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THE FIRST AMENDMENT AND THE NATIONAL INFORMATION INFRASTRUCTURE

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What the First Amendment status of electronic information should be is a fundamental question which must be addressed in any attempt to arrive at appropriate legal standards to protect the multifarious interests of the users of cyperspace. Yet, despite its importance, the First Amendment has largely been ignored in the debate surrounding what sort of legal framework should control the emerging National Information Infrastructure. Professor Cate surveys the current terrain of First Amendment jurisprudence and describes the different analytical approaches which may be taken. Doctrinal anomalies such as the law of common carriage indicate that at times the courts have reduced the scope of First Amendment protection in the face of new technologies. However, the rationales behind applying diminished protection do not carry force in the electronic context, especially when other controls such as antitrust doctrine are available. There is no reason not to confer full First Amendment protection on speech conveyed by cyberspace.

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INTRODUCTION

The vast majority of information in the United States today exists in electronic form. Text is composed on word processors, stored in computer memories, transmitted via local networks, telephone lines, and satellites, and recorded on printers, facsimiles, and computer monitors. Images and sounds are captured by cameras, scanners, microphones, and other sensors, stored on tape or disc, broadcast over the air or through coaxial cables or optical fibers, and displayed on television or computer screens or heard on radio. Data and voice signals are collected by telephones, computers, and remote sensors, and transmitted via copper wires, optical fibers, and satellites, or beamed through the air. Documents are printed, photocopied, facsimiled, scanned, and increasingly are stored electronically.

The escalating dominance of electronic information offers many opportunities for new and valuable products and services, but also raises many issues regarding cost, social and economic stratification, cultural domination, the protection of intellectual property, and the invasion of privacy, to name just a few. One fundamental issue, at the heart of both the extraordinary opportunities and the resolution of the dizzying array of concerns, is the First Amendment status of electronic information. Yet, despite its importance, the First Amendment has been almost wholly ignored in the policy debate raging in Washington and throughout the country about the National Information Infrastructure (NII) and the role of electronic information in every sector of American society.

At first blush, the role of the First Amendment would appear to be the only issue presented by electronic information technologies that is *not* new. After all, the First Amendment has been around for more than 200 years. What have judges, attorneys, and constitutional scholars been doing all that time if not definitively resolving what protection is afforded by the First Amendment? However, for the past century the Supreme Court has held that the amount of protection offered to information by the First Amendment depends on the medium by which that information is conveyed.[1] Thus, the same restriction on the same words would be analyzed differently under the First Amendment, depending on whether those words were uttered on a street corner, printed in a newspaper, transmitted through a telegraph wire, broadcast on the radio, or spoken into the telephone.

New information technologies and new conglomerations of old technologies challenge courts and commentators to determine which First Amendment standard or analysis should be applied. It has become customary, when confronted with a new communications medium, such as cable television, to ask, "which prior communication technology is it most like?" Is it more like a newspaper, a radio, or a telephone? The answer to this question often determines how the new medium is to be regulated. Reporters and law reviews are full of cases and articles asking the same question.

However, "what is it most like?" is the wrong question to ask because it misinterprets the Court's jurisprudence. The only reason the Court has compared new information technologies with old has been to help inform its investigation of whether there was any characteristic in the new technology that would warrant different treatment under the First Amendment. The comparison with existing technologies merely provides a shorthand, and often distracting, guide to that investigation. In short, rather than support three or four separate First Amendments, the Supreme Court's jurisprudence is better interpreted as recognizing a single First Amendment model—call it print, or, more accurately, speech—from which, for technological reasons, the Court has occasionally seen fit to diverge.[2]

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1. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101-02 (1973) (discussing First Amendment rights of broadcast media); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). Addressing the First Amendment protections of broadcast media, the *Red Lion* Court stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.*

2. This author believes that "what is it more like?" is the wrong question for a more fundamental reason: The First Amendment is technology-blind. It should make no difference how the information is communicated (unless, perhaps, it is communicated by being wrapped around a brick and thrown through a window). Information is no more or less constitutionally significant because it is spoken or printed or broadcast. The Supreme Court has been wrong to assume otherwise (to the extent it has so assumed—it has rarely addressed the issue directly). However, technology-dependence is what the Court has assumed is written into the First Amendment, and therefore this basic objection to the "what is it most like?" question is *not* the subject of this article.

This article examines the protection that the Court has determined the First Amendment affords to all information and the few technological exceptions that the Court has indicated may justify a lower standard of protection. The article then proceeds to consider whether any of those technological characteristics justify special treatment of electronic information under the First Amendment. The author concludes that the answer to the question—"Does this new communications medium have any characteristics that would justify according it different, less protective treatment under the First Amendment?"—is no.

Identifying the First Amendment standard applicable to electronic information is important for at least two reasons. First, the First Amendment acts as a check upon the government's power to enact certain laws and regulations. For the government to regulate expression and the industries that facilitate, transmit, and support expression without regard for the First Amendment invites reproach by the public and by the courts. Second, and more important, the First Amendment, along with the judicial opinions and commentary interpreting it, is more than just a limit on governmental action. It also reflects principles and aspirations which, while inconsistent and even flawed, offer important guidance for regulation or regulatory forbearance. In sum, the First Amendment is central to the information policymaking process not only because every law and regulation restricting expression must constitutionally comply with its terms, but also because the First Amendment and the discussion surrounding it contribute something positive and valuable to the process.

I. Electronic Information and Information Networks

A. *The Importance of Information*

Information is a key component of both the national and the global economy. Although figures vary, information services and products are either the first or second largest sector of the U.S. economy, accounting for between ten and twelve percent of the Gross Domestic Product.[3] Taken together, telephone companies, information service providers, communications equipment manufacturers, and computer hardware and software companies account for more than 4.5 million U.S. jobs.[4] The Commerce Department reports that business and consumer spending on high-tech equipment accounts for thirty-eight percent of economic growth since 1990.[5] The Department predicted in January 1994 that information sector revenues for that year would reach $699 billion, up twelve percent from

3. Secretary of Commerce Ronald H. Brown, Remarks at the Museum of Television and Radio (Jan. 6, 1994), *available on* Internet, NTIA IITF Bulletin Board, iitf.doc.gov/speeches, testimony [hereinafter Remarks of Secretary Brown]. Vice President Al Gore, Remarks at the National Press Club (Dec. 21, 1993) (transcript available from Federal News Service), *available in* LEXIS, Nexis library, CURNWS File [hereinafter Remarks of Vice President Gore].

4. Remarks of Secretary Brown, *supra* note 3.

5. Michel J. Mandel, *The Digital Juggernaut*, Bus. Week Annual, July 12, 1994, at 22.

1993.[6] The significance of information was forcefully recognized in the Clinton administration's *National Information Infrastructure Agenda for Action,* which concluded that: "[i]nformation is one of the nation's most critical economic resources . . . . In an era of global markets and global competition, the technologies to create, manipulate, manage and use information are of strategic importance for the United States."[7] The International Telecommunication Union estimates that by the end of the decade, global telecommunications, and information and entertainment programming, will account for $3.5 trillion in annual revenues and will constitute the world's largest economic sector.[8]

Yet even these figures do not represent the real importance of information and, therefore, the real significance of the information infrastructure to the United States. "Information," writes Anne Branscomb, legal scholar-in-residence at Harvard University's Program on Information Resources Policy, "is the lifeblood that sustains political, social, and business decisions."[9] Non-communications businesses rely as much on information services and products as do telephone companies and computer manufacturers. During the 1980s, for example, United States businesses alone invested $1 *trillion* in information technology.[10] Corporate spending on information technology in the United States reached $150 billion in 1992 and $200 billion in 1993.[11] Between one-half and two-thirds of the American workforce occupies information-based jobs.[12]

Information is equally significant for the activities of government. According to the Clinton administration's *National Performance Review,* the "[f]ailure to adapt to the information age threatens many aspects of government."[13] The report predicts that the government could save $5.4 billion over the next six years by "consolidating and modernizing the information infrastructure."[14] The importance of information is not limited to telephone and computer companies; it is indeed the lifeblood of modern society.

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6. INTERNATIONAL TRADE ADMIN., U.S. DEP'T OF COMMERCE, U.S. INDUSTRIAL OUTLOOK 1994 24-1, 25-1, 26-1, 27-1, 28-1, 29-1, 30-1, 31-1, 31-3, 31-4, 31-6 (1994) [hereinafter U.S. INDUSTRIAL OUTLOOK 1994]. Specific projections included: printing and publishing—$176.6 billion, information services—$135.9 billion, computer equipment—$66.2 billion, computer software—$32 billion (in 1993), satellites—$6.5 billion, telecommunications services—$193.1 billion, telecommunications equipment—$36 billion, and entertainment programming—$51.7 billion. *Id.*

7. INFORMATION INFRASTRUCTURE TASK FORCE, NATIONAL INFORMATION INFRASTRUCTURE: AGENDA FOR ACTION 5 (1993) [hereinafter AGENDA FOR ACTION].

8. Ted Bunker, *Is it 1984?,* LAN MAG., Aug. 1994, at 40.

9. Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition,* 36 VAND. L. REV. 985, 987 (1983).

10. Howard Gleckman, *The Technology Payoff,* BUS. WEEK, June 14, 1993, at 57.

11. Ralph King, Jr., *Magic Formula,* WALL ST. J., Nov. 14, 1994, at R18.

12. Remarks by Vice President Gore, *supra* note 3; AGENDA FOR ACTION, *supra* note 7, at 5.

13. NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 113 (1993).

14. *Id.* at iv.

B. The National Information Infrastructure

During the 1992 presidential campaign, Bill Clinton and Al Gore pledged to make deployment of a "national information network" a priority of their administration. They campaigned on a promise to create a network that would "link every home, business, lab, classroom and library by the year 2015."[15] Once in office, the President and Vice President moved quickly. On February 22, 1993, just twenty-eight days after their inauguration, they unveiled a five-part strategy for building the NII, a system which would use interconnected, interoperable telecommunications and computer networks to link computer systems, televisions, fax machines, and telephones, and to provide a variety of transmission and information services.[16] In addition to promoting technical development of the system and its applications for government and others, the Clinton/Gore strategy stressed the importance of creating incentives for private sector investment in the NII through the establishment of a consistent, stable regulatory scheme.[17] Many of the Clinton administration's most visible information-related activities focus on these reforms.

The Clinton administration (the administration) released its NII *Agenda for Action* on September 15, 1993. Although ostensibly the product of an Information Infrastructure Task Force, the *Agenda for Action* was actually a White House initiative, led by Vice President Gore and Secretary of Commerce Ronald Brown. The *Agenda for Action* sets forth the administration's vision for the NII. While stressing that the private sector will "predominate" in developing, deploying and paying for the nation's information infrastructure, the *Agenda for Action* notes that "the government has an essential role to play."[18] The *Agenda for Action* proceeds to identify nine "principles and goals" that are to guide the government's NII policies:

> (1) Promote private sector investment . . . .
> (2) Extend the "universal service" concept to ensure that information resources are available to all at affordable prices . . . .
> (3) Act as catalyst to promote technological innovation and new applications . . . . [through] important government research programs and grants . . . .
> (4) Promote seamless, interactive, user-driven operation of the NII . . . . [to] ensure that users can transfer information across networks easily and efficiently.
> (5) Ensure information security and network reliability . . . .

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15. Bill Clinton, *A National Economic Strategy for America* (June 19, 1992) (transcript available through U.S. Newswire).

16. INFORMATION INFRASTRUCTURE TASK FORCE, THE NATIONAL INFORMATION INFRASTRUCTURE; FREQUENTLY ASKED QUESTIONS, available on Internet, NTIA NII bulletin board, iitf.doc.gov.

17. *Information Infrastructure and H.R. 1757, The "High Performance Computing and High Speed Networking Applications Act of 1993": Hearings on H.R. 1757 Before the House Committee on Science, Space, and Technology*, 103d Cong., 1st Sess. 7, 13 (1993) (statement of John H. Gibbons, Director, Office of Science and Technology Policy).

18. AGENDA FOR ACTION, *supra* note 7, at 6.

(6) Improve management of the radio frequency spectrum . . . .
(7) Protect intellectual property rights . . . .
(8) Coordinate with other levels of government and with other nations . . . . to avoid unnecessary obstacles and to prevent unfair policies that handicap U.S. industry.
(9) Provide access to government information and improve government procurement . . . .[19]

To help carry out this ambitious agenda, the administration created the Information Infrastructure Task Force on September 15, 1994, chaired by Secretary Brown.[20] The Task Force is charged with articulating and implementing the administration's vision for the NII. "Working together with the private sector, the participating agencies will develop comprehensive technology, telecommunications, and information policies and promote applications that best meet the needs of both the agencies and the country."[21] The Task Force is divided into three committees: the Telecommunications Policy Committee, the Information Policy Committee, and the Applications and Technology Committee. These committees are subdivided into working groups and, in some cases, even subworking groups, reflecting the breadth of issues being addressed by the Task Force.[22]

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19. *Id.* at 6-7 (emphasis in original deleted).

20. INFORMATION INFRASTRUCTURE TASK FORCE, NATIONAL INFORMATION INFRASTRUCTURE FACT SHEET (Sept. 28, 1994), *available on* Internet, NTIA IITF bulletin board, iitf.doc.gov.

