low level of constitutional scrutiny and, gee-whiz, we need all the protection we can get from these malicious and monopolistic cable people.

Cox also has cable interests. So at the other end of the hall, we’ve got people who say “must carry” is terrible, it deserves the strictest First Amendment scrutiny. It’s basically a government preference for certain speakers and voices over others, stifling the right to choose—if you’re a cable guy—carriage of more popular signals. Then we could charge people more since we’re selling this stuff, but now we’ve got to put on some local stations that people may not really care about.

Cox is also an innovator in Teleport, as Jim mentioned, which is basically an alternate access telephone company where you take the fiber-optic stuff in the high-tech cable systems and turn it into a telephone system that lets people bypass the local phone company in order to get to Sprint or AT&T or MCI.

Cox also is part of the great convergence, as Jim mentioned, because we’ve got deals with Southwestern Bell here in the United States and in the United Kingdom to provide expanded cable operations here and ultimately cable and telephone over the same wire in England.

And then finally, Cox was one of the first—and, in fact, has

what’s called a pioneer preference from the FCC—in this new PCS technology, personal communications systems.

As a result, I just want you to understand that if at any point in this presentation I contradict myself, it’s because all I’m doing is basically juxtaposing one Cox viewpoint with another. Anyway, my job as Cox’s vice president of Legal Affairs is, of course, to try to keep all this stuff straight. But that will not get in the way of confusing you.

Let us now turn to the First Amendment and try to do that. Let me suggest that there are at least six First Amendments. There are seven if you count the one that Hugo Black used on the Supreme Court: when the First Amendment says that “Congress shall make no law abridging the freedom of the press,” then that means no law. Nobody took him up on that.

PROFESSOR GOODALE: Douglas did.

MR. MERDEK: Well that’s true, Justice Douglas did.

PROFESSOR GOODALE: A voice in the wilderness.

MR. MERDEK: Douglas knew more about the wilderness than anybody, but this is ultimately a kind of Goldilocks-and-the-porridge question: what’s too strong, what’s too weak, what’s too hot, what’s too cold—and you’ve got to get something that’s just right.

Let me suggest that there are a bunch of these First Amendments to play with and I’m going to go through them quickly. The next panel on the Turner case will probably tell you more about how it all played out in the context of “must carry,” but somebody—not me—did a count: in the Turner case there apparently are 22 substantive briefs, from 49 different groups, with 126 attorneys of record, taking the position that, at least as to “must carry,” the proper First Amendment standard is either strict scrutiny like the print model, some mixed intermediate standard, typically

24. U.S. CONST. amend. I.
26. See id. at 720 (Douglas, J., concurring).
referred to as the *O'Brien* test\(^\text{28}\)—which I’ll get to—or something like that, or even all the way down to rational basis, meaning if there’s really any conceivable reason for the government doing this, you may as well uphold it. If that many lawyers and that many companies can fight in that many briefs over the issue, there’s got to be at least six to choose from.

The first one, as Rich mentioned, is the print model, which we often refer to as pure speech, and cable wraps itself in that flag all the time. The cable system works largely by virtue of its franchise grant from the local licensing authorities, provides multiple video signals to your television set, and likes to think of itself as an editor. We choose what signals we’re going to send, so therefore, we’re an editor; we’re the same as the guy who runs the *New York Times*, deciding what story to put in every day or what wire service to carry. If you start from that premise, you can strike down “must carry” in a hurry—and you can strike down just about anything else—because the one central rule of pure speech or print model is that the government almost never wins. If you’ve got the *Brandenburg*\(^\text{29}\) clear and present danger of inciting violence, or the *Chaplinsky*\(^\text{30}\) fighting words, or maybe something real close to that, then maybe the government can have some limited regulatory role, but otherwise you almost get to the Hugo Black and Bill Douglas version of the “no law” First Amendment.

