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NOTES

NEW TECHNOLOGY, OLD PROBLEM: DETERMINING THE
FIRST AMENDMENT STATUS OF ELECTRONIC
INFORMATION SERVICES

PHILIP H. MILLER

INTRODUCTION

In the battle over free speech on electronic information services, Prodigy Information Services Corporation has been besieged from all sides. In 1990, a group of subscribers to the computerized information system complained that Prodigy had placed too many restrictions on the volume and content of electronic mail messages, inhibiting communication on the system.1 In 1991, the Anti-Defamation League of B'nai B'rith and others contended that Prodigy had in fact placed too few restrictions on its electronic mail and bulletin board services, permitting users to post "hate mail" directed at racial and ethnic groups.2 In 1993, another group of subscribers alleged that an electronic forum established for the discussion of alternative lifestyles had become overwhelmed by explicit sexual banter, prompting Prodigy to cancel the service.3

Although certain aspects of Prodigy's predicament may be unique to its status as the operator of an electronic information service ("EIS"), the conflict at the core of the problem is really nothing new. As a pioneering participant in a new type of communications service, Prodigy is caught in the same fundamental First Amendment struggle that has shaped the development of other "emerging" media—including telephone, radio, broadcast television, and, more recently, cable television. Like Prodigy and other EIS operators, those who own and control these more established media have had to struggle to stake out their status under the First Amendment.4 More specifically, at some point in their development, most of these media have sought to secure the sort of "full" First Amendment protection that is afforded to print publishers—the fullest freedom from regulation afforded by the First Amendment's proscriptions against government restrictions on free speech and freedom of the press.5

4. See infra notes 103-25 and accompanying text (discussing the development of the First Amendment status of telephone companies); notes 126-83 and accompanying text (discussing the development of the First Amendment status of broadcasters); notes 184-293 and accompanying text (discussing the development of the First Amendment status of cable television operators).
5. See, e.g., Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748.
A critical determination often comes fairly early on in this struggle, when Congress or the courts decide whether those that operate a new medium will be categorized as publishers, common carriers,\(^6\) broadcasters, or some sort of hybrid. For Prodigy and other electronic information services, at least one court has already tried to reach this determination. In Cubby, Inc. v. CompuServe Inc.,\(^7\) a federal district court ruled that the operator of an EIS should be treated as a distributor rather than as a publisher, at least for establishing liability under state libel law.\(^8\)

This Note considers whether Cubby and related rulings set the correct course for regulating electronic information services. Parts I and II begin more generally, however, by examining how courts can condone any government regulation of media at all, given the First Amendment's apparent blanket ban of such governmental interference with free speech and a free press, and the various categories into which the regulations that have survived constitutional scrutiny tend to fall. Part III then draws several historical analogies, noting how the tension between First Amendment concerns and government regulation has influenced the growth of three relatively mature technologies: telephone, radio and television broadcasting, and cable television. Finally, this Note concludes with some specific recommendations for applying these historical lessons to the regulation of electronic information services.

I. REGULATING ELECTRONIC MEDIA UNDER THE FIRST AMENDMENT: AN OVERVIEW

The First Amendment insists that Congress "make no law . . . abridging the freedom of speech, or of the press."\(^9\) Despite this constitutional prohibition, however, Congress and the states\(^10\) have in fact "made" a variety of laws that abridge the freedoms of speech and press—and that courts have accepted as reasonable restrictions on these First Amendment freedoms. For example, the United States Supreme Court has held constitutional laws that limit or prohibit

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6. The term "common carrier" is defined infra note 109 and accompanying text.
8. See id. at 139-41.
10. Although the First Amendment itself speaks only to Congress and not to state legislatures, the First Amendment guarantees are among the "fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." Gitlow v. New York, 268 U.S. 652, 666 (1925).
obscene speech,11 “fighting words,”12 and certain types of commercial speech.13 Moreover, and more important for this discussion, the Supreme Court has upheld a number of laws and regulations that place special burdens on the First Amendment rights of those that own and program radio and television stations, cable television systems, and other electronic communications services.14

As a general rule, any government restriction on the content of constitutionally protected speech is subject to strict constitutional scrutiny.15 That is, courts will require that the law or regulation in question be very narrowly tailored to serve a compelling state interest.16 When the restrictions are directed toward the content carried on electronic communications media, however, a less stringent standard sometimes applies. For example, in Red Lion Broadcasting Co. v. Federal Communications Commission,17 the Supreme Court upheld the constitutionality of the “Fairness Doctrine” through which the Federal Communications Commission (FCC) requires broadcasters to provide a right of reply to certain individuals and groups—even though, as the Court subsequently ruled, such a right of reply requirement is clearly unconstitutional when applied to print media.18 Similarly, in Federal Communications Commission v. Pacifica Foundation,19 the Court upheld the FCC’s right to sanction a radio station for broadcasting a comedy routine containing “indecent” language—even though the same language would probably have enjoyed

15. Strict scrutiny applies when the regulation in question restricts the content of protected speech. See, e.g., Sable Communications of Cal., Inc. v. Federal Communications Comm’n, 492 U.S. 115, 126 (1989) (“The government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”) (emphasis added). However, when the government attempts instead to regulate the time, place, or manner of speech, or when a regulation implicates “speech conduct” or purely commercial speech, a somewhat more relaxed standard applies. See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983) (to survive constitutional scrutiny, a time, place, or manner restriction must be “content-neutral . . . [and] narrowly tailored to serve a significant government interest”) (emphasis added).
16. See Sable, 492 U.S. at 126.
18. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (rejecting as unconstitutional a Florida “right of reply” statute requiring newspapers to provide political candidates with the opportunity to respond to attacks on their public records or personal characters).
full First Amendment protection if published in print. As these cases illustrate, in the Supreme Court's view at least, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."21

A. The Red Lion "Scarcity" Rationale

The Supreme Court has cited several reasons for drawing distinctions between electronic and print media under the First Amendment. In Red Lion, for example, the Court focused on the fact that, unlike print publishers, broadcasters operate on frequencies assigned to them under a government license.22 For this reason, the Court concluded that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use."23 This argument is also known as the "scarcity rationale," since it is based on the assumption that broadcast channels are a scarce public resource and that, in exchange for receiving the exclusive right to exploit such a valuable public commodity, broadcasters should both expect and accept regulation intended to insure that they operate in the public interest.

B. The Pacifica "Intrusiveness" Rationale

In Federal Communications Commission v. Pacifica Foundation,24 the Supreme Court followed a different line of reasoning in distinguishing broadcast and print media under the First Amendment. Pacifica involved the FCC's attempt to sanction25 a radio station operator for broadcasting a comedy monologue that, in the Commission's opinion, violated section 1464 of the U.S. Penal Code26—the provision that prohibits the transmission of "any obscene, indecent, or profane language by

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20. See id. at 746.
21. Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 386 (1969) (footnote omitted); see also Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 376 (1984) (noting that "because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests"); Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 n.8 (1980) (observing that "[t]he uniqueness of each medium of expression has been a frequent refrain" in Supreme Court opinions involving the First Amendment).
22. See Red Lion, 395 U.S. at 388-89.
23. Id. at 391.
25. As the Supreme Court observed, the FCC did not actually impose formal sanctions on the Pacifica Foundation, the operator of the radio station, "but it did state that the order [granting the complaint] would be 'associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress.' " Id. at 730 (quoting 56 F.C.C.2d, at 99).
means of radio communications." Significantly, the Supreme Court concluded that the language at issue constituted indecent speech under section 1464 and the current constitutional standard, rather than obscene speech that is outside the protection of the First Amendment. Nevertheless, the Court upheld the FCC's right to sanction broadcasters for transmitting such speech, even while acknowledging that similar government interference would be unconstitutional if the same material was disseminated in a print publication.

In justifying this distinction, the Court explained that it had "long recognized that each medium of expression presents special First Amendment problems. . . . [a]nd of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." In this instance, however, the Court did not focus on the fact that broadcasters operate under a government license, as it had in Red Lion. Rather, the Court concentrated on the peculiar characteristics of the medium itself, pointing first to the "uniquely pervasive presence" that the broadcast media have established in the lives of all Americans. To the Court, this "pervasive presence" meant that "indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."

As further support for its position, the Court cited a second distinguishing characteristic of broadcasting: its unique accessibility to children. In this sense, the broadcast media are distinct from many other forms of communication in that offensive expression disseminated through other media may be withheld from the young "without restricting the expression at its source" (for example, by restricting access to a movie theater displaying "adult" films to those of a certain age, rather than by restraining distribution of the film itself). In contrast, because broadcast programming becomes instantly available to children by simply switching on a radio or television, the only effective way to limit children's access to offensive or indecent broadcast material is to place restraints on its transmission.

C. The Sable Standard

Pacific is especially noteworthy because, read broadly, it would permit government regulation based on the peculiar characteristics of the communications system or service in question, regardless of whether the

28. See id. at 745.
29. See id. at 741.
30. Id. at 748 (citation omitted).
31. Id.
32. Id.
33. See id. at 749.
34. Id.
system or service operates under a government license. This raises the specter of the government reviewing each new communications service that comes along to determine if it threatens to be so pervasive or intrusive as to warrant preemptive government regulation.

In fact, it was just this sort of preemptive government strike that was at issue in Sable Communications of California, Inc. v. Federal Communications Commission, a 1989 Supreme Court case that considered the constitutionality of federal legislation aimed at restricting children’s access to “dial-a-porn” telephone services. The federal law in question amended section 223(b) of the Communications Act of 1934 to ban both obscene and indecent communications transmitted over interstate telephone lines for commercial purposes. Although the express purpose of section 223(b), as originally enacted, was to prevent minors from gaining access to sexually explicit messages, the total ban required under the amended statute would have effectively put Sable Communications and other dial-a-porn providers out of business.

In reviewing the statute, the Supreme Court quickly concluded that the section banning obscene messages was constitutional, since obscenity is not protected speech under the First Amendment. But the Court had much more trouble with the part of the law prohibiting those messages that were merely indecent. Lawyers for the government argued that such a ban on indecent telecommunications could withstand constitutional scrutiny, pointing to Pacifica as support for this proposition. The Court disagreed, however, noting that Pacifica was distinguishable on several grounds. First, the FCC rule challenged in Pacifica did not involve a total ban on a particular type of communication, as was the case with the dial-a-porn legislation at issue in Sable. Rather, it was an attempt to “channel” objectionable material to a time of day when chil-

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36. The Supreme Court described the service provided by Sable Communications as follows:

In 1983, Sable Communications, Inc., a Los Angeles-based affiliate of Carlin Communications, Inc., began offering sexually oriented prerecorded telephone messages (popularly known as “dial-a-porn”) through the Pacific Bell telephone network. In order to provide the messages, Sable arranged with Pacific Bell to use special telephone lines, designed to handle large volumes of calls simultaneously. Those who called the adult message number were charged a special fee. The fee was collected by Pacific Bell and divided between the phone company and the message provider. Callers outside the Los Angeles metropolitan area could reach the number by means of a long-distance toll call to the Los Angeles area code.

Id. at 117-18 (footnote omitted). The Court also noted that “[d]ial-a-porn is big business. The dial-a-porn service in New York City alone received six to seven million calls a month . . . .” Id. at 120 n.3.
38. See Sable, 492 U.S. at 120.
39. See id. at 124.
40. See id. at 127.
dren would be less likely to be tuning in. Second, and most important for this discussion, the Court distinguished the media involved in the two cases on technical grounds, observing that:

[t]he Pacifica opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in Pacifica. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication.

Given this distinction between broadcast and telephone technology, and given the availability of less restrictive means for limiting children's access to dial-a-porn, the Court concluded that the part of the statute prohibiting indecent communications did not survive constitutional scrutiny.

D. First Amendment Parameters: How Far Can the Government Go?

Red Lion, Pacifica, and Sable suggest some parameters for gauging how far the government may go in regulating electronic communications media. First, as Red Lion indicates, the government can go farthest when the media entity in question is licensed to transmit over the public airwaves. When this is the case, the scarcity rationale applies, and the government may impair the First Amendment rights of the communicator to promote the public interest. Second, as Pacifica shows, the government can place reasonable restraints on the transmission of indecent or offensive program material, regardless of whether the transmitting entity operates under a government license, to prevent unreasonable intrusions on the privacy or quietude of individual viewers and listeners. Finally, Sable suggests that the government's right to regulate under the Pacifica "intrusiveness" rationale varies in degree, depending in part on the nature of the technology involved.

In fact, Pacifica and Sable can be seen as setting out a sort of "spec-
trum of intrusiveness” for electronic media. At the farthest, most intrusive end of the spectrum are broadcast services that arrive in the home unsolicited, providing viewers or listeners with little prior warning or protection against unexpected program content. At the other, least intrusive end are services such as dial-a-porn and “pay-per-view” that require some sort of initiating act or intervention to trigger each transmission. Somewhere in the middle lie cable television channels such as Home Box Office that subscribers must initially ask to have added to their cable service, but that are then readily available to anyone, including any child, who switches on the television set.

II. CATEGORIES OF GOVERNMENT REGULATION

From a First Amendment perspective, most laws and regulations affecting electronic media fall into one of three categories: content regulation, access regulation, and ownership regulation. Reviewing these categories should provide some additional insight into the reasons for and limits of government regulation of the media. This review should also help establish a framework for the discussion of specific technologies that follows.

