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I. INTRODUCTION

Thomas Jefferson and James Madison, it is safe to assume, never envisioned multi-channel fiber optic digital networks carrying voice, video and data at the speed of light. Nonetheless, the eighteenth century promise of freedom of expression will still need to be fulfilled in the ever-changing Information Age.

While the principles of the First Amendment are timeless, their application has always varied with the introduction of new technology. As has ofttimes been stated, "Each method of communicating ideas is 'a law unto

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itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."[1]

The essential nature of the new media technologies will be the ability of many speakers to reach many listeners quickly and at relatively low cost. For First Amendment analysis, the primary complicating factor is that this multitude of speakers will have to utilize distribution networks which may be limited in number and operated by either private or governmental entities. If these entities seek to control either the identity of speakers or the content of the speech, the hope for truly diverse communications may be thwarted. If a local telephone company bars access to an information service, the lack of reasonable alternative means of reaching the desired audience may mean financial ruin for that service.[2]

On the other hand, it would be a mistake to assume that everyone must have the automatic right to "speak" over the new technologies wherever and whenever they choose.[3] If one group wants to establish a computer forum for their particular religion, for example, atheists should have no right to demand access to that particular forum to attack the ongoing services.[4]

It will become necessary, therefore, to sort out the competing claims of those involved in the electronic chain of communication. Cable television operators, telephone companies and computer networks have all attempted to lay claim to the electronic speech which is traveling through "their" wires into the home. But the owner of the wire does not always have the right to control the information it carries. While it seems increasingly true that "the medium is the message,"[5] as far as the First Amendment is concerned, sometimes the medium is merely the messenger.

The first part of this Article will explore how the distinction between speakers and distributors has affected rights and liabilities within traditional media. This distinction is necessary for understanding the differing protection the First Amendment provides for liberty of circulation as opposed to editorial discretion. A newspaper's editorial choice has always been viewed as fundamentally different from the selection process utilized by a distributor. Protection for the latter's "liberty of circulation" is focused primarily on safeguarding the ability of speakers to reach their audience, not for the ultimate benefit of a carrier.

The next section examines the lessons from *Turner Broadcasting System, Inc. v. FCC*.[6] In this case, the Supreme Court rejected calls to analogize cable television to either print or broadcast, and instead established an in-

1 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

2 *See, e.g.*, Westpac Audiotext, Inc. v. Wilks, 756 F. Supp. 1267, 1273 (N.D. Cal. 1991) (stating that phone company's objective in cutting off billing and collection services to information service was to put it "out of business"), *vacated*, 804 F. Supp. 1225 (1992).

3 The First Amendment does not require "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." Adderly v. Florida, 385 U.S. 39, 47-48 (1966); *accord* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981), *cert. denied*, 453 U.S. 917 (1981).

4 *See, e.g.*, David Gonzalez, *The Computer Age Bids Religious World to Enter*, N.Y. TIMES, July 24, 1994, § 1, at 1; Patricia King, *The Search for God goes Digital*, NEWSWEEK, May 10, 1993, at 68.

5 *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA 7 (1964).

6 114 S. Ct. 2445 (1994).

termediate standard, reflecting the dichotomous role of cable television as both speaker and conduit.

The last section creates a framework for analyzing First Amendment issues and the new media technologies. Carriers which have the ability to control access to essential pathways of communications can be subject to content-neutral regulation designed to encourage carriage of a diversity of information sources. Governments, however, are not permitted to turn private carriers into authorized censors of the speakers they carry. Finally, liability rules for distributors must be sensitive to the ease with which distributors can be deterred from carrying the controversial speech of others. Carriers should only be liable if they are active participants in illegal speech or if they have been informed that an independent tribunal has determined the speech to be unprotected.

II. The First Amendment Value in Distributing Ideas

A. Distinguishing Speakers and Distributors

First Amendment coverage extends to "the communication, to its source and to its recipients both."[7] The issue gets trickier when analyzing the transit of the communication from "source" to "recipient." For the goals of the First Amendment to be realized, the distribution of ideas must be protected. Many distributors, such as cable operators and telephone companies, have attempted to parlay this protection into a right to dominate a medium. Though it is sometimes lost in analysis, the "protection" afforded by the First Amendment for distributors is not identical to that for speakers. The difference is based on the simple truth that protection for distributors is derived from the value the Constitution has placed on the cargo being hauled, not the inherent value of hauling.

Freedom of expression is valued as both an integral aspect of personal freedom and as a means to greater social good.[8] In realizing these goals, distributors of communication play a role that is fundamentally different from the role played by the sources of the communication. Distributors are primarily important only insofar as they assist the source in reaching its audience.

The difference between the roles of speakers as opposed to distributors is most apparent when viewing the relationship between free speech and "human dignity and self-fulfillment."[9] As the Supreme Court has noted: "The First Amendment presupposes that the freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto it-

7 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

8 *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (suggesting that free expression is valued "both as an end and as a means"), *overruled by* Brandenberg v. Ohio, 395 U.S. 444 (1969).

9 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment § 2.03(1), p. 2-24 (1994). Smolla and Nimmer include a section entitled "Human Dignity and Self-Fulfillment" in their overview of Free Speech Theory.

self . . . ."[10] The interest obviously relates only to the source of the information and not to an independent distributor. While arguably all human activity, including package delivery, contributes to a generalized notion of self fulfillment,[11] the creation of speech is unique: "The individual self-fulfillment that comes from speech is bonded to the human capacity to think, imagine, and create."[12] The relationship between freedom of speech and individual autonomy is similarly evident in many of the "compelled speech" cases which barred the government from requiring that particular statements be uttered: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[13]

Beyond the benefits for the individual speaker, freedom of expression serves society as a whole. This freedom is necessary for democratic self-government,[14] and is essential for the pursuit of truth in "political, economic, religious or cultural matters."[15] Again, these benefits flow from the source of the information.[16]

One of the fundamental themes of the First Amendment is that the more of these sources there are, the better it is for a free society. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[17] Accordingly, there is a substantial "public interest in diversified mass communications."[18]

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10 Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503 (1984); *accord* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) (stating that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion. "). As Professor Smolla explained: "Freedom of speech thus embraces a right defiantly, robustly, and irreverently to speak one's mind *just because it is one's mind.*" SMOLLA, *supra* note 9, at §2.03(1), p. 2-24.

11 *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971).

12 SMOLLA, *supra* note 9, at § 2.03(2)(c), p. 2-27.

13 Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

14 *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1901 SUP. CT. REV. 245, 263.

15 NAACP v. Alabama, 357 U.S. 449, 460 (1958); *see also* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("The guarantees for free speech and press are not the preserve of political expression or comment on public affairs . . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by the free trade in ideas—that the best test of truth is . . . to get itself accepted in the competition of the market . . . .").

16 The First Amendment also serves as an instrument of social control by permitting government opponents to protest peacefully and to try to effect change without violence. *See* Stromberg v. California, 283 U.S. 359, 369 (1931) (stating that maintaining free public discussion "to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system"); *see also* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 12-13 (1966):

> They will feel that they have done all within their power, and will understand that the only remaining alternative is to abandon the ground rules altogether through resort to force, a course of action upon which most individuals in a healthy society are unwilling to embark. In many circumstances they will retain the opportunity to try again and will hope in the end to persuade a majority to their position.

The interest is obviously served by ensuring a multitude of sources.

17 Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also* New York Times, Inc. v. Sullivan, 376 U.S. 254, 270 (1964) (referring to "a profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open").

18 FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 802 (1978).

A corollary to these principles is that society is best served if the choice of which diverse opinions are to be expressed and considered is made by each individual citizen. The First Amendment was designed to place "the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[19]

To fulfill the promise of the First Amendment, the number of ideas offered should be maximized and, accordingly, there should be as many speakers as possible. To accomplish this, the relationship between speakers, distributors and the government needs to be carefully calibrated. Several principles must be pursued simultaneously:

(1) Speakers must have maximum autonomy to control the content of their speech and bear legal responsibility for its consequences. Speakers also must have effective ways for getting their messages to willing listeners.

(2) Distributors must not be prevented or discouraged from carrying a multitude of voices, either by direct governmental censorship or indirect inducements to engage in private censorship.

(3) The government must remain neutral in the marketplace of ideas, but may regulate in a reasonable, content-neutral manner to increase the diversity of information sources.

Based on these principles, the constitutionality of regulation of communications sometimes differs depending on whether it affects speakers or distributors. Without question, in neither instance can the government act to aid favored points of view or inhibit unpopular opinions.[20] However, distributors, unlike speakers, can be forced to carry the expression of others.[21] By contrast, speakers, unlike distributors, can be held responsible for repeating the speech of others, even without knowledge that the speech is unprotected.[22]

In the case of the emerging media technologies, it is essential, if not always easy, to tell the difference between "speakers" and "distributors." The constitutionality of governmental regulation may well depend, for example, on a determination of which party is "speaking" when a broadcast station is carried on a cable television system or a "dial it" service is provided by a local telephone company.

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19 Cohen v. California, 403 U.S. 15, 26 (1971); *see also* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence.").

20 *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("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 . . . .").

21 *Compare* Riley v. National Fed'n of the Blind, 487 U.S. 781, 796-97 (1988) (stating that freedom of speech includes "the decision of both what to say and what not to say") *with* National Ass'n of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976) (stating that, for common carriers, "customers 'transmit intelligence of their own design and choosing'") (quoting Industrial Radiolocation Serv., 5 F.C.C.2d 197, 202 (1966)).

22 *See infra* text accompanying notes 43-46.

Initially, it is essential to bear in mind that not all participants in the communications process are "speakers." If a store sells a typewriter, it is not responsible for the messages produced by the purchaser.[23] When San Diego passed an ordinance sharply limiting the permissible content on billboards, the Supreme Court permitted billboard owners to challenge the constitutionality of the ordinance—not because the owners were "silenced," but on behalf of others who pay for the right to post their messages: "One with a 'commercial interest' . . . [can] challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of *others*."[24]

With each new form of communication, courts must distinguish between speakers with First Amendment rights and those carriers of information with just a "commercial interest" in those speakers' rights. The fact that a distributor of information may select some of what is carried does not transform that distributor into an "editor" for all of the information carried. As far as the First Amendment is concerned, while all editing requires selection, not all selection constitutes "editing." A brief review of the ways courts have applied the concepts of both "liberty of circulation" and "editorial discretion" to earlier forms of communication will aid in constructing a model for the emerging media technologies.

B. Liberty of Circulation

The first case that described the constitutional protection for the distribution of ideas was *Ex parte Jackson*.[25] While permitting a ban on mailing lottery information, the Court declared that censorship by the post office would violate the First Amendment: "Liberty of circulating is as essential to . . . [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."[26] The "liberty of circulating" that was being protected was not, of course, that of the courier, the U.S. Postal System. Rather, the liberty protected by the First Amendment was that of a publisher using the post office as a distribution system.[27] As Justice Holmes later remarked: "The United States may give up the Post

23 *See, e.g.*, Anderson v. New York Tel., 320 N.E.2d 647 (N.Y. 1974) (holding that a telephone company leasing equipment used to replay taped messages is not responsible for defamatory transmissions).

24 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 (1981) (emphasis added). As Justice Stevens noted, the billboard owners:

> have standing to challenge the ordinance because of its impact on their own commercial operations. Because this challenge is predicated in part on the First Amendment . . . they also have standing to argue that the ordinance is invalid because of its impact on their customers—the persons who use their billboards to communicate with the public.

Id. at 544 (Stevens, J., dissenting in part).

25 96 U.S. 727 (1877).

26 *Id.* at 733; *accord* Lovell v. City of Griggin, 303 U.S. 444, 452 (1938); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . . .").

27 *See also* United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430 (1921) (Brandeis, J., dissenting) ("But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression.") (footnote omitted).

Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."[28]

The Court has also recognized that sources of information often distribute their own messages, and that their self-distribution is covered by the same "liberty of circulation."[29] If a note is written, it must be passed from writer to reader for communication to occur. To stop this passage would be functionally indistinguishable from silencing the speaker.

In *Martin v. City of Struthers*,[30] the Supreme Court ruled that the door to door distribution of noncommercial handbills was protected by the First Amendment. The Court's description of the facts of the case makes clear that the "speaker" and the "distributor" were one and the same: "The appellant, espousing a religious cause in which she was interested—that of the Jehovah's Witnesses—went to the homes of strangers . . . in order to distribute to the inmates of the homes leaflets advertising a religious meeting."[31] In striking down her conviction, the Court recognized the link between the thoughts she wished to communicate and the means of communication she had chosen to utilize: "[D]oor to door distributors [are] . . . engaged in the dissemination of ideas in accordance with the best tradition of free discussion. . . . Door to door distribution of circulars is essential to the poorly financed causes of little people."[32] The Court continued: "Freedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." [33]

Ms. Martin's freedom to distribute information to willing recipients, thus, was inextricably linked with her efforts to engage in free discussion.[34] If a business which carried packages was to carry packages containing her flier, however, the analysis of the courier's constitutional interest would be different.

In 1949, the Supreme Court upheld a law which banned the display of advertising on the sides of all trucks except for products sold by the owner of the truck.[35] Justice Jackson, in a concurring opinion, explained the logic behind the distinction:

> [T]he hireling may be put in a class by himself and may be dealt with differently than those who act on their own . . . . *[T]here is a real difference between doing in self-interest and doing for hire*, so that it is one thing to toler-

28 *Id.* at 437 (Holmes, J., dissenting). The Supreme Court has frequently quoted this statement approvingly; *see, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 69 (1983); Blount v. Rizzi, 400 U.S. 410, 416 (1971).

29 *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759-62 (1988).

30 319 U.S. 141 (1943).

31 *Id.* at 142.

32 *Id.* at 145.

33 *Id.* at 146-47.

34 *See also* Lovell v. City of Griffin, 303 U.S. 444 (1938). Alma Lovell had been distributing religious pamphlets on city streets, and in doing so, "she regarded herself as sent 'by Jehovah to do His work.'" *Id.* at 448. The Court ruled that her "liberty of circulating" had been violated by an ordinance giving unlimited licensing discretion to the city manager. *Id.* at 451-52.

35 Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). The truck owned by Railway Express Agency, a package carrier, was carrying advertisements for Camel Cigarettes, Ringling Brothers and Barnum & Bailey Circus, and a local radio station. *Id.* at 108 n.2.

