Editorial Freedom: Editors, Retailers & the First Amendment

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Working Paper Series
Revised
March 29, 1986

#116

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"For better or worse, editing is what editors are for; and editing is selection and choice of material."

Burger, C.J. in Columbia Broadcasting Systems v. Democratic National Committee (1973).

Editorial freedom is recognized as an integral part of freedom of the press and therefore protected by the first amendment.[1] But, what actions does editorial freedom actually protect? One need not be an editor to enjoy the freedom to publish one's own "editorials" without governmental interference. All writers enjoy that first amendment protection against governmental interference with the dissemination of messages. Nor does "freedom of association" depend on one's status as an editor. These rights are general first amendment freedoms.[2]

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1 Columbia Broadcasting Systems v. Democratic National Committee, 412 U.S. 94 (1973); Miami Herald v. Tornillo, 418 U.S. 241 (1974).

2 The Supreme Court has recognized only a limited number of instances when other constitutional values, such as national security, personal reputation [libel laws] and privacy, a fair trial, and public decency [laws against pornography], may justify governmental abridgments of free expression. See L. Tribe, American Constitutional Law 580-734, at $$ 12-2 to 12-36 (1978). Anyone who produces messages may assert freedom of expression directly or it may be asserted vicariously by the media owners who actually disseminate such messages as in New York Times v. Sullivan, 376 U.S. 254 (1964) and Bigelow v. Virginia, 421 U.S. 809 (1975) where newspaper publishers asserted the first amendment to protect their right to publish advertisers' messages.

Freedom of association, in its positive sense, applies to all forms of expression, Tribe, id, $ 12-23 at 700-10. However, the negative side of this freedom -- the right to disassociate --

Editorial freedom, however, appears to represent an additional freedom: a prohibition on governmental interference with the provision of "editorial services" by those who do more than merely disseminate their own messages.[3] But what services constitute editorial services? Certainly not all actions taken by editors.[4] The Supreme Court has already held that freedom of the press does not permit editors to violate antitrust or labor laws.[5] Still unclear is whether editorial freedom protects an editor°s right to exclude particular messages from his or her medium when the government attempts to impose access rules.

A quick reading of Miami Herald v. Tornillo[6] may suggest that all editors have the right to exclude any messages they choose.[7]

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may not even apply to the mass media. See note 13, infra.

3 One might regard the general right of expression as a right of producers or suppliers of messages to disseminate their messages and editorial freedom as the right of consumers to receive the editorial services that they needed or desired to help them absorb those messages. This pair of rights might be treated as the supply and demand sides of the first amendment, respectively.

4 Counsels for media firms often try to use the first amendment right of editorial freedom as a shield against any government regulations, regardless of whether they affect its freedom of expression or not. As former New York Times editor Lester Markel has observed, "The press . . . asserting its near-infallibility, countenances no effective supervision of its operation; it has adopted a holier-than-thou attitude, citing the First Amendment and in addition the Ten Commandments and other less holy scriptures." Markel, "Watching the Press," N.Y. Times, Feb. 2, 1973, at 31.

Nevertheless, it is beyond dispute that the press may be subject to generally applicable economic regulations without creating constitutional problems. See, Minneapolis Star v. Minnesota Comm°r of Revenue, 460 U.S. 575, 581 (1983).

5 See, Associated Press v. United States, 326 U.S. 1, 20 (1945). See also Central Telecommunications, Inc. v. TCI Cablevision, Inc. 610 F. Supp. 891, 899-900 (D.C. Mo. 1985); Home Placement Service v. Providence Home Journal, 682 F.2d 274 (1st Cir. 1982) cert den. 459 U.S. 903 (1982); Pines v. Tomson, 160 Cal. App.3d 370, 206 Cal.Rptr. 866 (1984). See also note 4, supra

6 418 U.S. 241 (1974).

7 This appears to be the position of the four Justices of the Supreme Court who were in the plurality in Pacific Gas & Electric

Yet that holding may also be read much more narrowly.[8] Meanwhile, there are other communications media from which messages generally cannot be excluded by the medium owner. For example, telephone companies are forbidden from refusing to transmit messages simply because they find undesirable.[9] As common carriers they must grant access even to indecent messages which might hurt their images.[10] A 1986 Supreme Court case concerning a right of access to the billing envelopes of a public utility produced a 4-1-3 split decision.[11]

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v. PUC of Cal., U.S.L.W. (Feb. 25, 1986). See also, G. Shapiro, P. Kurland, J. Mercurio, CableSpeech 123 (1983) [hereinafter Shapiro]; Lee, Cable Franchising and the First Amendment, 36 Vand. L. Rev. 867, 918-19 (1983); Goldberg, Ross & Spector, Cable Television, Government Regulation, and the First Amendment, 3 Comm./Ent. L.J. 577, (1981).

8 This appears to be the position of Justices Marshall, Rehnquist, Stevens, and White according to Pacific Gas & Electric v. PUC Cal., id.. See also F. Haiman, Speech and Law in a Free Society 334 (1981); M. Nimmer, Nimmer on Freedom of Speech $4.09[D][2][c], 4-132 to 4-134 (1984); B. Schmidt, Freedom of the Press vs. Public Access 40 passim (1976); Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res.J. 521, 629; Nadel, Electrifying the First Amendment, 5 Cardozo L. Rev. 531, 536 (1984); Price, Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation, 31 Fed. Com. L.J. 215, 222-23 (1979). Others, like Harvard Law School professors Archibald Cox and Laurence Tribe, believe that the Tornillo decision should have gone the other way. Personal conversations, spring, 1981.

9 Common carriers are required to "hold themselves out to serve all comers." 47 U.S.C. $153 (1976).

10 Of course the service is not unprofitable to the telephone company. See the Dial-a-Porn decisions. Carlin Communications, Inc. v. FCC, 57 R.R.2d 136 (2d Cir. 1984); Dial-a-Porn, 59 R.R.2d 230? (1985). See also note 49, infra. In fact, a provision of the AT&T consent decree prohibits former Bell telephone companies from offering electronic publishing or editing services. See United States v. American Tel. & Tel. Co. 552 F. Supp. 131, 186 (D.D.C. 1982), aff°d sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

11 Pacific Gas & Electric v. PUC Cal., U.S.L.W. x (Feb. 25, 1986). The plurality held that the regulation involved (1) content based discrimination (2) which chilled the expression of a medium owner (3) who had not opened its medium to others° messages. Marshall°s opinion, concurring in the judgment, held that (1) the medium had not been opened to others and (2) the

Today the issue of editorial freedom versus access rules is being hotly contested in the context of cable television.[12] Does editorial freedom protect cable TV operators from governmental regulations that require them to grant access to others, or is the right to exclude such access seekers merely a property right that can be regulated by the government?[13] This Article attempts to offer a framework for answering these and other questions concerning regulations of access to all communications media. It does so by exploring what services editors actually provide and

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regulation subsidized the expression of others at a cost to the medium owner.

This article will limit itself to a discussion of media that are opened to others, that is they do not carry only the personal messages of the media owner or owners.

12 Courts have considered whether editorial freedom protects cable television system operators against the "must carry" rules, see Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1452 (D.C. Cir. 1985); rules mandating exclusive franchise awards, see Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1336 (D.C.Cir. 1985); Preferred Communications v. Los Angeles, 754 F.2d 1396 (9th Cir. 1985), cert granted 54 U.S.L.W. 3328 (Nov. 1985); and public access channel requirements, Berkshire v. Burke, 571 F.Supp 976 (D.R.I. 1983) vacated as moot, 773 F.2d 382 (1st Cir. 1985). Cable industry attorneys also argue against leased access requirements, see, e.g., Shapiro, supra note 7, at 77-135; Lee, supra note 7, at 913-20. See more generally, Goldberg, Ross & Spector, Cable Television, Government Regulation, and the First Amendment, 3 Comm./Ent. L.J. 577 (1981); S.1917, 98th Cong. 1st Sess. (1983); Gladstone, "Taking the First," CableVision, May 7, 1984, at 36-43.

13 In Nadel, A Unified Theory of the First Amendment: Divorcing the Medium From the Message, 11 Ford.Urb.L.J. 163 (1983), this commentator argued that the right to exclude was purely a property right. That analysis, however, did not take into account a sensitive appraisal of editorial freedom. This Article, in turn, will not provide a detailed discussion of whether the first amendment°s freedom of association protects the mass media against disseminating messages they may disagree with. That may be a worthy subject for another article. At this time, however, it is useful to note that the negative right of association -- the right not to associate -- is a privacy right. And the right of privacy would seem to be significantly weaker for a medium owner who voluntarily opened its medium to the messages of others, particularly when access was offered for sale to advertisers. See PGE v. PUC Cal, Rehnquist, J. (dissenting).

why the first amendment protects them.

Part I explains why there is a need for editors in the communications media. It explains that individuals require the services of editors to help them to digest available information effectively. It then offers the thesis that the best way to understand the first amendment's protection of editorial freedom is as a right derived from the right to receive information;[14] that editorial freedom protects consumers against government efforts to deny them necessary or desirable editorial selection services.

Part II presents a detailed examination of the services performed by editors and analogizes them to the services

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[14] The right to receive information has been recognized by the Supreme Court in many cases. See, e.g. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748, 756-57 (1976)("Freedom of speech presupposes a willing speaker. But where a speaker exists, as in the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases, . . . Lamont v. Postmaster General . . . Kleindienst v. Mandel, . . . [and] Procunier v. Martinez."(footnotes and citations omitted). See also Board of Educ. Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 867 (1982).

For a more detailed discussion of this right see, Emerson, Legal Foundations of the Right to Know, 1976 Wash. U. L. Q. 1; Note, The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection of the Communication Process, 1 Cardozo L. Rev. 497 (1979).

As the Supreme Court has noted "The constitutional guarantee of free speech °serves significant societal interests° wholly apart from the speaker°s interest in self-expression." Pacific Gas & Electric v. PUC Cal, U.S.L.W. (Feb. 25, 1986); the first amendment guarantees "are not for the benefit of the press so much as for the benefit of all of us," Time, Inc. v. Hill, 385 U.S. 374, 389 (1966). See also, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)(it is "the right of the viewers and listeners, not the right of the broadcasters which is paramount"); Branzburg v. Hayes, 408 U.S. 665, 721 (1972)(Douglas, J., dissenting)("The press has a preferred position in our constitutional scheme, not to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public°s right to know.").

generally provided by retailers.[15] It explains how these services appear to fall into three categories: (1) searching, gathering and specializing; (2) evaluating, labeling, and screening; and (3) organizing. The Article then argues that the first amendment protects editorial freedom only to the extent that editors act to provide consumers with these specific retail services. Most significantly, it explains that the editorial freedom to screen messages -- to protect consumers against undesirable items -- is not synonomous with the right to exclude such items, and that while the first amendment protects the former, the latter is merely a naked property right.

