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Free Expression and Digital Dreams: The Open and Closed Terrain of Speech

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Each new communications technology (theater, print, telegraph, telephone, radio) presents the possibility of altering the infrastructure of discourse. As it is absorbed, implemented, and developed, each technology plays out and reshapes ideas of community. Societies, as Karl Deutsch wrote, reveal themselves and can be differentiated through the distinctive webs of social intercourse that are the consequence of particular domestications, adaptations, or responses to innovations in modes of communicating.[1] Because the current and massive redesign in the communications infrastructure—digital dreams of an electronic highway—will yield basic changes in social structure, governments are destined to try to affect the pace and direction of transformation. We are at an early stage, but government responses already seem chaotic, fitful, and undertheorized, more the product of the interaction among pressure groups than of some coherent notion of the role of free speech in society.

To these often scrambling, clumsy, and seemingly dissimilar efforts, I want to add a more general theory about how to accommodate conflicting ideas about speech, technology, and society. In thinking about the impact of the new technologies on freedom of speech, I want to posit two fundamental, and different, forms of speech patterns in society, patterns that I call the open and the closed terrain of speech. These forms have different functions, different etiologies, and different regulatory re-

1. See Karl Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality* (Cambridge, Mass., 1953), esp. pp. 70–74.

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sponses. One form is not necessarily more central to a democratic society or more consistent with First Amendment values than the other. What is significant, in any society, is the balance between the two. What is important—and threatening—about the new technology is that it undoubtedly causes a significant dynamic shift in that mix, a shift in the way information is transmitted and distributed within a group of citizens.

It is hard for us, as a society, to see the shift or to appreciate its consequences; we are taken rather with slogans than with substance. At the close of the twentieth century in Europe and the United States, the emerging symbol of a new future is the electronic superhighway—the vision of five hundred channels (or a single switched channel of access to a universe of information), unlimited interactivity, and the capacity for heightened consumer choice and apparent control. The vision is full of promise, freedom, and choice. It is the hope for a life of ultimate choice without externally imposed boundaries. Not only is the metaphor a powerful one; it is driving policy by creating expectations of a speech nirvana.

But most expressions of the vision, for all the industrial excitement, tell little or nothing about its impact. Five hundred channels—or the more likely fully switched network—could be like five hundred models of automobiles or flavors of chewing gum; it could provide either actual diversity or the illusion of choice. Five hundred channels could create new concepts of cohesiveness or it could contribute to the balkanization of community.[2] Their content could reinforce national identities or destroy them. Public debate could be enhanced or diminished. Five hundred channels could mean more news, as is often assumed, or, in the absence of public attention, less, and certainly the disappearance of newspapers as we know them. The new abundance could mean a multiplication of channels that increase the openness of government or the undermining of those experiments in access that now exist. Five hundred channels could be organized to provide lifeline service to the poor and the aged, or it could mean a two-tiered system of access to information and entertainment that increases the gap between haves and have-nots. Five hundred channels could mean a healthier political system with greater access

2. See Henry H. Perritt Jr., "President Clinton's National Infrastructure Initiative: Community Regained?" *Chicago-Kent Law Review* 69 (1994): 991.

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by political parties and more substantive discourse by candidates, or it could mean unmediated, uncritical, sharply divisive perspectives and an acceleration in the correlation between wealth and access to voters. Five hundred channels could provide room for more public broadcasting, but its hyped-up promise has already been used to justify the contraction of the federal role. New technologies can provide the infrastructure that makes existing polities more efficient, or they can be the web of their undoing.

The political dimensions of these vast changes in technology are drowned in fanciful enticements: more is better, motion equals freedom. In terms of technological plenty, more is not only thought to be good; it is considered to be inevitable. Abundance equals choice equals liberty. Progress is measured by the move to higher planes of availability. But more can be less: more pollution, more violence, more distance of individual both from self and from community. Indeed, the bleak prospect exists that more channels can mean endless variations on the same themes—endless repetition with changes in time slot as a fig leaf for choice. The vocabulary of change provides insight into the social outcomes. The concept, for example, of an electronic highway helps define the probable government role as minimal, limited to planning, to some traffic-cop functions, and to the minor collection of tolls. But thinking of change in another way—say in terms of its impact on education, or literacy, or the competitiveness of labor—might yield a different definition of the government's authority.[3]

The transition to a more complex technical system, given to interactivity and narrowcasting, may alter the definition of a proper role for government, clumsy enough in the era of broadcasting, in relation to the architecture of the new media. Classic American First Amendment analysis has assumed that a forum for public discussion—a marketplace of ideas—ordinarily exists. "Scarcity" justified the very limited government role of intervening when extreme cases of market failure were present. If the marketplace, as a locus of public discussion, diminished for structural reasons (bottlenecks caused by monopolies, for example), government involvement in reconstructing a public sphere could become essential.

Open and Closed Terrain

My claim, in this essay, is that these traditional justifications should be supplemented by another framework. Much of the history of govern-

3. See the discussion of Habermas in Nicholas Garnham, "The Media and the Public Sphere," *Communicating Politics: Mass Communications and the Political Process,* ed. Peter Golding, Graham Murdock, and Philip Schlesinger (New York, 1986), p. 41; hereafter abbreviated "MPS." Much of this discussion draws on Garnham's article. Garnham states, "Changes in media structure and media policy, whether these stem from economic developments or

ment regulation of speech can be reinterpreted in terms of the distinctions between the open and closed terrains of speech and the assumption that the balance between the two could be regulated to ensure easy access by speakers to willing listeners. To show that this is the case, I will expand on the distinction between the two models of speech, reviewing, in the process, a few instances of speech regulation reinterpreted to fit the model of the open and closed terrain of speech. To demonstrate the jurisprudential pain of the transition from one sort of information infrastructure to another, I draw not only on long-standing aspects of speech regulation but on problems that have been presented by the move from broadcast television to cable. By rethinking First Amendment jurisprudence in this way, the riddle of the five hundred channels can then be more suitably addressed. For the problem will be not how many channels there will be—an illusion of abundance—but the balance and mix between various forms of speech and the implications of shifts in that balance for important societal values.

Consider a world of channels of communication that are transparent, commonly received, pervasive, and everywhere available. Think of these as a kind of open terrain, like the spaces that have been used for public speech in the mass media in recent decades (or, like the streets, from time immemorial). In opposition, consider a closed terrain of channels of communication that are reserved and private, encrypted and privileged, channels in which important discourse takes place, but that are not so open to the public view. Much, though not all, of our current legal discussions concerning the media and free speech is based on the predominance of the open terrain or, at least, a substantial theater of speech in which information is democratically available and views can be commonly expressed. There is nothing intrinsically better about the open rather than the closed terrain. On the other hand, some appropriate balance or configuration of the two forms of speech is felicitous for the workings of a democratic society. When the First Amendment prohibits Congress from enacting any law that abridges freedom of speech or of the press, certain assumptions about the combination and functioning of the open and closed terrains of social intercourse are at work.