There was some interest in this view in the oral argument on *Turner* with Justices Scalia, O’Connor, Kennedy, and even Chief Justice Rehnquist reportedly suggesting that maybe there is some editorial choice going on here and that the government’s rights to regulate it are pretty limited, because ultimately it’s information

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\(^{28}\) See United States v. O’Brien, 391 U.S. 367 (1968). In *O’Brien*, the Supreme Court formulated an intermediate standard of analyzing regulations that purported to impinge upon freedom of speech. This intermediate standard falls between the strict scrutiny approach and the “mere rationality” test. Under *O’Brien*, a regulation will be upheld if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377.


being chosen and certain speakers being preferred based on what information they want to confer.\textsuperscript{31} But there was also a bit of a broader view with Justice Souter and Justice Ginsberg talking about entrepreneurial rather than editorial decisions and musing over whether maybe this wire that goes into your home really is a lot like the other wire which provides telephone, as opposed to being like the newspaper which gets delivered by second century B.C. technology: we throw one at your front door. Anyway, if you start from that model of pure speech, the government can't do much of anything.

The next step takes us down one notch to the broadcast model which, you'll recall, largely got its fuel from the \textit{Red Lion} decision,\textsuperscript{32} where the Supreme Court announced that broadcasters are just trustees of the public airwaves, and have a limited right to do anything, so that there can be permissible incursions on their right to choose content. This is, in some ways, an economically corrupt notion, because even though its premise is that the electromagnetic spectrum is scarce, or limited, or at least finite, which it is, from an economic standpoint this scarce spectrum in your average city probably produces about twelve TV stations and thirty radio stations, whereas in the unlimited world—unless you think there's a finite number of trees out there to make paper for newspapers from—there's one newspaper. It's kind of hard to talk about what's scarce with a straight face when you have forty or fifty electromagnetic spectrum users providing electronic signals full of content to you and only one newspaper.

It's also a little bit disingenuous to talk about it because, as Ted was suggesting, one of the things the government does is allocate the spectrum, which gives it control over who gets what. It has allocated spectrum since the Federal Radio Act in 1927,\textsuperscript{33} which

\begin{itemize}
\item \textsuperscript{32} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
\item \textsuperscript{33} Federal Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927), repealed by Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (current ver-
was largely passed to avoid a Tower of Babel with everybody broadcasting on the same, most desirable, frequencies and nobody being able to receive anything. As you read in the *New York Times* this morning, the government now is re-allocating spectrum, designating some for PCS, and taking some away from the U.S. Department of Defense to give to commercial, entrepreneurial use.\(^3\) So it may be finite, but it's flexible. That's that for the broadcast model.

There's a third model which I guess is based on economic scarcity or wire scarcity, which supports public utility regulations and local cable franchise regulation. This was the model that the FCC had looked at for common carriers, and it did try to pass "must carry" rules a couple of times before the Court struck them down.\(^3\) The reviewing courts said we can look behind what you're doing—you're the FCC, not Congress—and we'll look very closely, and the record doesn't support it.

If you look closely at that standard, though—and I'm going to get to it as the *O'Brien* test in a second—it is an intermediate level of constitutional scrutiny which is favored for many reasons, probably not the least of which is its flexibility. This has typically been applied to cable, if you look at cases like *Leathers v. Medlock*,\(^3\) which is basically a taxation case, or the Bell Atlantic *C & P Telephone* case,\(^3\) which was a successful challenge to a ban on a telephone company's owning cable in its own service area, which had been prohibited by the 1984 Cable Act.\(^3\) The courts tossed out the notion of using *Red Lion* broadcasting standards and said we're going to use the *O'Brien* standard, and they applied it and struck


the stuff down.

There's a very similar test, and we'll call it the fourth First Amendment, which is in essence quarantine or locational speech regulation. If you read cases like *Central Hudson* or cases involving labor picketing or zoning cases involving adult entertainment, where you have some speakers that want to speak but other people who are bothered by the proximity of speech, much less the content of it, that typically gets an intermediate level of scrutiny too, although it's slightly different from *O'Brien*. The *O'Brien* test basically says that you'll uphold regulations that further a "substantial" (magic word) government interest, and the restriction itself is "no greater than essential" (also magic words) to further that interest, whereas with the quarantine or locational speech issue, instead of substantial, they talk about "compelling" state interest, and instead of no greater than essential, they talk about "narrowly tailored." I'm not really sure what the difference between any of these are, substantial and compelling—somebody sitting in the back of the room with a gun is probably a substantial reason for me to turn over my wallet. Jim sitting next to me with a gun is probably a compelling reason. I'm not sure where you draw that distinction when it comes to cable and telco.