A. Content Regulation

Content regulation occurs when the government attempts to encourage or to discourage the transmission of a particular type of program material. Most often, as Pacifica illustrates, the content in question is obscene or indecent material, and the government assumes the role of “discourager” to protect sensitive members of the listening or viewing public. Conversely, the government also encourages the transmission of certain content that is considered beneficial to the public, most notably through the broad FCC rules requiring broadcasters to carry a mix of programming that meets the information and entertainment needs of the

48. See Pacifica, 438 U.S. at 748.
49. Pay-per-view is a service currently delivered over cable television systems that "allows viewers to order individual programs and pay for them on a per-view basis." James C. Goodale, All About Cable: Legal and Business Aspects of Cable and Pay Television § 5.05(2) (1992).
51. As discussed in note 15, supra, content regulation is the category of government regulation that is subject to the strictest form of constitutional scrutiny.
52. One recent example of the government acting to discourage allegedly indecent material (and one recent reminder that the Pacifica standard is alive and well) is the $105,000 fine that the FCC levied in October, 1992, against a Los Angeles radio station for its broadcast of sexually explicit comments by syndicated "shock jock" Howard Stern. In this instance, the Commission went much further than it had in Pacifica, actually levying a fine against the Los Angeles station and threatening to delay the planned acquisition of several additional radio outlets by the station's parent corporation. See Edmund L. Andrews, F.C.C. Torn Over Howard Stern Case, N.Y. Times, Nov. 27, 1992, at D14.
communities that they are licensed to serve. In addition, the Fairness Doctrine and Equal Time Provision, discussed below as examples of access regulation, can also be considered forms of content regulation through which the government encourages broadcasters to carry issue-oriented programming that reflects community concerns and interests.

One type of content that the government definitely discourages as being contrary to the public interest is cigarette advertising. Since 1971, a federal statute has prohibited cigarette commercials on radio and television. Prior to the passage of that statute, however, the FCC had made running cigarette advertising problematic for broadcasters by ruling that cigarette ads on radio and television were subject to the Fairness Doctrine. In reaching this determination, the FCC had reasoned that, because cigarette smoking was a controversial issue of public importance, and because cigarette advertising promoted smoking "as attractive and enjoyable," the Fairness Doctrine required broadcasters who carried cigarette commercials to devote a "significant amount" of valuable airtime to public service announcements or other programming that presented the anti-smoking point of view.

The constitutionality of this FCC ruling was examined and ultimately upheld in Banzhaf v. Federal Communications Commission, a case worth noting in this discussion primarily for the distinction that the Court of Appeals for the District of Columbia drew between broadcast and print media. The broadcasters intervening in Banzhaf argued that the FCC order applying the Fairness Doctrine to cigarette advertising on radio and television should be barred because the same rule would be unconstitutional if applied to print advertising. The Court of Appeals disagreed, concluding that this special treatment of broadcasters could in fact be accommodated under the First Amendment. Foreshadowing

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53. See Federal Communications Commission, Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303 (1960). In this report, more widely known as the 1960 Programming Policy Statement, the FCC formalized rules requiring broadcasters to ascertain the information and entertainment needs of residents in their service areas and to provide programming that, on balance, meets those needs. The FCC's constitutional and statutory authority to establish these programming standards was sustained in Henry v. Federal Communications Comm'n, 302 F.2d 191 (D.C. Cir. 1962). In recent years, however, the FCC has relaxed its ascertainment and programming requirements. See Action for Children's Television v. Federal Communications Comm'n, 821 F.2d 741 (D.C. Cir. 1987), vacated, 932 F.2d 1504 (1991). Congressional concern that this trend had left young viewers underserved resulted in one of the more recent government efforts to encourage positive program content, the Children's Television Act of 1990. This legislation is discussed in the text accompanying note 181, infra.


55. See Letter from Federal Communications Commission to Television Station WCBS-TV, 8 F.C.C.2d 381 (1967). The Fairness Doctrine is discussed infra in notes 66-78 and accompanying text.

56. See id. at 382.


58. See id. at 1099.

59. See id. at 1100.
the Supreme Court's reasoning in *Pacifica* some nine years later, the court observed that although “[t]he First Amendment is unmistakably hostile to governmental controls over the content of the press,”60 there may “be a meaningful distinction between . . . media justifying different treatment under the First Amendment.”61 In the court’s view, a key distinction between broadcast and print media is that:

> written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are “in the air.” In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.62

To the Court of Appeals, then, broadcast messages are subject to special content restrictions not only because they are so pervasive, as the Supreme Court would later acknowledge in *Pacifica*, but also because they are so potentially persuasive.63

**B. Access Regulation**

Through access regulation, the government attempts to open up communication channels to a variety of voices and viewpoints. The leading examples of access regulation are the Fairness Doctrine and its close cousin, the Equal Time Provision.64 The leading case that considers the constitutionality of this category of regulation is *Red Lion*.65

The Fairness Doctrine is an FCC rule66 that places a dual burden on

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60. *Id.* (footnote omitted).
61. *Id.*
62. *Id.* at 1100-01 (footnote omitted).
63. *But see* Telecommunications Research & Action Ctr. v. Federal Communications Comm’n, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (rejecting the notion “that it is the immediacy and the power of broadcasting that causes its differential treatment”). Writing for the court, Judge Bork was “unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection.” *Id.*
64. In contrast to the Fairness Doctrine, which is an uncodified rule that concerns the coverage of controversial issues generally, the Equal Time Provision is a statutory requirement that applies specifically to situations in which a station provides broadcast time to candidates for public office. Codified as § 315(a) of the Communications Act of 1934, the Equal Time Provision requires any broadcast station that allows one candidate access to its airtime and facilities to make the same opportunity available to other qualified candidates for the same office. *See* 47 U.S.C. § 315(a) (1988).
66. As discussed in note 67, *infra*, courts have held that the Fairness Doctrine is an FCC-created rule, rather than a statutory requirement under the Communications Act of 1934, despite the fact that the Code of Federal Regulations states that “The Fairness Doctrine is contained in section 315(a) of the Communications Act of 1934, as
First, the doctrine requires broadcasters to cover issues of public concern in the local areas that they are licensed to serve. Second, the doctrine requires broadcasters to cover these controversial issues fairly by presenting contrasting points of view. The specific regulation at issue in Red Lion was the "personal attack" rule—a subset of the Fairness Doctrine requiring that, when an individual is personally attacked as part of a broadcaster's coverage of controversial issues, the broadcaster must notify the individual that the attack occurred and provide the person with an opportunity to respond.

The Fairness Doctrine raises First Amendment concerns because it involves a government intrusion on a broadcaster's right to control the editorial content of its programming. When the First Amendment speaker is a newspaper or book publisher, this right of editorial control is considered nearly inviolable. In Red Lion, however, the Supreme Court determined that this right is not nearly so inviolable when the speaker in question is a broadcast licensee operating on a frequency assigned by the government. When that is the case, and where "there are substantially more individuals who want to broadcast than there are frequencies to amended." 47 C.F.R. § 73.1910 (1991). Section 315(a), which does codify the "Equal Time Provision" that requires broadcast licensees to provide equal access to candidates for political office, states only that "[n]othing in the foregoing sentence [describing the equal time requirements] shall be construed as relieving broadcasters . . . from the obligation imposed upon them under this chapter . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a) (1988) (emphasis added). But that obligation is not made explicit in any other section of the Communications Act of 1934.

67. The current status of the Fairness Doctrine is a matter of considerable doubt and debate. In 1985, during the height of the deregulatory spirit that permeated the Reagan Administration, an FCC report concluded that the Fairness Doctrine was an unnecessary burden on broadcasters because it impeded rather than enhanced broadcast coverage of controversial issues. See Federal Communications Commission, In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligation of Broadcast Licensees, 102 F.C.C.2d 143, 147 (1985). Then, in a matter that came to the D.C. Circuit as Syracuse Peace Council v. Federal Communications Comm'n, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), the FCC indicated its intent to abandon the doctrine altogether. In that case, the court upheld the FCC's authority to decline to enforce the doctrine. As support for this position, the court cited Telecommunications Research & Action Ctr. v. Federal Communications Comm'n, 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987), an earlier D.C. Circuit decision in which the court ruled that, contrary to what many commentators apparently believed, a 1959 amendment to § 315 of the Communications Act of 1934 (the section that sets out the Equal Time Provision) had not in fact codified the fairness doctrine. See Syracuse Peace Council, 867 F.2d at 656. There have also been several attempts by Congress to codify the doctrine, including the Fairness in Broadcasting Act of 1987. See S. 742, 100th Cong., 1st Sess. (1987). That legislation was vetoed by President Reagan, however, and Congress failed to override.

68. See Red Lion, 395 U.S. at 377.
69. See id.
70. See id. at 373.
allocate," the Court concluded that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." To the Supreme Court, then, the Fairness Doctrine constitutes a permissible abridgement of the First Amendment rights of broadcast licensees, since the doctrine promotes the "ends and purposes of the First Amendment" by opening the airwaves to "others whose views should be expressed on this unique medium." In other words, in this particular First Amendment balancing act, "[i]t is the right of viewers and listeners, not the right of broadcasters, which is paramount." Broadcasting is not the only medium that has been subjected to the Fairness Doctrine, the Equal Time Provision, or some similar sort of access regulation. In the 1970s, for example, the FCC promulgated rules requiring cable systems of a certain size to provide public, educational, and government access channels. And in 1986, in an opinion written by Judge Bork, the Court of Appeals for the District of Columbia ruled that teletext, a new technology that transmits information over an unused portion of the television signal, was itself subject to the Fairness Doctrine. Further, as discussed in the sections that follow, the government has attempted to promote comparable access goals through regulating the ownership and structure of communications services.

C. Ownership Regulation

One assumption that underlies the First Amendment, and one precept that is fundamental to all government regulation of broadcasting and telecommunications, is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." As just discussed, one way that government attempts to further this purpose is through the Fairness Doctrine and Equal Time Provision. Another way is through media ownership regulations intended to promote the "diversification of programming sources and viewpoints."
Although some media ownership restrictions are statutory, including the prohibition against foreigners obtaining broadcast licenses, most are the result of FCC rulemaking and regulatory discretion. Consequently, the scope and impact of media ownership rules have varied over the years, depending on the regulatory mood in Washington generally and at the FCC in particular. Because of this complex history, and because the rules themselves tend to be quite technical, a complete review of media ownership regulations is beyond the scope of this Note. For the purposes of this discussion, it is enough to recognize that the government attempts to further First Amendment "diversification" goals through quantitative ownership and "cross ownership" guidelines that prevent any one entity from owning too many media services in total and too many media outlets in any one market. For example, FCC regulations currently prevent any one individual or corporation from owning more than twelve television stations nationwide, and the Cable Communications Act of 1984 prohibits any single entity from owning a television station and cable television system that serve the same market. In addition, the FCC has attempted to promote diversity in media ownership by giving preferential treatment to women and minorities in granting broadcast licenses. As these examples suggest, most media ownership restrictions target radio and television stations—the media outlets over which the government exercises the greatest degree of control through the licensing process, and that of all the electronic media are generally perceived as the most powerful and pervasive information purveyors.

D. Structural Regulation and Libel Liability

Two other types of government regulation of media raise First Amendment concerns: structural regulation and libel law. Both types of regulation deserve discussion, but neither really fits under any of the categories described above. As a result, they are addressed separately here.

The first type, structural regulation, occurs when the government

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82. See Edmund L. Andrews, F.C.C. Plan to Ease TV Owner Rule, N.Y. Times, May 15, 1992, at D1. As the title of this Times article suggests, however, the FCC has proposed changing its rules to increase the number of television stations that any one licensee is permitted to own. The primary rationale for the proposed change is that new technologies such as cable television provide for more diversity of programming services, so that restrictions on ownership of broadcast licenses are less necessary to achieve this goal. In 1992, the FCC did increase the number of radio stations that any one licensee can own "to 18 AM and 18 FM stations from the current 12 each." Anthony Ramirez, A Compromise on Radio Station Ownership, N.Y. Times, Aug. 6, 1992, at D1.


designates a media service as a common carrier, broadcaster, publisher, or some other category of communications service. As discussed more specifically in the sections that follow, this structural designation carries important First Amendment implications. For example, for most regulatory purposes, telephone systems are designated common carriers. This means that they must provide public access to phone lines on a non-discriminatory, "first-come, first-served" basis. It also means that telephone companies have no real right to censor or to edit the messages transmitted over their lines. In contrast, newspaper publishers are free to exercise complete control over the editorial and advertising content carried on their pages, even when their exercise of this discretion seems capricious or discriminatory.

The second type of government regulation occurs when the courts enforce state libel laws. Until the Supreme Court decided New York Times Co. v. Sullivan, libel was generally not considered a constitutional issue. That is, like obscene speech or fighting words, libelous statements were viewed as falling outside the area of speech protected by the First Amendment. In Sullivan, however, the Court ruled that defamatory statements directed at public officials were fully protected speech under the First Amendment unless the public official could show

85. Under some definitions, structural regulation also occurs when the government reserves segments of the broadcast spectrum for particular types of communications services, or when the government insists that a communications service set aside a portion of its capacity for certain uses, as when the FCC required cable operators to reserve a number of channels for "leased access." See Daniel L. Brenner & Monroe E. Price, Cable Television and Other Nonbroadcast Video § 6.01[1] (1992).

86. See Federal Communications Comm'n v. Midwest Video Corp., 440 U.S. 689, 701 (1979):

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

(citations omitted).

87. See Michael O. Wirth & Linda Cobb-Reiley, A First Amendment Critique of the 1984 Cable Act, reprinted in 1988 Entertainment, Publishing and the Arts Handbook 315, 323 (John David Viera & Robert Thorne eds., 1988) ("A communications common carrier is defined as an entity that provides communication services for hire to the public on an indifferent basis and customers retain control over communications content.").


89. Defamatory statements made in a television or radio broadcast can be categorized as slander rather than libel, since they may considered to be spoken rather than written. The term "libel," as used in this Note, refers to both libel and slander.


that the statements were made with actual malice. In the Court's view, the actual malice standard provides the media with the breathing room required to pursue the "uninhibited, robust, and wide-open" debate on public issues that is such a central goal of the First Amendment.

In the years since Sullivan, the definition of who qualifies as a public figure under the actual malice standard has been refined, but the basic rule requiring that public figures prove actual malice still stands. In addition, in libel suits involving media defendants, courts now require that the plaintiff prove that the statements in question were false. This new standard, which reversed the prior rule requiring defendants to prove that the statements were substantially true, provides the media with a still greater measure of breathing space in libel suits.

Moreover, in establishing guidelines for determining libel liability, the courts have drawn some distinctions among the various types of media and communications services. For example, some courts have suggested that broadcasters should benefit from some additional room for error when conducting live interviews or covering breaking news stories. And in Cubby, Inc. v. Compuserve Inc., a case discussed in much more detail below, a federal district court determined that because an operator of an electronic information service functioned essentially as a common carrier or distributor, it should not be held to the same standard of libel liability as a publisher or broadcaster.