What changes, mainly as a result of technology, is the undergirding of these assumptions, toward a closing up of the open terrain, away from the broadcast channels, channels underwritten by advertising or government—and therefore seemingly free—toward the narrowcast channels, encrypted pay channels and pay programs in which all information is metered and individuals pay for what they receive. There are undoubted

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from public intervention, are properly political questions of as much importance as . . . subsidies to political parties" ("MPS," pp. 37–38). A different article with the same title by Garnham appears in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, Mass., 1992), pp. 359–76.

benefits to the shift away from universalizing fora for speech and toward the particular, and it would be wrong to be Luddite in the face of technological enrichment. On the other hand, because the effects of a shift on speech patterns could, and probably will, be quite radical, those consequences should be explored.

In the imagined city-state of the past, the agora or town hall was the theater for political expression where citizens assembled. The structure of expression in industrialized modern society allows for various substitutes for the agora, substitutes in which masses are accumulated through great newspapers or newsreels, and, finally, through the unifying radio and television channels often held in public or monopoly hands.

In the new technology, patterns of speech shift from a structure that has the elements of theater to a structure that approximates veins in the body, coursing invisibly, carrying valuable data, essential and effective, providing more particular and more specific functions than in the structure of old. The agora closes, the parks become gated, the subdivisions are reinforced against intruders as the new technology helps to reaffirm a possibly richer, but very differently public form of discourse. Specific examples of the shift may be helpful. One example, outside the technical bounds of communications policy, is the conception of the public library and public information sources. Formerly a reservoir of books and materials available to all at no charge, the "library" is reemerging as a variety of databases, information to be metered, charged by the minute or the megabyte. Far more is available, more conveniently, but not in the conventional form of the common building with wooden chairs and tables and books available, without a fee, to all alike. Andrew Carnegie's common temples to communal advancement, a model public gift, were well-designed buildings for study and research that would advance social life and help fulfill democratic expectations. Now that model of a public gift is transformed to arguments for universal access to databases as part of an electronic infrastructure.

Another site of transformation is the theater of news. The faded twentieth-century ideal (probably never ideal and never realized) has been of a mass media bringing together a national audience for the telling of a common narrative of relatively high quality. That ideal dissolves, now, into one of information on demand, reorganized and purchased separately for each household, designed, re-created, and repriced for each individual. The era of three networks, with their familiar anchors, each differentiated more in nuances of style than in political and economic outlook, is giving way to the potential for sharply distinguished, angular, calcifying, and reinforcing message senders whose versions of the news will vary far more substantially. The debate over whether public broadcasting in its now-traditional form should be continued presents similar questions. Among the arguments for its destruction, for the ending of a generally available institution of culture and education, is the

existence of more available private channels for each consumer to select and thereby determine seemingly more personal or individualized modes of acculturation.

There are consequences to this shift. For example, traditionally the cry has been that the answer to offensive speech is not censorship but more speech. But in the world of more closed terrain, additional speech does not necessarily mean more public communication. It may mean more stratification, more division, and intensified patterns of increased separation within the community. More speech, outside the context of the idealized open terrain with its meaningful debate, may instead lead to the hardening of views, not a sense of tolerance. Furthermore, especially as the open terrain diminishes, a new scarcity emerges: its content becomes more controversial and the desire to regulate it increases. The very publicness of the open theater of speech begins to justify the fact that the narrative that inhabits it is subject to debate and social regulation. The more scarce (or relatively scarce) this field for the development of a sense of community becomes, the more intense the competition to affect it.

The Public Sphere

The distinction between the open and closed terrains of speech—and the importance of a balance between them—can be placed in a useful theoretical framework by turning to the concept of the public sphere as it has evolved in passionate debate among political scientists and philosophers.[4] The public sphere, an idea used in evaluating speech practices and media structures, is most centrally a zone for discourse in which ideas are explored and a public view is crystallized. In Habermas's original description, the public sphere should be free of restrictions not only from government but from the great and overbearing forces of the economy so that the exploration of issues and the development of points of view have a certain authenticity. The key opinions of the public are, as it were, forged in the public sphere. The public sphere, in this classic aspiration, is a zone in which there is sufficient access to information so that rational discourse and the pursuit of beneficial general norms is made more likely. It is a set of activities in which the authority of preexisting status attributes—such as wealth, family, and ethnicity—lose their sway in the distribution of civic authority. Argumentation based on assumed laws of nature

4. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society,* trans. Thomas Burger (Cambridge, Mass., 1989). See also *Habermas and the Public Sphere,* and Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, Mass., 1992). Habermas himself has addressed the structure and functioning of the media in the public sphere. See chap. 8 of Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (forthcoming).

comes to have more influence. The public sphere is neither a fiction nor a mere debating society. It is a locus—though not a physical place—where debate has consequences. Its distinguishing characteristic, perhaps its signature for Habermas, is that the conclusions reached in a properly working public sphere must actually have a limiting impact on the state.

Accounts of the historical evolution of the public sphere, though much disputed, illuminate its significance for modern democratic society and its relationship to media. Students of the emergence of liberal democracy in the eighteenth century pore over the preconditions of change, sometimes with the hope of recreating those conditions today. In England, according to the most favorable reports, a small, elect group of middle-class citizens had, it is said, the luxury and resources to create a rich, complex, politically sophisticated civil society in which the instruments of discourse—newspapers, books, salons, debating societies—were used to create a social order largely independent of both church and state. Another characteristic was the openness of this discourse to all, in the same way that the market is open to all. Every citizen, in the very limited eighteenth-century meaning of the term, could, in theory, participate in the public sphere. And participants in this public sphere "obeyed the rules of rational discourse, political views and decisions being open, not to the play of power, but to that of argument based upon evidence . . . because its concern was not private interest but the public good" ("MPS," p. 41).[5]

Habermas, later in his work, gave a grand name—the "Ideal Speech Situation"—to the operation of the public sphere. "Every time we speak we are making four validity claims, to comprehensibility, truth, appropriateness and sincerity" ("MPS," p. 42). Ideal speech is inconsistent with an intention to distort the truth or to use overweening power or wealth purposely to manipulate. The ideal speech situation is hardly the norm, though its assumptions permeate aspects of European broadcast legislation. The elements are a condition to which a journalistic or speech community can aspire, a set of measures by which one can evaluate any particular society or a structure of telecommunications.[6] The health of the public sphere is related to the respect for the elements of ideal speech by those who use it. Or, put differently, a medium cannot be considered truly a participant in the public sphere if those who habitually use it do not, in their speech, abide by a high standard of truth, comprehensibility, appropriateness, and sincerity.

There is a temptation to compare, unfavorably, the twentieth century

5. Garnham states the usual criticisms of the eighteenth-century public sphere, among which, of course, was that access was restricted to bourgeois males, and their class interests were coterminous with the discourse. See "MPS," pp. 43–45.