> ate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.[36]

The "real difference" between speaking for oneself and carrying the message of another impacts on the relationship each activity has to the interests and purposes of the First Amendment. It is not that the hireling is outside the scope of the First Amendment; it is just that the different nature of protection afforded reflects the different speech interests implicated.

This distinction is even apparent in the Supreme Court's analysis of the print media. Bookstores, periodical stands and wholesale distributors sell the work of many different authors and publishers and are covered by the First Amendment.[37] Content-based regulation of these distributors is as suspect as content-based regulation would be of the information sources.[38] This protection, however, does not necessarily mean that the owner of a newsstand or bookstore is "speaking"; rather, it is a tribute to the essential role such distributors play in conveying the speech of others.

It is certainly possible for booksellers to "adopt" the ideals and opinions expressed in the books they sell. Religious and political bookstores abound, and the owners of those stores are obviously "expressing" themselves by their choice of books.[39] Even general interest bookstores and newsstands rightfully may claim that their selection process embodies their desire to communicate specific thoughts.[40]

Mass vendors often are not "expressing themselves" by their choice of what to sell, and such vendors still serve a vitally important communications function protected by the First Amendment. For example, in *Smith v. California*,[41] the Supreme Court struck down a law which criminalized the possession of obscene materials by bookstore owners even if they had no knowledge of the books' contents. Finding that the effect of such "strict liability" would be that booksellers would only be willing to sell books hav-

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36 *Id.* at 115-16 (Jackson, J., concurring) (emphasis added). This case preceded the advent of constitutional protection for commercial speech (*see* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)), and was based on an equal protection challenge. Nonetheless, the distinction between the interest of those speaking on their own behalf and those speaking for hire was reaffirmed by the Supreme Court when it determined that banning offsite, while permitting onsite, commercial billboards did not violate the First Amendment. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511 (1981) (citing *Railway Express Agency*, 336 U.S. at 115 (Jackson, J., concurring)).

37 *See* Smith v. California, 361 U.S. 147, 150 (1959) ("Certainly a retail bookseller plays a most significant role in the process of the distribution of books."); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61-64 (1963) (finding a violation of freedom of the press even though "[t]he Commission's notices [to book distributors listing books and magazines it had deemed to be obscene and thus objectionable for sale] were circulated only to distributors and not . . . to publishers.").

38 In *Bantam Books*, 372 U.S. at 58, the Supreme Court struck down a practice by the "Rhode Island Commission to Encourage Morality in Youth" of issuing informal threats to bring obscenity prosecution. The Court found the government to have violated the First Amendment in attempting "to intimidate the various book and magazine distributors and retailers and to cause [the] . . . suppression of the sale and circulation of [the publications]." *Id.* at 64.

39 *See generally* Martin Pedersen, *To Tie In or Not to Tie In; Booksellers Dispute the Effect of Movie Edition Cover Art*, PUBLISHERS WEEKLY, July 26, 1993, at 24.

40 *See generally* Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 652 (D.C. Cir. 1966) (en banc) (describing owner of pharmacy which sold various publications but who refused to sell local newspaper because of disagreement over paper's position on civil rights).

41 361 U.S. 147 (1959).

ing contents which they had inspected, the Court held that the law impermissibly "tend[ed] to impose a severe limitation on the public's access to constitutionally protected matter."[42]

It was certainly not the booksellers' interest in communicating their own beliefs and ideas that was being protected in *Smith*. The Court granted them immunity from prosecution precisely because of their total ignorance of, and unconcern with, the beliefs and ideas expressed in the books.[43] The First Amendment was protecting the booksellers, instead, only because of the critical role they played in getting constitutionally protected material from source to recipient.[44]

This distinction between "speaker" and "distributor" has also protected the owners of bookstores and newsstands from countless defamation lawsuits. The common law generally imposes liability on those who repeat the defamatory charges made by others,[45] but provides special protection for booksellers and news vendors.[46] A newspaper which copies a defamatory article from another publication, even with full attribution, is as responsible as if it had been the original publisher.[47] A newsstand operator who sells the same paper, however, is not treated as a "repeater" unless he or she knows of the defamatory content.[48]

For the electronic media, the contrast between source and distributor is most clearly evident in the law of telegraph and telephone companies. From the inception of these technologies, the owners of the wire were not viewed to be "speaking" themselves when they transmitted others' messages, and they had no "editorial discretion" to select among proffered messages.

In 1837, when Samuel Morse was seeking governmental support for his system of electro-magnetic telegraphy, he compared the telegraph to the postal service: "[A]lthough it does not carry . . . mail, yet it is another mode of accomplishing the principal object for which the mail is established, to wit: the rapid and regular transmission of intelligence."[49]

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42 *Id.* at 153.

43 *See also* United States v. X-Citement Video, Inc., 115 S.Ct. 464, 467-68 (1994) (stating that it would be "positively absurd" to hold that a Federal Express courier who is told only that a package contains "film," is knowingly transporting obscenity if the film is later adjudged to be obscene).

44 Similarly, book publishers were permitted to bring an action to stop a Rhode Island Commission from threatening to bring obscenity proceedings against a wholesale distributor. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963).

45 As early as 1610, English judges had ruled that if a person knew a statement was libelous and "repeats it, or any part of it in the hearing of others, or . . . he reads it to others, that is an unlawful publication of it." *John Lamb's Case*, 9 Co.Rep.*59b, 77 Eng. Rep. 822 (1610).

46 *Compare* RESTATEMENT (SECOND) OF TORTS § 578 (1977) ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.") *with* RESTATEMENT (SECOND) OF TORTS § 581 (1977) ("[O]ne who . . . delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.").

47 *See* RESTATEMENT (SECOND) OF TORTS § 578 cmt. b (1977); *see also* Martin v. Wilson Publishing Co., 497 A.2d 322, 327 (R.I. 1985).

48 *E.g.*, Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228 (S.D.N.Y. 1981).

49 Letter from Samuel Morse to Secretary of the Treasury Levi Woodbury, September 27, 1837, *reprinted in* JOHN BITNER, LAW AND REGULATION OF ELECTRONIC MEDIA 3-4 (2d ed. 1994).

This conception of the telegraph led to an obligation for non-discriminatory carriage of the messages of others:

> [A]n owner or manager of [a telegraph] line becomes to a certain extent a public servant or agent. . . . He cannot refuse to receive and forward despatches; nor can he select the persons for whom he will act. . . . He is required to send [messages] for every person who may apply, at a usual or uniform tariff or rate, without any undue preference, and according to established regulations applicable to all alike.[50]

It was widely accepted that these requirements "tend to prevent monopoly and exclusive privileges, and to secure to the public an equal enjoyment of the benefits arising from this new method of intercommunication between distant points."[51]

An additional rationale for common carriage obligations was that many of the telegraph companies received governmental assistance. The 1888 Telegraph Lines Act required every telegraph company which had received a federal "subsidy"—either land, rights-of-way, bonds or loans of credit—to provide service "without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms."[52]

The duties imposed on telegraph companies have given them even greater protection against suits for defamation than other distributors like bookstores and newsstands. In addition to being protected if they do not know or have reason to know of the defamatory character of a libel,[53] telegraph companies are given a second layer of defense. Even if a telegraph company is aware that a message is false and defamatory, the company will not be held responsible unless it "knows or has reason to know that the sender is not privileged to publish it."[54] The rationale for this rule rests on both the statutory duties imposed on the telegraph companies and on the special benefits made possible by telegraph over earlier forms of communication:

> The duty imposed upon a telegraph company by . . . statutes, as well as by common law, requires it to forward messages for any who request[ ] the service; . . . the large number of messages which a telegraph company is required to transmit, the speed expected in the transmission of the messages, the number and character of the minor employees needed in the business, and the difficulty of the legal questions involved, make it impracticable for the company to withhold or deliver messages until it can make an investigation as to their truth or privileged character.[55]

The invention of the telephone followed that of the telegraph by a half century. Somewhat bizarrely, when telephone service began it was viewed as a medium distinct from the telegraph, because it featured oral as opposed

50 Ellis v. American Telegraph Co., 95 Mass. (13 Allen) 226, 232 (1866).
51 *Id.*
52 Act of Aug. 7, 1888, ch. 772, § 2, 25 Stat. 382, 383 (1889) (codified at 47 U.S.C. § 10 (1988)).
53 RESTATEMENT (SECOND) OF TORTS, § 581(1) (1977).
54 *Id.* § 612(2).
55 Western Union Telegraph Co. v. Lesesne, 182 F.2d 135, 137 (4th Cir. 1950).

to written communications.[56] The similarities between the two forms of electronic communications rapidly dwarfed the differences, and in 1910, Congress declared them both to be "common carriers."[57] Under Subchapter II of the Communications Act, neither telephone nor telegraph companies are permitted to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[58]

The traditional limitation on carriers to pick and choose whose speech to carry and whose to block is not only constitutionally permissible, it embodies the very principles of the First Amendment. As the late Ithiel de Sola Pool noted:

> [While] common carrier doctrine often lacks explicit reference to civil liberties, many of the same concerns are dealt with in different words. In its own way the law of common carriage protects ordinary citizens in their right to communicate. . . . The rules against discrimination are designed to ensure access to the means of communication in situations where the means, unlike the printing press, consist of a single monopolistic network. Though First Amendment precedents are largely disregarded in common carrier law, still this one element of civil liberty is central to that law.[59]

Civil liberty is not threatened by the imposition of common carriage obligations *per se*. It is only when such obligations interfere with true editorial discretion that the First Amendment is endangered.

C. Editorial Discretion

As seen in the discussion of libel,[60] courts have long treated the selection decisions inherent in creating a newspaper as different from those made in stocking a newsstand. The communications service provided by a newspaper is inextricably connected to what the Supreme Court has termed, "the function of editors."[61] The Court noted, "The choice of material to go into a newspaper and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public

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56 In holding that the new telephone companies did not have the same right to use post roads for their wires as did telegraph companies, the Supreme Court explained the differences between the two media:

> [Telephone companies utilized a] device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other. . . . [while telegraph companies] employed the means then used . . . for the purpose of transmitting messages merely by sounds of instruments and by signs or writing. . . . Governmental communications to all distant points are almost all, if not all, in writing. *The useful Government privileges* which formed an important element in the legislation *would be entirely inapplicable to telephone lines*, by which oral communications only are transmitted.

Richmond v. Southern Bell Tel. & Tel. Co., 174 U.S. 761, 775-76 (1899) (emphasis added).

57 Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544-45 (1910). For a superb history of the regulation of telephone companies, see Angela J. Campbell, *Publish or Carriage: Approaches to Analyzing the First Amendment Rights of Telephone Companies*, 70 N.C. L. REV. 1071 (1992).

58 47 U.S.C. § 202(a) (1988).

59 ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 106 (1983).

60 *See supra* text accompanying notes 45-48.

61 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[62]

A statute requiring a newspaper to give a "right of reply" to a political candidate whose personal character it opposed was declared unconstitutional in *Miami Herald Publishing Co. v. Tornillo*.[63] In *Tornillo*, the Court declared that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[64] As the Court later remarked, "*Tornillo* affirmed an essential proposition: The First Amendment protects the editorial independence of the press."[65]

The First Amendment also protects the "independence" of a newsstand operator, but in a somewhat different manner. The Constitution equally prohibits governmental attempts to limit the publications they offer.[66] Unlike an access requirement for newspapers, though, governmental attempts to maximize the number of periodicals sold at a stand do not put freedom of the press at peril.[67] One court has upheld a city ordinance governing the granting of permits for operating a newsstand on city streets, which gave a preference to "an applicant who has the higher, not the lower, proposed number of publications to be sold from the newsstand."[68] The court stated that this preference "does not infringe, but rather promotes First Amendment interests. [The ordinance] conceivably 'censors' only the newsstand operator who himself might eliminate certain publications from distribution."[69]

For the print media, therefore, protection for the "source" of the information includes the writing, editing and distribution of one's own words. The independent distributor of books and periodicals, while playing a critical role protected by the First Amendment, is protected primarily against content-based governmental actions, particularly those which restrict the diversity of the publications offered.

Broadcasting has created a host of problems for First Amendment jurisprudence, in large measure because of the combination of speech and distribution functions inherent in the medium itself. A broadcaster provides programming analogously to any other source of information. The programming is "distributed" however, over the airwaves, a means of distribution not available to all. While the speech function of broadcasting has earned it some measure of "editorial discretion," the meaning and scope of that discretion is quite different than that of the print medium.

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62 *Id.*

63 418 U.S. 241, 258 (1974).

64 *Id.*

65 Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2464 (1994).

66 *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963).

67 *Cf. Tornillo*, 418 U.S. at 261 (White, J., concurring) (stating that, "Woven into the fabric of the First Amendment is the unexceptional, but nonetheless timeless, sentiment that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.'" (citing 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947))).

68 Graff v. City of Chicago, 9 F.3d 1309, 1321 (7th. Cir. 1993), *cert. denied*, 114 S. Ct. 1837 (1994).

69 *Id.* The court concluded that there was no danger of censorial motive in this requirement, describing it as "an obvious attempt at variety, not indoctrination." *Id.*

In *CBS v. Democratic National Committee*,[70] the Court upheld the FCC's refusal to require broadcasters to accept paid "editorial advertisements." The Court described the role of broadcasters deciding whether to broadcast certain advertisements as similar to that of newspaper editors: "For better or worse, editing is what editors are for; and editing is the selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided."[71]

Despite the apparent linkage of broadcast and newspapers in this case, the Supreme Court has recognized that the First Amendment's protection of "editorial discretion" for broadcasters differs significantly from that for newspapers. Both before and after *CBS v. Democratic National Committee*, the Court has upheld the constitutionality of a right of access to broadcasting as consistent with the broadcasters' editorial discretion.

Four years earlier, in *Red Lion Broadcasting Co. v. FCC*,[72] the Court upheld the constitutionality of the Fairness Doctrine, which required broadcasters to cover controversial issues by accurately reflecting opposing views and provide time for those who had been personally attacked.[73] Based on the scarcity of the airwaves, the Court distinguished broadcast from print: "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."[74] The Court belittled the attempt of broadcasters to claim the same total dominion over the airwaves that a newspaper publisher exercises over his or her printing press: "[T]he First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies."[75]

Eight years after describing broadcasters' "editorial discretion" in *CBS v. Democratic National Committee*, the Court found no constitutional flaw in another broadcast access requirement. In *CBS v. FCC*,[76] the Court upheld a statute requiring broadcasters to sell advertising time to legally qualified candidates for federal office.[77] The law had been challenged as violating "the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion."[78] The Court rejected this argument by stressing the additional First Amendment rights of both "candidates to present, and the public to receive, information necessary for the effective operation of

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70 412 U.S. 94 (1973).