Part III uses this analytical framework to evaluate the constitutionality of governmental regulatory schemes that have been used or may be used for facilitating access to the media. It concludes that exclusive franchise awards,[16] the must carry rules,[17] and public access channel requirements[18] imposed on cable television operators do not abridge editorial freedom unless they represent burdensome and uncompensated costs for cable editors. In particular, carefully crafted leased access requirements,[19] which require access seekers to compensate cable operators to offset the costs they impose, would not appear to interfere with editorial freedom in any way. Both the fairness

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15 While the term "retailers" will be used hereinafter it should be noted that wholesalers may also exercise the editorial and selection functions discussed. For example, Associated Press editors are selective about which stories they carry as are the television networks concerning which programs they carry.

16 See, infra, section III.A

17 See, infra, section III.B

18 See, infra, section III.C

19 See, infra, section III.D

doctrine[20] and right-of-reply statutes,[21] however, do abridge editorial freedom because they may, at times, discourage editors from providing consumers with desired messages. Whether or not the latter abridgements may be justified when balanced against other values is beyond the scope of this piece.

I. The Need for Editors (Retailers)

Individuals need editors because more messages are produced than any single individual could possibly see or hear.[22] Millions of news articles, tens of thousands of feature stories, and thousands of books are written annually. A multitude of new television programs is broadcast and motion pictures is produced.[23] As one commentator has observed:

> we are drowning in information . . . [some] scientists [even] . . . complain of . . . information pollution and charge that it takes less time to do an experiment than to find out whether or not it has already been done . . . If users . . . can locate the information they need, they will pay for it. The emphasis of the whole information society shifts then, from supply to selection.[24]

Without the help of editors consumers simply could not sort

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20 See, infra, section III.E.

21 See, infra, section III.F.

22 See, D. Goleman, Vital Lies, Simple Truths 79-82 (1985) (discussing internal editing "schemas" which "guide the focus of attention . . . guide the mind°s eye in deciding what to perceive and what to ignore. . . . They scan information that passes out of the sensory store, and filter it.")

23 See, e.g., Who Owns The Media? (B. Compaine ed. 1983) [hereinafter Compaine].

24 J. Naisbitt, Megatrends 24 (1982). See also Owen, "The Role of Print in an Electronic Society," in Communications for Tomorrow 230 (G. Robinson ed. 1978):

> A second feature of the print media is that they typically supply a high level of editorial service. That is, people are willing to pay something to avoid the task of sifting data for themselves and editors compete for the readership market by compiling packages that suit the tastes of individuals. Indeed, in the Age of Information, editors assume an even greater importance; people will pay not to be deluged with unedited data.

through the millions of items of information produced daily. It would simply be unmanageable for each household to tackle an unabridged version of the prior evening's UPI wirepress output, the daily Congressional Record, not to mention the sample of film scipts or book manuscripts submitted daily. As the editors of the U.S. News & World Report promise in their advertising: "With US News anything worth missing is already missing. We give you the cream, not the skim."[25]

The task of selecting among messages is, in fact, very similar to the process of searching or shopping for any other type of goods or services available in the marketplace. Whenever there is a large number of items differing in price as well as quality and competing with each other a consumer must make subjective judgments about what to buy.[26] Yet individuals do not have enough time or money to evaluate the price and quality of every available choice for every purchase they make.[27] Therefore even those willing to settle for a merely satisfactory choice must still seek some source of information.

The most common sources of readily available information are: prior experience,[28] advertising,[29] peers, and experts.[30]

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25 See, e.g. Advertising Age, Sept. 10, 1984, at 19.

26 See, e.g. Stigler, The Economics of Information, 69 J. Pol. Econ. 213, 224 (1961). And that choice is becoming ever more difficult. See, e.g. Belkin, "Shopping Is Getting a Lot More Complicated," N.Y. Times, Aug. 8, 1985, at A1 col. 1:

> There are nearly 300 long-distance telephone companies in the United States today, and 23 kinds of Nine Lives cat food. Revlon makes 157 shades of lipstick (41 of them pink) and Tower Video offers 5,000 video cassettes for sale or rent. The Love drugstore chain carries 41 varieties of hair mousse.

27 Search is expensive. see J.Engel, R.Blackwell, D.Kollat, Consumer Behavior 238 (3d ed. 1982)[hereinafter Engel]; M. Porter, Interbrand Choice, Strategy, and Bilateral Market Power 20-22, 101-04 (1976).

28 Consumers may simply purchase the products of producers who

However, at various times and for a variety of reasons these sources may not provide adequate assistance. In such situations consumers ordinarily rely on the explicit or implicit recommendations of the retailers[31] serving the particular market.

have provided them with satisfaction in the past. See, Engel, supra note 27, at 239. M. Porter, supra note 27, at 99, 110-11. Producers in all markets work hard to cultivate brand loyalty. See P. Kotter, Marketing Management 482-87 (5th ed. 1984) If they could not depend on brand loyalty even the best producers could find it difficult to sell their high quality products. For example, when the acclaimed novelist Doris Lessing wrote two novels under a pseudonym they were rejected even by her longtime British publisher. See E. McDowell, "Doris Lessing Says She Used Pen Name to Show New Writers° Difficulties," N.Y.Times, Sept. 23, 1984, [Sun] sec. 1, at 45 col. 1. Consumers often patronize the works of a favorite author, actor, or director. Movie producers commonly exploit this phenomenon by producing sequels to profitable films. Yet most consumers are reluctant to rely solely on their own limited personal experiences.

29 Consumers may also make choices based on the information in producers° advertisements. Although these self-serving presentations show the advertisers° products in the most favorable light, they almost always supply a buyer with at least some useful information. See Porter, supra note 27, at 235-37; F. Scherer, Industrial Market Structure and Economic Performance 376-80 (2d ed. 1980). See also, Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977)("the consumer°s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue"); Virginia State Bd. of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976). By carefully considering the ads of competing producers, buyers are often able to get a picture of the relative strengths and/or weaknesses of the products available. Frequently ads will also include the views of third parties whose advice, as discussed below, may be of great value to consumers.

30 Consumers often seek advice from family or friends who have personal experience with the product or who rely on the opinions of others, particularly those with similar needs or tastes. See, M. Porter, supra note 27, at 99-100; Engel, supra, note 27, at 278-81. Frequently valuable assistance is also available from the expert critics who exist in almost every product market. In the non-media markets, the magazine Consumer Reports evaluates competing consumer goods, food critics review restaurants, and services like Value Line and Standard & Poor°s rate corporate bonds. See, Eovaldi, The Market For Consumer Product Evaluations: An Analysis and a Proposal, 79 Nw. U.L.R. 1235, 1237-39 (1985). In the media, movie, theater, television and book critics share their critical opinions with consumers.

31 Retailers provide a screening service. See, M. Porter, supra note 27, at 21-22.

II. The Functions Performed by Editors/Retailers

Retailers are generally knowledgeable about the products they offer for sale.[32] Based on comments from competing suppliers and feedback from their customers they are usually able to ascertain both the best and worst features of each product in their product markets. As a result, they are able to provide consumers with many valuable services, falling into three categories: 1) searching, gathering and specializing, 2) evaluating, labeling and screening, and 3) organizing.

According to the Oxford English Dictionary, the verb "**edit**" is derived from the Latin word "**edere**" meaning "to put forth;"[33] hence it is not surprising that editors have this function in common with retailers. On close inspection, in fact, it appears that editors may be described as retailers of messages.[34] They perform the three services noted above on a micro level when they edit a single book or story (and enjoy first amendment protection in such roles as co-producers). But it is their editing on a

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32 These are retailers of what Michael Porter calls "nonconvenience goods" rather than "convenience goods." As Porter observes, "convenience goods are purchased without shopping, and the influence of the retailer on the purchase decision is small . . . Hence advertising is the dominant form of product differentiation," while "for nonconvenience goods, the consumer°s desire to shop and obtain more extensive product information, and the retailer exerts a relatively large influence on the purchase decisions." M.Porter, supra note 27, at 136.

33 3 The Oxford English Dictionary E-43 (1933).

34 See E. Dennis & J. Merrill, Basic Issues in Mass Communication 139 (1984)("A marketing approach to news is the most effective and efficient way to select and present news that is of interest to and pertinent for the audience.") Also:

> For as long as anyone can remember editors . . . have decided what will grace the pages of newspapers or appear on newscasts and what will not. They have engaged in a hard selection process, elevating some items to importance and public exposure while relegating others to the wastebasket.

Id. at 138.

macro level -- selecting from the multitude of available messages the relatively few with which to compose their magazine, radio program, film festival, library, or high school history curriculum -- which resembles retailing and is protected as editorial freedom.

A. Searching, Gathering & Specializing

Most retailers begin by searching for those items in their chosen product market that appeal to their particular target audience and then gathering the selected items together in some convenient location.[35]

A retailer may try to serve its entire product market by offering products that are at least minimally satisfactory to almost everyone in its geographic market.[36] Thus, the owner of the only clothing store in a community ordinarily finds it most profitable to offer a standard selection of items. The only doctor or lawyer in a small town is normally a general practitioner. Similarly, the only newspaper in a town generally tries to offer something for everyone and avoid offending any group (particularly advertisers).[37] Even the second or third

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35 See, Engel, supra note 27, at 43.

36 In a well known internal memo for NBC, former executive Paul Klein first offered the theory that television viewers are generally inclined to watch the television program on the channel to which they are tuned unless it is beyond some level of tolerance. He therefore inferred that it was important for networks to prefer bland programs that would not offend any viewers already tuned to the network.

37 In the newspaper industry this strategy was first pursued by the penny press publishers who "positioned their products toward °the great masses of the community° . . . the °commensense° reports the paper would present, controlled by no party and no class, would benefit democracy. . . . In the same vein, the penny press also welcomed all advertisers as contributing to the new democratic spirit." J. Turow, Media Industries: The Production of News and Entertainment 120-21

retailer entering the field may find it most profitable to serve the mass market. For example, affiliates of the three major commercial television networks prefer to compete for the mass market and therefore offer "least common denominator" programs.[38]

In other instances, however, a retailer will find it more profitable to specialize by focusing on a narrow target audience.[39] By specializing, a retailer commits itself to

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(1984).

As the late Ithiel de Sola Pool observed,

> Newspapers, as they moved into the status of monopolies, had the wisdom to defuse hostility by acting in many respects like a common carrier. . . . They not only run columnists of opposite tendency and open their local news pages willingly to community groups, but also encourage letters to the editor. Most important of all, they accept advertising for pay from anyone. Only rarely does a newspaper refuse an ad on grounds of disagreement.

I. Pool, Technologies of Freedom 238 (1983). See also id. at 19; P.Sandman, D. Rubin & D. Sachsman, Media: An Inroductory Analysis of American Mass Communications 104, 137-48 (3d ed. 1982).

