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Foreword

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I was tempted to begin this foreword with the statement that we are on the verge of massive changes in telecommunications and its regulation. In fact, as I reviewed the Federal Communications Commission's accomplishments of the last two years, I realized that we have passed the "verge" and are proceeding with rapid caution to complete comprehensive regulatory reform of the electronic media.

Perhaps the most fundamental and exciting reform which we are urging in the broadcast area—one which now is occurring—is the application of the "print model" to broadcasting. The essence of this approach is that broadcasters should be subject to the same regulations—or, more appropriately, absence of regulation—as the print media are. The objective is to remove the artificial distinction between electronic and print media. The effect is to obliterate the notion that electronic media were bestowed only partial rights of free speech and press under the first amendment. The result is that the walls of regulation which surround and, in my view, restrict broadcasters' freedom must fall. Only then will broadcasters be able to respond to marketplace forces and fully serve the public.

In welcoming a new approach to the regulation of broadcasting (and other video and audio entertainment and information distribution systems), we leave behind the "public trusteeship" model for broadcasting. That model resulted from a trade-off: in exchange for use of the "scarce ether," broadcasters were required to provide services to the public which the government (without regard to the broadcasters' discretion) deemed necessary. Forty years ago this barter might have seemed proper; today it is archaic.

I have urged that the Commission and the Congress move away from this "trusteeship" model for several reasons. First, the protectionism inherent in the quid pro quo of the "trusteeship" model inhibits innovation, technological development, and true competition. Second, the trusteeship restrictions imposed on broadcasters create a false "public interest," constructed on the unfounded and wavering proclamation of unelected bureaucrats. Broadcasters respond to market forces, as any other businesses

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do. To add a layer of decisions made by a government programming department only distorts those decisions. The result has often left the public with merely a different mix of programs, not necessarily a better one, or one that it wants or needs.

Third, the trusteeship model fails to account adequately for the first amendment protections guaranteed to broadcasters. Most of the licensees' discretion is removed, and government mandated forms and amounts of programming are substituted. In the process, the cornerstone of our democratic society—the first amendment—is obfuscated and is replaced by foundationless government intervention. This is improper and, in my view, objectionable.

Let me clearly state that by leading away from the "public trusteeship" model, we are *not* abandoning the public interest; rather, we simply are convinced that the service provided by broadcasters aimed at capturing the public's interest also generally serves the public interest. My hope, then, is that the golden anniversary of the Communications Act of 1934 will be celebrated with the "print model" in place and the Act in harmony with first amendment principles.

In a 1982 article in the *Texas Law Review*,[1] Daniel Brenner and I examined the legal bases for providing full first amendment protection to broadcasting. (Although we often describe the first amendment as bestowing "rights," it really is providing needed "protections.") We concluded that the Communications Act provides the FCC the discretion to remove the regulations now imposed on broadcasters.

The courts have treated broadcasting and print media alike in most areas of law affecting the press, including defamation, privacy, publicity, and protection of news sources. The detour from this straight and narrow path toward full first amendment protection for broadcasters comes only from the decision that the listeners and viewers have rights to hear suitable expression.[2]

The broadcast marketplace now provides us with a means to tear down the roadblocks between the electronic media and the first amendment. We have found that the marketplace approach to broadcast regulation is consistent with both the broadcasters, and the public's first amendment rights. In basing their content judgments on their perceptions of popular demand—responding to the marketplace forces reflecting the ultimate consumers' choices—the broadcasters conform their programming to the

1. Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

2. Red Lion Broadcating Co. v. FCC, 395 U.S. 367, 395 (1969).

interests of listeners and viewers. The broadcasters maintain their discretion while listeners' and viewers' interests remain paramount.

On a practical level, too, the distinction between first amendment treatment of broadcasters and newspapers is not sensible. The scarcity basis relied upon to justify imposing the "trusteeship" model on broadcasters no longer comports with the present circumstances in most American cities. Simply put, newspapers are scarce; in relation, broadcast outlets are abundant.

Second, it is not appropriate or accurate to suggest that broadcasters have a greater "impact" than newspapers. Broadcasting has an impact in our society, to be sure, but it is not unique in its influence. Motion pictures, newspapers, and other unregulated media regularly rival the influence of broadcasting in our society. Moreover, at the time the first amendment was adopted, newspapers and leaflets had a significant impact—one which led to hostility by political opponents, as illustrated by the Alien and Sedition Acts.

This "impact" argument, when followed to its logical conclusion, demonstrates other threats of such regulation. If we are to regulate only the most pervasive media, we favor the bland over the daring. In so doing we may end up stifling the very expression which most—rather than least—needs protection.

We advocate full first amendment protection for broadcasters not only because broadcasting is indistinguishable from other media for first amendment purposes, but also because we believe that a marketplace approach to broadcast regulation—parallel to the approach taken nearly two hundred years ago for the print medium—allows broadcasters freedom of speech while ensuring service in the public interest. It emphasizes the role of new competitors and new competition among existing firms.

