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## Foreword: The New Estates

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## FOREWORD: THE NEW ESTATES

*Lance Liebman\**

*Telecommunications Law is under pressure from fast-paced technological advances and changes in the industry structure. As the high-stakes debates plays itself out in federal and state legislatures, agencies and courts, the academic study is struggling to catch up. The author poses provocative questions about the present and future of Telecommunications Law. Of paramount interest are the ill-fitting legal categories that continue to influence crucial determinations about the level of First Amendment protection accorded various communications media, and the reach of Constitutional Takings doctrine that pits incumbent regulated industries against government regulators and up-start competitors looking to shake-up the established order. This Foreword previews many of the legal issues explored in depth in this Special Issue.*

Telecommunications is the “plastics” of the 1990s, attracting the intellect, energy, and capital of some of the world’s shrewdest entrepreneurs and largest corporations. Each day’s newspaper—delivered the old-fashioned way, for now<sup>1</sup>—brings new promises of impending change. British Telecom says it will purchase MCI.<sup>2</sup> John Kluge’s Metromedia Communications will “wireless” China, with Latvia as an appetizer.<sup>3</sup> AT&T introduces a “box” that will connect home phone calls to its wireless network.<sup>4</sup> Rupert Murdoch joins forces with EchoStar to deploy a five hundred channel direct-broadcast satellite service that will compete with local cable operators.<sup>5</sup>

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\* Professor of Law, Columbia Law School. Michael Finkelstein of Renaissance Communications and the Columbia Law School Class of 1960 supplied the vision and the support for Columbia’s focus on this important subject. The author has received his early instruction in the field from his co-teachers Paul Cappuccio and John Thorne. This Article had outstanding help from its editor Eric Rosof, and also from Jed Bergman, Nestor Davidson, Deborah Kun, and Seda Yalcinkaya. The author was counsel to the GTE Corporation in *Iowa Util. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

1. An interesting earlier example of the power of the press is the exemption of children delivering newspapers from the minimum wage and maximum hours provisions of the Fair Labor Standards Act. See 29 U.S.C. § 213(d) (1994).

2. See *BT Secures Its Place Among Telecom Titans with MCI Takeover*, Wall St. J., Nov. 4, 1996, at A1.

3. See Mark Landler, Rich, 82, and Starting Over, N.Y. Times, Jan. 5, 1997, § 3, at 1.

4. See John J. Keller, AT&T Steps Up Fight for Local Markets, Wall St. J., Feb. 24, 1997, at A3.

5. See Mark Robichaux, News Corp. To Buy 50% of EchoStar, Wall St. J., Feb. 25, 1997, at A3.

The law is struggling to keep pace with these business and technology developments. Sixty-nine nations agreed to permit international competition in traditionally state-controlled telephony.<sup>6</sup> The FCC proposed rules to govern the prices charged by incumbent local phone companies when newly empowered competitors use parts of their systems; the Court of Appeals for the Eighth Circuit stayed the rules.<sup>7</sup> New York City Mayor Rudolph Giuliani attempted to put Fox News on a city-controlled PEG cable channel; Judge Denise Cote ruled that the City violated the First Amendment rights of Time Warner.<sup>8</sup>

The academic study of these developments is embryonic. When I first thought about teaching a course in this field, late in 1995, I asked experts and aficionados what the name of the subject should be. Although catch-phrases such as "cyberspace" and the "information superhighway" were gaining currency, no subject title dominated. Michael Finkelstein suggested "Digital Law." Now, little more than a year later, it is certain that the field will be called Telecommunications Law. It is equally certain that it will be—at least for a time—an important way in which certain aspects of America's and the world's legal universes are packaged and studied.

But if we have settled on the name Telecommunications Law, we must still determine the scope of the subject and the various regulatory paradigms it comprises. Should we use the standard industry labels: telephone, television, radio, cellular, cable, and satellite? My former student and now co-teacher Paul Cappuccio suggested that our subject should encompass telephony (both wireline or wireless), television (broadcast, cable, and satellite), and "teledata," a category itself broad enough to include my withdrawal of Swiss francs at an ATM machine in Sils-Baselgia,

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6. See Robert S. Greenberger & Gautam Naik, *Global Telecommunications Pact Opens Lines to Growing Markets for U.S. Firms*, Wall St. J., Feb. 18, 1997, at A3.

7. See *Iowa Util. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996), (staying operation and effect of pricing provisions and "pick and choose" rule contained in Implementation of the Local Competition Requirements of the Telecommunications Act of 1996), motion to vacate stay denied, 117 S. Ct. 429 (Nov. 12, 1996).

8. See *Time Warner Cable v. City of New York*, 943 F. Supp. 1357, 1402-03 (S.D.N.Y. 1996); *Pressure Increased on Time Warner*, N.Y. Times, Oct. 5, 1996, at 37 (noting that New York City may threaten to deny renewal of Time Warner's cable franchise and that Giuliani Administration has waded into corporate grudge match that sounds as if it was dreamed up in Hollywood). "PEG" refers to public, educational, and governmental use channels, as authorized by 47 U.S.C. § 531 (1994) (allowing municipal franchisers to require the designations of such channels by applicants).