71 *Id.* at 124-25.

72 395 U.S. 367 (1969).

73 These rules were repealed by the FCC in Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

74 *Red Lion Broadcasting Co.*, 395 U.S. at 388.

75 *Id.* at 391. The Court also remarked, this time without the derisive quotation marks:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Id. at 389.

76 453 U.S. 367 (1981).

77 *Id.* at 397 (upholding 47 U.S.C. § 312(a)(7) (1952)).

78 *Id.* at 394.

the democratic process."[79] Recognizing the validity of the competing free speech claims, the Court concluded that "the statutory right of access . . . properly balances the First Amendment rights of federal candidates, the public and broadcasters."[80]

One lesson from this triad of cases is that broadcasters do enjoy "editorial discretion," but the meaning of that phrase is different than when used in the print medium. Broadcasters have failed to convince the Supreme Court that their "discretion" must be as absolute as newspaper publishers in order to be meaningful. For example, in striking down a law which prevented noncommercial broadcasters from editorializing, the Court noted that a total ban on broadcaster speech was in "sharp contrast to the restrictions upheld in *Red Lion* or in *CBS, Inc. v. FCC*, which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone."[81]

Because of the different ways access might be gained to that microphone, broadcasters' liability for defamation varies, depending on whether they are viewed as speaker or distributor. A broadcast station can be held liable even for programming independently produced by the network with which it is affiliated.[82] By contrast, the Supreme Court has held that a broadcaster must be immune from any liability for any libelous material broadcasting over "its" frequency by a speaker who has gained access pursuant to statutory mandate.[83]

Radio call-in shows present a special case. The broadcaster voluntarily chooses to utilize such a format, but much of the speech is provided by callers who are otherwise unrelated to the station. Call-in programming has been characterized as "the modern version of the town meeting . . . [which] afford[s] every citizen an opportunity to speak his mind on any given issue."[84] Accordingly, the Supreme Court of Wyoming held that a radio station did not have to use a tape-delay to screen out defamatory calls, citing the First Amendment value in avoiding rules "requiring private censorship."[85] The court warned that:

> The impact of censorship would not fall upon the broadcaster's words and ideas; instead, it would be applied to the opinions and ideas of those members of the public who elected to participate in this kind of public forum. The application of any technique of censorship to such a public forum can only result in the ultimate extinction of that forum.[86]

Rules regarding both access and tort liability have varied depending on the forms of communication to further the twin goals of preserving

79 *Id.* at 396. *See also id.* at 396 ("The First Amendment interests of candidates and voters, as well as broadcasters, are implicated . . . .").

80 *Id.* at 397.

81 FCC v. League of Women Voters, 468 U.S. 364, 385 (1984).

82 *See, e.g.*, Coffey v. Midland Broadcasting Co., 8 F. Supp. 889, 890 (W.D. Mo. 1934).

83 Farmers Educational & Cooperative Union v. WDAY, Inc., 360 U.S. 525, 535 (1959). This immunity was necessary for avoiding "the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." *Id.* at 531.

84 Adams v. Frontier Broadcasting Co., 555 P.2d 556, 566 (Wyo. 1976).

85 *Id.* at 557.

86 *Id.* at 567.

speaker autonomy and maximizing the number and variety of speakers carried by distributors. Where speech and distribution functions are combined, these goals need to be balanced.

For the emerging technologies, a similar calculus will need to be obtained. In *Turner Broadcasting System, Inc. v. FCC*,[87] the Supreme Court began this difficult process.

III. A PAGE *TURNER*: THE CONSTITUTIONAL APPROACH FOR NEW MEDIA TECHNOLOGIES

From its humble origins as Community Antenna Television (CATV), whose sole purpose was to improve the reception of a few local broadcast signals in hilly terrain, cable television has evolved into a distribution system capable of delivering more than one hundred channels of programming from satellite, microwave, broadcast and other sources.[88] As cable television technology grew more sophisticated and cable television regulation more complicated, the battle over the constitutionality of cable television regulation began in earnest.[89]

The primary difficulty in deciding the constitutionality of cable television regulation arises from the governmental decision to combine the distribution function with the speech function. As one court noted:

> [T]he city has painted itself into this corner by conflating the programming and utility functions of cable. For First Amendment purposes, we are concerned primarily about restrictions on programming, not on stringing wires or digging trenches; without the signals transmitted along the wires, cable is basically like any other utility, which may be regulated without implicating the First Amendment.[90]

The first step in analyzing the constitutionality of cable regulation is determining the appropriate First Amendment standard to apply.[91] The resolution of this question requires a disentangling of the dual functions—distributor and speaker—performed by a cable operator. With no clear guidance from the Supreme Court, lower courts struggled mightily to confront this problem.[92]

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87 114 S. Ct. 2445 (1994).

88 *See generally* DANIEL BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 1.02[1] (1993).

89 A sampling of the range of issues can be seen in the listing of more than 20 separate franchise provisions that were challenged in Preferred Communications, Inc. v. Los Angeles, 13 F.3d 1327, 1329 nn.2 & 3 (9th Cir.), *cert. denied*, 114 S. Ct. 2738 (1994). The Supreme Court opinion at 476 U.S. 488 (1986) is generally referred to as *Preferred I*, while the 1994 Ninth Circuit opinion is referred to as *Preferred II*.

90 *Preferred II*, 13 F.3d at 1331. For an excellent discussion of the relationship between First Amendment principles and cable television, see Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329.

91 *See, e.g.*, Century Communications Corp. v. FCC, 835 F.2d 292, 297-98 (D.C. Cir. 1987) (stating that "[a] threshold question for our first amendment analysis is what standard of review to apply"), *cert. denied*, 486 U.S. 1032 (1988).

92 The difficulty befalling these courts can be seen in the note which the Court of Appeals for the Seventh Circuit appended to a cable case to explain the more than one year time lag between oral argument (June 8, 1988) and its decision (July 19, 1989). The court noted that "[t]he delay in issuing this opinion was caused by lengthy panel deliberations about the outcome." Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1540 (7th Cir.

After almost three decades of deciding cable television cases without resolving this threshold issue,[93] the Supreme Court finally announced the First Amendment standard for evaluating the constitutionality of cable regulation.[94] What is especially significant about this case was that the Court rejected appeals to resolve the issue by simplistic analogizing to earlier forms of communication, and instead focused on the realities of contemporary electronic mass communications.

A. The Limits of Analogy: Creation of an Intermediate Standard

Much of the early legal skirmishing on the appropriate First Amendment standard for cable television focused on whether to use the "print" model or the "broadcast" model.[95] Opponents of cable television regulation had long tried to argue that cable television was an "electronic newspaper," and that the selection of cable programming by a cable operator was "indistinguishable" from the editorial discretion exercised by a newspaper owner.[96] Several lower courts agreed that there was no "constitutional distinction between cable television and newspapers."[97]

Some who supported cable regulation urged that cable television systems be treated analogously to broadcast television stations, in that both communicated electronically over public byways (streets or airwaves) and there were a limited number of each kind of speaker.[98] One court, in upholding cable television public access requirements, declared, "*Red Lion*,

1989) (upholding the constitutionality of a city requirement that cable operators present local programming), *cert. denied*, 493 U.S. 1044 (1990).

93 *See, e.g.*, Leathers v. Medlock, 499 U.S. 439 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); FCC v. Midwest Video Corp., 440 U.S. 689 (1979); United States v. Midwest Video, 406 U.S. 649 (1972); United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

94 *See infra* text accompanying notes 136-40.

95 Some creative commentators proposed the telephone model, based on the shared monopoly characteristics. *See, e.g.*, Mark Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 HARV. J. ON LEGIS. 541, 552 (1983); *see also* POOL, *supra* note 59, at 168 ("[T]he natural legal analogy for the physical element of a cable system is neither the printing press nor the broadcasting station, both of which are competitive, but the telephone common carrier system, which is obligated to carry whatever anyone wants to put on it at nondiscriminatory rates."). *But see* Frontier Broadcasting Co., 24 F.C.C. 251 (1958) (stating that cable television was not a common carrier because cable operators selected which broadcasters to carry).

96 *See, e.g.*, Henry Goldberg, *Cable Television, Government Regulation, and the First Amendment*, 3 COMM./ENT. L.J. 577 (1981); Note, *The F.C.C., the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 146-47 (1976). *See generally* GEORGE H. SHAPIRO ET AL., 'CABLESPEECH' 3 (1983) ("The cable industry in recent years has frequently been analogized to newspapers for First Amendment purposes.").

97 Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); *see also* Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979). The 1978 and 1979 decisions are commonly referred to as *Midwest Video II*, to distinguish them from an earlier decision upholding an FCC requirement that cable operators originate local programming. *See* United States v. Midwest Video Corp., 406 U.S. 649 (1972) (*Midwest Video I*).

98 *See, e.g.*, Roscoe L. Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 530 (1975); *see also Petition for Rulemaking to Establish Local Origination Requirements for Cable TV*, 52 Rad. Reg. 2d (P & F) 1299 (1971).

the seminal case of contemporary communications law, retains its vitality in the high-tech world of cable television."[99]

The first Supreme Court discussions of this issue did little to clarify the matter. In *FCC v. Midwest Video Corp.*,[100] the Court struck down an FCC attempt to impose public access requirements on cable operators.[101] The Court of Appeals for the Eight Circuit had ruled that Congress never authorized the FCC to issue such requirements,[102] and that, moreover, the similarity between cable operators and newspaper owners made the access requirements constitutionally suspect.[103] In keeping with the principle that courts should try to resolve cases on non-constitutional grounds rather than deciding a constitutional question unnecessarily,[104] the Supreme Court struck down the rules as contrary to the FCC's statutory mandate. The Court, however, could not resist entirely acknowledging the constitutional issue, and dropped this tantalizing point into a footnote at the end of its decision:

> The Court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on the question, *save to acknowledge that it is not frivolous* and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute.[105]

The declaration that the print model analogy was "not frivolous" was not necessary and not helpful. It was unnecessary to include because the Court simply could have stated what it says so often: "Because we find the [non-constitutional issue] to be dispositive of this question, we need not consider petitioner's constitutional argument . . . ."[106] Instead, the Court's vague pronouncement invited more in the nature of reading tea leaves than constitutional adjudication.[107]

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99 Berkshire Cablevision of R.I., Inc. v. Burke, 571 F. Supp. 976, 986 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); *see also* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1378 (10th Cir. 1981) (upholding cable franchising regulation, in part, because "[i]nherent limitations on the number of speakers who can use a medium to communicate has been given as a primary reason why extensive regulation of wireless broadcasting is constitutionally permissible"), *cert. dismissed*, 456 U.S. 1001 (1982).

100 440 U.S. 689 (1979).

101 *See* Report and Order, Docket 20508, 59 F.C.C.2d 294 (1976).

102 *Midwest Video II*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

103 *Midwest Video II*, 571 F.2d at 1054-56.

104 *See, e.g.*, Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

105 FCC v.Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) (emphasis added).

106 *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991) ("Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction."); *see also* United States v. Wells Fargo Bank, 485 U.S. 351, 359 (1988) (stating that because the Court found that a 1937 statute never exempted certain local obligations from federal estate taxes, "[it] therefore need not consider the constitutionality of [a 1984 law purporting to eliminate such exemption]").

107 *See, e.g., In re* Quincy Cable TV Inc., 93 F.C.C.2d 412, 422 (1983) (Jones, Comm'r, dissenting) ("If we are to infer law from footnotes . . . . Footnote 19 seems a virtual invitation by the court for a proper case in which to consider the constitutional arguments pressed so insistently by Quincy Cable."); *see also* Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322, 1388 (E.D. Cal. 1987) (stating that "public access requirements may have their own constitutional infirmities. The Supreme Court has *explicitly refused* to rule on the first amendment permissibility of

The Court's next venture into the debate over the use of analogy for deciding the constitutionality of cable television regulation was not much more successful. In *City of Los Angeles v. Preferred Communications, Inc.*,[108] the Court dealt with a constitutional challenge to a city's exclusive franchising system.[109] After noting that cable television operations "plainly implicate First Amendment interests,"[110] the Court issued this paradoxical statement concerning the scope of cable operators' First Amendment interests: "Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of *newspaper and book publishers*, public speakers and pamphleteers. [The cable operator's] proposed activities would seem to implicate First Amendment interests as do the activities of *wireless broadcasters* . . . ."[111]

This discussion did nothing to resolve the question of which model was to be utilized. By comparing cable operators simultaneously to both newspaper publishers and wireless broadcasters, the Court confounded rather than clarified the issue.[112] A concurrence by Justices Blackmun, Marshall and O'Connor recognized this difficulty and indicated that a new way of approaching this question was percolating at the Court: "In assessing 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 an already existing standard or whether *those characteristics require a new analysis.*"[113]

In 1994, the Supreme Court finally issued its new analysis. In *Turner Broadcasting System, Inc. v FCC*,[114] the Court was faced with deciding whether Congress could require cable systems to set aside channels for the carriage of the signal of local over-the-air broadcasters [the "must carry rules"].[115] The Court did not actually resolve the immediate legal controversy,[116] but did establish a framework that will be utilized not only for analyzing regulation of cable television, but of future communication technologies as well.

The Court began its analysis, as it had in *Preferred Communications*, by declaring that the activities of both cable programmers and cable operators

public access requirements, except to note that the claims of unconstitutionality are not frivolous.") (emphasis added).

108 476 U.S. 488 (1986).

109 *Id.* at 496. The Court remanded the case so that a more complete factual record could be created.

110 *Id.* at 494.

111 *Id.* (emphasis added).

112 The Court was similarly opaque five years later in Leathers v. Medlock, 499 U.S. 439, 444 (1991) when, in upholding a law imposing a sales tax on cable television systems but exempting other media, it declared, "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation part of the 'press.'" It is especially noteworthy that the Court referred to "cable television" without indicating whether it was the operators or programmers who were "speaking."

113 *Preferred I*, 476 U.S. at 496 (Blackmun, J., concurring) (emphasis added).

114 114 S. Ct. 2445 (1994).

115 The must-carry rules were imposed in Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534 & 535, Pub. L. 102-385, §§ 4, 5, 106 Stat. 1471, 1477 [hereinafter 1992 Cable Act]. Under the must-carry rules, cable systems must provide up to one-third of their channel capacity for carriage of local broadcast stations.

