PART II: REGULATION OF MASS MEDIA

by *Stephen R. Barnett*[*]

* The author is grateful to Tze Lee Tien, a law and doctoral student at the University of California, Berkeley, for his skilled research and editorial assistance on this project over an extended period. The author is also grateful to Berkeley law students Randy P. Baker, Glenn F. MacGilvra, Alfred M. Mamlet and Jeffrey E. Thomas for their valuable research and editorial assistance.

Introduction

Government regulation of the mass media has produced in the United States an extensive and intricate body of law. The fountainhead of this law is the First Amendment to the United States Constitution. That Amendment states, in apparently absolute and simple terms, that »Congress shall make no law ... abridging the freedom of speech, or of the press.«[1] Although United States law under the First Amendment is indeed highly protective of speech and press, as compared with the law of most other countries, it is neither as simple nor as minimal as the language of the Amendment might suggest.

Even with respect to the print media, First Amendment law draws distinctions between categories of speech. Some categories receive full constitutional protection, some receive no protection (e.g., »obscenity«), and some receive partial protection (e.g., defamation and commercial speech).[2] Further distinctions are drawn, and different First Amendment »tests« applied, depending on whether a particular regulation aims at the »communicative impact« of speech or only »incidentally« restricts speech while pursuing some other objective.[3] Meanwhile, a variety of special doctrines – such as »prior restraint,« the »public forum« and »content neutrality« – further complicate government regulation of speech.[4]

Different media add their own complications. Broadcasting has been accorded significantly less constitutional protection than the print media,[5] and the Supreme Court indeed has suggested that each new medium requires its own First Amendment analysis.[6] Although the traditional treatment of broadcasting, based on the notion of spectrum scarcity, is now

1 U.S. CONST. amend. I

2 *See infra* notes 35–40 and accompanying text.

3 *See infra* notes 58–66 and accompanying text.

4 *See infra* notes 41–55 and accompanying text.

5 *See infra* note 529 and accompanying text.

6 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, ___ (1969); *see infra* note 156 and accompanying text.

under question,[7] there is no reason to think that differences in the characteristics of new media will not continue to call forth differences in the First Amendment standards applied to them.

Given the elaborate development and high visibility of media law in the United States, one would expect that law to have devoted special attention to media flows that cross the borders of the United States. In today's world, the mass media are highly international in their operation and impact, preeminently so with respect to the United States. An article in a Lebanese magazine in November 1986 set off a political crisis in the United States.[8] Foreign journalists based in the United States number more than 1,400.[9] Foreign opponents of United States policies regularly take their cases to the American public. The distinction between domestic and international issues increasingly blurs. Many issues of national security, economics, health, the environment, culture and even politics that are debated within a country, especially a country as conspicuous as the United States, have international or worldwide dimensions.

Nevertheless, U.S. media law, as of the end of 1986, had devoted surprisingly little attention to the First Amendment questions raised by governmental regulation of transborder speech. The Supreme Court had touched on the subject both in an immigration law case involving the government's power to deny a visitor a visa on the basis of his ideological or political persuasions[10] and in cases involving the government's power to restrict the foreign travel of U.S. citizens.[11] But the Court only once had confronted a restriction on »pure speech« crossing the border. This was in *Lamont v. Postmaster General*,[12] decided in 1965, where the Court held invalid under the First Amendment a statute requiring that »communist political propaganda« mailed into the United States be detained at the Post Office until the addressee was notified and requested its delivery.

There now appears to be growing attention in the United States to legal

7 *See infra* notes 158–63 and accompanying text.

8 *See A Watchdog Asleep: The Press in the Iran Affair*, Int'l Herald Trib., Mar. 5, 1987, at 3, cols. 4–7 (N.Y. Times dispatch).

9 The Foreign Press Center, a division of the United States Information Agency, reports that its mailing list of foreign journalists based in the United States includes about 750 in New York City, 525 in Washington, D.C., and 150 in Los Angeles. Telephone interview with Nicholas King, director of the Foreign Press Center (New York) (Mar. 16, 1987); telephone interview with Don Jones, director of the Foreign Press Center's Los Angeles office (Mar. 16, 1987).

10 Kleindienst v. Mandel, 408 U.S. 753 (1952); *see infra* notes 346–58 and accompanying text.

11 *E.g.*, Regan v. Wald, 468 U.S. 222, 240–42 (1984); Haig v. Agee, 453 U.S. 280 (1981); Aptheker v. Secretary of State, 378 U.S. 500 (19864); *see infra* notes 373–91 and accompanying text.

12 381 U.S. 301 (1965); *see infra* notes 308–13 and accompanying text.

restrictions on transborder speech. The Supreme Court as of December 1986 was considering a case challenging under the First Amendment the provisions of the Foreign Agents Registration Act, which regulate as »political propaganda« speech disseminated in the United States by agents of foreign entities, that were applied to three documentary films from Canada concerning nuclear war and acid rain.[13] In October 1986, a federal district court held invalid under the First Amendment the regulations used by the United States Information Agency in deciding whether to certify films as »educational« for the purpose of duty-free import to other countries under an international agreement.[14] In addition, the Supreme Court in 1986 accepted for review a new case dealing with the denial of visitors' visas for reasons based on the ideological or political leanings of the would-be visitors.[15]

Meanwhile, the technology of communications, particularly of communications satellites, increasingly can reach across national frontiers. As a result, the existing U.S. restrictions on transborder speech are growing in their impact and, at the same time, are coming under increased scrutiny in the United States.

From another perspective, U.S. regulation of transborder speech invites a comparison with the position the United States has taken in the international debate on transborder speech. In that debate, the United States has stood staunchly for a »free flow« of information across national frontiers. It has championed article 19 of the Universal Declaration of Human Rights, which declares a right to »seek, receive and impart information and ideas through any media and regardless of frontiers.«[16]

The »free flow« position of the United States has been particularly evident in debates at the United Nations over control of direct-broadcast satellites (DBS).[17] The United States has opposed almost any restriction on transborder DBS, especially any requirement of »prior consent« by the country

13 Meese v. Keene, 107 S. Ct. 1862 (1987). The case was decided April 28, 1987; *see infra* note 470. *See also infra* notes 419–69 and accompanying text.

14 Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492 (C.D. Cal. 1986), *appeal docketed*, No. 86-6630 (9th Cir.); *see infra* notes 919–35 and accompanying text.

15 Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), *cert. granted*, 107 S. Ct. 666 (1986) [*aff'd*, 56 U.S.L.W. 4001 (Oct. 19, 1987)]; *see infra* notes 362-67 and accompanying text.

16 G.A. Res. 217, U.N. Doc. A/810 (1948); *see infra* notes 7–19, 319–24 and accompanying text.

17 *See, e.g.*, K. QUEENEY, DIRECT BROADCAST SATELLITES AND THE UNITED NATIONS 79 (1978).

whose residents would receive the broadcasts.[18] In 1982, for example, in opposing a General Assembly Resolution supporting the principle of prior consent, the United States delegate declared that:

> [A]ny principle requiring that [a] broadcaster must obtain the consent of a foreign Government would violate United States obligations towards both the broadcasters and the intended audience; it would also violate article 19 of the Universal Declaration of Human Rights on the right to freedom of expression.[19]

This international posture of the United States makes it appropriate to consider to what extent the United States allows a »free flow« of information across its own borders. The »free flow« concept provides an external benchmark, while the First Amendment provides a domestic benchmark, for appraising U.S. laws regulating transborder media flows. Those laws thus can be compared both with the laws of other countries and with the principles espoused by the United States itself.

With those perspectives in mind, Part II presents a survey and commentary on the United States law regulating transborder media flows. By way of background, Chapter IV sets forth the domestic framework of media regulation under U.S. law. Chapter V deals with regulation of media flow into the United States, and Chapter VI with regulation of outgoing flow. Each chapter focuses first on laws regulating media flow in general and then on laws addressed specifically to the electronic media.

18 *See, e.g., id.*; Gorove, *International Direct Television Broadcasting by Satellites: »Prior Consent« Revisited*, 24 COLUM. J. TRANSNATL L. 1, 5 (1985); Price, *The First Amendment and Television Broadcasting by Satellite*, 23 UCLA L. REV 879, 879–80, 883–84 (1976); Hagelin, *Prior Consent or the Free Flow of Information Over International Satellite Radio and Television: A Comparison and Critique of U.S. Domestic and International Broadcast Policy*, 8 SYR. J. INT'L L. & COM. 265, 265 (1981); Magraw, *Telecommunications: Building a Consensus*, Harv. Int'l Rev., Nov. 1984, at 27, 28–30.

19 37 U.N. GAOR Special Political Comm. (34th mtg.) at 11, U.N. Doc. A/APC/37 34 (1982).

Chapter IV: Framework of National Law: Regulation of Domestic Media

A. *Constitutional Framework: The First Amendment*

1. *Scope and Purposes of First Amendment Freedoms of Speech and Press*

The First Amendment to the United States Constitution, which states that »Congress shall make no law ... abridging the freedom of speech, or of the press,«[20] limits the scope and character of all government action that regulates or restricts expression. It applies, by virtue of the Fourteenth Amendment to the Constitution, to the states (and cities) as well as the federal government,[21] and it limits the action of all branches of government: legislative, executive, administrative, judicial. Primary responsibility for interpreting and enforcing the First Amendment guarantees lies with the judicial branch, since the power of judicial review enables the courts to invalidate government action inconsistent with the Constitution.[22]

While no theory, or collection of theories, fully or indisputedly captures the purposes of the freedoms of speech and press guaranteed by the First Amendment, four rationales have achieved broad acceptance. Advanced in seminal opinions by United States Supreme Court Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis following the First World War,[23] these rationales have provided the classic premises on which First Amendment doctrine has developed.

Three of the rationales justify freedom of expression by its social purposes, the benefits it provides for society in general and democracy in par-

20 U.S. CONST. amend. I (1791).

21 The Fourteenth Amendment, adopted in 1868, provides that no state shall »deprive any person of life, liberty, or property, without due process of law.« The freedoms of speech and press that were established against congressional action by the First Amendment are considered part of the »liberty« that the due process clause of the Fourteenth Amendment forbids the states from violating as well. Gitlow v. New York, 268 U.S. 652 (1925).

22 Marbury v. Madison, 5 U.S. 137 (1803).

23 Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

ticular. First, in a concept derived from John Milton[24] and John Mill,[25] free expression is considered essential to the advancement of knowledge and the discovery of truth. As Justice Holmes put it, »The ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market.«[26] Second, free expression is especially necessary in the context of American democracy, because it enables citizens to enlighten themselves and hence govern themselves.[27] As Professor Alexander Meiklejohn influentially argued, »the necessities of self-government by universal suffrage« explain the First Amendment.[28] Third, free expression gives society a »safety valve,« a way for disgruntled citizens to express their grievances peacefully. In the words of Justice Brandeis, »The path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.«[29]

The fourth of the classic theories, increasingly prominent in recent years, emphasizes not the social ends of freedom of expression but its role in promoting self-fulfillment of the individual. As Professor C. Edwin Baker has put it, »Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual.«[30]

Other writers have supplemented and elaborated the basic theories. Professor Vincent Blasi has distinguished a »checking« function that free expression performs in a democracy:[31] Apart from promoting self-government, the public knowledge and public debate made possible by

24 *See* JOHN MILTON, AREOPAGITICA 409 (Encycl. Britannica ed. 1948).

25 JOHN MILL, ON LIBERTY 76 (Penguin ed. 1982).

26 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1944) (Learned Hand, J.) (» ... right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection«); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

27 *See* Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (»freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; ... public discussion is a political duty ...«); T. EMERSON, *supra* note 26, at 7.

28 A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 37–39 (1948); *see also* T. EMERSON, *supra* note 26, at 7.

29 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

30 Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); *see also* Whitney v. California 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); T. EMERSON, *supra* note 26, at 6.

31 Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521.

the First Amendment enable the public to check governmental abuses of power.[32] In a parallel vein, Supreme Court Justice Potter Stewart suggested that one way the framers of the First Amendment sought to check governmental power was by recognizing freedom of the press separately from freedom of speech.[33] In Justice Stewart's view, the »press clause« of the First Amendment provides protection for the press as an institution, additional to the protection the »speech clause« provides for speakers generally, so the press can act as »a fourth institution outside the Government as an additional check on the three official branches.«[34]

2. *General Categories of Constitutionally Protected Speech*

It is possible to identify three general categories of constitutionally protected speech. (More specific categories, such as defamation, are considered below.) Political speech, particularly speech concerning issues or persons of civic importance, is the central object of First Amendment protection. »Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs.«[35] Art, literature, and entertainment are also fully protected,[36] although a few writers would give them less protection than political speech.[37]

The third category is commercial speech, defined as expression »related solely to the economic interests of the speaker and its audience«[38] – in particular, commercial advertising. First Amendment protection for commercial speech is based on »the informational function of advertising«[39] rather than on more fundamental First Amendment values,

32 *Id.*
33 Stewart, *»Or of the Press,«* 26 HASTINGS L.J. 631 (1975).
34 *Id.* at 634; *see also* Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 533–37 (1983).
35 Mills v. Alabama, 384 U.S. 214, 218 (1966).
36 *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952); *see also* Miller v. California, 413 U.S. 15, 34 (1973).
37 *E.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).
38 Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).
39 *Id.* at 563.

such as democracy or personal autonomy, and is therefore weaker than for the other categories. To justify a purposeful restriction on commercial speech, the government does not need to show a »compelling« interest; it needs only to show an interest that is substantial – that is, directly promoted by the restriction – and that could not be as effectively promoted by an alternative means less restrictive of speech.[40]

3. *Special Aspects of Constitutional Protection: Prior Restraint, Content Neutrality, and the Public Forum*

a. *Prior restraint*

One of the fundamental principles of First Amendment law is that regulation taking the form of a »prior restraint« of expression, as distinguished from penalties or other sanctions that take effect after material has been published, faces a very strong presumption of unconstitutionality. This principle derives from the main historical purpose of the First Amendment, which was to repudiate the schemes for licensing the press that had been employed in seventeenth-century England and also in the American colonies.[41] The principle has been extended, however, to »prior restraints« that have little in common with any licensing scheme.[42] The Supreme Court has used it, for example, to strike down a court order prohibiting journalists from publishing information about a criminal defendant's alleged confession until after a jury for his trial had been chosen.[43]

In the *Pentagon Papers* case,[44] the strong presumption against prior restraint prevailed against government claims that publication would damage national security. The Supreme Court rejected the federal government's attempt to enjoin the *New York Times* and the *Washington Post* from publishing the »Pentagon Papers,« even though these documents contained classified information and had been

40 *Id.* at 564; *accord*, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S.Ct. 2968, 2976–80 (1986).