21. *Id.*

22. *Id.* The Telecommunications Policy Committee, chaired by Larry Irving, Assistant Secretary of Commerce for Communication and Information and NTIA Administrator, is responsible for "formulat[ing] a consistent Administration position on key telecommunications issues." *Id.* The Committee is divided into four working groups: Universal Service, Reliability and Vulnerability, Legislative Drafting, and International Telecommunications. This last working group is further divided into five subworking groups: (1) Foreign Government/Foreign Corporation Participation in the NII and the Use of the NII to Open Overseas Markets, (2) Effect of Current Law on Setting Policy and Legislative Efforts to Change the Law, (3) Purposes of the United States Government Controlling the Flow of Technology Transfers, (4) United States Participation in International Organizations and Standards Setting Bodies, and (5) International Use of Research Networks. *Id.*

The Information Policy Committee, chaired by Sally Katzen, Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget, is responsible for "critical information policy issues that must be addressed if the National Information Infrastructure is to be fully deployed and utilized." *Id.* This committee has three working groups: Intellectual Property Rights, Privacy, and Government Information. *Id.* This last working group is further divided into two subworking groups: Electronic Record FOIA Legislation, and Scientific and Technical Information. *Id.*

The third committee, on Applications and Technology, is chaired by Arati Prabhakar, Director of National Institute of Standards and Technology in the Department of Commerce, and is "coordinat[ing] the Administration's efforts to develop, demonstrate, and promote applications of information technology in manufacturing, education, health care, government services, libraries, environmental monitoring, electronic commerce, and other applications." *Id.* The committee is divided into three working groups: Government Information Technology Services, Technology Policy, and Health Information and Applications. *Id.* The Technology Policy Working Group includes four subworking groups: Advanced Dig-

C. *The Omission of the First Amendment*

One of the great surprises of the administration's information policymaking efforts, given the range of issues addressed in the *Agenda for Action* and the variety of committees, working groups, and subworking groups, is the absence of any reference to First Amendment issues. The First Amendment is not mentioned in the administration's nine principles in the *Agenda for Action* nor in any of the administration's NII pronouncements. Nor does the First Amendment appear in speeches by Vice President Gore, Secretary Brown, or other senior administration officials.

This omission of the First Amendment from information policy is all the more significant in light of the substantial regulatory role that the administration anticipates that the government should play. On December 21, 1993, Vice President Gore delivered the administration's first major policy address on the NII at the National Press Club in Washington. In his speech, the Vice President, the intellectual and political force behind the administration's NII initiative,[23] analogized the current information marketplace to the environment that, in his view, permitted the sinking of the Titanic. The Vice President asked why the Titanic's radio operators did not receive the warnings about icebergs in the vicinity and why so few ships responded to the Titanic's distress signals:

> Why did the ship that couldn't be sunk steam full speed into an ice field? For in the last few hours before the Titanic collided, other ships were sending messages like this one from the Mesaba: "Lat 42N to 41.25 Long 49W to Long 50.30W. Saw much heavy pack ice and great number large icebergs also field ice." And why, when the Titanic operators sent distress signal after distress signal did so few ships respond?
>
> The answer is that—as the investigations proved—the wireless business then was just that, a business. Operators had no obligation to remain on duty. They were to do what was profitable. When the day's work was done—often the lucrative transmissions from wealthy passengers—operators shut off their sets and went to sleep . . . .

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ital Video and NII, NII Roadmap, NII Services Architecture, and NII Standards. *Id.* The Health Information and Applications Working Group is further divided into three subworking groups: Telemedicine, Consumer Health Informatics, and Standards.

In addition, an NII Security Issues Forum coordinates so-called "security issues" concerning "confidentiality, integrity, and availability of information and of the systems carrying the information," and a 37-member Advisory Council on the National Information Infrastructure, created by Executive Order No. 12864, advises the Task Force and Secretary Brown from the perspective of information "stakeholders," including industry, labor, academia, public interest groups, and state and local governments. *Id.*; *see generally* Fred H. Cate, *Information Policymakers and Policymaking*, 6 STAN. L. & POL'Y REV. (forthcoming 1995).

23. As a Member of the House of Representatives, Gore proposed a "nationwide network on fiber optic 'data highways' " in 1979. Al Gore, *Networking the Future*, WASH. POST, July 15, 1990, at B3. As a Senator and Chair of the Senate Subcommittee on Science, Technology and Space, Gore introduced proposals for a National Research and Education Network as the "Department of Energy High-Performance Computing Act" (S. 1976) in 1989, and for the "High-Performance Computing Act" (S. 272) in 1991. *See* 135 CONG. REC. S5689 (1989); 137 CONG. REC. S1198 (1991).

> Ironically, that tragedy that resulted in the first efforts to regulate the airwaves.
>
> Why did government get involved? Because there are certain public needs that outweigh private interests.[24]

The Vice President's vision of the proper role of the government's information policy, judging from the Titanic example, is to regulate the NII by restraining those "private interests" that are outweighed by unspecified "public needs." Such restraints, however, may pose constitutional issues when the private interests involved are engaged in providing information services and products. The complete absence of the First Amendment from the policymaking debate exacerbates these issues because it suggests that they have not been identified and resolved, but rather have been ignored by the government.

II. The First Amendment Interpreted

A. *The Basic Model: Print and Speech*

Despite its absolute language—"Congress shall make no law . . . abridging the freedom of speech or of the press"[25]—the First Amendment has never been interpreted to afford absolute protection to communications. Nonetheless, the Supreme Court has repeatedly asserted that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[26] The Court has stressed the importance of not allowing the government to interfere with that interchange: "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[27] Often characterized as a "marketplace of ideas," this central First Amendment tenet requires that "[d]iscussion must be kept open no matter how certainly true an accepted opinion may seem to be; many of the most widely acknowledged truths have turned out to be erroneous."[28]

Beyond these bold, but vague sentiments, the precise meaning of those words remains elusive. However, at least four general principles have emerged from more than 200 years of judicial opinions and scholarly commentary concerning the scope of freedom of expression.

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24. Remarks by Vice President Gore, *supra* note 3.

25. U.S. Const. amend. I.

26. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

27. FCC v. League of Women Voters, 468 U.S. 364, 381-82 (1984) (quoting Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) (footnote omitted)).

28. Thomas Emerson, The System of Freedom of Expression 6-7 (1970).

1. The principle against prior restraints

Governmental restraints on *future* expression may be presumptively unconstitutional because they restrain ideas prior to their expression and therefore exclude them absolutely from public debate.[29] Moreover, where ideas are excluded prior to their expression, their exclusion is more difficult to protest effectively. Finally, prior restraints inevitably distort the marketplace of ideas by involving the government in evaluating ideas, speakers, and modes of expression. The potential for distortion is particularly high where the government requires a license to speak or publish and then picks and chooses among licensees based on their character or on the nature, content, or quality of their expression.

The presumption against prior restraints received its most forceful judicial exposition in 1931 in *Near v. Minnesota*.[30] The appellant, Near, was the publisher of *The Saturday Press*, and had been convicted under a Minnesota state statute for publishing nine issues in the fall of 1927 "largely devoted to malicious, scandalous and defamatory articles."[31] Chief Justice Hughes, writing for the Court, struck down the statute.[32] After considering the few situations where a prior restraint on expression might be justified—for example, "publication of the sailing dates of transports or the number and location of troops"[33] during wartime—the Chief Justice concluded: "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraint or censorship."[34]

Since *Near*, the Court has struck down many ordinances on the grounds that they constituted impermissible prior restraints.[35] The principle against prior restraints, while not absolute, does pose a substantial barrier to government restrictions on future expression,[36] and remains at

29. *See* Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 660-69 (1955).

30. 283 U.S. 697 (1931).

31. *Id.* at 703.

32. *Id.* at 722-23.

33. *Id.* at 716.

34. *Id.*

35. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'") (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); Schneider v. State, 308 U.S. 147, 163-64 (1939) (New Jersey ordinance which banned "communication of any views or the advocacy of any cause from door to door" without a written permit from the Chief of Police "strikes at the very heart of the constitutional guarantees"); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) ("Whatever the motive which induced its adoption, [the ordinance's] character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship.").

36. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); NLRB v. Gissel Packing Co., 395 U.S. 575, 616-20 (1969); American Communications Ass'n v. Douds, 339 U.S. 382, 411-12 (1950); Cox v. New Hampshire, 312 U.S. 569 (1941); P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950); Charles of the Ritz Distrib. Corp. v. FTC,

the heart of First Amendment jurisprudence.

2. *The principle against content discrimination*

The Court has interpreted the First Amendment to place a high barrier to "content-based" restrictions on expression. The Court's jurisprudence in this area is clouded by the different meanings the Court has given the phrase "content-based," and by the Court's inconsistency as to the significance of those meanings.[37] At a minimum, the principle against content-based discrimination means that the government may never restrict expression merely because it disagrees with the ideas that the expression contains.[38] "If there is a bedrock principle underlying the First Amendment," Justice Brennan wrote for the Court in 1989, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[39]

The principle against content-based restrictions may also extend to restrictions based on the subject matter of the work. In 1972, the Court struck down a city ordinance that prohibited picketing within 150 feet of any school but did not prohibit "peaceful picketing of any school involved in a labor dispute."[40] Justice Marshall, writing for a unanimous Court, stated that:

> above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of . . . forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[41]

Eight years later, in *Consolidated Edison Co. v. Public Service Commission*,[42] the Court made it clear that the prohibition is not limited to viewpoint-based discrimination. The Court noted that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public dis-

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143 F.2d 676, 679-80 (2d Cir. 1944); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942).

37. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194-97 (1983) (discussing Supreme Court's content-based analysis); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) (discussing difficulty of analyzing subject matter restrictions); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 636-54 (1991) (discussing history of distinctions within content-neutral regulations).

38. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding statute requiring public school flag salute unconstitutional).

39. Texas v. Johnson, 491 U.S. 397, 414 (1989).

40. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 93 (1972) (quoting CHICAGO, ILL., MUN. CODE ch. 193-1(i)).

41. *Id.* at 95-96 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

42. 447 U.S. 530 (1980).

cussion of an entire topic."[43] Such a position was necessary because "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[44] The Court concluded four years later in *Regan v. Time*: "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[45]

3. *The principle against compelled speech*

The First Amendment not only restricts the government's ability to abridge expression, but also limits the government's ability to compel expression. The cornerstone precedent declaring this principle is the Court's 1943 decision in *West Virginia State Board of Education v. Barnette*.[46] In that case, the Court struck down a state board of education resolution that compelled all teachers and students to salute the flag while reciting a specific pledge of allegiance.[47] Justice Jackson concluded: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[48] For governmental officials to attempt to do so "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[49]

Justice Jackson's eloquent argument against the power of the state to compel an individual to express a specified message was echoed more than thirty years later by Chief Justice Burger, writing for the Court in *Wooley v. Maynard*.[50] In *Wooley* the Court struck down a New Hampshire statute requiring passenger vehicle license plates to bear the state motto, "Live Free or Die."[51] The Court reasoned that:

> [New Hampshire] is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.[52]

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43. *Id.* at 537.
44. *Id.* at 538.
45. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (plurality opinion).
46. 319 U.S. 624 (1943).
47. *Id.* at 642.
48. *Id.*
49. *Id.*
50. 430 U.S. 705 (1977).
51. *Id.* at 717.
52. *Id.* The Court also questioned why, if the interests served by the display of the motto on license plates was so important and so linked to the identity of the state, the motto was not included on the license plates for officials, such as the governor, supreme

The principle against compelled expression not only prevents the government from forcing individuals to express officially sanctioned messages, but also restricts the government from compelling one person—natural or legal—to carry the expression of another, at least where the right of access turns on the content of the expression at issue. In *Miami Herald Publishing Co. v. Tornillo*,[53] the Supreme Court unanimously struck down a Florida statute that gave any candidate "assailed regarding his personal character or official record by any newspaper," a right to reply to the charge, without cost, in the same publication.[54] Chief Justice Burger wrote in detail about the changes in the press since the ratification of the Constitution, all of which tended to decrease competition in the "marketplace of ideas." The changes included: the increased costs of publishing, which made entry into the newspaper business prohibitively expensive for most people;[55] the dominance of group-owned, chain, and national newspapers, which, often working in combination with television and radio stations, tended to homogenize the news and heighten the "business" aspects of the media;[56] the elimination of competing newspapers in most large cities;[57] and the prevalence of "abuses of bias and manipulative reportage."[58] Remedies for all of these alleged changes were quite likely desirable, the Chief Justice wrote, "but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[59]

The Court identified the "core" issue in the case as one concerning "[c]ompelling editors or publishers to publish that which ' "reason" tells them should not be published' "[60] and proceeded to identify three grounds for striking down the statute. First, the Court reasoned that the "Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."[61] Second, the Court noted that the "statute exacts a penalty on the basis of the content of a newspaper."[62] The penalty—measured in terms of the cost of printing the reply, the stories that could not be run because of the space that the reply occupied, and the potential burden on the newspaper to disassociate itself from expression with which it did not agree—was content-based because the right of reply statute was triggered only by stories assailing the character or record of any candidate.[63] This aspect raised the specter that the newspaper might steer clear of political controversy; as a

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court justices, members of congress, and sheriffs. *Id.* at 717 n.14.

53. 418 U.S. 241 (1974).
54. *Id.* at 244.
55. *Id.* at 248.
56. *Id.* at 249.
57. *Id.* at 249-50.
58. *Id.* at 250.
59. *Id.* at 256.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 256-57.

result, "political and electoral coverage would be blunted or reduced."[64] Those considerations led the Chief Justice to conclude that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'. . . ."[65] As a third basis for overturning the statute, the Court stressed that:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.[66]

It could easily be as distorting to public debate and as distressing to personal identity for the government to compel an editor to publish material which he has otherwise chosen "to leave on the newsroom floor" as for the government to compel an individual to salute the flag.

4. *The principle of broad application*

The three principles of free expression thus far noted have been both sustained and extended by a series of broad interpretations that the Supreme Court has applied to the First Amendment. For example, as the cases discussed above indicate, the Court has applied the First Amendment to protect both individuals and organizations and to restrict not merely "Congress," but all federal and state governmental agencies.[67] In this expansive framework, the Supreme Court has further interpreted the First Amendment to apply to expression that the Court has determined may not independently warrant protection, conduct that involves no speech, and activities ancillary to expression. In addition, the Court has created a variety of procedural devices to protect litigants claiming abridgement of their First Amendment rights.

a. "Breathing space" for protected expression. Although the Supreme Court has repeatedly acknowledged that there is "no constitutional value in false statements of fact,"[68] the Court regularly interprets the

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64. *Id.* at 257.

65. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

66. *Id.* at 258; *see also id.* at 261 (White, J., concurring) ("[T]his law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor."); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (upholding a bar against employment advertising specifying "male" or "female" preference, but stressing that "we affirm unequivocally the protection afforded to editorial judgment").

67. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-501 (1952) (citation omitted) ("In a series of decisions beginning with Gitlow v. New York, 268 U.S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day.").

68. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

First Amendment to protect such statements. The justification for this apparent contradiction is that a rule of strict liability separating "true" expression from "false," or protected from unprotected, would necessarily deter some "true" or protected expression, either because of errors by judges or because of "self-censorship" by publishers in an effort to avoid liability.[69] Thus, to avoid penalizing "true" or protected expression, the Court often carves out an area of "breathing space" around expression that it believes warrants protection under the First Amendment. In *New York Times Company v. Sullivan*,[70] the watershed case that marked the beginning of the constitutionalization of defamation law, Justice Brennan wrote for the Court that the "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ."[71] Instead of imposing summary liability for statements that are defamatory and false, the Court held that the First Amendment requires that where the statement concerns the official conduct of public officials, those officials must prove with "convincing clarity" that the statement was published with "actual malice."[72] The Court defined "actual malice" as requiring "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[73] The Court has since extended the *New York Times* actual malice requirement to "public figures" who, while not government leaders, "often play an influential role in ordering society."[74]

In 1974, the Court went even further to require that states not allow "liability without fault" for defamatory statements that injure private individuals and not permit recovery of presumed or punitive damages by private plaintiffs without a showing of *New York Times* actual malice.[75] "Although the erroneous statement of fact is not worthy of constitutional protection," Justice Powell wrote for the Court, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[76] The Court has also interpreted the First Amendment to require that all plaintiffs bear the burden of proving the falsity of the allegedly defamatory statements, at least where those statements deal with matters of public concern.[77] In *Philadelphia Newspapers, Inc. v. Hepps*,[78] the Court held that such a rule was necessary to "ensure that

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69. *Id.* at 340.

70. 376 U.S. 254 (1964).

71. *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

72. *Id.* at 279-80.

73. *Id.* at 280.

74. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).

75. *Gertz*, 418 U.S. at 347. *Gertz* was reinterpreted by a divided Court in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756, 757 (1985), to apply only where the expression at issue involved "a public issue," "public speech," or an "issue of public concern." *Id.*

76. 418 U.S. at 340-41.

77. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986).

78. *Id.*

speech on matters of public concern is not deterred . . . . [When] the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech."[79]

b. Expressive conduct and symbolic expression. The First Amendment protects far more than "speech" or even written or spoken expression. The Court has applied the First Amendment to protect expressive conduct and symbolic expression. For example, in *Texas v. Johnson,*[80] the Supreme Court reversed the conviction of Gregory Lee Johnson for burning a United States flag.[81] Justice Brennan, writing for the Court, noted that the Texas statute under which Johnson had been convicted would have permitted the burning of the flag if the purpose of the activity was to dispose of a soiled or worn flag, but not if the purpose was to offend others.[82] "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct."[83] Once the Court concluded that the statute targeted expression rather than conduct, the Court applied " 'the most exacting scrutiny,' "[84] because it found the statute to be content-based.

Congress responded to *Texas v. Johnson* by passing the Flag Protection Act of 1989,[85] which provided that "[w]hoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." The Court reviewed the constitutionality of the statute in *United States v. Eichman.*[86] Justice Brennan, writing for the Court, concluded that the "[g]overnment's asserted interest is 'related "to the suppression of expression," ' and concerned with the content of such expression."[87] The Act was therefore subject to "the most exacting scrutiny," a standard which, the Court found, the Act failed to satisfy.[88] The Court's decisions in *Johnson* and *Eichman* do not merely provide current examples of the Court's application of the First Amendment to expressive conduct. They also clarify that such conduct, when subjected to regulations that target the expressive content, is entitled to full protection under the First Amendment.

c. Funding and distributing expression. The First Amendment extends not only to expression and to expressive conduct, but also to those activities which are essential to meaningful expression, such as its fund-

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79. *Id.* at 776.
80. 491 U.S. 397 (1989).
81. *Id.* at 420.
82. *Id.* at 411.
83. *Id.*
84. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
85. Flag Protection Act of 1989, Pub. L. No. 101-31, 103 Stat. 777 (codified as amended at 18 U.S.C. § 700 (1988 & Supp. IV 1992)).
86. 496 U.S. 310 (1990).
87. United States v. Eichman, 496 U.S. 310, 315 (1990) (quoting Texas v. Johnson, 491 U.S. at 403).
88. *Id.* at 311.

ing and distribution. The First Amendment's application to protect funding of expression was made clear in a series of cases in which the Court struck down a Louisiana statute that imposed a two percent tax on the advertising gross receipts of all newspapers with a weekly circulation of more than 20,000;[89] a use tax imposed by the State of Minnesota on the cost of paper and ink used in the publication of periodicals, but from which was exempted the first $100,000 of these commodities used in any calendar year;[90] spending limitations on supporters of "a clearly identified candidate" for federal office and on candidates themselves;[91] and a Massachusetts law that prohibited certain corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[92] In none of these cases did the Court hesitate to find a vital First Amendment interest, even though each involved nothing more than purely financial restrictions on expression. Moreover, while so-called "commercial speech" may be subject to lesser First Amendment protection, the Court in these cases was resolute that "[i]t is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.' "[93]

The same holds true for regulations that restrict distribution, rather than the freedom to write or say what one wishes. Chief Justice Charles Evans Hughes wrote for a unanimous Court in *Lovell v. City of Griffin*[94] that a Georgia ordinance restricting distribution of literature without the written permission of the City Manager "cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' "[95] Thus, the Court held that "[t]he right of freedom of speech and press has broad scope . . . . This freedom embraces the right to distribute literature . . . ."[96]

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89. Grosjean v. American Press Co., 297 U.S. 233 (1936).

90. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983). The use tax would have exempted the first $100,000 of such commodities used in any calendar year. *Id.* at 578.

91. Buckley v. Valeo, 424 U.S. 1 (1976).

92. First Nat'l Bank v. Bellotti, 435 U.S. 765, 768 (1978) (quoting MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977)).

93. *Id.* at 786 n.23 (quoting Buckley v. Valeo, 424 U.S. 1, 16 (1976)).

94. 303 U.S. 444 (1938).

95. *Id.* at 452 (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1877)); *see also* Talley v. California, 362 U.S. 60, 64 (1960) (holding unconstitutional ordinance prohibiting handbill distribution). In 1964, the Court reaffirmed this important principle in Griswold v. Connecticut, 381 U.S. 479, 482 (1964), stating: "The right to freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read. . . ." *Id.*

96. Martin v. Struthers, 319 U.S. 141, 143 (1943); *see also* Smith v. California, 361 U.S. 147, 150 (1959) (discussing freedoms associated with publication and dissemination of literature).

d. Procedural protections for free expression. The First Amendment has also been interpreted to provide a wide variety of procedural protections for free expression. For example, the "overbreadth" doctrine permits courts to invalidate regulations on First Amendment grounds even when the specific litigants challenging those regulations have themselves engaged in no constitutionally protected activity.[97] This is a significant departure from the traditional rule that one person may not challenge the constitutionality of a statute because of how that statute might be applied to others in situations not before the court.[98] Under the overbreadth doctrine, "speech-specific statutes on their face forbidding speech not within the constitutional authority of the state to forbid, are subject to attack even by a party whose speech could clearly have been reached under a more narrowly drawn statute."[99]

"Vagueness" is another basis on which courts overturn restrictions on free expression that might be permitted if challenged only on due process grounds. In *Smith v. California*,[100] Justice Brennan wrote that "this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potential inhibiting effect on speech; a man may the less be required to act at his peril here because the free dissemination of ideas may be the loser."[101] Other procedural protections for free expression include placing the burden of proof on the state to justify the constitutionality of a law or regulation that restricts speech, rather than on the challenger to prove that the law is unconstitutional,[102] and permitting expedited or interim review of restrictions on expression.[103] These procedural protections, together with the very broad interpretation given the First Amendment to afford protected expression "breathing space," to protect expressive activity and symbolic speech, and to protect the funding and distribution of expression, substantially enhance the power and scope of the First Amendment.

B. Anomalies

Whatever else the First Amendment may mean, the Supreme Court has interpreted it to forbid the government from restricting expression prior to its utterance or publication or merely because the government

97. *See* Note, *The Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970) [hereinafter Note].

98. *See generally* New York v. Ferber, 458 U.S. 747, 767 (1982).

99. WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT CASES AND MATERIALS 677 n.37 (1991). *See generally* Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987); Note, *supra* note 97.

100. 361 U.S. 147 (1959).

101. *Id.* at 151; *see also generally* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 62 (1960).

102. *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958).

103. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); *In re* Providence Journal, 820 F.2d 1354 (1st Cir.) (en banc), *cert. granted sub nom.* United States v. Providence Journal Co., 484 U.S. 814, *cert. dismissed*, 485 U.S. 493 (1987).

disagrees with the sentiment expressed;[104] and from making impermissible distinctions by content,[105] or compelling speech or access to the expressive capacity of another,[106] without demonstrating that the abridgement is narrowly tailored to serve a compelling governmental interest. These First Amendment principles restrict not merely Congress, but all federal and state governmental agencies, and may also apply to expression that the Court has determined does not independently warrant protection, conduct that involves no speech, and activities ancillary to expression.[107]

Despite the force and breadth of the Supreme Court's interpretation of the First Amendment as stated above, the application of that interpretation has not been uniformly consistent. When confronted with restrictions on telegraph and telephone communications and on over-the-air radio and television broadcasting, the Court has assumed—often with little explanation—that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[108] However, the basic First Amendment principles do not change. Rather, their application is tempered by technological features of the specific medium at issue.[109]

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104. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

105. *Id.* at 2542-43.

106. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 244 (1974).

107. For a discussion of the principle of broad application, see *supra* notes 67-103 and accompanying text.

108. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

109. *See* Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994).

> In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation . . . . This is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech.

Id. See also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("In assessing the First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) ("We have recognized that 'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.' " (quoting *Red Lion*, 395 U.S. at 386)); Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 818 (1984) (Brennan, J., dissenting) ("The Court recognizes that each medium for communicating ideas and information presents its own particular problems. Our analysis of the First Amendment concerns implicated by a given medium must therefore be sensitive to these particular problems and characteristics."); Bigelow v. Virginia, 421 U.S. 809, 825 n.10 (1975) ("[T]he 'unique characteristics' of this form of communication 'make it especially subject to regulation in the public interest.' " (quoting Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kliendrast, 405 U.S. 1000 (1972))); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."). *See generally* Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 (1994).

1. The common carriage justification

Perhaps the most striking historical anomaly of First Amendment application is the concept of common carrier, particularly telegraph and telephone. Deployed in the United States during the middle part of the 19th century, the telegraph could reliably send short messages in Morse code through electrical wires.[110] In 1866, Congress, in an effort to encourage expansion of the telegraph system, offered telegraph companies rights of way along post roads and across public lands and permitted the companies to cut trees for poles on public lands without charge.[111] In exchange for these privileges, telegraph companies had to provide service to all would-be customers without discrimination—the hallmark of common carriage doctrine. By the turn of the century, telegraph companies were routinely treated by the courts as common carriers, analogous to the railroads that the telegraph lines so often ran along,[112] as opposed to the press or other speakers whose messages the lines carried.[113] As common carriers, telegraph companies were required to serve all who requested carriage,[114] to provide service for a reasonable price[115] and subject to reasonable regulations,[116] and were forbidden from discriminating among customers[117] or other carriers.[118] The First Amendment played no role in the evaluation of these restrictions on telegraph companies.

The laws which governed the telegraph industry were the obvious regulatory model to choose for the telephone when it was invented in

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110. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 25 (1983).

111. 47 U.S.C. §§ 1-6, 8 (originally enacted as Post Roads Act of 1866, §§ 5263-68, 18 Stat. 1019, 1020), *repealed by* Act of July 16, 1947, ch. 256, § 1, 61 Stat. 327.

112. The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 10101-11917 (1988)), regulated railroads as common carriers.

113. *See* DE SOLA POOL, *supra* note 110, at 95 (discussing extensive use of telegraph communication by the press; noting that "[b]y 1880 press telegrams were 11 percent of the total [telegraph traffic]").

114. *See* Cook v. Chicago, R.I. & Pac. Ry., 46 N.W. 1080, 1082 (Iowa 1890); State *ex rel.* Webster v. Nebraska Tel. Co., 22 N.W. 237, 238-39 (Neb. 1885); McDuffee v. Portland & Rochester R.R., 52 N.H. 430, 448 (1873); State *ex rel.* Gwynn v. Citizen's Tel. Co., 39 S.E. 257, 263 (S.C. 1901).

115. *See Cook*, 46 N.W. at 1082.

116. *See* Western Union Tel. Co. v. Call Publishing Co., 62 N.W. 506, 510 (Neb. 1895), *aff'd*, 181 U.S. 92 (1901); Shepard v. Milwaukee Gas Light Co., 6 Wis. 526, 535 (1858).

117. Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 211 U.S. 612, 619 (1909) ("This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises . . . ."); Scofield v. Lake Shore & M.S. Ry. Co., 3 N.E. 907, 919 (Ohio 1885) ("The duty to receive *and carry* was due to every member of the community, and in an equal measure to each" (quoting Messenger v. Pennsylvania Ry., 36 N.J. L. 407, 410 (1873)) (emphasis in original)).

118. A telegraph company "represents the public when applying to [another telegraph company] for service and no discrimination can be made by either against the other, but each must render to the other the same services it renders to the rest of the community under the same conditions." People *ex rel.* Western Union Tel. Co. v. Public Serv. Comm'n, 230 N.Y. 95, 101 (1920). For a discussion of universal access to common carriers, as well as common carrier duties, *see generally* Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 73-84 (1992).

