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# TAKING THE FIRST AMENDMENT ON THE ROAD: A RATIONALE FOR BROAD PROTECTION FOR FREEDOM OF EXPRESSION ON THE INFORMATION SUPERHIGHWAY

David Gordon<sup>1</sup>

Much of the discussion and debate thus far about the new information infrastructure has focused more on economic issues and on the role that the government might play than on some of the inherent legal issues that eventually must be faced. Such tunnel vision may well result in coming to grips with these legal questions only after it is too late to establish some basic ground rules that arguably would prove beneficial to society.

It is imperative, therefore, to broaden the perspectives and the discussion now, before a new "status quo" is established and some currently viable options thereby are foreclosed. Otherwise, the emergent generation of communication channels could well wind up regulated—and "protected"—by restrictive rules adapted from such earlier technologies as over-the-air broadcast or cable, simply because the rule-makers find it easier to apply familiar regulatory patterns instead of approaching new technological landscape innovatively.

Such specific issues as access, and, more generally, regulation, eventually will be settled within a legal framework. However, the lack of legal precedents that are applicable directly to this emerging "information superhighway" provides a wide range of possible starting points and interpretations from which to develop the legal context within which the new information systems will operate.

The choices among these varied options are important because the basic regulatory structure is being reworked to determine the roles to be played by cable and computer enterprises, local and long distance telephone companies, satellite communication

firms, public interest groups, federal and state government and, perhaps, other entities such as electric utilities. There is general agreement that current regulations are "dangerously out of date"<sup>2</sup> as boundaries between traditional communication technologies become ever more blurred: "[t]he established laws governing communications apply specifically to mail, newspaper, cable television and radio broadcasting, in their separate legal pigeonholes. Signals in a digital environment do not differentiate among voice, video and data."<sup>3</sup>

Certainly, some important compromises will be made before the final structural revisions are approved. These negotiations will not be easy, as was illustrated by the collapse of what appeared to be an emerging consensus on the proposed revision of telecommunication legislation in the fall of 1994. Beyond the basic policy-making, and the conflicting economic and social interests behind it, broad legal perspectives must be selected to provide the most useful guidance for the inevitable interpretations and applications of whatever regulatory package is finally approved.

There is a wide range of legal issues that will require answers as the new electronic information channels come into existence. Despite a few preliminary decisions, it is not yet certain how libel or privacy laws will be affected by this electronic environment. Many First Amendment concerns such as obscenity, indecency and copyright issues on the information superhighway still are unresolved. But a key underlying issue, and the major focus of this discussion, concerns two dimensions of access and the

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<sup>1</sup> Professor, Mass Communication Division, Emerson College, Boston, MA; Ph.D (Mass Communications), University of Wisconsin—Madison, 1971. The author would like to thank Dr. Donald Gillmor, Dr. John M. Kittross and Robert J. Karon, Esquire for their suggestions and encouragement throughout va-

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rious stages of this project.

<sup>2</sup> John Carey and Mark Lewyn, *Yield Signs on the Info Interstate*, BUS. WK., Jan. 24, 1994, at 88.

<sup>3</sup> Anne W. Branscomb, *Common Law for the Electronic Frontier*, SCI. AM., Sept. 1991, at 156.

First Amendment protection for it: first, access for those desiring to communicate through the new electronic networks (the "senders"); and second, and of at least equal importance, access for people who desire a full range of opportunities to receive the various kinds of content available in these channels (the "receivers").

A Commerce Department task force<sup>4</sup> as well as Vice President Al Gore listed "universal services" as one goal of the new informational infrastructure<sup>5</sup>. Similar calls for widespread participation in whatever the new system turns out to be have been sounded elsewhere,<sup>6</sup> and will be supported here. What generally has been lacking heretofore is a specific legal rationale to undergird this concept of universality. Is the new superhighway to be treated as a public thoroughfare—i.e., a common carrier—or as a private way . . . or as some combination of those extremes?