### III. Historical Analogies

The preceding Sections examined several rationales for, and First Amendment restrictions on, government regulation of the electronic media. This Section considers how the tension between these rationales and restrictions has shaped the development of three relatively mature electronic media: the telephone, radio and television broadcasting, and cable television. This historical review sets the stage for the analysis of elec-

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93. The Court said that the "actual malice" standard was satisfied when the plaintiff proved that the statement in question was made "with knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 280.

94. Id. at 270.


96. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (concluding that Falwell was a public figure and that, as a result, the actual malice standard applied).


100. See infra notes 324-43 and accompanying text.


102. Given the purpose of this Note, this historical review focuses on the First Amendment status of these three technologies. The discussion pays only passing attention to the
tronic information systems that follows.

A. The Telephone

The telephone was one of the first electronic communications media, and few would dispute that it has also proven to be one of the most important and pervasive communications technologies. Until quite recently, however, legal scholars and the telephone industry itself had expressed surprisingly little concern about where the telephone fits under the First Amendment. One reason for this apparent lack of concern may relate to the historical fact that, like most new technologies, the telephone was initially regulated by analogy. That is, Congress, the federal courts, and the states treated the telephone like the existing technology that it most closely resembled. In the case of the telephone, that analogous technology was the telegraph, a technology that itself had never received much respect as a medium worthy of First Amendment consideration.

According to Ithiel de Sola Pool, late professor of political science at the Massachusetts Institute of Technology, the telegraph failed to raise much First Amendment concern because the courts considered it analogous to still another 19th century technological phenomenon: the railroads alongside which the first telegraph wires were strung. As Professor Pool has pointed out, the initial model for regulating telegraphy "came from the evolving concept of a railroad common carrier." One critical consequence of adopting this model has been that:

the First Amendment is almost undetectable in cases concerning telegraphy. It might seem odd that when a new technology of communication came into existence, the courts did not perceive it as an extension of the printed word, sharing the same significance, the same infirmities, and the same need for protection as the press whose liberties the courts...
had so sedulously guarded. The reason for this dim perception of telegraphy was that the early telegraph carried so few words at such a high cost that people thought of it not as a medium of expression but rather as a business machine.107

Another key consequence of this initial perception was that the courts tended to view the telegraph as a means of commerce that Congress was free to regulate under the Commerce Clause, rather than as a medium of communication that was protected against intrusive government regulation under the First Amendment. This perception continues to carry important implications for federal regulation of the telephone and radio and television broadcasting, all of which continue to be regulated by Congress under the legislative authority conferred by the Commerce Clause.

1. Telegraph and Telephone Systems as Common Carriers

As Professor Pool observed, the adoption of the railroad model also resulted in the application of the common carrier form of structural regulation to the telegraph and, by subsequent analogy, to the telephone.108 Generally, communications common carriers are required to operate as "wires for hire," opening their transmission channels to public customers on a first come, first served basis.109

This structural designation carries several significant consequences for the First Amendment status of telegraph systems, telephone companies, and other communications common carriers. First, because common carriers must provide open access to their transmission channels, they are usually prohibited from programming those channels themselves (that is, from exercising their First Amendment right to free expression on their own channels) when doing so would result in reduced access for public users or an unfair competitive advantage for the carrier. Second, because common carriers are prohibited from exercising editorial control over the messages transmitted through their facilities, the carriers themselves are generally not held liable when those messages include libelous statements, obscene expression, fraudulent advertising or some other form of content that is subject to legal sanction.110 In other words, because telephone companies and others that operate as common carriers

107. Id.
108. See id. at 101.
109. See, e.g., Wirth & Cobb-Reiley, supra note 87, at 323 ("A communications common carrier is defined as an entity that provides communication services for hire to the public on an indifferent basis and customers retain control over communications content"); see also Federal Communications Comm'n v. Midwest Video Corp., 440 U.S. 689, 701 (1979) ("A common-carrier service in the communications context is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . ." ") (citations omitted).
110. See Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115 (1989) (holding the dial-a-porn service provider rather than the telephone company subject to sanctions for transmitting content that violated the federal statute in question).
are considered to be primarily transmitters of speech rather than First Amendment speakers themselves, they do not benefit from the full range of protections afforded to speakers under the First Amendment. Conversely, because they are not held responsible as First Amendment speakers for the content of the speech that they transmit, communications common carriers are usually not held liable when that speech is subject to criminal or civil sanctions. The significance of these distinctions will become more fully evident in the discussion of two communications technologies that are not regulated as common carriers: radio and television broadcasting and cable TV.

2. Telephone Systems as Natural Monopolies

Any extended discussion of communications common carriers in the United States will invariably touch on the theory of "natural monopolies." That is the case because the nation's most dominant and familiar common carrier, the American Telephone and Telegraph Company (AT&T), was allowed to control most local and long distance telephone service under this concept until the early 1980s.\(^{111}\) Briefly stated, the natural monopoly theory assumes that the public interest is best served by allowing only one company, or a designated group of companies, to control a certain service within a given service area.\(^{112}\) Usually, the service is a utility that is considered essential to the public such as electricity or gas, or one that requires the use of public facilities or rights of way.\(^{113}\)

In the United States, the concept of telephone service as a natural monopoly took some time to evolve. Early in this century, many U.S. cities were actually served by two or more competing telephone companies.\(^{114}\) As the telephone gained in importance as a personal and business communications medium, however, it soon became clear that the competition among local telephone providers was more burdensome than beneficial. To ensure interconnection with the entire community in areas where there was competing service, business or home subscribers required two or more separate phone lines and separate listings in two or more telephone directories, with the exact figures depending on how many companies competed in the service area.\(^{115}\) Those subscribers who were willing or able to pay for only one phone line naturally gravitated to the larger of

\(^{111}\) The monopoly position of AT&T changed in 1982, however, with the "Bell breakup" discussed in the text accompanying notes 123-25, infra.

\(^{112}\) See Pool, supra note 104, at 102 (discussing the evolution of the phone system as a monopoly).

\(^{113}\) See, e.g., Cantor v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976) ("[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation.") (footnote omitted); Otter Tail Power Co. v. United States, 410 U.S. 366, 369 (1973) ("Each town ... generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail.").

\(^{114}\) See Pool, supra note 104, at 102.

\(^{115}\) See id.
the competing systems, since it was more likely that more of their friends, relatives, or business customers also subscribed to that system. In most communities, the predictable outcome of this process was that the smaller telephone company or companies lost subscribers and eventually left the business, leaving the larger telephone company as sole provider of local telephone service. In most cities of any size, that sole provider was or became one of the regional companies owned by AT&T, the company that also provided the most long distance connections.

Another key result of this process was that the companies that provided local telephone service became subject to regulation by state public utility commissions, which stepped in to prevent the unfair pricing practices and other abuses that can arise under any monopoly, natural or otherwise. Over time, the relationship between the telephone companies and the public utility commissions in most states achieved a sort of uneasy equilibrium. On the one hand, the commissions preserved the telephone company's monopoly position, and the more efficient operation that was presumed to flow from that position, by requiring that any potential competitor obtain a license from the state, and by denying most requests for licenses on the grounds that the public interest would not be served by a second, competitive telephone service. On the other hand, the public utility commissions extracted a price for this protected position by subjecting the telephone companies to rate regulation and minimum service requirements.

In theory, a competitive telephone company that has been denied a license by a state public utility commission can challenge the government's action on First Amendment grounds, claiming that the license denial amounts to unlawful prior restraint of the company's right to free speech. This kind of constitutional challenge would almost certainly work if the communications company in question was a newspaper or book publisher, because licensing and most other forms of prior restraint of print publishers are forbidden under the First Amendment. However, the free speech argument carries much less weight when the communications entity is a common carrier because, as discussed earlier, common carriers are not generally considered "speakers" for First Amendment purposes. This issue will come up again in the discussion of radio and television, since several broadcasters have in fact pursued

116. See id.
117. One example of this policing at work, at least at the federal level, was the Justice Department's long-standing antitrust suit against AT&T discussed in the section that follows.
118. See Pool, supra note 104, at 102.
First Amendment challenges to the federal system for licensing television and radio stations.\textsuperscript{121} It will also come up in the discussion of cable television, since the Supreme Court has recently ruled that, unlike telephone companies, cable television operators do have standing as First Amendment speakers to contest exclusive local licensing agreements.\textsuperscript{122}

3. Impact of the Bell Breakup

Telephone regulation and the U.S. telephone industry changed radically in 1982 with the issuance of Judge Greene's decision in \textit{United States v. American Telephone and Telegraph Co.}\textsuperscript{123} That judgment, which modified and then entered a consent decree between the parties, ended the government's longstanding and controversial antitrust litigation against AT&T. The most immediate and dramatic result of Judge Greene's decision was the divestiture by AT&T of the seven regional Bell operating companies that provide most local telephone service in the United States.\textsuperscript{124} In return, AT&T and, to a lesser extent, the regional operating companies, were freed from a number of the broad federal "line of business" restrictions that had previously limited them to providing telephone service on a strict common carrier basis.\textsuperscript{125}

What do these changes mean for the First Amendment status of tele-

\textsuperscript{121} See infra text accompanying notes 157-68.
\textsuperscript{124} See id. at 226-27.
\textsuperscript{125} See id. at 223-24. AT&T benefited most from the removal of the line of business limitations because it no longer owned the regional companies that held a monopoly over local telephone service, and because it no longer monopolized the long distance telephone market in which it continued to operate. See id. As a result, the consent decree permitted AT&T to enter into all lines of business except for electronic publishing—a business over which, in the opinion of Judge Greene, there was a substantial risk that AT&T would gain a monopoly. See id. In contrast, because the regional operating companies would continue to monopolize local telephone service in their respective operating areas, the consent decree prevented them from entering, at least initially, any new business except for the sale of telephones and related equipment and the marketing of Yellow Pages advertising directories. See id. at 224. However, subsequent rulings by Judge Greene, the Court of Appeals for the District of Columbia, and the FCC have permitted the regional operating companies to enter several formerly forbidden businesses, including the provision of certain information services and the transmission of television signals. See, e.g., Edmund L. Andrews, "Baby Bell" Fights Cable Law, Citing Right to Free Speech, N.Y. Times, Dec. 18, 1992, at D1 (reporting on efforts by Bell Atlantic, a regional operating company, to enter the cable television business following recent easing of line of business restrictions); Edmund L. Andrews, \textit{F.C.C. Approves TV on Phone Lines}, N.Y. Times, July 17, 1992, at D5 (discussing impact of FCC decision that allows telephone companies to transmit, but not to produce, television programs); Edmund L. Andrews, 'Baby Bells,' Newspapers In a Brawl, N.Y. Times, Nov. 11, 1991, at D1, D6 (reporting conflict between telephone regional operating companies and newspapers over the telephone companies' plans to provide classified advertising and information services); see also Mary Lu Carnevale, \textit{Ring in the New: Telephone Service Seams on the Brink of Huge Innovations}, Wall St. J., Feb. 10, 1993, at 1 (reporting on plans of many telephone companies to enter markets for video and information services).
phone companies? In all likelihood, phone companies that enter new areas of business will seek to secure the same First Amendment status afforded to their competitors in those businesses. For example, telephone companies that transmit television signals will probably argue that they should receive, at a minimum, the same First Amendment treatment as companies that operate cable television systems. Similarly, phone companies that offer information services to homes may well argue that, in their role as information providers, they warrant the same First Amendment protection as print publishers. Ultimately, telephone companies will probably find that they are subject to a number of different constitutional standards, depending on the types of non-telephone services that they provide and the First Amendment status of the most closely analogous communications services. As discussed infra, this seems to be the approach that is evolving for another "hybrid" communications system: cable television.

B. Radio and Television Broadcasting

More so than has been the case for any other communications medium, federal regulation of radio and television broadcasting has been driven by technical necessity. In fact, much of the government's authority to regulate broadcasters can be traced to a single technical consideration: broadcasters must operate on assigned frequencies or "channels," one broadcaster to one channel. Otherwise, chaos prevails, as broadcasters competing for the same channels in the same geographic areas block each other's transmissions.\(^{126}\)

Chaos did in fact prevail over radio broadcasting in the 1920s, prior to the advent of effective federal regulation. At that time, radio transmission in the U.S. was regulated under the Radio Act of 1912.\(^{127}\) This legislation, enacted to govern the analogous technology of wireless telegraphy, was intended to bring order to the airwaves by granting the Secretary of Commerce and Labor the authority to license wireless operators.\(^{128}\) By the 1920s, however, federal regulatory opinions, an unanticipated demand to use radio frequencies for broadcasting voice signals, and several federal court decisions had left the 1912 Act inadequate to its intended task.\(^{129}\) In one key case decided in 1923, *Hoover v. InterCity Radio Co.,*\(^{130}\) a federal judge ruled that then Secretary of Commerce

\(^{126}\) See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943) ("the radio spectrum simply is not large enough to accommodate everybody"); Quincy Cable TV, Inc. v. Federal Communications Comm'n, 768 F.2d 1434, 1449 (1985) (citing Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 376 (1969)) ("Without the imposition of some governmental control 'the cacophony of competing voices' would drown each other out.").

\(^{127}\) 37 Stat. 302 (1912).

\(^{128}\) See id. at 302-03.

\(^{129}\) For a review of this early regulatory history, see National Broadcasting Co., 319 U.S. at 212-14.

\(^{130}\) 286 F. 1003 (D.C. Cir. 1923).
and Labor Herbert Hoover had overstepped his authority in refusing to
renew the license of a wireless telegrapher because renewal would result
in interference to channels that had been assigned to other government
and private users.\footnote{1} Three years later, the federal government's powers
to regulate radio received another blow in United States v. Zenith Radio
Corp.,\footnote{132} a case in which a federal appeals court ruled that Zenith could
operate a radio station on a frequency and at a time other than those
assigned through the licensing process.\footnote{133} Overall, the effect of Intercity
and Zenith was to restrict severely the federal government's power to
police radio traffic, particularly the power to assign specific frequencies
to licensees and to limit licensees to transmitting only on those
frequencies.