116 For a discussion of the issues left to be decided on remand, see *infra* text accompanying notes 209-17.

were protected by the First Amendment.[117] Noting that "not every interference with speech triggers the same degree of scrutiny," the Court declared that it "must decide at the outset the level of scrutiny applicable."[118]

The Supreme Court unequivocally rejected appeals to analogize cable television to either broadcast or print. Instead, the Court ruled that a new constitutional standard needed to be created because of the practical technological differences between cable television and the earlier media.

Broadcasting cases were deemed inapposite because "cable television does not suffer from the inherent limitations that characterize the broadcast medium."[119] For this analysis, the Court focused on the number of channels which can be carried over fiber optic cables, but did not consider the far more limited number of cables which can be accommodated on public streets and rights-of-way. Identifying the "fundamental technological differences" between broadcasting and cable, the Court concluded that, unlike broadcasting, "soon there may be no practical limitation on the number of speakers who may use the cable medium."[120]

The Court also refused to accept the argument that the selection process of cable operators was the same as that of newspaper publishers. As it has done with broadcasters, the Court used the phraseology of the publishing world but with a significantly different meaning for electronic communications.[121] The cable operator's act of selecting which programmers could use specific channels was described as "exercising editorial discretion over which stations or programs to include in its repertoire."[122] The Court made clear, though, that the "editorial control" of cable operators was not to be understood as the fully autonomous decision-making of their print counterparts. In stark contrast to the Court's description of newspapers as "more than a passive receptacle or conduit for news, comment and advertising,"[123] the Court depicted the role of the cable system as essentially that of a passive receptacle: "Once the cable operator has selected the programming sources, *the cable system functions, in essence, as a conduit for the speech of others,* transmitting it on a continuous and unedited basis to subscribers."[124]

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117 *Turner Broadcasting Sys.*, 114 S. Ct. at 2456; *Preferred I*, 476 U.S. at 494.

118 *Turner Broadcasting Sys.*, 114 S. Ct. at 2456.

119 *Id.* at 2457.

120 *Id.* The Court added, "Nor is there any danger of physical interference between two cable speakers attempting to share the same channel." *Id.* The Court also rejected the argument that there was a similar "market dysfunction" in broadcast and cable. The Court held that "[a] mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to non-broadcast media." *Id.* at 2458.

121 *See supra* text accompanying notes 69-77.

122 *Turner Broadcasting Sys.*, 114 S. Ct. at 2456 (quoting *Preferred I*, 476 U.S. at 494). The Court stated that the must-carry provisions "interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations." *Id.* at 2460.

123 Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

124 *Turner Broadcasting Sys.*, 114 S. Ct. at 2452 (emphasis added). The dissent in *Turner Broadcasting System* argued that the "recognition that cable operators are speakers is bottomed in large part on the very fact that the cable operator has editorial discretion." *Id.* at 2480 (O'Connor, J., dissenting). But even the dissent recognized that, because cable operators also serve as a monopoly conduit, access requirements would not automatically interfere with "editorial discretion" of cable television operators. Though opposing the must-carry rules, the dissent declared that content-neutral access requirements would not violate the First Amendment: "[I]t stands to reason

The recognition that even those cable operators who produce some of their own programming serve as conduits for the programs of others led the Court to distinguish must-carry rules for cable television from a statute mandating a right-of-reply to newspapers. Because of the public's historic understanding that newspapers endorse that which they print, a mandated right of access to a newspaper could induce "the newspaper to respond to the candidate's replies when it might have preferred to remain silent."[125] By contrast, said the Court, cable has long served as "a conduit for broadcast signals," so there was little risk that viewers would assume that carriage of a broadcaster meant that the cable operator "endorsed" its viewpoint.[126]

Cable television's simultaneous role as conduit and source was identified by the Court as the "important technological difference between newspapers and cable television."[127] The Court reasoned that even a monopoly newspaper cannot stop local residents from obtaining other publications, such as weekly local papers or out-of-town dailies. Newsstands, the postal service and even local delivery people would be able to bring other newspapers to "willing recipients in the same locale."[128]

Cable television, according to the Court, is different because once a consumer subscribes to cable, the "physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[129] The cable operator, by owning "the essential pathway for cable speech," has the technological ability to "silence the voice of competing speakers with a mere flick of the switch."[130] The Court concluded that the government is not barred by the First Amendment from ensuring that "private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[131]

The Court did not discuss one of the most important differences between the print and cable media: their respective relationships with the government. Newspapers do not need governmental permission to publish or to distribute. The act of publishing is truly "private," and any attempt to require a license would be rejected as a throw-back to the Star Chamber. By contrast, cable television's use of public streets and rights-of-way has always tied the industry closely to governmental authorities. Cable operators must obtain a franchise before construction can begin, and almost always benefit from being the sole franchisee in an area.

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that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies . . . ." *Id.*

125 *Id.* at 2465. This was also the Court's rationale for striking down a rule requiring a utility to include in its billing envelope a newsletter from groups critical of the utility's rates. Pacific Gas & Electric Co. v. Public Util. Comm'n., 475 U.S. 1, 11 (1986).

126 *Turner Broadcasting Sys.*, 114 S. Ct. at 2466. The Court also stated that viewer confusion would be avoided by broadcasters identifying themselves every hour, as required by federal law. *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

The Court described this relationship at the beginning of its *Turner Broadcasting* opinion: "The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, *the cable medium may depend for its very existence upon express permission from local governing authorities.*"[132] Probably because the must-carry rules were imposed on cable operators by the federal government, rather than by the local authorities who had given them "express permission," the Court did not explore the legal significance of this symbiotic relationship.[133] At a minimum, it would seem to supply an additional justification for upholding local regulation, such as public access requirements, designed to maximize the number of cable speakers.[134]

After rejecting both the print and broadcast model, and finding that the must-carry rules were content-neutral and did not pose "inherent dangers to free expression,"[135] the Court announced its standard: "[T]he appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech."[136]

This standard originated in *United States v. O'Brien*,[137] which upheld the conviction of a war protester who burned his draft card. In rejecting a First Amendment challenge to the conviction, the Court stressed that the case involved the combination of "'speech' and 'nonspeech' elements."[138] In what has since become known as the "*O'Brien* test," the Court announced its framework for evaluating the regulation of the "nonspeech" element: A regulation is constitutional if it is content-neutral, furthers an important governmental interest which is "unrelated to the suppression of

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132 *Id.* at 2451 (emphasis added).

133 This was one of the principle grounds relied upon by the Court of Appeals for the Tenth Circuit in upholding a city's cable franchising system. *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-78 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982):

> To disseminate information, a newspaper need not use public property in the same way that a cable operator does. . . . [A] cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. . . . Some form of permission from the government must, by necessity, precede such disruptive use of the public domain. . . . A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.

134 *See infra* note 174.

135 *Turner Broadcasting Sys.*, 114 S. Ct. at 2468. For a discussion of the Court's finding of "content-neutrality," see *infra* text accompanying notes 195-206.

136 *Id.* Although the Supreme Court did not refer to them, some lower courts had begun to apply this standard to cable regulation. *See, e.g.*, Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 599 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3rd Cir. 1988); Carlson v. Village of Union City, 601 F. Supp. 801, 810 (W.D. Mich. 1985). In striking down earlier versions of the must-carry rules, the Court of Appeals for the District of Columbia used this intermediate standard, but left open the possibility that a stricter standard of review might be more appropriate. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1453 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292, 298 (D.C. Cir. 1987).

137 391 U.S. 367 (1968).

138 *Id.* at 376.

free expression"[139] and does not "burden substantially more speech than is necessary to further the government's legitimate interests."[140]

Significantly, the Court in *Turner Broadcasting* was applying *O'Brien* even though the regulation was not limited to a non-speech aspect of cable television, such as the placing of cables on a public right-of-way.[141] Instead, the Court was staking out a middle ground for evaluating the permissibility of content-neutral cable television regulation, between the historical extremes of "strict scrutiny" accorded print and the deferential review of broadcast regulation.

Turner Broadcasting will have enormous significance for the emerging communications technologies. The rationale given for applying this middle standard to cable television will help shape the thinking of the constitutionality of all manner of regulation of all types of technology. Essentially, the courts should apply the intermediate test to regulation of a new medium if: (1) The regulation is content-neutral and does not give the government potential for censoring unpopular speech or manipulating the media to benefit favored speakers; and (2) The owner of the regulated means of communication has great control over the access to that medium, especially by potential competitors.

Additionally, courts must take into account the relationship between the new media and government. Many of the newer forms of communications may depend on governmental largesse, either favored use of a governmental infrastructure or special financial or technical assistance.[142] Content-neutral regulation of such governmentally-aided media should not be subject to strict scrutiny if the regulation merely attempts to prevent a private blockage of the free flow of information and ideas through a critical pathway of communication.

B. Classifying Interests

The Supreme Court agreed with the FCC that each of the three interests put forth were to be considered important: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3)

139 *Id.* at 377.

140 Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989). This last requirement is a revision of the original *O'Brien* requirement that the restriction "on alleged First Amendment freedoms is *no greater than is essential*" to further the governmental interest. *O'Brien*, 391 U.S. at 377 (emphasis added). While this *Ward* standard is less demanding of the government, it requires a greater governmental showing than an earlier Court statement that a regulation is valid if the interest "would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689 (1985), *quoted in Ward*, 491 U.S. at 799. The Court has also stated that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984). This standard upholds regulations provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 293.

141 *See, e.g., Preferred I*, 476 U.S. 488 (1986).

142 *See generally* Johnathan D. Blake & Lee J. Tiedrich, *The National Information Infrastructure Initiative and the Emergence of the Electronic Superhighway*, 46 FED. COMM. L.J. 397 (1994).

promoting fair competition in the market for television programming."[143] While the Court referred to these interests as "interrelated,"[144] they are not necessarily consistent with one another. In particular, the first interest looks disconcertingly backwards, technologically-speaking, while the other two show promise of encompassing the emerging communications technologies.

1. Return of the Luddites

The Court's rationale for "preserving" broadcasting is not wholly satisfying, almost implying an interest in nothing more than protecting an existing industry from the benefits of improved technology. In the early nineteenth century, the Luddites, a group of English textile workers, attempted to stop the advent of the Industrial Revolution by destroying the new labor-saving textile machines.[145] Just as their struggle was shortsighted, so too is a policy that fails to recognize society's interest in the evolving communications technology.

Most troubling is the Court's conclusion that "'protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."[146] Unlike the third interest identified above, the Court is not endeavoring to protect broadcasters from *unfair* competition, but, apparently, from any competition, even that resulting from simple consumer preference.

The difficulty with this interest can be seen in the following scenario. Suppose that the offerings of cable television programmers were uniformly more interesting and more entertaining than those of broadcasters. Accordingly, every subscriber to cable television only watched non-broadcast programming, even though their cable systems provided access to broadcast stations as well. With so many of the nation's viewers gone, many broadcasters would be economically ruined.[147] It is not self-evident that there would be a substantial government interest in protecting non-cable

143 *Turner Broadcasting Sys.*, 114 S. Ct. at 2469. The interest in preserving broadcasting was described in the 1992 Cable Act in § 2(a)(10) ("A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.") and § 2(a)(12) ("There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."). The second interest, in the multiplicity of information sources was described in § 2(a)(6) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.") and § 2(b)(1) (It is Congress' policy to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media."). The third interest, in combatting unfair competition was stated in § 2(a)(17) ("[Cable law] was premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems.") and § 2(b)(5) (It is Congress' policy to "ensure that cable television operators do not have undue market power vis-á-vis video programmers and consumers."). These sections of the 1992 Cable Act are codified at 47 U.S.C. §§ 521(a) & 521(b) (Supp. V 1993).

144 *Turner Broadcasting Sys.*, 114 S. Ct. at 2469.

145 *See generally* MALCOLM I. THOMAS, THE LUDDITES (1970).

146 *Turner Broadcasting Sys.*, 114 S. Ct. at 2470 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).

147 This is, after all, one of the premises behind the must-carry rules.

households from losing broadcasting service due to such competition from cable systems.

The Court began its defense of this interest by referring to the 1934 Communications Act policy of allocating free broadcast service so that all communities have "an over-the-air source of information and an outlet for exchange on matters of local concern."[148] The Court then referred to its 1968 decision which declared that "the importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"[149] In reaffirming the contemporary importance of "[t]he interest in maintaining the local broadcast *structure*," the Court referred to the "nearly 40 percent of American households" which do not have cable service and which "rely on broadcast stations as their exclusive source of television programming."[150]

The most questionable aspect of this analysis is the presumption, without elaboration, that it is the actual "structure" of local broadcasting which must be preserved in order for non-cable households to continue to have access to their "principal source of information and entertainment." Regardless of the contemporary benefits of broadcasting, the current structure of local broadcasting was created in a long-gone era and should not be permitted to constrict the growth of newer technologies.

As the FCC has noted, "The existing TV system was cast . . . in 1952,"[151] when the Commission established a system for the allotment of broadcast signals.[152] This system was based on the premise that only an extremely limited number of outlets for programming to the home were physically possible: "[I]t was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few."[153]

In 1965, the FCC proudly announced that it was "creating an assignment plan with our own Univac III computer."[154] The Commission marveled at the "speed with which a computer can perform intricate computations and examine stored data . . . heretofore considered impractical because of the time involved."[155] The new computer-generated plan provided that "over 90 percent of all TV homes should have access to three or more television services."[156]

148 *Turner Broadcasting Sys.*, 114 S. Ct. at 2469.
149 *Id.* (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)).
150 *Id.* at 2469-70 (emphasis added).
151 VHF TV Top 100 Markets, 63 F.C.C.2d 840, 847 (1977).
152 *See* Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952).
153 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969). Thus, one of the main priorities of the 1952 system was to "provide each community with at least two television broadcast stations." *Television Assignments*, 41 F.C.C. at 167. Based on then existing technology, the FCC had concluded that:

> [its] objectives of providing for a system of competitive nationwide television service reaching all parts of the country with the largest possible number of program choices and providing for as many outlets of local expression as possible within the available spectrum space . . . can best be met by utilizing the 12 VHF and 70 UHF television channels in a freely intermixed system.

VHF Television Expansion, Fourth Report and Order, 41 F.C.C 1082, 1083 (1965).
154 *Fostering Expanded Use of VHF Television Channels*, 41 F.C.C. at 1085.
155 *Id.* at 1084.
156 *Id.* at 1090.