Judge Cote's use of the First Amendment is encouraged by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2347, 2351 (1995), which granted the "private" organizers of Boston's St. Patrick's Day Parade the First Amendment privilege to exclude participation by openly gay, lesbian, and bisexual marchers. Cf. Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertyization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 Stan. L. Rev. 143, 147 (1996) (arguing against the *Hurley* Court's conceptualization of speech as "private space" deserving of "property-like entitlements including the rights of absolute use, exclusivity, and transfer").

and the Columbia Law School's homepage on the World Wide Web.<sup>9</sup> These three categories would presumably call for three sets of legal concepts and three regulatory structures. But at our first class a student challenged Paul: Are not voice and video just different kinds of data?<sup>10</sup>

Some traditional categories crumble but others remain intact. Telecommunications law is rife with rigid categories, which, in a period of rapid technological change, provide rich ground for dispute by competing analogies.<sup>11</sup> A city may not bar newspaper vending machines as unsightly; can it ban satellite dishes?<sup>12</sup> Is cable television "more like" broadcasting, or "more like" a newspaper?<sup>13</sup> Where does direct-broadcast satellite fit in?<sup>14</sup> And the Internet? The questions arise at cyber-speed, but the answers await the efforts of litigators, judges, legislators, and regulators. Classification determines results. Is an encryption code a form of speech? After all, it is merely a collection of ones and zeros. Or is it a dangerous means of allowing terrorists to evade observation?<sup>15</sup>

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9. The Columbia Law School's web site can be found at <http://www.columbia.edu/cu/law/>.

10. The ancient words of the Talmudic sage ring true: "I have learnt much from my teachers, and from my colleagues more than from my teachers, but from my [students] more than from them all." Babylonian Talmud, Ta'anith 7a (Soncino ed., Rabbinowitz trans., 1938).

11. Cf. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2402 (1996) (Souter, J., concurring) ("[I]n charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. . . . Rather than definitively settling the issue now, Justice Breyer wisely reasons by direct analogy rather than by rule.").

12. See *Telecommunications Act of 1996*, 47 U.S.C.A. § 303(v) (West Supp. 1997) (preempting state or local zoning regulation for home satellite dishes); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (holding unconstitutional on First Amendment grounds portions of appellant city's ordinance giving mayor unfettered discretion to deny permit application and unbounded authority to condition permit on any terms deemed "necessary and reasonable").

13. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (holding that intermediate scrutiny applies to content-neutral cable regulation, and reasoning that cable is different from broadcasting and more like newspapers, because dual problems of spectrum scarcity and signal interference do not exist for cable television), *aff'd*, 117 S. Ct. 1174 (1997). Compare *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-92, 400-01 (1969) (lower First Amendment standard for broadcasting than for print media) with *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspapers enjoy higher First Amendment protection than broadcast).

14. See generally Howard Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage"*, 97 *Colum. L. Rev.* 1048, 1049 (1997) (discussing new regulatory paradigm for direct broadcast satellite and corresponding pressure put on other regulated categories of telecommunications services).

15. See *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 8-9 (D.D.C. 1996) (refusing plaintiff's First and Fifth Amendment challenges to Department of State's Office of Trade Controls decision and holding that judiciary is not empowered to review State Department determination that encryption code—a series of ones and zeroes—is "defense article" subject to export controls, despite a finding that such code constitutes speech).

As a Property teacher, I cannot help but see Telecom as millennial Estates in Land. In the century and a half since Samuel Morse tapped "What hath God wrought!"<sup>16</sup> the United States and other countries have developed legal regimes for particular telecommunications technologies. These categories calcified, and today are every bit as structured as Fee Simple, Fee Tail, Life Estate, and Term of Years. "Telephone," for example, is a "common carrier" in direct descent from railroads and roadside inns. Companies must serve all, must carry every message, and should therefore escape responsibility for the messages they deliver. Assigned a monopoly, the local telephone company charges rates and offers services that are carefully regulated, thus making it easy for government to order redistribution from business to residential users and from urban to rural. Newspapers, however, are classified differently. Even when Miami (like most cities) has only one major paper,<sup>17</sup> its constitutional status is like that of a speaker in a public square.<sup>18</sup> The advent of cable seemed to present the legal system with the choice between creating a new category and stretching one of those already in existence. So far, the legal system has deftly sidestepped that decision. Today we know that cable is not a "common carrier," despite the fact that its wires pass under the same streets and along the same poles as those of electric and telephone companies. It is not a "newspaper," either, even though it is the monopoly deliverer of CNN and MTV, just as newspapers are often the only source for AP dispatches and the comics. Indeed, the constitutional status of cable is so ambiguous that the must-carry rules were upheld by only a narrow margin as this issue went to press.<sup>19</sup>

Academic commentators, echoed by litigators, have invested a great deal of time in recent years predicting, and pressing for, a technologically justified legal "convergence" of previously disparate media. Ithiel de Sola Pool made the point in 1983: Convergence is here, the categories do not work, and technological wizardry requires a new legal structure.<sup>20</sup> Con-

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16. See Webster's American Biographies 743 (Charles Van Doren ed., 1984) (Samuel F.B. Morse's first message transmitted over the telegraph machine on May 24, 1844).