41 *See* Near v. Minnesota, 283 U.S. 697, 713–714 (1931).

42 *See* Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977). *But see* Blasi, *Toward A Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

43 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

44 New York Times Co. v. United States, 403 U.S. 713 (1971).

obtained from the government surreptitiously. The Court ruled that, at least in the absence of authorizing legislation from Congress, prior restraints on publication are not permissible even to protect national security unless, in the words of the concurring opinion of Justice Stewart, the failure to issue the injunction would »surely result in direct, immediate and irreparable damage« to the country.[45]

On the other hand, the licensing type of prior restraint sometimes is allowed, but only for certain media – principally films, where the content is fixed and time is not crucial – and under strict procedural safeguards. Where such safeguards were lacking, the Supreme Court overturned a system requiring movie exhibitors to obtain a license from a state censorship board, certifying that the film was not obscene, before showing the film to the public.[46] The Court held that such a system would be constitutional only if the censor were obligated to prove in a judicial proceeding that the film was obscene, and further that there must be a prompt final decision and that any interim restraint must be »for the shortest fixed period compatible with sound judicial resolution« of the obscenity question.[47]

While such procedural safeguards can make licensing procedures acceptable for the purpose of preventing obscenity in media like films and plays,[48] it by no means follows that they would be acceptable in the print media or broadcasting. In those media not only is time more crucial, but the content is more spontaneous and hence more vulnerable to both external and internal censorship.

b. *Content neutrality*

Even when a government regulation of expression would otherwise be permissible, it will be ruled unconstitutional if it is not »content neutral« – if it favors or disfavors particular ideas, points of view or speakers. The leading case for this important proposition is *Police Department of Chicago v. Mosley*.[49] The Supreme Court there overturned a local ordinance that prohibited picketing, except labor picketing, on the grounds of a public school. The Court said the city could have

45 *Id.* at 730 (Stewart, J., concurring).
46 Freedman v. Maryland, 380 U.S. 51 (1965).
47 *Id.* at 59.
48 *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
49 408 U.S. 92 (1972).

banned picketing entirely in order to prevent noise or other disruption from affecting the classrooms but that the city could not discriminate on the basis of the content of the picketers' speech.[50]

c. *The public forum*

In addition to the other restrictions it imposes on government regulation of speech, the First Amendment requires the government to allow public access for speech and assembly in certain public places that traditionally have been held open for expressive activity, such as the streets and parks.[51] Expression in these »public forums« is subject to regulation of the »time, place, and manner« in which it occurs – as by requiring a parade permit, for instance, in order to minimize the disruption of traffic and assure adequate police protection.[52] But such regulation must be content-neutral, and speech in public forums may not be cut off or unduly restricted. Thus an ordinance that prohibited the distribution of leaflets in the streets, for the purpose of preventing litter, was held invalid because litter-free streets are not a sufficiently important governmental interest to warrant banning an entire medium of expression from a public forum, especially a medium that may be the only one available to people of small economic means.[53]

Obviously, not all public property – not the Oval Office in the White House, for example – is a public forum. If public property has not traditionally been open to the public for expressive activities and has not been »designated« for that purpose by the government, speech there may be restricted in ways consistent with the property's basic purpose.[54] Thus the Supreme Court has held that an Army base that was otherwise open to the public did not constitute a public forum, in part on the ground (questionable, it would seem) that speech on the base by members of the public would be incompatible with its military function.[55]

50 *Id.* at 101, 102. *See generally* Karst, *Equality As a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

51 *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J.); Kalven, *The Concept of the Public Forum: Cox v. Lousiana*, 1965 SUP. CT. REV. 1 (1965).

52 Cox v. New Hampshire, 312 U.S. 569 (1941).

53 Schneider v. State, 308 U.S. 147 (1939).

54 *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983).

55 Greer v. Spock, 424 U.S. 828 (1976).

4. *Limitations on the Constitutional Protection of Speech*

a. *Unprotected speech*

A few categories of speech are simply unprotected by the First Amendment. One is *deceptive commercial speech*. The Supreme Court has explained that since the limited purpose of constitutional protection for commercial speech is to inform the public, deceptive commercial speech, »communication more likely to deceive the public than to inform it,« is inconsistent with this objective.[56]

Also beyond the pale of First Amendment protection is *obscenity*. The Supreme Court has had great difficulty defining obscenity. Its current definition holds that a work of expression is obscene if »a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.«[57]

b. *»Clear and present danger« of public harm*

Speech that is constitutionally protected may nonetheless be regulated. In general there are two ways in which government may abridge speech and two corresponding modes of First Amendment analysis. One way – which Professor Laurence Tribe calls »track one« – is government action that aims purposefully at ideas or information, seeking to regulate the »communicative impact« of speech.[58] The other way, »track two,« involves government action that is content-neutral and seeks non-speech-related goals – clean streets, for example – but that »incidentally« limits the opportunities for speech.[59]

The current test for government regulation on »track one« holds that one may advocate with constitutional protection even the most hateful or offensive program (the right of American Nazis to speak and parade has been

56 Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). *See generally* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

57 Miller v. California, 413 U.S. 15, 24 (1973). *See generally* Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533 (1975).

58 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580–84 (1978).

59 *Id.*

upheld) and that speech may be suppressed for its content only if it is »directed to inciting or producing imminent lawless action and is likely to incite or produce such action.«[60] The Supreme Court laid down this tightened version of the older »clear and present danger« test in 1969 in *Brandenburg v. Ohio*,[61] in the course of striking down a law that generally prohibited advocacy of unlawful violence.[62]

The *Brandenburg* principle may be tested in connection with a law passed by the U.S. Congress. This statute makes it a crime to publish the names of U.S. intelligence agents, where the publisher has reason to believe that the publication might bring harm to the agents.[63] The statute does not require that the publication of the agents' names be likely to produce »imminent« lawless action and apparently applies even if the names already have been published elsewhere. The statute could well have the effect of deterring press accounts about the activities of U.S. intelligence agencies – accounts that may not be credible if they cannot use names – and thus may impair the First Amendment objective of keeping the public fully informed about the activities of their government. This law that directly punishes speech about government could well be held to violate the First Amendment.

c. *Regulations that »incidentally« restrict speech*

Content-neutral regulations having an »incidental« impact of restricting speech are judged on »track two« by a less severe constitutional test, derived from the case of *United States v. O'Brien*.[64] Under this test the regulation will be upheld if it furthers »an important or substantial governmental interest« and »if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.«[65] In essence, the governmental interest is »balanced« against the restriction on speech, with the court deciding which value weighs more heavily in the particular case. In one recent application of this test, the Supreme Court considered a Los Angeles city ordinance that prohibited the posting of all signs – including political campaign signs – on public pro-

60 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

61 *Id. See generally* Linde, *»Clear and Present Danger« Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970).

62 395 U.S. at 447.

63 50 U.S.C. § 421 (1982).

64 391 U.S. 367 (1968).

65 *Id.* at 377. *See also* United States v. Albertini, 105 S. Ct. 2897, 2907 (1985) (regulation permissible under *O'Brien* if the substantial government interest »would be achieved less effectively absent the regulation«).

perty, including utility poles and other fixtures on streets and sidewalks.[66] The Court, by the vote of 6 to 3, upheld the ordinance. It reasoned that the city had a »sufficiently substantial« esthetic interest in eliminating the »visual clutter« of signs, that the ordinance went no further than was necessary to promote that interest, and that there remained adequate modes of communication by which political candidates could get their messages to the public.

Thus »track two,« at least as applied by the majority of the present Supreme Court, fairly easily allows government regulation that can broadly limit opportunities for speech, even the political speech that lies at the heart of First Amendment protection.

d. *Defamation*

Defamation is a category of speech that has partial constitutional protection. U.S. civil law has always included the right to sue and collect damages for libel or slander. In the 1964 case of *New York Times Co. v. Sullivan*,[67] however, the Supreme Court held that the First Amendment limits this right. In a defamation suit brought by a public official for statements relating to his official conduct, the Court said, the First Amendment prohibits an award of damages (or any other remedy) unless the official can show that the statements were made with knowledge that they were false or with disregard of whether they were false or not. To impose liability for statements about the official conduct of a public official that did not meet this test would compromise the »profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.«[68]

The protection of the *New York Times* rule has since been extended beyond public officials to »public figures.«[69] In addition the Court has announced that defamation consisting of statements of opinion, rather than statements of fact, may not be sued on at all, by anyone. This is because »[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.«[70]

66 Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).
67 376 U.S. 254 (1964)
68 *Id.* at 270.
69 Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
70 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

Persons who are not public officials or public figures may still recover for libel or slander without showing knowing or reckless falsity; they need only show that the defendant was negligent in publishing the material.[71] (Much turns therefore on whether a particular plaintiff is a »public figure« or not, a point on which the law is chaotically unclear.) But even a »private« plaintiff may not recover punitive or general damages – only »actual damages« – unless he or she does show that the statement was knowingly or recklessly false.[72]

The reason the First Amendment is held to impose lesser restrictions on defamation suits by private persons than on suits by public officials or public figures is, in part, that speech about private persons is less important to democratic government. But persons considered »private« under present law may in fact be involved in matters of significant public interest, and the speech for which they are suing may be about those matters; so this reason for the public figure-private person distinction often seems questionable. The Supreme Court seems to put more weight, in fact, on the notion that public officials and public figures »assume the risk« of negative attention and comment that may injure their reputation, while private persons do not.[73]

e. *Invasion of privacy*

Also partially protected by the First Amendment, though to a less certain extent, is speech that »invades the privacy« of a person via the publication of private facts about him or her. The Supreme Court has held that a suit for invasion of privacy is blocked by the First Amendment when the facts that were disclosed consist of true information obtained from public records (in that case, the name of a crime victim that the defendant broadcaster had

71 *Id.* at 347 f. But »private« plaintiffs, like »public« plaintiffs, must bear the constitutional burden of proving that the statement was false, in contrast to the common-law rule requiring the defendant to prove truth. Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563 (1986).

72 Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). However, the Supreme Court in 1985 threw constitutional defamation law into turmoil by holding that this requirement does not apply when the defamatory statements »do not involve matters of public concern.« Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2948 (1985) (opinion of Powell, J.). The decision leaves open whether any or all of the other constitutional limits on defamation law likewise do not apply to such speech. It also leaves open what is meant by speech that is not of »public concern.« (*Dun & Bradstreet* itself involved a credit agency's report to its subscribers that the plaintiff company had filed for bankruptcy). *See also* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1559 (1986).

73 Gertz v. Robert Welch, Inc. 418 U.S. 323, 344 f. (1974).

obtained from court records).[74] The Supreme Court has not decided whether suits for invasion of privacy may be constitutionally maintained when the facts disclosed were true but were not taken from a public record. Lower courts have allowed such suits if the facts were »private« ones and were »not of legitimate concern to the public.«[75]

f. *Copyright infringement*

Another category of expression that may be limited without violating the First Amendment is copyright infringement. Such infringement not only produces an action for damages, but, if the action is brought before publication of the infringing material, that publication normally will be enjoined, despite the First Amendment's repugnance for prior restraint.[76] Yet the First Amendment does have an impact on copyright law. Since copyright protects only an author's »expression« and not the ideas or the facts presented, those ideas or facts can be made available to the public in different words without infringing the copyright. Moreover, even appropriation of the author's »expression« is protected to some extent by the copyright doctrine of »fair use.« This doctrine employs an ad hoc balancing test to determine whether the use of an author's work »for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research«[77] was justified in the particular case.

In a recent application of these principles, the Supreme Court held that the magazine *The Nation* infringed the copyright on the memoirs of former President Gerald Ford when it published an article about them prior to their first authorized publication.[78] The Court said that the First Amendment does not create a separate defense to copyright infringement, even for works by high public officials that have substantial news value. Rather, First Amendment values are adequately embodied in the fair-use defense and in the distinction between »idea« and »expression.« The Court's decision was accordingly based not on the magazine's having reported »the news« of Ford's memoirs before he could publish them but on its having used too many quotations from the memoirs and thus taken too much of his copyrighted »expression.«

74 Cox Broadcasting Co. v. Cohn, 420 U.S. 469 (1975).
75 *E.g.*, Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).
76 *See* 17 U.S.C. §§ 501–04 (1982).
77 17 U.S.C. § 107 (1982).
78 Harper & Row Publishers Inc. v. Nation Enters. Inc., 105 S. Ct. 2218 (1985).

g. *Censorship of government employes by contract*

A newly important government device for limiting constitutionally protected speech, and specifically speech about the activities of government, was upheld by the Supreme Court in the 1980 case of *Snepp v. United States*.[79] Snepp was a former employe of the Central Intelligence Agency who published a book about events that took place while he worked for the agency. The government did not claim that the book contained classified information, but it claimed he had violated a provision of his employment contract, which required that he submit to the agency, for pre-publication review, anything he might ever publish that contained information gained during his service with the agency. The Court upheld the government's position and its use of such contracts, saying the requirement of pre-publication review was constitutional in this context because it was a »reasonable means« for »protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence.«[80] Snepp accordingly was compelled to turn over to the government all the profits he made from his book.

Without condoning Snepp's personal conduct in breaking his agreement with the government, the Supreme Court's decision has been widely criticized for its likely impact on protected speech.[81] The prior-review procedure seems very likely to curtail the flow of information to the public about the activities of government from writers who are in a uniquely competent position to know what they are talking about.[82] Moreover, the Court approved this rather drastic approach without demanding from the government any evidence to confirm its claim that a less restrictive approach would have been incompatible with the national security.[83]

President Reagan has since acted to expand the scope of the censorship system approved by the Court in *Snepp*. National Security Directive No. 84, issued by the president in 1983,[84] required all federal employes with

79 444 U.S. 507 (1980).

80 *Id.* at 509 n.3.

81 *E.g.*, Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775 (1982).

82 *See* Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. Q. 690 (1984)

83 *See* Snepp v. United States, 444 U.S. at 522 f. (Stevens, J. dissenting).