While there has been a bit of tinkering with the allocation of the spectrum,[157] the television broadcast structure has not been seriously altered. In the interim, of course, there has been a video revolution, with cable television bringing anywhere from 36 to 120 channels into American homes. As the FCC itself noted, "The growth and development of the electronic communications mass media industry, in both broadcast and non-broadcast sectors . . . has benefited the public by providing greatly increased amounts and diversity of program choices."[158]

Without denigrating the value of broadcast television in general, the exact structure of the broadcast regulatory scheme which was created in the 1950s is no longer indispensable to the public interest. Even the FCC, that staunch defender of the must-carry rules, has recognized the change.

Prior to the expansion of video options, the utilization of each broadcast slot was viewed as essential for giving viewers a modicum of choice.[159] The fear of losing a single station was so great that, under the so-called *Carroll* doctrine,[160] an existing broadcaster could block the FCC from awarding a new broadcast license to a potential competing broadcaster if it could show that "the economic effect of a Second License in . . . [an] area would be to damage or destroy service to an extent inconsistent with the public interest."[161] In 1988, the FCC repealed the *Carroll* doctrine, concluding that the realities of the new communications marketplace makes such protectionism unnecessary and unwise.[162] The Commission noted that not only is competition between speakers inherently good,[163] there is no longer an appreciable danger of a significant loss in electronic communications even if "ruinous competition" between broadcasters were to result.[164] As the FCC concluded, "[T]he multiplicity of media voices that now exist makes the amount of harm that would result minimal."[165]

The changes in the video communications universe have eliminated the need to view the benefits of broadcasting as resulting from an indivisible and inflexible permanent structure that must be defended against all

157 For example, channels 70-83 were taken away from broadcast television and allocated to land mobile radio. An Inquiry Relative to the Future Use of the Frequency Band 806-960 MH2, 46 F.C.C.2d 752, 793 (1974).

158 Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 F.C.C.R. 638, 641 (1988) [hereinafter *Detrimental Effects*].

159 *See, e.g.*, NBC v. United States, 319 U.S. 190, 217 (1943) ("Suppose, for example, that a community can, because of physical limitation, be assigned only two stations. . . . One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area.").

160 The *Carroll* doctrine was named after the case in which the courts first ordered the FCC to consider the issue of detrimental economic effect: Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

161 *Id.* at 443.

162 *Detrimental Effects*, 3 F.C.C.R. at 638.

163 *See, e.g.*, Table of Television Channel Allotments, 83 F.C.C.2d 51, 55 (1980) ("In general, it is in the public interest for the Commission to promote opportunities for additional service to the American public. Increasing the number of television competitors is likely to (1) put pressure on competitors to be more responsive to the wants and needs of consumers, (2) increase the total amount of service available to consumers, and (3) increase the diversity of service offered.").

164 *Detrimental Effects*, 3 F.C.C.R. at 640.

165 *Id.* at 641.

comers.[166] The regulatory system should permit, if not encourage, vigorous competition for the hearts, minds and dollars of the American public. The competition must be fair, but regulators should follow the maxim long applied to antitrust laws: regulation is designed for "the protection of *competition*, not *competitors*."[167]

Unfortunately, politicians and regulators can confuse the two. In passing the 1992 Cable Act, Congress justified the imposition of the must-carry requirements as being necessary "to protect the federal system of television allocations and promote competition in local markets."[168] These are not synonymous; mere protection of the broadcast allocation system should no longer be viewed as an "important" governmental interest, in and of itself sufficient to hinder a newer technology. A system designed for the Univac should not restrict communications in a multi-media world.

Creation of a new system would neither spell the end of the must-carry rules, in particular, nor the federal regulation of broadcasters more generally. Instead, it would force the government to direct its attention where it belongs: to encouraging both a multiplicity of electronic voices and fair competition among those voices.

2. Promoting and Protecting the Electronic Marketplace of Ideas

The Court's discussion in *Turner Broadcasting* of the government's interests in assuring "a multiplicity of information sources . . . [and] eliminating restraints on fair competition"[169] was refreshingly brief, reflecting the unanimity of Court support. Nonetheless, each interest has enormous significance for the future of electronic communications.

In a single paragraph, the Court dispatched both issues. The Court's analysis of the fair competition issue consisted of just one sentence, which declared that the Government's interest in "eliminating restraints on fair competition is always substantial" even when applied to the press.[170]

166 *See, e.g.*, Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 313 (7th Cir. 1994) (describing the FCC's decision to end limitations on the broadcast networks' ability to syndicate their own programming as "a remarkable about-face for an agency that for half a century has treated the independent television stations as sensitive plants requiring high fences to keep out network predators.").

167 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

168 H.R. Rep. No. 862, 102d Cong., 2d Sess. 75 (1992), *reprinted in* 138 CONG. REC. H8308, H8327 (Sept. 14, 1992).

169 *Turner Broadcasting Sys.*, 114 S. Ct. at 2470. The interest in preserving broadcasting was described in the 1992 Cable Act in § 2(a)(10) ("A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.") and § 2(a)(12) ("There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."). The second interest, in the multiplicity of information sources was described in § 2(a)(6) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.") and § 2(b)(1) ("[Policy to] promote the availability to the public of a diversity of views and information through cable television and other video distribution media"). The third interest, in combatting unfair competition was stated in § 2(a)(17) ("[Cable law] premised upon the continued existence of mandatory carriage obligations for cable systems, ensuring that local stations would be protected from anticompetitive conduct by cable systems") and § 2(b)(5) ("[Policy to] ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers").

170 *Turner Broadcasting Sys.*, 114 S. Ct. at 2470.

In almost as short order, the Court characterized increasing the number of information sources as a governmental purpose "of the highest order" because it "promotes values central to the First Amendment."[171] The Court concluded its succinct discussion by declaring that "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[172]

These principles are not limited to any particular form of communications technology. In fact, as Judge Learned Hand declared, it is one of the "most vital of all general interests" to have "the dissemination of news from as many different sources, and with as many different facets and colors as is possible. . . . [R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[173]

One of the hallmarks of the new communications technology is the potential for opening the electronic medium so that mass communications can refer not only to a "mass" of recipients, but to a "mass" of speakers as well. More channels or more networks, though, are not enough. The promise of the First Amendment can only be realized if the "multitude of tongues" over the new technology can speak free of "any kind of authoritative selection."

IV. Free Speech and the Distribution of Ideas in the New Media

The information superhighway promises to become a crowded thoroughfare. More sources will be providing information electronically than ever before. Those who want to create information will inevitably run into conflict with those whose function it is to distribute information.

Regardless of the ultimate structure of the communications system, there will inevitably be some governmental involvement in the resolution of many of these conflicts. Historically, the government has played paradoxical roles, sometimes limiting the discretion of distributors to censor others, and sometimes mandating or encouraging the silencing of speakers.

The First Amendment will control both types of involvement. First, in what ways can the government encourage diversity by limiting the ability of particular distributors to control the speakers they carry? Second, when do governmental actions and rules impermissibly transform the private selection decisions of a distributor into unconstitutional censorship?

A. Multiplying Speakers by Regulating Distributors

The *Turner Broadcasting* decision dealt only with the ability of broadcasters to obtain access to a cable television system. There have been, and undoubtedly will be, other governmental attempts to limit the ability of

171 *Id.*

172 *Id.* (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion) (internal quotation marks omitted)).

173 United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1944).

distributors to deny carriage to unaffiliated speakers. For example, Congress and local governments have also provided for the ability of other programmers to use cable television, via leased and public access requirements. Some states have required telephone companies to provide dial-it services on a lottery basis. As for broadband networks, there will likely be calls for some open access to the backbone system.

For regulation of the new media to be constitutional, it will have to undergo a two-step analysis. First, the distributor must be evaluated to determine if it is a bottleneck with the ability to "restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[174] If so, the regulation will then have to pass the *O'Brien*[175] test as a content-neutral requirement, which furthers an important governmental interest unrelated to the suppression of free expression and does not burden substantially more speech than is necessary.[176]

1. Recognizing Bottlenecks

Access regulation is most appropriate for distributors who operate as "gatekeepers," effectively controlling which speakers can utilize a given medium. In determining whether the owner of a given distribution system exercises such control, courts should examine practical real-world realities, rather than theoretical possibilities for alternate delivery options.

In *Turner Broadcasting*, the Supreme Court found that cable was a bottleneck, even though other options exist for cable subscribers to receive broadcast programming. First, as one appellant told the Court, "cable subscribers could receive broadcast signals not carried on cable if they so desired by using an inexpensive input selector or 'A/B' switch."[177] Second, "most, if not virtually all, communities have the room—on utility poles or below ground—to accommodate the construction of additional cable systems."[178]

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174 *Turner Broadcasting Sys.*, 114 S. Ct. at 2466. This analysis deliberately omits the different issue where a distributor has some, but not bottleneck, control and the government imposing the requirements has provided significant assistance to the distributor. While this alternative justification was not specified in *Turner Broadcasting*, it is certainly implied by the Court's reference to cable as being dependent "for its very existence upon express permission from local governing authorities." *Id.* at 2452. *See supra* text accompanying notes 133-35. A more deferential standard than *O'Brien* may, in fact, be appropriate when the government is attempting to level the communications playing field which the government itself has tilted toward the distributor. *See, e.g.*, Red Lion Broadcasting v. FCC, 395 U.S. 367, 400 (1969) (stating that the Fairness Doctrine is justified, even if additional stations are possible, because "existing broadcasters [have] a substantial advantage over new entrants [which is] the fruit of a preferred position conferred by the Government.").

175 United States v. O'Brien, 391 U.S. 367, 377 (1968).

176 *See supra* text accompanying notes 136-40.

177 Brief for Appellant Turner Broadcasting System, Inc. at 8 n.22, *Turner Broadcasting System* (No. 93-44). In 1986, the FCC had envisioned that there would be no need for must carry rules, once the public became aware of the existence of A/B switches, because such a switch "guarantee[s] effective viewer choice between local and cable shows." Century Communications Corp. v. FCC, 835 F.2d 292, 296 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

178 Brief for Appellant National Cable Television, Inc. at 3, *Turner Broadcasting System* (No. 93-44). *See also* Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327, 1330 (9th Cir.) (finding that the infrastructure of Los Angeles can support a second cable system), *cert. denied*, 114 S. Ct. 2738 (1994).

Despite these possible means for alternate delivery of broadcast signals, the Court found that cable operators, as a practical matter, had "physical control of a critical pathway of communication," and could "silence the voice of competing speakers with a mere flick of the switch."[179] While the Court held that the mere "dysfunction or failure in a speech market,"[180] is insufficient to justify regulation when that disfunctioning is caused by "private power over a central avenue of communication,"[181] regulation to protect the market is permissible.

Most computer networks will not possess such power. If one is dissatisfied with the policy of Prodigy, for example, there are not only large networks, such as CompuServe and America Online, but hundreds of smaller ones available on the Internet.[182] Owners of networks should have the right to define how their networks will be used. There is no reason to mandate that each network serve as a common carrier. As long as there are other networks freely available, the First Amendment is served when companies have the freedom to decide what type of messages they will carry, from establishing a "family" network to a bulletin board dealing exclusively with tobacco.[183] An abundance of different types of networks would seem to further, not deter, free expression.

The only exception to this would be if the government were to somehow grant, or permit, a single entity the power to control who could utilize a major network backbone, be it the Internet or some later incarnation. Such control would create an unacceptable ability for private restriction of "a critical pathway of communication."

Telephone companies have traditionally been viewed as the paradigmatic gatekeeper. The role of telephone companies has been radically transformed in the last quarter-century. The entry of MCI and the break-up of AT&T helped divide the monolithic telephone service into competitive long-distance and monopoly local service.[184] The services offered by the local companies became further subdivided into monopoly basic service and unregulated "enhanced service."[185] The future will bring further permutations, though their ultimate make-up is far from certain.

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179 *Turner Broadcasting Sys.*, 114 S. Ct. at 2466.

180 *Id.* at 2458.

181 *Id.*

182 *See generally* Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Services*, 38 VILL. L. REV. 517, 519-22 & nn.11, 14 (1993).

183 *See, e.g.*, John Schwartz, *Internet Newsgroup Intrusion has Tobacco Wags Smokin' Mad*, WASHINGTON POST, Aug. 22, 1994, at F21 ("By bringing their divergent points of view into contact, smokers and nonsmokers alike sharpen their debating skills and learn more about the other side's point of view."). Other specialized services include health care, medieval history and cats. *See, e.g.*, Peter H. Lewis, *Anarchy, a Threat on the Electronic Frontier?*, N.Y. TIMES, May 11, 1994, at D1; *see also* Steve Lohr, *Who Will Control the Digital Flow*, N.Y. TIMES, Oct. 17, 1973, § 4, at 1 (describing a bulletin board dedicated to *Beverly Hills 90210*).

184 *See, e.g.*, Applications of Microwave Communications, Inc., 18 F.C.C.2d 953 (1969); United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). Even the local telephone monopoly seems destined to be ending, as cable companies prepare to offer local phone service. *See generally* Tim Greene, *Cable Firms Creep Towards Rollout of Local-Loop Sevice*, NETWORK WORLD, Sept. 11, 1995, at 1.

185 Amendment of Section 64.702 of Commission's Rules and Regulations (Second Computer Inquiry), 84 F.C.C.2d 50, 54-55 (1980).

As long as a telephone distributor dominates a geographic area, public policy demands that equal access be available. The mere technical possibility of bypass technology or alternate means of carriage should be insufficient. Even the existence of a few alternate carriers does not prevent the private abuse of power.[186] Oligopolies are not substantially safer than monopolies for safeguarding the First Amendment rights of speakers.[187]

When a telephone company is given discretion over sub-categories of service, care must be taken to ensure that practical alternatives exist for speakers. For example, "dial it services," which permit many callers to receive information simultaneously from a message provider, are considered an "enhanced service."[188] Telephone companies are generally free to decide whether or not to collect fees for such message providers.[189] When telephone companies have chosen to refuse to collect fees for certain message providers, usually the so-called Dial-a-Porn services,[190] courts have occasionally misunderstood the issues being raised. The question is not the desirability of controlling "indecent" services, but whether it is the job of the private telephone company to make that decision.