1876.[119] In 1910 Congress passed the Mann-Elkins Act,[120] classifying telephone companies as common carriers and subjecting them to the regulations of the Interstate Commerce Commission (ICC). Although the ICC was preoccupied with regulating the railroads, the states and the courts had already imposed an array of common carrier obligations on telephone companies.[121] In 1934 Congress passed title II of the Communications Act (title II),[122] which regulates common carriers.[123] Title II was taken almost intact from the Mann-Elkins Act. As with regulation of the telegraph, there was no mention of the First Amendment; a law designed for regulating the nation's railroads had been given a new name and applied to the nation's largest communications industry.[124]

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119. Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provision—A Product of Evolutionary Development*, *in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 25, n.3 (Max D. Paglin, ed., 1989).

120. Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539, 544-45 (1910), *superseded by* Communications Act of 1934, ch. 652, 48 Stat. 562 (codified as amended at 47 U.S.C. §§ 151-613 (1988 & Supp. IV 1992)).

121. *See* Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 100 (1901); Central Union Tel. v. State *ex rel.* Falley, 19 N.E. 604, 612 (Ind. 1889); State *ex rel.* Webster v. Nebraska Tel. Co., 22 N.W. 237, 239 (Neb. 1885).

122. Communications Act of 1934, ch. 652, 48 Stat. 562 (codified as amended at 47 U.S.C. §§ 151-613 (1988 & Supp. IV 1992)).

123. Although imposing substantial regulations on "common carriers," the Act provides a meaninglessly circular definition of who fits within the term. *See* 47 U.S.C. § 153(h) ("'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."). "Historically," Professor Henry Perritt writes, "one of the most important determinants of common carrier status was whether one held oneself out as a common carrier . . . . [T]he justification for the 'holding out' theory was contractual." Perritt, *supra* note 118, at 77.

In the specific context of title II, the FCC and courts have focused on two factors: "holding out" the provision of service on a nondiscriminatory basis; and carriage of messages, the content of which is controlled exclusively by the customer. *See* National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently . . . .'" (quoting Semon v. Royal Indem. Co., 279 F.2d 737, 739 (5th Cir. 1960))); National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) ("A second prerequisite to common carrier status . . . . is the requirement . . . that the system be such that customers 'transmit intelligence of their own design and choosing.'" (quoting *In re* Industrial Radiolocation Serv., 5 F.C.C.2d 197, 202 (1966))).

124. "Telephone companies" includes both local exchange carriers (LECs), which provide local telephone service and access to long-distance service providers, and interexchange carriers (IXCs), which provide telephone service between local exchanges. There are approximately 1,325 LECs providing service in the United States, most of which are very small. The 22 Bell Operating Companies (BOCs), the nation's largest LECs, are organized into seven regional holding companies (RHCs) and provide about 80% of local telephone service. Interexchange service is dominated by three carriers: AT&T (which controls 60% of the long distance market), MCI (17%), and Sprint (9%). Telephone customers usually have no choice as to LEC, but are free to choose among IXCs. Collectively, the telephone companies provide service to more than 88 million households (about 93% of all U.S. households) and 30 million businesses (near 100%). The entire U.S. telecommunications services industry

The provisions of title II impose significant restrictions on the activities of common carriers. In addition to a variety of filing and recordkeeping requirements,[125] title II obligates "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."[126] It further requires that all "charges, practices, classifications, and regulations for and in connection with such communication service . . . be just and reasonable . . . ."[127] Title II forbids common carriers to "make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[128] Common carriers must designate, file with the Federal Communications Commission (FCC), and make available for public inspection schedules showing all charges.[129] Title II empowers the FCC to hold public hearings regarding proposed charges,[130] prescribe minimum and maximum charges and "reasonable" classifications of service,[131] and order payments of damages to third party complainants.[132] In perhaps the Act's most extraordinary grant of authority, section 214 of title II forbids any interstate carrier from constructing a new line, extending or discontinuing an existing line, or providing service over any such line without a certification from the FCC that "the present or future public convenience and necessity *require or will require*" the new line or service.[133]

In addition to restrictions on creating, expanding, or discontinuing telephone service, and regulations on the operation of a telephone business, the government has restricted the capacity of telephone companies to offer information services. In 1970, for example, the FCC determined that it would not grant telephone companies the certificates required under section 214 to offer cable television service in the area where they provided telephone service.[134] The FCC was concerned about the potential for "unfair or anticompetitive practices" that might arise from telephone companies owning or controlling cable television service

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was predicted to have revenues in 1994 exceeding $193 billion. U.S. INDUSTRIAL OUTLOOK 1994, *supra* note 6, at 29-1; NATIONAL TELECOM. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, NTIA TELECOM 2000, at 203 (1988).

125. 47 U.S.C. §§ 219-220 (1988).

126. *Id.* § 201(a).

127. *Id.* § 201(b).

128. *Id.* § 202(a).

129. *Id.* § 203(a).

130. *Id.* § 204(a).

131. *Id.* § 205(a).

132. *Id.* § 209.

133. *Id.* § 214(a) (emphasis added). Some states require similar approval for changes in intrastate facilities or services. *See, e.g.*, CAL. PUB. UTIL. CODE § 1001 (Deering 1990).

134. *In re* Applications of Tel. Cos. for § 214 Certificates for Channel Facilities Furnished to Affiliated CATV Sys., 21 F.C.C.2d 307 (final report & order), *modified*, 22 F.C.C.2d 746 (1970) (opinion & order), *aff'd sub nom.* General Tel. Co. v. United States, 449 F.2d 846 (5th Cir. 1971).

providers.[135] Under the FCC's ruling, a local telephone company may lease transmission capacity to an unaffiliated video programmer, but it may not own, operate, or control such a programmer.[136] Congress codified these cross-ownership rules in the Cable Communications Policy Act of 1984.[137]

At no time during the promulgation or enforcement of these and other restrictions on telephone companies were those companies' First Amendment rights discussed.[138] As with the telegraph industry, a regulatory structure had built up around a communications business that had simply blinded legislators, regulators, and judges to the First Amendment implications. "The issue simply did not arise. The telephone was seen as a successor to the telegraph; the telegraph in turn was seen as a common carrier like the railroad; and so that was the law applied. The phone was not seen as a successor to the printing press."[139] The telephone companies themselves were often blind as well, accepting government monopolies and other preferences in exchange for their First Amendment rights. In the few instances where the companies did raise First Amendment objections to proposed regulations, those objections were dismissed out of hand, or with reference only to the First Amendment interests of the people whose messages the company carried via its transmission capacity.[140]

The failure to recognize telephone companies' First Amendment

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135. Applications of Tel. Cos. for Certain Certificates for Channel Facilities: Notice of Inquiry and Proposed Rulemaking Regarding CATV Sys., 34 Fed. Reg. 6290, 6292 (1969).

136. *See* 47 C.F.R. §§ 63.54-.58 (1993). The rule prohibits a local telephone company from providing "video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier" and from providing "channels of communications or pole line conduit space, or other rental arrangements" to any affiliated companies for the purpose of providing video programming to the public. 47 C.F.R. §§ 63.54(a) & (b) (1993).

137. Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2785 (codified in scattered sections of 47 U.S.C.). Relevant sections include:

> (b)(1) It shall be unlawful for any common carrier, subject in whole or in part to [title II of the Act] to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> (2) It shall be unlawful for any common carrier, subject in whole or in part to [title II of the Act] to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

Id. § 613(b), 98 Stat. at 2785 (codified at 47 U.S.C. § 533(b) (1988)).

138. *See generally* Daniel Brenner, *Telephone Company Entry Into Video Services: A First Amendment Analysis*, 67 NOTRE DAME L. REV. 97, 103-49 (1991); Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071, 1075-85 (1992).

139. DE SOLA POOL, *supra* note 110, at 103.

140. *See id.*

rights reflects both a century of thinking of telephone companies as regulated common carriers, and economic concerns, born of both real and perceived technological characteristics of the telephone medium. Given the high costs of laying wires and providing telephone equipment to homes and businesses, telephone service had always been thought of as a natural monopoly; it would be inefficient, if not economically impossible, to have two or more companies serving the same area. Moreover, because the value of a telephone system is largely measured by how many people it can connect, early competition between local telephone service providers fairly rapidly resulted in agreements and mergers among systems to provide interconnectivity to a greater number of customers—thus, the birth of AT&T—and the rapidly growing dominance of systems serving more customers over smaller systems.[141] In addition, because of the high costs of extending telephone service beyond cities, telephone companies were thought to need a consistent source of capital, supplied through their rate base, which the government protected from competition by providing for monopoly telephone service.[142] In short, consumer preferences and governmental regulation combined to centralize the supply of the vast majority of telephone and telegraph service in the United States to very few—ultimately two (Western Union and AT&T)—companies. This extreme centralization, in turn, provoked traditional "common carrier" regulation to guarantee some minimum quality of service, at a "fair" price, available to all who were willing and able to pay for it.[143] Since that time, while the features of the technology that had contributed to this situation—the reliance on lines, limits on line capacity, and the cost of laying and maintaining those lines—have largely evaporated, the system of monopolies and regulations and the associated disregard for the First Amendment remain.[144]

Beginning last year, however, the situation began to change dramatically. Although Congress had toyed with the idea of repealing the cross-

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141. *See generally* Philip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORD. L. REV. 1147, 1164-66 (1993).

142. DE SOLA POOL, *supra* note 110, at 102-05.

143. Miller, *supra* note 141, at 1165.

144. When finally forced in 1991 by the D.C. Circuit Court of Appeals to lift the information services restriction on the Regional Holding Companies, which, through subsidiaries, provide local telephone service, Judge Harold Greene wrote:

> In the opinion of this Court, informed by over twelve years of experience with evidence in the telecommunications field, the most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates, with the captive local telephone monopolies as their base. Such a development would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic well[-]being of the American people.

United States v. Western Elec. Co., 767 F. Supp. 308, 326 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 487 (1993) (footnotes omitted).

ownership ban,[145] the courts beat the legislature to it. Four federal courts have already enjoined enforcement of the ban, on the basis that the ban was no longer necessary, but rather that the cross-ownership restriction violated the First Amendment rights of telephone companies. In the first case, *Chesapeake & Potomac Telephone Co. v. United States*,[146] decided by the U.S. District Court for the Eastern District of Virginia in August 1993, two subsidiaries of Bell Atlantic Corporation challenged the constitutionality of the ban.[147] Judge Thomas Selby Ellis, III, wasted little time in recognizing the First Amendment implications of the ban:

> [T]he provision in question must be subjected to a higher standard than mere "rationality review." Section 533(b) directly abridges the plaintiff's right to express ideas by means of a particular, and significant, mode of communication—video programming . . . . As such, a statute that directly abridges the right to engage in this form of speech must be evaluated under the heightened standards that have evolved under the Supreme Court's First Amendment decisions. This is true even when the abridgement is an incidental effect of a statute directed at non-speech activity, such as "structural" economic regulation, if such a statute disproportionately impacts entities engaged in speech protected by the First Amendment.[148]

Judge Ellis made quick work of the government's claim that telephone companies waived their First Amendment rights in exchange for "a government-sanctioned monopoly for the provision of local wireline telephone exchange services."[149] The argument failed on both factual and legal grounds. The plaintiff's monopoly over local telephone service was granted by the Commonwealth of Virginia; the cross-ownership ban was imposed by the federal government. "[T]he sovereign which purportedly provided the benefit to the plaintiffs is not the same sovereign that placed the condition on the benefit."[150] Moreover, the state-sanctioned monopoly was granted long before the federal condition was imposed. "In no way is there a quid pro quo relationship between § 533(b) and the local exchange monopoly."[151] More important, the grant of monopoly powers or other benefits by the government has never been found to be sufficient to justify abridging the recipient's First Amendment rights. The Supreme Court rejected such arguments in *Central Hudson Gas & Elec-*

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145. *See* H.R. 1504, 103d Cong., 1st Sess. (1993); S. 1200, 102d Cong., 1st Sess. (1991); H.R. 2546, 102d Cong., 1st Sess. (1991); S. 2800, 101st Cong., 2d Sess. (1990); S. 1068, 101st Cong., 1st Sess. (1989); H.R. 2437, 101st Cong., 1st Sess. (1989).

146. 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, No. 93-2340, 1994 WL 661825 (4th Cir. Nov. 21, 1994).

147. The challenge put the Department of Justice in the untenable position of having to defend the validity of a provision that another federal agency, the National Telecommunications and Information Administration (NTIA), had recommended abolishing. *See id.* at 914 n.8.

148. *Id.* at 918 (citations omitted).

149. *Id.* at 919.

150. *Id.* at 920.

151. *Id.* at 921.

tric Corp. v. Public Service Commission[152] and in *Consolidated Edison.*[153] "[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely," the Supreme Court wrote in *Perry v. Sindermann.*[154] "It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech."[155] As a result, Judge Ellis rejected the government's arguments to the contrary in *Chesapeake & Potomac Telephone Co.*[156]

Having determined that the telephone company's First Amendment rights were implicated by the cross-ownership ban, Judge Ellis applied the intermediate scrutiny of *Ward v. Rock Against Racism*[157] and *United States v. O'Brien*[158] to determine that while the government's asserted interest—protecting diversity of ownership of communications outlets—was substantial, the cross-ownership ban "does not fit with [the government's] asserted justification."[159] The cross-ownership ban protects against anticompetitive conduct by telephone companies in the video programming market, where telephone companies have no greater market power or incentive to act anticompetitively than any other programmer or cable operator, not in the video transmission market, where the potential for cross-subsidization and access discrimination by telephone companies is greatest.[160] The court therefore found the cross-ownership ban to be "facially unconstitutional as a violation of plaintiffs' First Amendment right to free expression" and enjoined its enforcement.[161]

Judge Ellis' decision was affirmed by the Fourth Circuit Court of Ap-

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152. 447 U.S. 557, 568 (1980) ("appellant's monopoly position does not alter the First Amendment protection for its commercial speech").