84 The directive, issued March 11, 1983, is reprinted in *National Security Decision Directive 84, Hearings Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 85–86 (1984).

high-level security clearances – employes numbering in the hundreds of thousands – to sign contracts that would require them to submit to the government for pre-publication review – during their lifetimes – any speeches, books, articles or other writings based on their government work, even if the writings contained no classified information and even if they were based entirely on matter already public.[85]

Directive 84, even more than the *Snepp* decision, was criticized as likely to discourage a wide range of writings that inform the U.S. public about the conduct of its government.[86] Faced with strong opposition in Congress, the administration in 1984 suspended the pre-publication review requirements of Directive 84. However, it was reported in 1986 by a congressional agency that the suspension of Directive 84 »has had little effect on prepublication review requirements,« because the government was still requiring employes to sign another document, »Form 4193,« whereby they agree to submit to such review.[87]

In 1983 a committee of the House of Representatives approved a bill to prohibit pre-publication review agreements for federal employes outside the Central Intelligence Agency and other national security agencies.[88] Until such legislation is enacted, or until the courts overturn the administration's program, federal employes who have signed these agreements (or forms) presumably are obligated to submit to the pre-publication review. The administration's pursuit of this program designed to restrict the flow of information about the U.S. government to the U.S. public may seem difficult to square with the U.S. government's insistence on the »free flow« of information across international borders.

85 *See* HOUSE COMM. ON GOVERNMENT OPERATIONS, THE ADMINISTRATION'S INITIATIVES TO EXPAND POLYGRAPH USE AND IMPOSE LIFELONG CENSORSHIP ON THOUSANDS OF GOVERNMENT EMPLOYEES, H.R. REP. No. 98–578, 98th Cong., 1st Sess. 15 (1983).

86 *E.g.*, Abrams, *The New Effort to Control Information*, New York Times Magazine, Sept. 25, 1983.

87 *Security Rule Died but Lived On*, N.Y. Times, Oct. 23, 1986, at 12, cols. 4–6 (national ed.). The article describes a report of the General Accounting Office as stating that »more than 290,000 present and former Federal employees have now promised to submit material to prepublication review,« including some 224,000 connected with the Department of Defense but not including employees of the CIA or the National Security Agency, which have their own requirements. The number of writings submitted for review was said to be some 13,000 in 1984 and 14,000 in 1985. *Id.*

88 *See* Burnham, *Censorship*, N.Y. Times, Aug. 16, 1984, sec. 2, at 14.

B. *Regulatory Framework for the Print Media*

1. *Special Applications of Constitutional Protection*

The constitutional freedoms of speech and press, as described above, apply most fully to newspapers, books, magazines and other print media. Any licensing of newspapers or other print media is generally prohibited; their publication may be subjected to prior restraint only under the most extraordinary circumstances; and the other aspects of First Amendment protection noted above are at their strongest.

The press is also exempt from any special taxes. Thus in the 1983 case of *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*,[89] the Supreme Court struck down a state »use tax« on the ink and paper used in producing newspapers. The State of Minnesota had argued that under this tax newspapers actually were treated more favorably than other businesses, because this tax was accompanied by an exemption from the generally applicable sales tax. The Supreme Court conceded that this might be so and also that the general sales tax could be applied to newspapers, but it nonetheless held the special use tax invalid:

> When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency ... When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.[90]

Also distinctive of the printed press – at least quite different from the rule applied to broadcasters, as will be seen – is constitutional exemption from right-of-reply statutes. Thus in *Miami Herald Publishing Co. v. Tornillo*,[91] the Supreme Court struck down a Florida statute requiring a newspaper that attacked a candidate for public office to give the candidate an opportunity for reply in the newspaper. While acknowledging the legitimacy of the state's goal of assuring that the public hear both sides of the

89 460 U.S. 575 (1983).
90 *Id.* at 585.
91 418 U.S. 241 (1974).

controversy, the Court presented two reasons why the statute was inconsistent with the First Amendment. First, under the statute »editors might well conclude that the safe course is to avoid controversy« and thus avoid triggering the right of reply, with the result that coverage and criticism of election campaigns »would be blunted or reduced.« Second, even if that did not happen, the law would still be invalid because of »its intrusion into the function of editors.« Government regulation of »the choice of material to go into a newspaper,« the Court declared, is simply inconsistent »with First Amendment guarantees of a free press as they have evolved to this time.«[92]

2. *Applicability of General Laws*

The print media are not exempt from valid laws of general applicability, whether their focus is on speech or on other activities. Thus laws prohibiting obscenity are applicable to the print media,[93] as are legal sanctions against false advertising, copyright infringement, defamation, invasion of privacy and the like. Similarly, speech related to criminal conduct is punishable when it is printed. The Supreme Court made this clear when it held, by the vote of 5 to 4, that a newspaper could be prohibited from publishing job advertisements listed in terms of sex if it were illegal for employers to consider sex in their employment decisions.[94]

The print media are also subject to generally applicable non-speech laws, such as general taxes, labor laws, anti-discrimination laws and antitrust laws.[95] In the Newspaper Preservation Act,[96] however, Congress has given newspapers a special exemption from the antitrust laws. The Act enables competing newspapers in the same city to merge their business operations while maintaining separate editorial staffs and policies, where in the absence of the exemption it was likely that one of the newspapers would have failed. Passed in 1970, the Act not only applies to some twenty-two of these »joint-operating agreements« that already existed at that time but also authorizes the attorney general of the United States to confer the antitrust

92 *Id.* at 257 f. *See also* Baker, *Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980).

93 Kaplan v. California, 413 U.S. 115 (1973).

94 Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973).

95 *E.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 n. 9 (1983) (tax); Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937) (labor); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 376 (anti-discrimination); Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (antitrust).

96 15 U.S.C. §§ 1801–04 (1982).

exemption on newly created agreements if he determines that one of the newspapers involved is failing. Through 1985, attorneys general had ruled on four applications for new agreements and in all cases granted the exemption.[97] These proceedings are strangely reminiscent of newspaper licensing. Since the attorney general's decision carries immense financial value for the publishers seeking the exemption, it presents an open field for political favoritism or retaliation.[98] The exemption granted to the two daily newspapers in Seattle, Washington was challenged in a federal court of appeals, which upheld it. The court rejected claims that the Act is unconstitutional because it gives the attorney general undue discretionary power over the press and because it enables the exempted newspapers to do economic injury to competing newspapers and other media.[99] The court conceded the possible harm to competing papers but held that this did not render the Act invalid, since such harm was only an incidental effect of the Act's legitimate attempt to prevent newspaper failures.[100]

C. *Regulatory Framework for Movies, Plays and Other Nonelectronic Audiovisuals*

Movies, plays and other nonelectronic audiovisuals are subject to slightly greater levels of government regulation than the print media. For example, films, as noted earlier, are subject to prior review for obscenity. Such review is unconstitutional if it commits the censorship decision to an administrative official rather than a court, if it is not conducted in an expedited proceeding, or if the would-be censor does not carry the burden of proving that the film contains unprotected (obscene) material.[101] Plays are entitled to at least as much protection. The Supreme Court has overturned a municipal-

97 The cities involved were Anchorage, Alaska; Cincinnati, Ohio; Chattanooga, Tennessee; and Seattle, Washington. *See, e.g.*, Barnett, *Monopoly Games*, COLUM. JOURNALISM REV. May/June 1980, at 40. In 1986 an application was filed from Detroit, Michigan, the largest city yet involved. *See* Wall St. J., July 25, 1986, at 8, cols. 2–3.

98 *See, e.g.*, Barnett, *Fast Shuffle in Chattanooga*, COLUM. JOURNALISM REV, November/December 1980, at 65. Enactment of the Newspaper Preservation Act was brought about, in part, by political pressure exerted on President Nixon and his administration by newspaper publishers. *See* B. BAGDIKIAN, THE MEDIA MONOPOLY 92–103 (1983).

99 Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467 (9th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983).

100 *Id.* at 482.

101 Freedman v. Maryland, 380 U.S. 51, 51 (1965).

permit system authorizing local officials to limit access to a municipal theater to plays that comported with their standards of propriety.[102]
But government regulation of films with sexual content does not have to be entirely content-neutral. The Supreme Court has upheld zoning regulations that restrict the locations of theaters showing films whose content is sexual but not obscene.[103] This decision suggests the emergence, at least in the context of film, of a new, intermediate category of constitutionally protected speech. Such a »variable« approach, championed by Justice John Paul Stevens of the Supreme Court, has shown indications of spreading to other media and other forms of »less protected« content as well.[104]

D. *Regulatory Framework for Radio and Television Broadcasting*

1. *The Federal Communications Commission and the Radio Spectrum*

Radio and television broadcasting is regulated by the Federal Communications Commission (FCC) under the Federal Communications Act of 1934.[105] The FCC is composed of five commissioners appointed by the president with the advice and consent of the Senate; no more than three may belong to the same political party.[106] Under the 1934 Act, the FCC is given broad power to formulate and administer rules governing broadcasting. This includes the power to assign frequencies, power levels, areas and times of operation to broadcast stations; to classify stations; and to prescribe the type of service to be rendered by each class of stations. The FCC may make rules as needed to carry out either the provisions of the Communications Act or those of any international treaty or convention concerning broadcasting to which the United States becomes a party. If a broadcaster violates any of the laws or rules administered by the FCC, the Commission has authority to suspend the broadcaster's license or impose other sanctions.[107]

102 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 546 (1982).
103 Young v. American Mini-Theaters, Inc., 427 U.S. 40 (1976); City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986).
104 *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 557 (1980).
105 47 U.S.C. §§ 151 *et seq* (1982).
106 47 U.S.C. § 154(a), (b)(5) (1982 & Supp. II 1984).
107 47 U.S.C. § 303 (1982).

The FCC has allocated to various uses the portions of the electromagnetic spectrum that are under its authority. Some portions have been designated for nonbroadcast uses, such as aviation, civil emergency communications and common carriers. The public broadcast portion of the spectrum comprises four categories: AM radio, FM radio, VHF television and UHF television. The following chart shows the number of each type of broadcast station, subdivided between commercial and noncommercial, on the air in the United States as of June 30, 1986:[108]

	VHF Television	UHF Television
Commercial	542	422
Noncommercial	113	187
Totals	655	609

	AM Radio	FM Radio
Commercial	4839	3923
Noncommercial	0	1247
Totals	4839	5170

In making its original station allocations, the FCC gave heavy weight to the »local service« objective of the Communications Act – the establishment of stations in as many localities as possible.[109] Thus in its crucial 1952 Table of Assignments for television, the FCC placed the objective of providing »each community with at least one television broadcast station« ahead of providing »a choice of at least two television services to all parts of the United States.«[110] Instead of establishing powerful regional or even national stations that could have provided the entire country with six or more VHF television program services, the decision was made to diffuse less powerful stations widely so they could provide local service in their communities. The result was, since most cities had no more than three stations, that only three national networks developed (and the local stations became network affiliates and provided very little local programming). The local-service principle has remained a keystone of broadcast regulation. One of the FCC's chief justifications for restricting the development of cable television in the 1960s, for example, was that by bringing in distant

108 Broadcasting, Dec. 1, 1986, at 122.

109 The textual basis is section 307(b) of the Act, which does no more than call on the FCC to »make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.« 47 U.S.C. § 307(b).

110 Television Allocations, 41 F.C.C. 148, 167 (1952).

programs to compete with local stations, cable would impair the ability of those stations to provide the local service for which they were established.[111]

As the chart above indicates, the great majority of radio and television stations are commercial – that is, privately owned and operated for profit. They earn revenue by selling broadcast time to advertisers. The scheme of the Communications Act does not include the regulation of advertising rates, and hence broadcasters are free to set their own prices. They are also legally free to broadcast as much advertising as they like and to place their »commercials« not only at the beginning and end of programs but interspersed throughout. They use this freedom with a vengeance.

On the other hand, with the unimportant exception of STV (subscription television), all over-the-air broadcasting in the United States is »free,« in the sense that members of the public do not pay any direct charge for the right to receive it. (Of course, they may pay indirectly by way of higher prices for advertised products.) There are no license fees on radio or television receiving sets, for example.

As the chart indicates, the FCC has reserved a portion of the television and FM radio bands for noncommercial – also called educational or public – broadcasters. Most of these stations are licensed to governmental entities, such as school boards, local governments or universities, but many – including the most prominent public television stations – are licensed to private nonprofit organizations. Some nonprofit licensees are religious organizations.

Noncommercial broadcasters are financed by a variety of sources, including the federal government (mainly through the Corporation for Public Broadcasting), state and local governments, their own listeners and viewers (public broadcast stations are notorious for the amount of air time they devote to raising money), universities, businesses, foundations and private donors.[112]

Increasingly, noncommercial stations are also financed by advertising. While originally they were barred from selling broadcast time, recently this restriction has been relaxed, in large part as a result of decreasing federal support for public broadcasting.[113] Thus public broadcast stations are receiving growing revenues from corporations in return for displaying on the air their names, insignia and slogans, though the airing of actual »com-

111 *See* United States v. Southwestern Cable Co., 392 U.S. 157, 175 (1968).

112 *See generally* THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST (1979).

113 *See* 90 F.C.C.2d 895 (1982).

mercials« by public stations remains prohibited.[114] Despite the increasing advertising revenues, the financial condition of public broadcasting remains precarious. Attention has therefore focused on a variety of novel fund-raising possibilities. Among these was a proposal, subsequently shelved by the FCC because of broad opposition, that public TV stations holding valuable VHF frequencies enter into trades with commercial broadcasters holding much less desirable UHF frequencies and receive in return for their VHF slots enough money to create permanent programming endowments.[115]

2. *The Licensing of Broadcasters*

The Federal Communications Act directs the FCC to grant a station license to an applicant if the »public convenience, interest, or necessity« will thus be served.[116] The license term is now five years for a radio station and seven years for a television station, with renewals readily allowed.[117] In the seminal case of *National Broadcasting Co. v. United States*,[118] the Supreme Court concluded that the Act's vague charge to the FCC entailed more than the mere technical management of the airwaves:

> [T]he radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile ... But the Act does not restrict the Commission to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic.[119]

The notion was that a broadcast licensee would hold and operate a frequency as a »trustee« for the public, and the FCC's licensing process was designed to choose the licensee that would best serve the public interest.

114 *See* N.Y. Times, Apr. 1, 1985 (national ed.), at 17, col. 3.

115 The FCC in 1985 received public comments on the proposal that public broadcasters be allowed to enter into such trades. Broadcasting, Feb. 18, 1985, at 45. The comments were mainly negative, with opposition coming particularly from commercial broadcasters who already had VHF frequencies and did not want the competition. *See* Broadcasting, June 24, 1985, at 38–43. The FCC therefore decided to leave the proposal in suspension for the foreseeable future. *See* Broadcasting, Mar. 17, 1986, at 7.

116 47 U.S.C. § 307(a) (1982).

117 47 U.S.C. § 307(c) (1982).

118 319 U.S. 190 (1943).

119 *Id.* at 213, 215 f.