Then you've got a couple of lesser First Amendment standards—or at least we always believed they were lesser until recently. The commercial speech test really blossomed in the *Virginia Board of Pharmacy* case—it addresses speech which largely is commercial in the sense that it proposes transactions, it wants to sell you things, advertising. It's not commercial just because somebody is making money somewhere; it's commercial because of the subject matter. And that was frequently held not to get anywhere near the protection as other speech. But that may be

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changing too: there was a Supreme Court case called *Discovery*,\(^43\) in which the City of Cincinnati was trying to regulate news racks on the street, and they decided that shoppers—just little tabloids, handout-type of things that have nothing but shopping information in them—shouldn’t have as much right to be on the street as real newspapers. The Supreme Court sort of said a rack is a rack, and this is speech too. Someone was telling me, although I wasn’t there at the oral argument, that one justice, I think it was Justice Scalia, asked one of the advocates if he really can say that more people care about how many people got killed in Bosnia yesterday than they do about when the Bloomingdale’s half-price sale is. Maybe there is more value in local commercial speech than in pure speech for some people. But that typically gets a lower level of constitutional protection.

And then finally at the fringes of all this, you’ve got obscene speech, which is largely held to be not speech at all—it’s just sexual references that appeal to your prurient interest and offend contemporary community standards,\(^44\) and the Supreme Court can’t really define it too much better than that, other than to say they “know it when they see it.”\(^45\)

Anyway, if you’ve got to pick a test to apply to all of this convergence, my favorite one to pick for many reasons is the *O’Brien* test, largely because it’s so fuzzy. You get to define interests and then apply them. Here’s the individual or economic interest of the speaker, here’s the interest of the government, now let’s define them. We’ll see how they were defined in legislative histories, and what have you, or FCC comment records, and then we’ll weigh them against the private interests.

So you pick a government interest and you pick a private interest and you weigh them and you balance them and you decide if they’re “substantial” or “compelling” or whatever the word of the day is. Some of these interests are, in fact, tightly defined, like in the preambles of statutes. For example, in the 1992 Cable

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Act—which is what the whole “must carry” case comes up under—Congress makes findings that this is an economically disjointed area, and that there has been abusive competitive behavior, and that they need to do something about it. Some of this is part of the FCC’s own record when they do notice and comment rulemaking under the Administrative Procedure Act. They say, here’s what we plan to do: you’ve got X number of days to give us your comments, your comments go into the record, then we analyze them and we make a decision which has to be supported by what’s in the record.

Some of the interests really come out of the judge’s back-pockets in some ways, so there are some strange cases out there in the First Amendment landscape. There was a case called WNCN Listeners Guild which involved radio broadcasting and what was a “format,” because the FCC at one point thought that certain formats had to be preserved under the public interest, convenience and necessity, and it was judicially determined that classical music was a format such that there was a public-interest issue raised if somebody wanted to change from being a classical music station to being, say, an all rap station. So that was suddenly a government interest.

And then there are some non-articulated interests. As we all know and you all probably heard, bad facts make bad law. There are lots of things out there that are, in fact, interests—some of them economic, some of them political. People do, at least to the extent that Buckley v. Valeo lets you, contribute to political campaigns, and the people in Congress—to be just a little cynical about all these statutes—probably do have some constituencies other than the people who just vote for them. John Tower used to be called the Senator from Exxon. There are lots of pressures on these people to make the laws and to set the standards and to make the deci-

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49. 424 U.S. 1 (1976) (holding that spending limits in political campaigns violated candidates’ freedom of speech).
sions. If you read through the hundreds of years of First Amend-
ment jurisprudence and other constitutional jurisprudence, you’ll
see that these interests kind of creep into things. Go back and read
the Dred Scott decision, or Plessy v. Ferguson, where interests
like the concept of slavery and human beings as property are up-
held; there were some interests going on back then that I’d venture
to say are a lot different from what they are now.

