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## A Unified Theory Of The First Amendment:

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# A Unified Theory Of The First Amendment:

## **Cover Page Footnote**

Adjunct Assistant Professor, Pace University. B.A. 1978 Amherst College, J.D. 1981 Harvard Law School. The author would like to thank Douglas Hofstadler for his inspirational book *Godel, Escher, Bach: An Eternal Golden Braid*; Eli Noam, Carl Oppedahl, Douglas Ginsburg, and Samuel Simon for their helpful comments and criticisms, Eugene Nadel, for his time, effort, and indispensable assistance, and finally William Eckstein, for his conscientiousness, patience and diligence as editor.

# A UNIFIED THEORY OF THE FIRST AMENDMENT: DIVORCING THE MEDIUM FROM THE MESSAGE

Mark S. Nadel\*

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... the First Amendment question is simply: Under *what criteria* may government so act? Perhaps if we begin to push that question, we may slowly begin to integrate our two traditions of freedom of communications in the United States.\*\*

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\*\*Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & Econ. 15, 49 (1967).

## I. Introduction

When deciding first amendment cases, courts have historically balanced first amendment freedoms against other rights guaranteed by the Constitution<sup>1</sup> or against the need for reasonable time, place and manner restrictions.<sup>2</sup> The emergence of significant barriers of entry to

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1. Judicial deference toward the first amendment has been substantial. Some like Justice Hugo Black have gone so far as to hold that the amendment was absolute. *See, e.g., Smith v. California*, 361 U.S. 147, 157-59 (1959) (Black, J., concurring) (“[t]he First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting those freedoms beyond the reach of federal power to abridge”); *Roth v. United States*, 354 U.S. 476, 514 (1957) (Black & Douglas, JJ., dissenting); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245. Others have stopped just short of according it absolute status. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.) (“[o]ne may say that [freedom of speech] is the matrix, the indispensable condition of nearly every other form of freedom”). It has been described as “transcendent,” *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), and as occupying a “preferred place” in the constitutional framework, *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

Nevertheless, the need to balance the amendment against other constitutional values has been recognized by most. *See, e.g., Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51 (1961); *Dennis v. United States*, 341 U.S. 494, 508 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 90-97 (1949) (Frankfurter, J., concurring). The absolute v. balancing argument can be sampled in the Mendelson-Frantz debate. *See Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance*, 40 CALIF. L. REV. 821 (1962); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964). For a list of values that have been weighed against the Amendment, see note 91 *infra*.

2. The Supreme Court has recognized that at times “various methods of the speech, regardless of their content may frustrate legitimate governmental goals.” *Consolidated Edison v. Public Service Comm’n*, 447 U.S. 530, 536 (1980). Therefore, the Court has permitted “reasonable time, place and manner regulations [of speech] that serve a significant governmental interest and leave ample alternative channels for communication.” *Id.* at 535. “[A] restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable . . . . [However], a constitutionally permissible time, place or manner restriction may not be based upon either the content or subject matter of the speech.” *Id.* at 536. *See also* the discussion of time, place and manner restrictions in Note, *Access to State-owned Communications Media—The Public Forum Doctrine*, 26 U.C.L.A. L. REV. 1410, 1421 n.44 (1979).

In the judicial review of time, place and manner restrictions the issues of vagueness and overbreadth also are considered. Although they gain greater prominence in first amendment cases, these considerations are more general in nature and not peculiar to first amendment doctrine. Generally, vagueness and overbreadth conflict with due process standards. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (vagueness violates due process of law; life, liberty and property cannot be taken by virtue of a statute whose terms are “so vague, indefinite and uncertain” that one cannot determine their meaning) (reversing a conviction under a statute making it a

the communications media,<sup>3</sup> however, has created a new situation; the Supreme Court has been forced to consider competing claims of first amendment rights. Those advocating a "right of access"<sup>4</sup> and those advocating a "freedom to exclude"<sup>5</sup> have both laid claim to first

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penal offense to be a "gangster"). Overbreadth may be challenged as a violation of equal protection. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-4, at 999 (1978).

3. Due to technological, economic and political factors, see notes 164-66 *infra*, the supply of broadcast licenses is almost completely inelastic (i.e., the amount of goods is fixed in amount regardless of price. See P. SAMUELSON, *ECONOMICS* 377 (1980)). The price of a license, which may be as high as \$220 million, see BROADCASTING, April 5, 1982, at 36, has placed broadcast speech out of the reach of all but a very small percentage of the population. Entry into the other mass media is not necessarily easier. Although entry barriers in print and cable may be solely economic, they seem sufficiently great to prohibit easy access by the vast majority of the public. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 250 (1974) ("[economic and technological changes have] place[d] in a few hands the power to inform the American people and shape public opinion"); MAJORITY STAFF OF THE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 97th CONG., 1ST SESS., *TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 307-90* (Comm. Print 1981) [hereinafter cited as HOUSE REPORT]. See generally B. COMPAINÉ, *WHO OWNS THE MEDIA?* (2d ed. 1982) for a review of the major participants in each medium; B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* (1975) for a discussion of the economics of the media marketplace.

4. The seminal article presenting the claim of access was Barron, *Access to the Press—A First Amendment Right*, 80 HARV. L. REV. 1641 (1967). For a compendious review of the literature see Kreiss, *Deregulation of Cable Television and Problems of Access Under the First Amendment*, 54 S. CAL. L. REV. 1001, 1016 n.74 (1981); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C.L. REV. 1, 2 n.5 (1973).

5. Claims of "freedom to exclude" have been asserted most strongly by present media owners, their trade associations and their supporters in the government. In the keynote address at a two-day seminar "First Amendment Values in a Changing Information System," sponsored by the First Amendment Congress, on May 20-22, 1982, in Leesburg, Va., Federal Communications Commission (FCC) Chairman Mark Fowler "repeated and refined his position that all government controls—other than 'traffic cop' enforcement—should be eliminated from electronic media . . . [including] removal of so-called 'content regulation' such as the Fairness Doctrine, equal opportunities, reasonable access, personal attack rule, etc." Simon, *The Future of the First Amendment*, Access, June 2, 1982, at 1. See Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 244-45 (1982). At the National Association of Broadcasters 1982 Annual Convention, Senate Commerce Chairman Robert Packwood proposed that the United States Constitution be amended to guarantee the right of free speech to the electronic media, as he feels the founding fathers surely would have intended. See BROADCASTING, Apr. 12, 1982, at 30; CABLEVISION, Nov. 8, 1982, at 131. See also the position of the National Cable Television in Goldberg, Ross & Spector, *Cable Television, Government Regulation and the First Amendment*, 3 COMM/ENT L.J. 577 (1981) (cable operators have the same status as newspaper publishers).

amendment protection thereby creating great discord in the legal community.<sup>6</sup>

The Court presently permits reasonable regulation of access in the broadcasting media; it nevertheless allows print publishers to foreclose such access.<sup>7</sup> Although this approach has been praised by some,<sup>8</sup> such a doctrine can only survive if there is a clear distinction between the print and broadcast media. In today's rapidly developing communications industry, the distinction between these converging media is unstable and inadequate.<sup>9</sup> The increasing significance of cable television in particular has created a pressing need to replace the fragile double standard with a unified, all encompassing theory.<sup>10</sup>

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6. As Professor Laurence Tribe has noted: "The clear failure of the 'technological scarcity' argument as applied to cable television amounts to an invitation to reconsider the tension between the Supreme Court's radically divergent approaches to the print and electronic media." L. TRIBE, *supra* note 2, § 12-22, at 699. *See also* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43-52 (1975) (applying the equal protection principle to access to the media); Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539, 547 n.49 (1978) for a partial listing of the extensive literature on the *Red Lion* and *Tornillo* cases.

Both Kreiss, *supra* note 4, at 1001, and Note, *The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process*, 1 CARDOZO L. REV. 497 (1979) suggest ways to administer a balancing test of rights of access versus rights to exclude, but this Article attempts to finesse any such need.

7. Government controlled publications cannot foreclose such access. *See* note 149 *infra*.

8. Professor Lee Bollinger celebrates the advantages of a two-tiered approach to the media similar to that adopted by the Court. He observes that such an approach permits the print media to remain an unregulated check on government while permitting access seekers to enjoy some access. *See* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 U. MICH. L. REV. 1 (1976).

9. The convergence of the print and broadcast media may be best exemplified by the 100 local newspapers which provide continuous news presentations on cable television channels. *See* Wall St. J., Jan. 2, 1981, at 1, col. 6. It is unclear whether this use of broadcast technology should subject publishers to regulation. In fact, most traditional newspapers use broadcasting technologies when they use international phone service and some use satellites to relay their edition to printing presses throughout the nation. *See* Mueller, *Property Rights in Radio Communication: The Key to Reform of Telecommunications Regulation*, at 47 n.18 (CATO Institute, Washington, D.C. 1982).

Recognizing that "[t]he line between print and electronic journalism is thin at best and getting thinner," *New York Times* Publisher Arthur Ochs Sulzberger has advocated a repeal of the broadcast "fairness doctrine," *N.Y. Times*, Nov. 18, 1982, at B4, col. 5, apparently in fear that acceptance of such regulations might encourage their imposition on print publishers sometime in the future. For a discussion of the fairness doctrine, *see* notes 15-18 *infra* and accompanying text.

10. "[T]here has been persistent pressure for a unitary First Amendment theory that would embrace both the print and electronic media . . . [as part of] 'the quest

This Article proposes such a unified theory after first drawing the crucial distinction between first amendment rights—which shield messages—and rights held by media owners—which are merely property rights protected by the fifth amendment.<sup>11</sup> Once message and medium are clearly distinguished, the first amendment's protection of the free flow of information through our system of communication may be seen in a new and more meaningful light.

Before presenting the theory, it is useful to understand the tension which has been created in first amendment mass media doctrine by recent case law.<sup>12</sup> As Professor Laurence Tribe has observed, “the development of the law in this area is simpler to summarize than to comprehend.”<sup>13</sup>

## II. Access Seekers v. Media Owners

The first case which forced the Court to weigh the rights of access seekers against the rights of media owners (who claimed the right to restrict access selectively) was *Red Lion Broadcasting Co. v. FCC*.<sup>14</sup> In that 1969 decision, a unanimous Supreme Court upheld the constitutionality of the FCC's “fairness doctrine.”<sup>15</sup> This congressionally-

for coherent general theory in matters of the First Amendment.’” B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS 4* (1976) (quoting H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT 4* (1965)). See note 6 *supra*. The current chairman of the FCC favors removal of “content regulation” such as the fairness doctrine. See note 5 *supra*. Such removal would unify the application of the first amendment to the print and electronic media by not imposing regulation on either medium. However, this result would deny those seeking access any wedge for gaining entry to the electronic medium. See remarks of L. Tribe and B. Schmidt in *BROADCASTING*, May 31, 1982, at 55.

11. The distinction was recognized in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980). See L. TRIBE, *supra* note 2, § 12-22, at 696, discussing *Hudgens v. NLRB*, 424 U.S. 507 (1976) (“[t]he *Hudgens* Court made it clear that the NLRB could compel the shopping center owner to let picketers in, a position incompatible with the view that the owner's refusal rests on a first amendment base”). The two constitutional rights are often combined in one entity but one's property rights are not enlarged simply because one is in the media. See *Friedman v. Rogers*, 440 U.S. 1, 12 n.11 (1979) (“a property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication”); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937); see also note 47 *infra* for a discussion of the protection that the fifth amendment affords to property rights.

12. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

13. See L. TRIBE, *supra* note 2, § 12-22, at 698.

14. 395 U.S. 367 (1969).

15. *Id.* at 400-01. “[T]he fairness doctrine is the name given to two requirements applied by the Federal Communications Commission to radio and television broad-

authorized<sup>16</sup> and FCC-established<sup>17</sup> policy requires broadcast licensees to devote a reasonable amount of time to controversial issues of public importance and to afford adequate opportunity for the presentation of opposing viewpoints on these issues.<sup>18</sup> Recognizing that "as far as the First Amendment is concerned, those who are licensed stand no better than those to whom licenses are refused,"<sup>19</sup> the Court accepted the fairness doctrine as a reasonable compromise between the free speech rights of those who had been granted licenses and those to whom licenses had been denied.<sup>20</sup>

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casters . . . . The first . . . demands that broadcast licensees devote a reasonable amount of their programming to controversial issues of public importance. The second . . . requires that when such issues are presented, contrasting views on them be aired." S. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 9 (1978). See note 17 *infra*.

16. Under 47 U.S.C. § 303(r) (1976) the Federal Communications Commission "from time to time, as public convenience, interest, or necessity requires, shall [m]ake such rules and regulations, and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . ." When granting licenses, the FCC is required to consider the demands of public interest. See *id.* §§ 307(a), 309(a).

17. The fairness doctrine evolved through a number of decisions handed down by the FCC. One of the first cases dealing with the doctrine was *Great Lakes Broadcasting*, Federal Radio Commission, Third Annual Report 32 (1929). In *Great Lakes*, the Federal Radio Commission (FRC) (predecessor to the FCC) held that public interest required ample play for the free and fair competition of opposing views and that the principle applied to all discussion of issues of importance to the public. In *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932) and *Young Peoples Ass'n for Propagation of Gospel*, 6 F.C.C. 178 (1938), the FRC and FCC enforced the requirement of free and fair competition of opposing viewpoints by threatening to deny licenses to those who did not comply. The doctrine was further refined by a series of cases which include *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940); *United Broadcasting Co.*, 10 F.C.C. 515 (1945); *New Broadcasting Co.*, 6 RAD. REG. (P & F) 258 (1950); *Cullman Broadcasting*, 25 RAD. REG. (P & F) 895 (1963); *Mayflower Broadcasting* established that a licensee must cover fairly the views of others. 8 F.C.C. 333 (1940). *United Broadcasting* held that broadcasters must give adequate coverage to public issues. 10 F.C.C. 515 (1945). Under the *New Broadcasting* decision, coverage must be fair in that it accurately reflects opposing views. 6 RAD. REG. (P & F) 258 (1950). In *Cullman Broadcasting*, the Commission determined that such coverage must be done at broadcasters' own expense. 25 RAD. REG. (P & F) 895 (1963). The doctrine has been codified at 47 C.F.R. § 1212 (1981). See also S. SIMMONS, *supra* note 15, for a more detailed discussion of the fairness doctrine and its history.

18. See note 17 *supra*.

19. *Red Lion*, 395 U.S. at 389. See generally Karst, *supra* note 6 (discussing such an equal protection principle).

20. The Court recognized that where "100 persons want broadcast licenses . . . there . . . may be only 10 frequencies to allocate. [All of those persons] may have the same 'right' to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388-89. "Because of [this] scarcity . . . the Government is permitted to put restraints on licensees in favor of others whose views



Four years later, in *Columbia Broadcasting System v. Democratic National Committee*,<sup>21</sup> a divided Court refused to hold that those without licenses possessed an inherent first amendment right of access greater than the FCC-imposed fairness doctrine;<sup>22</sup> the first amendment did not require that all those wishing to purchase access time be allowed to do so.<sup>23</sup> The Court deferred to the FCC's decision to rely on the fairness doctrine compromise to satisfy the rights of non-licensed access seekers.<sup>24</sup> It did not, however, decide whether the FCC could have required broadcasters to sell commercial time for political advertising.<sup>25</sup>

A year later, in *Miami Herald Publishing Co. v. Tornillo*,<sup>26</sup> a unanimous Court refused to uphold a Florida statute<sup>27</sup> recognizing first amendment rights of access for non-publishers to the columns of a

should be expressed . . . ." *Id.* at 390. The Court, therefore, accepted the requirement that "a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that . . . already . . . expressed." *Id.* at 391. The Court considered the fairness doctrine such a restraint. *Id.* at 391, 400.

21. 412 U.S. 94 (1973).

22. *Id.*

23. The complainants argued that the first amendment principles of free expression required a broadcaster to sell commercial time to persons wishing to discuss controversial issues. *Id.* at 122. The Court upheld the FCC's conclusion that the public interest would not be served by such a system. *Id.* at 123.

24. The continued reliance on the fairness doctrine would avoid "the risk of an enlargement of Government control over the content of broadcast discussion of public issues," *id.* at 126, and "a continuing case by case determination," *id.* at 127, which the FCC would be drawn into if the system advocated by the complainants, *see note 23 supra*, would have been adopted.

In addition, the Court has recognized that "the Commission must be allowed to 'remain in a posture of flexibility to chart a workable "middle course" in its quest to preserve a balance between the essential public accountability and the desired private control of the media.'" *Columbia Broadcasting Sys. v. FCC*, 453 U.S. 367, 390 (1981) (citing *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973)).

25. Section 315 of the Communications Act of 1934 (codified at 47 U.S.C. § 315 (1976)), now imposes special regulations concerning the broadcasting of messages by political candidates. In particular, § 315(b) gives candidates preferential rates for commercial time. *See Columbia Broadcasting Sys. v. FCC*, 453 U.S. 367 (1981) for the Court's discussion of the statute's purpose and the FCC's role in administering it. This decision was foreshadowed in the comments of the majority of the Court in *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 131 (Burger, C.J.) ("[c]onceivably at some future date Congress or the Commission or the broadcasters may devise some kind of limited right of access that is both practicable and desirable"); *see also id.* at 138 (Stewart, J., concurring); *id.* at 147 (White, J., concurring).

26. 418 U.S. 241 (1974).

27. FLA. STAT. § 104.38 (1982) (repealed 1975). For a discussion of this and similar statutes, *see Bollinger, supra note 8*, at 3 n.10, 18 n.57.

newspaper which "assails" them.<sup>28</sup> The Court prohibited such governmental "intrusion into the function of editors,"<sup>29</sup> fearing that, "faced with the penalties . . . of the Florida statutes, political and electoral coverage would be blunted or reduced. . . . It has yet to be demonstrated how government regulation of this crucial [editorial] process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time."<sup>30</sup>

Thus, while the Court has accepted a fairness doctrine which requires government scrutiny of the access decisions of broadcasters,<sup>31</sup> it has forbidden governmental intrusion into the access decisions of publishers. In *Red Lion*, the Court justified this double standard with a "scarcity" argument,<sup>32</sup> but this rationale has been severely discred-

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28. 418 U.S. 241 (1974).

29. *Id.* at 258.

30. *Id.* at 257-58.

31. This scrutiny is achieved by evaluating the performance of broadcasters at license renewal time. See 47 U.S.C. § 309(d), (e) (1976); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471 (1975). Some have suggested that governmental scrutiny may chill the broadcast press, see F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 199-219 (1975); Douglas, *The First Amendment and the Electronic Press*, 10 U.C.L.A. L. REV. 123, 135-37 (1978); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 20-23 (1967); Note, *FCC Regulation of Broadcast News: First Amendment Perils of Conflicting Standards of Review*, 48 FORDHAM L. REV. 1226 (1980). Only once has the agency even mentioned the failure to comply with the fairness doctrine as one of the reasons for denying a license renewal. See F. FRIENDLY, *supra*, at 83-85; Note, *Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly Owned Forum*, 55 N.Y.U. L. REV. 517, 529 n.89 (1980) [hereinafter cited as Note, *Broadcast Deregulation*].

In fact license revocations are so rare that in *KWTX v. Commissioner*, 272 F.2d 306 (5th Cir. 1959), the court affirmed a tax court decision disallowing a depreciation deduction for the cost of obtaining a three-year license from the FCC, noting that the FCC "has never refused to grant a renewal of a license once it has been granted." *Id.* at 407 n.1. Before 1969, the FCC revoked or denied renewal of only six licenses: three were abandoned licenses, two were construction permits, and one was for unauthorized transfer of control. See S. BREYER, *REGULATION AND ITS REFORM* 412 n.17 (1982). See also Fowler & Brenner, *supra* note 5, at 209 n.10 (noting the nearly 100% renewal rate for licensees).

The FCC's present policy expressly includes a preference for the incumbent licensee as one of the many factors considered at renewal time, where the preference "depends on the merits of the past record." Cowles Broadcasting, Inc., 86 F.C.C.2d 993, 1012, 49 RAD. REG. 2d (P & F) 1138, 1156 (1981), *aff'd sub nom.* Central Fla. Enters. v. FCC, 683 F.2d 503 (D.C. Cir. 1982). It has been intimated by the Supreme Court that such a policy is permissible, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 782 & n.5, 805-07 (1978).

32. 395 U.S. at 388, 390.

ited<sup>33</sup> and the Court itself did not even mention *Red Lion* in its *Tornillo* decision.<sup>34</sup> It is still possible to maintain the distinction be-

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33. See Bazelon, *FCC Regulation of the Telecommunication Press*, 1975 DUKE L.J. 213, 223-29; Bollinger, *supra* note 8, at 6-12. The best discussion of the "scarcity" issue is in Mueller, *supra* note 9, at 6-12.