Because we cannot approach these questions with a blank legal slate, the choice of a general philosophical approach and the precedents to back it up become crucial. The issue is whether access to the new information channels should be based on an analogy to public streets and parks, or on an analogy to a company town or shopping mall, or on some variant of these or other precedents. The answer to such queries depends on what we want the new systems to accomplish, or to avoid. A commitment to openness and universality seems to require choosing a legal perspective based, at least in part, on ethical concerns, and founded upon a recognition that cyberspace is creating a new legal context where precedent must be adapted rather than applied rigidly on the basis of what mass media have been in the past.

Part I of this article adopts a utilitarian perspective which postulates that the greater the participation along the superhighway, the greater the eventual benefits to our "information society." This perspective requires a flexible rather than a rigid regulatory approach, as computer pioneer Mitchell Kapor has noted:

Our society has made a commitment to openness and to

free communication. But if our legal and social institutions fail to adapt to the new technology, basic access to the global electronic media [channels] could be seen as a privilege, granted to those who play by the strictest rules, rather than as a right held by anyone who needs to communicate.<sup>7</sup>

Part II of this article analogizes the electronic information highway to the traditional public forum in order to discern standards of First Amendment protection. This section will suggest that the public forum approach will best serve the needs of a democratic society, and will do so no matter who eventually operates the various channels of the new national information infrastructure.

Part III of this article suggests some appropriate legal bases for encouraging the widest possible access to, and participation in, the technologies paving the information superhighway, *regardless* of what the basic regulatory structure becomes or how these information technologies may change in the future. This section notes some prior approaches that arguably should be modified, because relying on them would restrict rather than encourage "travellers" on the information superhighway.<sup>8</sup>

## I. A NEED FOR UNIVERSAL SERVICE

In an information society, it is crucial to ensure—both legally and economically—that all members of that society have the greatest possible access to channels of information as senders or as receivers. Any other approach almost certainly will ensure societal conflicts between "information-rich people [and] information-poor people" in a society where information is power.<sup>9</sup>

The perspective here also is based on the principle that, in almost all circumstances, the best remedy for divisive or problematic speech lies in more rather than less speech. This approach calls for an expansion of the "marketplace of ideas," rather than placing restrictions on speech or ideas or information because some may consider them to be dangerous or unimportant.

In simpler mass media times and environments,

<sup>4</sup> Information Infrastructure Task Force, U.S. Department of Commerce, National Telecommunications and Information Administration, *The National Information Infrastructure: Agenda for Action* (1993).

<sup>5</sup> James A. Capo, *Ethical Issues in the Information Infrastructure*, MEDIA ETHICS, Spring 1994, at 4.

<sup>6</sup> See generally, Charles M. Firestone, ed., *The Aspen Institute, Television for the 21st Century: The Next Wave* (1993).

<sup>7</sup> Mitchell Kapor, *Civil Liberties in Cyberspace*, SCI. AM.,

Sept., 1991, at 158.

<sup>8</sup> There are obvious political, economic and other perspectives that can and will be brought to bear on this question which could lead to the choice of very different legal approaches and precedents. For a good overview of these broader issues, see WILSON DIZARD, JR., *OLD MEDIA NEW MEDIA: MASS COMMUNICATIONS IN THE INFORMATION AGE* 64-65 (1994).

<sup>9</sup> See EVERETTE E. DENNIS AND JOHN C. MERRILL, *MEDIA DEBATES: ISSUES IN MASS COMMUNICATIONS* 75 (1991).

concerns such as these were usually perceived as the need for access to media channels by senders or would-be senders of informational or ideological messages.<sup>10</sup> In an "information age" society, exclusion from the *contents* of mass communication channels is just as vital, because it could produce "an informational underclass, which is less capable of acting and choosing politically on its own behalf" and is thereby excluded from full societal participation.<sup>11</sup> Thus, the concern must be focused as much on the potential *users* or receivers of the available information as on those who have messages to send. As this author has written in a slightly different context, what is really at stake here was expressed succinctly by Thomas Jefferson in the lesser-known final sentence of his familiar quote about the importance of newspapers in his society:

The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. *But I should mean that every man should receive those papers and be capable of reading them.*<sup>12</sup>

From a legal perspective, how might society best implement this ideal that everyone should be capable of receiving the material that will be available in the various channels of the information superhighway? On the other side of the access coin, what precedents might be adapted to deal with legal or technological or economic barriers to access for people who wish to transmit material on some of those new channels? As Kapor wrote, when focusing on one part of the emerging information infrastructure:

As forums for debate and information exchange, computer-based bulletin boards and conferencing systems support some of the most vigorous exercise of the First Amendment freedoms of expression and association that this country has ever seen. Moreover, they are evolving

rapidly into large-scale public information and communication utilities.<sup>13</sup>

But those bulletin boards and conferencing systems rely on privately-owned "access ramps" to the information superhighway. Moreover, the computers that generate the messages directed to those ramps are also, more often than not, privately-owned, with each one a "publisher" in its own right. Additionally, the government's role in directing this private/public/quasi-public mixture of electronic traffic has not yet been clearly defined.

## II. REGULATING THE INFORMATION HIGHWAY AS A PUBLIC FORUM

### A. Historical Overview: Applying Traditional First Amendment Analysis to the Public Forum

The key question was posed succinctly over a decade ago by Ithiel de Sola Pool. De Sola Pool asked whether the model for protecting or regulating the "next" generation of electronic communication would be the First Amendment as it has been applied to safeguard the printing press, or the First Amendment as it has been used for public interest regulation of the broadcast industry.<sup>14</sup> As a more recent observer asked: "Once words are converted from newsprint to electrons, will they lose the special First Amendment status they enjoy compared to their broadcast counterparts?"<sup>15</sup>

The issue needs to be expanded somewhat, to serve society's members fully. It would appear that the new electronic information infrastructure needs First Amendment protection that recognizes it for the "virtual public forum" it rapidly is becoming. Expression in this new electronic environment requires protection for such open forum purposes, beyond the narrower context of traditional print or broadcast freedoms/regulations.<sup>16</sup>

<sup>10</sup> See generally, JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* 4-6, 13-16, 66-67, 304-312, 323-328 (1973); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARVARD L. REV. 1641 (1967).

<sup>11</sup> DENIS MCQUAIL, *Informing the Information Society: the Task for Communication Science*, in *BEYOND AGENDAS: NEW DIRECTIONS IN COMMUNICATION RESEARCH* 197 (Philip Gaunt, ed. 1993).

<sup>12</sup> See David Gordon, *Information Haves. . . . and Have Nots*, *PRESSTIME*, Dec., 1993, at 56 (citing Thomas Jefferson, *The People Are The Only Censors. . .*, *Letter to Edward Carrington*, Paris, Jan. 16, 1787, in *JEFFERSON, WRITINGS* 880 (Merrill D. Peterson, ed. 1984)) (emphasis added).

<sup>13</sup> Kapor, *supra* note 7, at 160. See also HOWARD RHE-

INGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING THE ELECTRONIC FRONTIER* 1-64 and generally (1993). Rheingold defines "cyberspace" as "the name some people use for the conceptual space where words, human relationships, data, wealth and power are manifested by people using CMC [computer-mediated communications] technology." He notes that the term originated in *NEUROMANCER*, a science-fiction novel by William Gibson. Rheingold at 5.

<sup>14</sup> ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 2-5 (1983).

<sup>15</sup> Walt Potter, *Free Speech on the Infobahn: Whither the First Amendment when print goes electronic?*, *PRESSTIME*, July/Aug. 1994, at 66.

<sup>16</sup> See Eli Noam, *Principles for the Communications Act of 2034*, in *Dizard app.*, *supra* note 8, at 187-89.

If one wishes to provide a legal foundation for the widest possible use of the information superhighway, an excellent starting place is Harry Kalven's "public forum" concept.<sup>17</sup> This approach is based on the common law precedent that expressive access to public places—e.g., streets and parks—cannot be totally denied even if speech in those locations may be regulated reasonably.<sup>18</sup> Kalven argued that the ease of access to speak in such public forums was a good index of the overall freedom of a given society.<sup>19</sup>