Unsure where these and other challenges to the 1912 Act had left the
government's power to regulate radio, the Secretary of Commerce asked
the Office of the Attorney General for its opinion. In its response, issued
in July of 1926, the Attorney General's office stated that the Secretary of
Commerce retained the authority to require radio broadcasters to obtain
licenses and to assign broadcasters specific frequencies and hours of oper-
ation as part of the licensing process.\footnote{134} In the Attorney General's view,
however, contradictions within the 1912 Act and adverse court rulings
had left the government with little or no authority to penalize broadcast-
ers who strayed from those assigned frequencies and authorized times of
operation, or who broadcast at a power level greater than that necessary
to service their assigned transmission areas.\footnote{135} In other words, the Office
of Commerce was left with its licensing powers intact, but with no real
power to regulate the operations of broadcasters once they had obtained
the required license. Without this ongoing regulatory authority, the fed-
eral government was simply unable to control the chaotic free-for-all that
had once again come to characterize radio broadcasting.\footnote{136}

1. The Radio Act of 1927

Once both the executive branch and the judiciary agreed that the 1912
Act gave the government only limited authority to regulate radio, and
once broadcasters had proven incapable of policing themselves, Congress
apparently concluded that more comprehensive legislation was required.
That legislation, the Radio Act of 1927,\footnote{137} continued the system of fed-
eral licensing administered by the Secretary of Commerce, but added the
policing powers that had been missing from the 1912 Act.\footnote{138} The 1927
Act also authorized the creation of the Federal Radio Commission, the

\footnote{1. See id. at 1006-07.}

\footnote{12. 12 F.2d 614 (N.D. Ill. 1926).}

\footnote{13. See id. at 617-18.}

\footnote{134. See 35 Op. Att'y Gen. 126 (1926).}

\footnote{135. See id. at 131-32.}

\footnote{136. See supra note 126 and accompanying text.}

\footnote{137. Ch. 169, 44 Stat. 1162 (1927).}

\footnote{138. See id. §§ 1, 4.}
agency charged with providing the ongoing supervision necessary to ensure that broadcasters complied with the more stringent operational requirements of the act. Significantly, among the most ardent supporters of the 1927 Act were commercial radio broadcasters themselves, who recognized that the structure and stability provided under the Act were necessary to the success of their fledgling industry. Even President Coolidge, no fan of government regulation but a big supporter of business, had urged Congress to pass the Act.

The Radio Act of 1927 governed radio communications only until 1934, when it was superseded by the more comprehensive Communications Act of 1934 (the "1934 Act"). However, the 1927 Act established many of the fundamental premises and policies of broadcast regulation that were incorporated in the 1934 Act, and that remain effective today. Those premises and policies include:

The requirement that all broadcasters operate under a federal license and only on the frequencies assigned to them;

The requirement that broadcast licenses be issued for a limited term (rather than in perpetuity, as had become the case under the Radio Act of 1912);

The concentration of all regulatory authority in a single federal agency (the Federal Radio Commission under the Radio Act of 1927; the Federal Communications Commission under the Communications Act of 1934);

The requirement that candidates for political office be given equal access to broadcast facilities (the forerunner of the Equal Time Provision discussed supra and);

139. See id. § 3.
143. See Radio Act of 1927, ch. 169, § 1, 44 Stat. 1162 (1927). Because broadcasting is considered a form of interstate commerce (that is, broadcasting in the United States is primarily a commercial enterprise, and the signals of most broadcasters cross state lines), regulation of broadcasting is almost exclusively a federal matter. Contrast this with the regulation of telephone service discussed supra (in which regulatory authority is shared by the federal government and the states, with federal regulation focusing primarily on long distance and other interstate services) and with the regulation of cable television discussed infra (in which regulatory authority is also split, with the federal government focusing mostly on broad policy matters, and with local government authorities handling the day-to-day administration of the cable television franchising agreements for their communities).
144. See Radio Act of 1927 § 1.
145. See id. § 3.
148. See supra notes 64-65 and accompanying text.
The prohibition of government censorship of broadcast content (coupled, somewhat contradictorily, with a general ban on obscene, indecent, or profane language). Additionally, and perhaps most importantly, section 9 of the 1927 Act established that broadcast licenses should be granted and renewed subject to the "public interest, convenience, or necessity." As discussed below, this "public interest and convenience" provision, which Congress subsequently incorporated in the Communications Act of 1934, has been at the heart of many of the First Amendment challenges to federal broadcast regulation.

2. The Communications Act of 1934

As the preceding section suggests, the Communications Act of 1934 is in many respects simply a more comprehensive version of the Radio Act of 1927. Compared to the 1927 Act, which focused exclusively on radio broadcasting and wireless telegraphy, the 1934 Act encompasses those media as well as television (still in the experimental stage in 1934), telephone, and all other wired and wireless communications systems. Amended many times over the years, often in response to the emergence of new technologies, the Communications Act of 1934 has become a sort of communications constitution that defines the scope and structure of all federal regulatory authority over electronic communications media.

One key provision of broadcast regulation is found in section 3(h) of the 1934 Act. This provision is often overlooked in discussions of broadcast regulation because it appears in the portion of the 1934 Act devoted to definitions, and because this particular provision defines the term "common carrier." For broadcasters, however, section 3(h) is significant not for what it includes but rather for what it excludes. Specifically, section 3(h) states that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier." Through this provision, then, the 1934 Act directs that, rather than being required to serve as retransmitters of messages produced or provided by third parties, broadcasters will retain control of and responsibility for the program content transmitted on their channels. One direct result of this structural designation is that, unlike common carriers, broadcasters are considered "speakers" whose programming activities are protected under the First Amendment.

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150. Id. § 11.
151. See, e.g., Communications Act of 1934, 47 U.S.C. § 307(a) (1988) ("The Commission, if public convenience, interest, or necessity will be served thereby . . . shall grant to any applicant therefor a station license provided for by this chapter.").
153. See id. § 153(h).
154. Id. (emphasis added).
As discussed earlier, however, broadcasters do not enjoy full First Amendment protection. Instead, under the scarcity and intrusiveness rationales, courts have concluded that broadcasters’ rights as First Amendment speakers must be balanced against the public’s First Amendment interest in obtaining efficient and effective broadcast service. Exactly what this public interest is, and exactly how far the government can go in restricting broadcasters’ First Amendment rights to promote the public interest, has been the subject of extended controversy.

3. First Amendment Challenges to the Station Licensing Process

In some of the earliest First Amendment challenges to federal broadcast regulation, broadcasters attacked the station licensing and renewal process itself, claiming that the government’s use of the public interest standard to evaluate the programming planned or currently offered by applicants constituted government censorship, prior restraint, or both. In Trinity Methodist Church v. Federal Radio Commission, for example, the Reverend Doctor Shuler, a religious broadcaster, challenged the Federal Radio Commission’s refusal to renew his license to operate KGEF, a Los Angeles radio station. During the renewal process, several residents of the Los Angeles area had complained that Schuler’s broadcasts attacked the Roman Catholic Church. The FRC denied Shuler’s renewal application on public interest grounds, pointing to the fact that KGEF’s programs were “sensational rather than instructive; and that . . . Shuler had been convicted of attempting . . . to obstruct the orderly administration of public justice.”

Shuler appealed the FRC decision, claiming that it violated his rights of free speech and due process. But the federal appeals court disagreed. In disposing of the due process question, the court held that the government’s denial of a broadcast license did not constitute a taking of property that raised due process concerns under the Fifth Amendment. With respect to the First Amendment argument, the court concluded that, although the FRC’s actions might constitute a form of government regulation of speech, this regulation was permissible given the power of broadcasting and the legitimate public interest goals of the station licensing process:

If it be considered that one in possession of a permit to broadcast in

communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area.”); Red Lion Broadcasting Co. v. Federal Communications Comm’n, 395 U.S. 367, 386 (1969) (“broadcasting is clearly a medium affected by a First Amendment interest”).

156. See supra text accompanying notes 22-50.
158. Although this case was brought under the Radio Act of 1927, the principles that it raises remain relevant under the Communications Act of 1934.
159. See Trinity Methodist, 62 F.2d at 850-51.
160. Id. at 851.
161. See id. at 853.
interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise . . . .

In other words, in the court’s view, the government could properly deny a broadcast license—in effect, silence a broadcaster for presenting objectionable programming—when doing so seemed necessary to promote the “public interest, convenience, or necessity.”

When placed in historical context, the holding in Trinity Methodist is really quite remarkable. Just one year earlier, in Near v. Minnesota, the Supreme Court had held that any government attempt to prevent the publication of similarly malicious and defamatory content by a print publisher constituted impermissible prior restraint. To the Trinity Methodist court, however, radio broadcasting was a much different medium subject to a much greater degree of government supervision and regulation. Some ten years later, in National Broadcasting Co. v. United States, the Supreme Court showed that it agreed with this view. Faced with still another First Amendment challenge to the government’s right to deny a broadcast license, the Court concluded that:

Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . The standard [that the Communications Act of 1934 provided for the licensing of stations was the ‘public interest, convenience, or necessity.’ Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Although there have been other challenges to the licensing process since National Broadcasting, the Supreme Court’s conclusion that the denial of a broadcast license on valid public interest grounds is not a denial of First Amendment rights remains a fundamental precept of media law.

162. Id. at 852-53.
164. 283 U.S. 697 (1931).
165. See id. at 722.
166. 319 U.S. 190 (1943).
167. Id. at 226-27.

A broadcaster has much in common with a newspaper publisher, but he is not
4. Other First Amendment Challenges to Broadcast Regulation

Most forms of federal broadcast regulation, including the government's right to license broadcasters, rest on the scarcity rationale. As discussed supra, the scarcity rationale posits that the station licensing process grants to broadcasters the privilege of exploiting a scarce public resource: the broadcast spectrum. From this grant of privilege has followed, in turn, the concept of the broadcaster as a public trustee subject to government-imposed obligations and responsibilities that would constitute clear First Amendment violations if applied to print media. Some of these requirements and responsibilities are statutory, such as section 1464 of the U.S. Penal Code, which prohibits the transmission of obscene and indecent material over broadcast channels, and section 315(a) of the Communications Act of 1934, which obligates broadcasters to provide candidates for elective office equal access to the airwaves. Other content, access, and ownership requirements, including the Fairness Doctrine, are products of the FCC's rulemaking authority. With few exceptions, the courts have concluded that these statutory and regulatory restrictions are protected against First Amendment attack so long as they can be justified as grounded in or extending from the scarcity, intrusiveness, or public trustee rationales.

See also Henry v. Federal Communications Comm'n, 302 F.2d 191, 194 (D.C. Cir.) (upholding the FCC's authority to impose "reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community"), cert. denied, 371 U.S. 821 (1962).

169. See supra text accompanying note 23.

170. See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973) ("broadcast licensees . . . are regulated as 'proxies' or 'fiduciaries of the people' "); United Church of Christ, 359 F.2d at 1003 ("broadcast license is a public trust").


173. For an overview of these content, access, and ownership requirements, see supra text accompanying notes 51-83.

174. See, e.g., CBS, Inc. v. Federal Communications Comm'n, 453 U.S. 367, 397 (1981) (rejecting television network's First Amendment challenge to § 312(a)(7) of the Communications Act of 1934, which permits the FCC to revoke a broadcaster's license for "repeated failure to allow reasonable access to . . . candidate[s] for Federal elective office," and concluding that FCC enforcement of this provision "properly balances the First Amendment rights of federal candidates, the public, and broadcasters"); Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (rejecting radio station's First Amendment challenge to FCC's right to prohibit broadcast of indecent content); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367
5. Current First Amendment Status of Broadcasters

As the preceding analysis has emphasized, the scarcity rationale is fundamental to the federal system of broadcast licensing and regulation. More specifically, and more directly relevant to the present discussion, courts have adopted the scarcity rationale as a key consideration in acceding to federal content, access, and ownership regulations that would be rejected as unconstitutional if imposed on print media. In recent years, however, broadcasters and scholars have questioned the continued relevancy of the scarcity rationale, arguing that it has lost much of its validity now that new technologies such as cable television and home video have given the public an apparent abundance of viewing alternatives. This argument was welcomed at the FCC in the 1980s, when it formed one of the philosophical cornerstones of the Commission's efforts to deregulate the communications industry.175 It has also been given some credence by the courts, most notably in Telecommunications Research & Action Center v. Federal Communications Commission,176 a decision of the Court of Appeals for the District of Columbia. Writing for the court, Judge Bork seemed sympathetic to the FCC's criticism of the scarcity rationale as a basis for applying the fairness doctrine to the new technology of teletext, observing that “[e]mploying the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.”177

Three years later, the D.C. Circuit expressly adopted the “increased diversity of media outlets” reasoning as support for its conclusion that the FCC's decision to withdraw from enforcing the Fairness Doctrine was “neither arbitrary, capricious, nor an abuse of discretion.”178

But Congress has not been so quick to buy into the idea that the scarcity rationale is no longer relevant to broadcast regulation. In the Fairness in Broadcasting Act of 1987,179 a bill intended to codify the Fairness

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177. Id. at 509. Judge Bork went on to state that “[p]erhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media . . . or announce a constitutional distinction that is more usable than the [scarcity argument].” Id. at 509. Until that point, however, the D.C. Circuit felt constrained by the Supreme Court's endorsement of the scarcity rationale in Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969), concluding that the fairness doctrine must apply to teletext since “[t]eletext, whatever its similarities to print media, uses broadcast frequencies, and that, given Red Lion, would appear to be that.” Id.


Doctrine in response to the FCC's reluctance to enforce it, Congress asserted the following findings:

(1) Despite technological advances, the electromagnetic spectrum remains a scarce and valuable resource;
(2) There are still substantially more people who want to broadcast than there are frequencies available;
(3) A broadcast license confers the right to use a valuable public resource and a broadcaster is therefore required to utilize that resource as a trustee for the American people;

(5) While new video and audio services have been proposed and introduced, many have not succeeded, and even those that are operating reach a far smaller audience than broadcast stations; [and]
(6) Even when and where new video and audio services are available, they do not provide meaningful alternatives to broadcast stations for the dissemination of news and public affairs.