38 See 1 Network Inquiry Special Staff, Final Report: New Television Networks: Entry, Jurisdiction, Ownership and Regulation 35 (1980):

> In advertiser-supported television, since payments by advertisers are based solely on the number and characteristics of viewers attracted to a program, there may be a tendency for an excessive "sameness" of programs, especially when the number of networks and stations is small. The most profitable policy for each of a small number of networks may be to attempt to capture a share of the mass audience by "duplicating" each of the others° programming, i.e., by providing programs very similar to those shown by the others.

See also "The Vast Wasteland" speech by 1961 FCC chairman, Newton Minow, reprinted in Documents of American Broadcasting 207 (I. Kahn ed. 1984). See, note 36, supra.

39 This is the "focus" strategy described in M.Porter, Competitive Strategy: Techniques for Analyzing Industries and Competitors 38-40 (1980). It is also called segmentation. See J.Mason & M. Mayer, Modern Retailing Theory and Practice 133 (1978)("Segmentation involves subdividing the market and then tailoring products and/or messages for all or a subset of the segments thus identified.") See also, P. Kotter, supra note 28, at 250-76. Such specialization is most likely to occur when a) there are already many other retailers competing for shares of the mass audience, b) there is a large group of consumers with some specialized tastes, who can be wooed away from the mass market retailers by catering to their special needs and desires, or c) some group is willing to pay a substantial premium for

serving the needs of some particular group of customers. It can concentrate on gathering those items of most interest to the specialized tastes of that group and attempt to offer more variations on their favorite themes.[40] In the media such specialization is most evident in the magazine industry. It also occurs among movie theaters, book stores, and radio stations in large cities where there are many competitors.[41] With its multiple retail channels, cable television has also encouraged the formation of specialized cable networks.[42]

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special treatment. Specialized retailers are therefore most frequently found in large population centers served by many competitors, in areas with large and diverse groups with special interests, and in product markets that appeal to the wealthy.

40 It may provide feedback to producers about the desires of its customers and if some item is not available from its regular producers, it may seek other sources. If this fails it may even commission its production or vertically integrate and produce the item itself. id. While television station and newspaper retailers normally rely on wholesaler networks and national wire services, respectively to supply them with national and international news items, they ordinarily cannot rely on independent freelancers to provide them with the local news that their consumers desire so they normally vertically intergrate into such production.

41 In these latter markets, it is likely that firms will arise to serve the specialized markets. As the FCC has observed about the radio medium:

> [I]n the early days of radio, it was essential that a few stations provide a broad general service. Today, however, it has become essential in view of the proliferation of radio stations and other broadcast services that radio licensees specialize to attract an audience so that they may remain financially viable.

Report and Order, Deregulation of Radio, 84 F.C.C.2d 968, 969, cited in United Church of Christ v. FCC, 707 F.2d 1413, 1434 (D.C.Cir. 1983). See, also, J.Barron, "Specialty Bookshops: A Browser°s Guide," N.Y. Times, Apr. 27, 1984, at C1 col 2. In New York City there are even enough legitimate theaters to lead them to specialize. Off Broadway, there are the Roundabout Theaters (classics); Playwrights Horizons (new "clever" plays by young American playwrights); La Mama (experimental concepts); and the Negro Ensemble Theater (plays by blacks or about issues of special interest to them).

42 While at one time all wholesale television networks were mass media generalists, there are now networks devoted solely to movies (e.g. HBO), news (CNN), congressional debate (CSPAN), and even separate networks for different styles of music (MTV & TNN).

Even when specialists exist it is often advantageous for a number of specialized retailers to combine within a common unit and share overhead costs. In such markets, specialized retailers may serve as departments within a single larger retail outlet by forming a department store or shopping mall. In the media, the best example of such a department store concept is a Sunday newspaper with a half dozen or more separate sections. Each section is ordinarily under the control of a separate department head (e.g. a sports, business, or leisure editor) who concentrates on only his or her particular section of the paper. Each section might even be offered individually if it were not for excessive distribution costs.[43]

B. Evaluating, Labeling & Screening Out

Some consumers are content once the retailer has gathered its products into a single location,[44] but most expect additional service. They depend on the retailer to evaluate the quality of each product that might be offered. They expect help in distinguishing among those articles that may be offensive, those that may be of lower quality, and those that are likely to be most suitable.

For a list of the cable networks see The Cable TV Program Databook (Paul Kagan Associates, 1984) or a recent issue of CableVision magazine.

43 The New York Times now does offer its book review section separately and subscribers can even receive it several days before its official Sunday issue date. Chip Block, former publisher of Games magazine offered his subscribers the opportunity to receive only the sections that they desired. Speech at Harvard Business School, Fifth Annual Communications Conference, Jan. 17, 1981. Some record clubs will ask subscribers to indicate their musical tastes to permit more individualized treatment and beauty product clubs often ask for color preferences and other individual traits to allow for more personalized service.

44 See the discussion of convenience goods in note 32, supra.

1. Potentially Dangerous or Offensive Products

One group of products that most consumers prefer retailers to identify and at least label, if not refuse to stock, are those that may be dangerous or potentially offensive. In some product markets the government provides a preliminary screening service.[45] For example, it restricts the dissemination of indecent messages in media accessible to children.[46] In many markets, however, sensitive consumers desire additional screening and they rely on specialized retailers for this service.[47]

In the information industry this service is particularly important to those consumers who are sensitive to messages intended to irritate them. In media without editors -- public forums, bulletin boards, the mail, and the telephone -- consumers can be subjected to offensive junk mail, obscene phone calls, and parades by groups like the American Nazi party.[48] While the

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45 For example, the Food and Drug Administration bans the sale of drugs that are considered to be "imminent hazards." 21 C.F.R. 2.5 ? and the provision of professional services by any who do # not meet minimum licensing standards. See Moore, The Purpose of Licensing, 4 J. L. & Econ. 93 (1961).

46 In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court upheld the right of the FCC to prohibit the broadcast of indecent programming over radio during the middle of the afternoon. See also Carlin Communications, Inc. v. FCC, 57 R.R.2d 163 (2d Cir. 1984)(discussing the FCC°s time period regulations of dial-a-porn services); Ginsberg v. New York, 390 U.S. 629 (1968).

47 Thus, those who observe strict religious dietary laws only patronize retailers who respect their customs. For example, Jews who keep kosher will not deal with butchers who use a single machine to slice both kosher and non-kosher meats.

48 Congress gave individuals some protection against offensive mail in the Postal Reorganization Act of 1970. See 39 U.S.C. 3010. Regulations adopted under the Act permit individuals to record their wishes on this issue by filling out USPS form 2201 which begins "I hearby state to the U.S. Postal Service that I desire not to receive sexually oriented advertisements throught the mail addressed to me or my children listed below." See Nadel, Privacy Rings: Telephone Calls and the Right of Privacy 45 (working paper, Columbia University Center for Telecommunications

government may outlaw obscenity and libelous messages, and often goes too far in this direction,[48A] many irritating messages are still permissible.[49]

Some individuals hire secretaries to "edit" out offensive mail and telephone calls (at least at their offices), and may be able to avoid offensive messages in the live media by turning their heads. When editors are available, however, consumers will often rely on them to screen out such material. Those with strong fundamentalist feelings may only patronize magazines or book stores that refuse to carry pornographic material. They may seek out publications that exclude advertisements for the PLO, KKK, IRA, contraceptives, or news stories that portray any of these in a favorable light.[50] Parents may prefer that their children only

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and Information Studies, Jan. 1986).

The Direct Marketing Association (DMA) adopted their own equivalent of this system: the Mail Preference Service (MPS), in 1971 and a Telephone Preference Service (TPS) in 1985. Consumers who do not desire to receive unsolicited mail or phone calls may send their names and addresses to the DMA for inclusion on the respective list. Direct mailers and telemarketers who subscribe to the service can then refrain from contacting those people. Id. at II-13 to II-14.

48A Government efforts at overly restrictive limitations on the transmission of adult programming are common. See, e.g. Community Television of Utah v. Wilkinson, 611 F.Supp. 1115 (D.Utah 1985); Videophile, Inc. v. City of Hattiesburg, 601 F.Supp. 552 (S.D.Miss. 1985); Cruz v. Ferre, 571 F.Supp. 125 (S.D.Fla. 1983), aff°d, 755 F.2d 1415 (11th Cir. 1985). There is also an issue concerning government censorship of public access channel users. See, M. Price & D. Brenner, Cable TV & the New Media Law (1986). ###

49 It should be noted that one of the consequences of having a robust first amendment is that some speech that might be undesirable to many will still be protected. See Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), aff°d 578 F.2d 1197 (7th Cir. 1978)(permitting Nazis to march in Skokie, Ill., a neighborhood inhabited by a large number of Jews inprisoned in the Nazi concentration camps); Cohen v. California, 403 U.S. 15 (1971)(upholding the right of a person to wear a jacket displaying the message "Fuck the Draft" in a public place).

50 Thus, NBC refused to carry an American Cancer Society commercial that sought to influence pregnant women not to smoke.

attend movies that are rated "G" or perhaps "PG-13."

Consumers also depend on retailers to protect them from items that are labeled in a misleading fashion. All buyers, including readers of newspaper classified ads or the yellow pages, want to be protected from producers or advertisers who have reputations for fraudulent or deceitful practices.[51]

Because consumers rely on editors to provide this screening service it is important that the first amendment protect an editor°s right to enable consumers to avoid accidental exposure to offensive messages in their media. Yet, editors can provide such protection without excluding messages. For example, they could enclose offensive messages in insert envelopes carefully marked with warnings or transmit such messages over cable channels that subscribers were warned to lock out. The first amendment freedom to screen is not synonomous with the fifth amendment right to exclude. The latter is more extensive, but more susceptible to governmental regulation.

The commercial showed a fetus in a womb smoking a cigarette and a narrator asked "Would you give a cigarette to your unborn child? You do every time you smoke while you°re pregnant." NBC turned it down because the network "thought it was too graphic and would likely upset a significant segment of our viewing audience." See San Francisco Examiner, Dec. 19, 1984, at E1 col. 1.

Similar broadcaster sentiment has inhibited broadcast advertising by the manufacturers of contraceptives. See, "NBC and CBS to Air TV Spots on Pregnancy," N.Y.Times, Oct. 24, 1985, at C13, col 2. And the courts have recognized the rights of newspapers to exclude advertisements that might offend their readers. See America°s Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F.Supp 328, 333 (N.D.Ind. 1972) and cases cited therein.

51 Thus, New York Telephone°s advertising standards and regulations state that "[i]t is (our) policy not to accept advertising that, in [our] judgment, contains statements or illustrations that are disparaging, deceptive, or that would tend to degrade the quality or integrity of the directory. . . . or suggest illegal activity are not permitted." The Manhattan Yellow Pages 3 (1984).

2. Minimum Quality Standards & Credibility

Retailers are also generally expected to set minimum standards for quality and then to guarantee that all of their products meet those standards unless otherwise noted. This permits consumers to shop with confidence once they have found a store with quality standards that match their own. Some will only frequent retailers who offer only the highest quality goods, others will prefer retailers who offer goods at lower prices.