6. Sometimes the legal and regulatory frameworks look like efforts to reshape speakers so that they conform to a zone of ideal speech—in Habermasian terms—or to suggest to the audience that the speech they are witnessing follows those rules.

to the eighteenth, to infer from the calamities and disorder of the present scene an impossible culture for the maintenance or restoration of the public sphere. Habermas himself despaired, seeing the collapse of the eighteenth-century liberal world into the twentieth-century social-welfare, mass-democracy, commercialized state. The citizenry is no longer, if it ever was, an exclusive, passionately rational collection of people. The public sphere, as a broad field for communication, has lost the coherence furnished by a relatively high standard of education. Instead, public debate is more consistently a locus only for harsh competition among political groups, with political agendas and a kind of force that originates in powers different from reason itself. "Laws which obviously have come about under the 'pressure of the street' can scarcely still be understood as arising from the consensus of private individuals engaged in public discussion. They correspond in a more or less unconcealed manner to the compromise of conflicting private interests."[7]

Assessing the role of the modern media in the making of a contemporary public sphere means discovering in the specific conditions for a public sphere how it might be impaired. For example, it is generally stated that an important quality is accessibility to citizens, with relatively low entry costs and relatively equal opportunities. A system in which costs to participate are bid way up and entry is scarce and difficult will, therefore, be a poor version of the public sphere. The zone of contemporary discourse, by ideal public sphere standards, is distorted, if not mutilated, by imbalances of access, wealth, and power. The force of advertising, the power of public relations, the transformation of entire systems of the sponsorship of speech—all of these affect the ideal of the public sphere model. And, of course, since the golden age of Habermas's imagination the state has become a strong participant in what once constituted the public sphere. Sometimes as the authoritarian or totalitarian monopolist of speech, but always in some ways—as controller of spectrum, manager of satellites, subsidizer of newsprint and libraries, and as censor—the state modulates some of the means of communication. "Thus the space between civil society and the state which had been opened up by the creation of the Public Sphere was squeezed shut between these two [the economy and the state] increasingly collaborative behemoths" ("MPS," p. 41). No longer is there—if there ever was—a "space for a rational and universalistic politics distinct from both the economy and the state" ("MPS," p. 41). One consequence of these historical developments is that, in a way different from Habermas's classic understanding of it, government becomes an implementer of the public sphere, not a "separate dimension of social life."[8]

7. Habermas, "The Public Sphere: An Encyclopedia Article (1964)," *New German Critique* 1 (Fall 1974): 54.

8. Michael Schudson, "The 'Public Sphere' and Its Problems: Bringing the State (Back) In," *Notre Dame Journal of Law, Ethics, and Public Policy* 8, no. 2 (1994): 532.

Regulating the Open Terrain

Here, the changed balance between the open and closed terrains of speech becomes relevant. We are used to patterns of intervention by government that are expressed or justified in terms similar to those that would contribute to a Habermasian public sphere. The problem, however, is that the forms of intervention depend on an understanding of an increasingly dated model of the fora of speech. Given that the open terrain—the theater of speech—has been the dominant form for the last half-century, much of current regulation (regulation aimed at rendering the media more democratic) has been shaped to correct its shortcomings. The danger, now, is that groups interested in a more democratic discourse will not adjust to the fact that patterns of information flow and habits of opinion formation are shifting dramatically.

Take as an example of regulations that assume an open terrain of speech those doctrines, often called access rules, designed to address the architecture of broadcasting and the relationship between the medium and the senders and receivers of information. These rules are historically justified because of their capacity to change and render more democratic a public theater of speech. One meaning of access, in modern communications policy, is improving a forum so that anyone who wishes to listen or observe can do so. A different, more complex, and perhaps more important meaning of access involves who can speak, and under what conditions. Communications systems can be designed and evaluated in terms of how much opportunity they provide for access by listeners and speakers. Access doctrines become an index of ways to reconstruct the mass media so that the predominant mode is no longer the few speaking to the many, but, at the least, the many speaking to the many.

Some illustrations of the use of access doctrines in the traditional broadcast media demonstrate the nature of the speech forum that is assumed. Providing access, as a political agenda, for example, is shorthand for identifying those who have, for a variety of reasons, been excluded from the community's dominant discourse and providing them the opportunity to speak to the general public, making more equitable the distribution of opportunities for a citizen or group to address other groups or citizens. Gaining access has also come to mean something more, namely, the assurance that there is fair representation among those who control the electronic media, altering monopolies of the social narrative. More cynically, concepts of access have meant constructing a set of artificial decorations, a false mosaic, a means of legitimating the dominant voices by putting on a show of toleration for difference and dissent. A mass media perceived as exclusionary by large segments of the population could have a destabilizing impact, and exhibiting concern about "access" is a means of forestalling perceptions of political injustice. Im-

proving access is taken to be a desideratum, a way of fulfilling expectations of self-government.

Regulating ownership of broadcast licenses has been a typical example of regulation based on assumptions about the open nature of the radio and television fora. American broadcast regulatory rhetoric has expressed faith in the link between the ownership of the media and the social narrative of its content.[9] The ownership-access policy had a mechanical truth to it, but, especially in the age of the old technology, not much in addition. More owners of radio and television licenses were said to be better than fewer from the point of view of diversified speech, but in fact most broadcast licensees sought an affiliation with one of the national networks, if available, and adopted or "cleared" most of the networks' program offerings. Even if the programming that the local licensee selected was from non-network suppliers, there were patterns of great similarity, based on what would maximize audience or advertising revenues, or, more recently, payments directly from viewers. Seldom has classic broadcast ownership diversity—except in very specific market circumstances—led to the kind of program diversity that is relevant to the public sphere. Neither Congress nor the FCC supported the argument, made for so long by the BBC, that a single manager of frequencies could maximize audience by purposely and rationally diversifying the programming and by catering to smaller segments of the audience in ways that only a monopolist can. Whether U.S. laws failed or succeeded, they existed because radio, and then television, produced such a dominant and ubiquitous panorama that opportunities to be represented had to be deemed generally available.

For much the same reason, the classic period of broadcast regulation included laws that focused on the suppliers of speech. The granting of access to particular speakers or producers of programs presupposed some imbalance in output, some imperfection in the market, or some need, basic to the democratic enterprise, that a particular speaker or organization of speakers gain entry into the public forum.[10] The most famil-

9. Many proposals for government intervention to provide access seem objectionable because an official must determine whether the range of stories told and pictures shown properly represent some desired or actual reality. A more abstracted solution—affecting the composition of proprietors rather than the content directly—has seemed preferable. Thus, what might be called ownership access—mandating diversity among owners in order to achieve diversity in content—has been, until recently, a favored method of Congress and the FCC.