Because all "goods are, by definition, scarce," see Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959), it seems that what was actually meant by "scarcity" was a fixed (inelastic) supply of broadcasting frequency bands, see note 3 *supra*. This inelasticity is allegedly due to a "physical" limit to the number of bands available, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 388, 390 (1969), but this is not correct. The channel capacity of the spectrum is fixed only in relation to the present state of technology, B. OWEN, *supra* note 3, at 91, just as the supply of newsprint can be said to be fixed, given the current state of investment in the paper industry. As the amount of available newsprint can be increased (up to some physical limit) through greater investment in paper production, so could the capacity of the spectrum be enlarged by economic investment in increasingly sophisticated broadcast equipment, thus allowing a more intensive use of frequencies. *Id.*; H. LEVIN, *THE INVISIBLE RESOURCE* 22-24 (1971); Fowler & Brenner, *supra* note 5, at 222-23. More stations could be provided over the air if more precise (and expensive) timing equipment was utilized in transmission and reception of signals. The fact that such technology seems prohibitively expensive today should not be surprising given the incentives of licensees who pay no fees for their licenses and are almost guaranteed automatic renewals.

In fact, those holding broadcast licenses have had incentives to discourage the development of less costly technologies and block their implementation when developed. R. NOLL, M. PECK & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 53-54 (1973); B. OWEN, *supra* note 3, at 92. Thus, when a technology was developed which would allow the AM spectrum to hold about 10% more stations by using 9 kHz bands instead of 10 kHz bands, the vested interests of broadcasters led them to oppose such a change. See Mueller, *supra* note 9, at 5-6.

There are those who might say that the scarcity of stations is due to the substantial investment required, but this is not the same as asserting that frequencies are physically scarce. Scarcity in this context is merely a claim that, in absolute numbers, there are too few stations for one's taste, and that adding new stations seems too expensive, *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 73-76 (D.C. Cir.) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973). By this reasoning, scarcity in the newspaper industry would justify regulation of the print media for as of January 1980, there were 1745 daily newspapers, *Editor & Publisher, 1981 International Yearbook*, preface; and 9159 radio stations and 1062 television stations, not including translators, *BROADCASTING*, Nov. 8, 1982, at 98.

The District of Columbia Circuit Court explained in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), however, that mere economic scarcity is not enough to justify regulation of speech. "[S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press . . ." *Id.* at 46.

34. The failure of the Supreme Court to even mention *Red Lion* is particularly odd in light of the heavy reliance on the case by the Florida State Supreme Court, 287 So. 2d 78 (Fla. 1973), *rev'd*, 418 U.S. 241 (1974). In fact, the *Red Lion* precedent was the very center of the *Tornillo* briefs and oral arguments. See Van Alstyne, *supra* note 6, at 546-47.

tween print and broadcasting,<sup>35</sup> but the "scarcity" rationale must be replaced with a more meaningful contrast between editors selected by the government and editors whose survival is solely the result of success in market competition.<sup>36</sup>

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35. For a discussion of the justifications that have been advanced for applying the first amendment differently to the print and media, see Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008, 1017-25 (1971). One particularly popular justification is that broadcasters are qualitatively more powerful than print publishers ever were. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("the broadcast media have established a uniquely pervasive presence in the lives of all Americans . . ."); Bazelon, *supra* note 33, at 220-21; Bollinger, *supra* note 8, at 13-14; Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 CIN. L. REV. 427, 432-33 (1975). *But see* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 770-71 (1972) ("the influence of television broadcasting on the public's political consciousness should not be exaggerated; it is only one among many bearers of experience"); Lange, *supra* note 4, at 21. One must also recognize that print publishers have substantial influence over broadcasters. For example, Earth Day, a rally staged by environmental activists, was a media event created initially by an article in the *New York Times*. Harvard University Kennedy School of Government, Steve Cotton and Earth Day, No. C94-75-062, at 12-15 (1975).

36. The difference between the rights held by government selected editors (e.g., broadcasters) and market selected editors (e.g., print publishers) is analogous to the difference between the rights held by those using public land (e.g., parks) and those using their own private land (e.g., front lawns). The former are required to share the use of their property and grant access to others while the latter may exclude all others. *See* notes 116-31 *supra* and accompanying text.

Since 1924, Congress, courts and commentators have regarded the radio spectrum as the "inalienable possession of the people of the United States and their Government." 65 CONG. REC. 5735 (1924). A Senate Report on amending § 315 of the Communications Act of 1934 noted that "broadcast frequencies are limited and therefore, they have been necessarily considered a public trust." S. REP. NO. 562, 86th Cong., 1st Sess., 8-9, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2564, 2571 (emphasis added). Yet it seems clear that it is actually no more necessary that the limited spectrum be owned by the government than it is necessary that the limited supply of real property comprising the United States be owned by the government. *See* Van Alstyne, *supra* note 6, at 554-59.

Public policy has dictated that the government should own some real property (e.g., public parks and streets). *See* *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) ("[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . . Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens"). *But see* Judge Oliver Wendell Holmes' opinion in *Commonwealth v. Davis*, 162 Mass. 510, 511 (1895) (private citizens have no inherent right to use public parks). However, most of the real estate in the country is privately owned and allocated by price in the marketplace. It would be equally practical to allow the portion of the spectrum presently used by commercial broadcasters to be privately owned while the government retained ownership of public educational station licenses.

Detailed proposals for private ownership of the airwaves have been offered by a number of commentators. *See, e.g.,* Coase, *supra* note 33; Coase, *Evaluation of*

In broadcasting, the government allocates a fixed number of *de jure* exclusive licenses to a select group of recipients.<sup>37</sup> These licensees enjoy not only free use of a valuable right,<sup>38</sup> but also protection from the entry of others.<sup>39</sup> Potential entrants are effectively prevented from competing with the favored licensees even when they feel economically and technologically capable of doing so.<sup>40</sup> Although economic

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*Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 LAND ECON. 161 (1965); DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Fowler & Brenner, *supra* note 5; Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J. L. & ECON. 221 (1975); Mueller, *supra* note 9. Leasing channels to the highest bidders was first suggested by Leo Hertzels in "Public Interest" and the Market in *Color Television Regulation*, 18 U. CHI. L. REV. 802 (1951). *But see* Jones, *Use and Regulation of the Radio Spectrum: Report on a Conference*, 1968 WASH. U.L.Q. 71.

Some have felt that private ownership would deprive most individuals of access or service but when one contrasts the access and service provided by regulated broadcasters and that provided by unregulated print publishers, even former critics of a marketplace solution have advocated private ownership. *See* Parkman, *The FCC's Allocation of Television Licenses: Regulation with Inadequate Information*, 46 ALB. L. REV. 22 (1981); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 240-43 (1978).

FCC chairman Mark Fowler has recognized the distinction between regulated public servants and unregulated private owners and has been urging broadcasters to support legislation to transform their industry into a privately owned medium similar to the print medium. Using a land metaphor, Fowler has asked broadcast licensees to offer to pay to transform leases for government owned "apartments" into privately owned "condominiums." Although broadcasters would like to be treated as owners of private property they seem to believe that they can get private property rights without paying for them. *See* BROADCASTING, Oct. 25, 1982, at 23.

To see that regulation is solely the result of the government's policy to retain ownership of the spectrum, one need only imagine the hypothetical situation where the government decided that all printing presses should be the inalienable possession of the United States because of their scarcity. If licenses to use the public presses at no cost were then awarded to a select group of editors, the first amendment would presumably require that some kind of access rights be provided to those not selected, *see* note 44 *infra*, presumably along the lines of the broadcast fairness doctrine. For the view that the government policy of retaining ownership of the broadcast medium actually violates the first amendment, *see* Van Alstyne, *supra* note 6, at 560; Note, *Broadcast Deregulation*, *supra* note 31, at 536-43.

37. *See* Communications Act of 1934 (codified at 47 U.S.C. §§ 301-315 (1976)); H. LEVIN, *supra* note 33, at 4-7, 52-55 (1971).

38. *See* *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. at 101; H. LEVIN, *FACT AND FANCY IN TELEVISION REGULATION* 111-20 (1980).

39. *See* T. MORGAN, *ECONOMIC REGULATION OF BUSINESS* 57 (1976); M. PORTER, *COMPETITIVE STRATEGY* 13 (1980). This right is similar to that created by the issuance of a patent. "The grant of a patent is the grant of a statutory monopoly." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964). *See* 35 U.S.C. § 271 (1976).

40. For example, by exerting tremendous pressure on the FCC to reverse its initial decision, present holders of AM radio licenses were able to block an agency proposal which would have opened the door to a substantial (10%) increase of new broadcast

conditions allow most publishers to enjoy at least as much monopoly or oligopoly power as broadcasters,<sup>41</sup> theirs is merely a *de facto* status. The government does not designate any preferred class of publishers for special privileges nor block new entry by others. New entrants may compete with incumbents whenever they feel capable of doing so.<sup>42</sup>

The Court's recognition in *Red Lion* that those refused licenses have equal first amendment rights to those with licenses<sup>43</sup> seems to require that the government provide some form of compensatory access to those legally denied a license to broadcast.<sup>44</sup> By contrast there would not appear to be any governmental obligation to provide compensatory access in the print media<sup>45</sup> because no private publishers have been denied special privileges.

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licensees. This would have been accomplished by decreasing the size of the frequency bands from 10 kHz to 9 kHz. 9 kHz bands, viable economically and in use throughout much of the world, have been rejected because of the "tremendously high" administrative costs of change. See Mueller, *supra* note 9, at 5-6; HOUSE REPORT, *supra* note 3, at 378. A similar situation led the CAB to reject all 79 applications from companies wishing to enter the domestic airplane industry between 1950 and 1974, see S. BREYER, *supra* note 31, at 205.

41. See note 3 *supra*.

42. See, e.g., the *Ann Arbor* [Michigan] *Observer*, discussed in P. SANDMAN, D. RUBIN & D. SACHSMAN, *MEDIA: AN INTRODUCTORY ANALYSIS OF AMERICAN MASS COMMUNICATIONS* 238 (3d ed. 1982) [hereinafter cited as P. SANDMAN].

43. See text accompanying note 19 *supra*.

44. Otherwise the awarding of licenses would amount to favoring some speakers over all others as rejected in *Red Lion*. In *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the Court's rejection of plaintiff's claim of a first amendment right to purchase advertising came only in deference to the FCC's imposition of a compensatory fairness doctrine. See *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) ("strong arguments" supported a policy of requiring the columns of a state subsidized college newspaper to be open to the expression of opposing views); Kreiss, *supra* note 4, at 531. For a cable operator to be free of regulation, California laws require the operator to observe a kind of public access fairness doctrine. See CAL. GOV'T CODE § 53066.1(a)(5) (West Supp. 1982). A cable operator must offer community service channels. *Id.* § 53066.1(d). This statute includes a requirement that 50¢ per subscriber be paid on an annual basis to an association of cable operators which provides a number of community services. *Id.* § 53066.1(d)(3).

45. "The struggle for the freedom of the press was primarily directed against the power of the licensor . . . . [T]he liberty of the press became initially a right to publish *without* a license what formerly could be published only *with* one." *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (footnote omitted). Thus, courts have consistently held that there is no inherent first amendment right of speakers to gain access to newspapers. See, e.g., *Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Publishing Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Person v. N.Y. Post Corp.*, 427 F. Supp. 1297 (E.D.N.Y.), *aff'd*, 573 F.2d 1294 (2d Cir. 1977); *Burke v. Kingsport Publishing Corp.*, 377 F. Supp. 221, 222 (E.D. Tenn.), *aff'd*, 497 F.2d 932 (1974); *Resident Participation of Denver, Inc.*

While this distinction between government-chosen and market-chosen monopolists appears to reconcile the Court's decisions,<sup>46</sup> it does not address the broader issue of monopoly power—whether it be due to economic or legal factors or whether in the print, broadcast, cable, or live media—the danger that media monopolists will exercise their market power to censor messages that they find distasteful. As medium owners they are clearly entitled to their economic property rights as guaranteed by the fifth amendment,<sup>47</sup> including the use of their property to support positions which they favor. The Supreme Court, however, recognized in *PruneYard Shopping Center v. Robins*,<sup>48</sup> that the first amendment does not protect a private medium owner's right to restrict access to its medium when it is open to public business.<sup>49</sup> Affirming a California Supreme Court ruling which inter-

v. Love, 322 F. Supp. 1100 (D. Colo. 1971); *Modla v. Tribune Publishing Co.*, 14 Ariz. App. 82, 480 P.2d 999 (Ct. App. 1971); *Bloss v. Federated Publications, Inc.*, 5 Mich. App. 74, 145 N.W.2d 800 (Ct. App. 1966), *aff'd*, 380 Mich. 485, 157 N.W.2d 241 (1968); *Poughkeepsie Buying Serv. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. Orange County 1954); *Wisconsin Ass'n of Nursing Homes, Inc. v. The Journal Co.*, 92 Wis. 2d 709, 285 N.W.2d 891 (Ct. App. 1979); *Lange*, *supra* note 4, at 25-32. *But see Uhlman v. Sherman*, 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (C.P. 1919) (an Ohio lower court held that the dependence and interest of the public in the community newspaper, particularly when it is the only one, imposes the reasonable demand that the purchase of advertising should be open to members of the public on the same basis). *But see Sky High Theatre, Inc. v. Garemer Publishing Co.*, No. 22820 (C.P. Champaign County), *reported in Bloss v. Federated Publications, Inc.*, 5 Mich. App. 74, 83, 145 N.W.2d 800, 804 (1966) (refusing to follow *Uhlman*).

46. This distinction can be used for all government chosen monopolists such as public libraries and school newspapers. *See* notes 121 & 160-62 *infra* and accompanying text.

47. The fifth amendment states that "[n]o person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

The fifth amendment applies to the states through the fourteenth amendment. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). Thus, the Court has recognized the property owner's right to exclude anyone from his property. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The rights of a newspaper publisher are "private business [i.e., economic property] rights," *Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Co.*, 435 F.2d 470, 478 (8th Cir. 1970), which are protected by the fifth amendment and permit it to exclude people from its "property." *See PruneYard*, 447 U.S. 74 (1980).

48. 447 U.S. 74 (1980).

49. The Court interpreted the cases of *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) as recognizing only a limited first amendment protection for owners of business media. Such protection

preted the state's constitution to prohibit shopping center owners from excluding speakers from their private fora,<sup>50</sup> the U.S. Supreme Court upheld the state law as a reasonable regulation of the economic property rights of the owner.<sup>51</sup> By thus recognizing that the government can use economic regulation to enhance the first amendment rights of access seekers,<sup>52</sup> the Court has provided legislatures throughout the country with an opportunity to remove many of the economic barriers to a free and open marketplace of ideas.<sup>53</sup> This Article will demonstrate that the implicit holding of *PruneYard*—that the first amendment protects messages and not media—suggests a unified theory of the amendment which can be applied to all media. To do so, however, one must first draw the distinction between medium and message.

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would include the right to "expressly disavow any connection with the message," *PruneYard*, 447 U.S. at 87. Finding that "[a]ppellants are not . . . being compelled to affirm their belief in any governmentally prescribed position or view, and [that] they are free to publicly disassociate themselves from the views of the speakers or handbillers," *id.* at 88, the Court found no violation of the forum owner's first amendment rights. *See also* *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973) (en banc) (per curiam) (recognizing the right of a university to disassociate itself from a message), discussed at note 151 *infra*; Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978), recognizing that the protection offered by *Barnette* and *Wooley* extends only where "there is a sufficient relationship between the actor and the activity to convey a reasonable impression that the actor is asserting the truth of the message carried by the activity." *Id.* at 821.

50. *Robins v. PruneYard Shopping Center*, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 447 U.S. 74 (1980).

51. 447 U.S. 74 (1980). Noting that "neither property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . ." *Id.* at 84-85 (quoting *Nebbia v. New York*, 291 U.S. 502, 523 (1934), citing *Railway Express Agency v. New York*, 336 U.S. 106 (1949)). *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3179 (1982); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978).

52. "A legislature may require private individuals to make various economic sacrifices in the interest of facilitating political or communicative activity, as in *Day-Brite Lighting Inc. v. Missouri* (342 U.S. 421 (1952), upholding law requiring employer to give employees paid time off in order to vote)." L. TRIBE, *supra* note 2, § 12-20, at 688. *See also* *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3170-71 (1982) (permitting N.Y. State to regulate the use of property to facilitate access to cable television); *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) ("[the legislation] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus [it] . . . furthers, not abridges, pertinent First Amendment values"); Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981).

53. The New York State legislature was permitted to facilitate tenants' access to cable television, although the Court required the State to provide landlords with just compensation for the property rights infringed. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982).



### III. Distinguishing Medium From Message

The separation of message from medium is easier said than done, for in the real world, a message can exist only within some medium.<sup>54</sup> This Article, however, proposes two standards to help distinguish between the pair. They are the “business/editorial” test and the “copyrightability” test. Although neither is dispositive, together they usually provide sufficient insight to permit one to distinguish between those parties who can assert first amendment rights to messages and those who are entitled only to the economic rights of the media.

#### A. The Business/Editorial Test

The first test to determine the applicability of the first amendment involves identification of the decision maker. On close examination,

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54. The medium/message distinction appears to be the one most relevant for an understanding of the first amendment’s treatment of the communications industry, although three-stage models seem more useful for general purposes. In the latter models, this author suggests that information can be seen as going through three stages:

First, the information is gathered and composed. Reporters, artists, novelists, and researchers are some of the many contributors who selectively create, discover and/or capture the raw data. Editors, directors and advertising agencies are some of those who then exercise editorial discretion in an effort to effectively serve the needs or desires of the general public or a particular target audience. It should be noted that this group earns copyrights for their work and is protected from government interference by the first amendment.

In the second stage, information is packaged and marketed by business managers, publishers, producers, and networks. They usually make their products more economically attractive to consumers by combining news content and advertising messages into single packages which are then subsidized by advertisers. As mere marketers of editorial and advertising copy this group does not earn copyrights for their work (although they may own the copyrights created by stage 1 workers) and the business decisions they make concerning distribution are not protected by the first amendment.

The third stage is distribution. Book stores, data terminals, the postal service, and broadcast transmitters and receivers are a few of the many conduits through which information is transmitted to consumers. This stage is the one most affected by technological developments and is the one changing most rapidly. *See* B. OWEN, *supra* note 3, at 12-13; CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT, chap. 2, 4-5 (1974) [hereinafter cited as WHITEHEAD REPORT].

Most media organizations act in more than one stage and such expansion into another stage is called vertical integration. Although there is a normally healthy competition in stage 1, there may be entry barriers to stages 2 and 3 (e.g., the expensive licenses required for broadcasting, *see* note 3 *supra*, or the natural monopoly characteristics of cable television distribution, *see* note 234 *infra*). As a result of the entry barriers at stages 2 and 3, one firm may enjoy monopoly control. As a stage 2 publisher, it may favor dissemination of its own product over those of its competitor. A stage 3 distributor could act in similar fashion. *See* B. OWEN, *supra* note 3, at 13-16; WHITEHEAD REPORT, *supra*, chap. 2, 5-6.

the amendment appears to protect only decisions made by editors (regarding messages),<sup>55</sup> not those made by media owners and their business staffs (concerning the use of the medium).<sup>56</sup> While there is often substantial overlap between business and editorial decisions, there are usually enough recognizable factors present to permit them to be identified as either editorial or business decisions.<sup>57</sup> Although economic realities usually deny editors the opportunity to enjoy complete freedom from business staff pressures, the *Tornillo* case held that the first amendment was meant as an absolute prohibition against government intrusion into such editorial decisions.

This same prohibition clearly does not apply to government interference with business decisions. Although the first amendment protects media business owners from being regulated out of existence,<sup>58</sup> it

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55. See notes 73-83 *infra* and accompanying text. The editorial staff is responsible for creating, developing, editing, and producing messages. Ideally, these messages are selected for inclusion in the medium's message package based solely on their "quality" or value to the target audience, P. SANDMAN, *supra* note 42, at 86-87, even if they may offend an advertiser or anger a segment of buyers. *Id.* at 137-48. While editors are subject to at least some implicit pressure to avoid antagonizing advertisers or their audience, most editorial staffs strive to maintain complete control over content (and their editorial integrity and credibility) despite business staff pressure. *Id.* at 104, 137-48. Even when their message is purely entertainment, although still protected by the first amendment, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (live adult entertainment is not unprotected by the first amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *Winters v. New York*, 333 U.S. 507, 510 (1948), writers, directors, and other artists will often fight for the right of final approval over their work so that others cannot transform their artistic and editorial creations into more commercially marketable products. See, e.g., *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976) (plaintiffs, a group of British performers called Monty Python, sought to restrain defendant from broadcasting edited versions of programs written and performed by plaintiffs).

56. A similar distinction was suggested by Circuit Judge Goldberg, dissenting in *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1087 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977).

57. Media organizations often insulate their editorial departments from business staff pressures. See P. SANDMAN, *supra* note 42, at 127. This is done normally to maintain the credibility of the editorial content. *Id.* at 137-48. While the separation is often sufficient to permit decisions to be identified as either editorial or business, it is rarely as clear as an organizational chart may show. When faced with this distinction in *Levitch v. Columbia Broadcasting Sys.*, 495 F. Supp. 649, 661-62 (S.D.N.Y. 1980), the district court judge noted that the three networks' decision to produce all of their new and documentary programs in-house was "editorial as well as economic in nature . . . [A]t least at this juncture, the challenged conduct has not been shown to be so purely editorial in nature as to exclude it from the reach of the antitrust laws." *Id.* at 661-62.

58. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) for the Court's discussion of the recognized exceptions to the principle that the press may be regulated by the government (threats to financial viability). See also *United States v. Hunter*, 459 F.2d 205, 212 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), recognizing that "a newspaper can be silenced as easily by cutting off its source of funds, as it can by enjoining its publication" (quoting appellants' brief).

does not exempt them from normal, non-discriminatory economic regulation.<sup>59</sup> The business staff and media owners normally have the right to print whatever they choose<sup>60</sup> and exclude all else, but their power to exclude is no greater than a normal property right, as protected by the fifth amendment.<sup>61</sup> Their rights to exclude are no broader than the rights of all business owners to: (1) choose those goods, services or clients with which or whom they wish to deal and

59. The media are not exempt from non-discriminatory taxation, *Girag v. Moore*, 49 Ariz. 74, 58 P.2d 1249 (1936), *aff'd on reh'g*, 64 P.2d 819, *app. dismissed*, 301 U.S. 670 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); labor laws, *Associated Press v. NLRB*, 301 U.S. 103 (1937); equal employment laws, *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976); or antitrust laws, *Associated Press v. United States*, 326 U.S. 1 (1945). There are, in fact, special cross media ownership rules, *see* Second Report and Order, 50 F.C.C.2d 1046 (1975).

Diversity in the marketplace is generally protected by the antitrust laws which prohibit undue concentrations of power. The Supreme Court eloquently articulated their application to the media in *Associated Press v. United States*, 326 U.S. 1, 20 (1945):

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests (footnote omitted).

60. As the Supreme Court observed in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976):

It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another . . . . Speech likewise is protected even though it is carried in a form that is "sold" for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money (citations omitted).

61. *See* note 47 *supra*. This dual role (editorial and financial) of the media is an unarticulated premise in a number of court decisions. *See, e.g.*, *Edwards v. National Audubon Soc'y*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (a newspaper acting as a conduit in its neutral reportage of accusation by a responsible conservation organization is privileged from defamation); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972); *Farmer's Educ. and Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (a broadcaster acting as a conduit in carrying statutorily required political messages is entitled to absolute immunity from defamation); *see* *Kreiss, supra* note 4, at 1024 n.100 (congressional ban on cigarette advertising through any electronic medium does not implicate broadcaster's first amendment rights, since the broadcaster as conduit has only lost the ability to collect revenue from others for broadcasting their commercial message).

those which they prefer to exclude,<sup>62</sup> and (2) maintain and protect the credibility that they have demonstrated concerning such choices.<sup>63</sup> These rights are not of the same character as first amendment rights.

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62. The Supreme Court has referred repeatedly to "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Reeves, Inc. v. Stake*, 447 U.S. 428, 438-39 (1980) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). In *Official Airline Guides, Inc. v. F.T.C.*, 630 F.2d 920, 927-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) the court noted that "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right." As the Supreme Court observed in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) "[o]ne of the essential sticks in the bundle of property rights is the right to exclude others." *Id.* at 82 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). Business owners decide with whom they prefer to deal by ascertaining the desires of a particular target audience. They then develop the necessary expertise to serve those needs, providing superior service to the targeted market segment. M. PORTER, *supra* note 39, at 38-40; P. SAMUELSON, *supra* note 3, at 52-53.

Nevertheless, the antitrust laws limit the rights of owners of scarce resources to restrict access to competitors. The Supreme Court has recognized the duty of such holders of monopoly power to make the resource available to all potential users on non-discriminatory terms. *See Silver v. New York Stock Exch.*, 373 U.S. 341, 347-49 (1963) (prohibiting the New York Stock Exchange and its members from denying non-member broker-dealers access to some private wire services); *Associated Press v. United States*, 326 U.S. 1, 15-18 (1945) (holding that the members of a news-gathering cooperative association could not block non-member competitors from becoming members); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 410-12 (1912) (requiring an association of railroad companies controlling access to the sole terminal facilities of a city to make them available to non-members on reasonable, non-discriminatory terms). *See also* the right of access to cable systems, discussed at note 221 *infra*. *But see* the right of access to newspapers discussed at note 45 *supra*.

When a monopolist does not restrict access to its resource to further its own monopoly power, it does not violate the antitrust laws, *see Official Airline Guides Inc.*, 630 F.2d at 927, finding that "enforcement of the FTC's order [to require access to be provided] would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry." According to Professors Areeda and Turner, even arbitrary restrictions on access merely for social, political or personal reasons technically are not violations of the present antitrust laws. *See* 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 736, at 270-76 (1978).

Such arbitrariness, however, may be prohibited by more specific legislation. The Robinson-Patman Act, (codified at 15 U.S.C. § 13 (1976)) prohibits dealers in uniform commodities from exercising discretion over the prices to charge similarly situated customers. Common carrier regulations limit the discretion that can be exercised by those designated carriers, *see* note 109 *infra*. Other access regulations may also be constitutional. *See* note 148 *infra*.

63. Any goodwill that they develop from these efforts is recognized as intangible property. *See Levitt Corp. v. Levitt*, 593 F.2d 463, 468 (2d Cir. 1979) (citing *Hanover Starr Milling Co. v. Metcalf*, 240 U.S. 403, 412-13 (1916)). Nevertheless, the first amendment does not prevent the government from undertaking reasonable regulation of this property. *See* note 59 *supra*.

## B. The Copyrightability Test

The second test to determine whether one has a message deserving of first amendment protection is to apply the abstract concept of copyrightability. Only if an action is or was capable of earning a copyright is it a message and therefore protected.

According to section 102(a) of the Copyright Act of 1976:

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . .<sup>64</sup>

The work of authorship is the copyrightable action or "message" as distinguished from the "medium" in which it is fixed.<sup>65</sup> It is therefore the actions of authors or other creative individuals which are recognized as copyrightable messages while the actions of printers and bookstore owners are recognized as mere business transactions.<sup>66</sup>

Under the test, unoriginal expressions, including phrases from the Bible or Declaration of Independence, are recognized as messages even though they are not copyrightable because they *were* capable of earning a copyright when they were original. Similarly, unrecorded extemporaneous expressions, such as street corner speeches, are recognized as messages because they *would be* capable of earning a copyright if they were fixed in a tangible medium.<sup>67</sup>

This copyrightability concept is especially useful for illuminating one particular aspect of the first amendment's treatment of message and medium. Just as a medium owner who publishes copyrighted messages may sue a copyright infringer "on behalf of"<sup>68</sup> the copyright

64. 17 U.S.C. § 102(a) (1976).

65. WGN Continental Broadcasting Co. v. United Video, 685 F.2d 218, 223 (7th Cir. 1982) ("[t]he copyright is in the programming rather than in the method by which it is transmitted"); 1 M. NIMMER, NIMMER ON COPYRIGHT §§ 2.03(c), 2.18(f), at 2-31, 2-208 (1982).

66. 17 U.S.C. § 202 (1976) states:

Ownership of a copyright, or of any of the exclusive rights under a copyright is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; . . .

67. A copyright is earned when the message is "fixed in a tangible medium." See 17 U.S.C. § 102(a) (1976).

68. It should be noted, however, that the phrase "on behalf of" is a legal fiction. It does not mean that the publisher of a message must get a writer's permission to assert the amendment on his or her behalf. Thus in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the *New York Times* could assert the first amendment rights of the writers of the Pentagon Papers even though those writers (the U.S. government) had forbidden the publication of the documents.

owner,<sup>69</sup> so may it assert first amendment rights “on behalf of” the message writer against those who would attempt to stifle publication. Such “derivative” rights allow a bookstore owner to defend an author’s books against unconstitutional obscenity laws<sup>70</sup> and a newspaper publisher to defend an advertiser’s rights against libel.<sup>71</sup>

It is important to recognize, however, that just as a publisher has no right to sue a copyright owner for infringement of the owner’s own copyright,<sup>72</sup> bookstore owners and printers cannot assert derivative first amendment rights to exclude authors, nor can a newspaper or network assert such rights against advertisers or independent producers. The ability to exclude a message from a medium is merely an economic right.

### C. Judicial Recognition of the Message/Medium Distinction

A careful examination of the language used by the Supreme Court in first amendment cases reveals an implicit recognition of the message/medium distinction. The protection provided by the amendment in those cases has been limited to editorial (copyrightable) decisions rather than economic or business (non-copyrightable) decisions,<sup>73</sup> although the Court, on occasion, has used the term “editorial” more loosely.<sup>74</sup>

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69. Presumably the publisher would receive this right to sue as the beneficial owner. 17 U.S.C. § 501(b) (1976).

70. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957).

71. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), discussed at text and accompanying note 91 *infra*.

72. Of course a copyright owner could be sued if the publisher had acquired the copyright from the owner.

73. See, e.g., *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff’d sub nom.* *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), decided by the district court for the District of Columbia, holding that the FCC’s ban on cigarette advertising did not interfere with any first amendment rights of the petitioner broadcaster. Noting that “petitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages,” the Court found that, “it is clear that petitioners’ speech is not at issue . . . . Section 6 does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights.” 333 F. Supp. at 584. See also *Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Publishing Co.*, 435 F.2d 470 (7th Cir. 1970) where the court recognized the distinction between first amendment rights and property rights.

74. The Court has at times used the word editorial very generally to include what are presumably purely business decisions. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control or judgment”) (emphasis

In the *Tornillo* case the Court observed that the

First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with *news* and *editorial content* is concerned. . . . [W]e have never thought that the First Amendment permitted public officials to dictate to the press *the contents of its news columns or the slant of its editorials*.<sup>75</sup>

Quoting from *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>76</sup> the Court went on to state:

Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on *stories or commentary originated by Pittsburgh Press, its columnists, or its contributors*. . . . [W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.<sup>77</sup>

Although in its role as a seller of space or time, a media owner is protected only by the fifth amendment, it may assert a derivative first amendment right on behalf of its advertisers or syndicated columnists. Such a right can only be claimed in *support* of these individuals' right to speak, as in the cases of *New York Times v. Sullivan*<sup>78</sup> and *Bigelow v. Virginia*.<sup>79</sup> The first amendment does not allow the medium owner—as a conduit owner—to exclude the messages of others.<sup>80</sup> As the Court observed in *Pittsburgh Press*:

[I]s the conduct of the newspaper with respect to the employment want ad entitled to a protection under the First Amendment? . . . Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of

added). *But see* Wisconsin Ass'n of Nursing Homes, Inc. v. The Journal Co., 92 Wis. 2d 709, 713-14, 285 N.W.2d 891, 894-95 (Ct. App. 1979) (“[t]he degree of judgmental discretion which a newspaper has with regard to refusing advertisements is not distinguishable, for purposes of first amendment analysis, from the degree of discretion it has as to the content of any other editorial materials submitted for publication”).

75. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259-61 (1974) (White, J., concurring) (emphasis added).

76. 413 U.S. 376 (1973).

77. *Id.* at 391 (emphasis added).

78. 376 U.S. 254 (1964). For a discussion of *New York Times v. Sullivan*, see note 91 *infra*.

79. 421 U.S. 809 (1975) (managing editor of a newspaper had sufficient first amendment interest to challenge a state statute which prohibited advertisements encouraging the procurement of an abortion).

80. A medium owner's right to exclude is purely an economic right, see note 11 *supra*.

the advertisement and in those cases, the scope of the newspaper's First Amendment protection may be affected by the content of the advertisement.<sup>81</sup>

Nevertheless, recognizing that the decision by the plaintiff publisher was a business judgment rather than an editorial judgment, the Court went on to hold:

As for the present case, we are not persuaded that either the decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there lifts the newspaper's actions from the category of commercial speech.<sup>82</sup>

The Supreme Court has made it very clear that in their business function, media owners have no first amendment rights to exclude the messages of others. As it stated eloquently in *Associated Press v. United States*:<sup>83</sup>

Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

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81. 413 U.S. 376, 386 (1973).

82. *Id.* at 387. The use of the phrase commercial speech instead of the presumably more accurate description "business judgment" seems to be indicative of the difficulty the Court was having with the commercial speech doctrine in 1973, three years before it was clarified in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Prior to that decision, "commercial speech, that is, expression related solely to the economic interests of the speaker and its audience . . . [or] speech proposing a commercial transaction," *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980), appeared to be unprotected. *Virginia Bd.*, 425 U.S. at 758. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Breard v. Alexander*, 341 U.S. 622, 642-43 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In *Valentine*, the Court refused to enjoin an ordinance restricting the distribution of commercial advertising. It properly recognized that, as a medium for distributing advertisements, the distributor was merely functioning as a business retailer with no first amendment rights, but rather subject to reasonable economic regulation. *Id.* at 55. Unfortunately, the Court failed to recognize that in his function as the creator of the message the distributor was entitled to first amendment protection. The Court did not recognize this right to protection until *Virginia Board*, where the Court held that even speech which did no more than propose a commercial transaction was entitled to first amendment protection. 425 U.S. at 762.

83. 326 U.S. 1, 20 (1945).



#### IV. The Theory

Once message and medium have been distinguished, they can be considered the software and hardware of the communications process, respectively. This computer-age terminology can then be used to represent a new theory of the first amendment. The amendment can be reinterpreted as guaranteeing three fundamental rights prohibiting unnecessary governmental interference with messages: free access to all *output* offered in the media (receipt of all information provided by willing speakers); freedom to *process* that output (thought); and freedom to provide *input* to the media (access permitting expression of one's thoughts).<sup>84</sup>

##### A. Freedom of Thought

Freedom of thought is absolute.<sup>85</sup> It is a right to self-edit one's personal values without governmental interference. The first amendment prohibits the government from interfering with the content of

84. Traditionally, courts and scholars have recognized that the first amendment is at least a negative limitation on government action. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 3-35 (1947). Whether the amendment imposes any affirmative obligations is less clear. See note 52 *supra*.

85. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("at the heart of the First Amendment is the notion that an individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); *Elrod v. Burns*, 427 U.S. 347, 356-57 (1976) (quoting *Barnette*, 319 U.S. at 624) ("[n]o official . . . can prescribe what shall be orthodox in . . . matters of opinion . . ."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) (preventing the unlimited display of obscene material is not thought control); *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969) ("[t]he assertion that the State has the right to control the moral content of a person's thoughts . . . is wholly inconsistent with the philosophy of the First Amendment"); *Abington School Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring) ("the rights of conscience . . . will little bear the gentlest touch of governmental hand"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (expulsion of school children who had refused to salute the flag and pledge allegiance held to violate first and fourteenth amendments); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) ("[f]reedom to believe . . . is absolute . . ."); L. TRIBE, *supra* note 2, §§ 15-5 to 15-8, at 899-913; note 1, *supra*.

It is clear that the Court has appreciated the consequences of this absolute status. *McDaniel v. Paty*, 435 U.S. 618, 627 n.7 (1978) ("[t]he absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the scope of that protection since to do so might leave government powerless to vindicate compelling state interests").

This absolute status is consistent with the laws of criminal and civil conspiracy whereby a defendant cannot be convicted for thoughts alone; an overt act is required. *United States v. Wiesenberger*, 604 F.2d 326, 335 (5th Cir. 1979); *Nalle v. Oyster*, 230 U.S. 165, 182 (1913). It is also consistent with the Court's holding that one cannot be committed to an insane asylum merely for one's thoughts, unless one is dangerous to others. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

one's thoughts and thus represents a right to personal integrity in one's mind.<sup>86</sup> It includes the freedom to select any political, economic, religious, or artistic value whatsoever (a right of inclusion)<sup>87</sup> as well as a right to reject any or all others (a right of exclusion).<sup>88</sup> In the marketplace of ideas one is free to choose according to self-established standards and one's formulation of a "preferred personality" (a personal "software package" to one's taste) cannot be regulated by the government. It was this personal prerogative of individuals to edit and exclude messages of others from their own "software packages" which was implicitly recognized by the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*, where it was unanimously held that the government must leave editing to editors.<sup>89</sup>

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86. See notes 87-88 *infra*.

87. See *McDaniel v. Paty*, 435 U.S. 618 (1978) (free exercise of religion considered a right of inclusion which could not disqualify a person from political participation); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) ("[m]ost exercises of individual free choice—those in politics, religion and expression of ideas—are explicitly protected by the Constitution"); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (the States' broad power to regulate obscenity does not extend to possession of obscene material by an individual in his own home). The government's employment decisions can be influenced by such beliefs, but only when the beliefs are relevant to the position. See *Branti v. Finkel*, 445 U.S. 507, 517 (1980) ("[i]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental efficiency and effectiveness") (citing *Elrod v. Burns*, 427 U.S. 347, 366 (1976)); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating statute barring teachers from employment in the schools merely on the basis of membership in "subversive" organizations).

88. See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("[t]he First Amendment protects the rights of individuals . . . to refuse to foster . . . an idea they find morally objectionable"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper's right to exclude letter to editor not subject to state regulation); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (appointee denied public office due to refusal to declare belief in God, held invasion of first amendment freedom of belief); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

89. 418 U.S. 241 (1974).

The choice of material to go into a newspaper, and the decision made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.

*Id.* at 258.

If the *Tornillo* decision is interpreted in this way it no longer appears that the Court's statement "is so sweeping that it is hard to believe that the Court could possibly mean what it said." Karst, *supra* note 6, at 50. This freedom also prohibits the government from favoring one set of beliefs over another. "If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can

## B. Freedom of Expression and Receipt of Information

The unrestricted right to think becomes almost meaningless, however, without the right of expression and the complementary right of receipt of information.<sup>90</sup> A message can hardly be said to exist until it

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prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). *But see* note 98 *infra*.

Such preference is usually litigated under the establishment of religion clause. U.S. CONST. amend. I. *See, e.g.*, *Walz v. Tax Comm'n*, 397 U.S. 644 (1970) (New York City tax exemptions to religious organizations held valid); *Engel v. Vitale*, 370 U.S. 421 (1962) (state officials prohibited from composing official state prayer and requiring its recitation in state public schools); *Zorach v. Clauson*, 343 U.S. 306 (1952) (program permitting public schools to release students during school hours to attend religious instruction held valid); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979) (discussing the wider scope of the establishment clause). L. TRIBE, *supra* note 2, § 12-4, at 590, and Emerson, *supra* note 52, at 801-02, have criticized the effort to extend the scope of the clause in order to prohibit government from favoring one set of non-religious personal beliefs over another.

Freedom of thought has been mentioned with respect to public funding of potential candidates, *Buckley v. Valeo*, 424 U.S. 1 (1976) (discussed at note 52 *supra*) and the use of mandatory union dues for political purposes, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *I.A.M. v. Street*, 367 U.S. 740 (1971) (particularly Black, J., dissenting, *id.* at 788); *Lathrop v. Donahue*, 367 U.S. 820, 865, 877 (1961) (Black & Douglas, JJ., dissenting); I. BRANT, *JAMES MADISON: THE NATIONALIST* 354 (1948) ("to compel a man to furnish contributions of money for the propagation of opinion which he disbelieves, is sinful and tyrannical"); the Virginia Statute of Religious Liberty, "drafted in 1786 by Thomas Jefferson, ushered through the legislature by James Madison, and an important part of the 'generating background' of the First Amendment"; B. SCHMIDT, *supra* note 10, at 31 (citing *DOCUMENTS OF AMERICAN HISTORY* 125 (H. Commager 4th ed. 1948)). Furthermore, the jurisdiction of the government is limited on such matters as identifying believers; *see Shelton v. Tucker*, 364 U.S. 479 (1960) (state statute requiring teachers in state supported schools to list every organization they belonged to, without limitation, held invalid); *Talley v. California*, 362 U.S. 60 (1960) (upsetting convictions based on an ordinance which banned the distribution of handbills which did not carry the name and address of the author, printer, and sponsor); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (reversing a civil contempt judgment against NAACP for refusing to disclose its membership list); L. TRIBE, *supra* note 2, § 12-23, at 707-08; the validity of beliefs; *United States v. Ballard*, 322 U.S. 78, 86-87 (1944), although sincerity can be considered and personal beliefs may somehow be distinguished from political beliefs; *Gillette v. United States*, 401 U.S. 437, 454-560 (1971); application of beliefs within religious association; *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial*, 393 U.S. 440, 449 (1969); or application of beliefs within political association; *see, e.g.*, intra party disputes over the seating of convention delegates, *Cousins v. Wigoda*, 419 U.S. 477, 487-91 (1975); *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972); *Graham v. Fong Eu*, 403 F. Supp. 37 (N.D. Cal. 1975), *aff'd*, 423 U.S. 1067 (1976).

90.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases,

has been communicated. The right of expression, however, is not as broad as the right to think, because it may conflict with other rights established by the Constitution.<sup>91</sup> By contrast, freedom of thought is

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. . . *Lamont v. Postmaster* . . . *Kleindienst v. Mandel*, . . . [and] *Procur-  
nier v. Martinez*.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, 756-57 (1976) (footnotes and citations omitted) (there are numerous other expressions to the same effect in the Court's decisions). *See also* Board of Educ. Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799, 2808-09 (1982) (action contesting Board of Education's removal of certain books from public school libraries). For a more detailed discussion of the right to receive information, *see generally* A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* (1948); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Note, *supra* note 6; Note, *Constitutional Ramifications of a Repeal of the Fairness Doctrine*, 64 GEO. L.J. 1293, 1309-14 (1976).