Neither these assertions nor the Fairness Doctrine attained statutory status, however, because Congress failed to override President Reagan's veto of the Fairness in Broadcasting Act.

Three years later, Congress launched another, more successful attack on the FCC's deregulatory policies by passing the Children's Television Act of 1990. This legislation, which became law without President Bush's signature, reflected Congress's conclusion that the FCC's relaxation of its broadcast programming and advertising standards during the 1980s had left young viewers underserved, and that newer media such as cable TV had not adequately filled the void. The Children's Television Act attempted to correct that condition by directing the FCC to draft rules requiring that broadcast television stations devote a certain amount of time to educational and informational programming for children and to limit the amount of advertising carried during that programming.

Where has all this legislative and judicial jostling left the First Amendment status of broadcasters? While the deregulatory drift at the FCC and recent court decisions have certainly called the future direction of broadcast regulation into question, the scarcity rationale and the related concept of broadcasters as public trustees still form the foundation for federal regulation of broadcasting under the Communications Act of 1934. As long as that remains the case—that is, until Congress or the courts decree that changes in technology and the number and variety of media outlets have left broadcasting as just one more competing service

180. Id. § 2 (numbering omitted).
182. See id. at 996-97.
183. See, e.g., Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984) (in which the Supreme Court declined to "reconsider [its] longstanding approach [to political broadcast regulation] without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required").
in the communications marketplace—broadcasters will retain their status as limited First Amendment speakers subject to federal content, access, and ownership regulations. However, even though broadcasters do not enjoy full First Amendment protection, they do share one of the burdens borne by all First Amendment speakers: full responsibility for any libelous statements made during the programs that they "publish."

C. Cable Television

Originally called "community antenna television" ("CATV"), cable television developed in the 1950s as a means of bringing broadcast television signals to remote areas.\(^{184}\) Because broadcast signals have a limited range, and because the signals can be blocked by mountains or other topographical obstructions, many communities were unserved or underserved by broadcast television.\(^{185}\) Sensing a business opportunity, entrepreneurs in these communities staked out positions on the highest ground available, where they constructed large antennas capable of pulling in distant television signals. Once captured, the signals were transmitted to homes through coaxial cable, a high-capacity wire capable of carrying multiple television channels.\(^{186}\)

In the early years of its development, cable television attracted little interest from federal regulators.\(^{187}\) One reason for this lack of interest was that the two constituencies most directly affected by cable—broadcasters and the viewing public—had few reasons to complain. Broadcasters generally welcomed the coming of cable, since the CATV systems of the early 1950s simply received and retransmitted the signals of the nearest local television stations (thereby extending the range of these local stations and increasing the fees that the stations, with the added cable audience, could charge to advertisers).\(^{188}\) For the most part, the members of the viewing public were also pleased since, for a fairly modest monthly fee, they were able to receive multiple television channels where few or none were available before.\(^{189}\)

The absence of regulatory activity during the CATV industry's early years also owed a great deal to the fact that, through much of the 1950s, the FCC was unsure that it had either the authority or the resources to regulate cable. As the FCC pointed out in a 1952 memorandum to Congress, the Communications Act of 1934 granted the Commission explicit authority over two groups: broadcasters and common carriers. In the FCC's opinion, however, the early CATV systems constituted neither

\(^{184}\) For an overview of cable's early regulatory history, see Donald E. Lively, Modern Communications Law 257-60 (1991).
\(^{185}\) See Don R. Le Duc, Beyond Broadcasting: Patterns in Policy and Law 83 (1987). In 1956, for example, "nearly half of America's television homes could receive only one television signal." \(\textit{Id.}\)
\(^{186}\) See \(\textit{id.}\) at 82.
\(^{188}\) See \(\textit{id.}\) at 12.
\(^{189}\) See \(\textit{id.}\).
"broadcasting within the meaning . . . of the [Communications] Act"\textsuperscript{190} nor "interstate common carrier operations within the meaning . . . of the Act."\textsuperscript{191} Given this lack of express legislative authority, and given the FCC's limited resources, the Commission declined to assert jurisdiction over cable.\textsuperscript{192} This left the regulation of cable, such as it was, to state and local governments under the auspices of public utility commissions, \textit{sui generis} cable television agencies, or local franchising authorities.\textsuperscript{193}

The FCC's hands-off attitude toward cable began to shift in the late 1950s and early 1960s, however, as the Commission became increasingly concerned about the impact of CATV systems on local television stations.\textsuperscript{194} Not surprisingly, this change coincided with a new development in the cable industry: the use of microwave links to import distant television signals.\textsuperscript{195} Prior to this point, cable operators had been limited to retransmitting the signals of the broadcast stations operating in closest geographic proximity to their antenna sites because these were the only signals that the cable systems' antennas were capable of picking up. With the use of microwave repeaters, this limitation was lifted, allowing cable operators to import the signals of television stations broadcasting in communities hundreds of miles away.\textsuperscript{196} Significantly, this newfound ability to import distant TV signals made cable attractive, for the first time, to individuals living in or near urban areas. Previously, urban residents had no real reason to pay for cable, since cable operators were limited to transmitting local stations that most urbanites could already receive for free.\textsuperscript{197}

These developments did not go unnoticed by local television broadcasters, many of whom now feared that, by importing distant TV signals, cable could become a competitor with, rather than simply a supplement to, local broadcast service. The local broadcasters voiced their concerns to the FCC, contending that, contrary to the Commission's previously stated position, the FCC did in fact have legislative authority to regulate cable.\textsuperscript{198} The broadcasters based this jurisdictional argument on their assertion that CATV systems should be considered common carriers under the Communications Act of 1934\textsuperscript{199} or, alternatively, on their contention that the competition that cable operators now posed to television station licensees implicated the FCC's statutory mandate to maintain and

\textsuperscript{190} Goodale, \textit{supra} note 49, § 1.03 (quoting Senate Committee on Interstate and Foreign Commerce, \textit{Review of Allocation Problems of TV Service to Small Communities}, 85th Cong., 2d Sess. 3490 (1958)).

\textsuperscript{191} Id.

\textsuperscript{192} See id.

\textsuperscript{193} For a review of state and local cable regulation, see \textit{id.} §§ 3.01-3.04.

\textsuperscript{194} See Parsons, \textit{supra} note 187, at 13.

\textsuperscript{195} See \textit{Le Duc}, \textit{supra} note 185, at 83.

\textsuperscript{196} See Parsons, \textit{supra} note 187, at 13.

\textsuperscript{197} See \textit{Le Duc}, \textit{supra} note 185, at 83.

\textsuperscript{198} See Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 251 (1958).

\textsuperscript{199} See \textit{id.} at 252.
protect local broadcast service.\footnote{200}{See \textit{id.} at 253.}

In 1958, the FCC rejected the suggestion that cable operators should be considered common carriers.\footnote{201}{See \textit{id.} at 253-54.} However, in a Report and Order issued in 1959, the Commission indicated that it might be more sympathetic to the "impact on broadcasting" argument for extending its jurisdiction to cable.\footnote{202}{See Federal Communications Commission, Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 430-31 (1959).} At the same time, though, the FCC conceded that it was unable to determine just what the extent of cable's impact on broadcasting was, or whether the Commission had congressional authority to take the regulatory action necessary to control that impact.\footnote{203}{See \textit{id.}} Essentially, the FCC's 1959 Report and Order threw the cable regulation question back to Congress, which then proceeded to fumble through several attempts to pass legislation that would have provided a more comprehensive regulatory scheme.\footnote{204}{See \textit{id.}}

With no solution forthcoming from Congress, the FCC eventually acceded to the continuing pressure from broadcasters and took steps to restrict the importation of distant signals by cable operators.\footnote{205}{See \textit{id.}} The Commission took these steps under its legislative authority to regulate microwave relays—the "over the air" transmission mechanism used by cable systems to import TV signals. Needless to say, both cable operators and the companies that operated microwave relay systems opposed the FCC's imposition of restrictions, claiming that the new rules unfairly favored local television broadcasters and unduly burdened the CATV and microwave carriage industries. A key point in this controversy came in \textit{Carter Mountain Transmission Corp. v. Federal Communications Commission},\footnote{206}{321 F.2d 359 (D.C. Cir. 1963).} a 1963 appeal of the FCC's decision to refuse to allow a microwave service to transmit TV signals to a Wyoming cable system unless the cable operator could establish that this importation of distant signals would not substantially harm a local television station.\footnote{207}{See \textit{id.} at 361.} Significantly, the court went along with the FCC's "economic impact" justifications for the restrictions, acknowledging the Commission's authority to regulate cable when necessary to preserve the economic viability of a local broadcaster.\footnote{208}{See \textit{id.} at 365-66.}

Buoyed by the court's favorable ruling in \textit{Carter Mountain}, the FCC embarked on a more ambitious effort to regulate the cable industry. In 1965, for example, the Commission promulgated general rules requiring microwave-fed CATV systems to carry all local broadcast signals (the
In 1966, the FCC went a substantial step further, issuing a new Report and Order that extended the must carry and signal duplication rules to all cable systems, regardless of whether they used microwave relays to import signals, and requiring cable systems operating in the 100 largest television markets to establish in advance that the importation of distant broadcast signals would be "consistent with the public interest."

These and other FCC actions generated a number of cases that challenged the Commission's authority to expand cable regulation. The most important of these challenges, United States v. Southwestern Cable, resulted in a significant if somewhat qualified Supreme Court victory for the FCC. In Southwestern, the Court concluded that the Commission did have the authority to regulate cable television, but restricted that authority "to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Using this "reasonably ancillary" standard as a guide, the Court went on to rule that the regulations challenged in Southwestern were within the FCC's legislative authority. The "reasonably ancillary to broadcasting" standard remained the accepted measure for gauging the FCC's powers to regulate cable TV until 1984, when the Commission finally secured explicit legislative authority over cable.

1. The Cable Communications Act of 1984

Congress finally resolved the lingering questions concerning the FCC's authority to regulate cable by passing the Cable Communications Policy Act of 1984 (the "Cable Act"). Codified as sections 521 to 559 of the Communications Act of 1934, the Cable Act delineates specific federal and state roles in regulating cable television systems. Specifically, the Cable Act gives the FCC the power to set technical standards for cable systems and to establish and enforce cross-ownership restrictions, as well as general authority to regulate franchise fees and the cable franchising process. However, state and local governments remain the

212. Id. at 178.
213. See id. at 178-81.
216. See id. § 533.
217. See id. § 542.
218. See id. § 541.
primary authorities empowered to grant cable operators permission to build cable systems within particular communities. Typically, a local government grants that permission in the form of a franchise agreement that stipulates, among other requirements, a percentage of revenues that the cable company will pay as a franchise fee and the range of government and public access facilities that the cable company will provide to the community.

In 1992, responding to consumer complaints about unreasonable increases in cable TV prices, Congress passed the Cable Television Consumer Protection and Competition Act. Enacted over the strong objections of cable TV industry groups, this legislation effectively reversed the provision of the 1984 Act that preempted the authority of local governments to regulate cable costs, returning to local governments the primary authority to set prices for certain basic cable services. The 1992 legislation also included a number of other provisions that did not sit well with cable operators, including the requirement that cable systems carry the signals of most local and nearby broadcasters.

2. Cable as Common Carrier?

Along with formalizing federal regulatory authority over the cable industry, the Cable Television Act of 1984 resolved another, more specific question: Is cable to be considered a common carrier? The answer appears in section 541(c) of the 1984 Act, which provides that a “cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.” But while this provision expressly states that cable is not to be treated as a common carrier, the Cable Act fails to provide an alternative structural designation. In other words, the Act tells us what cable is not, but it does not tell us what cable is.

Presumably, because cable is not a common carrier, cable operators do have some standing as First Amendment speakers. But should cable op-

219. The Cable Act limits this annual franchise fee to five percent of the gross revenues of the cable system. See id. § 542(b).
221. See id. § 3 (to be codified as amended 47 U.S.C. § 543). Local governments have this authority subject to review of their rate regulations by the FCC. See id.
222. See id. § 4 (to be codified as amended 47 U.S.C. § 533); see also Clifford Krauss, Cable Bill Agreement is Reached: Negotiators Support Fee for Broadcasters, N.Y. Times, Sept. 10, 1992, at D1, D2 (describing Congressional accord on broadcast signal carriage rules to be included in 1992 cable bill).
223. 47 U.S.C. § 541(c) (1988) (emphasis added). Note, however, that § 532 of the 1984 Act does require cable operators to set aside a certain portion of their channel capacity for commercial use. See id. § 532(b)(1). Further, the 1984 Act stipulates that cable operators must, for the most part, function as common carriers toward these channels, making them available to third parties on fair terms and refraining from exercising editorial control over the programming transmitted by third parties. See id. § 532(c). At the same time, though, § 532 provides safeguards to insure that, to the extent that these provisions designate cable operators as common carriers, this will be the only context in which cable operators will be considered common carriers. See id. § 532(b)(3).
New Technology, Old Problem

3. Cable System Operators as First Amendment Speakers

The First Amendment did not emerge as a significant factor in litigation challenging cable regulations until the 1970s. Not coincidentally, this was also the period during which the FCC enacted a series of rules that placed an increasing number of public service obligations on cable operators. The cable industry responded by challenging the obligations on First Amendment grounds, claiming that the requirements restricted the rights of cable operators to exercise complete editorial control over their channels.