17. See generally *Miami Herald*, 418 U.S. at 249 & n.13. The *Miami Herald* is, however, published in both English and Spanish.

18. *Id.* at 258 & n.24 ("A journal does not merely print observed facts the way a cow is photographed through a plate-glass window." (quoting 2 Zechariah Chafee, Jr., *Government and Mass Communications* 633 (1947))).

19. See *Turner Broad. Sys., Inc. v. FCC*, No. 95-992, 1997 WL 141375 at \*19-20 (U.S. Mar. 31, 1997) (applying intermediate scrutiny since "[c]ontent-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, which afford government the latitude in designing a regulatory solution," and holding that "the burden imposed by must-carry is congruent to the benefits it affords [and therefore] is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households with cable").

20. See generally Ithiel de Sola Pool, *Technologies of Freedom* 24 (1983) ("Both convergence and cross-ownership blur the boundaries which once existed between companies publishing in the print domain that is protected by the First Amendment and companies in businesses that are regulated by government.").

vergence is a useful concept for encouraging new thought about appropriate regulatory doctrines.<sup>21</sup> Much of our broadcasting law is based on the assumption that spectrum is scarce.<sup>22</sup> This was not a crazy thought in 1943, but it was not entirely true either.<sup>23</sup> When the coaxial cables and the telephone wires entering our homes are capable of both bringing us video programming and carrying telephone calls, does it make sense to treat the two differently? Should direct broadcast satellite operators, like cable operators, receive royalty-free rebroadcasting rights for television programming?<sup>24</sup> Or will cable operators succeed in blocking competitive parity in copyright fees while at the same time arguing in favor of parity in mandated local broadcast retransmission?<sup>25</sup> When voice and fax travel over the phone and Internet, is it fair to exempt Internet providers from the local access charges that cost local telephone companies billions? Similarly, should Internet providers be obligated to regulate pornography, privacy, and copyright infringement when telephone companies have never been so burdened? Notwithstanding the dogged persistence of category, categorical doctrines divorced from economic and technological reality cannot survive indefinitely.

Yet convergence may well be the latest incomplete assumption about technology that permits simplistic labeling. If we say that wired and wireless telephony and television are all the same, having converged into a

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21. See Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 *Colum. L. Rev.* 835, 836 (1997) (arguing that modern doctrine is built in large measure around "incoherence . . . between wireline and wireless communications, and between common carriage and broadcasting").

22. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969) ("It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government."). In a recent sequel to the government-broadcast industry give and take, President Clinton proposed that broadcasters give away air time to political candidates in exchange for "free" new licenses to provide digital high-definition television. See James Bennet, *Clinton Offers Licensing Deal for Free TV Campaign*, *N.Y. Times*, Mar. 12, 1997, at A1 (reporting the speech and quoting Reed Hundt, Chairman of the FCC, as saying, "I believe we have the power and the precedent and the procedure for giving free access to media for all candidates").

23. See generally Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 *Colum. L. Rev.* 905 (1997) (arguing that while physical scarcity has been critiqued on economic and technological grounds, public choice theory provides fuller rationale for the doctrine's survival in telecommunications law).

24. See 17 U.S.C. § 111 (1994) (providing rules relating to infringement and royalty fees for retransmission by cable systems); Mark Landler, *Deal by Murdoch for Satellite TV Startles Industry*, *N.Y. Times*, Feb. 26, 1997, at A1, D5 (noting that new satellite service providers are likely to lobby Congress "to give satellite distributors the same rights as cable operators, who are allowed to retransmit broadcast channels without paying an extra copyright fee to the makers of programming").

25. See Landler, *supra* note 24, at D5 (quoting president of competitive satellite video service: "[w]e'll be in our fourth year of operation before they get this deal approved"). The article also notes the likely competitive response of cable operators to apply the same requirement to carry all local broadcast channels on satellite services, thereby further handicapping the satellite industry. *Id.*

common digital format, then all we do is move to another set of categorical questions about takings, free speech, antitrust, and privacy.

Of course, it is far easier for an academic observer such as myself, a novice at that, to call for new paradigms than it is for Congress or the courts to imagine them. It is not surprising that change is hard, especially when even modest change unsettles large economic units that are comfortable with the current regime.<sup>26</sup> Telephone companies know their world of regulated prices and universal service has been gained in trade for freedom from responsibility for libel, pornography, and drug deals conveyed by their wires.<sup>27</sup> Broadcasters accept public duties as long as they retain oligopoly access to radio and telephone receivers. There is some validity to this resistance to change. After all, law is a system for imposing predictability and encouraging reliance. That can only be done with categories—with if/then propositions on which actors can rely. The “Rule of Law, not of men” requires some level of generality and consistency over time. Change threatens that consistency, and the expectations built upon it.<sup>28</sup> Thus Justice Kennedy, dissenting in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, expresses his frustration at the Court’s refusal to fit cable regulation into his sense of the First Amendment’s embrace.<sup>29</sup> Businesses similarly deploy the Takings Clause to defend settled expectations.<sup>30</sup> Rhetorical support for change, and in particular for change toward competition, is entirely consistent with a risk-averse refusal to move from the current structure in the absence of assurance that one’s situation will be better as a result of change and is even consistent with the stronger view that one has a right to be

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26. See generally Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 *Colum. L. Rev.* 976 (1997) (arguing that congressional capture made category reshuffling impossible in the Telecommunications Act of 1996, but that the Supreme Court has exercised more flexibility in rethinking the telecommunications paradigm).