If the case law supporting the use of streets, parks and other public facilities for speech purposes is extended into the forum of electronic space, we begin to establish a legal context that would foster more open access to, and use of, the message lanes of the information superhighway. However, there are some problems related to this case law, and such an extension requires a willingness to adapt precedents from cases arising out of the physical environment and to apply them to situations existing in the electronic one. In *Hague v. CIO*, the Supreme Court said unequivocally that streets and parks were part of the public forum and may be used for public assembly and discussion.<sup>20</sup> Later decisions forbade the government from regulating access on the basis of content, although content-neutral restrictions could be invoked for such purposes as maintaining order.<sup>21</sup> The Court, in a related series of cases, established that public locations, in addition to streets and parks, could be used for purposes of communication as long as the use was not at odds with the normal operations of those locations.<sup>22</sup> In *Heffron v. International Society for Krishna Consciousness*,<sup>23</sup> the Court de-

veloped the concept of the "limited public forum" where government regulation was more permissible.<sup>24</sup> However, the Court stated that these regulations have to be narrowly drawn, and that there must be adequate alternative communication channels available, if a governmental entity chooses to create and limit a public forum.<sup>25</sup> Such limitations contrast sharply with "[t]he traditional public forum which involves public premises where the right of access and the right of equality of access is guaranteed."<sup>26</sup>

The Court also has held that some types of public or semi-public premises are not available as either traditional or limited public forums. These non-forums range from jailhouse grounds<sup>27</sup> to teachers' school mailboxes<sup>28</sup> to utility poles.<sup>29</sup> Even a sidewalk between a post office building and its adjacent parking lot was held to be less than a fully-public forum, apparently because it was not a public passageway where the public forum concept may be applied, but instead was a sidewalk constructed solely for the use of individuals engaged in postal business.<sup>30</sup> As a result, the government reasonably could bar the solicitation of funds from a post office sidewalk, even though it had allowed other expressive activity there.<sup>31</sup>

Even more disturbing for free expression advocates was the 5-4 Supreme Court decision in 1992, *International Society for Krishna Consciousness v. Lee*,<sup>32</sup> which held that an airport terminal may be administered as a non-public forum because there was no historical precedent that airports had been made available for First Amendment activities.<sup>33</sup> In

<sup>17</sup> Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, THE SUP. CT. REV. 1 (1965).

<sup>18</sup> *Id.* at 12-13.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>21</sup> See, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939) (holding that a legislature may lawfully regulate the conduct of those using the streets only as long as the legislation is content-neutral and does not abridge the constitutional right of an individual to impart information); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (holding that a right of access to a public forum does not guarantee immunity from reasonable time, place and manner regulations).

<sup>22</sup> See, e.g., *Grayned v. Rockford*, 408 U.S. 104 (1972) (upholding the constitutionality of an anti-noise statute that prohibited a person on school grounds from creating a noise or diversion where such actions interfered with normal school activity).

<sup>23</sup> 452 U.S. 640 (1981) (holding that a state fair grounds can be designated as a limited public forum).

<sup>24</sup> *Id.* at 650-54.

<sup>25</sup> *Id.* at 654-55.

<sup>26</sup> JEROME A. BARRON AND C. THOMAS DIENES, FIRST

AMENDMENT LAW IN A NUTSHELL 197 (1993).

<sup>27</sup> *Adderley v. Florida*, 385 U.S. 39 (1966) (asserting that because a trespass statute that applied to a demonstration on the premises of a jail was aimed at conduct of a limited kind, in an area not open to the public, the statute was not unconstitutionally vague).

<sup>28</sup> *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) (holding that with respect to property that is not traditionally a forum for public communication, a state constitutionally may reserve the use of the property for its intended purposes as long as the speech regulation is reasonable and is not an effort to suppress expression).

<sup>29</sup> *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (stating that public property such as utility pole crosswires that is not by tradition or designation a forum for public communication may be reserved by the government for its intended purposes if the regulation on speech is reasonable and is not an effort to suppress expression).

<sup>30</sup> *United States v. Kokinda*, 497 U.S. 720 (1990).

<sup>31</sup> *Id.* at 737.

<sup>32</sup> 112 S. Ct. 2701 (1992).