Once again the government may be involved in this process. For example, it sets minimum standards for orange juice or different grades of eggs and meats.[52] It may also help to enforce non-government certification procedures that identify public accountants or tennis professionals who are certified.[53]

Those who desire the highest quality products and services may be aware of the brands that meet those standards, but alternatively they may rely on high quality retailers. They may only buy jewelry from Tiffany°s, clothes from Brooks Brothers,

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52 Government standards for different grades of agricultural products are found throughout 7 C.F.R., in particular the standards for meats and eggs are at 7 C.F.R. sects. 54 & 55. Canned fruit juices are discussed at 21 C.F.R. 164.

53 See Moore, supra note 45, at 104-06. The motives of professionals who refuse to permit para-professionals to practice their craft is poignantly illustrated by the case of Rosemary Furman, who was prosecuted by the Florida bar and sent to jail for offering an inexpensive source of "legal" advice concerning how to fill out legal forms to those consumers who are unable to pay the prices charged by members of the Florida bar. It appears to this writer that the lawsuit was primarily an effort by the Florida Bar to protect its oligopoly against low priced competitors. See Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978); Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979); Furman v. Florida Bar, 451 So.2d 808, cert. denied 105 S.Ct. 315 (1984).

The alternative is illustrated by the government egg grading system, whereby consumers who prefer only grade A eggs can insist on them, but others preferring lower priced lower quality eggs also have that option. See note 52, supra.

and artwork from galleries with impeccable reputations.[54]

Those who desire information to guide U.S. foreign policy or make important investment decisions for corporations demand the highest quality information and are willing to pay for it. They may prefer not to trust the credibility of a news story until it is reported in a highly reputable news letter or carried by a highly respected editor/retailer like The Wall Street Journal. Others may be willing to rely on products from less reputable retailers, particularly if those products are less expensive, or are more desirable in other ways.[55] Whether or not a retailer makes a conscious decision about its minimum standards, buyers will quickly discern them. Consumers will look for and patronize retailers who meet their own standards for quality.

While a retailer°s reputation for its quality standards may be one of its most valuable assets,[56] it is crucial to observe that a retailer can maintain its standards without excluding items that do not meet them. Food stores maintain their reputations° for fresh food while offering low-priced "day old" products. Classy clothing stores offer carefully marked "imperfects" or "seconds" without hurting their reputations. The key to

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54 See Arthur Weisz v. Parke-Bernet Gallaries, Inc., 67 Misc.2d 1077, 1081-82, 325 N.Y.S.2d 576, 581 (1971):

> notwithstanding the language of disclaimer, Parke-Bernet expected that bidders at its auctions would rely upon the accuracy of its descriptions, and intended that they should. . . . The very fact that Parke-Bernet was offering a work of art for sale would inspire confidence that it was genuine and that the listed artist in fact was the creat[o]r of the work.

55 See,e.g., "Theater Fare For the Daring," N.Y.Times, Apr. 27, 1984, at C1 col 1, discussing the production of unproven plays.

56 A retailer°s good will is legally recognized as property. See Levitt Corp v. Levitt, 593 F.2d 463, 468 (2d Cir. 1979)(citing Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412-13 (1916).

retaining one°s credibility is the careful identification of those items that may not meet one°s standards rather than the ability to absolutely exclude lower quality items.

Thus newspapers seeking to present high quality objective news reporting may also provide more subjective material of unknown accuracy without injuring their reputations provided that they carefully identify the latter material as such. Messages clearly identified as advertisements or letters-to-the-editor may be inaccurate without damaging the credibility of a publication°s news department. The local news department of a broadcast station may enjoy an excellent reputation even though the station broadcasts incredibly silly comedies or childish movies.[57]

3. Endorsements

Many consumers also look to retailers to recommend specific products. A retailer can make its endorsement explicit with a label or can offer consumers an explicit evaluation or analysis of competing products. Waiters often recommend dishes to diners seeking advice and real estate agents try to find the property most suitable to clients° tastes. In the media, a salesperson in a book store may recommend a special book or a television station may recommend a forthcoming program in an advertisement or editorialize about some news story.

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57 This identification strategy can also work for producers who are concerned about maintaining their brand image. For example, Walt Disney wanted to expand into the production of "R" rated adult films, yet it did not want to damage its reputation for producing wholesome family films. To maintain its traditional Disney quality standard while also producing films that did not meet those standards, it marketed its new category of films under a different name: Touchstone. See Multichannel News, Feb. 27, 1984, at 6 col. 1 By the use of such distinct labeling Disney has been able to retain its reputation and still offer material that would not meet the former Disney standard.

A retailer may also communicate its recommendations more subtly through the positioning of its products. Headlines and store windows often feature those products that retailers believe consumers will or should desire most. Also, just as retailers can use careful labeling to maintain their reputations for high quality standards while simultaneously offering lower quality less expensive products, so they can distinguish between products that they recommend and those about which they make no judgment.

One retailer may rent out a large space in its building to another retailer with different quality standards and disclaim any association with the lessee°s product selections. The landlord retailer may treat its tenant like a neighbor across the street. Similarly, a newspaper can establish an op-ed page to carry guest essays which may oppose positions taken by the editors without confusing readers about, or even revealing, the paper°s own position on an issue.

And the Supreme Court has recognized that media owners need not be perceived as endorsing all the items that are available in their media. In PruneYard Shopping Center v. Robins,[58] the Court held that a state constitutional provision forcing a shopping center owner to permit the public to disseminate messages on its property does not compromise the owner°s editorial integrity. The Court felt that the shopping center owner was not being forced to affirm the views of those on its property, nor even to make any editorial judgment about their messages. The nature of the medium was such that the owner was able to remain silent on the issue without revealing its own position.

58 447 U.S. 74 (1980).

In a concurring opinion, Justice Powell examined the issue in some detail. He quite properly recognized that the first amendment would come into play if the government forced a firm to permit others to act in a manner that was likely to mislead consumers about the firm's position on some issue. As Powell observed, such a requirement would force a retailer to speak out affirmatively to dispel any misconception and thereby deny it the right to remain silent on the issue. The critical issue concerns the nature of the medium and the public's perception of it.[59] A primary reason for the Supreme Court's split decision in Pacific Gas & Electric v. Public Utilities Commission of California[59A] was a disagreement on that matter.

Ordinarily it would appear that a simply worded disclaimer that "the views expressed here do not represent the views of this establishment, but are carried as required by state law" would more than adequately warn consumers not to attribute such views to the property owner. Such disclaimers are commonly used effectively by public broadcasting stations, concerning the viewpoints expressed on their programs, by airports, concerning the proselytizers in their terminals, and even by Supreme Court

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58A The central controversy in Pacific Gas & Electric v. PUC Cal., U.S.L.W. (Feb. 25, 1986) concerned whether or not Pacific's right to remain silent on an issue was affected by the messages that access recipients might disseminate. The plurality felt that Pacific would feel compelled to respond to statements that it disagreed with, yet they did not explain why. The others, backed by evidence such as that offered in the paragraph accompanying note 60, infra, suggested that Pacific could still remain silent without misleading the public.

59 Powell went on to discuss the media of bulletin boards and building lobbies and suggested that people would be likely to conclude that the views expressed thereon would reflect the views of the owner, unless the owner were to expressly disavow them, PruneYard, 447 U.S. at 99, but this seems unlikely.

Justices, upholding laws with which they personally disagree.[60]

C. Organizing

A third related service that retailers provide is organizational in character. While the serendipity of a flea market or a random twist of the TV dial is often refreshing,[61] most consumers like to be able to locate desired products quickly and easily. Many readers of Variety are frustrated with the lack of organization in that publication. It usually seems little

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60 As Justice Brennan observed in dissent in the 5-4 decision in Lehman v. City of Shaker Heights, 418 U.S. 298, 321-22 (1974):

> The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board . . . The impression of city endorsement can be dispelled by requiring disclaimers to appear prominantly on the face of every advertisement.

While this was a dissenting opinion, Justice Blackmun, the author of the majority opinion has explained that the decisive factor in the case was the existence of a captive audience. See, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). See also Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973).

Note also that "The Nightly Business Report," produced by WPBT in Miami and distributed by PBS, concludes each program with the message that the opinions expressed by its guests are their own and do not necessarily reflect the views of the producers, WPBT, or the station. The theory that judicial decisions should not reflect the value judgments of judges (i.e. judicial self restraint) is eloquently explained, among other places, in Felix Frankfurter°s dissent in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943)(Frankfurter, J. dissenting). In Pacific Gas & Electric v. PUC Cal., U.S.L.W. (Feb. 25, 1986), Justice Powell admitted that "[t]he presence of a disclaimer . . . serves . . . to avoid giving readers the mistaken impression that [the access recipient°s] words are those of the [media owner]." [10] In a current case, the owner of an electronic bulletin board is claiming that he should not even be responsible for being aware of the messages carried on his bulletin board, in particular, a list of telephone credit card numbers that could be used by viewers to avoid payments. See, Pollack, "Free-Speech Issues Surround Computer Bulletin Board Use," N.Y. TImes, Nov. 12, 1984, at A1 col. 1.

61 See Engel, supra note 27; P.Rose, "Hers," N.Y.Times, Apr. 12, 1984 at C2 col.1.

better organized than a set of school bulletin boards. Most retailers, however, will arrange their items in some logical fashion, for example, by departments and by size, style, or brand. They may also provide directories to assist consumers.

Editors provide similar organizing services for their readers. A sports magazine may place its statistics in the same place in every issue and a women°s magazine may index its beauty tips or fashion features. Classified ads and the yellow pages are normally organized by subject as are the books in a book store. When there is no general directory because specialized retailers are not affiliated with each other, an independent firm may even provide this editorial service. Thus TV Guide and local newspapers often identify their choice of the best movies, new television programs, or sporting events for a given day or week. These services save consumers time and trouble.

To some extent this service was discussed by the Supreme Court in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.[62] In that 1973 case, a newspaper was charged with violating a prohibition against sex discrimination in employment when it permitted its classified advertisers to place their help wanted ads under the categories of "Jobs - Male Interest" and "Jobs - Female Interest."

A 5-4 majority of the Court recognized that although the first amendment accorded editors wide discretion, it nevertheless did not protect an organization of messages that aided employers seeking to discriminate according to sex.[63] Under the analysis

62 413 U.S. 376 (1973).
63 Id, at 389.

developed in this article, the dissenters might seem to have the stronger argument since the ordinance also prohibited editors from sorting their ads to aid those of their readers who desired such editorial assistance.[64] Yet, the holding is consistent with the proposed framework if it is read, not as prohibiting an editor from providing the organizational service offered, but only as prohibiting the use of the labels "male interest" and "female interest." Clearly the editors were permitted to use other organizational categories, and they could have used sex neutral terms like "heavy manual labor" and "secretarial" to aid their readers in quickly and easily finding the most suitable job offerings.[65] This would permit the Court to uphold both the right of editorial freedom and the equal protection. Coexistence rather than difficult balancing.

