Jody Gruendel

From: Margaret Whitehead
Sent: Tuesday, May 11, 2010 2:28 PM
To: Jody Gruendel
Subject: FW: revised copy/Geller
Attachments: whitehead

Jody,

Please keep this for Susan's trip here and remind us to put it on the site.
WE must not forget. Very important.

Thank you,

Margaret

------ Forwarded Message
From: Geller Henry <henrygeller@comcast.net>
Date: Tue, 11 May 2010 13:59:17 -0400
To: Margaret Whitehead <mmww@cwx.com>
Subject: revised copy

Dear Margaret,
I have attached a revised copy of my talk. I did start off using the standard way that you had set up -- revisions in red, etc. However, the talk was so bad in gibberish that I gave up and just slammed out a coherent version of it. I believe that I was faithful to the original-- I did not try to embellish with new information or thoughts. I hope that you find it helpful. If you want to make further revisions, go right ahead, although I don;t think that it is worth spending more time on it.

All the best,
Henry

------ End of Forwarded Message

Henry Geller. There are two issues that I want to talk to you about. One is the legal or constitutional issue, and the other is the more interesting policy issue. I hope to devote most of my discussion to the policy issue. The only caveat is that with age the cilia in the ears wear out, and so you have to speak in italics. Otherwise, I won't hear you. Since this is a seminar discussion, your questions do matter.

The public interest standard for broadcasting was taken from a 1920 Transportation Act. There was a lot of chaos in the 1920's in the radio field. The Department of Commerce did license radio stations, but stations could and did jump to another frequency or to higher power. The result was interference and engineering chaos. So broadcasters wanted the regulatory scheme to protect themselves. Economists like Ronald Coase and Tom Hazlett argue that there was no need for this scheme of short term public interest licensing. Yes, there is scarcity in spectrum. But there is scarcity in all kinds of things, and it was not necessary to go to this system of short - term licensing.

But the government did choose this scheme in 1927. And it repeated the same regulatory approach in the more comprehensive 1934 Act, and again in the 1996 Telecom Act where the common carrier area was reformed, the public interest standard was retained for broadcasting and broadcasting was given new digital spectrum. The short - term licensing standard in the beginning was just three years but in 1996 it became eight years. The broadcast station at renewal must show a federal agency, the FCC, that it has served the public interest.

The public interest standard now has three explicit requirements in the Act. One is local service. The broadcaster must serve as an outlet for discussion of local issues or local matters. The allocation scheme devised by government requires that local service. It is possible to serve everybody by very powerful regional stations, but that was not done. Instead, each significantly large community has its own local stations. And if so much spectrum has been allocated to this local service, the government really ought to see that the people do get this local programming.

The second requirement in the Act involves the fact that broadcasting is the medium most relied upon by people for information. That's kind of a pity, because the information in broadcasting is not in depth but very terse. If you take the evening TV network newscast and break it out into print, it comes to two-thirds of one page of a newspaper. So people relying on TV for their news are getting no in-depth information at all. This second requirement for broadcasting to contribute to an informed electorate is set out in the Act in sections like 315 and 312(a)(7).

The third requirement came in a 1990 amendment to the Act, because children watch so much TV. It's their window on the world. Which again is a pity. They ought to be reading rather than watching so much TV. The public interest standard requires that there be a significant amount of programming that not only entertains them – children won't watch if they are not entertained – but also educates and informs. The programming has to be specifically designed to do that.

Let's now turn to the legal issue raised by this scheme. (And please interrupt with questions at any time). The constitutional issue came up in the Pottsville case and then

again in NBC v. FCC, 319 U.S. 190 in 1943, reviewing the Chain Broadcastings rules of the FCC.