91. *See* note 1 *supra*. Some specific values which can conflict with freedom of expression are: (1) national security and public order, *see, e.g.*, *New York Times v. United States*, 403 U.S. 713 (1971) (the United States, in seeking to enjoin publication of classified material failed to meet "heavy burden" of prior restraint justification); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent or lawless action and is to incite or produce such action"); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.) (preliminary injunction granted to prohibit publication of magazine article containing restricted data concerning the hydrogen bomb), *appeal dismissed*, 610 F.2d 819 (7th Cir.), *motion for reconsideration dismissed*, 486 F. Supp. 5 (W.D. Wis. 1979); (2) personal reputation, *see, e.g.*, *Herbert v. Lando*, 441 U.S. 153 (1979) (where member of the press is alleged to have circulated damaging falsehoods and is sued for injury to reputation of public figure who is required to prove actual malice, first amendment does not bar plaintiff from inquiring into editorial process); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (*New York Times* standard is applicable to private figure); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) ("[t]he Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct . . . [by] requiring proof of actual malice"); (3) personal property in creations or performances, *see, e.g.*, *Zacchini v. Scripps Howard*, 433 U.S. 562 (1977) (broadcast of a performer's act may appropriate a substantial portion of the value of that performance); *International News Service v. Associated Press*, 248 U.S. 215 (1918) (enjoining INS from appropriating the commercial value of AP's news by copying it from AP bulletin boards); U.S. CONST. art. 1, § 8, cl. 8, codified in U.S.C. Title 17 (copyright law); (4) personal privacy, *see, e.g.*, *Wolston v. Reader's Digest*, 443 U.S. 157 (1979) (plaintiff who is not a public figure need not comply with *New York Times v. Sullivan* standard in a libel action); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 487 (1975) ("there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity"); (5) fair administration of justice, *see, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (avoidance of a tainted trial justified restraint of the press); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (first amendment does not afford news reporter privilege to refuse answering grand jury questions); *Cox v. Louisiana*, 379 U.S. 559, 562-63 (Cox II) (1965) ("[a] State may adopt safeguards . . . to assure that the administration of justice at all stages is free from outside control and influence. . . . [Such safeguards do not] infringe upon the . . . protected rights of free speech . . ."); *Wood v. Georgia*, 370

absolute precisely because it does not conflict with any other constitutional right.

If expression of a message will not violate some other overriding constitutional value, the message can be shared freely with others. To do so, however, it must have access to a medium.<sup>92</sup> Freedom of association and the right to the free exercise of religion have traditionally guaranteed such access,<sup>93</sup> but there has been controversy over the rights of access to both government and privately owned media, as discussed earlier. This Article will now offer a resolution of this difficult issue. The traditional categories of first amendment freedoms, speech, press, religion, and association, will not be treated as separate guarantees, but rather as parts of a unified whole.<sup>94</sup>

U.S. 375 (1962); (6) integrity of political campaigns, *see, e.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (state statute prohibiting business corporations from making contributions in order to influence voters held to violate first amendment even though purpose was to prevent electoral process corruption); *Buckley v. Valeo*, 424 U.S. 1 (1976) (Federal Election Campaign Act provision for disclosure, record keeping and contributions by taxpayers held not to violate first amendment); *Mills v. Alabama*, 384 U.S. 214 (1966) (state statute prohibiting publication of editorial urging people to vote held to violate first amendment even though purpose of statute was to protect public from confusing last minute charges); (7) public decency and morality, *see, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (use of "obscene" or "vulgar" words in broadcast may be regulated by the government after the fact); *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (municipality's licensing and zoning ordinance concerning "adult" theaters held not to violate first amendment); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) ("obscene material is not protected by the first amendment . . ."); (8) truth in commercial speech, *see, e.g.*, *Friedman v. Rogers*, 440 U.S. 1 (1979) (state statute regulating content of optometry advertisement held valid). These values, in certain circumstances, may outweigh the right of expression. See L. TRIBE, *supra* note 2, §§ 12-2 to 12-36, at 580-734 for a discussion of the ways government can "abridge" freedom of speech, based on the impact of the speech (which Tribe calls "track 1" abridgements).

92. As Justice Brennan eloquently observed, dissenting in *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*:

freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communications, the right to speak would ring hollow indeed.

412 U.S. 94, 193 (1973).

93. "What the Court *has* recognized as implicit in the first amendment, and therefore in the liberty secured by the fourteenth, is a *right to join with others to pursue goals independently protected by the first amendment*—such as political advocacy, litigation (regarded as a form of advocacy) or religious worship." L. TRIBE *supra* note 2, § 12-23, at 702 (footnotes omitted). Thus, the right of free association guarantees that individuals will be able to communicate ideas (i.e. messages) via a medium (conversation, printed matter, meetings, house of worship) to others interested in similar ideas.

94. Although cases concerning religious beliefs are normally separated from non-religious beliefs cases in law school textbooks, *see* G. GUNTHER, *CONSTITUTIONAL*

### C. Freedom of Access to the Media

All first amendment cases can be placed in one of three categories: the absolute freedom to think,<sup>95</sup> the qualified freedom to express/receive<sup>96</sup> and the qualified right of access to the media.<sup>97</sup> Cases may be decided under a simple procedure. If the case concerns the freedom to think, it belongs in the first category and the first amendment acts as an absolute prohibition. No governmental body can interfere in one's choice of which messages to include or exclude from one's own software creation.<sup>98</sup>

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LAW (9th ed. 1975), (in which ch. 12 contains a discussion on freedom of expression for such beliefs as political speech, while ch. 14 contains a discussion on free exercise of religious beliefs, *id.* at 1040-1259, 1452-53), the task of distinguishing between beliefs appears unmanageable. As Professor Galanter notes: "The Court has broadened its notion of religion to include all beliefs which are sincere, meaningful, and paramount in the lives of their holders." Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WISC. L. REV. 217, 255-64. See *Welsh v. United States*, 398 U.S. 333, 358 n.9 (1970) (Harlan, J., concurring); *United States v. Seeger*, 380 U.S. 163, 187 (1965); *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1969), all discussed in L. TRIBE, *supra* note 2, § 14-6, at 826-33.

As for the historical differences between religious and non-religious speech, Professor Benno Schmidt has noted:

Some historical evidence suggests the founding fathers may have considered both freedom of expression and freedom of religious conscience . . . to be based on an integrated conception of individual autonomy in matters not appropriate for government regulation . . . . Moreover, Jefferson's and Madison's concerns with political and religious freedom went hand in hand, and there are hints in their writings that constitutional protections of religious liberty have parallels with respect to political expression.

B. SCHMIDT, *supra* note 10, at 32. Still the Court recognized distinct historical origins in *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976).

Some have claimed that the Speech and Press Clauses are separate and distinct. See Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979). But the concept of a distinct and independent press clause appears weak. See Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975); Lewis, *A Preferred Position For Journalism?*, 7 HOFSTRA L. REV. 595 (1979).

95. See text accompanying notes 85-89 *supra*.

96. See text accompanying notes 90-93 *supra*.

97. See text accompanying notes 14-53 *supra* & 116-240 *infra*.

98. No governmental body can determine what views one must affirm in public. See *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *But see* note 49 *supra*. In fact, the government cannot speak in support of one set of beliefs nor force citizens to subsidize such speech, unless it is necessary to the performance of governmental duties. The ability of the government to speak has been recognized in *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 697-716 (1970); Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980); Yudof, *When Government Speaks: Towards a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980); *see also* the limitations imposed by the establishment clause, discussed at note 89 *supra*.

If the case involves expression, then one must determine whether the government has restricted a message because of its content. If so, it belongs in the second category and the Court must decide whether the restrictions are necessary for the protection of some other constitutionally protected value.

If the case involves restrictions on access to a medium/forum then it belongs in the third category. The remainder of this Article will examine this area in depth. It will be argued that not only does the first amendment forbid the imposition of unreasonable regulations on access to fora controlled directly by the government<sup>99</sup> or by users selected by the government,<sup>100</sup> but that *the amendment permits, and probably even supports,*<sup>101</sup> *the imposition of economic regulations to facilitate access to all media,*<sup>102</sup> *including privately owned newspapers.*<sup>103</sup>

Cases falling in the category of qualified right of access to the media require courts to address two primary issues.<sup>104</sup> First, they must examine any legislatively imposed regulations concerning the *scope* of access to the forum.<sup>105</sup> The presumption would be that all fora con-

99. For example, public streets and parks, *see* note 106 *infra*; public theaters, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); military bases, *Flower v. United States*, 407 U.S. 197 (1972); *Greer v. Spock*, 424 U.S. 828 (1976).

100. For example, broadcasters, *see* notes 164-93 *infra*; public libraries, *see* note 121 *infra*; public school curriculums, *see* note 120 *infra*.

101. *See* note 52 *supra*.

102. Access to the individual media is discussed at notes 116-240 *infra* and accompanying text.

103. Regulating access to this medium, however, must be clearly distinguished from regulating access to a newspaper's messages, which is absolutely prohibited. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). *See* notes 139-51 *infra* and accompanying text for a further discussion of this topic.

104. Different commentators use different terms when discussing the two issues (i.e., *scope* of access permitted or *viewpoints* permitted). Professor Tribe distinguishes between regulations of the *type* of speech and regulations based on *position* taken within any type. L. TRIBE, *supra* note 2, § 12-21, at 692. Professor Stone makes this same distinction. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 99 (1978). *See also* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1143 (1974) (suggesting such a distinction). Professor Emerson calls the two issues the *macro* and *micro* levels of consideration. Emerson, *supra* note 52, at 813. *See also* Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L. J. 247 (1976) (discussing the inadequacy of the Court's decision concerning access to public fora).

105. This is the question of *type* of speech restricted or the *macro* question, as discussed in note 104 *supra*. The question concerns the suitability of limiting access to a narrower scope of users than the general public. Clearly access to the oval office of the White House could be limited to serve a compelling governmental function. To a lesser degree a public theater might constitutionally "devote an entire season to Shakespeare," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 573 (1975)

trolled by the government directly or by those selected by the government should be open to all (as required under traditional public forum doctrine)<sup>106</sup> unless the primary uses to which the public property is normally put require that some restrictions be made on their use by speakers.<sup>107</sup> For privately controlled media,<sup>108</sup> the presumption would be that the media owner could impose any and all limitations on the scope of access to its forum unless its monopoly power became so great that the legislature felt compelled to mandate some more general expanded (e.g. common carrier) access requirements.<sup>109</sup> To

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(Rehnquist, J., dissenting) or "reserve its auditorium for productions suitable for exhibition to all the citizens of the city, adults and children alike," *id.* at 569 (White, J., dissenting), or devote a season to opera as discussed in Karst, *supra* note 104, at 254. Access to government property can be limited whenever such access would threaten the purpose of the government function, such as security at a jailhouse, *Adderley v. Florida*, 385 U.S. 39 (1966), and political neutrality at a military base. *Greer v. Spock*, 424 U.S. 828, 838-89 (1976).

106. The doctrine of "traditional" public fora was first set out in *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939) ("[s]treets and parks . . . have . . . been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing . . . . [U]se [of] the streets and parks . . . may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience . . . but it must not, in the guise of regulation, be abridged or denied"), and was further developed in such cases as *Greer v. Spock*, 424 U.S. 828, 836 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1973); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Adderley v. Florida*, 385 U.S. 39, 41 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Jamison v. Texas*, 318 U.S. 413, 414-16 (1943); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Schneider v. State*, 308 U.S. 147, 163 (1939). *See also* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Note, *supra* note 2, at 1415-31.

107. Professor Stone discusses the need for such a balancing of interests, *see* note 104 *supra*, which the Court has seemed to recognize, *see Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring), as does Professor Karst, *see* note 104 *supra*, at 256.

108. That is, those media owned by individuals who owe their existence to survival in the marketplace rather than receipt of government license. *See* note 36 *supra*.

109. Normally, full economic rights to enter a market and exercise discretion over whom and what to deal with are granted to all businessmen subject only to the antitrust laws and Federal Trade Commission regulations. *See* note 62 *supra*. Nevertheless, if it appeared that a market would be most efficiently served by a single firm, legislative regulation of entry and access could be justified.

Apparently feeling that competition would be wasteful and inefficient, the government restricted entry into telephone service, 47 U.S.C. § 203(c) (1976), *see* Walters, *Freedom for Communications in INSTEAD OF REGULATION* 116-28 (R. Poole ed. 1982), and mail delivery, 18 U.S.C. § 1696 (1976), 39 U.S.C. §§ 601, 604 (1976), *see* National Ass'n of Letter Carriers v. Independent Postal Sys. of America, Inc., 470 F.2d 265 (10th Cir. 1972); Priest, *The History of the Postal Monopoly in the United States*, 18 J. L. & ECON. 33 (1975), even though there may never have been a natural monopoly in either.



decide the validity of such legislative regulation of access for either public or private fora, courts would balance the necessity or usefulness of specialized scope restrictions<sup>110</sup> against the availability of alternative fora.<sup>111</sup>

Assuming that the court had approved the reasonableness of the scope regulation, it would still have to examine any legislative time,

When "natural" monopolies are recognized and entry is prohibited to all but the designated monopolist, the monopolist is normally required to provide universal service as a common carrier. The Communications Act defines a common carrier as "any person engaged as a common carrier for hire . . ." 47 U.S.C. § 153(h) (1976). The circularity of this definition has led the FCC and the courts to redefine the term.

A common-carrier service in the communications context is one that "makes a public offering to provide [communication facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . . A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal."

FCC v. Midwest Video, 440 U.S. 689, 701 (1979) (citations omitted). Originally common carrier regulation was imposed on any business which held itself out to serve the general public, e.g., modes of public transportation and accommodations. For a review of the history and development of common carrier treatment and the conclusion that it was a response to market power in a service essential to the public, see National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 640-42 (D.C. Cir. 1976); Competitive Carrier Rulemaking, 84 F.C.C.2d 445, 520-34 (1981); but see Comment, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409 (1981) questioning that conclusion.

Statutory common carrier status has been imposed on local telephone and telegraph companies, *United States v. Radio Corp. of America*, 358 U.S. 334, 349 (1959); 47 U.S.C. § 153(h) (1976), and the postal service has been obligated to observe similar standards also. See note 136 *infra*. Satellites are also regulated as common carriers, see note 189 *infra*.

110. Although restrictions on scope may never be absolutely necessary, their tremendous value often creates a compelling need for them, see Canby, *supra* note 104, at 1133. Thus, Professor Karst, commenting on the need for editorial discretion by a student newspaper editor, recognizes that "[n]early everyone would agree that a newspaper without an editor would not be . . . so much a newspaper as a printed bulletin board . . . . [A]n editorial function is necessary to carry on a 'real' school newspaper . . . ." Karst, *supra* note 104, at 256.

In *Avins v. Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), the Third Circuit, quoting the trial judge with approval, noted, "the Editorial Board [of a state school's law review] must be selective in what it publishes." Restrictions on scope are similarly necessary for school curriculums, see note 120 *infra*, public libraries, see note 121 *infra*, and live public fora, see note 118 *infra*.

111. The availability of alternative media for communication is a consideration that the Court has recognized in *Greer v. Spock*, 424 U.S. 828, 839 (1976) (no requirement to allow political candidates to speak at military base where base personnel were free to attend political rallies off base); *Pell v. Proconier*, 417 U.S. 817, 827-28, 830 (1974) (no first amendment requirement to allow interviews with specified inmates where inmates retained alternative means of communication with outside world); *Saxbe v. Washington Post*, 417 U.S. 843, 846-47 (1974); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 566 n.12 (1972) (surrounding public roads of privately owned shopping center provided adequate alternative for distributing handbills).

place and manner regulation<sup>112</sup> that were imposed on the use of the forum to insure that speakers could not be excluded because of the *viewpoints* that they expressed.<sup>113</sup>

To understand the full implications of this theory, it is necessary to examine each segment of the communications industry individually.<sup>114</sup> Economic regulation of public and private media can be used to facilitate access. Such regulation, however, must be carefully distinguished from those which intrude into the editorial content of messages. The latter intrusions are absolutely prohibited by the first amendment.<sup>115</sup>

## V. The Media

### A. Live Media: Public & Private Fora

Access to public fora cannot be denied to any speakers on the basis of the viewpoints which they express.<sup>116</sup> This mandatory right of access extends to all suitable government facilities,<sup>117</sup> although the

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112. For a discussion of time, place and manner regulations, see *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“[t]he nature of a place, ‘the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable’ . . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 251-52. This issue is the “viewpoint,” “micro” or “position” issue discussed in note 104 *supra*.

113. See note 116 *infra*.

114. Differences in the characteristics of new media justify differences in the first amendment standards applied to them, *Red Lion*, 395 U.S. at 386 n.15 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

115. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). “If officials can tell newspapers what to put into their editorial pages . . . it is only a step to tell them what to leave out.” Z. CHAFFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 709-10 (1965). See also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977) (citing *Tornillo*). The courts have recognized that the antitrust laws are not applicable to messages. See *Levitch v. Columbia Broadcasting Sys.*, 495 F. Supp. 649, 661 (S.D.N.Y. 1980) (“it was not the intent of Congress that political and other First Amendment protected conduct be within the scope of the antitrust laws”) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *Missouri v. National Org. of Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980)).

116. “There is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard . . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.” *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972). See also *Kalven*, *supra* note 106 (proposing the concept of a public forum).

117. This includes both traditional public fora like streets and public parks, see note 106 *supra*, and other government facilities suitable for communications, such as public transportation terminals and vehicles, see, e.g., *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975)

scope (or type) of speech permitted can be limited for compelling governmental reasons.<sup>118</sup> When the advantages of limiting scope lead the government to delegate the duty to choose speakers to only one or a small group of persons, selection of such delegates may not be made on the basis of an applicant's political viewpoints,<sup>119</sup> nor may the chosen delegates abuse their delegated discretion by arbitrarily denying opposing viewpoints access to their forum. This kind of "fairness doctrine" applies to school teachers,<sup>120</sup> library officials,<sup>121</sup> distributors

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(airport); *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (schools); *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973) (school information distribution systems); Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CALIF. L. REV. 132 (1966); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (public meeting of City Board of Education); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theaters); *Flower v. United States*, 407 U.S. 197 (1972) (*per curiam*) (military reservation); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (State House grounds); *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974) (welfare office); *United States Servicemen's Fund v. Shands*, 440 F.2d 44 (4th Cir. 1971) (public auditoriums). *But see* *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (transit system held not to be an open space or public place for which first amendment guarantees access for all). Still, *Lehman* has been criticized severely, *see, e.g.*, Karst, *supra* note 6, at 34-36, Shiffrin, *supra* note 98, at 579-81, Stone, *supra* note 104, at 95-96. Even Justice Blackmun, author of the opinion, has since interpreted it to have turned on the "captive audience" problem. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975).

118. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (limits on political speech were necessary to avoid violating the political neutrality of an Army base); *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632 (D.R.I. 1976) (restricting use of Old State House was necessary to preserve its bicentennial-related theme). *See also* note 110 *supra* (discussing the need for restrictions of scope).

119. An example of such a situation would be the selection of teachers for public schools. For the sake of coherence, only a small group of teachers can speak with a class. The group which selects teachers may not make its decision on the basis of an applicant's viewpoints. *See* *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (where an untenured teacher did not have his contract renewed, he could still establish a claim for reinstatement if the decision not to rehire was based on his exercise of first amendment freedoms); discussed in note 124 *infra* and accompanying text.

120.

Implementation of the constitutional obligation of the government to maintain an open system of public education involves the principle of balanced presentation . . . . In essence, it requires that, in designing curriculum, adopting text books, prescribing classroom plans, and making similar policy decisions, the school authorities must provide a fair coverage of the information, ideas, opinions, and approaches to the subject matter involved.

*Emerson, supra* note 52, at 840-42. *See* *Board of Educ. Island Trees Union Free School Dist. v. Pico*, 102 S. Ct. 2799, 2806-07 (1982) ("[w]e have necessarily recognized that the discretion of the States and local school boards in matters of education

of government grants,<sup>122</sup> and state university presidents.<sup>123</sup> Choices must be made according to reasonable standards which can be applied evenhandedly.<sup>124</sup>

must be exercised in a manner that comports with the transcendent imperatives of the First Amendment"); Note, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485 (1979).

121.

Petitioners rightly possess significant discretion to determine the contents of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner . . . . Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions . . . . In brief, we hold that the local school boards may not remove books from library shelves merely because they dislike the ideas contained in those books . . . .

Board of Educ. Island Trees Union Free School Dist. v. Pico, 102 S. Ct. 2799, 2810 (1982); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) ("[n]either the State . . . nor the Board . . . could place conditions on the use of the library which were related solely to the social or political tastes of school board members"); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979) (removal of *Ms. magazine* because of its feminist viewpoint violates the first amendment); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978) (library staff could not remove student publication from the shelves).

122. See, e.g., *Advocates for the Arts v. Thomson*, 532 F.2d 792, 798 n.8 (1st Cir.) ("distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause, if not the first amendment . . ."), *cert. denied*, 429 U.S. 894 (1976); *Sefick v. City of Chicago*, 485 F. Supp. 644, 651 (N.D. Ill. 1979) (once a city had given an artist a permit to exhibit his work in a public building, it could not revoke the permit on the ground that the work satirized the mayor); *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 1052-64 (1972).

123. See, e.g., *Brooks v. Auburn Univ.*, 412 F.2d 1171 (5th Cir. 1969) (requiring a state university to pay an honorarium and travel expenses to a speaker whose invitation was withdrawn by the university president because of what the speaker might say).