D. Summary

In summary, editors appear to provide consumers of messages with three general categories of service, the same three that retailers in other markets generally provide to their customers:

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64 Id. at 384.

65 Were the decision to be read with a broader scope it would create the danger observed by Justice Stewart:

> The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out government policy. After this decision, I see no reason why government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable. And if government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?

Id. at 403.

Could a government agency prohibit a newspaper from presenting its men's and women's sports news on separate pages? It is hard to imagine that a court would prevent a publisher from carrying different classified ads in the employment sections of its separate men's and women's magazines, yet this seems almost indistinguishable from the Pittsburgh Press case.

searching, gathering and specializing; evaluating, labeling, and and screening; and organizing. If editorial freedom is the right of consumers to be served by editors then the first amendment must protect the right of consumers to receive these services from editors.

It is important to note, however, that the provision of the editorial services discussed does not necessitate that editors be permitted to absolutely exclude messages. They can provide all of their services without a right to exclude. Thus government regulations preventing media owners from exercising their fifth amendment property rights to exclude do not necessarily abridge first amendment editorial freedom. In fact, government access regulations, which facilitate the ability of multiple editors to gain access to consumers, would be supported rather than prohibited by the first amendment, provided such regulations did not themselves inhibit the provision of editorial services.

The specific editorial services that appear most susceptible to abridgement by governmental regulations of the media are: editorial efforts to specialize and editorial efforts to protect audiences from offensive material.

III. The Constitutionality of Alternative Access Schemes

The constitutionality of access regulations can be evaluated under the framework above by examining whether they deny consumers of information any of the particular editorial services discussed above. This section will present such examinations of regulations including: exclusive cable franchise awards, the "must carry" rules, public and leased (common carrier) access schemes, the fairness doctrine, and right-of-reply statutes. It will focus particularly on the effect of these rules on specialization and screening services. But first, since most of these rules relate to cable television it is helpful to discuss the editorial services that cable system operators provide.

Cable editors begin by considering the many varieties of programming available. From among the myriad of national and regional video satellite networks, audio networks, distant broadcast signals, information services, video cassette and locally produced programming, they select the set of messages they consider to be of most interest to the specialized tastes of their particular local market.[66]

Based on this review of the programming available, cable editors generally provide their subscribers with evaluations, identification and recommendations in the form of a cable guide. The guide may be displayed on a channel, but it is usually printed and mailed to subscribers and resembles TV Guide. It describes the offerings on each channel as well as more detailed descriptions and recommendations of particular individual movies or programs. In it cable operators may suggest that

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66 See note 42, supra.

subscribers make a special effort to watch a program or be careful to avoid another. They might even describe an adult movie in both ways, that is: "A °must see° for erotic film fans, but be sure to use a locked box to keep young children from seeing it."

Generally a cable operator will completely exclude networks that present programming it finds unattractive. Still, many networks may be included despite occasional offensive material, for cable operators can warn subscribers to avoid such programs. For the analysis below it is useful to observe that no cable operators evaluate or endorse every single individual program message that they transmit. It is understood by all that cable operators generally rely on the editorial choices of different network editors and therefore may have no opinion about particular programs or messages except to feel that the network as a whole is desired by local subscribers.

One organizational service that cable operators provide is the grouping of channels into groups or "tiers." Consumers generally cannot subscribe to channels individually; they must buy entire tiers. Such groupings, however, do not seem to represent an organizational service in the sense discussed above. The only such service that a cable operator might provide would be lists of sporting events, comedy programs, or special movies in a monthly cable guide or on a cable guide channel.

Now one can evaluate specific access regulations.

A. Exclusive Cable Television Franchise Awards

In Preferred Communications v. City of Los Angeles,[67] the

[67] 754 F.2d 1396 (9th Cir. 1985) cert. granted 54 USLW 3328

Ninth Circuit evaluated a claim that the L.A. franchising procedure violated the first amendment rights of the plaintiff, a desirous cable franchise operator, by permitting only a single firm to get the city franchise. The Court noted that the franchise agreement permitted unsuccessful franchise applicants, like the plaintiff, a limited right of access via mandatory and leased access channels. Nevertheless, it held that the plaintiff was still denied the editorial discretion to "[a]rrang[e] programming for an entire cable system,"[68] elaborating that "cable television operators exercise considerable editorial discretion regarding what their programming will include."[69]

Under the framework above, however, editorial freedom is not abridged by denying a firm the right to program an entire cable system. Moreover, it appears that the denial of a cable franchise license to a potential cable editor does not inhibit the provision of any of the editorial services discussed above, as long as the designated franchisee is required to provide adequate access. This is so whether or not cable TV transmission is a natural monopoly and, in either case, whether exclusive franchise awards constitute good public policy.[69A]

Assuming that they can secure adequate channel capacity,[69B] even unsuccessful franchise applicants can search and gather

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(Nov. 1985).

68 Id. at 1410.

69 Id. at n.10.

69A For an excellent discussion of why cable television transmission might not be a natural monopoly or why, even if it were, it might not be good public policy to award exclusive franchise licenses, see T. Hazlett, Private Monopoly and the Public Interest: An Economic Analysis of the Cable TV Franchise (Feb. 1986) (unpublished draft); Hazlett, "Private Contracting Versus Public Regulation as a Solution to the Natural Monopoly Problem," in Unnatural Monopolies 71 (R.Poole ed. 1985).

together the specialized set of programming they desire to offer to some target audience and disseminate it over leased channels. Lack of actual ownership or control over distribution systems need not inhibit their ability to communicate any more than government granted monopolies in first class mail delivery[70] and local telephone service[71] interfere with the free expression of those who use the mail or telephones.

If an exclusive franchise award permitted the monopolist to charge unreasonable rates for access then access seekers could argue that the excess charges were a form of unconstitutional government authorized tax on expression via cable,[72] but if the franchise agreement was designed to insure that rates were set at competitive levels no problem would exist.

Unsuccessful franchise applicants could also evaluate and identify programming for subscribers without owning or controlling a system. After evaluating all of the programming carried by the cable operator -- its own and others -- the unsuccessful applicant could identify the programming that it

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69B They could be guaranteed adequate capacity if the franchise agreement required the cable system franchisee to provide adequate and reasonably priced access to all access seekers just as local telephone franchise agreements require those companies to provide service at reasonable rates to all those who desire it. At first blush this suggests that access rates would have to be regulated to insure their reasonableness, but there is another alternative. Nadel, COMCAR: A Marketplace Cable Television Franchise Structure, 20 Harv. J. Leg. 541 (1983) explains how rates could be set by creating a competitive market.

70 See 18 U.S.C. $ 1696 (1982); 39 U.S.C. $$ 601, 604 (1982); see also National Ass°n of Letter Carriers v. Independent Postal Sys. of America, Inc., 470 F.2d 265 (10th Cir. 1977).

71 See 47 U.S.C. $ 203(c) (1982); see also Capital Tel. Co. v. City of Schenectady, 560 F.Supp. 207 (N.D.N.Y. 1983).

72 See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), discussed infra, note 82 and accompanying text.

recommended as well as warning consumers about channels or particular offensive programs to avoid. Subscribers could be instructed how to lock out the latter material through a lock box[73] or other similar device.

These evaluations and identifications could be communicated to subscribers on a separate cable channel at a particular time or times, in newspapers, competing cable guide magazines, or newsletters; via radio, television, or teletext; or even over the telephone. Thus consumers who preferred to rely on the editorial judgments of anyone other than an exclusive franchise applicant would still be able to do so.

Finally, unsuccessful franchise applicants could still help consumers to locate desired programs quickly and easily. Competing editors could tell subscribers exactly where to find the best programs for children, for working women, for sports enthusiasts, for senior citizens, or for those hungry for financial data. Such editors might even instruct consumers how to program VCRs to personally edit cable programming to suit their particular tastes.

In conclusion then, the award of an exclusive cable franchise need not abridge the rights of consumers to utilize the editorial services of unsuccessful cable franchise applicants. Adequate access rules are necessary to insure that consumers are able to receive the programs recommended by editors lacking franchise

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73 Thus section 624 (d)(2)(A) of the 1984 Cable Act states that:

> In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

licenses, but evaluation, labeling, and screening; and organizational services could be provided efficiently in other ways. Therefore, the award of an exclusive franchise without adequate provisions for access would abridge first amendment rights of editorial freedom. The provision of adequate access, however, would give subscribers the opportunity to consider the opinions of multiple competing cable editors and eliminate first amendment concerns.

B. The Must Carry Rules

Prior to their repeal in Quincy Cable TV, Inc. v. FCC,[74] the must carry rules required a cable system owner to carry the signals of local broadcast stations and thereby insured that such stations had easy access to cable subscribers.[75] Upon careful examination, however, the D.C. Court of Appeals found that: 1) the FCC had not demonstrated that the rules served an important or substantial governmental interest[76] and 2) that they were not narrowly tailored to impose a restriction no greater than essential to the furtherance of the articulated interest.[77]

While the court was careful to marshal the strong evidence that justified these conclusions, it was much more cursory with

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74 768 F.2d 1434 (D.C.Cir. 1985).

75 The rules of mandatory signal carriage were promulgated in First Report and Order, 38 F.C.C. 683, 710-14 (1965) and codified at 47 C.F.R. 76.51-76.65 (1984). The FCC imposed them out of a fear that cable systems would cause such economic harm to broadcasters that the latter would be unable to afford to meet their public service obligations, thus creating an information poor of non-cable subscribers. More recent economic reports, however, have raised some doubts about these conclusions. See, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979) discussed in Quincy, 768 F.2d at 1455-59.

76 768 F.2d at 1454-59.

77 Id. at 1459-62.

its review of how the rules interfered with the editorial freedom of cable operators. Thus it noted only that "[w]e need not decide whether the cable operator°s editorial discretion is of the same order as that of a broadcaster or a newspaper [citations omitted]. We have no doubt, however, that it is of sufficient magnitude to implicate the First Amendment."[78] Under the framework above, however, the rules do not appear to interfere with the provision of any editorial service.

1. Searching, Gathering & Specializing

On first glance the rules do appear to inhibit specialization; they require a cable editor who desires to offer only some particular specialized cable programming to also retransmit local broadcast stations. Yet on closer inspection this does not actually appear to be a true burden because cable operators are permitted to offset the cost of the rules by charging consumers for retransmission and overall the retransmission of broadcast signals is generally a very profitable business.[79]

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78 Id. at 1452-53 n.39. And this is not the first time that the Court has had trouble articulating the extent of editorial discretion. As Justice Rehnquist observed in Pacific Gas & Electric v. PUC of California, U.S.L.W. (Feb. 25, 1986):

> In Miami Herald . . . the Court extended negative [first amendment] rights to newspapers without much discussion. The Court stated that the right of reply statute . . . "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors." [citations omitted] The Court explained that interference with "the exercise of editorial control and judgment" creates a peril for liberty of the press like government control over "what is to go into a newspaper." [citations omitted] The Court did not elaborate further on the justification for its holding.