153. 447 U.S. 530, 534 n.1 (1980) ("Nor does [appellant's] status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.").

154. 408 U.S. 593, 597 (1972).

155. *Id.*

156. 830 F. Supp. 909, 921 (E.D. Va. 1993), *aff'd*, No. 93-2340, 1994 WL 661825 (4th Cir. Nov. 21, 1994).

157. 491 U.S. 781, 798 (1989) (noting that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so"). *See generally* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804-12 (1984); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

158. 391 U.S. 367, 376-77 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct," government regulation of that conduct is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.") (footnotes omitted).

159. *C&P Tel. Co.*, 830 F. Supp. at 929.

160. *Id.* at 930.

161. *Id.* at 932.

peals in an opinion reported on November 21, 1994.[162] Other telephone companies did not wait for the Fourth Circuit to reach its result, however. Within a few weeks of Judge Ellis's decision, Ameritech brought two similar suits,[163] followed shortly by GTE, US West, Pacific Telecom, NYNEX,[164] BellSouth, Southern New England Telephone Company, and Southwestern Bell.[165] The suit brought by US West and Pacific Telecom was decided in June,[166] BellSouth's case was decided in September,[167] and Ameritech's two suits were consolidated and decided in October,[168] all on similar grounds: the cross-ownership ban "directly abridges the plaintiffs' right to express themselves by prohibiting them from engaging in video programming."[169]

2. *The scarcity justification*

The development of radio transmission technologies at the end of the 19th century promised to spread the availability of communications over greater geographic distance and, in turn, to larger audiences. Although in Britain and elsewhere radio transmission was severely restricted and ultimately nationalized by the government,[170] in the United States it was rapidly evolving into a medium for the masses. By 1919 there were about 4,000 amateur radio stations in the United States.[171] By 1923 there were more than 500 professional broadcasting stations in the United States;

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162. No. 93-2340, 1994 WL 661825 (4th Cir. Nov. 21, 1994).

163. Ameritech Corp. v. United States, No. 93 C 6642 (N.D. Ill. filed Nov. 1, 1993); Ameritech Corp. v. United States, 93 CV 74617 (E.D. Mich. filed Nov. 1, 1993); *see* Ameritech Corp. v. United States, No. 93 C 6642, 1994 WL 142864 (N.D. Ill. Apr. 18, 1994) (considering whether to transfer Ameritech's Illinois action to Michigan in the interests of judicial economy); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994) (granting Ameritech's motion for summary judgment; finding violation of Ameritech's First Amendment right of free speech).

164. *See* NYNEX Corp. v. FCC, 153 F.R.D. 1 (D. Me. 1994) (granting New England Cable Television Association motion to intervene of right).

165. Frank W. Lloyd & Peter Kimm, *The Cable/Telco Cross-Ownership Issue*, N.Y. L.J., Apr. 15, 1994, at 5; *Bell Atlantic Leads Charge to Remove Cable Cross-Ownership Ban*, TELCO BUS. REP., Jan. 17, 1994, at 1.

166. US West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash.), *aff'd*, No. 94-35775, 1994 WL 719064 (9th Cir. 1994).

167. BellSouth Corp. v. United States, No. CV 93-B-2661-S, 1994 WL 656704 (N.D. Ala. Sept. 23, 1994).

168. Ameritech Corp. v. United States, Nos. 93 C 6642, 94 C 4089, 1994 WL 635008 (N.D. Ill. Oct. 27, 1994).

169. *US West*, 855 F. Supp. at 1190. For a discussion of these and other antitrust cases in the context of the development of the information superhighway, see Winston P. Lloyd, Comment, *What's the Frequency Uncle Sam?: Will the Government Hold Up the Information Superhighway?*, 30 WAKE FOREST L. REV. 233 (1995).

170. DE SOLA POOL, *supra* note 110, at 110. England became interested in restricting radio transmissions after an airplane's distress signals were intercepted by an entertainment program. *Id.* The restrictions imposed required governmental approval for radio transmission frequencies and contents. *Id.*

171. *Id.* at 112.

within one year, that number had grown to 1,105.[172] In 1925, Secretary of Commerce and Labor Herbert Hoover warned, "Conditions absolutely preclude increasing the total number of stations in congested areas. It is a condition, not an emotion."[173]

Federal regulation of radio first began with the Wireless Ship Act of 1910,[174] which "forbade any ship licensed to carry 50 or more passengers to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator."[175] Enforcement of this act was the responsibility of the Secretary of Commerce and Labor, who administered maritime navigation laws generally.[176] Two years later, the United States ratified the first international radio treaty,[177] compliance with which required more comprehensive regulation of radio communication.[178] The Radio Act of 1912[179] prohibited the operation of a radio transmitter without a license from the Secretary of Commerce and Labor, allocated certain frequencies for governmental use, and imposed restrictions on the propagation characteristics of radio transmissions.[180] The Secretary could not deny an applicant a license,[181] but he could, it was thought at the time, require a broadcaster to operate on a specified frequency in order to avoid interference.[182] In 1921, Secretary Hoover designated one channel, 833 KHz, as the single frequency for commercial broadcasting; in the summer of 1922 he added a second frequency, 750 KHz.[183]

The power to license, particularly where the licensor himself controlled the quantity of spectrum to be made available for broadcasting, even if it did not include the power to deny a license, brought with it the

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172. *Id.* at 110.

173. *Radio Control, Hearings on S.1 & S.1754 Before the Senate Comm'n on Interstate Commerce*, 69th Cong., 1st Sess. 57 [hereinafter *Radio Control Hearings*].

174. 36 Stat. 629 (1910).

175. National Broadcasting Co. v. United States, 319 U.S. 190, 210 (1943).

176. *Id.*

177. 37 Stat. 1565 (1912).

178. *Id.* at 1565-72. The treaty imposed comprehensive regulations covering hours of operation, organization, rates, collection of charges, and methods and languages of transmissions. *Id.* at 1581-1602. In addition, countries signing the protocol agreed on private and public uses, agreed to avoid interference, and agreed to give priority to distress calls. *Id.* at 1566-67.

179. Act of Aug. 13, 1912, ch. 287, 37 Stat. 302 (1912), *repealed by* Act of Feb. 23, 1927, ch. 169, § 39, 44 Stat. 1174.

180. *National Broadcasting Co.*, 319 U.S. at 210.

181. Hoover v. Intercity Radio, 286 F. 1003, 1006-07 (D.C. Cir. 1923) (holding that where executive officer's duty is "purely ministerial, and there is no discretion reposed in the officer, the courts will not hesitate to require the performance of the duty as prescribed").

182. *See id.* (noting that the Secretary of Commerce and Labor retained discretion to select wavelengths "within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference").

183. ERWIN G. KRASNOW ET AL., THE POLITICS OF BROADCAST REGULATION 11 (3d ed. 1982).

power to prefer certain expression over others.[184] The Secretary gave the most profitable hours on the frequency with the least interference to certain favored broadcasters, particularly commercial broadcasters who served the interests of the general public.[185] Special interest applicants, such as religious or labor groups, were given inferior frequencies and even these they had to share with other licensees.[186] It therefore came as no surprise that licensed commercial broadcasters supported the regulatory system that protected them from both electromagnetic interference and full economic competition.[187]

In 1925, the National Association of Broadcasters recommended that no more broadcasting licenses be issued.[188] However, that was not to be the case. The following year, the U.S. District Court for the Northern District of Illinois enjoined the Secretary from penalizing Zenith Radio Corporation for operating on an unauthorized frequency.[189] The court ruled that the 1912 Act did not grant the Secretary enforcement authority.[190] Less than three months after the court's decision, Acting Attorney General Donovan opined that the Secretary of Commerce and Labor had no power to regulate the power, frequency, or hours of operation of radio broadcasters.[191] The following day, Secretary Hoover issued a statement reneging his efforts to regulate radio and urging broadcasters to undertake self-regulation.[192] However, "the plea of the Secretary went unheeded."[193] Licensed broadcasters began switching to more desirable frequencies and hours; over the next seven months, almost 200 new, unlicensed stations went on the air, operating as they pleased.[194] Interference became rampant, the spectrum was in chaos, and both broadcasters and

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184. *See generally* Comment, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967, 971 (1931) (discussing "public interest" standard as leading to prior restraints and censorship over radio broadcasting).

185. *Id.* at 970-71. "There seems to be no sound objection to eliminating or allotting inferior privileges to those stations which do not maintain regular schedules, fail . . . to announce call numbers . . . permit personal attacks on the broadcaster's enemies, allow the use of indecent or defamatory language, [or] indulge excessively in 'direct advertising.' " *Id.* at 970 (citations omitted). However, the regulation of commercial advertising was left primarily to "the radio public through its power of indirect censorship over the stations" in that advertising brought substantial financial support for meaningful programming. *Id.* at 972.

186. *Id.* at 971.

187. At the Third National Radio Conference in 1924, Secretary of Commerce and Labor Hoover commented: "I think this is probably the only industry of the United States that is unanimously in favor of having itself regulated." SYDNEY W. HEAD, BROADCASTING IN AMERICA: A SURVEY OF TELEVISION AND RADIO 126 (3d ed. 1976) (quoting Secretary of Commerce and Labor Herbert Hoover).

188. *Big Radio Problems Face Conference*, N.Y. TIMES, Nov. 9, 1925, at 25.

189. United States v. Zenith Radio Corp., 12 F.2d 614, 618 (N.D. Ill. 1926).

190. *Id.*

191. 35 Op. Att'y Gen. 126 (1926).

192. National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1910).

193. *Id.*

194. *Id.* at 212-13.

regulators turned to Congress for help.[195] In his address to Congress on December 7, 1926, President Coolidge stated that

> the authority of the [D]epartment [of Commerce and Labor] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in the course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value.[196]

Congress responded with the Radio Act of 1927,[197] which continued the system of licensing frequencies and times of broadcasting, but added enforcement powers missing from the 1912 Act, as well as new substantive requirements for licensees.[198] Under the 1927 Act, only persons licensed by the federal government could broadcast, and then only on the frequencies and during the times assigned to them.[199] Broadcast licenses were issued for a limited term, rather than in perpetuity, as had become the case under the 1912 Act.[200] Licenses were to be granted and renewed as dictated by "public interest, convenience, or necessity,"[201] rather than pursuant to the preferences of a cabinet secretary. Broadcast licensees which carried the advertisements of one political candidate were required to give or sell equal time to opposing candidates.[202] In a single provision, the Act forbade censorship of broadcast programming by the governmental licensing agency, while it simultaneously banned obscene, indecent, or profane language.[203] Finally, the 1927 Act created a new administrative body, the Federal Radio Commission, to oversee the licensing process.[204]

The 1927 Act was soon replaced by the Communications Act of 1934,[205] which covered telegraph and telephone as well as radio and television broadcasting. The 1934 Act also centralized all federal authority not only for licensing, but also for overseeing the conduct of common carriers and broadcasters in a permanent, funded Federal Communications

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195. *Id.*

196. H.R. Doc. 483, 69th Cong., 2d Sess., at 10 (1926).

197. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 [hereinafter Radio Act of 1927].

198. *Id.*

199. *Id.* § 1, 44 Stat. at 1162.

200. *Id.*; *see* Miller, *supra* note 141, at 1169 (discussing licensing under the Communications Act of 1934 as carried over from the 1927 Act).

201. Radio Act of 1927, § 9, 44 Stat. at 1166.

202. *Id.* § 18, 44 Stat. at 1170.

203. *Id.* § 29, 44 Stat. at 1172-73.

204. *Id.* § 3. The Federal Radio Commission was authorized as a full-time body for only one year, and even then was not provided with funding or staff. After that first year of operation, the Commission would operate as a part-time appellate body, deciding appeals from decisions of the Secretary of Commerce and Labor. *See generally* KRASNOW, *supra* note 183, at 12-13.

205. Communications Act of 1934, ch. 652, tit. 1, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-613 (1988)).

Commission (FCC).[206] Title III of the Act,[207] which covers broadcasters, was taken virtually intact from the 1927 Act. The Communications Act, subsequent amendments to the Act, and rules promulgated and other actions taken by the FCC under the Act have given rise to extensive litigation regarding the First Amendment rights of broadcasters and the First Amendment's application to broadcasting.

The first real test of the First Amendment rights of broadcasters came in a challenge to the FCC's early regulatory action defining the relationships that were permissible between a network programmer and a local broadcaster.[208] In its Chain Broadcasting Report, the Commission adopted a series of rules forbidding the licensing of stations whose programming was significantly controlled by contract with a network organization. In *National Broadcasting Co. v. United States*,[209] the Supreme Court rejected the broadcasting networks' claims that the regulations violated the First Amendment. Justice Frankfurter wrote for the Court:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is the unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.[210]

The Court's reasoning, which was to become the basis for half a century of future decisions, began with the concept of electromagnetic spectrum scarcity, that is, the situation where there are more potential broadcasters than there is broadcast spectrum to accommodate their transmissions. As a result of that scarcity, selecting who could broadcast, and at what power, frequency, and hours, was as essential to the effective use of radio as "traffic control was to the development of the automobile."[211] Once such regulatory issues have arisen, Justice Frankfurter wrote, some method must be devised for selecting among financially and technically qualified candidates for the same license.[212] The standard by which the choice is to be made is found in the "public convenience, interest, or necessity" mandate of the Communications Act.[213] According to the Court's reasoning, scarcity justifies licensing; and licensing justifies picking and choosing among speakers and expression, at least to the extent of discriminating based on its origin. In light of this syllogism, the First Amend-

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206. *Id.* §§ 4-5, 48 Stat. at 1066-70 (codified as amended at 47 U.S.C. §§ 154-155 (1988)).

207. *Id.* §§ 301-329, 48 Stat. at 1081-92 (codified as amended at 47 U.S.C. §§ 301-386 (1988)).

208. Report on Chain Broadcasting, Commission Order No. 37, Dkt. 5060 (May 1941).

209. 319 U.S. 190 (1943).