10. For example, one of the most important current forms of guaranteeing access is the system employed by the European Broadcasting Directive that establishes goals and quotas for European Union programs. This intervention is justified not on economic protection grounds but on the theory that a pool of creators capable of using television must be fostered in order to maintain a healthy creative community, rooted in national identity, that can, over time, contribute to a particularized and national public sphere.

iar suppliers of speech to enrich the public sphere are candidates for office and political parties. The federal government established rules, in conjunction with many other campaign-structuring provisions, to ensure that recognized or qualified political candidates are entitled to time on radio and television at a regulated price or rate that is nondiscriminatory among political candidates. Federal law assures that candidates can have access to television and radio stations at the lowest available rates and gives one candidate equal time when another candidate receives time, under prescribed circumstances.[11]

Government rules attempted, most famously, to redress imperfections in the public sphere—as established through broadcasting—with such doctrines as the personal attack rule and the reply to editorial rule. If a broadcaster aired a personal attack, the person attacked had the right to respond, and a somewhat similar regime existed for editorials. As a consequence of congressional action legislating an antibias requirement for public broadcasting, the Corporation for Public Broadcasting announced a policy under which it would seek out and provide financing for producers with points of view different from those already aired if the productions presented were controversial and, in some determined way, not "objective." The most famous policy of the FCC in this general area has been the centerpiece of the now-abandoned fairness doctrine, which required that broadcasters cover controversial issues of public importance and, when doing so, provide the various sides of such issues.[12] It was—though not as an articulated matter—the openness of the broadcast terrain, its theatrical presence in the lives of the citizenry, that warranted a law like the fairness doctrine (whether the doctrine was effective or not, or even whether it was constitutional or not).

When the FCC established its table of allocations for the distribution of television broadcast licenses in the early 1950s, it reserved channels for educational purposes. This allocation provided access to spectrum. The reservation can be seen as a wholesale act of providing access, first for

11. Section 312(a)(7) of the Communications Act of 1934 authorizes the FCC to revoke a license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for elective office on behalf of his candidacy." The statute was upheld in *CBS, Inc.* v. *FCC,* 453 U.S. 367 (1981).

12. Strictly speaking, the fairness doctrine was not designed to provide access to speakers; groups were not granted the right to use airtime themselves to respond or to assure that all sides of a controversial issue were covered. It was the broadcaster's obligation to provide fairness and to design a method of achieving it. As it developed, there was something deeply flawed about the fairness doctrine. Bureaucratized, the clumsy product of vying angry forces, the fairness doctrine of the 1970s became naturally extinct, unable, like the dodo bird, to fly when necessary. For those who believe that a healthy public sphere can and should exist entirely without state interference, the fairness doctrine could be seen as a prime symbol of the inherent complexity and undesirability of government involvement in enhancing the public sphere.

colleges and municipalities that sought to use the new medium in order to fulfill their public responsibilities to instruct, and then for a far broader range of cultural institutions. It was a fundamental decision about the architecture of the electronic public sphere. Certainly, the question of continued financial support of a public broadcasting system could be rearticulated as a part of such an effort. Twenty years later, many local governments, as part of a highly competitive system for awarding local cable franchises, required that cable operators set aside a certain amount of channel time for governmental, educational, and public uses. In the 1970s, the FCC mandated that local franchises must have channels set aside for these educational and governmental purposes, but in the later Cable Act of 1984, Congress merely authorized, rather than compelled, these reservations.

These access rules, government ordinances that skated along the edge of First Amendment theory, are founded on the dominance of an open terrain of speech. Television, in the model underlying these interventions, is a theater of discourse, one that enters the life of the entire public. Because of television's centrality, society has an interest in which speakers have the opportunity to take their turn on this platform of public narrative.

If the balance between the open and closed terrains of speech is changing, then the significance of these steps must be reexamined. To the extent that aspects of these rules relate to output (Were minorities adequately represented in the narrative? Were political parties fairly situated in terms of costs and opportunities to deal with and build constituencies? Was there a general sense within society that the processes of speech were adequately accommodating?), new technologies change the context of the discussion, though not necessarily the need for government action.

Reexamining Captivity

Access doctrines are efforts to improve the operation of the open terrain. A second, often overlooked aspect of free speech jurisprudence—the captive audience doctrine—is designed to protect citizens from the oppressive quality of public narrative. The captive audience doctrine, like the transformation of access laws, helps to clarify the transition from one technology of communication to another and the difference between the open and the closed terrains of expression. Imperfect, tentative, subject of too few judicial decisions, the captive audience doctrine recognizes the dangers to an individual inherent in an open terrain of speech. In a world in which some speech strategies can be publicly enveloping and in which the stage intrudes into private lives, the individual may be subject to involuntary bombardment, the disappearance of privacy, and imagery

as a discordant and oppressive presence. In this sense, rules that help to protect listeners from being coerced into involuntary audition are based on the very publicness of speech.

On the surface, the cases are confused. In *Bolger* v. *Youngs Drug Products Corp.*, the Court struck down a ban on unsolicited mailings of contraceptive advertisements and held that recipients are not captive merely because they receive adjurations in the mail and cannot be protected as if they were.[13] Similarly, recipients of public utility bills are not a captive audience.[14] On the other hand, in some instances the picketing of private homes has been enjoined because the target is in fact "'captive.'"[15] A frequent example of captivity involves the passengers in the buses and subways of public transportation, for whom immunity from propaganda and dominating Muzak may be highly valued.[16] Congress has passed a statute limiting junk phone calls, nettlesome interventions generated by machine that roll through numbers automatically and inflict the pain of automated talk on the human who answers the phone. Of course, scheduled television programming, by definition, is not so oppressive as to turn a viewer into a captive, but advertising that is subliminal or that appears unexpectedly may have qualities of coercion. Even in that case, the mild captivity involved may only justify a requirement, in highly politicized circumstances, that "another side" of the surprise intervention be presented.[17] This advanced and psychologically potent definition of captivity rests, often, on rather mechanical distinctions, distinctions that may or may not have value depending on the manner in which new technology evolves. If surprise or ambush is the essence of captivity, then forcing disclosure of potential violence or segregating suspect programming on a clearly labeled and specially requested channel are potential solutions.

In recent years, the notion that children are by definition captive has been used to justify substantial regulation of "indecency" on broadcast stations.[18] The protection of children is founded on a kind of statutory captivity. These are individuals for whom broadcasting, the courts have said, is "uniquely accessible . . . even [to] those too young to read."[19] Captivity turns on whether judges believe that channels of distribution are "uniquely pervasive." In judicial and legislative debates concerning cap-

13. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983).

14. See *Consolidated Edison Company* v. *Public Services Commission of New York,* 447 U.S. 530, 538–42 (1980).

15. *Frisby* v. *Schultz,* 487 U.S. 484, 487 (1988).

16. See *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974).

17. See *Banzhaf* v. *FCC,* 405 F.2d 1103 (D.C. Cir. 1968).

18. See *Action for Children's Television* v. *FCC,* 932 F.2d 1504 (D.C. Cir. 1991), and *Action for Children's Television* v. *FCC,* 11 F.3d 170 (D.C. Cir. 1993); vacated for rehearing en banc.

19. *FCC* v. *Pacifica Foundation,* 438 U.S. 749 (1978). "'A State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees'" (*Erzoznik* v. *City of Jacksonville,* 422 U.S. 214, n. 11 [1975]).

tivity, a large but uninformed aspect of discussion assumes the existence of a social structure in which a group called parents makes (or ought to make) decisions concerning what children hear or absorb.