124. The evidentiary standard established by the Supreme Court in *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977) places the burden on plaintiffs to show that unconstitutional motivations were a "substantial" or "motivating" factor in the defendants decision. Once that threshold is met, the burden shifts to the defendants and they must show that the decision would have been the same if the improper factor had not been considered. See also *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) (rejecting "a system lacking in constitutionally required minimal procedural safeguards"); *Muir v. Alabama Educ. Television Comm'n*, 662 F.2d 1110 (1981), *aff'd*, 688 F.2d 1033, 1044, 1050 (5th Cir. 1982) (en banc) (Rubin, J., concurring) ("[i]f the state is conducting an activity that functions as a marketplace of ideas, the Constitution requires content neutrality"), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 8, 1983) (No. 82-1185); *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632, 640 n.9 (D.R.I. 1976) ("[t]he most troublesome aspect of the limited public forum approach, of course, would be the necessity to define the 'limits' of the forum, i.e., the general purposes for which it is made available, with enough precision that it could be applied even-handedly, without being used as a shield to cover censorship of expression that should fall within the scope of even the limited public forum").

Owners of private media such as theaters, parks and shopping centers have normal property rights which are usually sufficient to permit them to enjoy exclusive use of their media.<sup>125</sup> Nevertheless, as their rights are not of first amendment character,<sup>126</sup> the government may regulate them to provide greater first amendment rights for speakers.<sup>127</sup> If government regulations constitute a taking of property, then the property owner is entitled to just compensation for the property taken.<sup>128</sup> Further, if the owner of private property appears to have a monopoly over a forum, as in the case of a "company town"<sup>129</sup> or a privately held primary election,<sup>130</sup> the government may constitutionally impose common carrier type access requirements<sup>131</sup> upon such quasi-public monopolists.

### B. Printing: Presses & Periodicals

Access to printing presses has not been a significant problem in Anglo-American history since 1694 when England abandoned licens-

125. See note 62 *supra*.

126. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Media owners do have first amendment rights to disassociate themselves from the views expressed on their property. See note 49 *supra*.

127. See note 52 *supra*. Common carrier regulation might be imposed if, for example, a legislature feared the power of monopoly movie theaters in small towns. See note 109 *supra*.

128. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982) discussed at note 53 *supra*; U.S. CONST. amend. V. Regulations permitting labor picketing usually do not constitute a "taking." See, e.g., *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543-45 (1972) (property rights may permit exclusion of union organizers); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (same); *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940). For cases discussing an employee's right of access to an employer's property, see generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571-76 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976); *Holland Rantos Co.*, 234 N.L.R.B. 726, *enforced*, 583 F.2d 100 (3d Cir. 1978); *Hudgens v. NLRB*, 230 N.L.R.B. 414 (1977). Similarly, the regulations in *PruneYard* were not considered to have reached the threshold of a "taking." *PruneYard Shopping Center v. Robins*, 447 U.S. at 82-84.

129. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (where a town is privately owned by a company, its sidewalks are similar to public forum so that the first amendment requires the channels of communication to remain free).

130. Private property as used in this context is defined as the right to exclude others from access to a particular forum. See notes 47 & 62 *supra*. In the case of a privately held primary election, the owner of the forum where the ballot box is physically located possesses the right to exclude. *Id.* Although the owner may delegate that right to exclude to a political party, the state has the power to regulate a political party's exercise of such a right. See *Nixon v. Condon*, 286 U.S. 73, 85 (1932) ("[w]hatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State"). L. TRIBE, *supra* note 2, §13-23, at 790; Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735, 766-67 (1974); *Developments in the Law-Elections*, 88 HARV. L. REV. 1111, 1159-63 (1975).

131. See note 109 *supra*.

ing of the press.<sup>132</sup> While some of the original thirteen colonies had inhibiting press laws,<sup>133</sup> none survived the Constitution.<sup>134</sup>

Since a printer is paid solely to print, no editorial discretion is involved in its role and there is no basis for the printer to claim a direct first amendment right to exclude.<sup>135</sup> As the owner of a medium, a printer possesses only normal property rights. It can select which material to accept for publication and which to refuse, but this creates no control over the copyright; it merely enables the printer to serve a specialized clientele.

If there ceased to be sufficient marketplace competition and the few printers or other distributors serving the mass market enjoyed censorial power, then those printers or owners of bookstores, newsstands or entire integrated distribution systems could presumably be regulated as common carriers, in a manner similar to the post office,<sup>136</sup> without abridging any first amendment freedoms.<sup>137</sup> Present economic conditions, however, do not appear to require any such measures.<sup>138</sup>

Most periodicals also function as media for the messages of advertisers,<sup>139</sup> in addition to being vertically integrated into the production

132. P. SANDMAN, *supra* note 42, at 32-33. See generally F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 (1952) for a discussion of access to the press in England.

133. See L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 18-87 (1960); P. SANDMAN, *supra* note 42, at 33-37.

134. See U.S. CONST. amend. I.

135. See notes 55-63 *supra* and accompanying text.

136. See, e.g., *United States v. Van Leeuwen*, 397 U.S. 249, 251-52 (1970).

The course of events since 1878 has underlined the relevance and importance of the Post Office to our constitutional rights. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437 (dissenting opinion), said that "the use of the mails is almost as much a part of free speech as the right to use our tongues. We have emphasized over and over again that while Congress may classify the mail and fix the charges for its carriage, it may not set up regimes of censorship over it."

397 U.S. at 251-52. See also *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946) (prohibiting the Postmaster General from acting as a censor). The government can restrict access to certain materials such as pornography, see 18 U.S.C. § 1461 (1976), upheld in *Roth v. United States*, 354 U.S. 476 (1957); 18 U.S.C. § 1462 (1976), upheld in *United States v. Orito*, 413 U.S. 139 (1973); 18 U.S.C. § 1465 (1976).

137. Economic regulation of the print media was not found to violate the first amendment in *Associated Press v. United States*, 326 U.S. 1 (1945), quoted in note 59 *supra*. Common carrier regulation of the telephone, telegraph and postal media have also been accepted by the courts, see note 109 *supra*. See also the regulation of access to a cable television system, note 221 *infra*, as well as regulations of access to live fora, notes 48-51 *supra* and accompanying text.

138. There were, for example, 17,709 bookstores in the United States in 1981, JACQUES CATTELL PRESS, AMERICAN BOOK TRADE DIRECTORY ix (27th ed. 1981).

139. "[N]ewspaper publishers are essentially people who sell white space on newsprint to advertisers"; in large part they are only processors of raw materials purchased from others. V. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 379-80 (1961).

of non-commercial messages.<sup>140</sup> The editing of copyrighted software written by an editorial staff is clearly protected by the first amendment.<sup>141</sup> As a conduit for commercial advertisements solicited by their business staffs, however, a periodical appears to be little more than a print version of a private shopping center and would seem to have similar rights.<sup>142</sup> In this role it has little claim to a first amendment right of editorial integrity;<sup>143</sup> the editorial staff is not expressing its own ideas and readers are on notice that the periodical does not necessarily endorse the products or services advertised.<sup>144</sup> While a publisher may prove that readers rely on a newspaper to exercise judgment over which advertisements it will carry, such dependence is similar to a buyer's assumption that any reputable retailer deals only in legitimate products. The selection of "products"<sup>145</sup> is not a copyrightable action and is not of first amendment "editorial" character. When acting as a business conduit, a periodical owner is entitled only to the same rights as a bookstore owner: economic discretion to grant, condition or deny access to message producers.<sup>146</sup>

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140. For a discussion of vertical integration see note 54 *supra*.

141. See notes 55 & 89 *supra* and accompanying text.

142. "The fact that the publisher handles news while others handle food does not, . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." *Associated Press v. United States*, 326 U.S. 1, 7 (1945). As a "paper" version of a shopping center, the advertising department of a newspaper would have the same rights as a private shopping center owner. See notes 125-30 *supra* and accompanying text.

143. Thus, it was acceptable to regulate advertising in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). The courts have recognized that a newspaper is a conduit for paid advertising and for a few other functions, see note 61 *supra*. But see note 144 *infra* for a periodical's derivative first amendment rights.

144. If the media owner desires to endorse the advertisement it may do so and assert a derivative first amendment right on behalf of the advertiser, see notes 78-80 *supra* and accompanying text, but as a medium business owner it has no first amendment right to exclude those advertisements that it disapproves of. See note 80 *supra* and accompanying text. Its rights to exclude, in its role as a conduit, are strictly economic, *id.*, although a media owner does have first amendment rights to disassociate itself from distasteful messages, see note 49 *supra*.

145. The term "products" includes advertisements, news articles, columns, and editorials.

146. See *Fitzgerald v. National Rifle Ass'n of America*, 383 F. Supp. 162, 164 (D.N.J. 1974) ("a newspaper publisher is generally free to contract with whomever he chooses in the same manner as other businessmen"); *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 333 (N.D. Ind. 1972) (defendant did not violate the antitrust laws when it refused to accept an advertisement due to, among other things, a "concern that they would lose their 'family image'"); *cf. PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 597-98, 321 N.E.2d 915, 918 (Sup. Jud. Ct. 1975) (court refused to find *The Boston Globe* in violation of the antitrust laws for refusing an ad by an escort service absent evidence of a purpose to either exclude a person from the market or to accomplish some other anti-competitive

If competition between periodicals disappeared<sup>147</sup> and the industry became dangerously oligopolistic, the government could presumably impose common carrier non-discrimination obligations on a periodical's advertising department<sup>148</sup> similar to those imposed on govern-

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objective). The FTC has said that a newspaper can refuse an advertisement without violating the antitrust laws whenever it is "acting in accord with the exercise of its own independent judgment and not in concert with others . . ." FTC Advisory Opinion No. 93, 70 F.T.C. 1877 (1966). See 16 C.F.R. § 15 (1974); see also note 45 *supra* discussing the right of access to newspapers due to their monopoly status; note 62 *supra* discussing the general right of a property owner to exclude those that it chooses to exclude.

147. In the newspaper industry there are presently only 26 cities in the nation with separately owned, fully competitive newspapers. N.Y. Times, June. 18, 1982, at A18, col. 1. See generally B. OWEN, *supra* note 3, discussing the economic reasons for such a situation.

148. For a discussion of common carrier obligations, see note 109 *supra*; *Modla v. Tribune Publishing Co.*, 14 Ariz. App. 82, 40 P.2d 999, 1001 (Ct. App. 1971) ("[w]e have no doubt but that the legislature in any situation involving the public health, safety or welfare can impose reasonable regulation on advertising"); *Poughkeepsie Buying Serv. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 984-85, 131 N.Y.S.2d 515, 517-18 (Sup. Ct. Orange County 1954) ("[i]t may be that the Legislature has the right to reasonably regulate the newspaper advertising business . . .").

Arguments made by Professor Karst in discussing a hypothetical law that would require newspapers to accept paid political advertising are applicable here:

The burden on the newspaper's production would be minimal, and more than offset by advertising revenue. The publisher would be commanded by law to publish something it chose not to print. But: (a) the government would not identify subjects worth discussing; that choice would be left to those who seek to advertise; (b) there would be no government supervision to assure "fair" coverage of any issue; (c) there would be no regulation of message content; and (d) the publisher could dissociate itself from any advertising message, both by marginal notations and by editorial statements. The burden on the publisher's freedom, in short, is minimal. Against this burden must be weighed the benefits of such a law in bringing diversity of views to the public.

Karst, *supra* note 6, at 52 n.165. But see *Gore Newspapers Co. v. Shevin*, 397 F. Supp. 1253 (S.D. Fla. 1975), *aff'd*, 550 F.2d 1057 (5th Cir. 1977) invalidating a requirement that newspapers charge political candidates the lowest local rate available to advertisers; Opinion of the Justices, 362 Mass. 891, 285 N.E.2d 919 (1972), discussing a proposed Massachusetts statute which would have required newspapers, which published political advertisements for a candidate for a primary, to offer access at equal rates to any other candidates or organizations involved in the same primary. In an advisory opinion, the Supreme Judicial Court of Massachusetts found the statute to be unconstitutionally vague. See also Opinion of the Justices, 363 Mass. 909, 298 N.E.2d 829 (1973) (discussing a hypothetical newspaper access statute); Annot., 18 A.L.R.3d 1286 (1968) (right of a publisher to refuse publication of an advertisement); Comment, *Regulation of Commercial Speech: Commercial Access to the Newspapers*, 35 Md. L. Rev. 115 (1975) (commercial access to the press).

A congressional assessment that newspapers were monopolist could lead Congress to impose a limited right of access on newspapers, especially those governed by the Newspaper Preservation Act (codified at 15 U.S.C. §§ 1801-1804 (1976)). See Chatzky & Robinson, *A Constitutional Right of Access to Newspapers: Is There Life*



ment controlled publications.<sup>149</sup> The first amendment clearly protects the periodical owner against unreasonably burdensome regulations that would threaten its economic viability.<sup>150</sup> Otherwise it would only protect the owner's editorial integrity by forbidding regulations which interfered with its placement of ads and disclaimers.<sup>151</sup>

In its role as packager of noncommercial messages, the status of a periodical is less clear. One might plausibly consider a publisher to be merely a distributor (especially when it offers a multi-section Sunday newspaper). This would be the case if one regarded each section of a periodical as a distinct entity, controlled by an independent department head. The publisher would be serving merely as a common vehicle for marketing the different packages in a single profitable product. Under this view, the periodical publisher would enjoy only normal property rights and would be subject to government regulation.<sup>152</sup> In addition, if its packaging tactics served to frustrate the viability of other competing periodicals,<sup>153</sup> the publisher might be liable for illegal "tying."<sup>154</sup> There are, however, two reasons for not treating a publisher merely as a distributor.

*After Tornillo?* 16 SANTA CLARA L. REV. 453, 489, 491 (1976). It would seem in fact that the government would have as much right to regulate a newspaper's classified section as it did to regulate the shopping center in *PruneYard*. See note 142 *supra*.

149. See *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971) (a state university's campus newspaper which was open to commercial and certain types of public service advertisements could not reject political advertisements because of their editorial content); *Radical Lawyers Caucus v. Poal*, 324 F. Supp. 268 (W.D. Tex. 1970) (the Texas Bar Journal, conceded to be an agency of the state, which published political statements, was prohibited from refusing an advertisement); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (school officials were enjoined from interfering with the rights of students to place political advertisements in the school newspaper); Newell, *A Right of Access to Student Newspapers at Public Universities*, 4 J. C. & U. L. 209 (1977); Note, *The State College Press and the Public Forum Doctrine*, 32 U. MIAMI L. REV. 227 (1977). But see *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) (rejection of gay rights advertisement by a student newspaper was permissible since the mere fact that the university supplied part of the funds for the newspaper does not make out a case of state action in the absence of university editorial scrutiny).

150. See note 58 *supra*.

151. See *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973) (en banc), *cert. denied*, 416 U.S. 995 (1974) (permitting a university to place or stamp a disclaimer on the cover of a student edited magazine disavowing that it was an official publication of the university); Karst, *supra* note 6, at 50-52; note 49 *supra*.

152. See notes 47-53 *supra*.

153. If a periodical had potential liability under the Sherman Act it could be a candidate for at least partial common carrier obligations. See notes 62 & 109 *supra*.

154. Under the Sherman Act (codified at 15 U.S.C. §§ 1, 2 (1976)), restraints of trade are banned and monopolization of interstate commerce is unlawful. *Id.* A seller may not attempt to condition "his sale of one commodity upon another . . . [thereby coercing] the abdication of buyers' independent judgment as to the [commodi-

First, even if the sections of a periodical are actually separate vehicles for reaching distinct audiences, tying them together into a single package appears to be dictated by economic necessity;<sup>155</sup> usually it is not financially practical to sell sections separately to readers and advertisers. Transaction costs are normally too high to permit anything approaching page-by-page offerings<sup>156</sup> although new technologies such as teletext and videotext are beginning to make this possible.<sup>157</sup>

Second, a periodical editor could argue that its entire noncommercial content is actually a single interdependent message (similar to a book) rather than a collection of multiple independent messages. The direct and active influence of an editor-in-chief over the style, content, depth, and detail of the stories produced by different departments generally insures that the final product has a uniformity, consistency and cohesiveness indicative of a single message. In fact, many readers seem to regard the periodical as a single editing service,<sup>158</sup> distilling vast quantities of interesting and important information into concise portions that can be digested in a very limited amount of time. Credibility lost by one department usually affects the public's percep-

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ty's] . . . merits and insulate it from the competitive stresses of the open market." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953). Such an arrangement is called a tying arrangement and it is considered to "flout the Sherman Act's policy that competition rule the marts of trade." *Id.* In *Times-Picayune*, the Court held that a publishing company's practice of selling advertising in both its morning and evening papers but not in either separately was not an unreasonable restraint of trade under the Sherman Act. *Id.* at 627. For a discussion of the economics of tying, see F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 582-84 (2d ed. 1980).

155. See, e.g., *United States v. Jerrold Elec. Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (manufacture of a product in a new industry may constitute a defense against actions which generally violate antitrust statutes).

156. Chip Block, publisher of *Games Magazine*, has experimented with personally edited editions. Each subscriber to *Games* was allowed to choose a subset of the entire set of segments that are offered for each issue. Subscribers were saved the time and cost of unnecessary pages. Address by Chip Block, Publisher, *Games Magazine*, Harvard Business School, Fifth Annual Communications Conference, Jan. 17, 1981.

157. Videotext and teletext systems may be described as a group of information services ranging from one way transmission of information to sophisticated two way transmission. J. TYDEMAN, H. LIPINSKI, R. ADLER, M. NYHAN & L. ZWIMPFER, *TELETEXT AND VIDEOTECH IN THE UNITED STATES* 3 (1982).

Subscribers to videotext services like CompuServe or The Source may view electronic news at rates of pennies per minute of access. *Id.* at 55. Any effort to divest different departments/sections from each other would violate the first amendment if it destroyed the viability of the medium. See note 58 *supra*.

158. Owen, *The Role of Print in an Electronic Society*, in *COMMUNICATIONS FOR TOMORROW* 229, 230 (G. Robinson ed. 1978).

tion of the entire periodical.<sup>159</sup> As a single message, a periodical would enjoy full first amendment protection from government regulation of access to its noncommercial content.

Periodicals receiving government support, such as public school publications, are affected by the first amendment in two special ways. First, the amendment prohibits state (e.g., school) officials from exercising editorial discretion over the content of the publication to censor disturbing viewpoints.<sup>160</sup> The only content restrictions that can be imposed by the state are regulations of scope which are compelled by a strong government interest.<sup>161</sup> Second, those delegated as editors (e.g., students) probably are prohibited from arbitrarily suppressing views which they oppose.<sup>162</sup> It appears that courts can require editors

159. Courts have recognized the interdependence of messages in a periodical. See *Homefinder's of America, Inc. v. Providence Journal Co.*, 471 F. Supp. 416, 422-23 (D.R.I. 1979), *aff'd*, 621 F.2d 441 (1st Cir. 1980) (“[d]efendant’s decision to reject plaintiff’s advertising . . . was sound business judgment . . . intended to maintain a quality advertising section for its readers”); *America’s Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328, 333 (N.D. Ind. 1972) (defendant did not violate the antitrust laws when it refused to accept an advertisement due to, among other things, a “concern that they would lose their ‘family image’”).

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The principles affirmed in *Healy v. James*, [408 U.S. 169, 187-88 (1972) (a college, acting “as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent”)] have been extensively applied to strike down every form of censorship of student publications at state-supported institutions. Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimaturs of controversial articles, excising repugnant materials, withdrawing financial support, or asserting any other form of censorial oversight based on the institution’s power of the purse.

*Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (footnotes omitted). See also *Papish v. Board of Curators*, 410 U.S. 667 (1973) (university violated first amendment rights of a student when it expelled her for distributing a newspaper containing a cartoon which the university deemed indecent); *Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973) (university violated first amendment rights of editor (and student author) by disciplining them for publishing a letter offending the university president). Accord *Korn v. Elkins*, 317 F. Supp. 138, 142-43 (D. Md. 1970); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968).

161. See note 110 *supra*.

162. For example, in *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977), the editor of the Mississippi State University student newspaper—which was partially supported by state funds—refused to print a paid advertisement and announcement regarding the availability of homosexual counseling, allegedly because of the editor’s distaste for homosexual activity. In upholding the refusal of the paper to print the Gay Alliance advertisement, however, the court may well have treated the restriction as a valid restriction of scope (or “type”) prohibiting advertisements of *illegal* activities, *see id.* at 1075.

to abide by the same standards of reasonable conduct (i.e., "fairness doctrine") that presently govern the conduct of librarians and other school officials.<sup>163</sup>

### C. Broadcasting: Stations & Networks

Access to broadcast media (both radio and television) has been difficult to obtain because technological,<sup>164</sup> economic<sup>165</sup> and political factors<sup>166</sup> led to the licensing of only a limited number of broadcast frequencies. Congress could have compensated for this artificial restriction by requiring that broadcast licensees grant common carrier access to all,<sup>167</sup> but after limited consideration this idea was rejected.<sup>168</sup> Instead, individual station owners were granted discretion

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163. "Fair" access could be provided to all by forbidding the editor from excluding opposing viewpoints in violation of the equal protection clause. See Karst, *supra* note 6, at 43-52. Courts do not seem unqualified to make these judgments as they make similar appraisals when teachers and other public employees claim that they have been penalized for their political views. See notes 120-21 *supra*; Karst, *supra* note 104, at 257; Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841.