27. See generally Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 *Colum. L. Rev.* 955 (1997) (arguing that political principle to redistribute wealth through universal service survives Telecommunications Act of 1996, but that common carriage doctrine is under economic pressure that will diminish its role).

28. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires . . . continuity over time . . .”).

29. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2404 (1996) (Kennedy, J., concurring in part and dissenting in part) (“The [plurality] opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine.”).

30. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (three-judge court) (Williams, C.J., dissenting) (noting that challenges to 1992 Cable Act included takings as well as First Amendment claims, but reserving judgment on the former), vacated, 512 U.S. 622 (1994); *Motion for Stay Pending Judicial Review and for Expedited Judicial Review at 21, Iowa Util. Bd. v. FCC*, 1996 WL 589204 (8th Cir. Oct. 15, 1996) (No. 96-3321) (arguing FCC rules are unconstitutional on takings grounds).

sure one is receiving at least a fair share of the net gains from the set of changes.

In Property Law, reality has occasionally overwhelmed existing categories.<sup>31</sup> Thomas Cromwell altered a massive legal fiction when he achieved the Statute of Uses.<sup>32</sup> England, much more easily than the United States, reformed the ossified system of Estates in Land.<sup>33</sup> Zoning and rent control, once considered unthinkable, survived attack and are now established aspects of American legal culture.<sup>34</sup>

In Telecommunications Law today, we are in a period of change. The Telecommunications Act of 1996 tentatively places the United States government on the side of competition and accommodation to new technology, but substantially fails to deliver on its large promises.<sup>35</sup> Its practical reform fails to match much of its introductory rhetoric.<sup>36</sup> Just as domestic interests struggle to protect themselves through transitions, so nations rhetorically accept change toward convergence and competition but proceed slowly and fight aggressively to make sure their concerns (often cultural but sometimes merely economic) receive appropriate deference.<sup>37</sup> Courts, forced by litigants to face issues quickly, must make decisions that accommodate the investment-backed reliances of the present and the unstoppable technological advance of the future.

To confront this changing and challenging body of law, the Columbia Law Review recently convened a conference on Telecommunications Law and commissioned the pieces in this Special Issue. The Issue

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31. It is remarkable that as recently as 1996, the Court of Appeals of New York was unable to adapt the rule against perpetuities to modern conditions. See *Symphony Space, Inc. v. Pergola Properties, Inc.*, 669 N.E.2d 799, 804-06 (N.Y. 1996) (declining to exempt commercial option agreements from New York's rule against perpetuities).

32. 27 Hen. 8, ch. 10 (1535) (Eng.). See generally A.W.B. Simpson, *An Introduction to the History of the Land Law* (1961) (discussing history of Statute of Uses).

33. See John E. Cribbet & Corwin W. Johnson, *Principles of the Law of Property* 38 (3d ed. 1989) ("The last vestiges of the old distinctions were finally swept away in England on January 1, 1926, when a series of acts, known collectively as 'The Property Legislation of 1925,' came into effect.")

34. See generally *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (upholding zoning ordinance as legitimate exercise of police power broadly bearing substantial relationship to general public welfare); *Yee v. City of Escondido*, 503 U.S. 519, 538-39 (1992) (holding that rent control ordinance limiting grounds upon which park owners could terminate mobile homeowner's tenancy did not authorize unwanted physical occupation and therefore did not constitute per se "taking").

35. See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.A.N. (110 Stat.) 56 (to be codified in scattered sections of 47 U.S.C.) [hereinafter *Telecom Act*].

36. See Hazlett, *supra* note 23, at 906 (discussing how the "wireless" half of telecommunications sphere remains undisturbed by *Telecom Act*).

37. See generally John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 *Colum. L. Rev.* 874 (1997) (canvassing pertinent areas of international telecommunications legal developments, including liberalizing domestic telecommunications markets through bilateral and multilateral agreements, satellite agreements, and cross-border multinational telecommunications businesses).

is timely because it allows authors to reason about doctrine and policy at just the moment when those in the field are ready to accept new propositions. In this endeavor, Columbia seeks to renew the role of law reviews as progenitors of new ideas—as Cardozo wrote, to benefit practitioners and judges by canalizing “the stream [to] redeem the inundated fields.”<sup>38</sup> More teched-up than their elders, the law review editors realize they have been studying antiquated legal doctrines. They seek to do their part in bringing the new estates into existence.