You have to remember that there had not been full development of the Supreme Court's First Amendment jurisprudence at this time. The Court in the early 1930's invalidated a prior restraint on newspaper publication in Near v. Minnesota. But the strict scrutiny of content regulation and the intermediate scrutiny of incidental impact on content in O'Brien did not surface until 1968. So in 1943 the Court simply stated that if the regulation is reasonably related to the public interest, it is constitutional and grounded its decision on allocation scarcity. It stated that more people want to broadcast than there are available channels; the government chooses one person or entity and keeps everyone else off the frequency. So that one chosen has to be a fiduciary for those in the community who being kept off. In the 1969 Red Lion case in 395 U.S., the Court, in the opinion of Justice White, noted that the government could have divided up the broadcast day or month or year and thus given a number of people access to broadcasting. So once again, the one chosen, with all the rest kept off by the government, has to be a fiduciary. The Court, with no dissenters (Justice Douglas didn't participate), found the FCC's fairness doctrine to be constitutional. It's important that this is a pure content regulation, with rules like personal attack and political editorializing.

It is also very significant that in the 1994 Turner case, the Court adhered to the Red Lion jurisprudence for broadcasting. In Turner, the Court was considering the government requirement that cable must carry local broadcast stations. Cable is a monopoly service and a gatekeeper service. In order to get on cable, cable must allow you to do so. And at that time, for about 60 percent – now it is up to 67 percent of the TV audience – it is the

only way into the home for television. Cable thus has gatekeeper control. The government argued to the Court that this is a type of market dysfunction similar to what you had in Red Lion, and therefore extend Red Lion to cable. The Court unanimously refused to do so.

In the first part of the Turner decision, the Court says that our broadcast jurisprudence is unique and has been much criticized – believe me it has been – but we are not going to change it. But, it says, we are not going to extend Red Lion to any new transmission system because broadcasting is unique due to spectrum scarcity. The Court thus goes on to consider "must carry" cable regulation under the standard First Amendment jurisprudence.

That jurisprudence involves either O'Brien intermediate scrutiny or strict scrutiny. If a government regulation is content neutral, it may affect content but only incidentally and in a content neutral fashion. Then all the government has to show to prevail is that there is a substantial governmental interest involved, that there is no effort to suppress any viewpoint, and that the restriction on speech is no more that is reasonably required to achieve the governmental purpose; and that the course that has been chosen, even if there are other courses, reasonably relates to the accomplishment of the purpose.

If the regulation really deals with content, if it favors one form of content over another or one speaker over another, then the regulation comes under strict scrutiny. And this can be lethal to the government's case. With the O'Brien intermediate scrutiny standard, the government usually wins if has made reasonable findings. Usually but not always. But in the content area, the government does lose at times because it has to show a really compelling governmental interest and no reasonable alternative. The governmental

program to achieve that compelling purpose has to very narrowly tailored. There has to be no reasonable alternative: You are driven to do this to accomplish the purpose. If there is a reasonable alternative, the government should have taken that course rather than regulated content. That is the traditional First Amendment jurisprudence.

It was applied in the Supreme Court case striking down the application of indecency law to the Playboy Channel, a premium channel. The subscriber pays to receive its programming, so the case is similar to Stanley v. Georgia. The Court applied strict scrutiny.

The two justices that most often apply the traditional analysis are Justice Kennedy and Justice Ginsburg. Some of the others profess to follow this analysis but seem to do so when it suits their purpose. There are on the Supreme Court only two clear votes to overturn Red Lion – Justice Scalia and Justice Thomas. Justice Rehnquist would have joined them but he has left the Court.

Female voice: You mean that they would probably vote to overturn Red Lion.

Henry Gellere: Yes.

Female Voice: OK

Henry Geller: Yes. Justice Thomas was clear in this respect. But as I said, there is no majority that wants to do it. I am speculating but I think that's because it is so disruptive. The broadcast regulatory system has been out there all this time, and there's a whole multi-billion industry that is based on it. Further, the Court may recognize that new developments based on new technology will take apart the existing commercial broadcasting system. I am amazed that it is perking along the way it is. But you wait ten years and the Internet will have taken it apart. The Internet,with its video streaming,

and all the other developments like 4G wireless will overwhelm commercial TV. These new efforts employ both advertising and subscription payments.