164. See Levin, *supra* note 33, at 15-39; Jones, *supra* note 36.

165. Before the potential for using radio as an advertising medium was acknowledged, "[r]adio was operated as a secondary occupation at best—it was a sideline to another line of business. Electrical and radio manufacturers and dealers, who early in 1923 controlled nearly 40% of the country's 576 stations, operated broadcast outlets as a means of providing entertainment to attract listeners—and thus purchasers of receivers." B. COMPAINÉ, *supra* note 3, at 300.

166. The concern about the tremendous political power that could be wielded by broadcasters was voiced in Congress. In 1926, Rep. Johnson of Texas remarked:

There is no agency so fraught with possibilities for service of good or evil to the American people as the radio . . . . The power of the press will not be comparable to that of broadcasting stations when the industry is fully developed . . . . [I]t will only be a few years before these broadcasting stations, if operated by chain stations, will simultaneously . . . bring messages to the fireside of nearly every home in America. They can mold and crystallize sentiment as no agency in the past has been able to do. If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.

67 CONG. REC. 5558 (1926).

167. "[T]he government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-91 (1969).

168. In 1926, H.R. 9971 was introduced in the House of Representatives for the purpose of regulating radio communications, H.R. 9971, 69th Cong., 2d Sess., 67 CONG. REC. 4956 (1926). The existing Federal statutes, Wireless Ship Act of 1910, Pub. L. No. 262, 36 Stat. 629; Radio Act of 1912, Pub. L. No. 238, 37 Stat. 199, proved inadequate to permit proper administration of existing radio activities with the enormous increase in the use of radio communications. 67 CONG. REC. 5478-79 (1926) (statement of Rep. White). Only 89 different wavelengths were available and

over programming and Congress compensated those who were denied access rights by requiring the FCC to serve the “public interest” when awarding broadcast licenses.<sup>169</sup>

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a means had to be found “to distribute a limited number of wavelengths among an unlimited number of stations.” *Id.* at 5479. The bill was passed by Congress in 1927, 68 CONG. REC. 2580, 4155 (1927) and was enacted as the Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162. The act established the Federal Radio Commission, whose purpose was to regulate the communications industry by licensing only a limited amount of stations. 44 Stat. at 1162 (§3), 1163 (§4), 1166-67 (§§9-11).

H.R. 9971 originally contained a provision that would have required a broadcasting station to accept any service which was asked of it without discrimination (i.e. common carrier status), but this provision was deleted and replaced with a provision stating that if a licensee permitted one candidate access, it had to provide access to all. 67 CONG. REC. 12501-05 (1926). The common carrier provision was deleted because it was felt to be unwise to place a licensee under the hampering control of being a common carrier. *Id.* The amendment (in revised form) became § 18 of the Radio Act. *See* Pub. L. No. 632, § 18, 44 Stat. 1162 (1927).

On April 4, 1934, S. 3285 was introduced in the Senate providing for the regulation of wire communications. S. 3285, 73d Cong., 2d Sess., 78 CONG. REC. 5952 (1934). A large portion of the bill consisted of a rewriting of existing radio law and its amendments. Existing radio laws were to be repealed and replaced by the bill’s provision. The Federal Radio Commission was abolished and replaced by the Federal Communications Commission. *Id.* at 8822.

In § 3(h) of the bill, common carrier status was applied to any person engaged as a common carrier for hire in interstate or foreign communications by wire or radio, however, such regulation was not to be imposed on broadcasters. No person engaged in broadcasting was deemed a common carrier. 78 CONG. REC. 10969 (1934). The bill was passed, *id.* at 10912, 10995, and enacted as the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1976)).

169. Under the Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162, the licensing authority shall grant any applicant a license if the public convenience, interest or necessity (public interest) will be served thereby. *Id.* at 1166 (§9). Applications for a license or renewal or modification of license shall be granted if the public interest would be served thereby. *Id.* at 1167 (§11). Pursuant to the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1976)), the FCC exercises its statutory powers, *id.* § 303, grants licenses, *id.* § 309(a), or allows assignment or transfer of construction permits or station licenses, *id.* § 310(d), if the public interest will be served.

In effect, Congress has provided for a public trusteeship of the airwaves, a path somewhere between common carrier and private ownership. Technically, a trustee is a person who takes and holds the legal title to the trust property for the benefit of another. 89 C.J.S. *Trusts* § 3 (1955). The property in question is the broadcasting spectrum which is said to be an “[i]nalienable possession of the people of the United States and their government.” S. 2930, 68th Cong., 1st Sess., 65 CONG. REC. 5735 (1924). The government has delegated to the FCC the power to administer the broadcasting spectrum (by granting licenses for its use) for the benefit of the people. In administering its trusteeship, the FCC has taken the public interest standard and applied it to licensees. *See* *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978) (“[a] basic premise of Commission policy is that a licensee is a ‘trustee’ for the public . . .”). The result has been the evolution of the fairness doctrine. *See* notes 16-17 *supra* and accompanying text.

The public interest standard (which had been borrowed from public utility legislation, *see* Coase, *supra* note 33, at 8) as embodied in the Radio Act and the Communi-

In spite of the anticipated administrative difficulties of providing common carrier access,<sup>170</sup> the normal discipline of the marketplace

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cations Act has been recognized as meaning "about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority," Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930) (cited in Coase, *supra* note 33, at 8).

The Supreme Court has defined the public interest standard as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). But according to a recent study of FCC decision makers, the term had a different meaning to almost every official interviewed. Krugman & Reid, *The Public Interest as Defined by FCC Policymakers*, 24 J. BROADCASTING 311 (1980). As former FCC Commissioner Nicholas Johnson has observed: "use of imprecise language, like 'public interest,' to cover up the total lack of criteria has been said to be 'somewhere between a charade and criminal fraud,'" Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROBS. 505, 517 (1969), quoting Meckling, *Management of the Frequency Spectrum*, 1968 WASH. U.L.Q. 26. Congress or the courts must be trusted to spell out objective ways to measure it, and yet neither has done so. The FCC and the courts have been in constant disagreement over what standard to apply to achieve the public interest.

See, for example, the controversy over whether giving preference to incumbent licensees in the license renewal process is in the public interest. *Cowles Broadcasting, Inc.*, 60 F.C.C.2d 372 (1976), *reconsideration denied*, 40 RAD. REG. 2d (P & F) 1627 (1977), *vacated and remanded sub nom.* *Central Fla. Enters. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979), *decided on remand*, 86 F.C.C.2d 993, 49 RAD. REG. 2d (P & F) 1138 (1981), *aff'd*, 683 F.2d 503 (D.C. Cir. 1982); *Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming From the Comparative Hearing Process*, 88 F.C.C.2d (1981); Note, *In a Comparative Renewal Hearing the FCC May Not Create a Bias in Favor of Renewal, But Must Use Criteria That Affords a Challenger A Full Comparison*, 47 GEO. WASH. L. REV. 1205 (1979).

The nature of the standard appears to leave it undefinable, *see* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1682-83 (1975), and has led many to call for an articulated quantitative standard for measuring the public interest which would at least avoid the apparently "unpredictable excessively discretionary" standards being used today, *see* H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR A BETTER DEFINITION OF STANDARDS* 53-55 (1962); Anthony, *Towards Simplicity and Rationality in Comparative Broadcasting Licensing Proceedings*, 24 STAN. L. REV. 1, 39 (1971). Nevertheless, the FCC perseveres in its refusal to adopt officially any quantitative program standards. *See* *Broadcast Renewal Applicant*, 66 F.C.C.2d 419, 429 (1977), *aff'd sub nom.* *National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978).

170. When the Radio Act was being debated, *see* note 168 *supra*, Congress was concerned with predictions that the imposition of common carrier status would devastate the broadcasting industry. The idea of unlimited public access, whether real or imagined, created fears of administrative nightmares. *See* Note, *FCC Authority over Cable Television*, 1979 WIS. L. REV. 962, 981-82.

The FRC [Federal Radio Commission], the FCC's predecessor, feared that thousands of stations would be needed to accommodate all the persons who would want to state their views on the air and that the interference caused by so many stations' frequencies overlapping on the spectrum would injure rather than benefit the listening public.

quickly led broadcasters to act effectively as such carriers,<sup>171</sup> particularly in television.<sup>172</sup> Even today, broadcast television licensees still act primarily as medium conduits for network programming,<sup>173</sup> although they are usually vertically integrated<sup>174</sup> into the production of at least some local news shows.<sup>175</sup> As a conduit, a broadcaster does exercise discretion over the portion of its programming that it does not produce itself,<sup>176</sup> but such discretion is ordinarily limited to the selection

Note, *The Listener's Right To Hear in Broadcasting*, 22 STAN. L. REV. 863, 896 (1970) (discussing Great Lakes Broadcasting Co., Federal Radio Commission, Third Annual Report 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir. 1929), *cert. denied*, 281 U.S. 706 (1930)).

Common carrier status was therefore rejected in part "because of the perceived lack of wisdom in 'putting the broadcaster under the hampering control of being a common carrier' and because of problems in administering a non-discriminatory right of access." FCC v. Midwest Video Corp., 440 U.S. 689, 703 (1979), quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 106 (1973); see 67 CONG. REC. 12504 (1926). The concern with administrability is understandable because the Radio Act arose at a time of chaos in the radio industry, see Minasin, *The Political Economy of Broadcasting in the 1920s*, 12 J. L. & ECON. 391 (1969).

171. Owen, *Structural Approaches to the Problem of Television Network Economic Dominance*, 1979 DUKE L.J. 191, 224. Bruce Owen has noted that until quiz show scandals in the 1950's advertisers and their agencies controlled the content of network television and entertainment programs. *Id.* at 223.

172. *Id.* at 224.

173.

Radio did not originate as an organ of expression and made no claim to be such. It was seen as a facility somewhat comparable to the telephone and the telegraph or as a forum where entertainment and debates could be presented. Initially the Federal Radio Commission (FRC) refused even to allow radio to editorialize. Though the Supreme Court has confirmed the broadcaster's right of free speech, broadcasting, or at least TV, continues to be conditioned by its original function as a facility of dissemination, not of expression for its owner.

Jaffee, *supra* note 35, at 785. See generally Note, *supra* note 6, at 503 n.20, 526-37.

174. In general, vertical integration by networks into broadcasting is constrained by the FCC's 7-7-7 rules. 47 C.F.R. §§ 73.35 (b)(1), 73.240(a)(2), 73.636(a)(2) (1981) restrict a network to the ownership of no more than 7 AM, 7 FM, and 7 TV (including no more than 5 VHF) broadcast stations.

175. For a discussion of local television news, see BROADCASTING, July 26, 1982, at 37. A broadcast licensee has a statutory duty to offer news of local interest, see 47 C.F.R. § 0.281(9)(8)(i) (1981). One means of serving such interest is the ascertainment and discussion of community problems by the licensee for which the FCC has developed a primer. Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants, 41 Fed. Reg. 1372, 1381-83 app. B (1976). The primer implicitly recognizes the licensee's involvement in local news programming by permitting the licensee to discuss ascertained community problems in news programs (presumably produced by the licensee). *Id.* at 1383. For a discussion of vertical integration see note 54 *supra*.

176. The FCC requires that every broadcaster consistently maintain independent control over selection of all programs as broadcasted as a condition to retention of a license. 47 C.F.R. § 73.658(e) (1981). See *National Broadcasting Co. v. United States*, 319 U.S. 190, 199 (1943) ("[a] licensee station does not operate in the public

of which network to carry rather than involvement in the creative/editorial process.<sup>177</sup> The former economic discretion is, therefore, not entitled to either a copyright or first amendment protection.<sup>178</sup>

Requiring a licensee to honor the fairness doctrine does not violate its economic rights because that duty is part of its statutory obligation as a licensee.<sup>179</sup> To the extent the broadcaster is merely selling its services as a conduit, it cannot claim first amendment exemption from such access regulation.<sup>180</sup> As long as the government does not violate the licensee's editorial integrity in its role as program producer, the first amendment does not even come into play.<sup>181</sup>

Presently, government regulation of access in radio broadcasting appears unnecessary. There is sufficient competition to allow access for all those who can afford to pay the market price.<sup>182</sup> In addition, the public interest appears to be served by existing format specializa-

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interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable"; "[t]he licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest"). *Id.* at 206. *See also* *Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012, 1015 n.6 (5th Cir. 1981), *reh'g en banc granted*, 662 F.2d 1110 (1981), *aff'd*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 8, 1983) (No. 82-1185); *Cosmopolitan Broadcasting*, 59 F.C.C.2d 558 (1976).

177. These programming decisions of private television stations are not subject to constitutional attack. *See Kuczo v. Western Conn. Broadcasting Co.*, 566 F.2d 384 (2d Cir. 1977). They are only subject to review by the FCC when claims are made concerning abuse of private editorial discretion in violation of the public interest standards. For a list of such cases see *Muir*, 656 F.2d at 1025.

178. *See* notes 55-72 *supra* and accompanying text.

179. *See* notes 16-17 *supra* and accompanying text for a discussion of a licensee's obligations under the fairness doctrine. The fairness doctrine requires that a private broadcaster subsidize the messages of those with opposing viewpoints by supplying reply time free of charge if sponsorship is unavailable. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (citing *Cullman Broadcasting Co.*, 25 RAD. REG. (P & F) 895 (1963)). Broadcasters have probably accepted such a tax because the government has never charged them for their valuable licenses. Broadcasters have fought even the imposition of a license fee to cover administrative costs. Coase, *supra* note 33, at 24 (citing 100 CONG. REC. 3783 (1954)). Of course, one reason is that the beneficiaries of the present policy may have already disappeared, having already reaped their gains. As Prof. Harvey Levin has noted, the expectations of protected monopoly profits seem to be capitalized in the sale price whenever broadcast stations and their licenses change hands. H. LEVIN, *supra* note 38, at 111-20. Congress has occasionally considered charging broadcasters for their use of the spectrum, but those proposals all have failed. Coase, *supra* note 33, at 24. Even FCC Chairman Mark Fowler's proposal for broadcasters to pay a fee in return for freedom from content regulation has fallen on deaf ears. *See* note 36 *supra*. Thus it must be that the fairness doctrine tax is less than the tax that broadcasters feel they would be forced to pay.

180. *See* note 73 *supra*.

181. *See* notes 55-63 *supra* and accompanying text.

182. *See* HOUSE REPORT, *supra* note 3, at 330, 378.



tion.<sup>183</sup> It is more difficult to gain access to television broadcasting,<sup>184</sup> but the new video technologies may soon remedy this situation.<sup>185</sup> Common carrier regulation of broadcasters appears to be unnecessary<sup>186</sup> and even noncommercial "public" broadcasters<sup>187</sup> are governed

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183. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (discussing the best way to promote the public interest by promoting diversity in radio formats).

184. See *HOUSE REPORT*, *supra* note 3, at 344-48.

185. There are three principal conduits of video media: movie houses, UHF and VHF television stations and cable (wire) systems. *HOUSE REPORT*, *supra* note 3, at 343. Other means for disseminating information, aside from video cassettes and disks, are emerging. *Id.* These include wire and broadcast technologies. The broadcast technologies include: (1) Subscription Television (STV), which utilizes traditional VHF and UHF frequencies to broadcast video programming to subscribers who pay a fee for the service. *Id.* at 302. Nationwide STV service was approved by the FCC in Fourth Report and Order, 15 F.C.C.2d 466 (1968), *aff'd*, *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), *subsequently modified in* No. 21502, 90 F.C.C.2d 341, 51 *RAD. REC.* 2d (P & F) 1173 (1982). See 47 C.F.R. §§73.641-44 (1981); *BROADCASTING*, Aug. 16, 1982, at 33; (2) Low Power Television (LPTV), an experimental technology which has the potential to provide thousands of new low wattage stations across the country. *HOUSE REPORT*, *supra* note 3, at 255. The FCC recently solicited applications for LPTV, see 47 *Fed. Reg.* 30495 (1982); *BROADCASTING*, May 17, 1982, at 65; (3) Multipoint Distribution Service (MDS), which utilizes microwave frequencies to broadcast programming that can be received by those possessing a special antenna. *HOUSE REPORT*, *supra* note 3, at 304. See Report and Order, No. 19493, 45 F.C.C.2d 616 (1974), *as recently modified in* No. 80-113, 86 F.C.C.2d 381 (1982); *BROADCASTING*, Aug. 9, 1982, at 28; (4) Direct Broadcast Satellites (DBS), which use satellites to distribute video programming directly to home rooftop antennas. *HOUSE REPORT*, *supra* note 3, at 385. DBS was recently approved by the FCC. See Report and Order, No. 80-603, 90 F.C.C.2d 676, 51 *RAD. REC.* 2d (P & F) 1341 (1982); *CABLEVISION*, Sept. 6, 1982, at Plus 5.

The wire technologies include cable television as well as the mini version of cable, master antenna television (MATV), also known as satellite MATV (SMATV). SMATV operators receive broadcast signals and distribute them by wire but operate entirely on private property (such as apartments and condominiums). *BROADCASTING*, June 21, 1982, at 33. See *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982). There is also the possibility of video distribution by telephone companies. See Noam, *Towards An Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 *FED. COM. L.J.* 209, 241-57 (1982). Still, if broadcast licenses are no longer "exclusive" it is difficult to understand why they continue to be so valuable. See *BROADCASTING*, April 5, 1982, at 36. In fact, the price of a license may be as high as \$220 million. *BROADCASTING*, April 5, 1982, at 36. *But see* the proposal by Mark Fowler to tie removal of most broadcast regulation to broadcast fees, discussed in note 36 *supra*.

186. Due to the emergence of the new video technologies discussed in note 185 *supra*, broadcasters claim that they lack the monopoly power that would justify common carrier regulation. See note 109 *supra*. In fact, they now argue that access to video distribution channels is as easily available as is access to printing presses and thus they are seeking repeal of the fairness doctrine. See note 5 *supra*; Krasnow & Robb, *Telecommunications and the 94th Congress: An Overview of Major Congressional Actions*, 29 *FED. COM. L.J.* 117, 162 (1976). Congress has considered several bills that would do just that. See, e.g., S.2, 94th Cong., 1st Sess., 121 *CONG. REC.* 211 (1975); S.22, 95th Cong., 1st Sess., 123 *CONG. REC.* 539 (1977); S.622, 96th Cong.,

1st Sess., 125 CONG. REC. 4652 (1979). See *The Future of Content Regulation in Broadcasting*, 69 CALIF. L. REV. 555, 565-66 (1981).

If the video broadcast medium is truly competitive then competitive pressures alone would be enough to insure that broadcasters served the public interest. If sufficient options are available, viewers can use their dollars and time to vote for programs, as they do for other goods (including products of the print media) and choose whatever they deemed to be in their own interest. Some claim that paternalism requires that the government pressure viewers into watching some programs that might be ignored by them because of lack of information. See Barrow & Manelli, *Communications Technology—A Forecast of Change Part II*, 34 LAW & CONTEMP. PROBS. 431, 444-45 (1969). Such influence, however, could be accomplished with direct subsidies of programming by the government (e.g., the Corporation for Public Broadcasting), but see Note, *Freeing Public Broadcasting From Unconstitutional Restraints*, 89 YALE L.J. 719 (1980), or by private foundations. For example, the Benton Foundation will give millions to the electronic news media, BROADCASTING, Oct. 6, 1980, at 27. Although some meritorious works may still fail to receive funding, this problem is tolerated in the print media today and would seem equally tolerable in broadcasting.

Some fear that if the fairness doctrine were repealed, and time was allocated according to marketplace bidding, the wealthy would gain complete control of the media, but this is not true. As Ronald Coase has noted:

resources do not go, in the American economic system, to those with the most money, but to those who are willing to pay the most for them. The result is that, in the struggle for particular resources, men who earn \$5,000 per annum are everyday outbidding those who earn \$50,000 per annum.

Coase, *supra* note 33, at 19. Thus, a weekly half-hour news show in New Bedford and Fall River, Massachusetts is presently fully supported by advertisers who wish to reach the significant Portuguese audience. BROADCASTING, Dec. 1, 1980, at 2. Interestingly, much of the so-called public interest programming is already being produced by private parties acting in their own profit seeking interest although the pay networks would require STV delivery. See note 210 *infra* for a listing of many such offerings.

Ted Turner's Cable News Network and the Westinghouse-ABC Satellite News channels are providing 24-hour-a-day news, see CABLEVISION, Sept. 13, 1982, at Plus 16. Continuous local news is aired over cable in more than 100 locations, see Wall St. J., Jan. 2, 1981, at 1, col. 6. Gavel-to-gavel coverage of the Senate has been proposed, BROADCASTING, Jan. 10, 1983, at 95, and with cameras now allowed into the courtroom, *Chandler v. Florida*, 449 U.S. 560 (1981), there is another source of dramatic programming. Culture networks are being offered to adults, BROADCASTING, May 3, 1982, at 48. Children's programming advocates have highly praised the Nickelodeon channel of Warner Amex that provides 13 hours per day of high quality children's programming. See N.Y. Times, Mar. 4, 1979, § 4, at 20, col. 3; 125 CONG. REC. 18994 (1979). Educational channels are also being planned, aided by the 10-year \$150 million gift of Walter Annenberg for college programming. See N.Y. Times, Feb. 27, 1981, at C26, col. 5. Even esoteric subject matter like ALI-ABA's continuing legal education courses are being offered. See Nat'l L.J., Sept. 8, 1980, at 6, col. 2. Showtime has even given Ralph Nader his own show. BROADCASTING, Jan. 12, 1981, at 7.

