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# Notes

## GOVERNMENT-OWNED MEDIA: THE GOVERNMENT AS SPEAKER AND CENSOR

*When government operates a communications medium, it may either promote first amendment values, by ensuring a diverse marketplace of ideas, or hinder them, by censoring the information and ideas it conveys. This Note proposes a synthesis of government speech and government forum analyses which would provide first amendment limitations on government-operated media while still allowing government to exercise editorial discretion.*

### INTRODUCTION

THE NOTION THAT government cannot suppress speech because of its content is a central theme of first amendment analysis.<sup>1</sup> Yet government often does engage in content control. When public school boards prescribe curricula,<sup>2</sup> when public officials decide what to include in or exclude from public reports,<sup>3</sup> and when public libraries decide which books to put on the shelves,<sup>4</sup> government agencies and officials are restricting expression "because of its message, its ideas, its subject matter, or its content."<sup>5</sup>

What takes these examples out of the realm of censorship and places them into the realm of legitimate governmental discretion is

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1. *E.g.*, *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) ("the First Amendment's central proscription [is] against censorship"); *Board of Educ. v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring) ("the State may not act to deny access to an idea simply because state officials disapprove of that idea"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (the "choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, [is one] that the First Amendment makes for us"); *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972) ("government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). *See also* *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 545-46 (1980) (Stevens, J., concurring) ("the subject matter, or, indeed, even the point of view of the speaker, may provide a justification for a time, place and manner regulation . . . [But a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view . . . is the purest example" of a first amendment violation).

2. *See, e.g.*, *Pico*, 457 U.S. at 862 ("Respondents do not seek in this Court to impose limitations upon their school board's discretion to prescribe the curricula . . .").

3. M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 6-10 (1983).

4. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 570 n.23 (1980).

5. *Mosley*, 408 U.S. at 95-96.

a difference in purpose.<sup>6</sup> Government legitimately exercises its discretion when it attempts to carry out a necessary function: education, information, or cultural enrichment.<sup>7</sup> When government censors, it aims at the content of speech or at its effects;<sup>8</sup> expression is suppressed because government fears or disagrees with what is being said.<sup>9</sup>

In its role as a state public broadcaster,<sup>10</sup> government can act either as speaker or as censor.<sup>11</sup> It is ironic that state public broadcasting poses first amendment problems, because the purpose of public broadcasting legislation<sup>12</sup> was to encourage expression. Congress created the public broadcasting system as an alternative source of information and programming in response to concerns that powerful owners and commercial advertisers controlled traditional programming.<sup>13</sup> Nevertheless, fears of federal censorship of the content of public broadcasting programs have proven well-founded,<sup>14</sup> even though decentralized, local control of the stations has limited its effects.<sup>15</sup> State and local government censorship, through publicly funded, government-operated broadcasting stations, was less expected.

The issue of state censorship arose in *Muir v. Alabama Educational Television Commission*.<sup>16</sup> There, the Fifth Circuit held that the first amendment does not preclude state public broadcasting stations from making editorial programming choices, although it does

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6. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-5 to -6, at 592-97 (1978).

7. M. YUDOF, *supra* note 3, at 38-41.

8. L. TRIBE, *supra* note 6, § 12-2, at 580.

9. *Id.*

10. "Public broadcasting" encompasses not only noncommercial and publicly supported television and radio stations but also those owned and operated by instrumentalities of the state and local government. This Note focuses on government-owned and -operated stations, rather than on noncommercial stations operated by nonprofit agencies and organizations. The term "state broadcaster" is used in this Note to refer to stations owned and operated by state and local government agencies and to differentiate them from other public broadcasters.

11. Note, *Editorial Discretion of State Public Broadcasting Licensees*, 82 COLUM. L. REV. 1161 (1982).

12. Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. §§ 390-399 (1982 & West Supp. 1984)).

13. CARNEGIE COMM'N ON EDUCATIONAL TELEVISION, *PUBLIC TELEVISION: A PROGRAM FOR ACTION* 13-8 (1967) [hereinafter cited as CARNEGIE COMM'N]; see *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3110 (1984).

14. Note, *supra* note 11, at 1165-66 n.32; see also *League of Women Voters*, 104 S. Ct. at 3127 (47 U.S.C. § 399 violates first amendment right of broadcasting station, funded by Corporation for Public Broadcasting, to editorialize).