I would not invest in commercial TV. One of the ablest broadcasters – Jeff Smulyan – appears to be in the process of selling his stations. He first tried to figure out what he could do successfully with the 19.4 MBs – megabits per second—his TV stations have in the digital era. With compression techniques, they could deliver a high definition program with about 9 MBS, leaving 10. With that ten, he would offer a much smaller number of popular cable networks, like HBO, Showtime, ESPN. Cable offers 150 or more channels but people watch only the five or six they enjoy the most. The basic cable package is about $43, but with the extra channels the monthly payment is much more. That is why cable objects so strongly to an a la carte approach. Smulysn hoped to offer his small but choice package for perhaps a smaller price – maybe as low as $20 depending what was selected. But he could not get his novel proposal to work. So he seems now to be abandoning a future losing proposition, commercial TV.

I would like now to end this discussion of the constitutional issue. I do not think that there will be successful efforts to overturn Red Lion in light of what the Court said in Turner. The catalyst for change will be new technology. So if there are no questions –

Male Voice: I'll interrupt.

Henry Geller: Oh, by all means.

Male Voice: This is a rhetorical question. Isn't it hypocrisy to maintain this one jurisprudence for a few of the channels available on cable and satellite? Does it really serve any public interest purpose?

Henry Geller: It makes no sense at all. With hundreds of channels, the public makes no distinction between cable and over-the-air broadcasting. And so you have this one area, broadcasting, which is treated entirely differently by the government. There are First Amendment strains that we will get into, and broadcasters have obligations that the others do not have. And you have to ask why? Why now? Look at all the developments that have come in cable and satellite and all the developments that are coming on the Internet and wireless Congress or the Court ought to say that the public trustee scheme is no longer valid. Congress and the Administration ought to get rid of the failed public trustee regulatory scheme,

However, the broadcasters have enormous political clout. Senator John McCain complained bitterly that the NAB was the strongest lobby he had ever encountered. The commercial broadcasters give money for campaigns and they represent a terribly important medium. Politicians don't want to get on the wrong side of them; I am not saying that they would skew programming against the politician but it's not a good move, good karma, for the Congressman to stick his or her finger in the broadcaster's eye. So, for the most part, they don't do it.

The result is that the broadcasters get away with robbery. I do think that eventually they will be done in by technology – they can't stop that – but they seem to be able to stop everything else. They are today sitting on 12 Mhz when they never should have gotten the 6 MHz; they had the political clout to get it. Do you have a question?

Male voice: I just wanted to ask, apart from the constitutionality of it, there have been rumblings to extend indecency regulation and other public interest regulation to cable. What do you think the odds are of that?

Henry Geller; Cable has many channels, so just as a matter of policy, cable is meeting many needs with, for example, its news channels and C-SPAN for which cable and Brian Lamb deserve enormous credit. There are several channels that are excellent for informing and educating children – not MTV but the other channels like Nickelodeon or Discovery. The policy question for cable is that one entity is controlling an enormous number of channels going into the home. It turns out to be if not a de jure, certainly a de facto monopoly. That's being broken now. The telephone companies finally realize that if they don't go into broadband, they have no future. And so companies like Verizon, Bell South and Southwestern Bell are moving very strongly into delivery systems for video. They are coming late to this large undertaking but they know that they must provide broadband access to the Internet.

To return to policy issues regarding cable, initially there was an issue because cable did not always carry the local TV station and in a small town this could be a problem as cable was then cutting off a substantial part of the TV station's audience -- hence must carry was required.

Congress also acted in 1984 to implement the Associated Press principle – that the underlying assumption of the First Amendment is that the American people get information from diverse and antagonistic sources. Congress required that 10 to 15 percent of cable 's capacity – depending on the size of the cable system – be made available for commercial leased access. The policy has been largely a failure.

Another policy stemmed from the local franchising process. It became the custom to require PEG channels – public, educational and governmental channels. That last channel could be a local C-SPAN. This policy also has not been a success because of

lack of funds. Cable pays as much as 5 percent of its gross revenues to the franchising community but the money disappears into city coffers for pensions, potholes or whatever, but not to support PEG channels.