One such challenge came in Federal Communications Commission v. Midwest Video Corp., a 1979 Supreme Court case in which a cable operator questioned the FCC's right to require cable systems of a certain size to provide "channels for access by third parties, and to furnish equipment and facilities for access purposes." In the initial appeal, the Eighth Circuit had set aside the access requirements as being both beyond the regulatory authority of the FCC and as "present[ing] grave First Amendment problems." The Supreme Court affirmed but, in doing so, chose to focus almost exclusively on the jurisdictional question, dealing with the First Amendment issue only in passing. As the Eighth Circuit had pointed out, and as the FCC itself had acknowledged, the regulations at issue required cable operators to operate "as common carriers on some channels." Finding no provision in the Communications Act of 1934 that expressly permitted the FCC to apply this structural designation to cable TV systems, and noting the express provisions of the 1934 Act that prohibited the FCC from regulating broadcasters as common carriers, the Supreme Court concluded that the Commission had exceeded its legislative authority by promulgating the access rules. Notably, by focusing on

224. These rules are summarized in Federal Communications Comm'n v. Midwest Video Corp., 440 U.S. 689, 691-95 (1979).
226. Id. at 691 (citation omitted). As this language suggests, the FCC rules at issue were really a form of access regulation intended to transform a portion of the cable system's channel capacity into a public forum, thereby promoting "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs." Id. at 694-95 (citations omitted).
227. Id. at 695-96.
228. Id. at 702 (citations omitted).
229. See id. at 708. As discussed in the text accompanying note 223, supra, the Cable Communications Act of 1984 now provides that cable systems may not be regulated as common carriers.
these jurisdictional and structural issues, the Court was able to avoid addressing directly the question of cable’s status as a First Amendment speaker. The Court did observe, however, that “[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include”\(^\text{230}\)—an indirect acknowledgement that cable operators may at least lay claim to the limited First Amendment status held by broadcasters.

The Supreme Court spoke to the First Amendment question more directly some seven years later in City of Los Angeles v. Preferred Communications, Inc.\(^\text{231}\). In that case, Preferred Communications claimed that municipal authorities had violated both antitrust law and the First Amendment by refusing to allow it to construct a cable system that would compete with the system already operating in Los Angeles under an exclusive franchise agreement.\(^\text{232}\) Because the Supreme Court granted certiorari only on the First Amendment issue,\(^\text{233}\) and because the city’s denial of a construction permit appeared on its face to be an impermissible prior restraint, the primary question confronting the Court was whether a cable operator such as Preferred Communications had standing to sue as a First Amendment speaker.\(^\text{234}\)

The Supreme Court’s answer was a unanimous, albeit qualified, “yes.” On the one hand, the Court acknowledged that the activities in which a cable operator “engage[s] plainly implicate First Amendment interests”\(^\text{235}\) in that “through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,”\(^\text{236}\) a cable company “partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers.”\(^\text{237}\) On the other hand, the Court went on to say that a cable operator’s “activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters”\(^\text{238}\)—a comparison that suggests a willingness by the Court to balance the First Amendment rights of cable operators against the government’s right to protect the public interest (despite the fact that, unlike broadcast stations that transmit signals over the public airwaves, cable systems are not subject to the scarcity rationale). Further, the Court concluded that even though cable operators such as Preferred Communications engage in protected speech, their activities could be construed as “speech and conduct . . . joined”\(^\text{239}\) (that is, “speech

\(^{230}\) Id. at 707.
\(^{231}\) 476 U.S. 488 (1986).
\(^{232}\) See id. at 490-91.
\(^{233}\) See id.
\(^{234}\) See id. at 494-96.
\(^{235}\) Id. at 494.
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id.
\(^{239}\) Id. at 495.
conduct"), in which case "First Amendment values must be balanced against competing societal interests." Given these considerations, the Supreme Court remanded the matter to the district court to determine whether in fact Preferred's planned activities constituted speech conduct and, if so, whether the governmental interests advanced by denying Preferred permission to construct a competing cable system outweighed the First Amendment concerns.

4. The "Must Carry" Controversy

Historically, the FCC's "must carry" rules have required cable companies to pick up and retransmit to subscribers the signals of all television stations broadcasting within each cable system's transmission area. In *Quincy Cable TV, Inc. v. Federal Communications Commission*, a cable operator challenged the must carry rules on constitutional grounds, claiming that the rules violated its First Amendment right to control the content carried on its channels.

The *Quincy* court began by rejecting the FCC's argument that the scarcity rationale that applies to broadcasters (and the less stringent standard of constitutional review that the scarcity rationale implies) should also apply to cable TV. Observing that the conditions of spectrum scarcity and physical interference among competing users that gave rise to the rationale in broadcast regulation were not relevant to cable, the court concluded that "the 'scarcity rationale' has no place in evaluating government regulation of cable television." After rejecting the application of the scarcity rationale, and upon finding no "other attributes of cable television that would justify a . . . more forgiving First Amendment analysis," the court concluded that the FCC had failed to meet its burden of proving that the must carry rules, as then written, were "narrowly tailored to serve a substantial [government] interest." The court fell short of categorically condemning the must carry regulations, however, noting that it would reconsider the con-

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240. Id.
241. See id. at 495-96. In a subsequent case, *Leathers v. Medlock*, the Supreme Court once again acknowledged that cable television is "engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'." 111 S. Ct. 1438, 1442 (1991). Here again, however, the Court found it unnecessary to decide whether cable operators should share in the full First Amendment protection enjoyed by print publishers or the more limited protection available to broadcasters.
244. See id. at 1437.
245. See id. at 1448-50.
246. Id. at 1449.
247. Id. Specifically, the court rejected the argument that neither a cable system's use of public utility poles nor its arguable status as a natural monopoly justified a lower standard of constitutional review. See id. at 1449-50.
248. Id. at 1463. Note that, after spending considerable time discussing why strict scrutiny might apply to the must carry rules, the court determined that a strict scrutiny
stitutionality question "[s]hould the Commission wish to recraft the rules in a manner more sensitive to . . . First Amendment concerns."249

This reconsideration came two years later in Century Communications Corp. v. Federal Communications Commission,250 a case in which the Court of Appeals for the District of Columbia Circuit reviewed the FCC's "new, scaled-back"251 version of the must carry rules. Once again, the court debated which standard of constitutional review should apply to regulations affecting the editorial discretion of cable operators: the strict scrutiny test that applies to government action affecting the editorial autonomy of print publishers, or the more lenient O'Brien test used when the regulation in question only incidentally burdens speech. Once again, however, the court was able to avoid resolving this issue by concluding that FCC's revised "edition [of the must carry rules] fails to satisfy even the less-demanding first amendment test of United States v. O'Brien."252

A key consideration here, as in Quincy Cable, was the court's determination that the FCC had failed to produce credible evidence establishing that the must carry rules, in any of their incarnations, did in fact promote a substantial government interest.253 Even so, the court was careful to point out here, as it had in Quincy, that it did not find the must carry rules unconstitutional per se, but rather that the FCC must do a better job of producing "empirical support or at least sound reasoning"254 to defend the rules under the O'Brien standard. Presumably, had the FCC met that burden, the court would have been forced to determine if the relatively forgiving O'Brien test was in fact the correct constitutional measure to apply to cable television regulation.255

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249. Id. at 1463.
251. Id. at 298.
252. Id.
253. See id. at 300.
254. Id. at 304.
5. The Indecent Content Cases

Anyone who has watched premium cable channels such as Home Box Office ("HBO"), particularly late at night, should not be surprised that a number of cable operators and cable programming services have come under attack for disseminating sexually explicit and otherwise "indecent" content. Often, these attacks have come in the form of prosecution under local ordinances or state laws that were enacted during the cable franchising boom of the 1980s, and that were specifically intended to prohibit the transmission of indecent programming by cable television franchisees. Not surprisingly, the cable systems and programming services prosecuted under these provisions have tended to launch First Amendment counterattacks, claiming that the law or ordinance in question constitutes unconstitutional government censorship.

This scenario was played out in *Cruz v. Ferre*, where a Miami cable operator sought a judgment declaring that a city ordinance prohibiting the transmission of obscene or indecent material on cable television was unconstitutional. Significantly, as in *Sable Communications*, the challenge was not to the ban on obscene material—content that falls outside First Amendment protection—but rather to the provision prohibiting programming that was merely indecent. The district court judge concluded that this portion of the ordinance was unconstitutional and granted the cable operator's request for declaratory relief.

In appealing the district court's ruling, the City of Miami relied primarily on its position that the ban on indecent content was constitutional under the Supreme Court's reasoning in *Pacifica*. The Eleventh Circuit disagreed, however, distinguishing *Pacifica* by drawing distinctions between the broadcast transmission at issue in that case and the "cablecast" in question here. As the court pointed out, *Pacifica* "focused upon broadcasting's 'pervasive presence,' and the fact that broadcasting is 'uniquely accessible to children, even those too young to read.' " In contrast, cable is not nearly so pervasive or intrusive, since subscribers "must affirmatively elect to have cable service come into [their]"

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256. 755 F.2d 1415 (11th Cir. 1985).
257. *See id.* at 1416-17.
259. *See Cruz,* 755 F.2d at 1418. The circuit court suggested that the section of the ordinance banning obscene material was constitutional, pointing out that the definition of "obscene" used in the ordinance closely followed the standards set out by the Supreme Court in *Miller* v. *California*, 413 U.S. 15, 23-25 (1973). *See Cruz,* 755 F.2d at 1418.
260. *See Cruz,* 755 F.2d at 1416-17.
261. *See id.* at 1418 (citing Federal Communications Comm'n v. *Pacifica Found.*, 438 U.S. 726 (1978)). *See the discussion of Pacifica, supra,* in notes 25-34 and accompanying text.
263. *Id.* at 1420 (citation omitted) (quoting *Pacifica*).
home[s]." For these reasons, and because most cable operators provide subscribers with "lockboxes" that parents can use to prohibit access to selected channels, the court also concluded that objectionable cable programming is not nearly as accessible to children as the broadcast transmission at issue in *Pacifica.*

Given these distinctions, the Eleventh Circuit concluded, as had the district court, that the Miami indecency ordinance fell outside the limited First Amendment exception that had shielded the FCC's regulatory action in *Pacifica.*

Just a few weeks after *Cruz,* a federal district court followed a similar line of reasoning in declaring Utah's Cable Television Programming Decency Act unconstitutional. Like the court of appeals in *Cruz,* the court in *Community Television of Utah, Inc. v. Wilkinson* concluded that the *Pacifica* "intrusiveness" rationale did not apply to cable television because cable is "not an uninvited intruder" into the home. The district court also considered whether a state's power to regulate indecent cable content may be preempted under section 636(c) of the Cable Communications Policy Act of 1984 (which prevents states generally from regulating program content carried on cable systems) or, conversely, protected under section 638 of the 1984 Act (which reserves for state and local governments the right to regulate obscene content, libelous statements, and certain other types of expression that fall outside the First Amendment). Dealing with the section 638 exemption first, the district court determined that this section of the statute did not apply here, since the Utah statute banned both obscene and indecent expression. The district court never expressed an opinion as to whether the statute would in any event have been preempted by section 636(c), presumably because its subsequent conclusion that the law was unconstitutional made this further foray into statutory interpretation unnecessary.

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264. *Id.*
265. *Id.*
266. See *id.* at 1419-22.
267. See *id.* at 1421-22. The Eleventh Circuit also held that "[e]ven if we were to find the rationale of *Pacifica* applicable to this case, we would still be compelled to strike the ordinance as facially overbroad." *Id.* at 1421.
270. *Id.* at 1113. But see the long concurrence to the Tenth Circuit's brief opinion affirming *Community Television* in which Judge Balcock argued that *Pacifica* should apply to cable because cable television transmissions are both pervasive and uniquely accessible to children. See *Jones v. Wilkinson,* 800 F.2d 989, 1006-07 (10th Cir. 1986) (Balcock, J., concurring).
271. See *Wilkinson,* 611 F. Supp. at 1102.
272. See *id.* at 1103-04.
273. See *id.* at 1104-05.
6. Current First Amendment Status of Cable Operators

In some respects, the status of cable under the First Amendment is fairly well settled. For example, the Cable Communications Act of 1984 mandates that cable is not to be considered a common carrier for regulatory purposes,\(^{274}\) and \textit{Preferred Communications}\(^{275}\) and its progeny tell us that cable operators are considered speakers for First Amendment purposes.\(^{276}\) In addition, \textit{Quincy Cable TV}\(^{277}\) and \textit{Century Communications}\(^{278}\) make it clear that, unlike broadcast channels, cable systems do not fall within the extended regulatory reach of the scarcity rationale.\(^{279}\) Finally, \textit{Cruz}\(^{280}\) and other indecent content cases\(^{281}\) indicate that cable television places at the middle-to-low end of the "spectrum of intrusiveness"—a placement that justifies a lesser degree of government regulation under the \textit{Pacifica} rationale.

In many other respects, however, the First Amendment status of cable remains unclear. First, although \textit{Preferred Communications}\(^{282}\) does confer speaker status on cable operators,\(^{283}\) the Supreme Court has so far declined to decide whether government regulations affecting cable should be subject to the strict scrutiny that is brought to bear when pure expressive speech is at issue, or to the lesser standard that applies in a speech/conduct or other "indirect effects" context.\(^{284}\) Second, although \textit{Midwest Video}\(^{285}\) makes it clear that the FCC has no authority to require cable operators to provide public access channels and facilities, the Cable Communications Act of 1984 allows local government authorities to include public access requirements in their franchise agreements with cable operators.\(^{286}\) Third, to complicate matters further, the 1984 Cable Act re-

\(^{274}\) See the discussion of this issue, \textit{supra}, in note 223 and the accompanying text.
\(^{276}\) See the discussion of \textit{Preferred Communications}, \textit{supra}, in the text accompanying notes 231-41.
\(^{279}\) See the discussion of \textit{Quincy} and \textit{Century}, \textit{supra}, in the text accompanying notes 243-55.
\(^{280}\) \textit{Cruz} v. \textit{Ferre}, 755 F.2d 1415 (11th Cir. 1985).
\(^{281}\) See the discussion of these cases, \textit{supra}, in the text accompanying notes 256-73.
\(^{283}\) See \textit{id.} at 494.
\(^{284}\) See \textit{id.} at 496-97 (Blackmun, J., concurring). In his concurrence, which Justices Marshall and O'Connor joined, Justice Blackmun noted that the Court's opinion left "open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities." \textit{Id.} at 496. Justice Blackmun went on to observe that "the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing [First Amendment] standard or whether those characteristics require a new analysis." \textit{Id.}
\(^{286}\) See the discussion of \textit{Midwest Video} in the text accompanying notes 225-30.
quires cable systems of a certain size to designate a percentage of their channels for commercial, leased access use—in effect, requiring cable companies to set aside and operate part of their systems as common carriers. Finally, the Cable Television Consumer Protection and Competition Act of 1992 granted local franchising authorities and the FCC the power to regulate the prices that cable operators charge for basic cable service—a development that may give rise to a whole new set of First Amendment challenges by cable operators.