Corporations would also be able to air programming which they believed to be in the public interest. Although their right to do so is now clear, *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), most companies have been unable to secure air time due to the broadcasters' fears of costly legal battles at license renewal time. See, e.g., Kaiser Aluminum's continuing battle with ABC. BROADCASTING, May 5, 1980, at 8; *id.*, Aug. 11, 1980, at 47; *id.*, Feb. 16, 1981, at 48. Mobil has also been frustrated, *id.* Feb. 11, 1980, at 9; *id.*, Apr. 21, 1980, at 56. See also FCC STAFF, REPORT ON CABLE

only by fairness doctrine access requirements.<sup>188</sup> Satellite owners seem to be the only broadcasters treated as common carriers.<sup>189</sup>

TV CROSS OWNERSHIP POLICIES 47 n.38 (Nov. 17, 1981) [hereinafter cited as FCC STAFF REPORT] recognizing this problem. Such litigation arises when those opposing the corporation's viewpoint file petitions to deny renewal of the broadcaster's license charging it with giving an unbalanced view of the issue presented, in violation of the fairness doctrine. This fear has existed since the WTOP case, as noted in an editorial, BROADCASTING, Feb. 11, 1980, at 154, and nullifies increased interest broadcasters have expressed to accept issue advertising. BROADCASTING, Oct. 6, 1980, at 106. See also *id.*, Mar. 2, 1981, at 73; *id.*, May 26, 1980, at 52. For a discussion of the need for corporate viewpoints see Banks, *The Rise of the Newsocracy*, ATL. MONTHLY, Jan. 1981, at 54.

187. Licenses for noncommercial educational FM broadcast stations are granted only to nonprofit educational organizations upon a showing that the station will be used for the advancement of an educational purpose. 47 C.F.R. § 75.503(a) (1981). There is a similar regulation for noncommercial educational television stations, 47 C.F.R. § 73.621(a) (1981). Such television broadcast stations may transmit only educational, cultural, and entertainment programs. *Id.* at § 73.621(c).

188. The fairness doctrine, as codified in 47 C.F.R. § 73.1212 (1981), is made applicable to noncommercial educational broadcast stations by 47 C.F.R. §§ 73.503(d), 73.621(e) (1981): "the Government cannot control the content or selection of programs to be broadcast over noncommercial television any more than it can control programs broadcast over commercial television." *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 204-06 (1943) (radio licensees required to exercise discretion independent of national networks); *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064 (C.D. Calif. 1976), *vacated and remanded*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980) (first amendment violated where FCC, national networks and professional associations jointly pressured local stations to set aside a "family hour" for programming suitable for viewing by children). *Accord Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 291 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *City of New York Mun. Broadcasting Sys.*, 56 F.C.C.2d 169 (1975). This premise led a District Court to void as unconstitutional 47 U.S.C.A. § 399 (West Supp. 1982), which prohibited editorializing by certain non-commercial educational television and radio stations, *League of Women Voters v. FCC*, 547 F. Supp. 379 (C.D. Cal. 1982). The decisions by two public broadcasters to reverse initial decisions to broadcast the controversial movie "Death of a Princess" has created some controversy. In *Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012 (5th Cir.), *rehearing en banc granted*, 662 F.2d 1110 (1981), *aff'd*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 8, 1983) (No. 82-1185), the court held that

[u]nder the Communications Act, both public and private broadcasters are licensed by the FCC to serve the public interest as public trustees. . . . [A licensee must] insure that the public is presented suitable and varied social, political, and aesthetic ideas and experiences. . . . [T]he manner in which those obligated functions are discharged has to date been left to the editorial discretion of the licensee, whether public or private.

656 F.2d at 1017.

The court went on to note, however, that the discretion exercised by the broadcaster would not violate the first amendment. The court then twice emphasized that "the district court's finding . . . that AETC's decision was based on its view of the public interest, namely a concern for safety of Alabama citizens in the Middle East has not . . . been shown to have been clearly erroneous . . ." *Id.* at 1023 (paraphrasing itself at 1019). A Texas District Court decision, *Barnstone v. University of*

Access rights to the new media technologies will depend on how the government allocates the right to use them. If licenses are allocated through the marketplace, then media owners will be treated as print publishers.<sup>190</sup> If, however, licenses are awarded according to non-marketplace criteria and qualified applicants are turned away, then there would be an inherent right of access to those without licenses.<sup>191</sup> This right might be satisfied by imposing a fairness doctrine on the licensees.<sup>192</sup>

The issue of access to the airwaves does not end with a review of access to broadcast transmitters; it is also necessary to examine the question of access to broadcast networks. Past FCC policies have resulted in the emergence of three dominant television networks which fill the lion's share of television broadcasters' time.<sup>193</sup>

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Houston, 514 F. Supp. 670 (S.D. Tex. 1980), holding to the contrary was reversed, 660 F.2d 137 (5th Cir. 1981); the reversal was upheld by the Fifth Circuit en banc, 688 F.2d 1033 (1982).

189. See 47 C.F.R. § 25.103(c)(2) (1981). Yet on August 17, 1982, the FCC authorized DOMSAT licensees to sell transponders on their satellites on a non-common carrier basis, finding that the potential benefits outweighed the danger of anti-competitive action. Domestic Fixed Satellite Transponder Sales, 90 F.C.C.2d 1238, 52 RAD. REC. 2d (P & F) 79 (1982). For a detailed summary of the commission's domestic satellite policies, see Orbit Deployment Plan-Domestic Satellite, 84 F.C.C.2d 584 (1981); Domestic Fixed Satellite Service, 88 F.C.C.2d 318 (1981). See also Botein, *New Communications Technology: The Emerging Antitrust Agenda*, 3 COMM/ENT L.J. 685, 696-97 (1981); Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L.S. L. REV. 863, 873-78 (1980) (recognizing the general status of satellites as common carriers).

190. Where there is marketplace allocation for ownership of a medium (as in the print media), there does not appear to be a government obligation to provide compensatory access. See notes 36, 42 & 48 *supra*. If such a practice is used for the new technologies, the author advocates the use of funds to purchase access for non-licensed speakers.

191. Where licenses are distributed according to non-marketplace criteria, non-licensees have a right of access. See notes 37-40 & 43-44 *supra*.

192. The fairness doctrine has been imposed in broadcasting (where licenses are allocated according to non-marketplace criteria) to satisfy the rights of non-licensees. See notes 15-20 *supra*.

193.

Past Commission policies have served effectively to limit television to a system dominated by three over-the-air advertiser-supported networks . . . . In each case, the Commission limited the ability of new networks to enter and sacrificed the potential improvement in network competition in order to achieve some other goals. In no case have these other goals been realized.

*Executive summary* to 1 FCC NETWORK INQUIRY SPECIAL STAFF, FINAL REPORT: NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION at 5-6 (1980).

Broadcast networks act primarily as conduits for the distribution of advertising and the programming that will attract an audience for the advertisements.<sup>194</sup> They are also usually vertically integrated into the production of such programming.<sup>195</sup> In their role as conduits, they have no first amendment rights to exclude advertisers. If they attempt to frustrate advertiser access, the government presumably could impose regulations providing access.<sup>196</sup>

The constitutionality of such access regulations would depend on whether the networks were providing a single interdependent message (with full first amendment protection from government interference)

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194. "During the entire history of network radio entertainment, and during the first decade of network television, program decisions were made, not by the networks themselves, but by advertisers and their agencies." Jencks, *How Network Television Program Decisions Are Made*, in NETWORK TELEVISION AND THE PUBLIC INTEREST 37 (Botein & Rice ed. 1980) [hereinafter cited as Jencks]. The FCC soon became terribly concerned that advertiser influence was responsible for deficiencies in network programming, see Federal Communications Commission, Public Service Responsibility of Broadcast Licensees ("Blue Book"), reprinted in F. KAHN, DOCUMENTS OF AMERICAN BROADCASTING 132-216 (3d ed. 1978); for a more detailed discussion of the Blue Book, see Fisher, *Program Control and the Federal Communications Commission: A Limited Role*, 14 VILL. L. REV. 602 (1969); Meyer, "The Blue Book," 6 J. BROADCASTING 197 (1962), and for this reason among others the television networks were encouraged to take charge of program selection. Jencks, *supra*, at 37-39. For a more detailed discussion of the era see E. BARNOUW, THE SPONSOR: NOTES ON A MODERN POTENTATE 32-58 (1978).

195. In *Levitch v. Columbia Broadcasting Sys.*, 495 F. Supp. 649 (S.D.N.Y. 1980) a group of non-network producers attacked this vertical integration, claiming that the decisions of the three major networks to produce all news and documentaries in-house violated the antitrust laws, but the claim was dismissed. Even NBC chairman Grant Tinker has criticized network involvement in program decisionmaking. BROADCASTING, June 14, 1982, at 58, col. 1. For a discussion of vertical integration, see note 54 *supra*.

196. Thus, the Justice Department brought suit against two major networks for violating the Sherman Act by monopolizing prime time entertainment programming, *United States v. Columbia Broadcasting Sys.*, 459 F. Supp. 832 (C.D. Cal. 1978). But see Fastow, *Competition, Competitors and the Government's Suit Against the Television Networks*, 22 ANTITRUST BULL. 517 (1977). In 1965 the FCC proposed a "50-50" rule which would have required that, for at least 50% of its schedule, a network would have to return to the role of merely selling time to advertisers and others. Notice of Proposed Rulemaking, No. 12782, 45 F.C.C. 2146, 2164 (1965).

It should be noted that the decision in *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) held only that advertisers did not have a first amendment right of access greater than that provided by the fairness doctrine, see note 22 *supra* and accompanying text. In fact, such access has been legislated by the access rules for political candidates. See notes 25 & 52 *supra*. For a discussion of the FCC's jurisdiction over the networks see Davidson, *Extension of the Federal Communications Commission's Jurisdiction to the Television*, 4 COMM/ENT L.J. 235 (1981-82).

or a set of independent messages.<sup>197</sup> Measured audience flow<sup>198</sup> and the character of specialized format radio networks<sup>199</sup> appear to support the former, but a careful review of how a single network's daily schedule is established supports the latter.

Individual programs are clearly protected as single messages by the first amendment. Even if independent producers produce and retain ownership of the copyright, a network can assert derivative first amendment rights to prevent the government from interfering with its broadcast.<sup>200</sup> This protection, however, does not extend to the network in its role of tying together different and distinct programs (each protected by a different copyright).

A network might claim that an entire evening's offerings were actually a single message, but single television programs do not seem to be interdependent in the same way that sections or even issues of a periodical are. Many, if not most of the broadcast television audience seem to treat them as independent messages. One program's message does not seem to taint or otherwise compromise the editorial credibility of another.<sup>201</sup> As long as the government does not interfere with individual television programs, the program producer's absolute first amendment rights would appear to be adequately protected. It appears that treating programs as individual units is also economically viable, as advertising rates are already differentiated<sup>202</sup> and pay-per-view television appears to be profitable.<sup>203</sup>

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197. This is analogous to the question in the print media discussed at notes 152-59 *supra* and accompanying text.

198. Audience flow is the phenomenon of viewers' staying tuned to the same channel unless they have a definite reason to switch. E. EPSTEIN, *NEWS FROM NOWHERE* 93-100 (1973). Audience flows are very valuable to broadcasters, *see id.*; Owen, *supra* note 171, at 226.

199. For a discussion of specialized radio formats see *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

200. *See* note 69 *supra* and accompanying text.

201. The credibility of a broadcaster or a network's individual news programs, however, is undoubtedly affected by each other. *See* Certz, *The Influence of Researcher Methods on Television and Evaluations*, 25 *J. BROADCASTING* 155 (1981).

202. Program producers seem to treat individual programs as separate entities; the variable structure of advertising rates reflects the demographics of the diverse and disjointed audiences which their programs attract. The use of ratecards is an example of such treatment. Ratecards set a different advertising rate for each program that has a significantly different Nielsen rating. *See* *SRDS SPOT TELEVISION RATES* (monthly periodicals published by Standard Rate and Data Service). This is in contrast to the predominantly uniform rates normally charged print media advertisers for reaching a single audience. *See* *Editor and Publisher*, *supra* note 33, *passim*.

203. Pay-per-view programming means that viewers pay for each pay cable program they view. Baldwin, Wirth & Zenaty, *The Economics of Per-Program Pay Cable Television*, 22 *J. BROADCASTING* 143, 143 n.3 (1978). For a discussion of the

Decisions concerning the positioning of programs within a week or an evening certainly require tremendous skill. These decisions, however, are business judgments.<sup>204</sup> Even the most brilliant evening lineups do not earn a network executive a new copyright and the first amendment does not protect them.<sup>205</sup>

If the government were to impose common carrier non-discriminatory access obligations upon a network during particular time periods,<sup>206</sup> the only protection that the first amendment would provide would be a guarantee that the network be permitted to disclaim any association with those programs that it disapproved of in order to protect its editorial integrity.<sup>207</sup> The fifth amendment would supplement that right by guaranteeing the network that it received just compensation for its valuable time slots.<sup>208</sup>

While it would appear constitutional for the government to require networks to sell time slots in a non-discriminatory manner,<sup>209</sup> such access regulations seem unnecessary with the emergence of dozens of new satellite distributed programming networks.<sup>210</sup> Access to networks will probably be available at competitive rates. Moreover, the benefits of permitting networks to specialize by serving diverse audiences appear to outweigh the danger that discretionary power may be used for anti-competitive ends.

economics of pay-per-view programming see *id.* Presently it has been used primarily for prize fights. See *Multichannel News*, Oct. 5, 1981, at 36, 33, col. 1; *id.*, June 21, 1982, at 5, col. 1, but its potential for offering opening nights of first run movies is even more exciting. See Harmetz, *Hollywood's Video Gamble*, N.Y. Times Magazine, March 28, 1982, at 40; Baker, *Nail by Nail*, *CABLEVISION*, March 1, 1982, at Plus 15. There is also the potential for offering college concerts, *Multichannel News*, March 29, 1982 at 1, col. 1.

204. See notes 55-63 *supra* and accompanying text.

205. See notes 64-72 *supra* and accompanying text.

206. The first amendment seems to apply to such regulations in the same way as it does to the prime time access rule, 47 C.F.R. § 73.658(k) (1981), which prohibits the broadcast of more than three hours of network programming between the hours of 7 p.m. and 11 p.m. local time. *Id.* That rule was upheld against a first amendment challenge in *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 477 (2d Cir. 1971) ("the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts . . ."). See also *National Ass'n of Indep. Television Producers and Distribs. v. FCC*, 516 F.2d 526, 535-38 (2d Cir. 1975) (upholding a modified version of the rule).

207. See note 49 *supra*.

208. Under the fifth amendment, private property (e.g., property rights in broadcast time slots) cannot be taken for public use without just compensation, U.S. CONST. amend. V.

209. See note 196 *supra* and accompanying text.

210. For a list of most of the more than four dozen networks now in operation, see *BROADCASTING*, May 3, 1982, at 48; *CHANNELS*, Nov./Dec. 1982, at 17, 20, 22, 40, 41 (Field Guide Supplement).

The application of the first amendment to public broadcasting networks remains to be litigated, but it appears that such networks would have the same obligations to act evenhandedly (without supporting or suppressing viewpoints arbitrarily) in the same manner as publicly funded print publications or those awarding government grants.<sup>211</sup>

#### D. Wirecasting: Telephones, Telegraphs & Cable Television

Telephone and telegraph companies merely own and operate the wires and switches used to transmit messages and thus have no first amendment rights to exclude the messages of others. In fact, both are subject to economic regulation as common carriers.<sup>212</sup> American Telephone & Telegraph is presently denied even the first amendment right to disseminate its own messages over its lines because of the potential for anti-competitive behavior.<sup>213</sup>

Cable television system owners are similarly situated and also lack special first amendment rights to exclude others. The cable operator enjoys only normal economic property rights.<sup>214</sup> As economic rights they are subject to federal access regulation<sup>215</sup> and any access provisions that a state may impose or a locality may negotiate during the franchising process.<sup>216</sup> They do not have the character of constitu-

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211. In *Network Project v. Corporation for Pub. Broadcasting*, 561 F.2d 963 (D.C. Cir. 1977) the court held that a complaint against the Corporation for Public Broadcasting on first amendment grounds was not frivolous. See Canby, *supra* note 104; Note, *supra* note 186.

212. 47 U.S.C. §153(h) (1976). See *United States v. Radio Corp. of America*, 358 U.S. 334, 349 (1959).

213. See the consent decree between the U.S. Justice Dept. and AT&T, *U.S. v. Western Electric*, 552 F. Supp. 131, 180-86 (D.C. Cir. 1982).

214. See notes 47 & 58-63 *supra* and accompanying text.

215. The FCC extended the fairness doctrine and equal time access compromises, 47 C.F.R. § 1212 (1981), from broadcasting to cable television in First Report and Order, No. 18397, 20 F.C.C.2d 201 (1969) (codified at 47 C.F.R. §§ 76.205, 76.209 (1981)) but the agency has not sought to enforce them. See CABLE TELEVISION BUREAU, FCC, CABLE TELEVISION AND THE POLITICAL BROADCASTING LAWS: THE 1980 ELECTION EXPERIENCE AND PROPOSALS FOR CHANGE 22 (1981).

Cable operators are also subject to the rules on mandatory signal carriage ("must carries"), which require them to give free access to all "significantly viewed" local broadcast stations, 47 C.F.R. § 76.51-.65 (1981). "Significantly viewed" is defined by a percentage of viewing hours per week. 47 C.F.R. § 76.5(k) (1981).

216. For a discussion of public access requirements see Meyerson, *The First Amendment and The Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT L.J. 1, 2 n.10, 12-14 (1981). But see two suits filed recently charging that state and local public access regulations violate the first amendment. *Comax Telcom Corp. v. State of New York Comm'n on Cable Television*, No. 82-CV-746 (N.D.N.Y. filed July 19, 1982); *Century Cable of N. Cal. v. City of San Buenaventura*, No. 82-5274 (C.D. Cal. filed Oct. 12, 1982).



tional rights, whose surrender may not be conditioned on the grant of government privilege.<sup>217</sup>

Should operators appear to have excessive market power over program producers/suppliers, they could conceivably be prohibited from entering the video publishing field.<sup>218</sup> So far this has not been the

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217. While the government is not required to grant a franchise license to a cable television operator, it cannot condition receipt of that license on acceptance of conditions which could not otherwise be constitutionally imposed. *See* Thomas v. Review Bd. of Ind. Empl. Sec. Div., 450 U.S. 707, 716 (1981) (“a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program”); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“liberties of religion and expression may [not] be infringed by the denial or placing of conditions upon a benefit or privilege”); *Frost Trucking v. Railroad Comm’n of Cal.*, 271 U.S. 583, 594 (1926) (“[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence”); *Illinois Broadcasting Co. v. Decatur*, 96 Ill. App. 2d 454, 238 N.E.2d 261 (App. Ct. 1968) (a municipality can condition the grant of a cable franchise upon the provision by the cable operator of public access and privacy protections).

218. When a cable operator is vertically integrated into program production there exists a danger that it may favor its own affiliated services over those of its competitors. *See* WHITEHEAD REPORT, *supra* note 54, chap. II, at 12, 20; J. Ordovery & R. Willig, Notes on Non-Price Anti-competitive Practices By Dominant Firms, presented at the ninth annual Telecommunications Policy Research Conference, Annapolis, Md., Apr. 1981; *In re Teleprompter Corp.*, 87 F.C.C.2d 531, 578, 49 RAD. REG. 2d (P & F) 1631, 1662 (1981) (Fogherty, Comm’r, dissenting). There seem to be a number of examples of such practices.

Cable News Network (CNN) challenged the purchase of Teleprompter (now Group W Cable) by Westinghouse, claiming that the new vertically integrated company intended to exercise its market power to exclude CNN from the Teleprompter systems in favor of the Westinghouse/ABC Satellite News Channels, but the FCC discounted the dangers of anticompetitive practices. 87 F.C.C.2d, at 554-63, 49 RAD. REG. 2d (P & F) at 1647-52. Nevertheless, CNN has threatened an antitrust suit, *Multichannel News*, Jun. 28, 1982, at 4, col. 1. It appears that Group W may have acted this way by excluding HBO from systems soon after purchasing 50% of the Showtime movie network, *see* HOUSE REPORT, *supra* note 3, at 297. In apparent fear that this could happen again, Viacom conditioned its repurchase of Showtime from Group W on a guarantee that Showtime would remain on Group W systems for at least 5 years. *N.Y. Times*, Aug. 24, 1982, at D4, col. 5. Finally, the cable system owners who share ownership of the Spotlight movie network have been substituting it on their systems to the detriment of HBO, Cinemax, and The Movie Channel. *See* *Multichannel News*, July 19, 1982, at II-61, col. 5; *id.*, Aug. 23, 1982, at 1, col. 3. Although the FCC denies the harmful possibilities of such vertical integration, FCC STAFF REPORT, *supra* note 186, at 115-25, this conclusion appears to be flawed, *see* Noam, *supra* note 185, at 213-14; FCC STAFF REPORT, *supra* note 186, at 111, where the agency itself recognizes the critical assumptions on which these conclusions are based.