Anyway, if you’re going to take the O’Brien test—because it’s
the fuzziest and most flexible—you’re going to have to define
some of those interests, and there are some limitations on what you
can do. In addition to the interests that Congress and the FCC and
everybody else has articulated, you’ve got to keep a straight face,
by which I mean you’ve got to do something that will withstand
some level of scrutiny. You’ve got to do a little bit more than
Jeremy Bentham did when he articulated the theory of utilitarian-
ism where just about anything is good so long as there’s no corre-
sponding bad. That, incidentally, is now back as something
called “pareto economics,” if any of you are economic majors.
Bentham utilitarianism is alive and well and relative value analysis
of what’s good, what’s bad, and what’s neutral is a game that not
just judges, but economists and many other people—many of
whom are paid to be experts in these individual cable-telco kind of
cases—like to play.

And then finally you’ve got limitations of language. Whether
you’re into Lewis Carroll and notions of the Cheshire cat telling
you that words mean what we want them to mean, or if you’ve
ever taking a philosophy of language course, there are wonderful
philosopholinguistic (if that’s a word) tracts as to how one defines
things and measures and values things. Ziff or Quine will tell you

50. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that blacks were
not “citizens” within the meaning of the U.S. Constitution).
51. 163 U.S. 537 (1896) (upholding the “separate but equal” doctrine of Southern
“Jim Crow” laws which mandated segregation).
52. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND
53. See generally W.J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN
LOCAL TELEPHONEY (M.I.T. Press 1994).
that, for example, if you’re defining the word “good,” the characteristics of a good stalk of asparagus are significantly different from the characteristics of a good basketball. They’re both good but what makes each good is very different. Assigning words—nouns—to objects can be enormously complex, and all the more so for governmental interests.

You can play the game if you want as a strict constitutional, legal, regulatory, economic, serious exercise, or you can be a little cynical. Underneath all of this are the economic interests, and they’re enormous. The concentration of wealth in the Baby Bells is massive. We talked a little bit at the beginning about the phone companies contributing cash. They contribute a lot more than that—like switching expertise—but boy, do they contribute cash. The multiples, the prices that they pay—the proposed Bell Atlantic-TCI deal is an example—billions and billions, as Carl Sagan says, of dollars, and readily available. It had to come from somewhere, and since they don’t grow these dollars, chances are they came from people paying their phone bills over the years. Stuff gets into the rate base, it gets regulated, there’s a rate of return on it and somehow they end up with the billions and billions of dollars to spend on buying cable companies. That’s great if you’re a cable company. We’re real glad to be in that position.

These are ultimately economic interests. When you watch a case like the “must carry” Turner case in front of the Supreme Court, and you see very serious lawyers making serious constitutional arguments about which standard—O’Brien, rational basis, strict scrutiny, what have you—and how it’s applied and what the interests are, you can’t help but also think that there are billions and billions and billions of dollars behind this and riding on it. When you look at the hearings where Larry Irving of the Commerce Department and Reed Hundt of the FCC and Anne

55. See Hearings on H.R. 3626, supra note 11 (testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Dep’t of Commerce); Hearings on H.R. 3636, supra note 11 (testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Dep’t of Commerce).
56. Hearings on H.R. 3626 & 3636 Before the Subcomm. on Telecommunications and
Bingaman from the Antitrust Division\textsuperscript{57} tell Congressman Markey why they want two wires rather than one, and how they see two different companies' broadband, interactive, digital-switched, etcetera, competing with each other, you can see a bunch of people in major industries and corporations—some public, some private—licking their economic chops and saying, yeah, that's great, because there are billions and billions of dollars in it for us.

The point I want to make—and I'm not being entirely cynical by talking about billions and billions of dollars—is this: with the economic interests being so massive, there is a tremendous temptation—regardless of which analytical model we pick and how we apply it—for a court to go back to some really terribly discredited jurisprudence. You probably learned in the first year of law school about \textit{Lochner v. New York}\textsuperscript{58}—the notion of substantive due process—where for a while the Court wanted to substitute its economic judgment for that of lawmakers. To some extent, whichever tests you pick should be chosen and applied in a way that makes some sense for a participatory democracy. The real First Amendment goal is to have the most diverse speakers, so that the marketplace of ideas can be as full of things as you can imagine. If that doesn't happen, what you ultimately may have is the kind of \textit{Lochner v. New York} notion where somebody's economic judgment gets substituted—and that's a scary thought. That's something we all hope doesn't happen.