This regulatory and constitutional confusion stems, at least in part, from the fact that cable is a hybrid medium that combines elements of broadcasting and common carriage. Like broadcasters, for example, many cable operators produce and transmit their own “local origination” programming. In addition, like common carriers, all cable operators retransmit program content created and provided by others. Unlike common carriers, however, cable companies retain control over which programs and channels they will retransmit, with the exception of the channels that they are required to provide for commercial and public access users. And unlike broadcasters, cable operators are free from most of the content regulations that are applied to television and radio stations under the spectrum scarcity and Pacifica rationales.

Similar to broadcasters, though, cable operators that originate their own programming are subject to the equal time provision. Further, like broadcasters but unlike print publishers, cable systems are subject to cross ownership restrictions intended to promote diversity of ownership in local media outlets.

Finally, the hybrid nature of cable also complicates the question of cable operator liability under state libel laws. Section 558 of the Cable Communications Act of 1984 appears to relieve cable companies of liability for libelous statements transmitted over commercial access channels that the company is required to provide under section 532(b) of the Act, and over which section 532(c)(2) prevents the company from exercising editorial control. Like broadcasters and publishers, however, cable operators would appear to be fully liable for defamatory statements made in programs or editorial material that they themselves originate. Much less certain is the question of liability for libelous statements made

289. See Goodale, supra note 49, § 2.10[2]. Cable systems that originate programming might also be subject to the Fairness Doctrine, were the FCC still enforcing that doctrine. See id. § 2.10[1].
292. See id. §§ 532(b), 532(c)(2), 558; see also Playboy Enters., Inc. v. Public Serv. Comm’n, 906 F.2d 25, 27 (1st Cir.) (“In exchange for the loss of editorial control, Congress relieved cable operators of potential criminal and civil liability for the content of transmissions carried over these [access] channels.”), cert. denied, 111 S.Ct. 388 (1990).
NEW TECHNOLOGY, OLD PROBLEM

on "third party" channels that cable operators merely retransmit on their systems, but that they control to the extent that they decide which of the many available third-party channels they will carry. As discussed in the section that follows, a similar question has come up in the context of electronic information services.

IV. THE FIRST AMENDMENT STATUS OF ELECTRONIC INFORMATION SERVICES

Part I of this Note examined the various rationales that justify government regulation of communications media generally and electronic media specifically. Part II defined the primary categories and forms that this regulation usually assumes. Part III traced the regulatory history of the telephone, broadcast, and cable industries, paying particular attention to how technical and policy considerations have combined to shape the treatment of these technologies under the First Amendment. This Section attempts to bring all of these historical lessons and analogies to bear on the primary issue at hand: the First Amendment status of electronic information services.

A. Background

Known popularly as "computer bulletin boards," electronic information services emerged with the microcomputer revolution of the 1980s. As microcomputers became common in homes and small businesses, many microcomputer users began to feel a need to communicate with other users about their computing needs and interests. The early computer bulletin boards responded to this need by providing an electronic location where microcomputer users could post queries and receive responses. To communicate in this manner, computer users needed only a phone line, the phone number of the bulletin board, a "modem" telecommunications device connected to their computer, appropriate telecommunications software, and a password or identification number.

As this description suggests, many of the first computer bulletin boards were small, not-for-profit operations that functioned as online meeting places for those that shared interests in particular aspects of microcomputer culture. However, the 1980s also saw the emergence of

293. The general rule is that "'one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.'" Cianci v. New York Times Publishing Co., 639 F.2d 54, 61 (2d. Cir. 1980) (quoting the Restatement (Second) of Torts § 578 (1977)).


larger, commercial electronic information services such as Compuserve and Prodigy. Among the services provided by these commercial systems are various "value added" services such as stock market quotations, sports scores, electronic encyclopedias, computer games, national and regional news, online shopping, and instant airline reservations. As addressed further in the discussion of Cubby, Inc. v. Compuserve Inc., some commercial information systems also sponsor or sublet electronic space to "special interest" groups or "forums" that provide services tailored to subscribers with interests in certain areas.

B. Coming Up With the Correct Analogy

As discussed earlier, new communications technologies tend to be regulated, at least initially, like the existing technology to which they are most closely analogous. In the case of electronic information services, however, it is not immediately clear what the most closely analogous communications technology is. On first view, it is tempting to compare electronic information services to telephone technology, since subscribers communicate with an EIS over phone lines. Unlike telephone companies or other common carriers, though, the entities that operate electronic information services do not own or control transmission channels. Instead, EIS operators simply control a service that is carried over phone lines. Thus, it is not clear that the common carrier provisions of the Communications Act of 1934, which are primarily intended to regulate access to transmission channels, could or should apply to electronic information services.

Analogies to other electronic communications media seem even more strained. Unlike broadcasters, for example, electronic information services do not transmit signals over the public airwaves, and they are not required to operate under a government license. And unlike cable television companies, EIS operators do not require exclusive franchise licenses to provide service in particular communities, nor is there any apparent need for the FCC to regulate the operation of electronic information services as being "reasonably ancillary" to the Commission's obligation

296. According to one source, there were an estimated 45,000 public access electronic information services operating in 1992, the vast majority of them "mom-and-pop operations [that] come and go." William Grimes, Computer as a Cultural Tool: Chatter Mounts on Every Topic, N.Y. Times, Dec. 1, 1992, at C13. The same source lists Prodigy as the largest commercial EIS with 1.75 million subscribers, followed closely by Compuserve with 1.69 million users. Other large commercial EIS operators are GENIE (350,000 subscribers), America Online (180,000 subscribers), and Delphi (100,000 subscribers). See id.


298. For further discussion of Cubby, see infra notes 324-43 and accompanying text.

299. Compuserve, for example, provides "access to over 150 special interest 'forums,' which are comprised of electronic bulletin boards, interactive online conferences, and topical databases." Cubby, 776 F. Supp. at 137.

300. See supra note 104 and accompanying text.
to regulate broadcasters or common carriers.\textsuperscript{301}

Of course, there is another choice: treating EIS operators as print publishers. In several respects, this analogy would seem to provide the closest fit. After all, electronic information services do seem to function primarily as electronic publishers, providing subscribers with information in text and (in some cases) graphic form. And this analogy would certainly seem to be attractive to most EIS operators, since status as print publishers would generally provide them with the greatest protection under the First Amendment.

But the two leading cases in this area indicate that there may be obstacles to regulating EIS operators as publishers. First, \textit{Telecommunications Research & Action Center v. Federal Communications Commission}\textsuperscript{302} (the "TRAC" decision) suggests that the manner in which electronic information services are transmitted, rather than the fact that they function as electronic publishers, is the key to determining their status under the First Amendment.\textsuperscript{303} Second, in \textit{Cubby Inc v. CompuServe Inc.},\textsuperscript{304} the operator of one of the world's largest electronic information services argued that it should not be treated as a publisher—and the court agreed.\textsuperscript{305}

Both TRAC and Cubby are considered more closely below. First, however, a more fundamental question requires examination: assuming that the government has an interest in regulating electronic information services, which of the rationales raised earlier would serve as the foundation for such regulation? That is, for electronic information services, what public interest goal would allow the government to get around the First Amendment roadblocks to regulation?

\textbf{C. Coming Up With the Correct Regulatory Rationale}

As discussed in Part I, supra, the Supreme Court has acknowledged two primary theories under which the government may regulate communications content: the \textit{Red Lion} "scarcity" rationale\textsuperscript{306} and the \textit{Pacifica} "intrusiveness" rationale.\textsuperscript{307} However, while these rationales remain the primary justifications for regulating broadcasting, neither would appear to justify government regulation of electronic information services. The scarcity argument simply seems irrelevant, since electronic information services do not transmit over the public airwaves—a precondition for the

\begin{thebibliography}{307}

\bibitem{301} As discussed in the text accompanying note 212, supra, the Supreme Court has concluded that the FCC has general authority to regulate cable television to the extent that the cable regulations in question are "reasonably ancillary" to the Commission's duty to regulate broadcasting.


\bibitem{303} 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

\bibitem{304} See id. at 506-09.


\bibitem{306} See supra notes 22-23 and accompanying text.

\bibitem{307} See supra notes 24-25 and accompanying text.

\end{thebibliography}
scarcity rationale to apply. Further, there is no allegation or suggestion that electronic information services operate as natural or de facto monopolies—a condition that might also support a scarcity argument. But the scarcity rationale would apply if one assumes, as did the TRAC court, that an EIS picks up the regulatory characteristics of the medium over which it is transmitted, and if that medium is itself subject to the scarcity rationale.

Determining the relevancy of the intrusiveness rationale to EIS regulation requires figuring out where electronic information services fit on the "spectrum of intrusiveness" derived from *Pacifica* and *Sable*. Those cases, particularly *Sable*, suggest that electronic information services would place at the "least intrusive" end of the spectrum alongside pay-per-view, dial-a-porn and other services that require an initiating act or invitation to trigger transmission into the home. In fact, under the criteria set out in *Sable* and *Cruz*, electronic information services would seem to be among the least intrusive of communications media, since gaining access to an EIS requires the use of a considerable amount of computer equipment, a "dial up" initiated by the user, and (at least for commercial services) the entering of an individual password assigned to each user. With this in mind, the intrusiveness rationale simply does not work as a way to justify government regulation of EIS operators.

D. Regulating Electronic Information Services: Lessons from the TRAC and Cubby Cases

As the preceding sections indicate, there is no quick answer to the question of how far the government can and should go in regulating electronic information services. The regulatory experiences of existing communications technologies offer no clear guidance, since no existing technology provides a closely analogous fit with electronic information services. The theories that have historically justified government regulation of communications media provide no certain solution either, because none of the recognized rationales are directly relevant to the regulation of EIS operators. As the two cases discussed below show, this lack of clear historical guidance has required courts either to stretch and reshape existing regulatory policies to fit electronic information services, or to come up with rationales and analogies of their own for determining the extent to which government can regulate EIS operators under the First Amendment.

308. For a definition of the spectrum of intrusiveness, see *supra* notes 45-50 and accompanying text.


1. The TRAC Case

In *Telecommunications Research and Action Center v. Federal Communications Commission*, 312 the D.C. Circuit considered whether the Fairness Doctrine should apply to teletext, a type of electronic information service that is transmitted within an unused portion of the broadcast television signal. 313 The FCC had determined that the doctrine should not apply because, in its opinion, "teletext 'more closely resembles . . . print communication media such as newspapers and magazines'"314 than broadcast communications. In other words, the FCC concluded that this new communications technology was more closely analogous to print media than to broadcasting, an assumption that led the Commission to the corollary conclusion that teletext operators should receive the same level of First Amendment protection as print publishers. 315 More specifically, because teletext is like print publishing, and because print publishers are not subject to the scarcity rationale that the Supreme Court has cited as justification for imposing the Fairness Doctrine on broadcasters,316 the FCC found that it was not justified in applying the doctrine to teletext operators.317

The Court of Appeals disagreed with the FCC's reasoning, however, holding that the FCC really had no choice but to apply the Fairness Doctrine to teletext.318 While it seemed sympathetic to many aspects of the Commission's argument, the court found dispositive the fact "that teletext is transmitted over broadcast frequencies that the Supreme Court has ruled scarce."319 That is, the D.C. Circuit focused almost exclusively on the nature of the technology over which teletext is broadcast, concluding that "[t]eletext, whatever its similarities to print media, uses broadcast frequencies, and that, given Red Lion, would seem to be that."320 Significantly, although the court acknowledged that "main signal operators"321 (television station licensees) controlled and operated most

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312. 801 F.2d 501 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987). Other aspects of TRAC are discussed in the text accompanying notes 176-78, supra.
313. See TRAC, 801 F.2d at 503. Like conventional commercial EIS systems that employ telephone transmission, broadcast teletext provides subscribers with information and entertainment services in text and graphic form. See id. Because it is a broadcast service, however, teletext cannot accommodate interactive communications such as electronic mail or "online" dialogues among users (both of which are available on most conventional electronic information services). As the D.C. Circuit was careful to point out, its analysis in TRAC applies "exclusively to such over-the-air transmissions, and not to transmission of text and graphics by way of cable or telephone." Id.
314. Id. at 504.
315. See id.
318. See id. at 504.
319. Id. at 508.
320. Id. at 509.
321. Id. at 503.
teletext services at the time, it held that the FCC should apply the fairness doctrine to all broadcast teletext providers based on the nature of the transmission technology involved, and not just to those providers otherwise subject to the doctrine through their role as broadcast licensees. 322

If adopted widely, the TRAC holding that teletext “picks up” the regulatory traits of the medium over which it is transmitted would have profound implications for the First Amendment status of all electronic information services. As discussed earlier, most electronic information services, including large commercial operations such as Prodigy and Compuserve, operate over phone lines. Applying the reasoning in TRAC, this would mean that most electronic information services would pick up the regulatory characteristics of a common carrier. In one sense, this would be a favorable outcome for EIS operators, since common carriers are free from most of the content regulations that burden broadcasters and from general liability under state libel laws. In important other ways, however, acquiring the structural designation of common carrier would carry its own burdens and drawbacks, including the loss of editorial control (the result of having to make space available to third parties on a non-discriminatory basis) and, possibly, the loss of any claim that EIS operators would otherwise have to full status as First Amendment speakers. 323

2. The Cubby Case

Cubby, Inc. v. Compuserve Inc. 324 required a federal district court sitting in diversity to determine the structural status of electronic information services under state libel law. The defendant, Compuserve, operates a commercial electronic information service. 325 As the court explained it, Compuserve acts like an online “electronic library.” 326 In return for a membership fee and usage charges, subscribers gain access to thousands of information sources available on the system, some of which are prepared and provided by Compuserve itself, as well as to “over 150 special interest ‘forums’ which are comprised of electronic bulletin boards, interactive online conferences, and topical databases.” 327 Most of these forums are operated by third parties who, under a contract with Compuserve, “‘manage, review, create, delete, edit and otherwise control [their] contents’.” 328 One of these forums, Rumorville USA (“Rumorville”), was the focus of this lawsuit.