To achieve this end, the licensing process is divided into two phases. First, an applicant must demonstrate that it is qualified to hold a broadcasting license. The qualifications include U.S. citizenship (to be discussed below), adequate financial resources, appropriate broadcasting equipment and an »affirmative action« program to insure adequate recruitment, training and promotion of disadvantaged minority groups and women.[120] In addition, the applicant's other media holdings must not exceed the legal limits (see below), and the applicant must have adequate »character« qualifications.[121] When the same license is sought by more than one qualified applicant, the process enters a second, »comparative« phase, in which the FCC seeks to decide which applicant is »best.« In choosing between applicants, the FCC seeks to promote a variety of goals that have included diversification of media control, promotion of ownership by women and members of minority groups, »integration« of ownership and management, local ownership and broadcasting experience.[122]

This comparative process has attracted over the years devastating criticism that is now virtually unanimous. Comparative contests for the extremely valuable VHF television licenses in large cities have been known to go on for as long as twenty years, bouncing between the FCC and the courts, and no serious person sees any reason to think that the eventual winners serve the public interest better than the eventual losers would have.[123] The various criteria by which the FCC judges the applicants are so manipulable, and so often inconsistent with each other, that the Commission can easily justify any decision it may want to make. It has been suggested that some of the decisions made during the 1950s, the heyday of the granting of the most valuable television licenses, correlated most closely not with any of the legal criteria but with the political allegiance of the applicants.[124]

The comparative licensing process is especially absurd because once an applicant has won the contest and received a license from the FCC – for which the applicant pays only a nominal fee (though its lawyers' fees may be substantial) – the applicant is then entitled to sell that license on the open market for whatever price it will bring (it can even be sold to the

120 47 U.S.C. §§ 310(b), 308(b) (1982); 47 C.F.R. § 73.125 (1985).

121 47 U.S.C. § 308(b) (1982).

122 *See* Policy Statement on Comparative Broadcast Hearing, 1 F.C.C.2d 393 (1965); W. Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984). In September 1986, however, the FCC – reversing a position it had taken for more than ten years – told the federal court of appeals that it now thought the preferences it had been giving to women and members of minority groups exceeded its statutory and constitutional authority. *See* Broadcasting, Sept. 22, 1986, at 42.

123 *See* Kinsley, *Gifts of the Nation*, The New Republic, Oct. 14, 1981, at 21.

124 *See* Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959).

applicant who lost before the FCC). Although the Communications A states expressly, several times, that a license granted under the Act crea no right beyond the term of the license,[125] practice under the Act h accorded to the licensee a property right in the license. Not only is licen renewal almost automatic, but the Act was amended to provide that wh a licensee seeks the FCC's approval to transfer its license, the FCC m not compare the proposed transferee with other applicants for the license see who would best serve the public interest; it may only consider wheth the proposed transferee is qualified to hold a license.[126] The remarkab result is that broadcast licenses, awarded free by the government after elaborate attempt to determine which applicant will best serve the pub interest, can then be sold on the market to whomever will pay the highe price. Recent years have seen a dramatic surge in purchases, and purcha prices, of broadcast licenses. As of 1986, the record for sale of a single st tion belonged to a television station in Los Angeles that was sold in M 1985 to the Tribune Company of Chicago for $510 million.[127]

Many people propose, not surprisingly, that the government should sell th licenses itself and thus at least obtain their value for the public.[128] B such a solution, however attractive it might have been originally, is out the question now. Not only does the political power of the broadcast indu try stand in the way, but in addition it would not be fair, given the reliance interests built up under the present system, for the government now to tak away and sell for its own gain licenses that have in fact been purchased o the open market. The most that might be achieved toward compensatin the public for the value of the radio spectrum would be annual license fees fo broadcasters. But broadcasters wield their formidable political power t resist even this, and even when it is proposed as a trade-off for deregula tion of broadcasting.

Consistently with the de facto recognition of property rights in broadca licenses, the FCC's renewal of a license is almost automatic. Although th Communications Act allows competing applications at renewal time an thus another comparative process,[129] the FCC has consistently sought way to give the incumbent licensee a strong preference over any renewa challengers. The FCC's present doctrine, approved by the federal court o appeals, largely achieves this goal by according the incumbent a preference fo

125 47 U.S.C. §§ 301, 304, 307(d), 309(h) (1982 & Supp. II 1984).
126 47 U.S.C. § 310(d) (1982).
127 Broadcasting, May 20, 1985, at 39.
128 *E.g.*, N.Y. Times, Dec. 3, 1984, at 22 (editorial).
129 47 U.S.C. § 309(e) (1982)

the quality of its past performance that is strong enough to override a challenger's superior merit on such criteria as diversification of ownership or minority ownership.[130] Nonetheless renewal is not guaranteed, especially if the incumbent has gotten into trouble with the FCC or otherwise has black marks on its record.

The FCC has authority to deny renewal, even in the absence of a competing application, if it finds that the licensee's performance has not served the public interest.[131] Thus in one case, the court of appeals reversed the FCC's renewal of a license where there was substantial evidence that the station has discriminated against black people in its programming.[132] Some fifty years ago, the FCC itself denied renewal, and was upheld by the court, where the station's broadcasts had »offend[ed] the religious susceptibilities of thousands, [or] inspire[d] political distrust and civic discord.«[133] That kind of decision today might well collide with modern First Amendment doctrine. Indeed the FCC in 1985, apparently overruling its earlier case, refused to deny renewal to a radio station that had aired many hours of programs containing »crude, derogatory and defamatory« remarks about blacks and Jews, as well as attacks on the government, lawyers, judges and bureaucrats that were found to encourage disregard of the law. Citing cases such as *Brandenburg v. Ohio*, the FCC ruled that such broadcasts fell within the First Amendment's protection of freedom of speech and therefore could not be a basis for denying license renewal.[134]

3. *Ownership Restrictions*

To promote diversity of ownership in the mass media, the FCC has adopted a variety of rules limiting the number and location of media outlets that may be under common control. On the national level, the FCC's »multiple ownership« rule now provides that no person or company may own (or have a significant interest in) more than twelve AM stations, twelve FM stations and twelve television stations anywhere in the country, with the further condition that the television stations may not reach more than twenty-five percent of the national viewing audience.[135] (Until 1984 the limits

130 *See* Cent. Florida Enters. Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982).
131 47 U.S.C. § 309(d), (e) (1982 & Supp. 1982).
132 United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).
133 Trinity Methodist Church v. FCC, 62 F.2d 850, 853 (1932), *cert. denied*, 288 U.S. 599 (1933).
134 *F.C.C. Bars Penalty on Racism on Air*, N.Y. Times, Apr. 29, 1985, at 16.
135 Broadcasting, Dec. 31, 1984, at 35.

were more strict – only seven stations of each kind. The relaxation of the rul spurred a wave of media mergers. The 1985 acquisition of the ABC compan by Capital Cities Communications, for example, produced a company ownin eight television stations and reaching 24.38 percent of the national audience just under the new limit.)[136]

The FCC also has rules limiting ownership interests within the same city Almost from the start, the Commission prohibited common ownership o more than one AM station, one FM station and one TV station servin the same city.[137] Since 1975 it has prohibited the acquisition or transfer but not the continuing ownership – of both a radio station and a VHF tele vision station in the same city.[138] Since 1975 it has also prohibited the acquisition or transfer – but, again, not the continuing ownership – of broadcast station and a daily newspaper serving the same city.[139] (Hence Rupert Murdoch, who in 1985 agreed to buy television stations in Chicago and New York, was required to sell his newspapers in Chicago and New York.) The FCC's rule on newspaper-broadcast combinations has been upheld by the Supreme Court.[140] The Court said it was reasonable for the FCC to conclude that the public interest was best served when broadcast stations and newspapers represented fully independent sources of informa- tion. The rule did not violate the First Amendment rights of newspaper owners, the Court continued, since they remained free to own broadcast stations in other cities and since the First Amendment does not guarantee a right to broadcast as it does a right to speak or print.

4. *Obligations to Promote the Electoral System*

Although broadcasters receive at virtually no cost licenses to use public resources worth many millions of dollars, they are not required by law to make any of their broadcast time available without charge to anyone, includ- ing candidates for public office. The Communications Act does impose on them, however, two obligations designed to promote the nation's electoral system (in addition to the more general »fairness doctrine« obligation, to be discussed next). The first is the »equal time« or »equal opportunities«

136 Broadcasting, May 20, 1985, at 40.

137 Genesee Radio Corp., 5 F.C.C. 183, 186 (1938); 47 C.F.R. §§ 73.35 (AM), 73.240 (FM), 73.636 (TV) (1983).

138 47 C.F.R. § 76.401 (1981).

139 Multiple Ownership, 53 F.C.C.2d 589 (1975); 47 C.F.R. §§ 73.35(c), 73.240(c), 73.636(c) (1983).

140 FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 773 (1978).

law.[141] It provides that if a station gives or sells air time to a candidate for public office, it must afford an »equal opportunity« – that is, the same amount and kind of time at the same price – to all other qualified candidates for the same office. (Since even a »nonpolitical« appearance by a candidate will trigger the equal-time law, old movies featuring Ronald Reagan, for example, were not shown on television during his electoral campaigns; the FCC never had to decide the interesting question of what would constitute an »equal opportunity« for an opposing candidate.) The equal-time law has four exceptions: appearances by candidates during newscasts, news interviews, news documentaries and on-the-spot coverage of bona fide news events.[142] The FCC has ruled that debates between candidates are »bona fide news events.« This ruling has made possible televised debates between the major-party candidates – President Reagan and Walter Mondale, for example – because it relieves the networks of having to give equal, free time to all the minor-party candidates as well.[143]

While the equal-time law comes into play only after a broadcaster has voluntarily decided to put a candidate on the air, the second electoral-system obligation does require broadcasters to provide some time whether they like it or not. Section 312(a)(7) of the Communications Act requires them to provide »reasonable amounts of time« – which need not be free – to legally qualified candidates for federal elective office. In the 1981 case of *CBS v. FCC*,[144] the Supreme Court upheld the constitutionality of this requirement. The Court noted that it created only a »limited« right of access to the broadcast medium and said it made »a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.«[145]

5. *The Fairness Doctrine*

The fairness doctrine, originally promulgated by the FCC but now arguably ratified by Congress, imposes on broadcasters two general obligations: (1) to »devote a reasonable percentage of time to the coverage of public issues«

141 47 U.S.C. § 315 (1982).
142 47 U.S.C. § 315(a) (1982).
143 Aspen Institute on Communications, 55 F.C.C.2d 697 (1975), *aff'd sub nom.* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 89 (1976).
144 453 U.S. 367 (1981).
145 *Id.* at 396–97.

and (2) to make that coverage »fair,« in the sense of providing »an opportunity for the presentation of contrasting points of view.«[146] The FCC accords broadcasters wide latitude in deciding which issues to cover, so the first obligation is rarely invoked.[147] It is the obligation to present contrasting viewpoints once an issue has been covered that has generated most of the litigation and controversy under the fairness doctrine. Here again broadcasters are given considerable latitude. They need not give equal time to each side of an issue; they need not present each side in the same format (speeches by the president advocating one point of view can be »balanced,« for example, by newscasts and news-interview programs reflecting opposing viewpoints); and they can exercise their own news judgment in determining who shall be the spokesperson for a particular point of view.[148]

On the other hand, the fairness doctrine applies to all programming, regardless of the context in which a point of view on a controversial issue is presented. Even if the point of view is presented in advertising, the broadcaster is required to present the opposing points of view on the broadcaster's own time, if necessary.[149] While the FCC now holds that product commercials do not address a controversial issue of public importance if they simply urge the audience to buy the product,[150] commercials that otherwise address a public issue can still trigger the fairness doctrine if the station has not adequately covered the other side of the issue.[151] Thus, while the Reagan administration FCC has been extremely reluctant to find violations of the fairness doctrine, it did find one where a station had run a series of editorial advertisements for a public-utility trade association advocating continued construction of a nuclear generating plant. The plant's construction was shown to be a controversial issue in the locality, and the advertisements had consumed 182 minutes of coverage while the station had provided only 22 minutes to contrasting views.[152]

In addition to its general obligations, the fairness doctrine has two more specific corollaries – the personal-attack and political-editorializing rules.

146 Fairness Report, 48 F.C.C.2d 1 (1974) [On Aug. 4, 1987, the FCC repealed the fairness doctrine. Syracuse Peace Council, 63 Radio Reg.2d 541].

147 The FCC did invoke it once, where a radio station in a coal-mining area declined to cover the issue of strip mining. Rep. Patsy Mink, 49 F.C.C.2d 987 (1976).

148 *See* 48 F.C.C.2d 1 (1974); Democratic Nat'l Comm. v. FCC, 481 F.2d 453 (D.C. Cir. 1973); *cf.* Comm. for the Fair Broadcasting of ‚Controversial Issues, 25 F.C.C.2d 283 (1970), *rev'd on other grounds sub nom.* CBS v. FCC, 454 F.2d 1018 (D.C. Cir. 1971).

149 Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

150 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard, 58 F.C.C.2d 691, *rev'd in part*, Nat'l Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

151 Energy Action Comm., Inc., 64 F.C.C.2d 787 (1977).

152 Syracuse Peace Council, 99 F.C.C.2d 1389 (1984).

Both require the giving of air time to a specific person (or group) to reply to what the station has said. When a station in discussing a controversial issue (subject to the same four exceptions as the equal-time law) airs a »personal attack« on the »honesty, character or like personal qualities« of an identified person or group, the station is required promptly to provide the person or group with a notice of the attack and a reasonable opportunity to reply over the air. As one would expect, the line separating a »personal attack« from mere criticism is hazy; a court has ruled that calling a congressman a »coward« for example, could appropriately be found to constitute a personal attack.[153]

The political-editorializing rule, which is both easier to implement and more useful, provides that when a station airs an editorial – that is, the station's own opinion – endorsing or opposing a candidate for public office, it must promptly notify the candidate whom it has opposed, or has not endorsed, and give that candidate an opportunity to reply over the air.[154]

The Supreme Court upheld the personal-attack and political-editorializing rules, and the fairness doctrine in general, in the 1969 case of *Red Lion Broadcasting Co. v. FCC*.[155] Responding to the broadcasters' claims that the reply and access obligations imposed by the fairness doctrine violated their First Amendment rights, the Court justified this regulation of speech on two grounds, namely, the scarcity of space in the radio spectrum and the First Amendment right of the public to receive a diversity of information and opinion:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment ... It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. ...[156]

The Court's opinion in *Red Lion* sharply illuminates the difference in the First Amendment protections afforded to the broadcast and the print media. The case of *Miami Herald v. Tornillo*,[157] involving a right-of-reply

153 Strauss Communications Inc. v. FCC, 530 F.2d 1001 (2d Cir. 1976).
154 47 C.F.R. § 73.193(a) (1985).
155 395 U.S. 367 (1969).
156 *Id.* at 390.
157 418 U.S. 241 (1974).

statute for newspapers, presented almost the identical question yet drew from the Court a diametrically different opinion. Both of the arguments accepted by the Court in *Tornillo* – that the statute would deter the coverage of controversial issues and that it constituted impermissible government interference with editorial discretion – were made in *Red Lion* as well. So great was the gulf between the constitutional treatments of the two media that the Court's opinion in *Tornillo*, issued five years after *Red Lion*, did not even cite that decision, let alone explain why it was so different.