I want to mention a couple of other things—just to put a little more context on this decision—although they're not purely constitutional. They are from a different context, but nonetheless I think they're important to consider. One of them is the regulatory models. Both Rich and Ted were alluding to the fact that there is, in fact, a well developed scheme of regulation, not just at the federal


\textsuperscript{57} See Hearings on H.R. 3626, \textit{supra} note 11 (testimony of Anne Bingaman, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice).

\textsuperscript{58} 198 U.S. 45 (1905) (holding that a New York law which limited the hours employees could work in bakeries violated due process).
government through the FCC, which compartmentalizes things in its own way—Title II\(^59\) is common carriers and Title VI\(^60\) is cable, and if there’s going to be an Al Gore Title VII, it’ll be a kind of fast-track superhighway—but there’s a lot of state regulation, public service commissions, which the telcos put up with every day. Then there’s local regulation because cable basically gets franchised at the local level. So you’ve got three layers of formal regulatory stuff to get through before you have the right to do much of anything in this business. You also have a fourth layer, too, but it’s informal and that’s the raised-eyebrow regulation. It comes up from time to time—the most recent incarnation being over cable and broadcast industries which, after a certain amount of hand-wringing and finger-pointing, decide that they would try to develop a way to self-regulate to avoid anyone else regulating them as to the violence content of television.\(^61\) You’ve seen it before where MTV moved “Beavis and Butthead” from one time period to another after some little kid set fire to something after having seen Beavis and Butthead do that.\(^62\) You’ve seen the movie The Program get re-cut because it had a scene where somebody is lying in the road, and somebody goes out, tries that and gets killed.\(^63\) You saw it to a lesser extent when Tipper Gore—who may or may not be part of the driving force behind this Title VII superhighway with her husband—made it her cause celebre years ago to put parental advisory warnings on rock music.\(^64\) There’s a certain amount of this informal raised-eyebrow type of regulation that will also be

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64. See Richard Harrington, Accord on Lyrics Labeling; Firms, Parents Agree to 2 Warning Options, WASH. POST, Nov. 2, 1985, at H1; Congress All Shook Up Over Rock Lyrics, BROADCASTING, Sept. 23, 1985, at 28.
with us along with the billions and billions of dollars of economic interest behind it.

And then there is the little bit of historical context—looking forward and looking back—that you've got to put all this in. Right now, you look at a regulatory legislative model that's really been around since the Federal Radio Act of 1927 and apply it to telephone service, which has been around for a hundred years or so, and to television, which has been around for fifty years or so, but as you look forward, some new things are coming. One of them is direct broadcast satellites ("DBS"), and by sometime this year—supposedly in April but who knows—cable is going to have a competitor, albeit not interactive in two-way, but just in cable program delivery—from at least two, and eventually maybe as many as four or five, direct broadcast satellite companies. You put a very small dish in your window, your yard, your roof, and you get this stuff direct to your TV, without the wire at all. And if that's all you want—if you see TV as something to stimulate the alpha-waves in your brain and you don't want to interact with it, you just want to watch it—then that's a perfectly good substitute for all of this wire, regulated, coaxial, fiber stuff.

Finally, there's a joker in the deck in the sense that if you need fiber optics, which is a better wire, if you will, than coaxial cable, which is in turn a better wire, if you will, than the so-called twisted pair the phone company largely has, there's other fiber optic out there. For example, your electrical company, your gas company, and other public utilities that are regulated for other purposes could cost-justify and have laid a bunch of fiber, with intentions to use it for their own purposes, for example, to read your meter. Why send somebody driving around the neighborhood to read your meter if you can just do a fiber two-way line to see how much electricity you're using? If they've laid enough fiber so that they can offer to deliver fifty to one hundred TV programs on it, at some point they may try that. Rich's point, which I thought was a very good one, is that if you have different people competing to deliver the same thing, you've got a certain amount of incongruence if they're suffering under different regulatory schemes. Here is yet another provider that has yet the same fiber technology out there that may
be under a totally different regulatory scheme, being looked at by a public utilities commission as a gas company or an electrical company, but yet with the capacity to provide you with the same stuff.

PROFESSOR GOODALE: Thank you. That was quite a tour through the First Amendment landscape.