79 While it is clear that consumers might not be willing to pay the real cost of carriage of less popular UHF stations, the total price that consumers are willing to pay for the entire bundle of must carry signals appears to make them the most profitable service to provide in many areas. See, J. Henry, "The Economics of Pay-TV Media," in Video Media Competition: Regulation, Economics, and Technology 21 (E.Noam ed. 1985)

In addition, cable operators are granted another privilege long regarded as a quid pro quo for the must carry rules: they are granted a license to import and retransmit programming from distant broadcast stations, and to pay only a low compulsory license rate.[80] These compensatory benefits ordinarily cover more than the cost to the cable operator of providing must carry access, and therefore the must carry rules would not appear to create an expensive entry barrier to desirous cable operators.

If a cable operator could show that the rules did serve as taxing burden on cable transmission[81] then they would probably be recognized as a media tax and be voided under the standard

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observing that the sale of "basic" service is more profitable to cable operators than the sale of pay services. In fact this should not be surprising since the cable industry initially earned its profits simply by srving as a retransmitter of local broadcast signals. See K. Webb, The Economics of Cable Television (1983).

80 17 U.S.C. 111 grants cable operators a compulsory license to retransmit broadcast programs at a regulated rate. Intitally, the rate was set artificially low in deference to the economic plight of the cable industry. See Hatfield & Garrett, A Reexamination of Cable Television°s Compulsory Licensing Royalty Rates, 30 J. Copyright 433 (1983). Many commentators consider the benefit that cable operators receive from this provision to be predicated on the must carry rules. See C. Ferris, F. Lloyd & T. Casey, Cable Television Law sec. 7.12 [7] at 7-48 to 7-49 (1983). Thus, after the repeal of the latter rules, proposals for the repeal of the former arose. See, e.g. "Going to War over must carry," Broadcasting, July 29, 1985, at 23-28; "Countdown on must carry," id., Feb. 3, 1986, at 30-34.

81 Such a regulation would act effectively as a tax. See, e.g. Posner, Taxation by Regulation, 2 Bell J. Econ. & Man. Sci. 22, 33-34 (1971). To require cable operators to provide public access channels is comparable to requiring theater owners to donate some use of their stage or screen to public purposes, for example, two weeks a year or every other Tuesday, or requiring that all newsstands devote at least 8% of their shelf space to the distribution of free leaflets written by local residents.

A 1984 NCTA study, conducted by the NBER, concluded that the cost of providing public access channels and other regulatory costs amounted to approximately $240-340 per subscriber over the life of the franchise. See, W. Shew, Costs of Cable Television Franchise Requirements 3-4 (1984).

announced by the Supreme Court in Minneapolis Star & Tribune Co. v. Minnesota Comm°r of Revenue.[82] Such a tax would presumably raise the price of cable service and thus would probably makes it prohibitively expensive for some lower income households to subscribe. The tax would therefore deprive such households of receiving a specialized editorial service that was willingly offered to them.

If other benefits were provided to offset the cost of the must carry channels, the rules would appear to have no influence on the ongoing editorial decisions made by cable operators. The rules do not create any contingent duties which might inhibit operators from selecting the programs or satellite networks that its customers desire[82A] nor do they limit the number of additional channels an operator may construct.

While cable operators might argue that the must carry rules force them to undertake the expense of expansion to provide space for new services rather than simply replacing existing must carry stations, this is a disengenuous position. Since 1966, well before most cable systems completed their construction or most recent upgrade, operators have been aware of the number of

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82 460 U.S. 575 (1983). This ruling was the basis for striking down a tax on MDS subscription fees in City of Alameda v. Premier Communications Network, 156 Cal. App.3d 148, 202 Cal.Rptr. 684 (Cal.App. 1 Dist.), cert denied, 105 S.Ct. 567 (1984). See also, Ripon Cable Co. v. City of Ripon, No. 81-CV-684 (Wisc. Cir. Ct., Fond du Lac County, filed Oct. 12, 1982), discussed in Cable TV Law & Finance, Aug. 1984, at 4.

82A It would be hard to argue that compelled access for local TV stations would "penalize the expression of particular points of view and force[cable operators] to alter their speech to conform with an agenda they do not set." under the standard articulated in Pacific Gas & Electric v. PUC of Cal., U.S.L.W. (Feb. 25, 1986) since TV households would have easy access to local broadcasters° messages under any circumstances.

channels required to retransmit must carry stations. They were then free to add as many additional channels for their elective channels as they desired. If they underestimated their need for channels then they would now have to face expensive expansion anyway. That expense is not a burden created by the must carry rules.[83]

For first amendment purposes one can treat the must carry rules as if they involve the provision of a service separate from the editorial service that the operator desires to provide, a service provided on a separate fixed number of channels. It is as if a local government were to contract for the construction of a modern information "highway" to permit its citizens to have high quality access to local broadcast signals in the same way that the government might contract for the construction of a subway system to provide high quality transportation services to its residents. As long as the rules do not impose a burden -- here an economic one -- there seems to be no reason why the government can not require adherence by the cable operator; clearly the operator, who will already be digging up streets or stringing wires on telephone lines for its own purposes, is the ideally qualified candidate.

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83 Because it is only practical to add channel capacity in bundles of multiple channels, e.g. a 12 channel cable, an operator at full capacity, who does not find expansion to be cost effective may feel that its obligation to carry must carry stations is preventing it from carrying more desirable channels. Yet this problem of a "lumpy" supply curve is created by the technology, not the must carry rules. One need only realize that if the government were to acquire an entire 12 or 24 channel cable, by purchase or a taking with just compensation, the operator would face the same problem when it reached full capacity and found it desirable to carry a few new channels of service, but not economical to add an entire 12 or 24 channel cable.

From this perspective it is clear that the cable operator is actually providing two distinct transmission services: 1) transmission of local broadcast stations under a government contract and 2) transmission of cable services of its choice.

2. Evaluating, Labeling & Screening

The must carry rules also do not prevent cable editors from helping consumers to screen out those programs that they find offensive. Not only can editors warn consumers to avoid particular messages which may be scheduled to appear on the must carry channels, but editors can recommend the use of lock boxes for consumers who would like to eliminate any or all must carry channels.[84] Cable editors can recommend which channels to lock out permanently or can be more particular and suggest only occasional lock outs. Thus they can provide a screening service to all subscribers who desire it while others rely on the screening services of the editors of the must carry stations.

Editors can argue that the must carry rules damage their reputations because subscribers will evaluate cable based in part on programs broadcast on must carry stations -- which could include religious or excessively indecent or violent programming. There is no reason, however, why the the cable operator can not dispel this notion by careful labeling its products in the same manner as other retailers. A cable operator can clearly indicate in its guide and marketing materials that "must carry stations are carried by law and may be affirmatively excluded by consumers who desire a locked box."

Although both must carry stations and services preferred by

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84 See note 72, supra.

the operator would flow through the same equipment there should be no more danger of misassociating the two than there is danger that PBS will be associated with ABC or MTV associated with CBS, simply because they both share occupancy of a subscriber's TV. Consumers are already aware that the firms that market television sets or VCRs are not responsible for program content.[85]

3. Organizing

As for organizational services, the must carry rules do not interfere with the way a cable operator organizes the programs it desires to carry. It can place them all in a separate tier if it desires.

In summary then, as long as the must carry rules do not impose an unreasonably taxing economic burden on cable operators -- and they do not appear to do so -- the rules do not interfere with an operator's provision of the editorial services desired by consumers and protected by the first amendment.

C. Public Access Channels

Cable television franchise agreements often require cable operators to offer public access channels as a kind of electronic soap box for the community[86] and section 611 of the 1984 Cable

85 Even if a firm like RCA desired to sell television sets which were only capable of receiving signals from the affiliates of its wholly owned subsidiary NBC, it is required to manufacture TV sets that can receive all licensed TV broadcast stations, VHF and UHF. See, the All Channels Receivers Act, 76 Stat. 150 (1962), codified at 47 U.S.C. 303(s). For a more general discussion of disclaimers, see note 60, supra and accompanying text.

86 For a short early history of public access channels see, B. Schmidt, Freedom of the Press vs. Public Access 207-16 (1976); Price & Morris, "Public Access Channels: The New York City Experience," in Sloan Commission on Cable Communications, On the Cable: The Television of Abundance 229 [appendix C] (1971).. For a more recent update see, K. Beck, Cultivating the Wasteland (1983).

Act authorizes such requirements.[87] Despite such congressional authorization, the rules have been subject to a number of first amendment challenges.[88]

Based on the same reasoning used to analyze the must carry rules, public access channel requirements only appear to threaten a single editorial service: specialization. They should not have any effect on a cable operator°s efforts to recommend which cable channels to lock out and how to organize its program information.

As with the must carry channels, the cost of constructing and maintaining public access channels is not insignificant. Still, cable operators receive some payment to offset the cost of providing such access channels. First, some portion, albeit small, of the revenues that subscribers pay for basic service should be attributed to the receipt of the channels. Second, the good will they generate may be very valuable. Third, and most controversial, is the compensation that may be attributed to receipt of the franchise license.

If a locality is permitted to sell a franchise license for a profit-maximizing price[89] then it may treat the value of the

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87 47 U.S.C. 611 (1985).

88 See Berkshire v. Burke, 571 F. Supp. 976 (D.R.I. 1983) vacated as moot, 773 F.2d 382 (1st Cir. 1985); also, Connecticut Cable Television Association v. O°Neill (D. Conn., filed Aug. 13, 1984)(cited in Cable Television Law & Finance, Oct. 1984 at 5). Although section 611 of the 1984 Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat 2779, 2782 to be codified at 47 U.S.C. 611, expressly permits franchising authorities to impose such access requirements, the Act does not resolve the issue of whether the requirements abridge the first amendment rights of cable operators.

The Supreme Court upheld a challenge to cable access rules in FCC v. Midwest Video Corp (Midwest Video II), 440 U.S. 689 (1979), but that holding was on statutory grounds. The only reference to the first amendment was a footnote observing that the first amendment claims were "not frivolous." Id. at 709 n.19.

89 See Gannett v. Metropolitan Transit Authority, 745 F.2d 767

franchise (minus the amount of any franchise fee that a cable operator pays) as a payment by the community for public access. Since cable operators calculate all projected costs, including the expense of providing the additional required channels and since they voluntarily agree to such conditions the fee determined would appear to fully offset the cost of the channels. If, on the other hand, the sale of a franchise license violated the first amendment, then the first amendment would require the government to provide some other form of just compensation to cover the cost of constructing and maintaining the additional channels.