<sup>33</sup> *Id.* at 2706.

addition, the Court asserted that the government was acting as a proprietor managing internal operations rather than as a regulating or licensing entity and therefore was not held to stringent First Amendment standards.<sup>34</sup>

### B. Application of the Public Forum Concept to Cyberspace

The concurring opinion by Justice Kennedy in *Lee* is an excellent starting point for the argument that the cyberspace created by new technologies should be addressed dynamically and creatively, with regard to freedom of expression issues. In *Lee*, Justice Kennedy argued that history and subjective governmental intent regarding expressive use of public property were less important than whether the property's actual characteristics and use allowed expressive activity to be appropriate and compatible.<sup>35</sup> To this end, Kennedy stated that "our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity."<sup>36</sup> Kennedy further asserted that there were sufficient physical similarities:

to suggest that the airport corridor should be a public forum for the same reasons that streets and sidewalks have been treated as public forums by those who use them . . . It is the very breadth and extent of the public's use of airports that makes it imperative to protect speech rights there.<sup>37</sup>

This "preference for a public forum concept which has a capacity for growth in terms of the public facilities to which it might apply"<sup>38</sup> allows for a "dynamic conception" that "broadens the reach of the First Amendment. . . ."<sup>39</sup> It has been observed that "the essence of Justice Kennedy's public forum analysis is a plea for recognition of the new role that new public facilities play, and should play, in the marketplace of ideas."<sup>40</sup>

This dynamic extension of the public forum concept is in keeping with the spirit of a much older dissent by Justice Hugo Black, who wrote in 1949 that "[t]he basic premise of the First Amendment is

that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition.<sup>41</sup>

Applying an evolving and dynamic public forum approach to cyberspace obviously requires a mindset like that of Justice Black, and the ability to see the new electronic turf and "virtual realities" as more than just digital signals. Mitchell Kapor's perspective may be helpful here, in assessing how the new electronic networks can facilitate "[p]rivate messages serving as 'virtual' town halls, village greens and coffeehouses, where people post their ideas in public or semi-public forums."<sup>42</sup>

If we are able to view cyberspace as more than just digital impulses—in short, if we are able to view electronic space as a functional if not a physical equivalent of public spaces as we knew them before digital communication—we then can apply an appropriately dynamic and creative approach to legal issues inherent in the regulation of the information superhighway. This is the approach suggested by Patrick M. Garry, who argues that the First Amendment must be interpreted so that it can "accommodate all the technological and economic changes in the media" in order to protect "the democratic dialogue function" of the mass media.<sup>43</sup> This, he says, will best serve "the needs and values of a democratic society."<sup>44</sup>

The concern expressed by de Sola Pool for a "policy of freedom [that] aims at pluralism of expression rather than at dissemination of preferred ideas"<sup>45</sup> is also appropriate to this discussion. De Sola Pool argued that, in the electronic convergence of communication technologies, digital communication should be developed under First Amendment protections analogous to those accorded the print media.<sup>46</sup> This was appropriate, he wrote, particularly in view of 18th century technology, through which freedom of the press "gave voice to an individual" and which "meant that individuals could express themselves"<sup>47</sup>—concerns that are highly relevant to individual communication along electronic networks. Garry takes a similar position with regard to the

<sup>34</sup> *Id.* at 2705.

<sup>35</sup> *Id.* at 2716-18.

<sup>36</sup> *Id.* at 2717.

<sup>37</sup> *Id.* at 2719. Kennedy also added that "[w]hen adequate time, place and manner regulations are in place, expressive activity is quite compatible with the uses of major airports." *Id.*

<sup>38</sup> BARRON AND DIENES, *supra* note 26 at 204.

<sup>39</sup> *Id.* at 205.

<sup>40</sup> *Id.* at 205.

<sup>41</sup> *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949).

<sup>42</sup> Kapor, *supra* note 7, at 160.

<sup>43</sup> PATRICK M. GARRY, *SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT* 10 (1994).

<sup>44</sup> *Id.* at 10.

<sup>45</sup> DE SOLA POOL, *supra* note 14, at 8.

<sup>46</sup> *Id.* at 233-34, 246.