In permitting a telephone company to bar indecent programming from its dial-it service offerings, one court held that because the service went to many listeners simultaneously, "[t]he phone company resembles less a common carrier than it does a small radio station."[191] Accordingly, the court reasoned, the phone company could "edit" these services. This analysis confused the issue of speaker versus distributor selection. A "small radio station" speaks itself over its single assigned frequency; it is not a conduit for hundreds of other services. If there is any such analogy to be made, it is the service provider who is "broadcasting" like a radio station, while the telephone company is functioning as the "ether" through which messages are transmitted.

If, indeed, the telephone company were deemed to be "speaking" when it carried the information services of others, there could be a significant danger to free speech. Michigan Bell, for instance, issued a policy barring any service it determined to be "inflammatory, and likely to offend ethnic, gender, racial or religious groups; lewd, lascivious, indecent or ob-

186 *See, e.g.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1194 (D.C. Cir. 1985) (stating that non-monopoly long-distance telephone companies were still common carriers).

187 *See, e.g.*, Michael Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM./ENT. 1, 10 (1981) (describing cable television as a "natural oligopoly").

188 *Second Computer Inquiry*, 84 F.C.C.2d at 54-55.

189 *See, e.g.*, Network Communications v. Michigan Bell Tel. Co., 703 F. Supp. 1267, 1269 (E.D. Mich. 1989) (stating that the tariffs of the Michigan Public Utility Commission "do not require [Michigan Bell] to provide billing services for such programs, but rather leave such decisions to be set as a matter of business policy by the telephone company"); Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1543 (2d Cir. 1991) (stating that New York's Public Service Commission "has adopted no rule requiring the telephone company to provide billing and collection services") *cert. denied sub nom.* Dial Info. Servs. v. Barr, 502 U.S. 1072 (1992).

190 "Dial-a-porn is a widely understood shorthand expression to describe a telephone 'information service' that offers sexually-oriented messages, recorded or live, to callers for a fee." Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 869 (9th Cir. 1991).

191 Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1294 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

scene; . . . or likely to have a detrimental effect on Michigan Bell's image or reputation."[192] If the wires of Michigan Bell were the only way for an information provider to offer services, or even if it were only the most efficient,[193] a private corporation would be able to exercise substantial control over this avenue of communication.

If, on the other hand, there are many realistic alternatives for the providing of such services, the refusal of the phone company to carry a particular provider would not seriously impede the ability of the provider to be heard. The mere theoretical availability of alternatives is irrelevant. But if it can be shown that information services can be provided practically and efficiently either through the local system with an alternate billing method,[194] or through long-distance carriers,[195] the selection decision of a telephone company on its billing plan will not raise the same censorial threat.

2. Content Neutrality

It is imperative that any governmental involvement in the new media technologies be content-neutral. Irrespective of the means of communication involved, "it is a central tenet of the First Amendment that government remain neutral in the marketplace of ideas."[196]

In *Turner Broadcasting*, the Court found the must-carry rules to be content-neutral. Most notably, the Court held that encouraging a diversity of information sources was a permissible, content-neutral purpose,[197] even though that purpose is arguably "tied to the content of what the speakers will likely say."[198]

The must-carry rules were found to be content-neutral because they were viewed as mandating carriage by a distributor, rather than regulating a speaker. In *Riley v. National Federation of the Blind*,[199] the Court held that a North Carolina law requiring professional fund raisers to disclose to potential contributors the percentage of gross revenue turned over to charity was subject to strict scrutiny because it was not content-neutral: "Mandating speech that a *speaker* would not otherwise make necessarily alters the con-

192 Robert M. Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change* 66 (OPP Working Paper No. 24; Office of Plans and Policy, FCC, November 1988) (on file with author). U.S. West has a similar policy, barring billing for information services which "cause harm to the telephone company's reputation." Henry H. Perritt, Jr., *Tort Liability, The First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. Spring 1992, at 65, 112.

193 *See* Morgan W. Tovey, *Dial-a-porn and the First Amendment: The State Action Loophole*, 40 FED. COMM. L.J. 267, 288 n.115 (1988) (stating that "[o]f course, callers living in, for example, the region controlled by Mountain Bell could access dial-a-porn messages in Pacific Bell's region, but toll charges may be prohibitively expensive").

194 Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), *vacated and en banc reh'g granted*, 15 F.3d 186 (D.C. Cir. 1994), *rev'd*, 56 F.3d 105 (D.C. Cir. 1995) (en banc), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124).

195 Audio Enterprises, Inc., 3 F.C.C.R. 7233, 7238 (1988).

196 FCC v. Pacific Foundation, 438 U.S. 726, 745 (1978).

197 *Turner Broadcasting Sys.*, 114 S. Ct. at 2469-70.

198 *Id.* at 2477 (O'Connor, J., dissenting).

199 487 U.S. 781 (1988).

tent of the speech. We therefore consider [the requirement] a content-based regulation of speech."[200]

The must-carry rules, by contrast, did not affect the cable operator as "speaker" but as carrier.[201] The rules, according to the Court, "reduce the number of channels over which cable operators exercise unfettered control."[202] Increasing the total number of voices carried by a distributor is content-neutral, said the Court, because it does not "favor or disadvantage speech of any *particular* content."[203]

Equally important, the must-carry rules pursued their purpose without regard to the content of speech. The Court noted that, in contradistinction to the right-of-reply law struck down in *Tornillo*, the must-carry requirements were neither triggered by statements made by the cable operator nor limited to helping those speakers who will "counterbalance" the cable operator's message. The law applied to cable operators and broadcasters regardless of any point of view expressed or subject matter covered.[204]

Additionally, the Court stated that the mandated carriage of the broadcasters' messages would not cause cable operators to alter their own messages in response. Because the operators were serving merely as conduits to broadcasters' speech, mandatory distribution of the programming of others could not be equated to "compel[ling] cable operators to affirm points of view with which they disagree."[205] Also, because unlike the right-of-reply, there is no content-based "trigger" to the must-carry rules, they will not cause an operator to avoid presenting controversial opinions or programming.

Any rules designed to enhance diversity over the new technology must be similarly content-neutral. They must not mirror the old Fairness Doctrine and be triggered by particular statements or opinions.[206] Nor can they be limited to proponents or opponents of any particular viewpoint. Second, to avoid the risk of "forced response," the medium and the access rules must be such that the "carrier" is not made to appear to agree with the "speakers'" messages.[207]

These conditions will likely be met by broad based access rules, such as public access for cable television or common carriage for a telephone company or computer network. Such rules are content-neutral. By granting access to many speakers, the rules ensure that the "conduit" cannot reasonably be viewed as endorsing the messages of each. Moreover, the kind of identification requirement cited by the Court for broadcasters to distin-

200 *Id.* at 795 (emphasis added).

201 *Turner Broadcasting Sys.*, 114 S. Ct. at 2460 (stating that "the extent of the interference does not depend upon the content of the cable operators' programming").

202 *Id.* at 2456.

203 *Id.* at 2464 (emphasis added).

204 *See id.* at 2460 (stating that "an operator cannot avoid or mitigate its obligations under the Act by altering the programming it offers to subscribers.").

205 *Id.* at 2462.

206 *See supra* text accompanying notes 72-73.

207 *Cf.* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 16 (1986) (stating that a utility might "feel compelled to respond to arguments and allegations made by [the group] in its messages. . . . [This] kind of forced response is antithetical to the free discussion the First Amendment seeks to foster.").

guish their message from the cable operator could easily be applied to any speaker being granted access to these electronic media.[208]

3. Finding a Reasonable Fit

While the Court in *Turner Broadcasting* upheld the importance of the governmental interests behind the must-carry rules, the case was remanded for a determination of whether the rules would actually advance those interests.[209] To determine the need for the rules, the lower court was directed to make factual findings as to whether broadcast stations will be dropped from cable systems without must-carry rules, and whether dropped stations would suffer substantial economic harm.[210]

This demand for a fuller record reflects the medium-level scrutiny of *O'Brien*. Even though Congress made a general finding as to both issues,[211] the Court was required to provide "meaningful judicial review," to assure that "Congress has drawn reasonable inferences based on substantial evidence."[212]

This is an appropriate message for any regulator, especially in the realm of communications. Even when regulating a distributor, the government should assure that there is a need for the regulation and that there is solid evidentiary support for its prediction that the regulation will serve the need.[213]

The must-carry remand also contained some potentially confusing language. The lower court was directed to determine the "actual effect" of must-carry rules on cable operators and programmers, including how cable operators are changing their programming selection, how many programmers were dropped from cable systems, and how many cable systems are able to utilize unused channel capacity to carry broadcasters.[214] A plurality stated that this information was needed because "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech than . . . necessary' to ensure the viability of broadcast television."[215]

The particular factual inquiry ordered, however, will not reveal whether the rules suppress substantially more speech than necessary. Even assuming this determination can be made free of self-serving efforts to in-

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208 *See Turner Broadcasting Sys.*, 114 S. Ct. at 2466; *see also supra* note 126.

209 *Turner Broadcasting Sys.*, 114 S. Ct. at 2469-70. This portion of the opinion was signed by only four Justices: Chief Justice Rehnquist, and Justices Kennedy, Blackmun and Souter.

210 *Id.* at 2471.

211 *See, e.g.*, Cable Consumer Protection and Competition Act of 1992, § 2(a)(16), 47 U.S.C. § 521 (Supp. 1993).

212 *Turner Broadcasting Sys.*, 114 S. Ct. at 2471 (plurality opinion).

213 *See, e.g.*, Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994) (striking down ban on telephone company ownership of co-located cable system because of the less burdensome alternatives for preventing telephone domination of video services, such as a common carrier requirement for some, though not all, of the telephone company's video channels), *cert. granted*, 115 S. Ct. 2608 (1995). *See generally* STEPHEN BREYER, REGULATION AND ITS REFORM 184 (1982) (stating that "regulators ought to *aim at worst cases* and that, in attacking such cases, they should strive for *simplicity*.")

214 *Turner Broadcasting Sys.*, 114 S. Ct. at 2472 (plurality opinion).

215 *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

fluence the factual resolution,[216] the record will only show the *amount* of interference, not whether that amount is *more than necessary*. The last element of the *O'Brien* test is not a balancing test, asking whether the interference with speech is "too much." Instead, the element requires the government not to utilize a method for advancing its interests when there are equally effective means which are less intrusive on First Amendment interests.

Thus, for this determination on remand to be meaningful, the amount of interference caused by the must-carry rules will have to be compared with the amount of interference caused by some other regulatory alternative which would serve the government's purposes equally well. This is best understood by the plurality's final directive for the lower court to provide "judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests."[217]

Regulators should not have to "balance" the needs of speakers with the "effect" on distributors. It is perfectly acceptable for the government to determine that speakers are more important. Regulators should, however, be prepared to show that there is no equally effective way to help speakers which would be less intrusive on the selection process of distributors.

B. Unconstitutional Influences on Distributors

1. Direct State Action

The Constitution, though only limiting the actions of governmental entities, applies to private decisions when the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[218] Nonetheless, there seems to be an unfortunate belief by some government officials that it is not really censorship if the government forces a private distributor to silence a speaker. While the courts have been able to turn back many of the attempts to create governmentally-led private censors, their repeated recurrence is cause for concern.

For example, in 1985, Mountain States Telephone & Telegraph began carriage of a dial-a-porn service on its "dial-a-message" network.[219] A deputy attorney from Maricopa County, Arizona wrote to the telephone company advising it to terminate the service and threatening to prosecute the phone company for distributing sexually explicit material to minors if it did not comply.[220] It should come as no surprise that the telephone com-

216 As Justice Stevens noted, the remand "may actually invite the parties to adjust their conduct in an effort to affect the result of this litigation (perhaps by opting to drop cable programs rather than seeking to increase total channel capacity)." *Turner Broadcasting Sys.*, 114 S. Ct. at 2475 (Stevens, J., concurring).

217 *Id.* at 2472 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989)).

218 Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982); *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356 (1974).

219 Carlin Communications, Inc. v. Mountain States Tel. & Tel. Corp., 827 F.2d 1291, 1292 (9th Cir. 1987), *cert. denied*, 480 U.S. 1029 (1988).

220 *Id.* at 1295.

pany reacted by immediately sending a termination notice to the programming service.[221]

Similarly, the New York Police Department Public Morals Squad contacted executives of Manhattan Cable Television, the cable television franchisee for Manhattan, to express "concern" about the portrayal of sexual acts on the programming supplied by a leased access programmer.[222] The cable company subsequently began ordering the programmer to delete certain material, even though it had permitted the same material earlier.[223]

As these instances illustrate, there are even greater dangers to the First Amendment when distributors are forced to censor speakers than when the government is censoring speakers directly. First, the speakers are subject to being silenced at the whim of an intimidated private party, lacking expertise and training in drawing the fine line between protected and unprotected speech. As was aptly stated by the court which struck down a 1976 FCC requirement that cable operators censor obscene and indecent public access programming, "Thus the Commission made the cable operator both judge and jury, and subjected the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest in satisfying the Commission enlists him on the 'safe' side—the side of suppression."[224]

The second danger in mandating distributor censorship is that the censorial decisions are made absent any of the safeguards which the Supreme Court has imposed on the government. Since the 1965 case of *Freedman v. Maryland*,[225] the Court has required the following system to be in place before prior restraints are permitted:

> First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.[226]

When an information provider is barred from using a telephone service or an access programmer is prevented from offering a particular program on a cable television system, there is a restraint imposed prior to speech. When that restraint is imposed by "a corps of involuntary government[al] surrogates,"[227] it must be struck down as an unconstitutional prior restraint.

Sometimes, the distributor has been not an "involuntary" government surrogate, but an all-too-willing co-conspirator in the silencing of speakers. Nonetheless, the Constitution would be violated if a private distributor and

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221 *Id.* at 1293.

222 Diane L. Hofbauer, *"Cableporn" and the First Amendment: Perspectives on Content Regulation of Cable Television*, 35 FED. COMM. L.J. 139, 189 (1983).

223 *Id.*

224 *Midwest Video II*, 571 F.2d 1025, 1057 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

225 380 U.S. 51 (1965).

226 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975) (summarizing *Freedman*, 380 U.S. at 58-59).