We believe that the print model means a great deal to broadcasters. But equally important, it means a great deal to the public. We do not believe that application of the print model will have a negative effect on services rendered by broadcasters as a group or market-by-market. The number of broadcast voices in most communities is large enough to assure that competition generally will result in full service. In the past, broadcasters often served the public in excess of the requirements the FCC has set; this has resulted largely from market demands. For example, while the FCC at one time had been concerned about the level of news service, all-news radio—and now, all-news cable television—have emerged and are growing strong.

In addition, the public interest which is served by the marketplace is the

public's true interest. It is not the "public interest" manufactured by paternalistic bureaucratic proclamation. This point is of crucial importance in understanding the first amendment protection which must be afforded to broadcasters. As an individual, family-member, and parent, I have the utmost faith in my personal judgment about the programs my family watches. But I do not believe that I, nor the Commissioners who serve with me at the FCC, should be making those choices for the American public. Nor should we make choices that effectively "chill" the public's choices.

It is easy to discern the types of regulations which have been deleted—or should be studied for removal—as the result of this approach: content regulation (specified guidelines for news, public affairs, and other nonentertainment programming), the fairness doctrine and other access-based requirements, ascertainment, and ownership restrictions. The litmus test is straightforward: hold the broadcast regulation up against newspaper "regulation." Would we permit it for a daily or weekly publication? If not, the regulation should be eliminated.

The fairness doctrine and other access regulations provide the easiest case. There, the Supreme Court itself held the litmus. In striking down as unconstitutional an access regulation imposed on newspapers,[3] the Court sent a clear statement which can no longer be ignored as we move to the print model for broadcasting. The process works equally well if we consider imposing ascertainment, localism and content requirements on newspapers.

The incongruity of imposing such requirements on the print media does not arise because it would be improper to have such service occur. For example, it might be laudable for newspapers to devote five percent of their space to children's articles, a certain percentage to local news, or another chunk to news for minorities or the elderly. The incongruity arises because it is inconceivable that the government would impose such requirements on newspapers. A major objective of my administration of the FCC is to create a regulatory environment where we are sensitive enough to the first amendment that we view such regulation of the *broadcast* industry as equally odd.

I say that we have passed the "verge" of the new era in telecommunications regulation because we have begun movement toward the "print model." The deregulation of radio which the FCC adopted in 1981 generally has been upheld on appeal.[4] We have instituted a rulemaking to de-

3. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

4. Office of Communication of the United Church of Christ v. FCC, No. 81-1032, slip op. (D.C. Cir. May 10, 1983).

termine whether to remove the obligations imposed on broadcasters by the personal attack and political editorial rules.[5] We continue to urge the Congress to enact full deregulation—including removal of the statutory content-based restrictions embodied in the fairness doctrine. These actions strive toward full installation of the "print model" by eliminating government action that restricts broadcasters' discretion and, thus, infringes the freedom of electronic speech and of the electronic press. I believe that until broadcasters are truly free, our society cannot be. A free society simply cannot accommodate the exercise of government censorship powers over the electronic press.

The other side to the marketplace approach exhibited by the "print model" has not been forgotten: the encouragement of additional means of distribution so that entry into the marketplace is facilitated and more players can compete to serve the public's needs. We accomplish this by removing the last vestiges of the restrictions which helped create and assure a once-scarce system of broadcasting. Our "print model" objective in this regard is to create, to the maximum extent possible, an unregulated, competitive marketplace environment. Marketplace forces spur on innovation, experimentation, and risk-taking. In the fray of free market business competition, the parties strive to serve better the needs of the public. In the end, all parties—including the people—are better served.

Not surprisingly, we all have focused on the "unregulation" part of the catch-phrase representing this objective. This "unregulation" clearly is a crucial element. But we must not—and have not—forgotten the second factor: "development." We aim to foster full development of broadcast and nonbroadcast media.

We have worked hard at encouraging media "development." We authorized direct broadcast satellites, low power television, and teletext; created greater channel capacity for MDS, and provided for FM reallocations to accommodate more stations. We removed many restrictions on subscription television. During the past decade, the Commission responded to tremendous growth in the cable television industry by deleting many inhibitive restrictions which became obsolete, and continues to work to ensure that municipalities don't tie the franchise bind around the coaxial cable too tightly. We have examined alternative microwave entertainment distribution systems. We are considering lifting many ownership restrictions, an action which we believe will nurture increased competition in broadcasting.

5. Repeal or Modification of the Personal Attack and Political Editorial Rules, FCC Press Release, Rep. No. 17498 (May 13, 1983).

We do not know that all of these services will survive. We hope they will. But it is not the FCC's role to second guess the business judgment of those risk-taking and innovative entrepreneurs who present well-considered and technically-feasible proposals to the Commission. We have broken down the barriers surrounding distribution submarkets and now look at the marketplace with wider vision. And it is in this marketplace that we continue to work to create an environment conducive to innovation, competition, and the development of new, better and fuller service to the public.

The articles which follow consider the effects of the changes in communications technologies on regulation and deregulation of communications. While I may not agree with some of the conclusions reached by the authors, I welcome their thoughtful discussion of the issues.

I commend the Catholic University Columbus School of Law and its Law Review for devoting this issue to further discussion of the many issues which arise as we witness great changes in communications and proceed to reevaluate the regulation surrounding them.