210. *Id.* at 226.

211. *Id.* at 213.

212. *Id.* at 216.

213. *See* 47 U.S.C. § 307(a) (1988) ("The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.").

ment prohibition against restrictions on speech fails, at least where those restrictions are rationally related to determining which broadcasters are more likely to operate in the public interest.[214]

The Supreme Court expanded the reasons why the First Amendment applies with less force to broadcasting than to print media in *Red Lion Broadcasting Co. v. Federal Communications Commission.*[215] Justice White, writing for the unanimous Court and citing *National Broadcasting Co.*, began by focusing squarely on the scarcity argument: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[216] Because of scarcity, Justice White concluded, "Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations."[217] In addition, wrote Justice White, continuing the now-familiar scarcity syllogism, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees . . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[218]

According to the Supreme Court, scarcity permits the government to pick and choose among broadcasters. Scarcity also justifies imposing a duty on broadcasters to provide the public with "suitable access to social, political, esthetic, moral, and other ideas and experiences."[219] This suggests that broadcasters are never independent of the government, but instead act, under the government's direction, as trustees of the public. Broadcasters occupy the spectrum not for their own expressive purposes, but because it serves the interests of the public as identified by the FCC and enforced by the courts. As a result, broadcasters, as is the case with other trustees, can be restrained from, or compelled to, action to serve the interest of the trust beneficiaries. This framework was exactly what the Court in *Red Lion* envisioned: "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."[220]

Red Lion demonstrates the power of the scarcity doctrine. That doctrine has been found to justify not only licensing broadcasters and setting standards for picking and choosing among applicants, but also both compelling broadcasters to cover subjects they might not otherwise have se-

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214. *National Broadcasting Co.*, 319 U.S. at 226 ("But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice upon some such basis, the issue before us would be wholly different.").

215. 395 U.S. 367 (1969).

216. *Id.* at 388.

217. *Id.* at 389.

218. *Id.* at 391 (citations omitted).

219. *Id.* at 390.

220. *Id.* at 394.

lected and compelling them to permit the expression of others in response to that coverage. Only five years after *Red Lion* was decided, the Court in *Miami Herald Publishing Co. v. Turnillo*[221] unanimously struck down a far more limited intrusion into the First Amendment rights of newspaper publishers. In that case, the interests of the public in a competitive and responsible press could not justify "[c]ompelling editors or publishers to publish that which ' "reason" tells them should not be published.' "[222] In *Red Lion*, similar interests had been used by the unanimous Court to justify obliterating the independent First Amendment interests of broadcasters. The only difference between the two cases was the medium involved.

Red Lion may have marked the peak of the scarcity justification for treating restrictions on broadcast speech more leniently than restrictions on other expression. Within four years, the Court rejected claims that *Red Lion*'s focus on the First Amendment rights of the public supported a government-mandated right of access, and in so doing the Court retreated from its previous application of the public trustee doctrine to apply the rights of the public to restrain the actions of broadcasters. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[223] the Court found that in the absence of a requirement by the FCC or Congress that broadcasters accept political advertisements, the Constitution imposed no such burden.[224]

3. *The intrusiveness justification*

CBS v. DNC marked the first serious recognition of the First Amendment rights of broadcasters and it narrowed, though by no means terminated, scarcity as the justification for sweeping regulation of the content of broadcast programming. At the same time, it was the first occasion on which the Court considered a new justification for according less First Amendment protection to broadcast expression. At the end of his opinion for the majority, Chief Justice Burger added, almost with the appearance of an afterthought, that the Commission, in considering whether to impose broader access requirements on broadcasters, "is entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience.' "[225] The Chief Justice quoted approvingly from then-Judge Bazelon's opinion for the United States Court of Appeals for the District of Columbia, which upheld the FCC's authority to promulgate rules regarding broadcast advertising for cigarettes:

> Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a

221. 418 U.S. 241 (1974).
222. *Id.* at 256.
223. 412 U.S. 94 (1973).
224. *Id.* at 131-32.
225. *Id.* at 127.

> citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.[226]

Although the Court in *CBS* declined to find that the intrusive nature of television necessitated a right of access for political speakers, the Chief Justice's reference to the concept laid the groundwork for future application of the intrusiveness doctrine, while offering little clarification as to what it means or why it might have constitutional significance. The passage by Judge Bazelon raises three possible understandings of the doctrine. First, Judge Bazelon suggests that broadcast signals are somehow "in the air" and therefore are more intrusive than printed expression. Second, Judge Bazelon suggests that printed expression requires an affirmative act to perceive, while broadcast signals do not. In fact, he argues, certain broadcast signals, such as advertisements, require an affirmative act to avoid. Third, Judge Bazelon's opinion suggests that broadcasting may be more intrusive than print media because the former is simply more powerful than the latter. The combination of motion, images, and sound on television, and of music and words on radio, may be easier to perceive and remember or, as is suggested by Judge Bazelon's use of the word "subliminal," harder to forget.

The Supreme Court returned to the intrusiveness rationale in *FCC v. Pacifica Foundation*,[227] a case involving an allegedly indecent, but not obscene, radio broadcast. In upholding the FCC's decision to require broadcasters to "channel" "indecent" programming away from " 'times of the day when there is a reasonable risk that children may be in the audience,' " the Court accepted the assertion that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[228]

Justice Stevens offered two justifications for the lower standard of protection, at least as relevant to the present case. "First," he wrote, reminiscent of Judge Bazelon's opinion in *Banzhaf*,

> the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[229]

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226. *Id.* at 128 (quoting Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (1968), *cert. denied*, 396 U.S. 842 (1969)) (emphasis added).

227. 438 U.S. 726 (1978).

228. *Id.* at 748.

229. *Id.*

Because of the pervasiveness of broadcast signals and their intrusiveness into the home, broadcast programming may be regulated more stringently than other expression. "Outside the home," Justice Stevens pointed out, "the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away."[230]

Justice Stevens seemed to follow neither the "affirmative act" nor the "greater power" strands of the intrusiveness argument, but rather the rationale that broadcast signals are "in the air." Because broadcast signals enter the home uninvited—as an "intruder"—they receive less First Amendment protection not only than printed expression, but even than the homeowner's desire to not be confronted with such programming. As with the public trustee concept, the rights of the public—in this case, to avoid unsuitable "social, political, esthetic, moral, and other ideas and experiences"—trump those of broadcasters.

4. *The differential impact on children justification*

The Court's second justification for allowing restrictions on broadcast indecency is the presence of children in the audience. "[B]roadcasting is uniquely accessible to children," Justice Stevens wrote, "even those too young to read. Although Cohen's written message ["Fuck the Draft"[231]] might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[232] The protection of children from the potentially harmful effects of speech has caused the Court to uphold requirements that restrict the distribution even of printed expression to children.[233] The limit on those restrictions has always been that they must not reduce adults to reading "only what is fit for children."[234] With most media, it is possible to restrict access by children to identified expression without also foreclosing access by adults. As Justice Powell wrote, concurring in the judgment in *Pacifica*, "[s]ellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access."[235] The difficulty presented by broadcasting is that children and adults cannot be effectively separated in the audience. This difficulty, as the Court recognized, "is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media

230. *Id.* at 749 n.27. To the contrary, as Judge Bazelon pointed out in Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (1968), *cert. denied*, 396 U.S. 842 (1969), a recipient of broadcast signals "can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some affirmative act" (emphasis in original).

231. *See* Cohen v. California, 403 U.S. 15, 16 (1971).

232. *Pacifica*, 438 U.S. at 749.

233. *See* Ginsberg v. New York, 390 U.S. 629, 642-43 (1968).

234. Butler v. Michigan, 352 U.S. 380, 383 (1957).

235. *Pacifica*, 438 U.S. at 758 (Powell, J., concurring in part).

for First Amendment purposes."[236]

III. THE FIRST AMENDMENT APPLIED TO ELECTRONIC INFORMATION

A. *Features of Networked Information*

Information networks, whether joining the computers in a single office, or linking vast numbers of other networks around the globe, are rapidly growing to dominate business, government, education, and even recreation in the United States and throughout the world. The Internet today connects more than 45,000 separate networks and 25 to 30 million users in more than 100 countries, and is growing at the rate of 750,000 new users per month.[237] The number of Internet business service providers—the bellwether of future growth and expansion—has ballooned from less than 100 in 1990 to almost 20,000 as of August 1994.[238] Compuserve, Prodigy, and America Online, the three largest U.S. information network providers, have over 5.4 million subscribers.[239] Computer industry giants are entering the field with their systems, like Microsoft's Marvel.[240]

While on-line services operate differently, they generally consist of three types of services: electronic mail messages (e-mail), through which one user can communicate privately with another or with a service provider; electronic bulletin boards, where users can post messages for all other bulletin board subscribers to read and can read and respond to the messages posted by all other users; and on-line services and products, such as electronic catalogs from which a user can order merchandise, on-line airline reservations, and more than 2,200 searchable databases, such as those provided by Lexis and Westlaw.[241]

Overlapping these three broad types of services are three types of service providers: users, who receive and transmit messages and access services; electronic service providers, who offer on-line services; and intermediaries who, like bookstores and libraries, may supply the equipment or transmission capacity to link users to each other and to service providers. One of the powerful attributes of the Internet and other electronic networks is that these three general categories are not rigid or exclusive—one user may fill all three. For example, a university that uses computer networks for e-mail and recordkeeping is therefore a user. If the university offers services, such as on-line library catalogs or course syllabi, it is an information service provider. Finally, if the school provides Internet access to its students and faculty and disk space for bulletin boards, it is also an intermediary.

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236. *Id.* at 759 (Powell, J., concurring in part).

237. *Latest Estimates of Internet Growth*, ONLINE NEWSLETTER, Nov. 1994 [hereinafter *Latest Estimates*].

238. Jared Sandberg, *Net Working: Corporate America Is Falling in Love with the Internet*, WALL ST. J., Nov. 14, 1994, at R14.

239. Paul M. Eng, *It's Getting Crowded On Line*, BUS. WEEK, Nov. 7, 1994, at 134.

240. *Id.*

241. MATTHEW RAPAPORT, COMPUTER MEDIATED COMMUNICATION 16 (1991).

Given the dominance of electronic information and the phenomenal growth of information networks, these networks, and particularly the Internet, are certain to be the new battleground for fundamental First Amendment freedoms. Given the Court's fascination with the technological aspects of communications media and its willingness to condition fundamental First Amendment freedoms on those aspects, the question is whether electronic networks present any technological characteristics that the Court has identified as warranting lower First Amendment protection. Specifically, is there scarcity sufficient to warrant government intrusion? Are computer networks so pervasive or intrusive as to warrant lower First Amendment scrutiny? Do these networks uniquely threaten children? And are there technological features that contribute to "natural monopolies" and thereby potentially create incentives for limiting access to the communications medium, or providing access on fluctuating terms of price and service? In short, does electronic information partake sufficiently of any of these features to justify a different standard of First Amendment protection?

B. Scarcity of the Medium

Some of the features of the scarcity argument seem to play no role in information technologies, even in those technologies in which they were first identified by the Court. Consider spectrum scarcity. For several reasons, spectrum scarcity has always been a problematic justification for limiting First Amendment protections. First, the government has always played a role in creating scarcity. Broadcast licenses are limited by frequency, power, time, and geographical location. By adjusting those features of every license, it may be possible to provide the needed amount of broadcast spectrum for everyone. There are competing uses for the broadcast spectrum, including commercial broadcasting, public broadcasting, mobile radio, pagers, garage door openers, police scanners, and thousands of others. The FCC chooses how much of the spectrum to allocate to a given service. In 1921, Secretary Hoover designated only one channel for commercial broadcasting; the scarcity that resulted was the government's creation.[242] Often, the government reserves a portion of the spectrum for its own or future use. Each of these choices contributes to scarcity in the high-demand services.

Second, has any real scarcity in fact existed? Throughout the 20th century, there have always been unallocated frequencies for some uses of the spectrum, for example, unallocated AM, FM, or VHF frequencies in markets thought too small to support commercial service; UHF frequencies where broadcasters preferred VHF frequencies; and AM frequencies where broadcasters were holding out for FM stereo.[243] If available fre-

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242. KRASNOW, *supra* note 183, at 11.

243. In 1950 there were 111 television broadcasting stations authorized, but only 97 operating; in 1970 there were 1038 authorized, but only 872 operating; in 1990 there were 1684 authorized, but only 1436 operating; and in 1994 there were 1688 authorized, but only

quencies are going unused, it seems less tenable that scarcity should be a problem.

Third, even if scarcity exists, is scarcity necessarily bad or unusual? Market demand often results in scarcity as service and product providers gear up to respond to that demand. Scarcity often contributes to innovation. If there are not enough six KHz VHF broadcast frequencies, broadcasters will develop technologies for broadcasting at four KHz. If there is an insufficient supply of enough natural rubber, tire manufacturers will develop synthetic products. If there is not enough newsprint, newspapers will begin recycling programs and look for alternatives to wood fiber paper. Clearly, scarcity is common in many markets, and in many communications markets. The ratio of daily newspapers to broadcast stations in this country has steadily decreased.[244] The reason is not simply that fewer people are interested in publishing; rather, there is a scarcity of capital, skill, and other resources. One of the most scarce communications resources in the United States today are street corners on which newspaper racks can be placed. The allocation of those scarce corners has been the subject of intense litigation,[245] yet that scarcity has never been used to justify a lesser First Amendment standard for the content of the newspaper.

Fourth, is there in fact scarcity in broadcasting—the medium in which the Court first developed the doctrine of scarcity—today? Supreme Court justices,[246] the U.S. Court of Appeals for the District of Columbia,[247] the FCC,[248] and many commentators[249] have challenged the contin-

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1518 operating. R.R. BOWKER, BROADCASTING & CABLE YEARBOOK 1994 C218 (1994). Similarly, in 1950 there were 2234 AM radio stations and 788 FM radio stations authorized, but only 2086 and 733 respectively operating; in 1970 there were 4344 AM and 2651 FM stations authorized, but only 4269 and 2476 respectively operating; in 1990 there were 5223 AM and 6705 FM stations authorized, but only 4966 and 5665 respectively operating; and in 1994, there were 5147 AM and 7538 FM stations authorized but only 4945 and 6613 respectively operating. *Id.* at B604.