I think you put your finger on the crucial question really for this symposium, and it would be my view that if you pick the wrong First Amendment standard—setting aside the economic interests of everyone involved of which you spoke so eloquently—the effect upon the political and social life of this country could be disastrous. The reason is that you have to assume in the future that print is not going to have a great force on opinion-making and the role that print played in this century will be taken over by the electronic media, and if the electronic media ends up with more regulation than print has had, as a generality, we’re going to be worse off, because we’re going to have less freedom to communicate and to speak and write. So the issue that we’re talking about is no small matter. I can’t think of anything more important that I’ve ever thought about.

Secondly, if we pick the wrong approach in legislation—and what I want to talk about now and go back to you, Rich, if I could—then you end up with the same result, because if your legislative model effectively picks the wrong standard, then you’re just as bad off as if the court picks the wrong standard. I was wondering what you think about, can I call it the “Title VII approach” and call that the “Clinton approach,” and also about the two bills in Congress in light of where you were coming from when you finished talking. You were talking about the common carrier model, and you were telling us you had some questions about it and whether it was the right kind of model to take us into the future. Then we heard from the government, which expanded that point of view, and then we heard the First Amendment standard. Now we’re back to you. Do you have any problems from your point of view with respect to the two bills we talked about and the Clinton approach? I don’t want to put you on the spot. Maybe you can speak individually, maybe Sprint doesn’t want to go on record,
whatever you want, but I’d like to hear some views on these bills.

MR. DEVLIN: Jim, I guess I don’t know enough about Title VII to comment on it. The Markey-Fields bill—we’re very supportive of it, even though we have telephone companies. The bill is structured to open up local telephone companies to competition. Among other things, the bill would preempt state regulation, entry regulation. In other words, telephone companies today largely have an exclusive franchise—that would go away, under this federal bill; the feds would preempt the states. There would be interconnection standards so that competitors would be able to freely interconnect with the local networks. You know, it’s very clear to us that this is the way things are going. Andy did a wonderful job in explaining who else is out there in terms of direct broadcast satellites. We have seen power companies—in fact, we’re doing a joint-venture trial with the power company, putting fiber throughout locations for the stated purpose of load management. That is, the electric company believes it can justify putting fiber to customers’ premises solely based on cost savings on managing electrical loads. So we do see competition out there. We’re very much supportive of that, even though it’s clear we’re going to lose our franchise, if you will, our monopoly in the areas where we’re the local telephone company. It’s a long way about going. I’m still not sure yet how we come down relative to cable companies.

PROFESSOR GOODALE: Let me try this out on you and you can come back to me on this point, because we’re going to go another ten minutes and then we’re going to run out of time. But from my point of view just as a First Amendment-nik, I look at common carriage as the enemy of the First Amendment. I mean that is the worst thing that can happen to the First Amendment, because the government makes a decision—which makes a lot of sense for your telephone operations—to deprive the telephone company of speech in certain instances—those instances being when I want to talk to you. There’s no place for the telephone company to speak, and for a whole variety of reasons we want that result, but to apply that to cable, which we can talk about now, seems to me to be very dangerous, and what I was wondering about with respect to the cable part of these bills, is that both bills and the
Clinton-Title VII approach place a great emphasis on access—and access to me is just another way of saying common carriage—and I wonder if there's any reaction to that.

MR. DEVLIN: Boy, I guess I don't share your views on common carriage being the enemy of the First Amendment, if you will. I mean, in a fully competitive environment where there are a lot of players out there, I agree, everyone should have a voice, and it is offensive that one speaker is precluded from speaking. But the reality is both the local markets and the cable markets are heavily dominated by one player, and if you give them a voice and you allow them to have a strong financial interest in their own voice and can exclude others, I think you've done major damage in terms of getting diverse programming to the public.

PROFESSOR GOODALE: So then the provisions of access here in the bills, they're okay from your point of view.

MR. DEVLIN: It's a slightly different issue. If you're going to have competition and there's going to be real and meaningful competition, then I agree with you—that you don't need common carrier regulation. But we're not there now.

PROFESSOR GOODALE: Do you want to respond to my point too, Mr. Hirt? Because maybe the two of you would be on same side; I don't know where Mr. Merdek is going to come out in this. He's going to give us the Bentham answer, what Jeremy Bentham would tell us. Go ahead.