227 *Midwest Video II*, 571 F.2d at 1056.

a government official "somehow reached an understanding to deny" speakers their First Amendment rights.[228]

In Kansas City, for example, the cable operator and the city both wanted to prevent the Ku Klux Klan from using the public access channel.[229] The president of the local cable company wrote to the City Council saying that while the company was unable to prohibit access programming which was "morally offensive . . . to the City Council's constituents," a member of the Council had "suggested" that the city eliminate the franchise provision requiring public access.[230] In exchange, the cable operator pledged to "accommodate" current public access programmers on its own local channel.[231] A few hours after the operator's letter was received, a resolution to abolish public access in Kansas City was introduced into the City Council, and enacted shortly thereafter. This was an interesting ploy, since the elimination of the access channel by the city was, at least on its face, content-neutral. The actual barring of the Klan was left to the private cable operator. Nonetheless, this arrangement was found to be subject to constitutional constraints because the city and cable operator "engaged in joint action designed to suppress free speech . . . [which forms] a cognizable claim under the state action doctrine."[232]

A subtler form of joint action is embodied in Section 10 of the 1992 Cable Act, permitting cable operators to prohibit indecent programming on access channels.[233] The FCC, in its rulemaking implementing this section, concluded that this authorization was constitutional.[234] The FCC put great stock in its conclusion that access channels were not "public fora" but were "common carriers."[235] The Commission made the extraordinary statement that, as common carriers, cable operators could censor constitutionally protected speech because "public utilities, such as telephone common carriers . . . engag[e] in content-based discrimination."[236]

It is almost unbelievable that the agency charged with primary control over communications common carriage in the United States could put forth such a proposition. Even if cable television access is viewed "only" as a common carrier service, such services are not permitted to pick and

228 Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970).

229 Missouri Knights of the Ku Klux Klan v. Kansas City, 723 F. Supp. 1347 (W.D. Mo. 1989).

230 *Id.* at 1350.

231 *Id.*

232 *Id.* at 1354. Kansas City eventually agreed to reinstate the public access channel and pay $100,000 in attorney fees; *see Kansas City Reinstates Public Access Channel*, MULTICHANNEL NEWS, July 24, 1989, at 1; *Kansas City Caves in to Klan Claim*, KAGAN CABLE TV LAW REP., Aug. 29, 1989, at 9.

233 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992) (codified at 47 U.S.C. § 531 (Supp. V 1993)). This section was initially struck down by a panel of the Court of Appeals for the District of Columbia, but subsequently upheld by the court sitting en banc. Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), *vacated and en banc reh'g granted*, 15 F.3d 186 (D.C. Cir. 1994), *rev'd*, 56 F.3d 105 (D.C. Cir. 1995) (en banc), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 21, 1995) (No. 95-124). Other courts, though, still find the provision constitutionally suspect. *See* Goldstein v. Manhattan Cable TV, Inc., No. 90 Civ. 4750 (LBS), 1995 U.S. Dist. LEXIS 13716 (S.D.N.Y. Sept. 20, 1995); Altmann v. Television Signal Corp., 849 F. Supp. 1335 (N.D. Cal. 1994).

234 *See* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 998, 999 (1993) (First Report and Order); 8 F.C.C.R. 2638, 2639 (1993) (Second Report and Order).

235 *Implementation of Section 10 (First Report and Order)*, 8 F.C.C.R. at 1001.

236 *Id.*

choose which programs to carry.[237] While common carriers have traditionally been authorized to bar *illegal* messages, that has not been construed as permission to censor constitutionally protected messages.[238] As the Commission itself has repeatedly noted, "[T]he service must be for a lawful purpose, since the only *service which a person has the right to demand of a public utility* is service lawful in character."[239]

Moreover, public access is more properly understood as a public forum. The FCC itself has previously characterized public access as "a channel set aside as a public forum."[240] This fits with the Supreme Court's definition of a public forum as being created when "the State has opened [a forum] for use by the public as a place for expressive activity."[241] Access channels were so opened by Congress, which defined the channels as "designated for public . . . use,"[242] and termed access, "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet."[243] If access channels are to be viewed as public fora, then the government, or its authorized private agent, has "an obligation to justify its discriminations and exclusions under applicable constitutional norms."[244]

Whatever the characterization of the access channels, the government's role in private censorship was unacceptable. Congress very much desired cable operators to silence "indecent" access programmers. This determination of governmental purpose does not require the making of uncertain "[i]nquiries into congressional motives."[245] The title of the section, "Children's Protection From Indecent Programming on Leased Access Channels," proclaims its purpose to block the showing of "indecent" pro-

237 The cases relied on by the FCC, such as Information Providers' Coalition v. FCC, 928 F.2d 866, 877 (9th Cir. 1991) and Carlin Communications Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1294 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988), dealt with telephone companies providing enhanced services and *not* serving as common carriers. *See supra* text accompanying notes 190-91.

238 *See, e.g.*, Pike v. Southern Bell Tel. & Tel. Co., 81 So. 2d 254 (Ala. 1955) (stating that telephone company is liable for wrongful discontinuation of service when it incorrectly assumed telephone was being used for illegal purposes).

239 Humane Society v. Western Union Int'l Inc., 30 F.C.C.2d 711, 713 (1971) (emphasis added). *See also* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. 2819 (1987) (stating that "common carriers have a general obligation to hold out their services to the public on a first-come, first-served basis without reference to content. Most authorities, however, recognize an exception to this general rule which gives common carriers the right to prohibit the use of their facilities for an illegal purpose.").

240 Amendment of Part 76 of the Commission's Rules and Regulations Concerning Cable Television Channel Capacity and Access Channel Requirements, 87 F.C.C.2d 40, 42 (1981). *See also* Missouri Knights of the Ku Klux Klan v. Kansas City, 723 F. Supp. 1347, 1351-52 (W.D. Mo. 1989) (holding that, as commonly constituted, access channels are a public forum).

241 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (alteration added). *See also* International Soc. for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) (stating that a public forum is created if "a principle purpose" for creating the forum was for "public discourse" and "the free exchange of ideas").

242 47 U.S.C. § 522 (15)(A) (Supp. V 1993).

243 H.R. REP. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

244 Widmar v. Vincent, 454 U.S. 263, 267 (1981).

245 United States v. O'Brien, 391 U.S. 367, 383 (1968).

gramming.[246] This is confirmed by the legislative history.[247] The government is encouraging and endorsing the ban on indecent access programs.

Similar governmental encouragement of private action has been held to constitute state action. For example, the Supreme Court found state action where federal regulations authorized, without requiring, drug testing of employees by private railroads.[248] The Court concluded that, by "remov[ing] all legal barriers to the testing," indicating "its desire to share the fruits of such intrusions" and "pre-empt[ing] state laws . . . covering the same subject matter," the government had done "more than adopt a passive position toward the underlying private conduct."[249] These factors were held to be "clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the [Constitution]."[250]

The identical situation is created by Section 10 and the FCC's regulations. First, Congress has wholeheartedly encouraged and endorsed the censorship of indecent access programming. Second, Congress and the FCC have removed all legal barriers to the cable operator's censorship of access. Third, the FCC announced that Section 10 is to be read as preempting conflicting state indecency and obscenity laws.[251] The government has done far more than "adopt a passive position" toward the censorship of access programming. A cable operator who censors access programming pursuant to the law must "be deemed an agent or instrument of the Government."[252]

Legislative and regulatory bodies should not be trying to execute an end run around the First Amendment. If the governmental purpose is truly legitimate, as in the protection of children, it must pursue its goals in a constitutional manner.

2. Distributor Liability and the Encouragement of Collateral Censorship

Even when the government is not directly trying to force distributors to censor speakers, rules imposing civil and criminal liability on distributors could have the same censorial effect. When regulating distributors, extreme care must be taken to ensure that the reasonably nervous conduit is not induced to silence protected speech in the name of prudent business decision making.

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246 Even though the title of the section refers to "Leased Access," the provisions within the section are meant to cover both leased and public access. 138 CONG. REC. S642, S648 (daily ed. Jan. 30, 1992) (statement of Sen. Thurmond).

247 The chief sponsor of Section 10, Senator Helms, stated that the purpose of this section was to "forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs." 138 CONG. REC. S642, S646 (daily ed. Jan. 30, 1992). *See also id.* at S647 (statement of Sen. Helms) ("Mr. President, the bottom line is that this amendment will keep decent Americans from being victimized by the disgusting programs, and the strip shows, and all the rest [of] the sleaze that runs on leased access channels.").

248 Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). The Court stated, "The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id.* at 615.

249 *Id.* at 615.

250 *Id.* at 615-16.

251 *Implementation of Section 10, First Report and Order*, 8 F.C.C.R. 998, 1006-07 nn.42 & 44.

252 *Skinner*, 489 U.S. at 614-15.

Uncertainty over whether particular speech will result in liability will frequently result in a speaker opting to avoid the speech altogether. In *Riley v. National Federation of the Blind*,[253] the Court explained how a law prohibiting professional fund raisers from collecting fees from charities that were not "reasonable" would unconstitutionally "reduc[e] the quantity of expression":[254]

> [F]undraisers will be faced with the knowledge that every campaign . . . will subject them to potential litigation over the "reasonableness" of the fee. And, of course, in every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.[255]

Whether dealing with claims of defamation, copyright infringement, indecency or obscenity, the line between illegal and constitutionally protected speech is difficult to ascertain and often uncertain until the end of litigation. Any rule permitting the imposition of liability will threaten speakers to some extent. The existence of the rules, though, does not have an excessively negative effect on communications, as speakers will presumably ignore a small risk because of the value they place on communicating their own messages.

By contrast, the factors identified in *Riley*—fear of potential litigation costs and the risk of mistaken adverse rulings—are particularly devastating when considering the effect the same liability rules have on a distributor. If distributors face a threat of litigation, the speech for which they will be liable is not their own, but that of unaffiliated speakers. Distributors have no strong personal stake in the communication. There is no powerful political belief or pride of authorship to counterbalance the dangers and costs of litigation. If the threat of liability causes rational speakers to censor themselves and "steer far wider of the unlawful zone,"[256] a rational distributor can be expected to steer far wider still. It simply does not have to get very cold to chill the distribution of someone else's speech.

Thus, it is inappropriate to use the same standard to judge the "effect" of a law imposing liability on a distributor as on a speaker. Unfortunately, some courts have failed to notice this distinction. After conceding that fear of a state obscenity law may cause a telephone company not to carry an independent information service, the Ninth Circuit Court of Appeals declared, "Some *self-censorship* is an inevitable result of all obscenity laws."[257]

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253 487 U.S. 781 (1988).

254 *Id.* at 794 (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976)).

255 *Id.* at 794; *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (stating that punishing governmental criticism with only truth as a defense, "dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.").

256 New York Times Co. v. Sullivan, 376 U.S. at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

257 Carlin Communications Inc. v. Mountain States Tel. & Tel., 827 F.2d 1291, 1297 n.6 (9th Cir. 1987) (emphasis added) *cert. denied*, 485 U.S. 1029 (1988). *See also Implementation of Section 10 (First Report and Order)*, 8 F.C.C.R. at 1001-02 n.22 (stating "*Carlin* also disposes of . . . [the] claims that a cable operator's decision to ban indecent programming constitutes state action or an un-

Similarly, in upholding the imposition on cable operators of liability for obscene public and leased access programming, one court stated:

> The danger of *self-censorship* induced by the ambiguity inherent in the concept of obscenity itself has never been held to mandate a constitutional requirement for general immunity from obscenity laws for anyone. In other words, *no speakers*—cable operators included—have a constitutional *right* to immunity to relieve them of anxiety about crossing the threshold from the risqué to the obscene.[258]

These statements incorrectly characterize what is occurring when a telephone company drops an independent service provider or a cable operator bars an access programmer. It is not *self*-censorship at work, because the telephone company and cable operator are not censoring their own speech. Rather, this phenomenon should be viewed as "collateral censorship," the silencing by a private party of the communication of others. It is thus incorrect that the possibility that a distributor "might yield . . . to the pressure of an otherwise valid and applicable obscenity law does not convert that law into an unlawful prior restraint."[259] When liability rules are imposed on distributors for the speech they carry, the fundamental question is whether the rules impose such "pressure" on distributors that they will be significantly deterred from permitting others to communicate constitutionally protected speech.

Distributors are "chilled" far more readily than speakers. Even a marginal risk will chill a distributor. Moreover, a chill on one distributor will freeze out hundreds of speakers, deterring far more constitutionally protected speech than a traditional rule of liability. Rules for distributors need to be created, therefore, that are consonant with the First Amendment's protections for speech.

To avoid the dangers of collateral censorship, rules for liability must reflect the differences between speakers and distributors. Speakers should always be legally responsible for their defamatory or obscene speech. Special rules are needed for distributors, though, to ensure that the flow of information does not dry to a trickle.

One court which attempted to make this calibration was *Cubby, Inc. v. CompuServe, Inc.*,[260] the first judicial analysis of the liability of a computer network for the communication produced by independent users. CompuServe is a network that provides on-line information services. Subscribers using personal computers obtain access to more than 150 information sources, organized into "forums" on particular topics, which include elec-

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lawful prior restraint simply because the cable operator potentially could face liability if it carries obscene programming.").

258 Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 11 (D.D.C. 1993) (first and second emphasis added).

259 *Carlin Communications*, 827 F.2d at 1297 n.6. Even the Supreme Court has occasionally mischaracterized as self-censorship what is really a threat of collateral censorship created by laws imposing liability on bookstores. *See, e.g.*, Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989) ("[O]ur cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'") (quoting Smith v. California, 361 U.S. 147, 154-55 (1959)).

260 776 F. Supp. 135 (S.D.N.Y. 1991).

tronic bulletin boards, on-line conferences and databases. These "forums" are managed not by CompuServe, but by independent contractors.[261] Forum managers then make contracts with numerous information providers.

One forum, the Journalism Forum, was operated by Cameron Communications, Incorporated (CCI). CCI, in turn, had contracted with Don Fitzpatrick Associates (DFA), which published a daily newsletter, *Rumorville USA*, which provided "reports about broadcast journalism and journalists."[262] DFA agreed in its contract to "'accept[ ] total responsibility for the contents' of Rumorville."[263]

Although the contract for running *Rumorville* was between the newsletter's publisher and the network manager, the actual physical link was between the publisher, DFA, and CompuServe: "DFA uploads the text of Rumorville into CompuServe's data banks and makes it available to [CompuServe's] subscribers instantaneously."[264]

The owners of a competing computer database, Skuttlebut, which also published news and gossip about the world of broadcasting, were angered by what they saw as *Rumorville's* repeated publication of false and defamatory attacks. They sued not only DFA, the producer of the material, but CompuServe, the network which carried it.

There is no doubt that if the statements were defamatory, the producer would be legally responsible. The question in the case was whether the carrier would also be liable.