Two large legal ideas presently provide the structure for much of the litigation that arises concerning telecommunications: “takings” and free speech. We are in a period of resurgence of takings jurisprudence, with some Justices ready to use the Clause to discipline legislative, executive, and especially regulatory actions. Given the much-noted incoherence of the doctrine, it is hard to be confident of outcomes, and it is thus understandable that legal boundaries are tested. Moreover, “takings” is a relevant word for thinking about much that is occurring: change is widespread, with vast sums at stake. The established structure of the telecommunication industry, based on immense investment over decades, and earning more than \$200 billion in annual domestic revenue alone,<sup>39</sup> is suddenly under attack by both government policy and technological change.

The primary strands of takings jurisprudence, physical occupation and regulatory takings, apply well to what are essentially two forms of telecommunications property. Telecommunications companies own property such as wires and switches. If government takes them or requires that they be shared with competitors, someone must pay.<sup>40</sup> With technology and regulation changing so rapidly, we have now also begun to pay a transaction cost: the detailed determination of the constitutionally protected value of tangible property.

Consider *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>41</sup> *Loretto* held that a New York law requiring landlords to permit installation of cable

38. Benjamin N. Cardozo, Introduction to Selected Readings on the Law of Contracts from American and English Legal Periodicals at vii, ix (Ass'n of Am. Law Schs. ed., 1931) (“Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of universities. . . . [T]he outstanding fact is here that academic scholarship is charting the line of development and progress in the untrodden regions of the law.” (referring to scholarship in law review articles)).

39. See U.S. Dep't of Commerce, Statistical Abstract of the United States 560 (116th ed. 1996) (reporting 1992 revenue for communications industry, primarily telephone, broadcast and cable, as \$231 billion).

40. See *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987) (upholding FCC's rates pursuant to Pole Attachments Act, which provides authority, in absence of parallel state regulation, to determine “just and reasonable” rates that utility companies may charge cable television systems for using utility poles to string cable, since rate provided for “recovery of fully allocated cost, including the actual cost of capital”).

41. 458 U.S. 419 (1982).

television wires was an unconstitutional taking.<sup>42</sup> As a Property teacher, I tried to persuade Dean Erwin Griswold, who represented the appellee, to argue that because precedent shows that a landlord can be told to provide plumbing, not to build higher than two stories, and to charge only a regulated rent, surely it is far less intrusive to tell the landlord that a tenant is entitled to access through the wall or window for a cable wire. But Dean Griswold was stuck, as Justice Marshall and the majority turned out to be, on the legitimate point that seizures of a tangible asset feel like a thing different from regulation; or, at least, feel different to members of a certain generation. Younger people, I am convinced, have a much greater sense that important assets are evanescent: money flows forth from a computer; no certificate memorializes a pension right; health benefits are symbolized by a plastic card. So long as *Loretto* lives, we will struggle to decide whether the wire must be paid for at cost or replacement, whether the value of an ongoing business is compensable property, and what price to put on the opportunity to share a facility (e.g., an electric pole) when adding an extra wire imposes no burdens on the current user.<sup>43</sup>

We will make better public policy in the field of Telecommunications Law, I think, if we emphasize *regulatory* takings over physical occupation. We give property constitutional protection both to achieve efficiency by safeguarding reasonable investments and because it is unfair to make some pay for benefits that go to many. Both arguments give way, however, when the government intervention that “takes” is normal regulation that investors should have expected. History should be relevant. What did society ask this company to do? How has it been compensated? What is now being asked of it? This way of thinking has never been put better than by Judge Breitel when the New York Court of Appeals allowed New York City to stop the Penn Central Railroad from putting an unsightly Marcel Breuer tower atop the beautiful Warren and Wetmore Grand Central Station:

Although government regulation is invalid if it denies a property owner all reasonable return, there is no constitutional imperative that the return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests. So many of these attributes are not the result of private effort or investment but of opportunities for the utilization or exploitation which an organized society offers

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42. See *id.* at 426.

43. See generally J. Gregory Sidak & Daniel F. Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 *Colum. L. Rev.* 1081 (1997) (arguing that pricing rule for sale of “unbundled network elements” under 1996 Telecommunications Act by local telephone companies will only be efficient and conform to statutory requirements if it includes opportunity cost to incumbent firms, and that FCC’s pricing rule will bankrupt phone companies and have perverse result of under-investment in information infrastructure).

to any private enterprise, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which the private enterprise could neither exist nor prosper. It is enough, for the limited purposes of a landmarking statute, albeit it is also essential, that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.<sup>44</sup>

This argument, not exactly endorsed in Justice Brennan's opinion in the Supreme Court,<sup>45</sup> applies perfectly to many of the telecommunications situations that now arise. Local telephone franchises, many of which stem from the first decades of the century, are based on unwritten assumptions that include a monopoly, service for all, and price regulation under constitutional requirements of adequate return. The vital relationship between long distance and local telephone companies—without which the long distance call could not begin or end—is regulated. Over-the-air broadcasters have licenses, and cable companies have franchises. Many newer technologies—satellite television providers, cell phone companies, Internet providers—are much more thinly regulated. Across the telecommunications industries, the jurisprudence should endeavor to assure fairness to those who invest. *United States v. Winstar Corp.*<sup>46</sup> was a step in that direction, except for its excessive attention to specific contractual language. The more important point is that government should treat regulated enterprises fairly, giving them the benefit of previously-negotiated regulatory bargains. Whether the duty is called "contract" or "property" does not matter. But making such judgments is an entirely appropriate judicial role when traditionally regulated entities are being guided by government across a narrow precipice of transitional politics and economics to a beautiful meadow of competition.