That is a very brief look at the regulatory scheme for cable. It is not one of content regulation. In fact, there is a provision in 624(f)(1) of the Cable Act that says that the FCC cannot impose any further content regulation on cable than those now in the Act like must carry. So the FCC has no power to impose public service or indecency regulations on cable. What about Congress imposing indecency on cable? The indecency regime in Pacifica in 438 U.S. does not stem from Red Lion but rather from the fact that broadcasting is such a pervasive medium and there are young children in the audience. While that might be equally true of many cable channels, people pay each month to receive cable service and where the dirty language if most prevalent – on the premium channels – you pay to receive that channel. Cable will also give you a lock box to block any channel you want. People don't usälly ask for the lock box. People also don't make use of the V-Chip to block program or language they don't want. It thus has not been a success.

So under the established First Amendment jurisprudence, the extension of indecency to cable would be unconstitutional.

If the programming were deemed obscene, it could be proscribed. But under the three part test of Miller, the material must be patently offensive under contemporary local standards, must appeal to prurient interest, and must lack redeeming social value. Many programs could claim to have such value, and nobody is aroused sexually by words like fuck, shit, and so on.

As an interesting aside, I believe that the FCC's current campaign against indecency in broadcasting is unconstitutional. It is difficult to predict how the pending cases will turn out. Some of the Justices are very strong on First Amendment protection --- Justice Kennedy and Justice Ginsburg. Others like Justice Stevens and Breyer are more pragmatic. Everyone recognizes that indecent programming cannot be banned, so the issue is whether it can be channeled to late hours – say, after 10 pm. And that is where the pragmatic consideration comes into play. Some jurists might take the position that this is a good societal compromise.

That is what the Court did in Boston adult theater case. Boston restricted movie theaters that show adult films to certain areas of the city. The films were sleazy but not obscene. The Court, in an opinion by Justice Stevens, and with Justice Brennan vigorously dissenting, permitted this as good solution to this societal problem, even though there is no way to define the vague term, adult programming.

In effect, the Court is legislating. I believe that despite disclaimers it happens all the time. Justices claim always to be following the original intent of the Constitution or the Congress but if it is a result which they favor, the construction follows to get the result.

Let us go the policy discussion because it is much more interesting. The regulatory policy in broadcasting has been a total failure. It was almost bound to be a failure.

Male Voice: Before you do, would just say a word about your distinction between law and policy.

Henry Geller: The law involves a question whether Communications Act authorizes the FCC to act as it did, and if it does, whether the action is consistent with the Constitution. For example, the FCC acted in the copyright field by establishing a broadcast flag

program where if a program had the flag, it could not be copied or reproduced more than once; the court struck it down because it found that the FCC had no authority to act on copyright. In another example, the FCC Chairmen indicated that they were going to adopt a television regulation to effect campaign finance reform. Vice President Al Gore had called for such reform, and the Chairmen held their positions because of his backing. This issue never got to a court because both parties in Congress made clear that the FCC had no authority to act in this field. And I think that the FCC never should have raised this matter as it is so clearly one for Congress, not the agency. What should be the amounts for House or Senate? What should be done about third party candidates? What about State Associations?

Now let me give you an example of a course of action that I advocated that raises both the legal and policy issue. The Act seeks to promote local service and to inform the electorate. Research by certain universities showed that a majority of TV stations in their main newscasts had failed to cover local elections at all. So I filed a petition urging the FCC to require in the 30 days before an election, all TV stations must cover a local election – they choose it and can consult with other stations -- by affording a brief opportunity – say five minutes in prime time – for the candidates to appear. I argued that this remedied a failure to meet public interest requirements set out in the Act. The FCC has never acted on my petition to this day. I might as well have filed it on a plain in Texas. I understand why there is no action; Congress might resent this intrusion by the Commission in the election area even though it is to carry out provisions in the Act. But you see again this meld of law – does the FCC have the authority? – and policy – is it sound policy?

Let me introduce a personal note here. I liked government service – especially as FCC General Counsel and Assistant Secretary of Commerce – and when it ended, I engaged in public interest law. I filed a slew of petitions for reform like the one I just described. Only rarely was there action taken on these petitions. One very successful one was in 1976. Since the 1960 debate between Kennedy and Nixon, there had been no debates because Congress would not suspend the equal time provision of Section 315 and time would have to be given to a dozen fringe candidates. So I filed urging that a debate came within an exemption, 315(a)(4) as coverage of a bona fide news event. President Ford wanted to debate as he was far behind in the polls and Governor Carter was willing to debate. The FCC, with Chairman Richard Wiley, was amenable and granted my petition. The court of appeals affirmed, with a strong dissent by Judge Wright that the legislative history clearly showed that debates were not meant to come with the exemption. He was right on that score. What we sought was good policy, but bad law.