244. In 1950 there were 104 licensed television stations and 1,772 daily newspapers in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 796, 809 (1975). In 1970 there were 881 licensed television stations and 1,748 daily newspapers in the United States. *Id.* In 1994 there were 1,518 licensed television stations and 1,831 daily newspapers, not to mention 9,728 weekly or semi-weekly newspapers and 12,136 other periodicals. R.R. BOWKER, *supra* note 243, at C218; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 1994 576 (1994).

245. For examples of cases addressing the issue of a party's right to place a newspaper rack on a street corner, *see, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Gannett Satellite Info. Network, Inc. v. Metropolitan Transit Auth., 745 F.2d 767 (2d Cir. 1984); New Times, Inc. v. Arizona Bd. of Regents, 519 P.2d 169 (Ariz. 1974); California Newspaper Publishers Ass'n v. City of Burbank, 51 Cal. App. 3d 50, 123 Cal. Rptr. 880 (Cal. Ct. App. 1975); Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648 (N.Y. Sup. Ct. 1972).

246. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 144 (Stewart, J., concurring), 149 (Douglas, J., concurring) (1973).

247. *See, e.g.*, Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1019 (1990); Branch v. FCC, 824 F.2d 37 (D.C. Cir.), *cert. denied*, 485 U.S. 959 (1988);

ued existence of spectrum scarcity. In 1986 the District of Columbia Circuit wrote:

> There is nothing uniquely scarce about the broadcast spectrum. Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in *National Broadcasting Co. v. United States*, and it appears that currently "the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried." Indeed, many markets have a far greater number of broadcasting stations than newspapers.[250]

Fifth, even if scarcity once existed or if the broadcast spectrum remains scarce today, does that justify a lower First Amendment standard? Remember that the FCC and the Court have used scarcity not merely to justify an allocation scheme, that is, licensing,[251] but also to rationalize character and fitness qualifications for broadcasters,[252] obligations to air programming covering matters of public interest, to give or sell time to persons attacked in broadcasts[253] and candidates for public office,[254] to air children's programming,[255] to avoid indecency,[256] not to advertise cigarettes[257] or lotteries,[258] and hundreds of additional requirements. Does all

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Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 918 (1987).

248. *See, e.g.*, Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5048 (1987) (mem. opinion and order). "[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provides an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*." *Id.* The Commission noted the explosive growth in radio and television since *Red Lion* was decided in 1969: a 48% increase in radio stations and 44% increase in television stations. *Id.* In addition, with the development of UHF television, cable television, and new video delivery technologies (including low power television, video cassettes, and home satellite dish antennae) the number of information outlets had increased and the structure of the industry had become far more competitive than in 1969. *Id.*

249. *See, e.g.*, LEE C. BOLLINGER, IMAGES OF A FREE PRESS 87-90 (1991); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-209 (1987); David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213 (1975); Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12-27 (1959); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

250. *Telecommunications Research Action Center*, 801 F.2d at 509 n.4 (citations omitted) (quoting Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983)).

251. 47 U.S.C. § 301 (1988).

252. 47 U.S.C. §§ 308(b) & 319(a) (1988); *see also In re* Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179 (1986); Broadcast Licensing—Proceedings, Misconduct; Policy Statement, 55 Fed. Reg. 23,082 (1990) (codified at 47 C.F.R. § 1.65(c)).

253. 47 C.F.R. § 73.1920 (1993).

254. 47 U.S.C. §§ 312(a)(7) & 315 (1988).

255. 47 C.F.R. § 73.4050 (1993, updated by 59 Fed. Reg. 52,086 (1994).

256. 18 U.S.C. § 1464 (1988); 47 C.F.R. § 73.4165 (1993).

257. 15 U.S.C. § 1335 (1988).

of this—does *any* of this—flow logically from scarcity?

Even if the scarcity doctrine did not face these and other hurdles as applied to broadcasting, scarcity has no role to play in regulating the tidal wave of information services and products. The Supreme Court has already recognized this fact with regard to cable service:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases are inapt when determining the First Amendment validity of cable regulation.[259]

Computer networks already offer many times the capacity of cable television systems. Although there are temporary limits to how much data a computer may store or how much a network may transfer in a given time, the great attraction of advanced information technologies is their capacity.[260] Whereas there are only 1,518 licensed television broadcasters and 11,600 cable systems[261] in the United States today, no one can keep an accurate count of the information service providers on Internet and through Compuserve, Prodigy, America On-Line, Lexis, Nexis, Westlaw, and other networks and databases. According to recent estimates, there are more than 150,000 bulletin boards in North America alone,[262] and more than forty-four million e-mail messages each month on just three U.S. commercial on-line services.[263] Each of the estimated 25,000 to 30,000 Internet accounts provides its user with the opportunity to be not merely a receiver, but also a distributer of information. The number of users is growing at approximately 191 percent each year.[264] In the face of rapidly advancing information technologies and the varied sources of information and entertainment programming they make possible, scarcity has little relevance and the government has little role, if any, in guaranteeing for the public "suitable access to social, political, esthetic, moral, and other ideas and experiences."[265]

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258. 18 U.S.C. § 1304 (1988).

259. Turner Broadcasting v. FCC, 114 S. Ct. 2445, 2457 (1994).

260. The Internet currently supports approximately 10 terabytes (10 trillion bytes) of data on the National Science Foundation backbone in the United States, and over 500 gigabytes (500 billion bytes) of data on the main European backbone networks. *Latest Estimates*, *supra* note 237.

261. R.R. BOWKER, *supra* note 243, at C218.

262. *Fast Fact*, TORONTO STAR, Nov. 3, 1994, at J1.

263. *Networks Overloaded, E-mail is Bouncing Back to the Senders*, PLAIN DEALER, Oct. 30, 1994, at 4H.

264. *Latest Estimates*, *supra* note 237.

265. Economic scarcity has already been rejected by the Court as a basis for altering

C. Intrusiveness of the Medium

Like scarcity, the allegedly "intrusive" features of broadcasting that the Court identified in *CBS v. DNC* and *Pacifica* are dubious in the context of broadcasting, and inapplicable as regards electronic information technologies. As noted, Chief Justice Burger, writing for the majority in *CBS*, quoted approvingly from Judge Bazelon's opinion in *Banzhaf*, which identified three possible meanings of intrusiveness: (1) broadcast signals are somehow "in the air" and therefore more intrusive than printed expression; (2) printed expression requires an affirmative act to perceive, while broadcast signals do not; and (3) broadcasting is simply more powerful than print.

The first understanding—that broadcast signals are more intrusive because they are "in the air"—is nonsensical. No matter how much broadcast signals use electromagnetic spectrum, they are indecipherable without the aid of a television or radio. In that regard, broadcast signals may even be less intrusive than printed expression which may be perceived while blowing by as litter on a street, laying on a coffee table, or being displayed in a newsrack. Broadcast signals, although all around us, require the use of an interpretive device, the location of which, particularly in the case of television, is fairly predictable, given the cost, weight, and power needs of most television receivers. Even if valid, however, the "in the air" rationale would have no force in the context of computer networks, because the information which they contain is wholly captured by tangible media—wires, optical fibers, hard and floppy disks, and telephone lines—except to the extent that any telephonic part of the communications is conveyed via satellite.

The second view of intrusiveness as focusing on the fact that broadcast signals can be perceived without any affirmative act is equally spurious. Radio and television signals take considerable affirmative action to perceive, requiring as they do the acquisition and maintenance of a receiving device, as well as the affirmative acts of being in the same place as that device, turning the device on, and tuning it to a desired signal. A newspaper or magazine, by contrast, can be understood with far less trouble and in any adequately lit location. It is difficult to understand

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the standard of First Amendment protection. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); *see also* Chesapeake & Potomac Tel. Co. v. United States, 803 F. Supp. 909, 919 (1993), *aff'd*, Nos. 93-2340, 93-2341, 1994 WL 661825 (4th Cir. Nov. 21, 1994):

> The only scarcity argument that defendants could legitimately advance to make the broadcasting cases apposite is that the cable television industry is a natural monopoly and, therefore, that certain economic factors conspire to create a condition of scarcity in the market for cable television analogous to the scarcity imposed on broadcasting by the physical properties of the electromagnetic spectrum. This argument has been foreclosed, however, by the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo* . . . . The clear implication of *Tornillo* is that the principle that allows an increased level of government intervention under conditions of physical scarcity is inapplicable when scarcity results from purely economic forces.

Id. at 919 (citations omitted).

Judge Bazelon's suggestion that broadcast commercials are more difficult to avoid than printed ones, since both are interspersed with noncommercial material. In fact, it may be easier to mute the sound, change the channel, or avert one's eyes during a broadcast commercial, particularly predictably timed thirty- and sixty-second television commercials, than to avoid the advertisements that clog most daily newspapers.

Even once "invited" in, electronically transmitted information, unlike newspapers and magazines, can be expelled with the flip of a switch. As intruders go, broadcasting is as compatible with the "privacy of the home" as one may imagine because, while broadcast signals may enter the home uninvited, broadcast programming does not. Moreover, the Court has not explained why magazines and newspapers do not also receive lesser First Amendment protection once carried into the "privacy of the home" or why the conscious decision to bring printed expression into the home is different from the decision to turn the television on.

Again, however, even if valid in the broadcast context, this justification has little meaning in the computer context because a series of affirmative, often skillful acts are almost always required to display information on the screen. Even in the most mundane setting, for example, operating an automatic teller machine, a user must have an access card and password, and must take a series of steps in order to transmit or receive information. To use the Internet, as the number of "user friendly" articles, books, video tapes, and consulting services demonstrates, requires not only an account number and password, but considerably more skill.

The third justification—that broadcasting is simply more powerful than print—may make more sense than the prior two, as applied to both broadcasting and some forms of new electronic media. Ironically, however, the Supreme Court has never relied on this understanding of intrusiveness. Recall that in *Pacifica,* Justice Stevens wrote about broadcasting's "uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[266] It is difficult to conceive of broadcast programming—invited into the home by purchasing a television set, raising an antenna, turning the set on, tuning to the desired channel, and then viewing by the willing home owner—as an intruder. However, even if the Court continues to think of it as such, the argument has no merit in the context of computerized information. In the latter case, the programming requires additional "inviting" steps, such as subscribing to a service, dialing into a network or bulletin board, accessing a service, downloading specific material, and then displaying it on the screen or printer. In the context of cable television, the Eleventh Circuit Court of Appeals found that the steps needed to obtain cable television constituted enough affirmative invitations to bring the programming into the home that the

266. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

intrusiveness rationale would not apply.[267] Similarly, a federal district court in Utah, in a decision since affirmed by the Supreme Court, reached the same decision, holding that the "intrusiveness" rationale is inapplicable to cable television because cable is "not an uninvited intruder" into the home.[268]

Does the "power of the medium" interpretation of the intrusiveness rationale, thus far not pursued by the Supreme Court, nonetheless have application to electronic information? The better view is that it does not. The fact that the Supreme Court has thus far eschewed this interpretation is not without significance. To penalize a medium solely because of its effectiveness flies in the face of many Supreme Court opinions concluding that the right to engage in free expression includes the right to engage in effective, even jarring or shocking, expression.[269] In addition, the uses of computer networks and other services are so nonintrusive, and so demanding of affirmative action, skill, and resources, that any intrusiveness rationale seems inapposite. This does not mean that regulations prohibiting subliminal advertising[270] or similarly nonperceptible communicative uses of information technologies would be inapplicable to computer networks, any more than they are inapplicable to broadcast programming today. Just as the communicative aspects of conduct may be protected as expression, the noncommunicative aspects of a communications medium are not. This fact in no way, however, lends credence to the intrusiveness rationale, as applied to either broadcast or computer programming.

D. *Differential Impact of the Medium on Children*

The presence of children in the audience has always added weight to the government's asserted purpose for regulating expression, no matter what the medium. Broadcast indecency,[271] 900-number explicit telephone services,[272] and adult magazines,[273] although they involve media, have all

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267. Cruz v. Ferre, 755 F.2d 1415, 1419-22 (11th Cir. 1985).

268. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099, 1113 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

269. *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971).

270. 47 C.F.R. § 73.4250 (1993); Concerning the Broadcast of Information by Means of "Subliminal Perception" Techniques, 44 F.C.C.2d 1016 (1974) (public notice).

271. Indecency is different from obscenity. As defined by the Supreme Court, works are obscene if:

> (1) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; [2] . . . the work depicts or describes, in a patently offensive way, sexual or excretory conduct specifically defined by the applicable state law; and [3] the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). Broadcast programs are indecent if they contain "language or material that depicts or describes in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities or organs." New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726, 2726 (1987) (public notice).