<sup>47</sup> *Id.* at 11.

new interactive media, which he says may "provide a participatory communication forum for social and political dialogue, much like the role played by the eighteenth-century American press."<sup>48</sup>

Placing both freedom of expression and user/receiver access to the communication system at the top of our value system for electronic society provides a coherent and useful framework within which to deal with many emerging legal issues. In fact, de Sola Pool placed the concept of freedom of expression—regardless of the medium used—at the top of his list of ten principles for enhancing freedom of communication in an electronic era, and at least partially implied the need for access:

The first principle is that the First Amendment applies fully to all media. It applies to the *function* of communication, not just to the media that existed in the eighteenth century. It applies to the electronic media as much as to the print ones. Second, anyone may publish at will. The core of the First Amendment is that government may not prohibit anyone from publishing. There may be no licensing, no scrutiny of who may produce or sell publications or information in any form.<sup>49</sup>

As both Kapor and de Sola Pool have noted, electronic networks "contain elements of publishers, broadcasters, bookstores and telephones, but no one model fits."<sup>50</sup> If we focus on the communication *function* rather than on the physical attributes of the system, Kalven's public forum model arguably is highly useful in developing an electronic society that will rank higher on his index of freedom. As a society, we need to be realistic enough to see that the electronic bulletin board systems ("BBSs") and forums developing on computer networks are, in fact, the functional 21st century equivalent of streets, parks and other sites where freedom of expression traditionally has been (or should have been) encouraged; that is, we must regard electronic publishers as "the conveners of the environments within which on-line assembly takes place."<sup>51</sup>

Because the courts have limited the "public forum" concept, society and its policymakers must be sufficiently creative and flexible in order to transcend those restrictive precedents, which simply do not conform to the new electronic information infrastructure. Otherwise, we risk serious damage to freedom of expression, which is intended to benefit both the

communicator and the public. It seems both logical and necessary to view on-line communication channels "locations" as having a far wider—and more crucial—societal impact than such specific physical locations as shopping malls, which the Supreme Court has held to be private property and, therefore, outside of the requirements of the public forum precedents.<sup>52</sup> "Virtual forums" on the electronic networks are—or will soon be—too pervasive to be regarded solely as private locations.

Borrowing from the limited public forum approach, one well might argue that, in order to be upheld as constitutional, any regulations limiting access to information networks must be narrowly drawn, and adequate alternative communication channels must be made available to replace capacity lost to regulation.<sup>53</sup> Otherwise, potential "speakers" in electronic public forums easily could lose the protection needed to ensure both access and equality of access.

Ensuring sufficient alternative channels will also help to safeguard the rights of the potential audience. The ability to receive communications is as vital as the right to originate them, if people are to have the option of seeing or hearing material ranging from opinions and exhortations to information about health or political matters. The best precedent in this regard is *Red Lion Broadcasting Co. v. FCC*,<sup>54</sup> with its insistence that the rights of the audience are paramount.<sup>55</sup> This is important especially at the point where the costs of access to the new information systems begin to exclude significant percentages of the potential audience. If access is restricted because of its cost, because of ideology, or because of physical or knowledge handicaps (which raise related issues), the democratic ideal of a participatory and informed citizenry can never be achieved. People who are prevented from sending or receiving material unavoidably will become second-class citizens in an information society. As Wilson Dizard, Jr. has suggested, "[t]he essential issue concerns preserving and expanding the legacy of two centuries of information freedoms in the postindustrial environment."<sup>56</sup>

As noted elsewhere, the "debate about the regulation of new communications technologies has too often focused on a comparison of technologies instead of on the underlying question of how a regulatory regime can assure that First Amendment values—which solve the interests of both speakers and

<sup>48</sup> GARRY, *supra* note 43, at 9.

<sup>49</sup> DE SOLA POOL, *supra* note 14, at 246 (emphasis added).

<sup>50</sup> Kapor, *supra* note 7, at 162.

<sup>51</sup> *Id.*

<sup>52</sup> See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976).

<sup>53</sup> See *infra* text accompanying notes 23-25.

<sup>54</sup> 395 U.S. 367, 390 (1969).

<sup>55</sup> *Id.* at 390.