Monopoly power can also be exercised through tiering practices. Tiers are bundles of channels, *see* *Multichannel News*, Sept. 14, 1981, at 40, col. 1, and are now created at the discretion of the cable operator. Although they may be attacked as illegal tying, *see* *United States v. Loew’s*, 371 U.S. 38 (1962), they may be saved by their economic necessity under the standard of *United States v. Jerrold Elec. Corp.*,

case.<sup>219</sup> Absent common carrier treatment,<sup>220</sup> the system operator has the right to select which programs and services to offer. If, however, it

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187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1969), discussed in note 155 *supra*, as long as it is prohibitively expensive to bill for each service individually, see Besen & Johnson, *An Economic Analysis of Mandatory Leased Channel Access for Cable Television* 30-31, 78-79 (Dec. 1982). By structuring the tiers of channels, a cable operator can put its own programming in the most favorable position (benefiting from cross-subsidies at times) while keeping its competitors in the least favorable tiers. See *The Buffalo Shuffle: TMC Gains, HBO Loses 27,000 in Channel Shift*, *Multichannel News*, Sept. 14, 1981, at 40, col. 1.

The 1971 Sloan Commission, the 1974 Presidential Cabinet Committee, and the 1976 House Subcommittee cable reports all recommended a strict separation of programmer and cable operator as soon as it was economically practical. See SLOAN COMMISSION ON CABLE COMMUNICATIONS, *ON THE CABLE: THE TELEVISION OF ABUNDANCE* 142 (1971) [hereinafter cited as SLOAN REPORT]; WHITEHEAD REPORT, *supra* note 54, at chap. III, at 1-4; STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., *CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE* 90 (subcomm. reprint 1976) [hereinafter cited as HOUSE SUBCOMM. REPORT]. See also F. POWLEDGE, *AN ACLU GUIDE TO CABLE TV* 32 (1972) (expressing the ACLU's support of strict separation); K. Kalba, *Separating Content From Conduit?* (Kalba Bowen Assoc., Cambridge, Mass. 1977) (a comprehensive discussion of strict separation); FCC STAFF REPORT, *supra* note 186, at 1-38 for a shorter view of strict separation.

219. Cable television operators face competition from the new technologies, as discussed in note 185 *supra*. For some appraisals of intermedia competition see Reidy, *An Economic Perspective: The Business of Communicating*, *CHANNELS*, Nov./Dec. 1982, at 4-6 (field guide); Noam, *supra* note 185, at 233-41; Moozakis, *SMATV: Your Business or Theirs?*, *CABLE TELEVISION BUSINESS*, Nov. 15, 1982, at 35-44; Holsendolph, *Tougher Times for Cable TV*, *N.Y. Times*, July 11, 1982, § 3, at 1, col. 2.

Legislation prohibiting vertical integration is particularly unlikely in light of the present deregulatory mood of Congress and the FCC. In fact, Congress is presently reexamining the restrictions on vertical integration between television broadcasters and networks, discussed in note 174 *supra*, see *BROADCASTING*, Dec. 20, 1982, at 56, and the Justice Department has hinted that it is considering the repeal of the Paramount consent decree, discussed in note 220 *infra*. See Justice Department Press Release, Oct. 21, 1981.

220. Proposals for treating cable television as a common carrier were frequent in the early 1970's because, as economist Bruce Owen noted, they would allow "the carrier to take advantage of economies of scale in the transmission process, and at the same time provide an opportunity for considerable competition among message sources. . . ." Owen, *Public Policy and Emerging Technology in the Media*, 18 *PUB. POL'Y* 539, 546 (1970). See F. POWLEDGE, *supra* note 218; Besen & Johnson, *supra* note 218, at 1-2.

The FCC also has recognized the merits of common carrier status for cable. In 1970 it requested comment on a proposal that more than half of the channels of large cable systems be leased at reasonable, non-discriminatory rates. Second Further Notice of Proposed Rulemaking, 24 F.C.C.2d 580 (1970). The New York Public Service Commission also considered the possibility, see W.K. JONES, *REGULATION OF CABLE TV BY THE STATE OF NEW YORK, REPORT TO THE COMMISSION* 199-201 (1970) (proposal by Commissioner Jones for cable systems to evolve into common carriers).

The FCC rejected a full common carrier model in 1972, finding it premature, *Cable Television Report and Order*, 36 F.C.C. 2d 143, 197 (1972), as had the Sloan Committee, SLOAN REPORT, *supra* note 218, at 148. Subsequently the WHITEHEAD

REPORT, *supra* note 54, chap. IV, at 2, and HOUSE SUBCOMM. REPORT, *supra* note 218, at 90, both agreed that the imposition of common carrier status should be delayed. The FCC's decision, meanwhile, was upheld in the courts against a challenge by the ACLU, *see* ACLU v. FCC, 523 F.2d 1344 (9th Cir. 1975).

The FCC did adopt a limited common carrier plan which required systems to provide some special free-access channels, 47 C.F.R. § 76.254(a)(1)-(3) (1979) (repealed 45 Fed. Reg. 76,179 (1980)), and one leased access channel, *id.* § (4), with a provision for additional leased access channels when all of its present leased channels were "in use during 80 percent of the time during any consecutive 3-hour period for 6 consecutive weeks." *Id.* § 4(d). Nevertheless, these regulations were struck down in FCC v. Midwest Video, 440 U.S. 689 (1979), when the Supreme Court held, in a 6-3 decision, that such common carrier regulations were beyond the scope of the FCC's power. After reviewing the history of the Communications Act, the Court found that § 3(h) of the Act unequivocally prohibited the FCC from treating broadcasters as common carriers. *Id.* at 704. The statute specifically provided that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. §153(h) (1976). Although Congress does have the power to legislate such a structure its actions in this regard have been unsuccessful, *see* S.2653, 86th Cong. 1st Sess., 105 CONG. REC. 18486 (1959); S.1044, 87th Cong. 1st Sess., 107 CONG. REC. 2516 (1969); H.R. 7715, 89th Cong. 1st Sess., 111 CONG. REC. 8751 (1965); H.R. 12914, H.R. 13286 and H.R. 14201, 89th Cong. 2d Sess., 112 CONG. REC. 3348, 4886, 7364 (1966).

In the absence of FCC jurisdiction and congressional action, common carrier status may be imposed by states or localities. The late Governor Rockefeller asked New York State to try it, Note, *Common Carrier CATV: Problems and Proposals*, 37 BROOKLYN L. REV. 533, 549 (1971), but to date no states or localities appear to have adopted it. Some have felt that localities have not favored such proposals because they have been more concerned with treating cable systems as sources of general revenues than with guaranteeing access, *see* Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U. L. REV. 816, 819 (1970); Clarification of Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 176, 181 (1974). It appears that public interest groups may also prefer to receive implicitly subsidized free access to cable systems than to pay explicitly for a leased channel.

Cable operators generally oppose common carrier treatment for four reasons. First, it would deprive them of control over which program services they carried, a right they claim as "electronic publishers," *see* notes 223-37 *infra* and accompanying text. Second, it would deprive them of the power to fix the consumer prices of their programming services which they may presently do without violating the Sherman Act's prohibition against price fixing, 15 U.S.C. § 1 (1976). Third, they fear that common carrier status would facilitate the establishment of rate regulation, *see* FCC STAFF REPORT, *supra* note 186, at 127-40. Finally, they normally link common carrier treatment to a prohibition against vertical integration by operators into programming. It should be noted that such a prohibition, discussed in note 218 *supra*, is a separate issue from the imposition of common carrier status. *See, e.g.,* Nadel, *COM-CAR: A Marketplace Cable Television Franchise Structure*, 21 HARV. J. ON LEG. (forthcoming May 1983), for a proposal of a cable television franchise structure which would treat cable operators as common carriers, not require rate regulation and permit operators to vertically integrate.

If cable operators do not act affirmatively to assure all interested parties that leased channels are available on a non-discriminatory basis, they may well be subject to the same type of divestiture suit (divesting them of their programming interests) as was brought by the Justice Department against movie theater owners in *United States v. Paramount Pictures*, 334 U.S. 131 (1948) (divesting theater owners of their film studios), or recently settled against AT&T (divesting the company of its local monopoly operating companies). *See* remarks of Assistant Attorney General William

is granted the exclusive right to serve a franchise community (whether expressly *de jure* or effectively so) the first amendment,<sup>221</sup> if not the antitrust laws,<sup>222</sup> would require that some form of access be available to those denied licenses.

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Baxter, *CABLEVISION*, Jun. 28, 1982, at 79. Bernard Wunder, Assistant Secretary of Commerce for Communications and Information has predicted that "leased channels are the future of the cable industry." Grudgel, *Leased Channels Conference Held*, National Federation of Local Cable Programming Newsletter, Nov./Dec. 1982, at 1. See also Huffman, *Pressure Grows for Law Requiring Leased Access*, Multichannel News, Mar. 8, 1982, at 1, col. 1 (describing desire for law requiring leased access).

221. If franchise licenses are truly only *de facto* exclusive licenses, i.e., they are available to all qualified applicants, see, e.g., note 235 *infra*, then there would appear to be no more of an *inherent* first amendment right of access to cable channels than to newspaper columns, see note 45 *supra*. Where, however, a *de facto* exclusive license is effectively *de jure* (because a municipality refuses to grant additional franchise licenses, even to qualified applicants) then there is some inherent constitutional right of access to the cable channels. See *Mountain States Legal Found. v. City and County of Denver*, No. 82-1738 (D. Colo., filed Nov. 1, 1982), discussed in *N.Y. Times*, Dec. 2, 1982, at A18, col. 1; *CABLEVISION*, Dec. 13, 1982, at Plus 5-11; note 44 *supra*.

It seems inconceivable that the Supreme Court would permit this right of access to be manifest in the form of a fairness doctrine, enforced by the municipality, although such an FCC imposed standard was accepted in *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See text and accompanying notes 15-25 *supra*. Those decisions appeared to rest upon the technological limitations of the broadcast medium. See notes 14-20 & 31-34 *supra* and accompanying text. In the cable medium, with its inherently unlimited channel capacity, the Court would more likely require that a reasonable number of public access and/or leased channels be mandated by some government body. *But see* note 216 *supra*.

222. In *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the Supreme Court held that municipalities are not exempt from the antitrust laws unless a state specifically grants them an exemption. Absent state legislation, the question remains as to what effect the antitrust laws will have. See Comment, *Alternative Approaches to Municipal Antitrust Liability*, 11 *FORDHAM URB. L.J.* 51 (1982). Cable operators denied franchise licenses might charge unprotected municipalities with unreasonable restraint of trade. The operators may claim that by denying access to public rights of way, municipalities are fostering monopolization of "essential facilities," Henderson, *Municipal Ownership of Cable Television: Some Issues and Problems*, 3 *COMM/ENT L.J.* 667, 670-72 (1981). An essential facility is one which cannot be duplicated by would-be competitors and foreclosure to such a facility is an illegal restraint of trade. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978). A number of new dual franchises have recently been awarded in apparent reaction to *Boulder*, see Narrod, *Boulder Verdict, Renewals May Increase Overbuilds*, Multichannel News, May 3, 1982, at 49-57, col. 1, but most cable operators feel that dual franchising benefits neither of the competing companies and thus the cable brotherhood has almost unanimously stayed true to the unspoken code opposing overbuilds. Companies seem to fear that to encroach on someone else's territory is to invite retaliation. Dawson, *How Safe Is Cable's 'Natural Monopoly'?*, *CABLEVISION*, Jun. 1, 1981, at 333; Narrod, *supra*.

Cable operators may also be prone to suits from programming networks seeking access. See *Channel 100, Toledo, Inc. v. Comcast Cablevision Corp.*, No. 80-40071

Cable television franchise owners analogize their position to print media publishers,<sup>223</sup> claiming equal first amendment rights. This comparison, however, is somewhat deceptive.<sup>224</sup> If a cable operator vertically integrates and establishes an editorial/production department to produce operator-originated programming, then that editorial department clearly has the same first amendment rights as any other message producer; but a cable operator cannot claim that its simultaneous transmission of independent networks comprises a single message. Programming on one channel does not taint the editorial credibility of the others.

A cable operator's selection of which networks it will carry will certainly affect its business reputation and future earnings, but such business judgments are not of first amendment character.<sup>225</sup> They do not earn the operator a copyright nor do they prohibit economic regulation. As long as the operator is permitted to operate under an economically viable structure,<sup>226</sup> and protect its editorial integrity by disclaiming any association with any networks that it finds distasteful,<sup>227</sup> it cannot claim any more first amendment protection. The amendment does not provide it with any more of a right to exclude others from its channels than the amendment provides television set producers a right to adjust their sets to exclude channels that they feared would harm their reputations and profits.<sup>228</sup>

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(E.D. Mich. 1980) (preliminary injunction restraining cable operator from terminating plaintiff's access to cable channel), *discussed in* BROADCASTING, May 19, 1980, at 76; notes 45 & 137 *supra*.

223. See Goldberg, Ross & Spector, *supra* note 5. In the final stipulation and judgment in *Community Communications Co. v. City of Boulder*, No. 80-M-62 (D. Colo. Oct. 29, 1982) (Stipulation & Judgment) the parties stipulated that the cable operator was "a First Amendment disseminator," *id.* at 5, although the court found that "[n]o evidence in the record and nothing within the stipulation indicates a need for unique rules and standards to govern the application of the First Amendment to cable television." *Id.* at 9-10.

224. This analogy is suggested because localities normally do not distinguish between the award of a license to build and operate cable franchise hardware and the right to determine the programming. Repeated commingling of the roles creates such a confusion, but to see that they are not necessarily tied one need only recognize that such roles are separated in both the satellite and telephone industries due to common carrier regulations, see Kreiss, *supra* note 4, at 1011. Still, the analogy is repeated by many, see, e.g., note 5 *supra*.

225. They are mere economic rights. See notes 47 & 58-63 *supra* and accompanying text.

226. While the government is prohibited from imposing regulations that threaten the economic viability of a medium, see note 58 *supra*, a common carrier structure like that suggested in Nadel, *supra* note 220, would not violate that prohibition. The structure would not require rate regulation nor foreclose a cable operator from leasing its own channels.

227. See note 49 *supra*.

228. It would be equivalent to a printer claiming a first amendment right to control its competitors' contents because of their effect on its profits and thus viabil-

Operating an entire cable system, even if consisting of only twelve channels,<sup>229</sup> is also very different from publishing a single newspaper or magazine in another way. The cable operator's control over multiple channels makes it more analogous to the operator of the presses and newsstands used by twelve different periodicals serving a single locality.<sup>230</sup> Unlike a single publisher or broadcaster, the cable operator is able to stifle direct competition among a large number and percentage of the media outlets in its market segment,<sup>231</sup> both in terms of content<sup>232</sup> and price.<sup>233</sup> As the natural monopolistic characteristics of distribution<sup>234</sup> almost always prevent a second cable operator from entering a market (even though cable franchise licenses are rarely *de*

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ity. "[T]he First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969).

229. Currently, almost half of all systems have more than 12 channels and 12% of them have more than 30 channels. *See Besen & Johnson, supra* note 218, at 111.

230. Ownership of the 100-plus channel systems that are promised for Boston, Dallas, Denver, Montgomery County, Maryland and Sacramento, California, *see BROADCASTING*, Nov. 15, 1982, at 35, will be equivalent to owning the presses for 100-plus periodicals serving a single locality.

231. This would be so even if the relevant product market includes all of those media mentioned in note 185 *supra*.

232. *See HOUSE REPORT, supra* note 3, at 354 ("it is legitimate to ask the extent to which emerging competition is undermined by permitting a single cable operator to retain program control over the major proportion of . . . [video] outlets [in a market]").

233. Its position as monopsonist buyer (i.e. sole seller, P. SAMUELSON, *supra* note 3, at 549) and monopolist seller of video programming distributed over the cable medium allows the operator to set all prices without violating the Sherman Act's prohibition against price fixing, 15 U.S.C. § 1 (1976), which would forbid the actual distributors of programming (networks) from discussing their pricing practices with each other.

234. *See Comanor & Mitchell, Cable Television and the Impact of Regulation*, 2 *BELL J. ECON. & MGMT.* 154, 171-74 (1971); Noam, *Economies of Scale in Cable Television*, Columbia University working paper No. 430A (Oct. 20, 1982), both presenting data supporting cable's natural monopoly status. Still, in *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652 (N.D. Ohio 1968), *aff'd sub nom. Wonderland Ventures, Inc. v. City of Sandursky*, 423 F.2d 548 (6th Cir. 1970), the court declared "CATV is not a natural monopoly." *Id.* at 657. In *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982), Chief Judge Markey, in dissent, claimed that "the city's sole defense is to pretend disingenuously and contrary to the extensive, uncontradicted testimony and the findings of the trial judge . . . that cable is a natural monopoly." *Id.* at 712. Even if cable distribution were not a natural monopoly, the limited availability of space for pole attachments and underground ducts in many communities would preclude competitive entry by cable systems, *see Miller & Beals, Regulating Cable Television*, 3 *COMM/ENT L.J.* 607, 622-23 (1981). *See also Dawson, supra* note 222 (noting that almost all cable operators seem to believe that a franchise is a natural monopoly).

*jure* exclusive),<sup>235</sup> there is a strong case for divesting a cable operator of control over its channels by imposing non-discriminatory common carrier obligations upon it. As a common carrier it would operate very much like a publicly owned system,<sup>236</sup> with the same first amendment status as others delegated to operate a public forum.<sup>237</sup>

## VI. Conclusion

The theory of the first amendment discussed above distinguishes between the rights of the two groups comprising our system of communication: "hardware" medium owners and "software" message producers. First amendment rights belong solely to the latter—those who edit software messages which are normally entitled to copyrights. The amendment absolutely protects their thinking and editing (inclusion and exclusion of messages). If the expression of their message does

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235. Localities normally award only a single franchise license, see Johnson & Blau, *Single Versus Multiple-System Cable Television*, 18 J. BROADCASTING 323 (1974). Competitive franchising (known in the industry as "overbuilding") is usually limited to municipalities which are juxtaposed to franchises controlled by different companies and presently exists in only about a dozen franchises out of more than 4,000. Only those in Allentown, Pa., and Phoenix, Ariz., are of appreciable size. See FCC STAFF REPORT, *supra* note 186; Dawson, *supra* note 222; Narrod, *supra* note 222.

The right of the city to grant a single *de jure* exclusive license is unclear. Such licenses have been prohibited in some states, Dawson, *supra* note 222, and a California court has held that the California State Constitution precludes such monopolies in the field of communications. See *TM Cablevision v. Daon Corp.*, No. 15067 (San Diego Sup. Ct. Jan. 22, 1981), discussed in BROADCASTING, Jan. 12, 1981, at 69. Still, a survey of New Jersey franchises in 1972 found that 8 of 66 had explicitly granted exclusive rights to install cable. Leone & Powell, *CATV Franchising in New Jersey*, 2 YALE REV. L. & SOC. ACT. 252, 258 (1972).

236. Municipal ownership of cable television systems has been advocated by many, see, e.g., R. JACOBSON, *MUNICIPAL CONTROL OF CABLE COMMUNICATIONS* (1977); Comment, *Community Antenna Television: The Case For Municipal Control*, 22 WAYNE L. REV. 99 (1975); Comment, *Toward Community Ownership of Cable Television*, 83 YALE L.J. 1708 (1974). Nevertheless, public ownership has its problems also, see Henderson, *supra* note 222; Synchef, *Municipal Ownership of Cable Television Systems*, 12 U.S.F. L. REV. 205 (1978). Cambridge, Mass., and Cleveland, Ohio, are presently seriously considering the option, see *Multichannel News*, Feb. 1, 1982, at 7, col. 1; *id.*, Dec. 6, 1982, at 25, col. 1. Statistics on 28 municipally owned systems are presented in MacKenna, *The Cabling of America: What About Municipal Ownership?*, 70 NATIONAL CIVIC REV. 307, 311 (1981).

237. See, e.g., libraries, *Board of Educ. Island Trees Union Free School Dist. v. Pico*, 102 S. Ct. 2799 (1982), discussed at note 121 *supra*; public theaters, *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), discussed at note 105 *supra*; publicly owned periodicals, discussed in notes 160-63 *supra* and accompanying text; and public broadcast stations, discussed at note 188 *supra*. See generally note 107 *supra*.

not conflict with some other constitutional value then the government may not impose unreasonable restrictions on their access to media.<sup>238</sup>

The owners of the media are not entitled to any direct first amendment protection, although they may assert rights of inclusion on behalf of those who use their media. The owner's rights to include and exclude messages are solely economic property rights. These permit them to select which messages will gain access to their media.<sup>239</sup> If, however, their economic power becomes great enough to enable them to censor messages and/or the advantages of permitting them to exercise discretion is minimal, then the government may regulate access<sup>240</sup> and even impose common carrier obligations upon them.

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238. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), discussed in notes 26-30 *supra* and accompanying text.

239. See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), discussed at notes 21-25 *supra* and accompanying text.

240. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), discussed at notes 16-20 *supra* and accompanying text.