The second important legal idea framing much of the Telecommunications Law debate is the First Amendment. Even though it will be a redoubt in circumstances where it is not properly relevant, "free speech" is inevitably a useful lens for viewing many aspects of millennial telecommunications lawmaking. Free speech was privileged as early as 1791 when

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44. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1273 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

45. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (basing "no taking" decision on findings that City's restrictions on applicants were substantially related to general public welfare, permitted reasonable beneficial use of the landmark site, and afforded opportunities for future development of site and other properties).

46. 116 S. Ct. 2432 (1996). *Winstar* upheld suits by thrifts against the federal government for breach of contractual promise to allow respondents to count goodwill toward their regulatory capital requirements. See *id.* at 2440.

it became Amendment One, and in this century has been in ascendancy since Judge Hand<sup>47</sup> and Justice Holmes,<sup>48</sup> and later Chief Justice Stone,<sup>49</sup> placed the protection of speech on a pedestal higher than that on which economic rights stood. Today, huge telecommunications businesses invoke First Amendment protections to fend off government regulation, whether content-directed or not. Yet, Time Warner and Rupert Murdoch are but distant relatives of Anita Whitney and Jacob Abrams.<sup>50</sup>

Commentators have already moved to their respective—and opposing—corners. Thomas Krattenmaker and L.A. Powe say that traditional First Amendment jurisprudence—unfettered editorial control for what they cavalierly call “private” owners (whether the Miami Herald or TCI)—should apply to all modern forms of communication.<sup>51</sup> They argue strongly that attempts by government to promote the public interest by sponsoring “good” speech (e.g., children’s broadcasting or presidential debates) or hindering “evil” speech (e.g., indecency or music that glorifies drug use) have a terrible track record.<sup>52</sup> Some dream that the glories of the Internet will give voice to every speaker and allow every listener to find his or her own music whenever he or she wants it. But these optimists pass too easily over the risk that a monopolist will control the list of available songs and that multinational multimedia giants will guide cultural and political discourse into a steady downward spiral.

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47. See, e.g., *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), rev'd, 246 F. 24 (2d Cir. 1917) (drawing distinction between agitation, often a safeguard of free government, and direct incitement to violent resistance to the war effort and law generally, and finding that plaintiff's antiwar cartoons did not fall within statutory prohibitions of the latter).

48. See, e.g., *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (“Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law . . . abridging the Freedom of speech.’” (quoting U.S. Const. amend. I)); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding conviction for conspiracy to circulate pamphlets directed at draft obstruction consistent with free speech rights).

49. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (indicating that presumption of constitutionality might operate more strongly for legislation facially consistent with first ten amendments “which are deemed equally specific when held to be embraced within the Fourteenth”).

50. See *Whitney v. California*, 274 U.S. 357, 371 (1927) (Whitney was member of Communist Labor Party convicted under California Criminal Syndicalism Act, and the Court held such conviction was consistent with free speech rights); *Abrams*, 250 U.S. at 624 (upholding conviction of American Socialist who published Bolshevik leaflets urging workers not to manufacture arms which might be used against Russia).

51. See Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 Yale L.J. 1719, 1733–39 (1995).

52. See *id.* at 1727–30.

In the other corner are the civic republicans, such as Cass Sunstein<sup>53</sup> and Owen Fiss,<sup>54</sup> who argue that current free speech doctrine has ruined political discourse<sup>55</sup> and unreasonably halted attempts to limit the power of monopoly press lords.<sup>56</sup> In this view, the future of our society is at stake.<sup>57</sup> Collective action is required and the Supreme Court must be persuaded that government action, even if inconsistent with the First Amendment as it is applied to the broadsheet and the public square, is essential to a healthy nation that seeks to retain its values in the electronic age. But the problem with their argument is the mirror image of that faced by the nostalgic free speech advocates: It is hard to imagine a government that has taken years to settle on an HDTV standard, and that still can not decide how to auction spectrum, will do a better job of promoting and moderating speech than the imperfect job done by Hollywood and the networks.<sup>58</sup>

It is too early to predict what form the First Amendment will take in the world of deregulated telecommunications. Increasingly, the nation's commitment to free speech is being wielded as a sword to attack that which in any other industry would be considered economic regulation. Should takings fail as a first wave of constitutional defense, litigants will rely on the First Amendment to protect them from such unwanted regulatory limitations as rate-setting and interconnection rules;<sup>59</sup> they have

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53. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* 49 (1993) (arguing that scarcity rationale in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), is based on need to ensure "broad diversity of views").