If government bodies did not fully offset the burdensome cost of the public access channels then courts might treat the channel requirement as a taxing burden on cable transmission. The requirement would then fall for the same reason that burdensome must carry rules would fall: the imposition of a discriminatory media tax.[90]

D. Common Carrier Leased Access Structures

As a common carrier, the owner of a transmission conduit is required to relinquish editorial control over some of its medium to others on a non-discriminatory basis.[91] There are a number of ways of imposing such a nondiscriminatory structure. For example, the 1934 Communications Act requires telephone companies

(2d Cir. 1984).

90 See note 82, supra and accompanying text.

91 The Communications Act defines common carrier as "any person engaged as a common carrier for hire . . . ." 47 U.S.C. sect. 153(h)(1976). Originally common carrier regulations were imposed on any business which held itself out to serve the general public, apparently in response to a finding of market power in an essentail service. See, Competitive Carrier Rulemaking, 84 F.C.C.2d 445, 520-34 (1981).

to offer non-discriminatory access to all consumers and producers of information[92] and the modified final judgment in the AT&T divestiture case forbids AT&T from entering the information services industry altogether for seven years.[93]

Many different proposals were made in the 1970s and early 1980s for regulating cable as a full or partial common carrier[94] and the 1984 Cable Act included a commercial leased access provision from the latter category. Section 612 requires operators of cable systems with more than 35 channels to set aside approximately 10 to 15 percent of those channels for the use of unaffiliated program supplier/editors at reasonable rates.[95]

If this system serves to satisfy the access needs of all those who are willing to pay the competitive market price for access, then this system would appear to be free of constitutional infirmities. It would not seem to interfere with the provision of any of the editorial services protected by the first amendment. If 612 does not provide adequate access at competitive rates[96] then a full common carrier system -- which

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92 47 U.S.C. 202.

93 See United States v. AT&T, 552 F.Supp. 131, 186 (D.D.C. 1982) aff°d sub nom. Maryland v. U.S. 460 U.S. 1001 (1983). It is interesting to observe that this provision of the divestiture decree was imposed at the urging of those traditional champions of the first amendment, the newspaper publishing industry, who appear to interpret the first amendment as forbidding the government from suppressing any press expression, unless it is the expression of a potential competitor! See Compaine, supra note 23, at 75-77.

94 See the list of studies in Nadel, Cablepeech For Whom?, 4 Cardozo Arts & Ent. L.J. 51, 70 n.104 (1985).

95 See 47 U.S.C. 612. The provision requires that such cable systems designate 10 to 15 percent of their channels which are activated and not otherwise being used for other government required, e.g. must carry purposes, for commercial leased (i.e. common carrier) access.

also permitted the system owner to transmit its own programming -- might be advisable.[97]

Such a common carrier requirement would not prevent a cable operator from searching, gathering, or presenting the programming it desired or from evaluating all programming on its or others° channels and identifying which was recommended, and which should be avoided (or even locked out). Other programming could be carried with no comment or with an explicit disclaimer: "This programming is being carried as a legal obligation. The cable system owner is not responsible for its content."[98]

E. The Fairness Doctrine

The Communications Act of 1934 requires broadcast licensees to serve the public interest[99] and the FCC has interpreted this to require broadcasters and cable operators to observe a "fairness doctrine."[100] The doctrine imposes two obligations. A licensee

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96 The complicated procedures established in 612 make it almost impossible for a desireous lessee to compel a cable operator to grant access at a competitive market rate. The operator is permitted to charge a rate which fully appropriates its monopoly power.

97 This author has proposed a common carrier scheme that would not require rate regulation. See Nadel, supra note 68B.

98 See note 60, supra. While the availability of lock boxes would permit cable operators to help their audiences to avoid offensive programming, the imposition of common carrier requirements in other media might be unconstitutional if it deprived editors of the ability to provide similar protection to their audiences. For example, readers of traditional print media might want to be guaranteed protection against serendipidously stumbling upon an offensive message in their favorite periodicals. Absent some less drastic way of permitting editors to help readers avoid messages that they might find offensive, the right of editorial freedom would appear to include the right to require that an access seeker pay the cost of enclosing his or her message in a sealed envelope insert which could be opened or disposed of at a reader°s discretion.

99 47 U.S.C. 303, 309.

100 For a detailed discussion of the evolution of the fairness doctrine, see Notice of Inquiry, 49 Fed.Reg. 20317, 20319-22 (May 14, 1984); S. Simmons, The Fairness Doctrine and the Media

must 1) devote a reasonable amount of its programming to controversial issues of public importance and 2) provide a balanced presentation of contrasting viewpoints on these issues.[101] The political editorializing rule, a corollary to the fairness doctrine, requires broadcasters who endorse or oppose political candidates to offer reasonable time for responses by opposing candidates.[102] Since the first of these duties is almost never enforced,[103] the focus here will be on the second "balance" requirement.

The balance requirement has been severely criticized by broadcasters and commentators alike for creating a chilling effect.[104] The argument is that, in view of the cost of carefully presenting opposing views as well as the risk that a failure to do so could cost it the loss of its license, a broadcaster may be reluctant to freely express its positon on some specialized set of issues. Although the Supreme Court called these fears speculative when it upheld the fairness doctrine in Red Lion v. FCC,[105] the FCC recently documented a

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(1978). For a discussion of the application of the doctrine to cable television and proposals to repeal or replace it there, see Notice of Proposed Rulemaking, 48 Fed.Reg. 26472 (Jun. 8, 1983).

101 See Red Lion Broadcasting Co. v. FCC, 395 US. at 377; and Report on the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C. 1 (1974).

102 See 47 C.F.R. 73.1930 (1984).

103 See, e.g. Chamberlin, The First Principle of the Fairness Doctrine: A History of Neglect and Distortion, 31 Fed. Comm. L.J. 361 (1979); Comment, Enforcing the Obligation to Present Controversial Issues: the Forgotten Half of the Fairness Doctrine, 10 Harv. Civ. Rts.-Civ. Lib. L.Rev. 137 (1975).

104 See Fairness Doctrine Report, 58 R.R.2d 1137, 1151-71 (1985); F. Rowan, Broadcast Fairness 120-23 (1984). But see, Steir, "The Struggle for TV°s First Amendment Rights," View, Jan. 1984, at 39, reporting that, according to an informal survey of group-owned stations, the doctrine did not appear to have any significant chilling effects in practice.

number of instances where the fairness doctrine actually appears to have chilled expression.[106]

For example, relatively few broadcasters editorialize or permit advertisers to present issue oriented commercials,[107] apparently because they fear that such messages might trigger a fairness doctrine duty to offer free time to those with contrasting viewpoints.[108] Rather than taking this risk, most broadcasters find it preferable simply to refuse to grant access to advertisers who desire to present controversial messages.[109]

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105 See Red Lion, 395 U.S. at 393. It should be pointed out, however, that the court did not feel that the chilling effect of a right-of-reply statute was too speculative to recognize when it decided Miami Herald v. Tornillo, 418 U.S. 241 (1974).

106 See Fairness Doctrine Report, 58 R.R.2d at 1158-71 (1985). Meanwhile, the Supreme Court has hinted that it would accept a decision by legislators or regulators to repeal the doctrine. See FCC v. League of Women Voters, 104 S.Ct. 3106, 3116-17 n.11 & n.12 (1984).

107 According to a study by the National Association of Broadcasters, only 3 percent of stations endorse candidates and only 45 percent reported editorializing in any form since 1980. See NAB, Motion for Leave to File Supplemental Comments in Petition for Rulemaking to Repeal and/or Modify the Personal Attack and Political Editorializing Rules, RM-3739, Jan. 10, 1983. cited in F. Rowan, supra note 104, at 147.

And ". . . few broadcasters routinely accept paid editorial advertisements.", Fairness Doctrine Inquiry, 74 F.C.C.2d 163, 175 (1979); F. Rowan, supra note 104, at 154-55. See also the discussion of the WTOP case, in Lee, The Problems of "Reasonable Access" to Broadcasting for Noncommercial Expression: Content Discrimination , Appelleate Review, and Separation of Commercial and Noncommercial Expression, 34 U. Fla. L.Rev. 348, 348-53 (1982).

108 Under the Cullman doctrine, broadcasters must offer free time to opposing parties who can not afford to pay for it. See Cullman Broadcasting Co., 40 F.C.C. 576 (1976).

109 The attitude of many broadcasters is reflected in the testimony given by a Mr. Lavergne before the House Communications Subcommittee, where he indicated that the right to editorialize, when tied to an obligation to provide equal time, was really no right at all. See Hearings on H.R. 3333 before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (1979). Vol II, Pt.1 at 555, cited in Kokalis, Updating the Communications Act: New Electronics, Old Economics, and the Demise of the Public Interest, 3 Comm/Ent L.J. 455, 495-96 n.250 (1981). The Supreme

In fairness to the FCC, the agency almost never second guesses the discretionary judgments of broadcasters on questions of balance,[110] but broadcasters are often still reluctant to risk the possibility that some group will charge them with having made an unbalanced presentation of an issue and force them to undertake expensive litigation.

The requirement that broadcasters present contrasting viewpoints on controversial issues does not prevent them from editorializing[111] to identify their own position on issues, labeling opposing viewpoints as "editorial replies," and making no comment or a disclaimer concerning issues about which they prefer to keep their views private. It does prevent them from screening out viewpoints that their audience might find offensive.

Court upheld the right of broadcasters to refuse ads in CBS v. DNC, 412 U.S. 94 (1973).

110 In Columbia Broadcasting System v. Democratic Nat°l Comm., 412 U.S. 94, 111 (1973) the Supreme Court held that a broadcaster is allowed significant journalistic discretion in deciding how to fulfill its obligations under the fairness doctrine. Thus the Commission has stated that: "Unless clearly unreasonable, editorial decisions [concerning obligations under the fairness doctrine] will not be disturbed." Energy Action Committee, 64 F.C.C.2d 787, 797 (1977). In fact, according to longtime FCC observers Barry Cole and Mal Oettinger:

> When petitioners have alleged that a station has not been meeting its public service obligations in programming, but no question of racial discrimination has been raised, the Commission usuually cites its philosophy of leaving program judgments to the licensee°s discretion.

B. Cole & M. Oettinger, The Reluctant Regulators 220 (1978). Of 10,301 fairness doctrine complaints received by the FCC in 1980, the agency found cause in only 28 to even ask broadcasters to respond and only 6 led to admonitions against the stations. See F. Rowan, supra note 104, at 51, 92 (1984). Nevertheless, informal efforts to secure enforcement appear to be effective. Id. at 71-88.

111 In FCC v. League of Women Voters, 104 S.Ct. 3106 (1984), the Supreme Court held that even public broadcasters are entitled to editorialize.

Ardent Zionists can not rely on a broadcaster to exclude the PLO position, and devout Fundamentalists cannot expect a broadcaster to keep out all references to legalized abortion or homosexual lifestyles. Although some audience members might prefer to rely on a broadcast editor to screen out undesirable material, broadcasters cannot guarantee that their entire output will be free of messages that might offend some.