Today there is growing attack on the »second class« constitutional treatment accorded the broadcast medium by *Red Lion*. The basic theory that the scarcity of the radio spectrum distinguishes broadcasting from other media is much criticized. Critics argue that much of the scarcity is government-created (there is room for many more stations than the government has licensed); that the scarcity of the airwaves is no different from the scarcity of other resources, such as the paper and ink that go into newspapers; that in fact newspapers – at least daily newspapers – are more scarce in almost all U.S. cities than are radio or even television stations; and that the development of cable and other new technologies is removing scarcity from the broadcast context.[158] The present FCC shares these views and would like to repeal the fairness doctrine,[159] though it probably cannot do so without the approval of Congress.[160] The Supreme Court itself, recognizing that »[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years,« has indicated that it would be prepared to »reconsider our longstanding approach« if it had »some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.«[161] At the same time, the Court indicated it might reconsider *Red Lion* more specifically if it were shown that the fairness doctrine, by deterring broadcasters from addressing controversial issues,

158 *E.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); *see also* Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959).

159 *See* General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145 (1985).

160 Congress probably codified the doctrine in its 1959 amendment to section 315 of the Communications Act. 47 U.S.C. § 315(a). *See* Broadcasting, Apr. 1, 1985, at 121 (FCC commissioner so concluding). A decision of the federal court of appeals in 1986, however, expressed the view that Congress had not ratified the doctrine. Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986). *See* Broadcasting, Sept. 29, 1986, at 72. [*But see supra* note 146].

161 FCC v. League of Women Voters, 468 U.S. 364, 376–77 n. 11 (1984).

did more to reduce than to enhance speech.[162] On the other hand, the Court's 1981 decision in *CBS v. FCC*,[163] upholding the statutory requirement of reasonable access for federal political candidates, suggests that the *Red Lion* approach to broadcast regulation has not lost all its force. .

6. *Aspects of Broadcasters' Independence*

Within the extensive regulatory framework that governs broadcasting, broadcasters retain substantial spheres of editorial discretion protected by the First Amendment. Thus in the 1983 case of *CBS v. Democratic National Committee*,[164] the Supreme Court held that neither the First Amendment nor the Communications Act requires broadcasters, while they accept commercial advertising, also to accept »editorial advertising« on public issues. The Court declared:

> In the delicate balancing historically followed in the regulation of broadcasting, Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs ...[165]

Somewhat ironically, in view of today's attacks on the fairness doctrine, the Court in *CBS v. Democratic National Committee* relied in part on the obligation broadcasters have under that doctrine – their »affirmative and independent statutory obligation to provide full and fair coverage of public issues.«[166] Thus the opinion fell distinctly short of recognizing full journalistic discretion for broadcasters under the First Amendment.

The Court endorsed another aspect of broadcasters' journalistic autonomy in the 1984 case of *FCC v. League of Women Voters*.[167] That decision held unconstitutional under the First Amendment a provision in the Public Broadcasting Act that barred noncommercial broadcasters from editorializing. None of the justifications offered for the statute – such as a desire to prevent stations partly financed by the government from becoming vehicles for government propagandizing – was found by the Court to be sufficiently

162 *Id.* at 378–79 n. 12.
163 CBS v. FCC, 453 U.S. 367, 367 ff.
164 412 U.S. 94 (1973).
165 *Id.* at 125.
166 *Id.* at 129.
167 468 U.S. 364 (1984).

important and sufficiently related to the statute to justify such a flat ban on highly protected political speech.

In addition, charges of falsity or distortion in broadcasters' news or documentaries – aside from charges of fairness doctrine violations – are regularly rejected by the FCC. While the Commission condemns »slanting« or »staging« of the news as a violation of the broadcaster's public-interest responsibility, it also refuses to become »the national arbiter of truth.«[168] It therefore will not investigate charges of news distortion unless presented with »extrinsic evidence of deliberate distortion,« evidence apart from both the program itself and the alleged »true facts.«[169] Since such evidence for obvious reasons is rarely presented, broadcasters' news judgments are normally free – defamation lawsuits aside – from official inquiry into their accuracy.

7. *Regulation of Programming Content*

As a result of recent deregulation by the FCC, broadcasters are now subject to very little formal regulation of their programming content. The FCC no longer concerns itself – except in comparative renewal contests and other special situations – with the amount of time a broadcaster devotes to public affairs, to locally originated programming, to agricultural or religious programming, and so forth. Industry-supported guidelines limiting the amount of time devoted to commercials also have been dropped (in the face of antitrust attack by the government). Indirect regulatory approaches to program content, such as the FCC's former requirement that broadcasters interview numerous local leaders to »ascertain« the issues of importance to their communities, have been largely lifted as well. All that remains in this connection is a broadcaster's obligation to keep a public list of five to ten local issues and how the broadcaster's programming has treated them in the past three months, plus a general obligation – enforceable in extreme cases at renewal time – to provide programming that covers issues of public concern and that generally serves the public interest.[170]

168 Hunger in America, 20 F.C.C.2d 143 (1969); Chet Huntley, 14 F.C.C.2d 713 (1968). *Compare also*, Broadcasting, Mar. 11, 1985, at 79.

169 *Id.; see* Chronicle Broadcasting Co., 27 Radio Reg.2d 743 (1973); 30 F.C.C.2d 150 (1971).

170 *See* Broadcasting, July 2, 1984, at 31.

8. *Informal Regulation of Programming*

Apart from what the law provides, there is informal regulation of broadcasting, sometimes by »raised eyebrow« and sometimes by rougher gestures. These methods vary widely in nature and efficacy. In 1979 the FCC issued a »nonbinding« policy statement encouraging broadcasters to do more programming for children.[171] Broadcasters largely ignored the request. But when the FCC, after receiving complaints about the broadcasting of »drug-oriented« song lyrics, notified licensees that as part of their public-interest duties they were responsible for knowing what they broadcast, the Commission's action – upheld by the court of appeals[172] – apparently had its intended effect of reducing the play of the targeted songs.

A less formal kind of regulation occurred in 1974 when the chairman of the FCC, responding to pressure from Congress to curb the amount of »sex« and »violence« on television, lobbied and cajoled the three networks and the broadcasters' trade association to establish a »family viewing hour« early each evening that would be free of such programming. The broadcasters initially gave in to this pressure,[173] but then a suit was brought challenging the chairman's actions as violating the First Amendment.[174] The suit dragged on for ten years and was eventually settled,[175] and in the meantime broadcasters drifted back to their old ways, and the »family hour« languished.[176] It was only because of the lawsuit that the scope and nature of the interventions by the FCC chairman became known to the public.

Another effort came to public light only because of the extensive Watergate investigation into the administration of President Richard Nixon. A memorandum from presidential assistant Charles W. Colson to presidential assistant H.R. Haldeman, dated September 25, 1970, reported that Colson had met with the chief executives of the three television networks to discourage them from airing replies to televised speeches by the president and to let them know, among other things, »that we are not going to let them get away with anything that interferes with the President's ability to communicate.« Colson told Haldeman he would pursue with the then-

171 Children's Television Programming and Advertising Practices, 75 F.C.C.2d 138 (1979).

172 Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973).

173 *See* Writers Guild of America v. FCC, 423 F. Supp. 1064, 1092-1128 (C.D. Cal. 1976), *rev'd*, 609 F.2d 355 (9th Cir. 1979).

174 *See* 609 F.2d at 355 ff.

175 Broadcasting, Jan. 7, 1985, at 204.

176 *See* M. FRANKLIN, MASS MEDIA LAW 843 (3d ed. 1987).

chairman of the FCC »the possibility of an interpretive ruling by the FCC on the role of the President when he uses TV, as soon as we have a majority.«

Since the president appoints the members of the FCC and since the FCC holds great power over broadcasters, any president can exert weighty influence over broadcasters through his FCC appointments. The government's capacity for informal regulation of broadcasters must be taken into account along with the independence they are formally accorded by the law.

9. *Regulation of »Offensive« Programming*

One clear difference between the broadcast and print media under current law is that »offensive« speech may be restricted more readily in broadcasting. In *FCC v. Pacifica Foundation,*[177] the Supreme Court upheld the FCC's power to regulate broadcast speech that is »indecent« but not »obscene.« By the vote of 5 to 4, the Court said the Commission had acted permissibly in imposing sanctions on a radio station for presenting a satirical monologue entitled, and consisting of, »Filthy Words.« Although the material was not obscene under the constitutional standard, it »did not conform to accepted standards of morality« – at least not in the afternoon, when children would be in the audience – and therefore could be found »indecent« under a federal statute banning the use of »any obscene, indecent, or profane language by means of radio communications.«[178] The Court upheld the statute's constitutionality as thus interpreted, notwithstanding that in other media »indecent« speech has constitutional protection. The Court rested the lower standard of constitutional protection for broadcast speech on two considerations: the »uniquely pervasive« presence of the broadcast media »in the lives of all Americans,« and the fact that broadcasting »is uniquely accessible to children.«[179]

177 438 U.S. 726 (1978).

178 18 U.S.C. § 1464 (1982); *see* 438 U.S. at 735.

179 438 U.S. at 748 f. A federal appeals court has struck down under the First Amendment a state law attempting to apply the »indecency« standard of *Pacifica* to cable television. Jones v. Wilkinson, ____ F.2d ____ (10th Cir., Sept. 8, 1986) [*aff'd mem.*, 107 S. Ct. 1559 (1987)].

In 1967 the FCC rather surprisingly ruled, in response to a citizen's complaint, that broadcast cigarette advertisements presented one point of view on a controversial issue of public importance – the desirability of smoking – and therefore required, under the fairness doctrine, that broadcasters air (without charge) anti-smoking announcements from public-health organizations.[180] The court of appeals upheld the Commission's ruling, relying not so much on the fairness doctrine as on the public-health component of the public interest that the FCC is charged to promote.[181] Congress responded with a law prohibiting all cigarette advertising on radio and television.[182] Under constitutional challenge by broadcasters, the law was upheld by a federal district court.[183] The court stressed the legitimacy of the government's objective, the lower level of First Amendment protection accorded to the broadcast media and the marginal amount of First Amendment protection that was accorded (at that time) to commercial speech. The Supreme Court affirmed the decision without issuing an opinion.[184] Since then, while adhering to a differential standard for broadcasting in cases like *Pacifica*, the Court has substantially strengthened the constitutional protection accorded to commercial speech.[185] It therefore has been thought questionable whether the cigarette-advertising law, flatly banning a form of expression because of the message it conveys, would survive constitutional review under today's standards. A 1986 decision of the Supreme Court, however, indicates that laws banning tobacco advertising would be upheld, and not only in the broadcast media.[186]

180 Television Station WCBS-TV, 9 F.C.C.2d 921 (1967).

181 Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

182 15 U.S.C. § 1335 (1982).

183 Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971).

184 405 U.S. 1000 (1972) *(per curiam)*.

185 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Bigelow v. Virginia, 421 U.S. 809 (1975).

186 Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986). The Court held that Puerto Rico's power to completely ban casino gambling »necessarily includes the lesser power to ban advertising of casino gambling.« *Id.* at 2979. The decision, though surprising and questionable, presumably means – if the Court adheres to it – that all cigarette advertising could be prohibited, since cigarettes themselves could be prohibited.

11. *General Laws Regulating Broadcasters*

Like the print media, the broadcast media are subject to general laws that affect speech – those concerning defamation, invasion of privacy, copyright infringement and the like. The broadcasting of a movie, television program, or other copyrighted work is a »performance« of the work that, if unauthorized, constitutes copyright infringement.[187] Broadcasters are also subject to generally applicable taxes, labor laws and other economic regulation. In addition to actions taken by the FCC to limit concentrations of control in broadcasting, broadcasters in theory are fully subject to the antitrust laws,[188] though in practice it appears that only extreme cases will bring forth government antitrust action against either broadcasters or newspaper publishers. Broadcasters are also subject to the general anti-discrimination laws and, in addition, to extensive »affirmative action« requirements imposed by the FCC.[189]

False advertising on the broadcast media is subject to sanction by both the FCC and the Federal Trade Commission (FTC).[190] The FCC has stated that licensees are required to »take all reasonable measures to eliminate any false, misleading or deceptive matter« from the advertising they carry.[191] Both the FCC and the FTC have attempted to protect children from television advertising that is considered unfair to them. The FTC under the Carter Administration took major steps in this direction but was blocked in Congress.[192] The FCC has taken more limited steps, such as ordering a clear separation during children's programming between the programming material and the advertising.[193]

12. *Deregulation of Broadcasting*

In recent years, consistent with the trend in other areas of government regulation, a movement has developed to reduce or abolish government regulation of the broadcast media. The primary arguments have been (1) that the rationale of spectrum scarcity, which has provided the basic justifi-

187 17 U.S.C. § 101 (1982); *see, e.g.,* Roy Export Co. v. CBS, 672 F.2d 1095 (2d Cir. 1982).
188 United States v. RCA, 358 U.S. 334 (1959).
189 47 C.F.R. § 73.2080 (1985).
190 *See* FTC v. Colgate Palmolive Co., 380 U.S. 374 (1965).
191 False, Misleading or Deceptive Advertising, 40 F.C.C. 125 (1961).
192 *See* M. FRANKLIN, MASS MEDIA LAW 892 (2d ed. 1982).
193 *See* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

cation for broadcast regulation, is no longer plausible (if it ever was) because of the proliferation of new media such as cable, and (2) that »regulation« by the free market would more effectively respond to public desires and promote the public interest than regulation by a government agency like the FCC.[194] In 1984 the FCC chairman, Mark Fowler, cited the greater efficacy of market regulation in explaining the FCC's elimination of most of its general regulation (the political obligations aside) of radio and television programming content.[195] Congress has joined in the move toward deregulation. In 1982 it amended the Communications Act to empower the FCC to allocate new broadcast licenses by a lottery – but still not a money-making auction – instead of the traditional comparative hearings.[196]

In the 1981 case of *FCC v. WNCN Listeners Guild*,[197] the Supreme Court approved the FCC's decision to eschew regulation of radio station »formats.« The court of appeals had held that when a proposed sale of a radio station involved a change in its program format so that, for example, the city's only classical-music format would be eliminated, the FCC, before approving the license transfer, was obligated to consider whether the proposed format change would be in the public interest. The FCC said it preferred to leave format decisions to broadcasters, who in seeking to maximize their audiences and incomes in the marketplace would respond to public desires more quickly and effectively than the FCC could. The Supreme Court upheld the FCC's position.