54. See Owen M. Fiss, *Free Speech and Social Structure*, 71 *Iowa L. Rev.* 1405, 1425 (1986) (arguing that free speech means allowing voices to be heard, and government regulation may be justified to achieve these ends).

55. See, e.g., *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309, 2312 (1996) (holding that First Amendment prohibits application of spending limits to expenditure that political party makes without coordination with any candidate); *Buckley v. Valeo*, 424 U.S. 1, 44-51 (1976) (per curiam) (holding that provisions for expenditure limits in Federal Election Campaign Act of 1971 violate First Amendment).

56. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding Florida statute unconstitutional on First Amendment grounds since it intrudes on editorial discretion).

57. See generally Eben Moglen, *The Invisible Barbecue: Reflections on the Symposium*, 97 *Colum. L. Rev.* 945 (1997) (observing lack of debate regarding socio-political consequences of carving up telecommunications rights at the "Great Barbecue," and drawing parallel with allocation of benefits and privileges with respect to railroad industry in the Gilded Age).

58. See generally Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 *Colum. L. Rev.* 1016 (1997) (arguing that Congress's enactment of provision to create "open video systems" is yet another example of regulation hiding in the guise of deregulation).

59. If the telephone companies are "speakers" for First Amendment purposes—they arguably *do* provide information (data) in the same way as broadcasters, and deregulation will inevitably increase this aspect of their business—then arguments for government regulation of the provision of such "speech" will come under First Amendment attack.

already challenged must-carry rules,<sup>60</sup> can't carry rules,<sup>61</sup> and restrictions on content carried through leased-access cable channels.<sup>62</sup> Telecommunications affects speech—but is it inevitable, therefore, that all economic regulation in this area is constitutionally dubious?<sup>63</sup> While there is some indication that rigid thinking is being questioned,<sup>64</sup> we have explicit acknowledgment that a new intellectual structure must still be found.<sup>65</sup>

Telecommunications is not just a business like selling soap or cappuccino. It carries over its wires or through the air the essence of our culture and politics. This country can tolerate two colas, three car makers, and four brands of sneakers. But we would be extremely worried if we could not find our individual truths without traveling over a virtual

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60. See generally *Turner Broad. Sys., Inc. v. FCC*, No. 95-922, 1997 WL 141375 (U.S. Mar. 31, 1997); Comment, Substantial-Evidence Review of Statutes? Lessons from *Turner Broadcasting v. FCC*, 97 Colum. L. Rev. 1162 (pointing out confusion in *Turner* Court's standard of review, and suggesting that Court may be shifting toward new kind of intermediate scrutiny in technologically complex First Amendment cases).

61. See *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 203 (4th Cir. 1994) (invalidating rule prohibiting telephone companies from providing video service), vacated, 116 S. Ct. 1036 (1996).

62. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2381 (1996) (plurality) (holding as consistent with First Amendment provision permitting cable system operator to decide not to broadcast "patently offensive" sex-related material on leased-access channels, but invalidating other provisions).

63. In a reference to the notorious "Lochner Era," Justice Breyer, in oral argument with Professor Laurence Tribe, questions this point with reference to a First Amendment challenge to the prohibition against telephone companies entering the video market:

[I]'m nervous—I don't fully understand the standard of review. . . . [I]s suddenly this whole big economic area going to be turned over to courts? Because . . . [if] we're going to use the First Amendment . . . other people in history have used other amendments to sort of go into economic regulation in great depth.

See Transcript of Oral Argument, *Chesapeake* (No. 94-1893), available in 1995 WL 733396, at \*34-35 (Dec. 6, 1995).

64. In *Denver Area*, Justice Kennedy argued that the Court should confront First Amendment challenges to emerging telecommunications technologies by squarely applying strict scrutiny to any content restrictions. See *Denver Area*, 116 S. Ct. at 2404, 2416-17 (Kennedy, J. concurring in part and dissenting in part). Justice Thomas, on the other hand, would continue to pick and choose the level of First Amendment scrutiny based on the nature of the medium. See *id.* at 2420-21 (Thomas, J. dissenting in part and concurring in judgment). But Justices Breyer and Souter, in their plurality opinion, made it clear that they would *not* declare a clear First Amendment standard to govern modern telecommunications law. As they argued, "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes." *Id.* at 2385. They are surely right to recognize that telecommunications is in a state of flux and that familiar categories no longer make sense. What will take the place of the traditional doctrines, however, is far from clear.

65. See *id.* at 2402 (Souter, J., concurring) ("[I]t will take some time before reaching a final method of review."). See generally Price & Duffy, *supra* note 26 (discussing Court's transition); Comment, Pluralism on the Bench: Understanding *Denver Area Educational Telecommunications Consortium v. FCC*, 97 Colum. L. Rev. 1182 (1997) (showing how and why the Court in *Denver Area* was unable to articulate a consistent frame of reference for evaluating telecommunications regulation).

highway owned by Bill Gates, or if Fox, Disney and Time Warner came to dominate movies, music, television, and books. Whereas traditional First Amendment protections secured individual autonomy from potential government abuse, today we may be more concerned with providing diversity of viewpoints and access to individual speakers as opposed to private gatekeepers. Cast in this light, the First Amendment may permit government intervention and regulation to give content to our free speech values.<sup>66</sup>

We have entered a period of legal evolution, when traditional concepts will be redefined to fit new technology and, more importantly, new social thought about the importance of communications and appropriate media structures. Unavoidably, we will devote substantial resources to determining the protected rights of property holders who are transitional losers. We will also use the lens of the First Amendment to focus judicial scrutiny on the impact of government policy on free expression and wide access to ideas.