272. Under section 223(b) of the Communications Act, the Commission is authorized

been subject to government-enforced restrictions on access by minors. Broadcasting has always been thought to present two special problems. First, as noted above, "broadcasting is uniquely accessible to children, even those too young to read."[274] Second, because it has offered comparatively few choices, broadcasting has traditionally involved children and adults in the same audience. This situation should be distinguished from adult bookstores, which can easily separate minors from adults without inordinately inconveniencing adults. For broadcasters to control access to "indecent" programming by children, adults have either been denied access as well, or have been "channelled" to watching such shows at night when Congress has assumed children to be asleep.[275] In the traditional First Amendment model, the government may not constitutionally reduce adults to reading "only what is fit for children."[276] In broadcasting, however, such an outcome may be permissible under the First Amendment. This, therefore, "is one of the distinctions between the broadcast and other media to which we have often adverted as justifying a different treatment of the broadcast media for First Amendment purposes."[277]

Computer networks, bulletin boards, and electronic e-mail are largely inaccessible to children. These technologies are used overwhelmingly for delivering text, so there is less concern than in broadcasting that a child not yet able to read may see an image, as opposed to a word, that is offensive. Moreover, as already noted, computerized information is less likely to enter the home "accidentally." Enough affirmative steps must be taken, and sufficient control must be exercised over what information is received, to reduce the chance of surprise by an "indecent" image or sound received unintentionally. Electronic information technologies also offer greater ability than broadcast television to segregate the audience. The broadcast programmer has no idea who specifically is watching her show. A bulletin board operator has a better, although by no means certain, opportunity to verify who is reading or downloading information

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to impose civil fines of up to $50,000 per day upon those who, for commercial purposes, send obscene or indecent messages over the interstate telephone network to minors or nonconsenting adults. 47 U.S.C. § 223(b) (1988 & Supp. IV 1993). According to FCC rules, adult message service providers are immune from section 223(b) prosecutions if they undertake certain steps, such as requiring access codes and providing those codes only to persons who so request and who submit proof of being over age 18. 47 C.F.R. § 64.201 (1993). *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 115 (1989).

273. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (holding New York statute prohibiting sale of adult magazines to minors under age seventeen to be constitutional).

274. FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

275. *Id.* at 758 (Powell, J., concurring in part). "Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access." *Id.*

276. Butler v. Michigan, 352 U.S. 380, 383 (1957). When Congress passed the Child Protection and Obscenity Enforcement Act of 1988, amending 47 U.S.C. § 223(b) to prohibit obscene and indecent telephone calls, the Supreme Court unanimously struck down the prohibition on merely "indecent" so-called "dial-a-porn" telephone calls. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

277. *Pacifica*, 438 U.S. at 759.

from her site.[278] In addition, the same technologies that are under development today to monitor and control use for intellectual property reasons will likely be useful for controlling access by minors to certain information as well. Finally, even without the lesser First Amendment standards which have been applied to broadcasting in the effort to protect children, electronic information would still remain subject to broad-based criminal obscenity and other laws.[279]

Many parents complain that access by children to computer information, just like access to broadcast programming, is very difficult to control. This difficulty may even be exacerbated by the greater prevalence of computer literacy in minors than in adults. In addition, it should be remembered that *Pacifica* involved not an errant child who was home alone, but a twelve-year-old listening to the radio while driving with his father in New York City.[280] The Court's willingness to overlook the obvious means of control present in that situation—that the parent could have tuned the radio to another station or turned the radio off—does not offer much reason to believe that the Court will examine in detail, in the electronic information context, the availability of remedial steps to prevent access by a minor to "indecent" information.

Such a failure by the Court, however, may be of little consequence because, as already noted, under the traditional First Amendment print/speech model, the government may already require programmers to take steps to control access by minors. So whether electronic information technologies are found to have a differential impact on children or not, they may in any case be subject to basic "channeling" restrictions. This raises no unusual First Amendment issue, precisely because on the information highway, as with adult bookstores, it should be possible to control access without reducing adults to consuming "only what is fit for children."[281]

Moreover, such restrictions will have to pass the strictest scrutiny under the First Amendment. As the Supreme Court noted in striking down a congressional ban on indecent commercial telephone communications:

> We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards . . . . The government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[282]

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278. For a discussion of control of electronic information, see *supra* note 237 and accompanying text.

279. 18 U.S.C. §§ 1461-1468 (1988 & Supp. IV 1993).

280. *Pacifica*, 438 U.S. at 726.

281. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding unconstitutional a Michigan statute which prohibited sale of obscene material to general public on grounds that statute was "not reasonably restricted to the evil with which it [was] said to deal").

282. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (citations omitted) (quoting Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980)).

This is the same highest form of scrutiny applied by the Court to print and speech.

E. Natural Monopoly and Access

The information superhighway—the networks of networks, combining millions of terminals, databases, and information services—is unlikely ever to be monopolized by a single entity. Such monopolization would violate antitrust laws, and the fact that the violation occurred in the context of First Amendment protected expression should in no way insulate that conduct from the full force of antitrust laws.[283] Moreover, at a practical level, single-firm monopolization would require a concentration of capital impossible for any one entity to maintain in the current marketplace. Far more likely than such total monopolization, however, is that some essential element of the superhighway, akin to a bridge or on-ramp, might come under the control of a single entity. Yet there are inherent shortcomings to the "superhighway" metaphor. Unlike a highway, which is orderly, regulated, and only bidirectional, the electronic information environment is more like a fishtank—confused, random, and multidirectional. In such a "fishtank" context, the likelihood of there being a single essential element, much less its being controlled by a single entity, is reduced. Moreover, information service and product providers have a fairly predictable interest in adding more customers and clients, which weighs against the incentive to use control of an on-ramp to deny access or to discriminate.

Effective denial of access to any service or facility is possible only if access is controlled by one or a very small number of entities. This is clearly not the case with many information services, such as e-mail and bulletin boards, because the users are also the service providers. Such interchangeability of roles, which is the very essence of truly interactive information services, militates against there being a very small number of providers who can deny access to others. Similarly, providers of information services, such as on-line databases, are unlikely to be able to restrict access effectively in light of the availability of alternatives. If you cannot get the *New York Times* via the Nexis database, you can always get it from the New York Times Company. If you cannot get airline reservations through Prodigy, you can always call the airline. The existence of alternatives, combined with the desire to maximize customers and profit, creates a powerful disincentive to discriminate; it also diminishes the effectiveness of any efforts to control access.

Only providers of exclusive or near-exclusive electronic information services or means of electronic access are likely to have any capacity to discriminate effectively. Currently, there are few such situations. Virtually every service and access provider, whether to the Internet or to other public electronic environments, has real competition. Local telephone

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283. Associated Press v. United States, 326 U.S. 1, 19-20 (1945) (finding news association liable for antitrust violations in spite of First Amendment arguments).

companies may come the closest to exercising significant monopoly control over the means by which many individuals and businesses connect into networks, although that control is diminished by the presence of cellular and private phone systems.

In the rare instance in which an access provider has both the desire and the capacity to restrict access, antitrust laws would come into play to prevent or penalize the anticompetitive conduct and protect or restore access for unlawfully denied applicants. Under Section II of the Sherman Act,[284] a single firm incurs liability for refusing to deal with a competitor only when two elements exist "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[285] These requirements are both easier to understand and easier to apply when restated as what has become known as the "essential facilities doctrine."[286] This doctrine consists of four elements: "(1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[287]

Even where these four conditions exist, a discriminating monopolist may escape liability by demonstrating a valid reason for its refusal to deal. John Stevens has argued that courts would likely excuse network access providers for refusing to deal with providers of obscene, illegal, defamatory, or even merely sexually explicit or offensive information service providers.[288] Access providers may also justifiably be able to refuse to deal with others if the providers lack sufficient capacity in the way of telephone lines, memory, or personnel to do so.[289]

Absent an acceptable justification, a monopolist meeting the four conditions of the essential facilities doctrine, who refuses to deal with otherwise qualified customers, violates the Sherman Act and becomes subject to its full panoply of remedies. The fact that the offending monopolist provides an information service or facility is irrelevant. It requires no adjustment of the otherwise applicable First Amendment standards to reach this result. The Supreme Court held in *Associated*

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284. 15 U.S.C. §§ 1-2 (1988).

285. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

286. *See generally* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 841 (1990) (noting that the doctrine indicates "some exception to the right to keep one's creations to oneself").

287. MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

288. John M. Stevens, *Antitrust Law and Open Access to the NREN*, 38 VILL. L. REV. 571, 617-19 (1993) (arguing that networks "would be justified in refusing to deal with information providers whose content, if published . . . would so offend its subscribers that they would stop doing business with it").

289. *See id.* at 621-22 ("Lack of capacity is merely another way of stating that the defendant considers the plaintiff's suggested price of access insufficient because the defendant could, for the right price, add capacity.").

Press v. United States[290] that efforts by the Associated Press (AP) to restrict the business activities of its subscribers violated antitrust laws. The Court did not find that the conditions that gave AP the market power to enforce those restraints required application of a different First Amendment standard.[291] Rather, the Court concluded that the high First Amendment standard which applied to AP's information gathering and disseminating activities in no way insulated those activities from the application of antitrust law.[292] Just as businesses engaged in First Amendment-protected activities still must pay taxes and obey labor laws, so too must they adhere to antitrust laws. Similarly, information service providers and network operators, while engaged in activities infused with First Amendment interests, remain subject to all laws generally applicable to businesses lacking that First Amendment component.

Unlike the situation with telephone companies in the first half of this century, there is no need to permit, much less condone, monopolies to facilitate a more efficient, wider-reaching network. The environment supported by the Internet and promised by the NII is noteworthy for its diversity of technologies, services, and users. Technological advances and human creativity are bridging the gap between different computer languages, operating systems, and hardware. The fishtank metaphor accurately reflects the multi-dimensional nature of the information infrastructure and argues against both the possibility and the desirability of monopolization.

The fact that new information technologies may facilitate or be the subject of monopolization does not justify the application of a different First Amendment standard. Rather, the presence of such technologies argues for greater vigilance in identifying and greater speed in responding to alleged antitrust violations. Indeed, the Supreme Court has noted that the vigorous application of the Sherman Act to information network access providers is permitted and even supported by the First Amendment.[293]

CONCLUSION

Despite the historically broad interpretation of the First Amendment to provide significant protection to a wide range of communicative and expressive activity, the Supreme Court has repeatedly assumed that technological differences among media involved may justify diminished application of the First Amendment. The Court has specifically relied on spectrum scarcity, pervasiveness of the medium, special harm to children, and potential for monopolization to justify a lower standard of First

290. 326 U.S. 1, 20 (1945) ("The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity").

291. *Id.* at 19-20.

292. *Id.*

293. *See id.* at 19-20 (rationalizing application of Sherman Act to news association access provider on First Amendment grounds).

Amendment protection for telegraphy, telephony, and broadcasting. These justifications, while problematic even as applied to date, have little application to the variety of information networks spreading across the nation and around the globe. To the extent the justifications have any relevance, existing law, particularly antitrust law, is sufficient to deal effectively with any issues that may arise without offending vital First Amendment principles.

The effect of this conclusion is not to resolve the potential First Amendment challenges to governmental restrictions on electronic information. Rather, it is to clarify that information networks present no features warranting a diversion from the Court's traditional print or speech model of First Amendment jurisprudence. Even in that model, however, different types of regulations are subject to at least three different standards of review depending upon their motivation and impact.[294]

However, the First Amendment means more than a restriction on government regulation of communications and information services. It also contributes something positive and valuable to the information policymaking process. The First Amendment reflects a constitutional commitment not only to freedom of expression, but also to reaping the

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294. Under strict scrutiny, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987). Recognizing the Court's propensity for striking down regulations to which it applies strict scrutiny, Professor Gerald Gunther has characterized the standard of review as " 'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Intermediate scrutiny refers to a variety of tests typically used by the Court to evaluate regulations that affect expression, but are not targeted at expression, regulations that target only "low value" expression, or those that do not discriminate among types of expression. In United States v. O'Brien, 391 U.S. 367, 376-77 (1968), Chief Justice Earl Warren wrote for the Court that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," governmental regulation of that conduct is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Regulations concerning the time, place, and manner of expression are constitutional if they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). This test and the *O'Brien* test noted above have been found by the Court to be similar, if not identical. *See* Ward v. Rock Against Racism, 491 U.S. 781, 797-98 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (noting that *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions")); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 804-12 (1984) (applying *O'Brien*).

Rational basis scrutiny is the least restrictive scrutiny applied by the Court. "Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983). "Statutes are subjected to a higher level of scrutiny [only] if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race." *Id.* As a result, rational basis scrutiny is rarely applied where First Amendment interests are at stake.

benefits of free expression without governmental interference. "[A] cardinal tenet of the First Amendment is that governmental intervention in the marketplace of ideas . . . is not acceptable and should not be tolerated."[295] This commitment to freedom of expression without governmental interference is essential to addressing other problems confronting electronic information networks, including concerns about privacy, intellectual property, sovereignty, cultural identity, and data integrity.

The absence of First Amendment protection is substantially more significant in the case of information technologies than it was with telegraphy, telephony, and broadcasting, because of the growing dominance of electronic information. This is not a peripheral issue. No form of communication other than face-to-face conversation and hand-written, hand-delivered messages escapes the reach of electronic information technologies. No communication that bridges geographic space or is accessible to more than a few people exists today without some electronic component. And the dominance of electronic communication is growing. E-mail, bulletin boards, and other types of electronic information services, transmitted by national and even global networks, are decreasing our reliance on those few remaining non-electronic communication systems such as the post office, and forever changing the way in which we communicate.

It will be ironic if, just as the courts are beginning to accord full First Amendment rights to earlier forms of electronic media, the government denies those same rights to new, more powerful, and more widespread information technologies. Yet that is precisely what the Clinton administration appears to contemplate with its ongoing initiative to regulate "private interests"—even where those interests involve essential media of communication—to serve "public needs." Excluding electronic information technologies from the full protection of the First Amendment would create an exception that would make the rule of freedom of expression meaningless.

Ithiel de Sola Pool wrote more than a decade ago about the ironic tendency of policymakers to seek to regulate new information technologies:

> The easy access, low cost, and distributed intelligence of modern means of communication are a prime reason for hope. The democratic impulse to regulate evils, as Tocqueville warned, is ironically a reason for worry. Lack of technical grasp by policy makers and their propensity to solve problems of conflict, privacy, intellectual property, and monopoly by accustomed bureaucratic routines are the main reasons for concern. But as long as the First Amendment stands, backed by courts which take it seriously, the loss of liberty is not foreordained. The commitment of American culture to pluralism and individual rights is reason for optimism, as is the pliancy and profusion of electronic technology.[296]

295. *In re* Syracuse Peace Council, 2 F.C.C.R. 5043, 5056, (1987) (memorandum opinion and order).

296. DE SOLA POOL, *supra* note 110, at 251.