Once I got the crucial initial victory, I expanded again and again. I went from includin0g only non-broadcasters like the League of Women Voters to all broadcasters and finally to any back-to-back appearance, not just a debate. All that stemmed from a legal decision that was wrong.

Female Voice: But it was good policy.

Henry Geller: Yes, it was. I am cynical about all of this.

Female Voice: I can see that.

Henry Geller: You also will become cynical. Justice Scalia recently noted that at times he would like a certain result and even though it would be good to get that result, he will abstain from doing it because the law is clear and must be followed. There are judges

that strive always to be faithful to the law: Justice Harlan and on the DC Court of Appeals, Judge Fahey and McGowan. On the other hand, Judge Bazelon and Skelly Wright were more result oriented. Let us go back to policy.

Henry Geller: The broadcast regulatory regime is a failure and it was almost bound to be. First, what is desired is high quality public service programming. Take the duty to serve children. You want broadcasters to put on shows like "Sesame Street" or "Contact 3-2-1." What you don't want is for broadcasters to put on "The Little Mermaid" and claim that it is educational because it teaches girls how to be leaders.

You're laughing but some broadcasters did claim just that. You don't want broadcasters putting on "The Flintstones" and claiming that it teaches children family values. Please understand that there's nothing wrong with "The Flintstones" or "The Little Mermaid." They are entertaining and the public should have them. But what is being sought is public service programming that not only entertains – young children won't watch if doesn't entertain them -- but also informs or educates them – is cognitive or intellectual. There is no way that commercial TV will supply such programming. You have to devise the high quality show and to test it to see if it is accomplishing the educational goal and to revise if it does not. That is what is done with "Sesame Street" and the other similar PBS shows. Why would a commercial broadcaster do that? Commercial TV is interested in number of eyeballs seeing the commercials because it is driven by the bottom line.

I don't say that in a derogatory fashion. That is what the commercial system is based on. In any event, if you want high quality, regulation can't help. Examining programs for quality is too subjective and would violate the First Amendment. Regulators could not

look at programs and say that's high quality and that's not. Our system soundly forbids such censorship.

The regulators can do that in the United Kingdom. On the commercial system, ITV, there is a Board that allows a programmer to be on for five years, and then the Board finds that the programming was not sufficiently high quality and the programmer is not renewed. Our First Amendment soundly forbids such a pattern here. So what we are left with is the quantity of public service programming.

The broadcasters oppose quantitative rules and have a lot of clout. So with the single exception of children's television where Reed Hundt got a three hour weekly guideline adopted – I will discuss that in a moment – there are no quantitative rules. It's as if in the environmental area there were no objective rules on pollution – the government just said, "do right and don't pollute." In talking to an assembly of broadcasters in 1973, Chairman Burch said that "if I were to ask you what the standard for renewal of license are, you couldn't tell me, I couldn't tell you, nor could our renewal staff."

In the Greater Boston case in 444 F.2d, Judge Leventhal stated that renewal of license must be constrained by some rules that are known to the licensee and to the public. Otherwise, the public does not know when to complain and the renewal applicant does not know what is expected of his operation. This is not "fair play."

So while he didn't like it, Burch was willing to propose numerical renewal standards. The standards would be in the area of informational programming defined broadly and locally originated programs – the areas could overlap. Burch left the Commission and the broadcasters opposed his proposal, so it was never adopted.

The only quantitative rule that has been adopted is the three hour guideline as to core children's TV. After the passage of the 1990 Children's Television Act, very little was done by stations – just a half hour program in the early morning hours like 6 am. Reed Hundt's rule adopted in 1994 required three hours a week of regularly scheduled core programming, in the time period 7 am to 10 pm and had other clear definitions. Broadcasters protested but never appealed. I suspect that they were worried about Congress being angry at them at the time.