A formal aspect of captivity—captivity closely related to slavery—has attracted the attention of the creative legal scholar Akhil Reed Amar. He has focused on the Supreme Court appeal of Robert A. Viktora, who was convicted, with his teenage friends, of assembling a crude cross, made from broken chair legs, and setting it afire within the fenced yard of a black family in St. Paul, Minnesota. The malefactors were arrested under a city ordinance that made it a misdemeanor to use certain symbols, specifically including a burning cross, that would likely arouse anger, alarm, or resentment on grounds of race, color, creed, religion, or gender. The Court, in a noteworthy opinion restricting the power of states to proscribe categories of expression, struck down the St. Paul ordinance. Government, it said, could not pick and choose what kind of hate speech was offensive. Amar saw in the case something else: "the intentional trapping of a captive audience of blacks, in order to subject them to face-to-face degradation and dehumanization." These circumstances engendered a badge of servitude.[20] Captive exposure to speech that was race-based thus raised Thirteenth Amendment issues beyond the ordinary concern that "there simply is no right to force speech into the home of an unwilling listener."[21] For Amar, it is not only the nature of the speech but the circumstances of its delivery that suggest the power of the state to regulate it.

The move from a burning cross on a St. Paul lawn to a Cor-Ten steel sculpture in an urban plaza may seem difficult. But public art is another example, like the Minnesota cross, of discourse that takes place within an open terrain and, therefore, illustrates particular hazards related to captivity or oppression. What makes the art public is precisely its location in a place where viewers come across it accidentally, as opposed to art within a museum or gallery or on the walls of a person's home. The fact that the art is public, in this specific audience-related sense, can justify greater societal mediation of competing claims of right.

The issue is exemplified by the controversy over Richard Serra's *Tilted Arc,* the brooding and massive sheet of rusting steel that long stood, against intense public outcry, in front of the federal courthouse in New York's Federal Plaza. Powerful judges and some of the office employees who passed the sculpture daily called for its removal. Serra claimed that his free speech rights would be abridged by any action that destroyed or moved the sculpture from the site for which it had been commissioned by the General Services Administration of the federal government. Over

20. Akhil Reed Amar, "The Case of the Missing Amendments: *R.A.V.* v. *City of St. Paul*," *Harvard Law Review* 106 (Nov. 1992): 158.

21. *Frisby* v. *Schultz,* p. 485.

time, the issue of rights was reinterpreted. Here was an essentially public space, a nicely geographical version of the open terrain of speech and ideas. Those who populated the region asked what limits could be placed on the nature of speech within that space (contractual rights aside). Hearings were held, and a perspective reminiscent of decisions requiring "fairness" in broadcasting seemed to emerge.[22] The rights of the viewer, as well as the rights of the purported speaker, were entitled to consideration.[23]

A few years after the height of the debate, David Antin, the performance artist who, among other things, has orchestrated projects of poetic skywriting, raised questions about the ethical propriety of Serra's arguments based on First Amendment rights. "'Think of it this way . . . the nice thing about [skywriting] is it goes away fast, if you don't like it. And if you do like it, you remember it. But it takes an awful lot of energy to get rid of *Tilted Arc*.'"[24] For Antin, if we adapt his argument to the issues here presented, duration of message is a variable that helps determine problems of abuse and occasions for mediation in the open terrain:

> We would probably have very much better public art if everybody wasn't afraid of disturbing people, because they knew you could eventually wheel the art away. I would like to suggest that you could make the most disturbing public art in the world and nobody would give a damn, because you would know that after some limited time it would go away. The way all good discourse goes away. I don't think public art installations should be permanent. I think they should be wreckable. I think we should have a ceremony of destruction and remove them regularly. I think works like Serra's work should after some specifically limited time have been publicly destroyed in an honorable fashion. . . . There was no reason for Serra to iterate his single utterance forever. Perhaps the right to repeat yourself endlessly in a given space is not freedom of speech. It may become a form of tyranny.[25]

Captivity, then, is a condition intrinsic to the openness of speech and to the perceived risks of unmediated communication between powerful speakers and such weak listeners as children, or between speakers and listeners who cannot escape or should not be made to divert themselves

22. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

23. See *Richard Serra* v. *United States General Services Administration*, 847 F.2d 1045 (2nd Cir. 1988). In *Lebron* v. *National Railroad Passenger Corporation (Amtrak)*, 115 S.Ct. 961 (1994), reversing 12 F.3d 388 (2d Cir. 1993), a performance artist rented the "Spectacular," a huge sign in Pennsylvania Station, to mount an advertisement satirizing the Coors Beer Company for its support of right-wing causes. Amtrak refused to run the ad. The Court held that the case implicated "state action" and remanded to determine whether there were appropriate grounds for the advertisement to be rejected.

24. David Antin, "Fine Furs," *Critical Inquiry* 19 (Autumn 1992): 155.

25. Ibid., p. 162.

from speech they cannot abide. Whether a listener or viewer is captive depends, as I have suggested above, on the complexity of the arrangements by which speech moves from sender to recipient. The more complex the steps taken by the recipient, the more likely it is that information has been specially requested or paid for and that (in the paradigms suggested here) the pathway is closed, but the less likely that the person receiving it is a captive.

Intense Diasporic Communities and the Closed Terrain

So far, in my discussion of access and captive audience doctrines, I have dealt with the "problems" of a speech terrain that is and potentially remains open. Regulatory approaches, like the access doctrines, are defended as exemplars of democratic enhancement or therapeutic correction. These approaches are based almost entirely on a model of communications technology in which the information exists in a forum purporting to be available to the common gaze. The legislative goal is not only making service universal and transparent but determining who will have access, who will control the narrative, and how participatory the forum will be.

But openness, I have asserted, is declining as a paradigm. The new technologies, redolent with addressability (the capacity of producers to reach individual households rather than the mass) and complex interactivity (the capacity for senders and receivers to communicate) are distinguished because of their tendency to be closed. The power to efficiently establish closed channels and to collect money from individuals, based on the intensity of their response to a particular set of offerings, is not only a hallmark of these new systems but the distinguishing factor that allows financing and development to go forward. Because of this process of containment and rerouting of speech, the very abundance of channels may mean more, not fewer, calls for government intervention to ensure that something remains of the public space.

The closing of the speech terrain is particularly important, as I have mentioned, because it mirrors other developments in society. The voucher system for schools is another, more virulent manifestation of the trend away from publicness, which provides a technical answer to the inability to agree on curricula. As with television, here is an interesting example of open terrain, an arena where children have mandatory exposure to a set of messages. An elaborate public agenda exists; formally or informally, machinery is established in every state for citizens and interest groups who seek to fashion or limit what is in the curriculum. The depiction of subjects about which there are sharp differences—accounts of American history, depiction of gays and lesbians, matters touching religious beliefs—is a matter of negotiation in which governmental involve-

ment is central. Departures from consensus—no matter how justified—lead to an increase in the number of children who are taken out of the public schools (which withdraws them from the open terrain); a call for restrictions on or manipulation of content (for example, AIDS and sex education or prayer in the schools); and demands for political action to continue or, through elections, to alter the status quo. The closing or lack of substantial funding for libraries is a response to controversy over what books should be on their shelves.[26] Public parks, swimming pools, and golf courses closed in the South in the 1960s, and later elsewhere, because the community could not constitutionally agree on acceptable patterns of their use.