<sup>56</sup> Dizard, *supra* note 8, at 66.

listeners—can best be served.”<sup>67</sup> Some governmental intervention yet may be needed in this area, to safeguard both potential originators and potential recipients of information, ideas and opinions. The *Red Lion* decision, with its emphasis on audience rights, provides the basis for this paradox of increased cyberspace regulation in order to ensure greater freedom for a wider range of expression.<sup>68</sup>

### III. FUTURE SOLUTIONS

#### A. Virtual and Physical Access

Treating a minimum number of channels on the information superhighway (perhaps the functional equivalent of cable’s “basic” services package) as public, rather than private thoroughfares, is one way of ensuring that various types of basic information fully are available within the system. Of course, providing a variety of channels for public use could be accomplished through government subsidy, but this result also might be realized through some sort of “public interest” requirement placed upon those private firms that are accorded a regulated monopoly or other operating rights by the government. Perhaps some degree of public access to channels on the information superhighway might be provided by a manner similar to the “must-carry” rule, under which cable television franchises are required to carry all local channels, at least until the courts act further on this issue.<sup>69</sup> Alternatively, setting aside a fixed number of channels of electronic space for the use of citizens might be financed by revenues from the lease of parts of the radio spectrum.<sup>60</sup> Lew Friedland of the University of Wisconsin has suggested that income from such leases could create “a public telecommunications [revenue] pool that would build a competitive citizen’s information sector separate from the corporate interests of communications

giants” or of public broadcasters.<sup>61</sup>

As to the physical details of providing access, that part of the equation may well be much easier to solve than the economic and legal portions. Suggestions to set up public terminals in existing institutions such as libraries or schools, or in new locations such as information kiosks in shopping centers, already have been advanced<sup>62</sup> and other ideas certainly will be forthcoming. These approaches will create a context within which to implement the public forum concept in cyberspace, ensuring a basic degree of access for both communicators and receivers along the electronic information channels.

#### B. Resolving Libel Issues

There is another part of this legal dilemma, beyond safeguarding both kinds of access, that also merits brief consideration. Once on the network, to what degree are communications protected from such dangers as libel suits? On this topic and others such as privacy and freedom of information, we currently are in the initial stage of adapting technologically outmoded precedents, and, with enacted legislation setting only hazy boundaries, outcomes remain murky at best.<sup>63</sup> One question already being considered is what responsibility falls upon the operators of BBSs for damaging material posted in these forums by third parties. A second issue, yet to be determined, is to what degree materials transmitted on the electronic superhighway are deemed to be “matters of public concern” and therefore subject to a greater degree of First Amendment protection than purely private matters.

The first of these concerns perhaps may be solved by using the *scienter* concept articulated in *Smith v. California*<sup>64</sup> and recently revised somewhat in *Cubby v. Compuserve Inc.*<sup>65</sup> The *scienter* concept holds that a distributor must have specific knowledge

<sup>67</sup> Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1077 (1994). Unless this focus is altered, we will succeed only in reinforcing the “hierarchy of protections for the media” that currently exist. *Id.* at 1062.

<sup>68</sup> See 395 U.S. at 390.

<sup>69</sup> See The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1465 (1992) (codified at 47 U.S.C. §§ 521-59), 47 C.F.R. §§ 76.51-70 (1994).

<sup>60</sup> *Will press freedom survive in cyberspace?*, POYNTER REPORT, Spring 1994, at 7.

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., FOUNDING A FIRST WORLD ALABAMA: A SUMMARY OF THE INFORMATION AGE TASK FORCE REPORT 6

(1991).

<sup>63</sup> See, e.g., BOB RITTER, NEW TECHNOLOGY AND THE FIRST AMENDMENT: AN OVERVIEW OF LEGAL ISSUES ON THE ELECTRONIC FRONTIER 17 (1994) (primer on the major first amendment issues created by new technologies and how journalism will be impacted by them).

<sup>64</sup> 361 U.S. 147 (1959) (holding unconstitutional an ordinance that made a proprietor of a bookstore criminally liable for the mere possession in his store of a book later judicially determined to be obscene).

<sup>65</sup> 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (stating that a computer service company that provided its subscribers with access to an electronic library of news publications put together by a third party was a mere “distributor” of information and could not be held liable for defamatory statements made in a news

of the contents of a publication deemed to be libelous or obscene before liability can be imposed for distribution of that publication.<sup>66</sup> This would be a logical starting point when considering the possible protection or liability of BBS operators.