MR. HIRT: Well, I would try to “put on the hat” of a policymaker, again emphasizing that this is not an official view. It seems to me that any use of the term is not only value-laden, but precedent-laden, in terms of “common carrier” versus “broadcast” model versus whatever other model. I'd like to step back to first principles and say that even if you don’t care for the principles that the administration has talked about—you’ve already been told in terms of the case law either in Associated Press or NCCB65—that you’re looking at a greater public interest. Maybe “common carrier” is not the term we ought to use for that broader public interest. But,

as Rich pointed out, the 1994 reality is the same whether we’re talking about cable, whether we’re talking about a telephone company, whether we’re talking about an amalgamation or a joint venture of them, or direct broadcast satellites as a new competitor. At the local level—the telephone subscriber, the would-be subscriber to a cable system, the person who doesn’t have cable and who is still strictly limited to over the air broadcasting, or the local municipality which still has the reality of one franchise—we still have, if I can use the word loosely, an oligopoly-type situation. I’m not going to get into Preferred Communications as to what may ultimately be the law as to multiple franchises. I’m not an antitrust lawyer; all I’m saying is that First Amendment reality is that we’re looking for a robust marketplace of ideas in which diverse speakers can be heard.

The dilemma we have, and the balancing that’s talked about—“must carry” is an example and a lot of the other cases are examples—is balancing the rights and interests of an existing or would-be speaker who has access to that very expensive soap box, but against the outside world wanting to come in by way of access. Or you have the listener or the viewer, meaning you and I, saying we want to have a certain menu of programming. So to me, maybe being naïve on this point, the term “common carrier,” although I understand the ramifications of it, makes me return to first principles, which is what is the broader public interest. Keeping in mind that whether we’re talking about common carriers or the broadcaster-licensee framework, those entities are still ultimately answerable to the public interest. I’m not saying this rhetorically—therefore the First Amendment is a dead letter, and therefore it’s subordinate to a greater good. All I’m saying is that we’re talking about a balancing, and we still have to use these terms of “bottlenecks” and “information bottlenecks.” We still have access problems, and my personal view is we will have access problems, for a lot of reasons, into the foreseeable future, which is why it’s very difficult to “freeze” a model in place. Maybe this new Title VII is the answer.

66. Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327 (9th Cir. 1994).
to that, because the model will emerge and maybe it won’t be fixed in stone.

PROFESSOR GOODALE: Well this argument’s been going on ever since 1932 or 1933 when the FCC passed the broadcasting act, because the arguments you made are the very same arguments that were made there—and it’s the very same argument that lost in Tornillo. What disturbs me, I must say however, on Title VII is that it seems to me that the common carrier model is what Title VII is talking about. All the public policy arguments you make are very good, but it does mean government supervision that we haven’t had in our information structure historically. What would Jeremy O’Bentham say?

MR. MERDEK: I’m not sure what he’d say but I want to respond to a couple of things that Rich and Ted have said. I think they made some good points. Ted said in prefacing his economic discussion of this that he’s not an antitrust lawyer, and one of the things we tend to forget when we’re either legislating or adjudicating in this area is that while we’re trying to wrap all of this in the flag of the First Amendment, there really is a heavy collection of antitrust laws and enforcement mechanisms out there for the purpose of correcting problems with markets. You know when you passed the 1992 Cable Act, as Congress did, with a preamble and findings relating to economic dysfunction and dislocation and the need to correct abusive practices and all of that, what you’re really doing is taking the place of what otherwise would be done by and through the Justice Department, the Federal Trade Commission, State Attorneys General, private litigation from competitors, and private litigation from customers. There are lots of ways to fix economic dislocation without disrupting the First Amendment, and I think Jim Goodale’s point about disrupting it is a good one. As we get into a world where electronic communications and moving pictures with sound pretty much replace the words in your newspaper as your principal and immediate means of communicating all

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these bits of news and ideas, you run a real risk if that principal means of disseminating the core information that the First Amendment's there to protect gets some lesser standard of protection than print media does.