The scarcer the open terrain, the higher its value for the shaping of public views. The more difficult it is to reach consensus on what should be on the open channels of speech (those subject to negotiation and regulation), the more rapid the inclination will be to unregulated alternatives. A deeply divided community cannot easily tolerate a public space. These elements feed on themselves: technology and its industrial organization reduce the common narrative, and then the reduced common narrative makes the remaining public space more contentious. The vanishing of public space is more acceptable precisely because there can no longer be adequate consensus on what its content should be.

The closing of the media rekindles the scarcity justification. If privatization proceeds apace, government intervention can become warranted to establish a new balance, to restore adequate open terrain, and to provide rules of access and rules concerning content of an ever more precious resource. Channels of communication may be abundant, but *publicly available channels,* the channels of open terrain, will be in short supply.

More important as an outcome, for the purposes of the overall architecture of speech, is the possible proliferation of what might be called *intense and exclusive diasporic communities,* assembled along ethnic, class, or interest lines. What makes them diasporic is that the members are physically, though not spiritually, disassociated from one another; what makes them intense is the strength of loyalty to the group. Here, access takes on another meaning, embracing techniques that allow the marginalized to speak to the marginalized, improving internal communications networks for those who are otherwise disenfranchised. In a society dominated by a closed terrain of speech, audiences will be regrouped and redefined, with traditional hierarchical structures disturbed. Across the internet, using the new technologies of rapid and private communications, groups establish new loyalties—sometimes to communities defined by religious fervor, ethnic pride, economic ambition, or place of origin—and abandon old

26. See *Board of Education, Island Trees Union Free School District No. 26* v. *Pico,* 457 U.S. 853 (1982), which limited the power of boards of education to remove books from school libraries.

ones. The internet has become a new mode for instant national and global organizing of constituencies. Given sufficient intensity, the cumulative impact of these newly formed communities on traditional constructs of loyalty, such as national identity, can be profound.[27]

The closing of the terrain of speech endangers an architecture of speech in a democratic society in which some speakers, at some times, must have the right to broadcast their views, to invade, as it were, the airspace, reaching even those who might not wish to hear them. This is in stark contrast to the problem of captivity, or the right of the listener to choose not to be bombarded and to take refuge from the onslaught of modern technology. A dramatic shift from the open to the closed terrain of speech may give rise to a fairly novel category of rights or claims of right: the rights of speakers to exercise by their choice who will be obliged to listen to their speech, and the rights of listeners to require certain speakers to make their words available to them.

In that zone called cyberspace, the keepers of the new morality contend that there should be a limit on anonymous messages and that speakers should be obliged to identify themselves as sources. And just as the law now provides that some government meetings must be open and some government information available to the public, constraints may be imposed on how extensive and unmonitored supposedly secret communications can be between organizations and individuals in the future.

The two rights, roughly a right of access and the right of privacy, must be separated; they have different justifications and different historical bases. The right of the speaker and listener to form a closed community is akin to the right of association asserted by organizations like the NAACP when membership lists were demanded by ill-motivated state governments.[28] The speaker's right to send a message solely to an intended recipient is similar to the right of the user of the postal service to be sure that only the addressee receives it. But the rights of a speaker to select only some listeners or of a group of listeners and speakers to mutually establish their boundaries are not absolute.[29] There must be limits, having to do with race or other matters, that justify legislation governing the power of speakers and listeners to establish their own intense diasporic community.

27. Daniel Dayan and Elihu Katz write about these communities in their works on significant public television events. They use the term *diasporic ceremony.* See Daniel Dayan and Elihu Katz, "Performing Media Events," in *Impacts and Influences: Essays on Media Power in the Twentieth Century,* ed. James Curran, Anthony Smith, and Pauline Wingate (London, 1987), pp. 174–97. See also David Chaney, "The Symbolic Form of Ritual in Mass Communication," in *Communicating Politics,* pp. 115–32. The debate is summarized in David Morley, *Television, Audiences, and Cultural Studies* (London, 1992).

28. See *NAACP* v. *State of Alabama ex rel. Patterson,* 357 U.S. 449 (1958).

29. Congress has enacted legislation that compels copyright holders to license their creations to cable operators.

Case Studies from the Latest Transitions

I have tried to demonstrate some of the implications for government regulation that arise from the shift from an open to a closed terrain of speech. What is important, as well, is whether society can, through government, affect the balance between open and closed terrain. It is too soon to know how legislators and other policymakers will address this question of balance on the electronic highway, but other recent telecommunications transitions can be used to illustrate the complex social aspects of settling upon a suitable configuration or balance as one technology of communication is related to another.

An example is in the transition from broadcast television to cable television, which had the supposed quality of moving from a television of scarcity to a television of abundance. Certain provisions of the 1984 and 1992 federal cable television laws, those dealing with indecency and obscenity, have a surface absurdity that can best be explained using the tools of this distinction between the open and closed terrain of speech. Pay television services, for example, including pay-per-view programs, are not covered by special provisions applying indecency standards to cable. On the other hand, in language of laborious and withering exactitude, the law requires that free promotions of pay channels (free to cable subscribers, that is) are regulated for their qualities of indecency. Programs that appear on so-called commercial leased-access channels can, if the cable operator wishes to do so, be subject to indecency exclusions, but if an operator does not exclude indecency, the system must segregate such programs on a specific channel that has to be specifically purchased by a customer or subscriber.[30] Cable operators, who prior to the passage of the 1992 act were immune from liability for obscene and indecent programming on public-access channels, are now empowered (and virtually required) to impose rules barring such programming, and their immunity from prosecution and suit has been removed.[31]

Congress fumbled and stumbled in its search for distinctions, for criteria about modes of delivery and the relationship between the receiver and sender of messages, that might justify differential legal regimes. Its potpourri of rules reflects an intuition that there ought to be a difference between the treatment of channels of communication that are, more or less, open (part of a "basic service" in this case) and channels that are "selected" and, therefore, in some intimately contractual manner, tend toward the closed. The architects of these rules seem to have been motivated by a principle that can be articulated roughly as follows: channels of information and entertainment that are most in the control of an adult

30. See *Alliance for Community Media* v. *FCC*, 10 F.3d 812 (D.C. Cir. 1993); vacated on granting of suggestion for rehearing en banc, 16 Feb. 1994, U.S. App. Lexis 6440.

31. See ibid.

viewer (channels that the subscriber must specially request and specially pay for, channels where the subscriber has specific notice of content) ought to be subject to a lesser degree of imposed social control than channels that might surprise the viewer (or the viewer's children). Channels that are more generally available—part of the common stock of imagery, part of the standard offerings—must be far more subject to a common code. The pay channels, the channels subject to special subscription, the films that must, for each and every one of them, be specially ordered—these have the characteristics of closed channels of communication. The new technology provides the audience with the illusion of autonomy and active participation. When a viewer dials a phone number or pushes a button to receive a motion picture in the home, paying for a single view, the programmer and viewer have a contractual arrangement for passing information between them. In contrast to the pervasive speech of the open terrain, the obligation of society to intervene in such a private transaction is minimal. In exercising the paid right to view a movie, the recipient has expressed his or her desire, and, except for the narrow possibilities of monitoring frontiers of hate, violence, and obscenity, the function of the state seems minimal.