The FCC has also expressed a strong interest, as noted above, in abolishing the fairness doctrine.[198] The Supreme Court, in the *League of Women Voters* case, has indicated that it might be sympathetic.[199]

Meanwhile in Congress every year there are bills to deregulate the broadcast media and give them full First Amendment protection.[200] These measures founder, typically, on the refusal of broadcasters to pay anything for their use of the spectrum, such as annual license fees (not to mention something approaching the true value of their licenses). To at least some extent, then, U.S. broadcasters have themselves to blame for their continued failure to achieve full First Amendment rights; they simply place a higher value on money.

194 *See, e.g.*, Fowler & Brenner, *supra* note 158.
195 *See* Broadcasting, July 2, 1984, at 31.
196 47 U.S.C. § 309(i)(1) (1982).
197 450 U.S. 582 (1981).
198 *See supra* note 159 and accompanying text [*but see supra* note 146].
199 *See supra* text accompanying notes 161–62.
200 *See, e.g.*, Broadcasting, Jan. 14, 1985, at 216.

The constitutional question is reemerging in the Supreme Court, however. Both there and in Congress, the essential nature of broadcast regulation in the U.S. legal scheme remains unsettled.

E. *Regulation of Other Electronic Media Delivery Systems (Excluding Cable and DBS)*

1. *Subscription Television (STV)*

Over-the-air pay television, or subscription television (STV), uses a conventional, full-powered television broadcast station to broadcast commercial-free programming, in scrambled form, which subscribers decode and view for a fee. STV operators obtain revenue from the subscription fees and also from leasing or selling decoders. At the end of 1984, there were fewer than twenty STV operations, serving 560,000 homes, a sharp drop from about 1.4 million homes in 1982. STV appears to be, if not dying, at best short-lived. With its single station and its high operating costs, it apparently cannot compete with cable, and it survives mainly in cities where cable has been slow to develop.[201]

At one time the FCC regulated STV quite aggressively, imposing limits on the kinds of movies, sports events and other programming that STV could carry, in an effort to prevent the »siphoning« of such programs away from conventional »free« television.[202] In recent years regulation of STV has been reduced almost to the vanishing point. Under present regulations, any television licensee may become an STV operator simply on ten days' notice given to the FCC.[203] STV operators are relieved of some of the rules still applicable to regular broadcasters, such as the ban on owning more than one station in the same city.[204]

2. *Low Power Television (LPTV)*

Low power television (LPTV) evolved from »translator« television stations. A translator uses conventional broadcast technology at a low power

201 *See* Broadcasting, Dec. 10, 1984, at 44.
202 *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 19, 59–60 (D.C. Cir. 1977).
203 *See* 47 C.F.R. § 73.642-.644 (1984).
204 *See* Subscription Television Service Amendment, 48 Fed. Reg. 56,386 (1983).

level to strengthen and rebroadcast a weak signal from an affiliated station, typically to bring that station's signal to a remote area. LPTV was born when the FCC allowed translator stations to begin broadcasting their own programming. The primary difference between conventional television and LPTV is that an LPTV station has a much more limited range, and a great many LPTV stations can therefore be licensed without interfering with one another.[205]

When the FCC in 1980 first proposed to license LPTV, it set off a gold rush that at one time brought forth more than 30,000 applications.[206] The Commission was overwhelmed, and even though it subsequently adopted a lottery system to award the licenses between mutually exclusive applicants, the awards have been slow and the medium remains stunted. But the number of licensed stations is now rising rapidly. As of June 30, 1986, there were 408 LPTV stations on the air (248 VHF, 160 UHF), and construction permits had been granted for another 210 stations.[207]

The FCC decided to minimize regulation of LPTV. In addition to adopting the lottery procedure, it declined to impose ownership restrictions, minimum hours of broadcasting or requirements to ascertain community needs. On the other hand, restrictions on network-affiliation agreements do apply, as do the equal-time and reasonable-access laws for political candidates and the fairness doctrine.[208]

3. *Multipoint Distribution Services (MDS)*

In 1974 the FCC authorized two channels in each city to be used for multipoint distribution services (MDS). An MDS system transmits an omnidirectional microwave signal that can be received by subscribers with special antennas.[209] The MDS signal can carry large amounts of information, including television programming; MDS may be thought of as a »wireless cable system.« In 1983 the FCC reallocated some of the electromagnetic

205 An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunication System, 47 Fed. Reg. 21,468 (1982).

206 Broadcasting, Dec. 10, 1984, at 58.

207 Broadcasting, Dec. 1, 1986, at 122. (These are in addition to the conventional television stations listed in the chart in the text at note 108 *supra*.)

208 *See* The Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunication System, 48 Fed. Reg. 21,478 (1983); 47 C.F.R. §§ 74.780, 74.784 (1985); 47 Fed. Reg. at 468.

209 Amendment of Parts 1, 2, 21, and 43, 45 F.C.C.2d 616 (1974).

spectrum from the Instructional Television Fixed Service to MDS in order to allow for eight more MDS channels in each city. These new channels are allocated in two groups of four, creating Multichannel MDS (MMDS).[210] MMDS operators thus are able to offer four or five channels, still a good deal less than cable but perhaps at lower capital costs.[211]

For reasons that are less than clear, both MDS and MMDS have been classified by the FCC under the Communications Act as »common carriers« rather than »broadcasters.«[212] This means that they lease their channels rather than do their own programming. Single-channel MDS operators have typically leased their entire capacity to a single programmer, such as a pay-movie entrepreneur who provides programming to hotels, apartment houses and homes. Under the common-carrier rules, MDS operators are prohibited from substantial involvement in the programming they transmit, and they can devote no more than half of their broadcast time to programming supplied by an entity with which they are affiliated.[213] Broadcasting regulations, such as equal time, reasonable access and the fairness doctrine, probably apply to the customers who lease the MDS channels – not because the FCC has said so but because the court of appeals did in a parallel case involving DBS.[214]

As with other new technologies, there has been a tremendous interest in obtaining MMDS licenses. Overwhelmed by more than 16,500 applications, the FCC adopted a lottery procedure to choose between mutually exclusive ones, though it still held comparative hearings for the few remaining single-channel MDS licenses.[215] At the end of 1984, there were some 450,000 subscribers to MDS – down from 570,000 in 1982 – but the first MMDS licenses had yet to be awarded.[216] Enthusiasm about the prospects of MMDS declined in the years 1982–85, and it remains to be seen how

210 Amendment of the Commission's Rules with Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and Private Operation Fixed Microwave Service, 48 Fed. Reg. 33,873 (1983).

211 *See* Broadcasting, Dec. 10, 1984, at 45 f.

212 47 C.F.R. §§ 21.900 *et seq.* (1985); *see also* Common Carrier, 45 F.C.C.2d 616 (1974); Hornet, *Getting the Message: Statutory Approaches to Electronic Information Delivery and the Duty of Carriage*, 37 FED. COM. L.J. 217, 238–40 (1985).

213 47 C.F.R. § 21.903 (1985).

214 *See* Nat'l Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1199–1205 (D.C. Cir. 1984).

215 *See* 50 Fed. Reg. 5983 (1985).

216 Broadcasting, Dec. 10, 1984, at 46. The first awards were made in September 1985; lotteries and resulting awards continued through 1986. *See* Broadcasting, Oct. 6, 1986, at 73. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).

effectively the medium can compete against the much greater channel capacity of cable.

F. *Regulatory Framework of Cable Television*

1. *Description and Background of Cable*

Cable television has existed in the United States since about 1950. The first cable systems – called at that time community antenna television (CATV) - were located in communities perhaps sixty miles away from the nearest television station, or surrounded by mountains, and therefore afflicted with poor television reception. The CATV operator erected an antenna on high ground near the town, picked the television signals off the air, and sent them by wire to the homes of local residents, who paid a monthly fee for the service. Cable's original purpose, thus, was to overcome natural obstacles to good television reception in communities that were more or less within the »natural« range of the stations being received.

The next step was to increase the program offerings available by using microwave relays to bring in the signals of »distant« stations. With this attraction cable could appeal to viewers even in large cities enjoying a full complement of off-the-air stations. It could, for example, bring the independent (i.e., not network-affiliated) stations in the very largest cities, such as Los Angeles or Chicago, into cities (say Denver) that had three network affiliates but no independent VHF station. What made cable's distant-signal appeal a commercial reality was the introduction in the mid-1970s of domestic satellites to replace terrestrial microwave relay stations as cross-country program carriers. The satellites have made possible the carriage of television »superstations« – three independent VHF stations in Chicago, New York and Atlanta – to thousands of cable systems throughout the country.

The satellites have also brought to cable systems something new and even more important than distant broadcast signals: a legion of new »cable networks« that provide original cable programming in a wide diversity of formats. There are cable networks showing full-time news (Cable News Network), full-time coverage of the proceedings of the U.S. Congress (C-Span), full-time music (MTV), full-time sports, full-time movies, full-

time foreign-language programs and numerous other formats. The cable networks are provided for a fee to individual cable systems, and the systems provide them to their subscribers either as part of the »basic tier« of cable services that every subscriber receives in return for the monthly subscription fee or as part of an added tier for which the subscriber pays extra (»pay cable,« exemplified by entertainment networks such as Home Box Office or Showtime). In addition cable systems can, and often do, originate their own local programming. This has rarely been an important factor in attracting audiences, though it is commercially important insofar as it involves the origination of commercials. Advertising, however, still provides only a small part of cable revenues (less than five percent) as of 1985).[217] Although cable systems still carry the signals of local television stations, regardless of being required to do so by the FCC's »must carry« rule,[218] the variety of specialized programming provided by the cable networks is the principal thing that has made cable today a successful, fast-growing and increasingly important medium.

In mid-1985 there were in the U.S. some 6,600 operating cable systems serving about 37 million homes, or fourty-four percent of the nation's television households.[219] The cable industry's revenues in 1984 totaled about $3.6 billion, and the industry was starting to be profitable as well. Most cable systems have at least twelve channels. Those built after March 1972 must have at least twenty. It is now common for systems to have around fifty channels, and fifty-four is typical for systems built today. Many systems now being built in large cities have two cables and thus the ability to transmit more than one hundred channels. The average monthly subscription fee for basic cable service in late 1986 was $10.50 and rising rapidly.[220]

2. *Local Franchising Regulation of Cable*

Originally, and to a significant extent still, cable has been regulated largely at the local level through the »franchising« process. Because the cables must be laid over or under the city's streets, a cable operator cannot begin construction without a permit, or »franchise,« from the city. Contests among cable companies to obtain a city's franchise – assuming there will be only one franchise, a question discussed below – have often been fierce,

217 BROADCASTING YEARBOOK 1985, at D-3.
218 *See* text at notes 237–38 *infra.*
219 Broadcasting, May 13, 1985, at 11.
220 Wall St. J., Dec. 12, 1986, at 29, cols. 4–6.

and cities have developed elaborate auction procedures designed to obtain as much as possible for the city in the franchise terms. Thus a city might set franchise conditions specifying the minimum channel capacity of the cable system; the area it would serve; a timetable for wiring the entire area; the cable networks or other program services the system would provide; the subscription rates it would charge; the setting aside of one or more channels for use by the city government and the school system and for free public-access programming; construction of network and studio facilities in connection with the channels so set aside; the length of the franchise (typically fifteen years); procedures for deciding whether the franchise would be renewed; and a minimum franchise fee – typically a percentage of the system's revenues – to be paid to the city each year. All bidders for the franchise would be expected to meet these basic conditions, and the franchise would then be awarded to whichever company agreed to pay the highest franchise fee or otherwise made the most attractive bid (or, in many cases, had the most political influence with the city government; or, in some cases, paid the most effective bribes).[221]

3. *Cable and Copyright*

When cable began to develop in earnest in the 1960s, the question naturally arose whether a cable system, when it received broadcast signals (either off the air or by microwave relay) and retransmitted them by wire to its subscribers, was infringing the copyrights on the movies or other television programs being broadcast. If so, then the television networks and the motion picture companies, which owned most of the copyrights, might be able either to close down or to take over the emerging cable industry and end the competitive threat it represented. Under the copyright law, the question was whether a cable retransmission of a broadcast signal constituted a »performance« of the work being broadcast (or, if it did, whether there was an »implied license« to perform a work by aiding the reception of a signal broadcast to the public).

The Supreme Court decided the question twice. In 1968 it held in *Fortnightly Corp. v. United Artists Television, Inc.*,[222] dealing with a tradition-

221 *See* Cable Franchise Policy and Communications Act of 1984, H.R. REP. No. 934, 98th Cong., 2d Sess. 23 (1984) (hereinafter cited as »House Report«); Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685 (1972).

222 392 U.S. 390 (1968). The author was among the counsel for the defendant cable operator in *Fortnightly*.

al cable system that took its signals off the air from a station some sixty miles away, that such retransmission did not constitute a performance of the broadcast work. In 1974, in *Teleprompter Corp. v. CBS*,[223] the Court dealt with a more advanced cable system that received signals by microwave relay from more than a thousand miles away, and it reached the same conclusion. In both cases the Court's reasoning – that cable did not »perform,« because it was more like a receiver than like a broadcaster – was unsatisfactory, but its result was sound. Not only were better legal reasons available, but the result, as a Supreme Court Justice has since observed, »had the arguably desirable effect of protecting an infant industry from a premature death.«[224]

In the Copyright Act of 1976, Congress reached a complicated compromise on the cable copyright question. The Act establishes that cable retransmission does constitute performance, but it relieves cable systems of copyright liability for carrying local signals and further gives them a compulsory license for the carriage of distant signals. The statutory royalty fees for distant-signal carriage are set, periodically adjusted and distributed among copyright owners by a new federal agency called the Copyright Royalty Tribunal.[225]

4. *Cable Regulation by the FCC*

Cable regulation by the FCC rose in the 1960s, crested in 1972 and has since subsided. Designed originally to protect television broadcasters against cable, it exists today largely to protect cable against local franchise regulation.

The FCC began in 1959 by deciding that its regulatory jurisdiction under the Communications Act gave it no authority to regulate cable, which was neither a broadcaster nor a common carrier.[226] But as cable grew in the 1960s and began to import distant signals that competed for the audience of local broadcasters, the FCC changed its mind. In 1966 it adopted rules designed to protect broadcasters against cable competition.[227] These rules (i) required cable systems to carry the signals of local stations (the »must

223 415 U.S. 394 (1974).