I worry about that for a couple of reasons. One of them is because of my own background in the newspaper business, and it's hard to see newspapers being less important, given what they've done historically, than the electronic stuff. But the other is that we are living in a world where increasingly we've got two classes of people, those that can read and those that can't. Everybody in this room obviously is in the rather privileged class and you do have access to newspapers even though you may find cable coverage of the Gulf War or some other electronic communication more immediate—a picture is worth a thousand words, and a moving picture is worth God knows how many for imparting information to you more quickly. There's a lot of people out there on the street who can't read, and this electronic revolution and convergence may be a saving grace for them. It's the only way they can get all this information, but it also may be—returning to my cynical economic viewpoint—too expensive for them. What we may end up with if we're not careful is a couple of classes of society—one of which who can afford all this stuff in their home, and one of which who can't. It's one of the reasons why, as Ted was saying, the administration's preference for universal service and open access is so important. If 94 percent of the people have telephones right now, that's worth maintaining because even if you can't read, you can talk. But if this converged cable-telco, whatever it's going to be called—technology, two-way, interactive, broadband, digital-switched, whatever—is going to cost you a hundred dollars rather than ten dollars to get, you're going to disenfranchise an awful lot of folks, and even Jeremy Bentham wouldn't go for that.

PROFESSOR GOODALE: Well, are there any other comments from the panel, so we can have a last word, and maybe we'll take one question from the audience.

MR. HIRT: My final word is to give one other way of looking at the nature of the protections we talked about, and you'll hear about this in the other panels. Trying to come up with models as
we’ve talked about has pitfalls to it. I think that the other perspective to look at is the function or the activity being regulated, and *Tornillo* may represent an extreme, if you will, because that was viewed as an attack on the core editorial right of the newspaper to speak and say what it wanted to and then not have to give equal time to the opponent. I think that’s a far cry from a lot of the other things that have been litigated, whether it’s the fairness doctrine in *Red Lion*, whether it’s “must carry,” or a whole host of other things. As you can tell from what the government has stated in pending cases, we have emphasized the issue of: is the activity something that is viewpoint-neutral? to what extent is it content-related? to what extent, going to the other extreme, is it trying to rectify market dysfunction that dates back to the *Associated Press*-type of line of cases? So one perspective is to look at the end-user, as I’ve talked about, the franchisor or the cable subscriber or the telephone subscriber. Another way to look at it is to examine what is being regulated. Because if we’re balancing the interests, I think the key question is whether the government is regulating or is it directly infringing upon “editorial judgment.” No matter how you slice it, quite frankly, the industries we’re talking about have unique access to this information highway as it is presently structured, and who knows how it will be structured within the next decade? So I’m not at all trying to say we’re stripping away the First Amendment protections. All I’m saying is that these doctrines have to be applied in a very carefully crafted way and one can look at the function of the regulation as well as the broader public interest that I talked about earlier.

PROFESSOR GOODALE: Any questions from the audience?
Yes.

AUDIENCE MEMBER: Professor Goodale, do you agree with Mr. Merdek that the *O’Brien* model is the appropriate First Amendment standard for the future?

PROFESSOR GOODALE: I don’t think we call it the *O’Brien* model. We call it the *O’Bentham* model, because it was a very

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flexible model where you’re balancing this against that and so forth.

I would just point out that the *O'Brien* model is supposed to be a model for regulating viewpoint-neutral speech, and the interest in the application of the *O'Brien* test is supposed to be substantial—it’s not just a substantial interest by the way, it’s a substantial interest unrelated to speech. What’s happened, I think, in all the cases the cable industry has argued, is that the cable industry has forgotten what the substantial interest was supposed to be. Burning the draft card, in the *O'Brien* test, is an interest unrelated to speech, and what’s happened is that because of the early 1977 cable case in which the D.C. Circuit pushed out the *O'Brien* test, it’s been adopted by the cable industry ever since. I think really what the cable industry has done, without realizing it, is it has substituted the broadcast test for the *O'Brien* test. I think we might end on this—those of you like Allison, who have taken my course, know I can go on for hours on this point—but I really think the issue is probably well stated by Mr. Hirt on my right, which is he thinks, and he may be right, that we’re always going to end up with some sort of conflict between viewers’ interests and speakers’ interests, and if that’s one’s view of what the future is, then we use *O'Brien*. But let’s remember, it’s not *O'Brien* we’re using. We’re using the broadcast test. We’re right back to broadcast regulation. That may be the appropriate answer. I don’t happen to think so, but there are a lot of arguments pro and con.

Why don’t we end on that note and get to your next panel.

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