Another example of lawmaking, capable of being reinterpreted in terms of the open and closed terrain distinction, involves what are called must-carry rules, heavily contested laws that require cable television systems to carry the signals of local commercial and noncommercial broadcast channels. The cable industry, in its infancy, had fought for the right to deliver these broadcast channels that were the backbone of American television watching, but as it matured and nonbroadcast programming offered substantial competition, the industry wished to be free to determine what programming should be available on their wire into the home.[32] Undoubtedly, the FCC, and then Congress, in imposing rules requiring carriage to continue, were acting to protect the economic interests of an industry they had long regulated. Whether they could do so under the First Amendment was a matter of substantial controversy.

But there was something else. There was the fear that over time the quality and quantity of services on free, "over the air" television that had generally been made available to viewers would begin to diminish. In the early 1970s, as the transition was beginning, the FCC sensed the possible

32. By the mid-1980s, with the coming of the satellite and the proliferation of new networks (like HBO and MTV), cable had many other products to sell (motion picture channels, news channels, and sports channels). In some instances, with limited shelf space available, cable systems wanted to discard local broadcasting stations to make room for the specially created program services. In response to intense pressure from broadcasters and from Congress, the FCC kept drafting must-carry rules that limited the freedom of cable operators, rules ultimately enshrined in the 1992 act. See Monroe E. Price and Donald W. Hawthorne, "Saving Public Television: The Remand of *Turner Broadcasting* and the Future of Cable Regulation," *Hastings Communications and Entertainment Law Journal* 17, no. 1 (1994): 65.

danger and attempted to retain a competitive advantage for broadcasters over cable by giving them the exclusive rights to certain categories of programming (for example, sports programming—say the World Series or the Olympics—and certain dramatic forms and films) in order to provide an economic basis for public-service uses of television.[33]

In 1992, Congress went further, however, claiming that it was in the national interest to maintain a system of broadcast signals that would be almost universally available, no matter what they broadcast. In 1994, the Supreme Court, in *Turner Broadcasting System, Inc.* v. *FCC,*[34] held that, in principle, Congress could preserve "free television," though it held this only by a very narrow vote and only after redefining the history of broadcasting regulation.[35] The Supreme Court's reading of the 1992 legislation is virtually inexplicable except in terms of an unconscious need to maintain an open terrain of speech. In terms of appropriate congressional purposes, the must-carry rules are justified because of the need to protect some abstract thing called free television, a concept that must have some reference to the system of speech and society if its protection is to be understood regardless of its content and function.[36] The Court and Congress, whether they were willing to say so or not, must have been committed to preserving a certain stock of discourse in a mode of delivery—a theater of speech, as it were—available to more than the 60 or 70 percent of the American households who subscribe to cable.

A related intertechnological problem of transition—with the unusual name of *antisiphoning*—can be redescribed as the search for a way to preserve (and maintain the quality of) the open terrain. In the early 1970s, as I have indicated, the FCC sought to hold for "free broadcasting" whole categories of programs: sitcoms, movies that were more than two and less than twenty years old, and, most important, certain sports events, such as the World Series, that ought in the eyes of Congress to be generally available. The 1992 cable television act repeats this concern with a provision requiring a study of the "migration" of certain college sports from so-called free (or open) television to a pay or closed system.

The courts have been hostile to these attempts, consistently rejecting them using a traditional free speech analysis. Both the antisiphoning rules and the must-carry provisions have had rough going. There have been problems (some of which have been resolved in the recent *Turner*

33. See *Home Box Office, Inc.* v. *FCC,* 567 F.2d 9 (1977); cert. denied, 434 U.S. 829 (1977).

34. See *Turner Broadcasting System, Inc.* v. *FCC,* 114 S.Ct. 2445 (1994).

35. See Price and Hawthorne, "Saving Public Television," p. 65.

36. The Court did not credit the fact, though it was cited in the congressional findings, that this programming includes local news, programs that carry important elements of the political debate, and federally funded public, cultural, and instructional presentations. If anything, these content-related features were marks against the must-carry rules in the Court's superficial jurisprudence.

Broadcasting case) determining what legitimate purpose Congress was addressing, what standard of review to apply, whether the remedy was narrowly tailored, and whether there was a sufficient basis for a decision before Congress (or the FCC). But these cases have all been decided under an old paradigm, a paradigm that assumes the substantially open nature of speech, and especially that of the mass media in society. The justification for the rules—preserving local news and information and providing a universal, free television service—only begins to receive credence in *Turner Broadcasting*. Only therein does the Court seem to glimpse that the structure of discourse might be different in the future and that Congress has some responsibility for considering the nature and openness of the emerging technology.

Technology and the Public Sphere

I have tried to show how the tendencies toward closure along the information highway are especially important as part of a larger trend, namely, a systematic transformation in the distribution and presentation of speech (and social relations). The growing debate about the architecture of the national information infrastructure can thus be defined as concern over whether there is a need to assure through the force of law the maintenance of a public place, a sustained public sphere, and whether, to accomplish that goal, parts of the infrastructure demand rules of access and control of content. The strengthening of a Habermasian space where important issues are debated, independent of government and of dominant economic forces, can be a guide to determining whether any shift from the open to the closed terrain results in a balance that serves or frustrates public needs.

Thus, rethinking technology means determining far more clearly the relationship between the organization and distribution of information and the public sphere; it involves recognizing that as the commons contract, new rules of protection and new modes of government intervention may be necessary to establish the preconditions of democracy. Some space must be cherished for speech that is held and communicated in common, open to all, not just in transactions where content, in packages of programming, is bought and sold privately. *Turner Broadcasting* is not enough. To preserve "free television" because, by convention, the commodity is almost universally available and requires no additional formal payment does not sufficiently contribute to a public sphere. The constitutional protection of streets as a site for debate is, of course, meaningless if the speech to be protected within them is discouraged and dispersed.

As technology transforms the channels of communication, there are more vital questions than the survival of the mode of television we call free. These include evaluating the cost of access by citizens to information

and the cost of access by information providers to citizens. In particular, the cost of providing information from candidates or government officers to voters and the cost to voters of receiving that information is a vital issue in a democratic society. Rules concerning political contributions are related because they are a form of intervening in the distribution of speakers' costs for gaining access to citizens. In an ideal speech situation, a subsidy to one speaker rather than another based on wealth—an ill that is constitutionally tolerated under current Supreme Court law—would certainly be disallowed. Other specific areas of attention might be the transformation of the way in which news is packaged and made available to assure that a base of common access leads to a broadly egalitarian participation in the public sphere. Even the enrichment of modern efforts to enhance such a base of information—efforts such as C-SPAN and public broadcasting—must receive attention. Care must be taken to avoid modes of government intervention that alter the public sphere so that it becomes more constrained, biased, and incapable of performing the functions necessary to maintain unimpeded discourse among citizens and between citizens and the machinery of politics.