224 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 166 (1975) (Blackmun, J., concurring).

225 17 U.S.C. § 111 (1982).

226 CATV and TV Repeater Services, 26 F.C.C. 403 (1959).

227 Community Antenna Television, Second Report and Order, 2 F.C.C. 725 (1966).

carry« rule); (ii) barred them from duplicating a locally broadcast program with an imported signal on the same day; and (iii) prohibited cable systems from importing distant signals into the 100 largest cities – and thus, effectively, from getting started in those cities – without a cumbersome hearing into the effect the cable operation would have on local broadcasting. The Supreme Court in 1968, in the *Southwestern Cable* case,[228] upheld these rules on the ground that they were reasonably considered necessary to protect local broadcasting and therefore were within the FCC's power to regulate things »ancillary to broadcasting.«

The FCC in 1972 moved further by adopting a comprehensive set of rules governing the aspects of cable that were subject to local franchise regulation.[229] These rules required franchising authorities to hold a public hearing before granting a franchise; required newly built systems to have at least twenty channels; required cable systems to provide channels for governmental, educational, public access and leased use; limited franchise terms to fifteen years; limited franchise fees to three percent (or, on a special showing, five percent) of the cable system's annual revenues; and so forth. In addition, the FCC already had barred ownership of cable systems by any of the television networks and by television stations and telephone companies in the same locality as the system.[230]

Not long after the 1972 rules were issued, the regulatory tide began to turn, as the advent of satellites brought cable new growth and political influence and as it was increasingly recognized that the FCC's regulation had functioned largely to protect broadcasters against a new competitive industry. Contributing to the trend was a 1979 Supreme Court decision holding that the access-channel requirements in the FCC's 1972 rules went beyond the Commission's existing jurisdiction over cable.[231] Contributing also was the 1976 Copyright Act, which removed the justification for the FCC's distant-signal restrictions on cable.[232] The 1970s thus saw a progressive dismantling of the regulatory structure the FCC had erected. The various rules governing the local aspects of cable were reduced to nonbinding recommendations, except that the ceiling on franchise fees remained in effect.[233] The FCC also »preempted,« or used its superior federal authority to prohibit, any local regulation of the rates charged by cable systems for pay-cable

228 United States v. Southwestern Cable Co., 392 U.S. 157 (1968).
229 Cable Television Report and Order, 36 F.C.C.2d 143 (1972).
230 47 C.F.R. §§ 63.54 (telephone), 76.501 (networks, broadcasters) (1985).
231 FCC v. Midwest Video Corp., 440 U.S. 689 (1979).
232 *See* text at note 225 *supra*.
233 47 C.F.R. § 76.31 (1985).

programming (but not of the basic rates for subscribing to cable).[234] FCC rules restricting distant-signal carriage by cable systems – adopted as a substitute for copyright liability – were lifted in 1980.[235] The rule banning network ownership of cable systems has been effectively lifted, though the bans on ownership by local television stations and local telephone companies remain.[236] Also remaining were the »must carry« rules, until they were struck down by a federal court of appeals in 1985 as violating the First Amendment rights of cable operators.[237] The FCC in late 1986 readopted the rules in more limited form, no longer requiring cable systems to carry *all* local broadcast stations regardless of the number of channels available on the system.[238] It remained unclear whether these new rules would withstand court attack.

That FCC regulation of cable serves largely now to protect cable from local (or state) regulation was illustrated by the 1984 Supreme Court decision in *Capital Cities Cable Inc. v. Crisp.*[239] The Court held that an Oklahoma statute prohibiting commercials for alcoholic beverages could not be applied to cable programming. Requiring cable systems to remove such commercials would impose a heavy burden and would conflict, the Court said, with FCC regulations permitting cable carriage of distant signals and also with the compulsory-license provisions of the 1976 Copyright Act.

5. *The Cable Communications Policy Act of 1984*

Despite the deregulation at the FCC, cable still chafed under the demands of cities in the local franchising process and, in particular, under their regulation of cable's subscription rates. At the same time, the power of cities to regulate cable through the franchising process – for example, to grant an exclusive franchise – was coming under increasing challenge in court. A 1982 Supreme Court decision struck dread into the hearts and pocketbooks of cities by holding that they could be subject to antitrust liability for

234 *See* Brookhaven Cable TV Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

235 Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980); *see* Malrite T.V. of New York, Inc. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

236 47 C.F.R. §§ 63.54, 76.501 (1984).

237 Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986).

238 Broadcasting, Dec. 1, 1986, at 43.

239 104 S. Ct. 2694 (1984).

actions taken in cable franchising.[240] With the cable industry wanting less local regulation and the cities wanting legal protection for some local regulation, a bargain was struck that produced congressional passage of the Cable Communications Policy Act of 1984 (the »Cable Act«),[241] the most important amendment yet of the Communications Act of 1934. The essence of the bargain was that regulation of cable subscription rates was lifted, while the power of cities to grant franchises and impose other regulations on cable as part of the franchising process was confirmed.

The Cable Act states that every cable system must have a franchise and authorizes a city to award »1 or more franchises.«[242] The House Committee Report makes clear that this means the city may decide to grant only one franchise.[243] The Act limits franchise regulation in several ways: the city's franchise fee may not exceed five percent of the cable system's annual revenues;[244] the city (at least in new franchises) may not regulate the content of cable programming (except for programming that is obscene or »otherwise unprotected by the Constitution of the United States«);[245] and – the big prize for the cable industry – after January 1, 1987, the city may not regulate the cable system's subscription rates.[246] The Act also has provisions for modification of the franchise at the behest of the cable operator and a complex franchise-renewal section that seeks to balance the competing interests of the city and the franchise holder.[247]

The Act has important provisions regarding »mandatory access« to cable systems by parties other than the system owner. It allows cities as part of the franchising process to require that channels be set aside for use by the city, the schools and the public, with studios and other facilities provided by the cable operator.[248] More important, the Act requires all cable systems having thirty-six or more channels to set aside some of them – ten percent on systems with up to fifty-four channels, fifteen percent on systems with more than fifty-four – for commercial leased access by other programmers.[249] The likely effectiveness of this requirement is weakened, however, by provisions allowing the cable system owner to set the rates for channel leasing so as to

240 Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).
241 98 Stat. 2779 (1984), 47 U.S.C. §§ 521–59 (Supp. 1985)
242 47 U.S.C. § 541(a)(1), (b).
243 House Report, *supra* note 221, at 59.
244 47 U.S.C. § 542(b).
245 47 U.S.C. § 544(b), (d).
246 47 U.S.C. § 543; *see also* Note following 47 U.S.C. § 521.
247 47 U.S.C. §§ 545, 546.
248 47 U.S.C. § 531.
249 47 U.S.C. § 532.

protect his own programming against the competition provided by the leased offerings.[250] (Yet the antitrust laws, in turn, might undercut these provisions.)[251]

The Act confirms the preexisting restrictions on ownership of cable systems by television broadcasters or telephone companies in the same locality.[252] (Last-minute lobbying by newspaper publishers knocked out a similar ban on ownership by local newspapers.) It provides that cable systems, insofar as they carry television programming, are not subject to regulation as common carriers (apart from the access requirements imposed or approved by the Act).[253] Government entities are allowed to own cable systems, but if they do, they may not exercise editorial control except through a separate entity.[254]

The Act requires cable operators to protect the privacy of their subscribers. They may collect and use personally identifiable information only to the extent necessary to render service or to detect unauthorized reception. Subscribers are given the right to know what information has been collected about them, how it will be used and when it is available for inspection. They also have a right to recover damages in court for violation of the Act's privacy provisions.[255]

Various content regulations apply to cable programming under the Act and the preexisting law. Except with respect to programming on access channels, a cable operator remains liable – just as a broadcaster is – for defamation, invasion of privacy, false advertising or other generally applicable speech offenses.[256] The operator is also subject to criminal laws on obscenity; since sex-oriented material on cable has been a sharp political issue in some parts of the country, the Act adds its own criminal prohibition for transmitting over cable any matter that is obscene or »otherwise unprotected by the Constitution of the United States.«[257] (The quoted phrase reflects a hope that the special constitutional standard applied to broadcasting in the *Pacifica* case[258] will be applied to cable as well. This seems unlikely, particularly since the Act requires cable operators to sell or lease to

250 *See* 47 U.S.C. (c)(1), (2), (d), (f); House Report, *supra* note 221, at 50–54; Homet, *supra* note 212, at 268.
251 *See* House Report, *supra* note 221, at 50.
252 47 U.S.C. § 533.
253 47 U.S.C. § 541(c).
254 47 U.S.C. § 533(e).
255 47 U.S.C. § 551.
256 *See* 47 U.S.C. § 558.
257 47 U.S.C. § 559.
258 FCC v. Pacifica Foundation, 438 U.S. 726 (1978); *see supra* notes 177–79 and accompanying text

subscribers, on demand, a »lock box« to prevent viewing by children.[259]) Finally, the FCC had previously extended to cable-originated programming such broadcast-content regulations as the equal-time and reasonable-access requirements and the fairness doctrine,[260] and the Cable Act does nothing to change that.[261]

6. *Cable Regulation and the First Amendment*

The existing scheme of cable regulation, as confirmed and adjusted by the Cable Act, raises some serious First Amendment questions. There is room here only to outline the most important ones.

a. *The constitutionality of access requirements*

The provision of the Cable Act requiring cable systems with thirty-six or more channels to set aside channels for commercial leased access is under attack – as are franchise provisions requiring that channels be set aside for governmental, educational and public-access use – as an unconstitutional intrusion on the editorial discretion of the cable operator as a First Amendment speaker. That discretion is said to comprehend the programming or program selection for all channels on the system. A requirement that some channels be made available to other programmers is thus said to violate the constitutional principle of *Miami Herald Publishing Co. v. Tornillo,*[262] which held that newspapers could not be required to make reply space available. One federal appeals court has supported this argument,[263] two others have indicated some sympathy for it,[264] and the Supreme Court has observed that the argument is »not frivolous.«[265] But another appeals court has viewed cable access requirements as distinguishable from the right-of-reply statute in

259 47 U.S.C. § 544(d)(2).
260 47 C.F.R. § 76.205–.221 (1985).
261 *See* 47 U.S.C. § 544(f).
262 418 U.S. 241 (1974); *see supra* text at notes 91–92.
263 Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055–56 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).
264 Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1401 n.4 (9th Cir. 1985), *aff'd as modified*, 106 S. Ct. 2034 (1986); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985).
265 FCC v. Midwest Video Corp., 440 U.S. 689, 709 n. 19 (1979).

Tornillo,[266] while a federal district court has squarely upheld such requirements.[267]

The Supreme Court, one would think, will uphold them. *Tornillo* seems different not only because it involved newspapers, traditionally a specially protected medium under the First Amendment, but also because the Court there emphasized that the reply-space requirement could deter the newspaper from printing controversial campaign coverage in the first place. There is no such danger with respect to channel access requirements, since they are independent of the content of the cable system's own programming. A more pertinent precedent than *Tornillo* may be found in *Prune-Yard Shopping Center v. Robins*.[268] There the Supreme Court, distinguishing *Tornillo*, held that a state could require the owner of a private shopping center to allow First Amendment activities, such as picketing and leafleting, on his property – that imposing this right of speech by others did not violate the owner's First Amendment rights.

The argument that access requirements nonetheless intrude on the cable operator's editorial discretion in the same manner as telling a newspaper what to print begs the question whether the cable operator's editorial discretion extends, as a matter of constitutional right, to all the channels on the system. While the cable operator, to the extent that he programs or selects programming, is a First Amendment speaker, he is also something else: the owner of a cable grid. This grid is capable of carrying 50 or 100 channels of television programming (and other communications) running to homes throughout the city, and, given the natural-monopoly characteristics of cable, it is very likely to be and remain the only such grid available to homes in the area it serves. The government, it would seem, has power to regulate this grid as it regulates other public utilities, and such regulation can include requiring that some channels on the grid be made available to programmers other than the system owner. This requirement has only the most attenuated impact on speech by the cable owner, who remains entitled to program all the other channels (and to add more of them at will). Meanwhile the access requirement does much to promote the First Amendment interests of the public by assuring that the cable medium in the community will not be monopolized but reflect a diversity of sources of information and opinion, including ones that disagree or compete with those of the cable system owner. The Supreme Court has recognized the First

266 Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 n. 82. (1977).
267 Berkshire Cablevision of Rhode Island v. Burke, 571 F. Supp. 976, 983-88 (D.R.I. 1983).
268 447 U.S. 74 (1980).

Amendment interests of the public in a number of cases,[269] and one would expect it to do so again by upholding the congressionally approved access requirements for cable.[270]

b. *The constitutionality of exclusive franchising*

A more difficult question is whether cities may grant – as they have traditionally done and are apparently authorized to do by the Cable Act – only one cable franchise, thereby excluding other cable companies from constructing and operating systems in the city. In March 1985, the federal court of appeals in California, in *Preferred Communications, Inc. v. City of Los Angeles*,[271] held that the traditional method of auctioning a single franchise to the highest bidder violated the First Amendment rights of a cable company denied a franchise, if there were room on the utility poles (as there was conceded to be) for a second company's cable.

Forceful arguments exist on both sides of the question. Cable television is clearly a medium protected by the First Amendment, and denial of a franchise prevents a would-be cable operator from »speaking« in that medium in that locality, at least through the means of constructing and operating his own system. But the cities – relying on the First Amendment »balancing« test of *United States v. O'Brien*[272] – assert a number of governmental interests to justify the single-franchise approach to cable. These interests include avoiding repeated disruption of the streets and obtaining for the city various benefits of a cable franchise: benefits such as the wiring of the entire city (including low-income areas); maximum channel capacity and other state-of-the-art technology; channels and facilities for governmental, educational and public-access use; a maximum franchise fee; and so forth. These benefits represent legitimate and important government objectives, given the growing significance of the cable medium, and the cities say a cable operator will not agree to such franchise terms unless the city can assure the operator exclusivity in return. The cities further contend

269 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); CBS v. FCC, 453 U.S. 367 (1981); Nat'l Citizens Comm. for Broadcasting v. FCC, 436 U.S. 775 (1978); Associated Press v. United States, 326 U.S. 1 (1945).

270 See Barnett, *Franchising of Cable TV Systems to Get Airing at Supreme Court*, National Law Journal, Apr. 21, 1986, at 42, 43. The Supreme Court in City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2038 (1986), while not addressing the constitutionality of access requirements, appeared to disavow a strict analogy between cable and newspapers and to suggest application of a First Amendment »balancing« test that seems likely to accommodate access requirements. *See infra* notes 276–80 and accompanying text.