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322. See id. at 508 (“[t]he dispositive fact is that teletext is transmitted over broadcast frequencies”).
323. See the discussion of common carrier status in the text accompanying notes 108-10, supra.
325. See id. at 137.
326. Id.
327. Id.
328. Id. (citation omitted).
Rumorville allegedly published defamatory statements about a competitive service, "Skuttlebut," and one of Skuttlebut's principal organizers.\textsuperscript{329} Cubby, Inc., the corporate parent of Skuttlebut, sued Compuserve for libel, trade disparagement, and unfair competition under the theory that Compuserve, as the EIS operator, was liable as the publisher of Rumorville.\textsuperscript{330} Thus, the threshold question in this case, and the focus of Compuserve's motion for summary judgment, was whether an EIS operator could in fact be held liable as a "publisher" for third-party statements transmitted on its system.\textsuperscript{331}

Like most courts confronted with questions concerning the regulatory status of a new technology, the district court in Cubby could not resist the urge to analogize. But unlike the Court of Appelas in TRAC, which looked to the transmission technology involved in drawing its regulatory analogy, the Cubby court took a more functional approach.\textsuperscript{332} Concentrating on the relationship between Compuserve and the operators of forums such as Rumorville, the court concluded that, in this relationship, Compuserve functioned more as a distributor than a publisher of information.\textsuperscript{333} In other words, like a book distributor, "Compuserve may decline to carry a given publication [such as Rumorville] altogether, [but] in reality, once it does decide to carry a publication, it will have little or no control over the publication's content."\textsuperscript{334} Further, like a large distributor of print publications, an EIS operator such as Compuserve has "'no duty to monitor each issue of every [publication] it distributes.'"\textsuperscript{335} Finding no such duty, and finding no evidence that the defendant either "knew or had reason to know of Rumorville's contents," the court granted Compuserve's motion for summary judgment.\textsuperscript{336}

Although the district court's ruling was a clear individual victory for Compuserve, Cubby carries several potentially conflicting implications for EIS operators generally. For example, in determining that Compuserve functioned as a distributor, the court was essentially saying that, like common carriers such as phone companies, EIS operators should not generally be held liable for the third-party content that they transmit. But the reason that courts do not generally hold common carriers liable for libelous or otherwise actionable third-party transmissions is that, un-

\textsuperscript{329} See id. at 138.
\textsuperscript{330} See id.
\textsuperscript{331} See id.
\textsuperscript{332} Of course, in this libel case, one reason for not focusing on the transmission technology involved may have been the court's realization that this would not have been a very useful comparison, since most media technologies are subject to the same, or at least very similar, standards of libel liability. In contrast, the transmission technology consideration was key in TRAC, since the issue in that case was the application of the Fairness Doctrine to teletext, and since broadcasting stations are the only transmission channels subject to the Fairness Doctrine.
\textsuperscript{333} See Cubby, 776 F. Supp. at 140.
\textsuperscript{334} Id.
\textsuperscript{335} Id. (citation omitted).
\textsuperscript{336} Id. at 141.
like EIS operators, these "wires for hire" do not have discretion to exclude particular third-party information providers from using their channels. The Cubby court conceded that EIS operators do have this discretion, but found another, more functional consideration that, in the court's opinion, worked to exempt Compuserve from libel liability. The court held that, given the speed of electronic communications and the amount of information involved, there is no practical way for an EIS operator to monitor the content of the postings on its system. Using this same reasoning, an EIS operator like Prodigy should not be held liable, in libel or under any other legal theory, for the content of the electronic mail carried on its system.

Again, this exemption from libel liability rests on the premise that it is impossible, or at least very impractical, for an EIS operator to exercise any real degree of editorial control over third-party postings. But what if an EIS operator does attempt to exert some level of control over third-party content, as Prodigy has done in attempting to place constraints on the use of its electronic mail services? Would this take the EIS operator out of the limited "functional distributor" exception introduced in Cubby, leaving the operator liable for libelous and other actionable content? Such a result would be somewhat ironic, since it would effectively punish those EIS operators who attempt to take an active editorial role and reward those who simply sit back and assume the role of passive common carriers.

Cubby also raises another related concern. Usually, relief from liability of the sort granted to Compuserve is provided as part of a tradeoff: the communications entity in question receives the relief in return for providing access to third parties on a non-discriminatory basis. Conceivably, then, the district court's decision in Cubby could open the door to regulations requiring EIS operators to set aside all or part of their capacity for this sort of common-carrier-like access. Although just a theoretical possibility today, mandated access could become more probable if, as seems likely, electronic information services become increasingly important sources of information and if, as also seems likely, the commercial EIS industry comes to be dominated by a few large "information utilities."

337. See the discussion of common carrier status, supra, notes 108-10 and accompanying text.
339. See id.
340. As the Cubby court acknowledged, however, an EIS operator might be held liable if the plaintiff could show that the operator in fact "knew or had reason to know" about the actionable statements sufficiently in advance of their transmission to take preventive measures. Id. at 141.
341. See Takahashi, supra note 1, at D5.
342. A precedent for such a requirement is the commercial access set-aside for cable TV systems mandated by § 532 of the Communications Act of 1934. See 47 U.S.C. § 532 (1988). The cable commercial access set-aside is discussed in the text accompanying note 287, supra.
Finally, on a more general level, just what does Cubby say about the status of EIS operators as First Amendment speakers? First, even though the district court did not address this question directly, there can be little doubt that EIS operators possess speaker status when they themselves originate the information services transmitted to subscribers. The Cubby court seemed to go further, however, suggesting that Compuserve retained its full rights as a First Amendment speaker even when functioning in its role as a distributor and that, in that role, it actually enjoyed a greater measure of protection against libel liability than do print publishers. Although this sort of expanded speaker status may well be justified, it would seem to provide EIS operators with a First Amendment windfall, allowing them to gain all of the benefits of publisher status while escaping much of the burden of libel liability.

E. Analysis and Recommendations

Although Cubby, Inc. v. Compuserve Inc. certainly does not resolve the question of where electronic information services fit under the First Amendment, the district court's decision does point to the sort of analysis that may prove useful in reaching that determination. Again, the district court adopted a functional approach, focusing on the types of services that Compuserve provided and the manner in which it operated as the keys to evaluating its level of liability under libel law. In contrast, the TRAC court took a more technical “transmission channel” approach, concluding that teletext must be subject to the Fairness Doctrine simply because it is carried on broadcast channels that are themselves subject to the doctrine. As discussed below, the functional analysis used in Cubby seems the more flexible and constitutionally viable of the two approaches, especially when it comes to evaluating the First Amendment status of electronic information services and other new technologies that combine the characteristics of several different media.

Many new media, and many newer applications of older media, do combine characteristics that blur the conventional regulatory boundaries between communications services and technologies. For example, cable television combines elements of broadcasting, publishing, and common carriage in a single communications system. Similarly, since the

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343. See Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) ("First Amendment guarantees have long been recognized as protecting distributors of publications." [citation omitted]; "Given the relevant First Amendment considerations, the appropriate standard of liability to be applied to Compuserve [in its role as distributor] is whether it knew or had reason to know of the allegedly defamatory Rumorville statements.").

344. Id.

345. See id. at 140.


347. See id. at 517.

348. See supra text accompanying notes 287-93.
AT&T breakup, the regional telephone operating companies have sought and in some cases secured the right to provide video and electronic publishing services over the local phone lines that they operate as common carriers. Additionally, as just discussed, electronic information services such as Compuserve and Prodigy operate as both publishers and distributors while operating over telephone lines that are regulated as common carriers.

A strict TRAC approach would focus only on the transmission technology involved, adopting the First Amendment standard that has traditionally been applied to that technology or, if it is a new transmission technology, the standard that has been applied to the most closely analogous existing communications medium. However, as the TRAC court itself acknowledged, a rote application of the transmission technology approach to new media "inevitably leads to strained reasoning and artificial results." This strained reasoning was evident in TRAC, where the court adopted the transmission technology approach in ruling that the fairness doctrine applied to teletext, but where more than half the court's opinion was devoted to discussing concerns about the practical "applicability" of the doctrine to teletext.

The TRAC rationale becomes even more strained when applied to scenarios in which a publisher converts, verbatim, an existing print publication to electronic form and then retransmits the converted publication over teletext. Under the Supreme Court's ruling in Miami Herald Publishing Co. v. Tornillo, the newspaper publisher could not be required to accommodate a "right of reply" in the print version of the newspaper. Under the D.C. Circuit's reasoning in TRAC, however, the publisher could be required to accommodate a right-of-reply in the electronic version of the newspaper, since communications on broadcast teletext services are subject to the Fairness Doctrine. Recognizing the inconsistency and questionable constitutionality inherent in this result, the TRAC court predicted that "the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, surely by pronouncing Tornillo applicable to both, or announce a constitutional distinction that is more usable than the present one."

Now would seem to be the time to revisit the TRAC "transmission channel" approach, at least in its potential capacity as a general rationale for justifying the regulation of electronic information services. Under the

349. See supra note 125 and accompanying text.
351. See id. at 510.
353. See id. at 258.
355. Id. at 509.
alternative “functional” approach, electronic information services would not be regulated under broadcast or common carrier standards simply because they transmit over television channels or phone lines. Instead, EIS operators would be subject to several First Amendment standards, depending on the different types of services that they provide and the constitutional standard generally applied to each type and category of service. As discussed earlier, this functional approach is already used to some extent with cable television operators, who are considered First Amendment speakers with respect to most of their channels, but who function as common carriers toward the access channels that they are required to provide under local franchising agreements or the commercial access requirements of the Cable Communications Act of 1984.

To EIS operators, the main advantage of the functional approach is that it is inherently flexible, permitting realistic regulatory schemes that avoid the “strained reasoning and artificial results” of the broad-brush transmission channel approach. The main disadvantage is that this flexibility and fluidity makes for less certainty than there is under the transmission channel approach, where there is a single constitutional standard derived solely from the nature of the transmission channel involved. For most EIS operators, however, exchanging certainty for greater regulatory flexibility would seem to be a trade that is well worth making.

In fact, this tradeoff should prove extremely attractive to most EIS operators, since abandoning the transmission channel approach in favor of a functional approach would effectively negate many of the rationales that might justify more extensive government regulation of electronic information services. As already discussed, once you separate electronic information services from the transmission channels over which they are transmitted (that is, once you abandon the transmission channel approach to regulation), both the scarcity and intrusiveness rationales that would justify imposing broadcaster-type regulations on EIS operators be-

356. See supra text accompanying notes 287-93.
357. See 47 U.S.C. § 532(b) (1988) (requiring cable systems of a certain size to set aside channels for commercial access on a non-discriminatory basis); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (program origination and selection activities of cable operators plainly “implicate First Amendment interests”); Federal Communications Comm’n v. Midwest Video Corp., 440 U.S. 689, 701 n.9 (1979) (“A cable system may operate as a common carrier with respect to a portion of its service only.”). Note that this functional, split-standard approach also seems implicit in recent decisions allowing telephone companies to become providers, rather than mere retransmitters, of information services. See supra note 125 and accompanying text.
359. The downside to this approach is that it requires determining, in each case, which capacity (publisher, distributor, etc.) the EIS operator was functioning in with respect to the content at issue. However, once that factual determination is made, the constitutional standard applied would remain constant across cases. For example, once a court found that the EIS operator was functioning as a distributor toward an electronic mail message, it would necessarily conclude that the operator could not be held liable for defamatory statements contained in that message.
Similarly, once you reject the notion that electronic information services simply pick up the regulatory characteristics of the technology over which they are transmitted, there is nothing inherent in the structure of electronic information services that would justify their regulation as common carriers.

This brings us back to the point where the Cubby court started—analyzing the First Amendment status of electronic information services from a purely functional perspective. From that perspective, it does seem clear most EIS operators function as both publishers and distributors of information. When the EIS operator either creates or exercises editorial control over information transmitted to subscribers, it is functioning as a publisher. Conversely, when the EIS operator simply supplies space on its system to third-party information providers, it is functioning as a distributor. In both roles, the EIS operator is fully protected from government regulation of constitutionally protected speech that it transmits to subscribers. In addition, in the Cubby court's opinion, an EIS operator is also protected from liability for transmitting unprotected speech (in Cubby, libelous statements made about a private citizen) once the court determines that it functioned as a distributor, rather than a publisher, of the speech in question.361

As discussed earlier, this relief from liability for third-party content is also available to common carriers (a category that includes cable operators that function as common carriers toward access channels), for whom it is considered part of the tradeoff for the requirement that they provide non-discriminatory access to third-party information providers.362 Thus, this aspect of Cubby does raise the possibility of government regulation that would require such non-discriminatory access to electronic information systems in return for relieving EIS operators from liability for any actionable content contained in the third-party materials that they transmit (or, as is perhaps more likely, a regulatory or judge-made rule that this exemption from liability is available only when the third party in question has been the beneficiary of a common-carrier like access policy).363

With this one possible exception, however, adopting a functional approach to regulating electronic information services should benefit both EIS operators and the public generally. EIS operators will benefit by being freed from the many burdensome regulations that would restrict their First Amendment rights and inhibit the growth of their services, and that often seem to be applied to new media by blind and inappropria-
ate analogy to existing communication systems. This regulatory approach should also work to the advantage of the American public, which will benefit from the continued growth of electronic information services that function both as independent editorial voices and as electronic forums for the free exchange of information and ideas provided by others.

CONCLUSION

As Justice Blackmun observed, when considering where a new communications medium fits under the First Amendment, courts should first determine whether the characteristics of the new technology "make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." In the case of EIS systems, analogies to existing electronic media are clearly insufficient. In particular, it would be a mistake to assume that electronic information services should simply "pick up" the regulatory characteristics of the more established media over which they are transmitted, since this would result in inappropriate and burdensome regulation that would work to restrict the First Amendment rights of EIS operators and the growth of the electronic information industry. Instead, Congress and the courts should pursue a more functional approach that focuses on the type and scope of communications services that EIS systems provide, the manner in which they operate, and their role in the information marketplace in which they must compete. Under this sort of analysis, EIS operators generally appear to warrant the full level of First Amendment protection provided to print publishers and the distributors of print publications.