Just as there are weaknesses in the implicit *Turner Broadcasting* determination that guaranteeing "free television" is a suitable congressional goal, similar weaknesses inhere in the call for "electronic democracy." For example, it is all too common to argue that the moral and political institutional scheme of liberal democracy no longer fits the aspiration of its citizens because of a sense of disempowerment and loss of self-government. These complaints, and the many like them, seem to invite technological solutions to provide opportunities for therapeutic alternatives, such as the idea of electronic town meetings. Jeffrey Abramson has defined the obstacles to easy transformation and the preconditions that need to be met before the virtues of the ancient form can be replicated in a modern teledemocracy.[37] Too often the electronic town meeting models avoid the preparation, the immersion in the issues that characterized the idealized original. Too often, there is only the simulacrum of decision making.

The electronic town meeting movement is one technique for building the public sphere for citizen discourse, but it is very likely to become to democratic life what spectacle is to reality. Constructing a new instrument of democracy is a task that requires endurance and experimentation. A more immediate task is that of reconstructing the rules for political campaigns. Recent campaigns, including the 1992 presidential campaign and the 1994 congressional races, seem, among other things, to mark a change in the infrastructure of political discourse. The campaigns made orthodox the formerly unorthodox use of such forms as the radio call-in

37. See Jeffrey Abramson, *The Electronic Commonwealth: The Impact of New Media Technologies on Democratic Politics* (New York, 1988).

shows and made predictable use of such forms as cable television, faxes, email, and networks of constituents connected by satellite for an interconnected address. The shift in technology appears to lead to a radical transformation in political campaign techniques.

To reason to the public sphere from the history of broadcasting is problematic. These instruments of communication are not just late developments of democratic societies, but neither are they necessarily the descendant of the newspaper, as opposed to vaudeville and the music hall. There is something about the emergence and history of radio (and later television) that is almost antithetical to the idealized notions of the public sphere. Almost from the beginning, radio was a vehicle of entertainment, a toy, a soother or organizer of the masses rather than a locus for interpersonal rational discourse among individuals dedicated to the public welfare. And in too many places in the 1930s, radio—and television after it—became instruments to rearrange loyalties rather than tools for debating the public good. These technologies have been too useful for the sale of goods (or of ideas) for them to be conceptualized, automatically, as providing a neutral forum for public discourse.

As television has risen to be of central importance in the conduct of the democratic process, the intertwined questions of cost of time, access to time, fairness of coverage, right to advertise, obligation to debate, and forms of campaign financing have always been the site for regulatory controversy. The illusion is that the new electronic media, by providing an abundance of channels and a greater choice of modes of linking speaker and listener, will redress some of the past problems of cost and campaigning. Here, again, certain fora will become more scarce and more subject to rationing, either on the basis of price or by means of regulation. The question will be how much of the campaign has to be common and open: for example, will presidential campaigns have orchestrated television debates as a legislated requisite? It may be that the "basic tier," an invented category that includes the fundamental television service that most households receive, should include some central elements of the political system, such as C-SPAN. As with sports, there must be concern with the diverting of campaigns to the closed terrain. In addition, the technologies of addressability and encryption mean an increase in the coded, differentiated messages sent by a single campaign to various constituencies, and the implication of that phenomenon for greater disclosure of campaign material cannot yet be determined.

One frequently recommended tool to apply new technology to a more active public sphere involves ensuring that providers of service can gain access to cable (and other multiple-channel systems) on a common-carrier basis. The common carrier is the invention of ancient custom to establish the fair and nondiscriminatory use of an essential instrument for the conduct of society. A common carrier for transportation allows, within predetermined limits, assurance concerning travel. The common

carrier, providing transit at a set rate and without preference, was the model for ferrying across rivers since time out of mind. In the twentieth century, the telephone has been the common carrier, first for voice, now for data, and potentially for video. Some think of the common-carrier model as the perfect mechanism for a free-market society dedicated to unencumbered speech and access to modes of distribution of that speech. Multichannel common-carrier systems, viewed as the deus ex machina of the new technology, supposedly avoid the need for government intrusions in the public sphere.

Public-access channels, the idealized space of populist dreams, the romantic version of the public sphere, are also a modern fantasized contribution to mandatory open terrain. Based on the principle of first come, first served and rendered famous by "Wayne's World," they retain only an echo of the use of the streets to hector and implore. A soapbox in a small village may be an important part of its public sphere, while a soapbox in a global village can be the equivalent of shouting into the void. And without the necessary care, this is often what the public-access channel has become. In practice, public-access channels have been an unkempt corner, a place of disarray at the margins, but not a significant contributor to public debate.[38] Congress, acting consistently with the notion that the open terrain is a place where narratives can be contested, recently sought to reduce the broad freedom of public-access users by establishing new guidelines for what constitutes unacceptable obscene or indecent programming.[39]

Taken together, these measures—common carrier, architecture of openness, reformulation of the political process—some of which are now under legislative consideration, can be read as preliminary building blocks of a reconstituted public sphere.[40] The very need for these steps implies that without intervention the public sphere would be crippled and nonfunctional. Because the measures are piecemeal, often coming

38. When marginal and unpopular views have been propounded, cities and others have gone to court to try to censor them, as occurred with a Ku Klux Klan use of public-access channels in the Midwest. See *Missouri Knights of the Ku Klux Klan* v. *Kansas City,* 723 F.Supp. 1347 (W.D. Mo. 1989).

39. See sec. 10 of the Cable Competition and Consumer Protection Act of 1992, discussed in *Alliance for Community Media* v. *FCC.*

40. The early skirmishing over the shape and architecture of aspects of the national information infrastructure reflects all of these speech-related concerns. Even though the system is most likely, and in most of its parts, the closed terrain of speech, the older thinking of common experience and entitlement finds its way into the discussion. There is a debate, for example, over universal access, which in this context means that each citizen or each household should have a basic entitlement to be part of the system. The nature of the debate over universal access has some aspects of the "theater" and the open domain to it. The idea is that there should be a common experience, or a basic set of information (and the capacity to manipulate it), that should be available to all regardless of income. The result is somehow like the department store converted into a series of boutiques: the space is still open to all, but the interior design is one that is a simulacrum of closed spaces.

from different motives and different groups, and because, at bottom, they depend on the ersatz culture of television, they will not yield a well-functioning public sphere. If the existence of a well-ordered public sphere is a precondition of a well-functioning democratic society, then it is important to determine whether these initiatives work together and how the public sphere seems to be evolving with respect to broadcasting and the new technologies in the United States.

The public sphere in the twentieth century cannot be described without our thinking about the role of radio and television and the transition from old forms of press and speech to the new technologies. But we cannot understand this role without comprehending the simultaneous changes in the balance between the open and closed terrain of speech. The configuration of the electronic media determines, in large part, the patterns and framework for discourse in society. The immediate impulse is to think that many channels, with many speakers, produces a healthy public sphere in modern society; but we cannot avoid the process of analysis that sheds light on how debate is conducted. We have yet to see whether electronic communication, in its evolved state of hundreds of channels, will produce yet another cheap technological illusion.