271 754 F. 2d 1396 (9th Cir. 1985), *aff'd as modified*, 106 S. Ct. 2034 (1986).

272 391 U.S. 367 (1968); *see supra* text at notes 45–47.

that, since leased access will be available (as the Cable Act requires) on the franchised system, other cable operators are not in fact excluded from »speaking« by way of cable in the city – they simply have to do so by leasing channel space on the single franchised system.

While the court of appeals in *Preferred* relied too heavily on the analogy between cable and newspapers, it was probably right in holding that denial of a franchise works too much restraint on speech to pass muster under the First Amendment. The test of *United States v. O'Brien* requires that a regulation of speech leave adequate alternative modes of communication by which the speaker can reach the public.[273] A would-be cable operator denied the right to construct and operate a cable system does not appear to have adequate alternative means of speaking by way of cable in that community. True, access to the franchised system presumably would be available under the Cable Act (assuming the constitutionality of the access requirement). But the Act's leased-access requirement applies to only ten or fifteen percent of a system's channels, is subject to discriminatory pricing by the system owner and is full of doubts about how much demand there will be and how much channel time will in fact be available and on what terms.[274] Leased access therefore seems an inadequate substitute for the right to build one's own system. This is particularly so because the Constitution's Equal Protection clause limits unequal treatment in the exercise of First Amendment rights.[275] Under that standard, the contrast is dramatic between the speech rights of the franchised cable operator, who controls numerous channels and further controls the pricing for the access channels, and those of the would-be cable operator, who is reduced to standing in line for problematic access to a few channels subject to price control by his competitor.

Finally, while the benefits sought by the city through granting a single franchise are substantial, it is not clear enough that the single-franchise approach is truly necessary in order to obtain them. All of those benefits, with the exception of highest-bid features, such as a maximum franchise fee (which in any event is capped by the Cable Act at five percent of revenues), can be demanded in all the franchises that a city grants to all qualified operators who want them. While one cannot conclusively reject the city's fear

273 City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 928, 932 (1986).

274 *See* 47 U.S.C. § 532; House Report, *supra* note 221, at 50–54; Homet, *supra* note 212, at 268–69 f.

275 *See* Williams v. Rhodes, 393 U.S. 23 (1968); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Karst, *supra* note 50.

that cable operators will not accept such terms unless they are guaranteed protection from competition, the natural-monopoly character of cable makes it likely that whichever operator builds first in a particular area will be the only operator who builds there, thus providing de facto exclusivity in any event.

In 1986 the Supreme Court decided the *Preferred* case.[276] In a terse opinion, the Court recognized that the activities of cable television »plainly implicate First Amendment interests,« since cable »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.«[277] But the Court also stated, citing *O'Brien*, that »where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing social interests.«[278] On this basis, the Court sent *Preferred* back to the lower courts for the development of more facts, particularly with respect to the city's claims that the operation of more than one cable system in a given area would disrupt its public ways and cause »permanent visual blight.«[279]

The Supreme Court in *Preferred* thus took a narrower view of cable's First Amendment rights than had the court of appeals and apparently called for application of the *O'Brien* »balancing« text instead of a strict analogy between cable and newspapers. Nonetheless, when the constitutionality of single franchising is finally decided, the *O'Brien* test itself should lead to the conclusion, as indicated above, that this approach to cable is inconsistent with the First Amendment.[280]

c. *The constitutionality of cable franchise fees*

A third question involves the franchise fees that cable systems traditionally have paid to their franchising cities – and that the Cable Act expressly authorizes cities to collect, though with a ceiling of five percent of gross revenues annually.[281] These fees are laid only on cable systems and are in addition to general taxes, such as a sales tax, that are laid on cable systems together with other businesses. Since the Supreme Court in the *Minneapolis Star* case[282] struck down a tax laid only on newspapers, one may ask

276 City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986).
277 *Id.* at 2037.
278 *Id.* at 2038.
279 *Id.* at 2037–38.
280 *See* Barnett, *supra* note 270, at 42.
281 47 U.S.C. § 542..
282 460 U.S. 575 (1983); *see supra* text at notes 89–90.

why cable franchise fees are not likewise invalid as a state-imposed financial burden that singles out one communications medium. True, the five percent statutory ceiling removes the potential, relied on by the Court in *Minneapolis Star*, for escalating the fee to confiscatory levels. Moreover, the fees are traditional for cable systems. Presumably they will be defended as a charge for the use of public property – the streets and easements through which the cable is laid. Yet newspapers also »occupy« public property – through their forests of newsracks on public sidewalks – and are not charged a revenue-raising fee for the privilege. While a revenue-raising fee for newsracks within a public bus terminal has been upheld by a federal appeals court, the court's reasoning suggested that to impose the fee for newsracks on the sidewalk – which might well be a necessary location if newspapers are to reach their public – would be invalid.[283] For cable, the use of the public ways to lay the wires is a necessary way to reach the public. If revenue-raising cable franchise fees are upheld, then, it will be because tradition and the congressional five percent ceiling indicate that they are not in fact a threat to cable's financial health and growth. The constitutional case against them is substantial.

7. *Regulation of the Reception of Cable Programming from Nonbroadcast Satellites*

Section 705 of the Federal Communications Act of 1934 (formerly section 605) prohibits any person not authorized by the sender to »intercept any radio communication« and any person »not being entitled thereto« to »receive or assist in receiving any interstate or foreign communication by radio.«[284] The 1984 Cable Act amended this provision insofar as it applies to the growing practice of using a satellite receiving dish to receive from a domestic satellite television programs that the satellite is transmitting to cable systems for retransmission to their subscribers. (By mid-1986, there were an estimated 1.5 million »backyard dishes« in the United States.[285]) The amended section 705 provides that the interception or receipt »of any satellite cable programming for private viewing« is not illegal if (1) the programming involved is not encrypted (scrambled) and (2) the owner of the programming has

283 Gannett Satellite Information Network v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984).
284 47 U.S.C. § 705 (1985).
285 Broadcasting, Oct. 6, 1986, at 74.

not established a marketing system under which individuals can pay for the right to receive the programming for private viewing.[286] Thus, if pay-cable operators and other cable networks wish to control the practice of receiving their programming directly from satellites, they have the choice of scrambling their »satellite feeds« or selling the right to receive them. (Since enforcement of a marketing system would be difficult, cable programmers generally have decided to scramble their feeds, and by early 1987, most major programmers were expected to have done so.[287]) More broadly, the new amendment signifies that when program-bearing signals for cable television are being distributed in the United States in nonscrambled form, even by satellites engaged in point-to-point transmission, members of the public have a legal right to receive those signals for private viewing, either free or by paying for them.[288]

G. *Regulatory Framework for Direct-Broadcast Satellites*

The FCC has defined direct-broadcast satellites (DBS) as »a radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.«[289] DBS is a medium of awesome potential power. The service area of a single DBS transmitter could encompass an entire U.S. time zone; using two or three satellites, a DBS operator could broadcast to virtually every home in the nation, bypassing »such earthbound media as broadcasting and cable.«[290] Moreover, DBS can broadcast multiple channels, and its powerful signal enables reception by dishes two to three feet in diameter instead of the ten to fifteen feet needed for conventional satellites. In 1982 the FCC authorized DBS service in the United States and granted construction permits to eight

286 47 U.S.C. § 705(b) (1985).
287 *See* Broadcasting, Oct. 6, 1986, at 74.
288 However, this is true only of signals being distributed for *cable* programming and not for broadcast programming. Broadcast television networks and program owners take the position, which seems correct, that their unscrambled »network feeds« may not be picked up by satellite dish antennas. *See* N.Y. Times, Dec. 11, 1986, at 16, cols. 1–2 (national ed.) (*War Over Satellites Pits N.F.L. Against Bars*). *See infra* notes 701–22 and accompanying text.
289 47 C.F.R. § 100.3 (1985).
290 Broadcasting, Dec. 10, 1984, at 46.

applicants (subject to the United States's receiving enough orbital slots at the 1983 Regional Administrative Radio Conference,[291] which was accomplished).[292]

In determining whether it would serve the »public interest« under the Communications Act to authorize DBS, the FCC weighed the potential benefits of the new service against the potential costs. It noted five major potential benefits: (1) DBS can bring service to isolated rural areas that presently have little or no television service; (2) DBS can provide additional channels of programming for rural or noncabled viewers; (3) since DBS can reach many people with many channels and is contemplated as a pay service, it offers the prospect of »narrowcast« programming for smaller audiences with more specialized tastes, a service potentially more responsive to consumer demand than advertiser-supported programming; (4) DBS can provide innovative services, such as high-definition television, stereo television, teletext and dual-language sound tracks, more easily than conventional broadcasting can; and (5) DBS can be used for non-video services, such as data transmission.[293] Against these potential benefits, the FCC weighed the economic harm that DBS might cause to the existing broadcast system and to the »local service« it provides. But the FCC found no »strong evidence that a significant net reduction of service to the public would result,«[294] concluding that the evidence of economic harm to existing broadcasters was at best speculative. The FCC also considered harm to existing users of the 12-GHz band, where DBS would be assigned, but concluded that they could be satisfactorily relocated. The Commission thus concluded that the public interest would be served by authorizing domestic DBS service.

The regulatory scheme the FCC erected for this service was designed to minimize regulation and to rely as heavily as possible on the competitive forces of the marketplace. DBS licensees were not made subject to any of the ownership limits that apply to conventional broadcasters, and thus no limit was imposed on the number of channels a single DBS operator could control. Nor was any access requirement imposed, as has been done for cable systems under the Cable Act (unless the DBS operator chooses to operate as a common carrier). The DBS rules do include, however, the

291 Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982); STC Decision, 91 F.C.C.2d 953 (1982); In re Application of CBS, 92 F.C.C.2d 64 (1982).

292 *See DBS Under FCC and International Regulation*, 37 VAND. L. REV. 67, 82 f. (1984).

293 90 F.C.C.2d at 680–82.

294 *Id.* at 689.

same ban on alien ownership (discussed below) that is laid down for broadcast licensees by the Communications Act.[295]

While the Communications Act establishes separate regulatory schemes for »broadcasters« (in title III of the Act) and »common carriers« (in title II), the FCC, saying that technological changes had drained meaning from these classifications, declined to force DBS into either category. Instead, it proposed to make an individual determination that would depend on the nature of the service offered by a particular DBS operator or by the same operator on different channels. Thus, an operator who proposed direct-to-home service and retained control over program content presumably would be treated as a broadcaster and hence made subject to the equal-time, reasonable-access and fairness requirements; on the other hand, an operator who leased channels to others presumably would be treated as a common carrier and hence required to offer services to the public without discrimination.[296] The suggestion of common-carrier designation for DBS operations then raised the question of what regulation, if any, would be applied to the »customer-programmers« of a DBS common carrier. The FCC said these programmers would be subject only to the common-carrier regulation applied to the DBS operator and would not be regulated themselves as broadcasters.[297]

The DBS regulatory scheme took its final form in a 1984 decision of the U.S. Court of Appeals for the District of Columbia Circuit on appeal from the FCC's ruling. In this case, *National Association of Broadcasters v. FCC (NAB)*,[298] the court upheld the FCC's determination that authorizing DBS service was in the public interest. It had difficulty with the FCC's refusal to apply to DBS operators the ownership limitations that apply to terrestrial broadcasters, finding an inadequate empirical basis for the Commission's claim that competition in the market for video services made such a rule no longer necessary.[299] The court accepted, however, the Commission's alternative argument that, in view of the high costs and riskiness of the DBS business, there was a substantial economic need, at least initially, for DBS enterpreneurs to be able to offer more than one channel of service.[300]

What the court reversed was the FCC's refusal to impose the obligations of broadcasters on DBS in the case where the DBS operator leases channels

295 47 C.F.R. § 100.11 (1985), *see* 47 U.S.C. § 310 (1982); text at notes 579–82 *infra*.
296 90 F.C.C.2d at 709; *see* Homet, *supra* note 212, at 242.
297 90 F.C.C.2d at 709–11.
298 740 F.2d 1190 (D.C. Cir. 1984).
299 *Id.* at 1208.
300 *Id.* at 1207

as a common carrier. When the DBS customer programs a DBS channel and that programming is transmitted to the homes of the public, *somebody* is acting as a broadcaster within the meaning of the Communications Act, the court said. The FCC therefore had no authority to refuse to apply broadcast regulatory requirements. The court noted that under the FCC's scheme, a federal candidate for national office would have no right to obtain »equal time« or »reasonable access« on a DBS channel to reply to the opposing candidate and declared that the sheer power of DBS made application of the political-broadcasting rules even more critical than for conventional broadcasting.[301] While the court thus vacated the FCC's ruling on this point, it let the ruling stand otherwise, and it left to the FCC the remedy for this defect – whether by treating the customer-programmers as broadcasters or by making the DBS operator responsible for their compliance with the statutory obligations.[302]

While a regulatory framework for DBS is thus established, DBS itself is far from being established. The medium has enormous entry costs – an estimated $700 million to launch one satellite and provide just one year of service to homes on the East Coast.[303] As a result, as of 1986, none of the ten applicants granted permits by the FCC since 1982 had raised the necessary money and gone into operation. The first and most enthusiastic applicant, Satellite Television Corp., a division of Comsat, pulled out of DBS in 1984 after spending some $140 million. In 1986 at least two companies were still trying to raise capital to begin DBS service, but their prospects were not considered bright. This was especially so because the potential DBS market was shrinking as more and more homes acquired home earth stations (dishes) capable of receiving cable-network programming from conventional satellites.[304]

301 *Id.* at 1201–04.

302 *Id.* at 1205; *see also* United States Satellite Broadcasting Co. v. FCC, 740 F.2d 1177, 1187 (D.C. Cir. 1984).

303 Broadcasting, Dec. 10, 1984, at 50.

304 *Id.*; Broadcasting, Oct. 6, 1986, at 72. While high-power DBS thus foundered, low-power satellite broadcasting, an unexpected new medium, was showing distinct if limited promise. This medium consists of the transmission of scrambled satellite feeds, for a price, to the home earth stations that previously were receiving unscrambled satellite feeds for free. The medium was born in early 1986, when cable programmers began scrambling their feeds and selling subscriptions to them to dish owners and was expected to spread to almost all cable programmers. *See id.* at 72, 74. Of course, this type of satellite broadcasting, unlike DBS, is simply an alternative way of delivering programming that is already available on cable systems. It is not a new or additional programming medium.