The result has been quite modest. The Annenberg Washington Program did studies and found that a third of the programs could not be deemed core children's educatioãl programs, and other than the PBS programs, none of those presented by the commercial system were cognitive – rather they were what are called social purpose programs.

For example, NBC, which broadcasts NBA programs, put on a children's show, "NBA Inside Stuff", and Reed Hundt said that it was not a core children's educational program. NBC produced two educational psychologists whom they had hired in connection with the program, and who said it was educational. Reed Hundt had nowhere to go: he is not going to hold a hearing on the program; this is a sensitive First Amendment area. The broadcaster has great discretion in programming matters and can say that this is a good social purpose effort, teaching kids leadership, or being responsible, or whatever.

The FCC can't win that fight. Reed Hundt backed off. So what you get from the commercial broadcasters is social purpose programming. They don't like doing this because they don't get as many eyeballs. Yes?

Female Voice: Well, I always heard that the broadcasters, even though they may have protested the three-hour guideline, they actually liked having something that they could pretty clearly say they met. And, you know, as opposed to vague statements.

Henry Geller: I don't think that they do. The commercial broadcasters are now in there protesting that in the digital era the three hour requirement applies to any broadcast channel;0 if the channel is subscription, it is not broadcasting in nature and there are no public service requirements. In my opinion, extending the three hour requirement to every standard broadcast channel is mistaken as it just means more social purpose programs.

The broadcasters have protested to the Commission that it is interfering with their putting on more sports programming. At the time this rule was adopted, the CBS representative urged that commercial broadcasters do not have the resources, the wherewithal, to do three hours of educational programs – that the public interest would be better served by a few quality shows than this three hour material. Now in the digital era it is possible that the amount is up to nine hours if broadcasters were to do three standard channels.

I think that's folly – that the FCC won't get what it wants from the commercial broadcasters. There is a provision, 303(b) in the 1990 Act, that relieves the broadcaster of the requirement to do core educational fare if it enables some other broadcaster – most likely a public station – to do the core educational programming. It has never been used.

But what if you actually took one percent of the gross advertising revenues of local commercial TV stations – about $300 million annually – and gave it to public TV. We starve public broadcasting in comparison to other nations --- per capita expenditure in the US, $1.06, in Japan, $18, in Canada, $32, and in the UK, $38 per person.

As a result, public television does not have sufficient production or marketing capabilities. But if you relieved commercial broadcasters of the obligation to present core educational children's programming and in lieu thereof, gave the above one percent figure ($300 million) to public television, it would be enabled to present one channel specifically designed to serve pre-schoolers, another standard channel for school-aged children, still another for teachers or parents, one for literacy. All that is possible in the digital era.

This would be a win-win situation. The broadcasters would be free to present whatever programs they wanted. And an entity that is committed to high quality children's programming would be able to fulfill that mission. Now I am addressing you as future policy makers: Always choose a course that lends itself to the accomplishment of your goals. Today Congress has chosen a course that works against their goal – they are trying to make commercial broadcasters act against their driving economic interest by behavioral content regulation that has First Amendment strains. If instead Congress chose the one percent solution, the strains would be gone, and high quality children's educational program would actually emerge. So don't choose a course that is set up for defeating your goal – choose a structural course that works for the accomplishment of the goal. That is what was done in the environmental area where a market approach of credits was established, and that is what could be in the entire public service area of broadcasting.

This fight is still going on. Public interest groups still seek to have commercial broadcasters render public service. Indeed, they want to expand that obligation to new

areas like providing civic programs. Again you are in a sensitive First Amendment area with difficult problems of defining what is called for.

It is like family viewing. In the late 1970's Chairman Richard Wiley put a lot of pressure on commercial broadcasters to provide a family hour between 8 to 9 pm. He got it but it came apart in the courts. The present Chairman, Kevin Martin, is reported as seeking family viewing channels on cable. He knows that he has no power to require it and that to order it would be unconstitutional, so he is using pressure tactics, saying to cable to do it if it wants his help in resisting carriage of all the broadcast digital channels,

This technique is called "lifted eyebrow." It was used in the case of topless radio which became very popular in the early 70's. There would be discussions on radio by ordinary folks about sexual issues, like "How I Overcame My Aversion to Oral Sex." There is no reason why you can't talk about sex colloquially. Such programs can have redeeming social value. As general counsel, I informed Chairman Burch that the FCC could not rule these programs off the air.