The threshold issue was the determination of the standard of liability for computer networks. The court viewed this as a choice of print analogies: whether to treat CompuServe's role as that of "publisher" or "newsstand." If CompuServe were viewed as the publisher, its responsibility would have been identical to that of a newspaper publisher which is liable for republishing defamatory articles.[265]

Instead, the court ruled that CompuServe should be viewed as "the functional equivalent of a more traditional news vendor."[266] Even though CompuServe has the contractual right to refuse to carry a particular "publication," according to the court, "in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents."[267] Thus, CompuServe had "no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[268]

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261 The contract required the forum manager to "'manage, review, create, delete, edit and otherwise control the contents' [of the forum] 'in accordance with editorial and technical standards and conventions of style as established by CompuServe.'" *Cubby*, 776 F. Supp. at 137 (quoting Affidavit of Jim Cameron, sworn to on April 4, 1991, Exhibit A). The contract also provided that forum managers would indemnify CompuServe for claims resulting from information published in the forum. *Id.* at 143.

262 *Id.* at 137.

263 *Id.* at 137 (quoting Cameron Affidavit, Exhibit B).

264 *Id.* at 140.

265 *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

266 *Cubby*, 776 F. Supp. at 140.

267 *Id.*

268 *Id.*

Placing a duty on a computer network to monitor each and every publication it carries would "impose an undue burden on the free flow of information."[269] Based on what the court termed "the relevant First Amendment considerations," the standard of liability was held to be whether CompuServe "knew or had reason to know of the allegedly defamatory Rumorville statements."[270] Because there was no evidence of such knowledge, the claims against CompuServe were dismissed.

This decision was greeted with acclaim, as a great victory for the First Amendment.[271] Certainly, it would have meant the death knell for free speech on computer bulletin boards if the network had been treated as a "speaker." As the Supreme Court has observed about bookstores and magazine stands, "If the contents . . . were restricted to material of which their proprietors had made an inspection, they might be depleted indeed."[272]

Unfortunately, the rule in *Cubby* does not go far enough to protect free speech on computer networks. The linchpin of the protection against liability is the network's ignorance of both the defamatory message and circumstances which would alert a reasonable observer to the message. That is a largely illusory bulwark. All that any person or corporation would need to do to stop criticism from appearing on a network is notify the owner of the network that there is defamatory language appearing by a particular speaker.[273] The network would then be on notice of the offending publication and, arguably, of the possibility that similarly defamatory statements would be forthcoming by the offending speaker.

In the vast majority of instances, the network owner will have no knowledge of the accuracy of the charges being made, and will be forced to either censor the speech or face the burden of undertaking an arduous, and likely inconclusive, investigation. Even in those rare times when the network owner has personal knowledge of the underlying facts, the costs and risks of litigation will deter all but the most stalwart network owner from carrying the contentious message.

The First Amendment prohibits the enforcement of liability rules which lead to such a result. In *Philadelphia Newspapers v. Hepps*,[274] the Supreme Court held that placing the burden of proving truthfulness on those "who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result . . . . [S]uch a 'chilling' effect

269 *Id.*

270 *Id.* at 140-41.

271 *See, e.g.*, Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 439 (1992).

272 Smith v. California, 361 U.S. 147, 153 (1959).

273 Such a tactic has apparently been used with some success against television broadcasters. After learning of plans to broadcast a political advertisement on Washington, D.C.'s local television stations attacking Pizza Hut's position on health care, Pizza Hut's lawyer sent the following message to each station: "If you cause to be broadcast any statement to the effect that Pizza Hut does not offer health care for its employees in the United States, the company will regard that false broadcast as having been made with knowledge of falsity or in reckless disregard of falsity." Howard Kurtz, *Local Stations Bar Ad Attacking Pizza Hut*, WASH. POST, July 21, 1994, at C1, C5. Although all the stations denied the letter had any impact on their decision, none of the stations would broadcast the advertisement. *Id.*

274 475 U.S. 767 (1986).

would be antithetical to the First Amendment's protection of true speech on matters of public concern . . . ."[275]

The FCC, in a little noticed rulemaking, struck a reasonable balance that can serve as a model for the entire future of telecommunications. The issue before the Commission was whether a Multipoint Distribution Service ("MDS") common carrier was either required or permitted to censor programming it "reasonably determine[d]" was obscene.[276] The Commission stated that, while common carriers do not enjoy absolute immunity from liability, they should only be held responsible for the programming of others if there is "a high degree of involvement or actual notice of an illegal use."[277] Cognizant that a complaint against a carrier could be viewed as putting the carrier on notice of the salacious nature of a given program scheduled for rebroadcast, the Commission wisely declared that it was "reluctant to place MDS common carriers in the uncertain predicament of watching all programming and assessing, in each instance, whether to engage the legal machinery for interpretive rulings."[278] Accordingly, the Commission ruled that it would only hold MDS common carriers criminally responsible if a court had made the determination of obscenity first. Under this definition, "actual notice of an illegal use" means "actual notice that a program has been adjudicated obscene."[279]

Thus, the obscenity rules are not to be interpreted so as to encourage MDS common carriers to censor the programming of others. The FCC tried to limit further the problem of unqualified private censorship in its discussion of carrier discretion to refuse carriage of potentially obscene programmers. The FCC announced that it would allow "an MDS common carrier who has reason to believe that its facilities are being used for an illegal purpose to petition the appropriate state, local or federal authority (e.g., United States Attorney) for a ruling that its customers' programming violates [federal obscenity] or other applicable law."[280] The MDS operators are free to make this determination unilaterally, but, as the FCC warned, they "may later be subject to legal action [for wrongful termination] if the transmissions in question are found to be lawful."[281]

This is an appropriate scheme for the emerging communications technology as well. Speakers and programmers are responsible for their speech. Carriers who serve as common carriers are neither under a duty nor encouraged to undertake the difficult private determination of whether speech is or is not protected. Once an independent tribunal has

275 *Id.* at 777.

276 Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. 2819 (1987). MDS stations use omnidirectional microwave signals to deliver customer-supplied information from a stationary transmitter to subscribers. The most common subscribers are typically either hotels, apartment complexes or single family residences. *See generally*, BRENNER ET AL., *supra* note 88, § 16.04[1].

277 *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 F.C.C.R. at 2820.

278 *Id.*

279 *Id.*

280 *Id.* at 2819.

281 *Id.* (footnote omitted).

evaluated the program, the risk to the First Amendment is minimal, as the only speech being silenced by the carrier will be unprotected speech.

The standard for liability of distributors should be the same as that utilized by the FCC: "a high degree of involvement or actual notice of an illegal use."[282] Carriers who by law or contract serve only as "conduits" for the speech of others would only be responsible for distributing the speech of another if they have "actual notice" that the speech has previously been adjudicated illegal or unprotected. Thus, cable operators providing must-carry or public and leased access programming, telephone companies providing dial-it services on a lottery or other common carrier basis, and computer networks available to all would each be under this umbrella of protection.

Of course, with this protection comes a limitation on the freedom to silence others. Such carriers should only be permitted to keep out illegal and unprotected speech. The determination of illegality should be made by an independent court or agency, and a carrier making that decision without such guidance should be held responsible to the silenced speaker if the speech is found not to be illegal.

There is one last category of distributor requiring special attention, consisting of distributors who are not common carriers but, nonetheless, serve as an important forum for the speech of others. Many computer networks, for example, retain the ultimate ability to bar users who go beyond some limit, but otherwise provide open access to bulletin boards and message services. The network's ability to refuse carriage precludes treatment as common carriers,[283] but they are not properly viewed as primary speakers either.

One such network, Prodigy, a joint venture of Sears, Roebuck & Co. and I.B.M., offers numerous services, including over 100 electronic billboards, to more than one million subscribers.[284] Prodigy has vigorously defended its right to refuse to carry programming it finds offensive. It advertises itself as a "family-oriented" service, and uses both a five-person crew and computer software to catch expletives and otherwise offensive words and phrases.[285]

Prodigy defends its right to censor offensive material by arguing it was only "using its editorial discretion, [and] chose not to publish [offensive] submissions and other similar material. . . . The First Amendment protects private publishers, like the New York Times and Prodigy, from Government interference in what we publish."[286]

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282 *Id.* at 2820.

283 *See, e.g.*, 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).

284 For a good discussion of the controversies involving Prodigy's policies, see Naughton, *supra* note 271.

285 *See, e.g.*, Barnaby J. Feder, *Toward Defining Free Speech in the Computer Age*, N.Y. TIMES, Nov. 3, 1991, at E5; Sandra Sugawara, *Computer Networks and the 1st Amendment*, WASH. POST, Oct. 26, 1991, at A12. *See generally* Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L.REV. 1147 (1993) (discussing Prodigy and other services).

286 Geoffrey Moore, *The First Amendment is Safe at Prodigy*, N.Y. TIMES, Dec. 16, 1990, § 3, at 13. Prodigy was involved in a controversy in mid-1991 when one of its billboards began displaying vicious anti-Semitic messages. The Anti-Defamation League of the B'nai B'rith (ADL) com-

The print analogy may be useful rhetorically, but is actually quite dangerous. A securities investment banking firm was accused of criminal fraud on Prodigy's "Money Talk" bulletin board. When the company sued Prodigy for libel, a court found that "Prodigy exercised sufficient editorial control of its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."[287]Even the newsstand analogy of *Cubby*[288] would not have protected Prodigy once it learned of the disputed message.

If networks like Prodigy are held responsible for comments they do not produce, free discussion on bulletin boards will be at risk. To hold that a network becomes the speaker as soon as it makes any decision either on the general topic for a bulletin board, such as issues relating to financial matters, or on the tone of the language permitted, such as barring indecent language, will either force networks to censor everyone's speech or lead to the end of both limited topic and family-appropriate bulletin boards. This will needlessly diminish free speech in an evolving media. A far better approach would be to only find liability when the non-common carrier network has had a high "degree of . . . involvement"[289] in the illegal speech.

Under this proposal, a network owner who dedicates a bulletin board to explicit sexual material will be criminally liable if the material is found to be obscene.[290] Other network owners will be responsible if they actively participate in the discussions or messages which are the subject of the litigation, or in other circumstances where it can be fairly concluded that the

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plained to Prodigy and asked them to censor the offending items. At first, Prodigy refused, citing its policy of permitting free exchange on its bulletin boards. Some argued that because Prodigy both retained the ability to delete messages which it felt were offensive and permitted the anti-Semitic tirades to continue, "Prodigy did not regard them as offensive." Melvin Salberg & Abraham H. Foxman, Letter to the Editor, N.Y. TIMES, Nov. 15, 1991, at A30. Finally, Prodigy relented, and announced that "offensiveness" included statements "grossly repugnant to community standards." *See* Sandra Sugawara, *Computer Network to Ban 'Repugnant' Comments*, WASH. POST, Oct. 24, 1991, at A1.

287 Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 229, (N.Y. Sup. Ct. 1995).

288 *See supra* text accompanying notes 260-70.

289 Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. 2819, 2820 (1987). As with common carriers, such networks will also be liable if they have "actual knowledge" of a message's prior adjudicated illegality. *See supra* text accompanying notes 278-80. There may be some support, as well, for imposing liability for distributing obscene materials on a non-common carrier network that is aware of the "character and content of the material." Hamling v. United States, 418 U.S. 87, 123 (1974). The Supreme Court has been much more willing to uphold laws that chill speech near the border between obscenity and protected speech, than those which operate on the border between defamation and legitimate criticism. *Compare Hamling*, 418 U.S. at 124 (upholding an obscenity law because "[t]he precise course of the line may be uncertain, but no one can come near it without knowing that he does so") (quoting United States v. Wurzbach, 280 U.S. 396, 399 (1930)) *with* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1969) (striking down a defamation law because speakers "tend to make only statements which, 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate.") (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

290 *See, e.g., 2 Convicted in Computer Pornography Case*, N.Y. TIMES, July 29, 1994, at B7.

network owner has adopted the speech of the network user.[291] A more passive network would generally avoid liability.[292]

There is obviously, and deliberately, some flexibility in the determination of how "active" the network's participation must be. The multiplicity of networks and the variety of their policies preclude any "one size fits all" rule. If a distributor has a no-censorship policy, it will face no liability. The more involved a network owner is in the speech of others, the more appropriate it is to treat the speech as the responsibility of the owner. Thus, network owners who wish to exercise control will be free to do so, aware that they will be held responsible to the extent of their involvement. The law, however, will encourage greater freedom for the multiple users of the network. Each network owner will be provided with protection from liability that increases as the network functions more as a conduit, permitting others to speak freely.[293]

The rules of liability for distributors must be different from those for speakers. Speakers must be held responsible for their own speech. We must be ever vigilant, however, that in the regulation of the new media technology, threats of litigation and liability against carriers, common and uncommon, do not "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to [publishing facilities]—who wish to exercise their freedom of speech even though they are not members of the press."[294]

V. CONCLUSION

In 1965, the Supreme Court characterized the United States postal system as "the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare."[295] In the not-too-distant future, the convergence of cable television, telephones and computers will produce an electronic artery, transporting more communication from more diverse sources than was ever before possible.

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291 *See, e.g.*, Peter H. Lewis, *Student Accused of Running Network for Pirated Software*, N.Y. TIMES, Apr. 9, 1994, § 1, at 1 (operator of bulletin board which distributed pirated software charged with using code names to warn users to keep the network secret).

292 *See, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (1991) (describing CompuServe as possessing the contractual right to refuse to carry particular offerings but generally exerting "little or no editorial control"). *See generally* Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 FORDHAM L. REV. 439, 441 (1985) (discussing the "imposition of liability on the operator who does not encourage or approve of the misuse" of its bulletin board).

293 *See also* Perritt, *supra* note 192, at 131 (proposing that tort immunities "should be less available to network service providers that engage in content-based discrimination"). One commentator proposed the additional requirement that bulletin board operators desiring immunity help deter libelous statements by requiring identification codes for users and warning all system users of the liability for defamatory messages. Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should be Liable? Under What Standard?*, 2 J.L. & TECH 121, 147 (1987).

294 New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

295 Lamont v. Postmaster General, 381 U.S. 301, 305-06 n.3 (1965) (quoting Pike v. Walker, 121 F.2d 37, 39 (D.C. Cir. 1941)).

Regulators and courts must realize that the Constitution neither mandates nor permits speakers and distributors to be treated the same in all circumstances. If the new distributors face neither direct governmental directive nor subtler encouragement to engage in private censorship, and the government encourages access to, while staying neutral in, the digital marketplace of electronic ideas, the new technologies can create the most democratic mass communication system in world history.