With regard to the second issue, David L. Marburger, a lawyer for a defendant in an Internet libel suit, has invoked the rationale from *Gertz v. Robert Welch, Inc.*,<sup>67</sup> namely that public figures, who presumably have greater access to the mass media than do private figures, deserve considerably less protection against defamatory statements than their private counterparts.<sup>68</sup> Marburger has argued that virtually all Internet publishers are public figures, stating that, "[u]nder the theory of the public figure, [the Internet publisher] has greater access (than private figures) to the mass media' and, thus, needs less libel protection, because he can rebut claims against him . . . . Through global, instantaneous communication, 'everybody has the ability to rebut everybody.'" <sup>69</sup> This application of the principle of meeting "problem speech" with "more speech," rather than with restrictions, would be highly useful to bear in mind as the courts fashion revised libel and privacy precedents for electronic forums.

#### IV. CONCLUSION

The question of how far to protect libelous electronic speech, and the issues of sender and receiver access to, and protection on, the new information infrastructure, ultimately will be defined by what type of forum the superhighway is deemed to be. As that regulatory drama begins to play out, it is worth recalling de Sola Pool's concern with the problems created by dealing with new communication technologies through the legacy of outdated regulations left over from the most recent prior technological generation. The new media technologies of the late 20th century, de Sola Pool wrote, require major adaptations in the regulatory approach rather than recycling the restrictive controls developed during the first half of this century for the electronic media.<sup>70</sup>

Economics and politics, of course, cannot and will not be ignored. Clearly, there must be some accommodation made among those concerns and, on the other hand, among the legal and ethical ideals of in-

clusiveness, protected expression and an expanded "marketplace of information/ideas" discussed herein. Such an accommodation will be dictated, in part, by what reasonably can be achieved regarding public or other financing or subsidies, private investment in the "public good," and related approaches to the costs of expanded participation. But this accommodation also will be determined by the strength of the public commitment to freedom of expression and to a system that is accessible to those who are unable to pay the tariffs imposed by profit-making entities.

It is important to keep the focus on the broad issue of freedom of expression for citizens in general, rather than on media-related concerns. The latter focus is where Garry's approach creates needless definitional problems. Garry attempts to "move the free press clause away from an interest-group orientation,"<sup>71</sup> but in doing, he worries excessively about defining exactly what we mean by "the press," especially as it becomes less and less "journalist-centered."<sup>72</sup> If, instead, we remember that freedom of expression is a right guaranteed to all citizens, not just to the media, and if we aim to protect that right fully on the new electronic communication channels, the definitional dilemma disappears.

This discussion has attempted to provide philosophical and legal starting points for the decisions that remain to be made concerning the right to freedom of expression on the new electronic communication channels, whatever form they may take. This approach appears to be well-suited to fostering widespread participation in the "information society," regardless of the details of the electronic landscape that finally emerge from today's uncertain picture of today. The perspectives advanced herein are vital if we truly are concerned about preventing certain segments of society from becoming saddled with second-class informational citizenship, and if we are dedicated to expanding First Amendment freedoms—especially freedom of expression—into electronic space.

Paul McMasters, former national president of the Society of Professional Journalists, perhaps said it best in 1994 when he warned against letting all media be brought to "the lowest common First Amendment denominator."<sup>73</sup> Rather, the highest level of First Amendment protection is needed especially to

publication absent a showing that the company knew or had reason to know of the defamation).

<sup>66</sup> *Id.* at 139 (citing *Smith v. California* at 152-53.)

<sup>67</sup> 418 U.S. 323 (1974).

<sup>68</sup> Potter, *supra* note 15, at 68.

<sup>69</sup> *Id.*

<sup>70</sup> DE SOLA POOL, *supra* note 14, at 150, 189, 232-34.

<sup>71</sup> GARRY, *supra* note 43, at 95.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> Paul McMasters, remarks at the New England Professional Chapter of the Society of Professional Journalists, Boston (May, 1994).

protect, in the words of one recent observer, "the 1990s [electronic] equivalent of the lonely pamphlet-

eer,"<sup>74</sup> if all segments of society are to benefit from the emerging communication technologies.

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<sup>74</sup> Potter, *supra* note 15, at 68. See also de Sola Pool, *supra*

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note 17.