But at that time there had been a lot of controversy generated by a decision transferring the license of a Boston channel to a newcomer against the incumbent. The broadcast industry was alarmed. So Burch and Senator John Pastore, who abhorred topless radio, said to the industry, that if you want our help dealing with this renewal problem that has arisen, there will be no help unless topless radio goes off the air. And topless radio, even though it was very popular, disappeared almost overnight.

A short time later, the issue of the use of dirty language – the usual expletives – came up. I told Burch that I believed that such language was fully protected by the First Amendment. The criminal code, under a section labeled "Obscenity", outlaws "any

obscene, indecent or profane language by radio" in 18 U.S.C. 1464. The problem was that the Supreme Court in Hamling had construed the same language in Sec. 1461 as meaning only "obscene" and saying dirty words does not appeal to prurient interest and could be in a program with redeeming social value. So I said if you proceed under the indecent part, you will lose and the floodgates will be open; therefore, let's use lifted eyebrow again.

Burch, however, did want any further use of lifted eyebrow. So I did use indecent as having different meaning in 1464 from obscene. We did lose in the Court of Appeals but when it got to the Supreme Court, there were five votes to allow the FCC to proceed in this area. Three dissenters said Hamling controlled the case but the Court, led by Justice Stevens, thought that the use of indecent was a good pragmatic way to go; the material had First Amendment protection still but to be presented at a late hour.

Female Voice: That specific.

Henry Geller: That specific.

Female Voice: OK.

Henry Geller: I would make two points. First, and most important, Burch was right to be honest so avoid use of lifted eyebrow. Second, the Supreme Court can do what it wants. Here it ignored the Hamling precedent and in giving indecent a separate meaning, it also gave it First Amendment protection so that it must be able to be presented at a late hour. Where is that in the statute?

Male Voice: I was just going back to your proposal. Have usage fees that go to the public broadcaster. How would the public broadcaster be governed?

Henry Geller: First, you have to get assured funding for public broadcasting by the proposal. So you relieve the commercial broadcasting of their public interest obligation and take a spectrum fee of three percent of gross advertising revenues – if you could get 5 percent that would even better –to go to public broadcasting to do the children's programming or in depth informational or cultural programming. There would be a trust set up with this funding. So public television would be largely freed from government interference through the funding process.

I would make sure that the people who went on the governing board were really a class act, genuinely interested in doing this high quality public service programming. And then let this board appoint its own successors as vacancies come up. With a sufficient trust fund, public broadcasting might be able to live off the interest, and thus be free of Congress; the commercial broadcasters would be relieved of public service obligations and thus First Amendment strains. Broadcasting would be treated the same way as cable or the Internet. The special jurisprudence for broadcasting would be ended. And we would for the first time be accomplishing our goal, because it has been shown in Japan and other places that if public broadcasting is funded adequately, it will produce and market the high quality children's, in depth information and cultural programming.

Reed Hundt rejected this proposal because, he said, public television only gets ratings of 3 percent and occasionally perhaps 5 percent. But it has never had the funds for continuing production facilities or to really market, saying "Watch the Human Body at 8 tonight." Even if the ratings remain below 5%, you are still serving millions of viewers and you are still making the programming available for the public to be informed or educated. If the parent does not insist on the child watching the high quality educational

show, and allows the child to just see cartoons on the Cartoon channel, there is nothing government can or should do about that.

Whether the monies obtained in this fashion were made available to public broadcasting is a matter for the Congress. which could instead using the sums for the F-22 or whatever. But the monies stemmed from relieving the commercial broadcasting of the public service obligation and there is still a need to meet that obligation but in a much more effective way. I

I do recognize that this is not likely to happen. When I became Assistant Secretary of Commerce, I urged Congress to relieve radio broadcasters of public service and take a one percent fee – I would have settled for less. I got nowhere on that, and it will probably never be implemented.