Yet broadcasters may still provide a screening service by the use of careful scheduling. The fairness doctrine does not require that all viewpoints on an issue be presented in each program;[112] a broadcaster can present one side on one evening and those other sides, which may offend some viewers, on other evenings accompanied by explicit warnings for viewers who might prefer to avoid such material. Broadcasters might even label such material "All the news unfit to broadcast." Even with the availability of carefully written programming guides and lock out devices, the danger still exists that children or adults might accidentally switch on to such programming, but that danger may be one of the costs of having a strong first amendment.[113]

In summary, however, even if broadcasters could protect their audiences from undesired and offensive messages, the fairness doctrine certainly hinders their efforts to provide consumers with some specialized editorial services. While this interference might be tolerable if it were inevitable, due to

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112 See the Fairness Report, cite at 8, 17, 19-20?; Democratic National Committee v. FCC, 717 F.2d 1471 (D.C.Cir. 1983); American Security Council, 94 F.C.C.2d 521, 524 (1983); Public Media Center, 59 F.C.C.2d 494 (1976), remanded, 587 F.2d 1322 (D.C.Cir. 1978), on remand 72 F.C.C.2d 776 (1979).

113 See note 49, supra.

some scarcity rationale,[114] the existence of less drastic means of regulating access -- the leased access/common carrier structure discussed above[115] -- suggests that the fairness

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114 Courts and commentators have commonly held that the costs of the fairness doctrine are justified by the scarcity of radio frequencies, but this justification is invalid. As all serious economists have noted, the radio frequency spectrum is actually no more scarce than the resources used by other media. See Coase, The Federal Communications Commission, 2 J. L & Econ 1 (1959) and other sources noted in Nadel, supra note 8, at 541 n.62 (1984). And even if there was some absolute scarcity of spectrum this would not justify a government scheme that allocates the vast majority of it to the government itself (primarily the defense department, see H.Levin, The Invisible Resource (1971)), sets the price of spectrum at zero, and then uses the resulting government created shortage of spectrum for the private media to justify regulations.

To hold otherwise would suggest that the government could impose a fairness doctrine on the print media if it first created a scarcity of paper by legislation, for example, during war time. See, e.g. War Production Board Limitation Order L-244, imposing quotas on newsprint, reported in United States v. Rewl Publications, 153 F.2d 610 (2d Cir. 1946), see also United States v. Baird, 241 F.2d 170, 172 (2d Cir. 1957). The scenario for a Federal Paper Commission is given in B. Owen, Economics and Freedom of Expression 90 (1975).

In fact the imposition of a licensing scheme on a medium of expression appears to be precisely what the framers of the first amendment sought to prohibit. Even those who interpret the amendment narrowly--as only prohibiting prior restraint of the press--use the example of the sixteenth century English Stationers° Act, which outlawed unlicensed publications, as the type of law that was to be unconstitutional. Yet Professor William Van Alstyne has pointed out that the licensing scheme of the 1934 Communications Act is "uncomfortably akin" to that Stationers° Act. It should be remembered that that Act was passed by Parliment to deal with the novel and potentially powerful new technology of printing. W. Van Alstyne, Interpretations of the First Amendment 61, 69 (1984).

115 See B. Owen, J. Beebe, W. Manning, Television Economics 130-37 (1974), suggesting that broadcast licenses could grant the holder the right to broadcast on one day a week, among other arrangements. As more television households are equiped with addressable converters, there is the possibility of multiple firms presenting single pay-per-view (PPV) segments. See, e.g., Baldwin, Wirth & Zenalty, The Economics of Per-Program Pay Cable Television, 22 J. Broadcasting 143 (1978); Ross, "Pay-per-view: On the verge of prominence," CableVision, Nov. 4, 1985, at 24-32.

It appears that the primary reason that the Supreme Court upheld the fairness doctrine in the Red Lion case was that to do otherwise would upset 40 years of broadcast history, according to the FCC°s winning counsel in the case, Henry Geller. See Geller

doctrine is unacceptably restrictive.

F. Right-of-Reply Statutes

To encourage balanced debate many countries have imposed access regulations resembling those established by France in 1881, whereby publishers are required to grant a right of reply to those attacked in published stories.[116] While the system appears to work adequately well in practice,[117] the version of

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and Lampert, Cable, Content Regulation and the First Amendment, 32 Cath. U. L.Rev. 603, 618 (1983)

Today a common carrier system of broadcasting appears to be required by the "least drastic means" test. As the Supreme Court said in Minneapolis Star & Tribune v. Minn. Com°r of Rev., "[u]nder a long line of precedents, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. [citing United States v. Lee, 455 U.S. 252, 257-58, 259; U.S. v. O°Brian, 391 U.S. 367, 376-77; NAACP v. Alabama, 357 U.S. 449 (1958)]. See also, United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969); Emerson, supra note 14, at 11 ("it is hard to avoid the conclusion that the right to know demands a common carrier system of regulation in broadcasting.") A common carrier structure is discussed in section III.D., supra.

116 Since the enactment of Art. 13 of the Law of July 29, 1881 a "right of response" has been available in France for persons who believe that their reputations have been injured by a statement in the written press. The people mentioned in a news article are the sole judges of whether they have been injured and they can require a newspaper to print their response to the defamatory language. Toulemon, Le Droit de Reponse et la Television, La Gazette du Palais-Doctrine 393, 394 (1975). Cited in Meyerson, The Pursuit of Pluralism: Lessons of the New French Audiovisual Communications Law, 21 Stan. Int'l L.J., nn. 140-41 # and accompanying text (1985). See also, P. Lahav, Press Law In Modern Democracies (1985) discussing the right of reply in Germany, id. 214; Sweden, id. 248-49; and Israel, id. 293.

117 The importance of this right is so well accepted in France that one commentator described it as, "the principle that has long been recognized as necessary for the protection of public and private liberty." Bouissou, Le State de L°Office de Radiodiffusion-Television Francaise (ORTF), 80 R.D.P. 1109, 1196 (1964). It has been hailed as, "an excellent law which established a reasonable balance between the freedom of thought and the rights of others." Toulemon, supra, at 393.

In 1972 a more narrowly drawn right of response was extended to radio and television. Art. 8 of the Law of July 3, 1972. The ground rules for it were laid out in Decree No. 75-341 of May 13,

that law adopted by Florida was voided by a unanimous Supreme Court in Miami Herald Publishing Co. v. Tornillo.[118] As the Court summarized its holding, the Florida right-of-reply statute was unconstitutional because it "°exact[ed] a penalty on the basis of the content of a newspaper,°[and t]here also was a danger . . . that the statute would °dampe[n] the vigor and limi[t] the variety of public debate.°"[119]

That is, a right-of-reply statute, like its cousin the fairness doctrine, can hinder the efforts of editors to provide consumers with specialized and screening services.[120] First, it creates a disincentive to present controversial stories, for publishing them might trigger an obligation to provide free coverage of unpopular opposing viewpoints, and therefore double the cost of providing the first story. Second, while it does permit editors to differentiate between messages--indicating whether they recommend them, find them unfit to print, or present

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1975. See Meyerson, supra note 116.

118 418 U.S. 241 (1974). See FLA. STAT. sec. 104.38 (1982) (repealed 1975). Recently, an Ohio statute requiring retractions was struck down on constitutional grounds, see Journal v. Landsdowne, 11 Med.L.Rptr. 1094 (Ohio Ct. of Common Pleas 1984). Earlier, a Mississippi right-of-reply statute, MISS. CODE ANN. sect. 3175 (1942) (now MISS CODE ANN. sect. 23-3-35 (1972)), was essentailly overturned in Manasco v. Walley, 216 Miss. 614, 63 So.2d 91 (1953). In 1969, Nevada repealed its right-of-reply statute, Law of April 14, 1969, ch. 310, sect. 10 [1969], repealing NEV. REV. STAT. sect. 200.570 (1963) as discussed in Bollinger, Freedom of the Press and Public Access: Toward A Theory of Partial Regulation of the Mass Media, 75 U. MICH. L. REV. 1, 3 n.10, 18 n.57 (1976).

119 The Court summarized its Tornillo decision in PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980)(quoting Tornillo, 418 U.S. at 256-57). See also Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 n.82 (D.C.Cir.) cert denied, 434 U.S. 829 (1977).

120 This flaw could be remedied, however, by modifying the law to grant a paid-right-of-reply. See, e.g., the common carrier scheme discussed in III.D., supra.

them without taking a position--editors would not be empowered to actually screen out all the messages that at least some of their customers might want excluded, thereby denying consumers of information a service which they desire.

This latter difficulty could be rectified if the editor disseminated offensive replies in sealed inserts, but the cost that this would impose would certainly hinder the ability of any publisher to print messages that were likely to trigger such costly replies. There is no doubt that right-of-reply statutes would abridge editorial freedom.

In Pacific Gas & Electric v. Public Utility Commission of California[121] Justice Powell also complained that the Florida statute "interfered with . . . °editorial control and judgment° by forcing the newspaper to tailor its speech to an opponent°s agenda, and to respond to candidates° arguments where the newspaper might prefer to be silent."[122] but it is unclear how or why this would occur. Powell did not elaborate about this point in his concurrence in Tornillo nor in his plurality opinion in Pacific Gas.[123]

IV. Conclusion

When economies of scale and scope serve to frustrate the establishment of a competitive media marketplace, the government may consider a number of alternatives for facilitating access to the media. While media owners may challenge all proposed access schemes as abridgements of their editorial freedom, this defense does not hold up against a careful analysis of what editorial

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121 U.S.L.W. (Feb. 25, 1986).
122 Id. at .
123 See id. at (Rehnquist, J., dissenting).

freedom actually is and why it is protected by the first amendment.

This article has argued that editorial freedom is best understood as the right of consumers to receive the editorial/ retail services that they want and need to digest the messages produced in the marketplace of ideas and information. An examination of the role of editors in that marketplace indicates that they provide consumers with three particularly valuable and important editorial services: 1) searching, gathering & specializing; 2) evaluating, labeling & screening; and 3) organizing the messages so that desirable ones can be located easily. The first amendment appears to protect the right of consumers to utilize these services by protecting the rights of editors who desire to offer them.

Using this framework, it is clear that both the fairness doctrine and right-of-reply statutes abridge editorial freedom because they hinder the ability of editors to specialize to serve the desires of consumers and may hinder efforts to screen out offensive messages. The must carry rules and public access channel requirements may also abridge that right when they represent a burdensome tax on the provision of cable service, but absent a taxing burden they would not.

Exclusive cable franchise licenses abridge the editorial freedom of unsuccessful franchise applicants, unless those applicants are guaranteed an adequate right of access at competitive prices. The only way of insuring the provision of adequate access would appear to be by imposing common carrier duties on cable system owners. Such duties would not hinder the

efforts of cable operators to offer any of the editorial services protected by the first amendment°s editorial freedom.