But no matter how accurate the dreams of the Internet ideologues turn out to be,<sup>67</sup> there will be bottlenecks. Just as the movie studios' concentrated control of theaters in the 1920s and 1930s led to government intervention<sup>68</sup> and the perception of a limited spectrum seemed to require public interest limitations on radio stations during the war against Hitler,<sup>69</sup> so monopoly power over the interface that separates the citizen from the world of information or oligopoly concentration of video distribution will produce calls for positive and negative intervention by government.

If it is concentration of power through ownership that is the core problem—the question of who will own the paths to our ears, eyes, and brains—then competition law should have a high profile in the debate.

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66. See *Turner Broad. Sys., Inc. v. FCC*, No. 95-992, 1997 WL 141375 at \*10 (U.S. Mar. 31, 1997) ("Even in the realm of First Amendment questions . . . deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted."); *id.* at \*26 (Breyer, J., concurring) (arguing that must-carry statute has important "noneconomic purpose[] to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public" and that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994))).

67. See Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 *Harv. L. Rev.* 1062, 1082 (1994) ("Infinity will replace scarcity.").

68. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 232 (1939) (price restrictions agreed to by motion picture distributors and theater owners violate Sherman Act); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44, 52-55 (1930) (agreements between film distributor/owner and theater owners violates Sherman Act); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43-44 (1930) (same).

69. See *National Broad. Co. v. United States*, 319 U.S. 190, 225-27 (1943) (refusal by FCC of radio license is not denial of free speech).

Historically, the statutory and FCC limits on ownership in national and local markets,<sup>70</sup> as well as cross-ownership restrictions,<sup>71</sup> maintained ownership concentrations at levels below the Sherman Act radar screen—at least when the government was not awarding a monopoly franchise. With some of these limits lifted, and the current business judgment that larger competitors are necessary to pay for vast new technology infrastructure investments, we are likely to see ownership levels that require serious anti-trust review.

New questions will be posed. How is market power evaluated when new telecommunications services that may result in strong competition are promised “tomorrow”? Does Time Warner have monopoly power today in the New York City television market? If not, what is the Fox News fight all about? Are there free speech concerns that should influence competition analysis?<sup>72</sup> Should the populist ancestry of the Sherman Act be revisited to contend with telecommunications giants?<sup>73</sup> Or will anti-trust remedies do more harm than good—unless we offer guidance to help judges divine the difference?

We are at an early stage in the process of posing and answering these questions. Our protean legal system is just beginning to choose doctrines

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70. For example, the Telecom Act eliminates national ownership limits for AM and FM radio licenses entirely, and ownership in a single market is increased to eight stations. See Telecommunications Act of 1996, 47 U.S.C.A. § 202(a), (b)(1)(A) (West Supp. 1997).

71. For example, the Telecom Act eliminates the cross-ownership ban that prevents affiliation of broadcasters and cable operators that serve the same television markets. See *id.* § 202(f), (i). Furthermore, the FCC is required to review all of the ownership rules every two years. See *id.* § 202(h).

The Act repeals section 221(a) of the Communications Act of 1934, which permitted local phone companies to merge without facing antitrust scrutiny if the FCC approved. See Federal Communications Act of 1934, 47 U.S.C. § 221(a) (1994) (empowering the FCC to immunize mergers from any act of Congress making the proposed transaction unlawful, including the Sherman Act). The Telecom Act was intended get both the FCC and the Department of Justice “back to their proper roles.” Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, at 201 (1996), reprinted in 1996 U.S.C.A.N. 124, 215.

72. Robert Pitofsky, Chairman of the Federal Trade Commission, explains:

It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By “political values,” I mean, first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all.

Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1051 (1979).

73. See generally Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 Cal. L. Rev. 917, 918-20 (1987) (arguing that Chicago School of antitrust theory is not faithful to legislative intent of Sherman Act, and that motivating issue was “concern for consumers; concern for the ‘little man’; interest in access, diversity, and pluralism; and condemnation of coercion and exploitation”); Roger Lowenstein, *Trust in Markets: Antitrust Enforcers Drop the Ideology, Focus on Economics*, Wall St. J., Feb. 27, 1997, at A1 (tracing revolution in Sherman Act policy from political concern about “bigness” to microeconomic concern about efficiency).

from its traditional deck of cards with which to address these challenges. Many of these issues are discussed with insight and imagination in this Special Issue of the Columbia Law Review. For teachers, judges and practicing lawyers, wonderful intellectual challenges await as together they construct the new telecommunications estates. Perhaps the Chinese wish "May you live in interesting times" was not a curse after all.