Therefore, public broadcasting should look for alternatives. Public television is sitting on very valuable spectrum. It should ask Congress for permission to sell the spectrum and to put the money so received in a trust fund. Public television stations do very little local programming – 5 or 6 percent. The PBS network can get distribution through cable or satellite or the Internet. The estimate now is that such an auction would raise about 18 billions. In 2009, the broadcasters are going to give up 6 MHz (megahertz) so a lot of beach front property will become available. (Beach front because it goes right through buildings and will be ideal for 3G wireless). So that will affect the market for public TV spectrum. The Association of Public TV Stations once proposed this, as did Larry Grossman and I. I think it unlikely that Congress would OK the proposal In any event, the sums – say 18 million—might be used by Congress for other purposes. They would not go –

Female voice: To public broadcasting.

Male Voice: If they did, the cronies of the committee chairmen would on the board of directors of this new organization.

Henry Geller: You are right. That's another thing that went wrong. Whether in Democratic or Republican Administrations, the people appointed to the governing board were not always genuinely interested or committed to this task. The Executive Branch personnel director would want to do something for Joe Zilch who had contributed generously to the campaign so he got this plum. When I was Assistant Secretary, we proposed to the White House that the President should follow the same process as in Court of Appeals judges. He used a prestigious commission to give him five names, and he chose from that list. This medium of public television was going into millions of homes, and it was just as important to proceed here in an impartial, high quality way. If he adopted this course, we would follow it up with a request for legislation to enshrine it in the law.

We failed. The White House guy in charge of personnel said that if one wanted good people, you've got to appoint them. Well, he appointed people who had raised a lot of money for the party. End of story.

Female Voice: I was just going to say that you seem to have found that broadcasting was a dying technology. And I'm just wondering , you know, with digital, and they are going to able to multicast, I have this idea – I sent it to Dick Wiley this week—broadcasters should be out there giving people free antennas. I mean, people are going to be able – if they get their antenna, and they get six channels from the broadcaster for free, then they

are not spending 40 or 50 dollars when they only watch six channels anyway. So, I wonder whether they could make it a viable alternative to other technologies.

Henry Geller: I think that you've got a point in that. There were ten percent of the audience who were not on cable to start with, and others might join. But you have to remember that cable and satellite do have sports programming that its not available elsewhere. And some people may want old movies or MTV or gardening or whatever. You remember that Smulyan wanted to offer people the free standard broadcast channels, perhaps as many as six when not doing high definition, and then on a subscription basis a small group of cable channels –all over the air. He could not work it out but it was an interesting idea on the same basis as you suggest – to avoid the high monthly cable bills. Thee are other interesting ideas. Whether they will pan out or not is way beyond my expertise. I don't purport to be a market expert on what will succeed.

I do think that the Internet will continue to grow as to provision of video and will therefore have great impact. I also believe that Negroponte has it right: If you are delivering video to the home, it should be done by coaxial cable or fiber like FIOS. Spectrum should be used for wireless operations including 3G, delivering video to smart telephones or tablets or portable computer devices.

Male Voice: Is the reason why people like Smulyan were not able to enter that market and create over-the-air a great number of over the air channels to compete with cable – is because of the emerging technologies like Internet, or is it because of regulations that we have now preventing people entering the broadcasting market?

Henry Geller: It is difficult to enter the broadcasting market in the traditional fashion – there are not outlets for the new network. You have six over-the-air networks now,

reaching the audience not only over the air but through cable and satellite. There may be changes to spectrum allocation as urged by Gilder and there may be changes on the local scene, but that is speculative at this time.

So I would answer your question in two ways: in the present circumstances, you can't do it, and second, with the Internet coming on so strongly, why bother trying?

Male Voice (Whitehead or Hazlett?): Also, it think you're not likely to see any creation of new networks for those extra channels until the must-carry thing is resolved. Right now the big issue with broadcasters is trying to get the maximum they can out of the cable industry, either through retransmissions or must carry, Once that is settled, then the people who want to start new networks or broadcasters will presumably get together, and I predict there will be some new networks. But not until the must carry thing is resolved. Henry, we have to quit.