15. M. YUDOF, *supra* note 3, at 131-33.

16. 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1274 (1983).

not protect their choices either.<sup>17</sup> This Note focuses on *Muir* and proposes a series of first amendment limitations on the operation of state-owned communications media.<sup>18</sup> The limitations are based on the premise that government is acting without a legitimate purpose when it suppresses speech solely because of its content or effect on the listener.<sup>19</sup> Society's rights to curb or counter government speech<sup>20</sup> and the rights of speakers and listeners to be free of content-based suppression in a government forum<sup>21</sup> at these times outweigh government interests in speaking or editing.<sup>22</sup>

Part I of this Note discusses first amendment values and emerging rights.<sup>23</sup> Part II traces the development of the right-of-access theory, which asserts that government has an affirmative obligation to foster free expression.<sup>24</sup> Part III examines government speech and government forum analyses and derives from them first amendment limitations on government-owned media,<sup>25</sup> and Part IV explores the application of these limits in the context of *Muir*.<sup>26</sup> Finally, Part V proposes a merger of government speech and government forum analyses to establish a right to be free from illegitimate government interference with expression in the public broadcasting system.<sup>27</sup>

## I. FIRST AMENDMENT VALUES AND RIGHTS

### A. *Values*

The first amendment declares, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>28</sup> It protects freedom of expression for two reasons. First, free speech helps society to achieve fundamental objectives. By encouraging free expression and discussion of diverse views, the first amendment aids in the search for truth,<sup>29</sup> ensures enlightened self-govern-

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17. 688 F.2d at 1043-44.

18. See *infra* notes 204-69 and accompanying text.

19. See *supra* note 1.

20. See *infra* notes 115-32 and accompanying text.

21. See *infra* notes 143-53 and accompanying text.

22. See L. TRIBE, *supra* note 6, § 12-2, at 580-81.

23. See *infra* notes 28-70 and accompanying text.

24. See *infra* notes 71-96 and accompanying text.

25. See *infra* notes 97-153 and accompanying text.

26. See *infra* notes 154-203 and accompanying text.

27. See *infra* notes 204-69 and accompanying text.

28. U.S. CONST. amend. I.

29. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

ment,<sup>30</sup> promotes social stability,<sup>31</sup> and provides a structural check on governmental power.<sup>32</sup> This "instrumental view" of free expression focuses on the values gained by society.<sup>33</sup> Second, free speech is important for the individual. By protecting individual thought and expression, the first amendment guarantees individual autonomy<sup>34</sup> and encourages individual development.<sup>35</sup> This "individual autonomy" or "liberty view" emphasizes individual rights.<sup>36</sup>

Generally, the two views reinforce one another. Society gains from the protection of individual free speech—more ideas enter the marketplace, and information necessary for political decisionmaking circulates. Moreover, this protection encourages criticism of and comment on government operations and provides a peaceful outlet for such expression.<sup>37</sup>

However, the two views conflict when the first amendment is advanced to achieve societal goals in a manner that clashes with the countervailing interests of an individual.<sup>38</sup> Such affirmative use of the first amendment has been advocated to ensure speakers' rights to effective nongovernmental forums and to protect listeners' rights to receive information from diverse sources.<sup>39</sup> The countervailing individual interest usually is a private broadcaster's.<sup>40</sup>

Conflict may also arise when speech interests clash with govern-

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30. A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 57 (1960).

31. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-8 (1970).

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

33. T. EMERSON, *supra* note 31, at 8.

34. *Id.*; L. TRIBE, *supra* note 6, § 12-1, at 576 (freedom of speech is partially "an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be"); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) ("The liberty model holds that the free speech clause protects . . . an arena of individual liberty from certain types of governmental restrictions").

35. T. EMERSON, *supra* note 31, at 6.

36. *Id.* at 8.

37. *Id.*

38. *Id.* at 18-19. See also B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 28 (1976) ("Perhaps the most basic question is whether the First Amendment contains both principles of individual (or institutional) autonomy and social policies of diversity of expression—ideas that, in some circumstances, may conflict.").

39. See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* (1973); Z. CHAFEE, *2 GOVERNMENT AND MASS COMMUNICATIONS* 471-75 (1947); W. HOCKING, *FREEDOM OF THE PRESS* 161-90 (1947); B. SCHMIDT, *supra* note 38; Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C.L. REV. 1 (1973). In the context of public broadcasting, see Comment, *Access to State-Owned Communications Media—The Public Forum Doctrine*, 26 UCLA L. REV. 1410 (1979).

40. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The Supreme

mental interests.<sup>41</sup> Although primarily a negative limitation on government interference with the free exchange of ideas, the first amendment can affirmatively ensure speakers' access to public forums.<sup>42</sup> In these situations, there is no conflict between the access granted and another expressive right, as there is when a private broadcaster is forced to allow a political candidate to speak.<sup>43</sup>

### B. *First Amendment Rights*

The notion that the first amendment imposes affirmative obligations on government to open public and private forums led to the articulation of a new right. The right to hear, while less focused than the right to speak, stems from the assumption that freedom of thought and expression is meaningless without the right to obtain information and ideas from diverse sources.<sup>44</sup>

#### 1. *The Right to Speak*

The first amendment undoubtedly limits government suppression of the right to speak.<sup>45</sup> The scope of this limitation is broad.

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Court has traditionally subordinated broadcaster's interests to the interests of listeners. *Id.* at 390; *see also infra* note 43 and accompanying text (equal opportunity for political candidates).

41. Governmental interests include such matters as peace and order on the public streets and national security concerns with publication of certain information. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (where advocacy is directed to and is likely to incite imminent lawless action, a state may limit constitutional guarantees of free speech and press); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis. 1979) (ordering preliminary injunction against publication of information about how to produce a hydrogen bomb because of national security concerns).

42. *See* B. SCHMIDT, *supra* note 38, at 29 ("The Bill of Rights generally reflects a conception of liberty as a collection of negative controls on official power. Consequently, the First Amendment has been viewed in negative terms."); *cf.* notes 133-42 and accompanying text (affirmative and negative obligations for public forums); T. EMERSON, *supra* note 31, at 629 ("the government must affirmatively make available the opportunity for expression as well as protect it from encroachment").

43. *CBS v. FCC*, 453 U.S. 367 (1981) (upholding constitutionality of 47 U.S.C. § 312(a)(7) (1982), which requires licensees to provide reasonable access to candidates for federal office); *see also Red Lion*, 395 U.S. at 367 (upholding constitutionality of "fairness doctrine," currently codified at 47 C.F.R. § 73.1910 (1983)); 47 U.S.C. § 315(a) (1982) (requiring broadcasters to afford equal opportunities to other candidates for same office when broadcaster has allowed time to one candidate); *see infra* notes 77-91 and accompanying text (access to private media for citizens to express views).

44. *See Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) ("The First Amendment protects the right to receive information and ideas . . . . The freedom to speak and the freedom to hear are inseparable [from] the process of thought and discussion."); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1 ("[T]he right to know serves much the same function in our society as the right to communicate. It is essential to personal self-fulfillment. It is a significant method for seeking the truth . . . . It is necessary for collective decision-making.").

45. *See Z. CHAFEE, FREE SPEECH IN THE UNITED STATES* 19 (1967) (the Framers

Prior restraints on speakers because of the content of their speech bear a "heavy presumption" of unconstitutionality.<sup>46</sup> However, speakers can be barred from some government facilities because of the content of their speech,<sup>47</sup> and can be punished for the content of their speech when it is incitive, libelous, or obscene.<sup>48</sup>

The right to speak includes the right to exercise editorial discretion.<sup>49</sup> Since all speech involves selection, editorial decisionmaking is simply a part of the process of protected expression. The Supreme Court has held this view paramount in its treatment of newspaper editors,<sup>50</sup> and, accordingly, editors have been afforded full speech protection. Even newspaper editors are limited, however, when they are simply selecting from among commercial advertisers<sup>51</sup> and not performing a truly editorial function.

The private broadcaster's role has been viewed differently.<sup>52</sup>

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intended that the first amendment provide a "right of unrestricted discussion of public affairs"); L. LEVY, *LEGACY OF SUPPRESSION* 236 (1960) (first amendment at least means government cannot interfere to suppress speech before publication).

To some extent, the government can control the speech of its own employees. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (free speech rights of federal employees not violated by prohibiting them from taking active part in political management or political campaigns). However, federal employees, unlike private employees, can assert their constitutional rights against their employer. See, e.g., *Connick v. Myers*, 103 S. Ct. 1684 (1983) (when government employee's speech involves a matter of public concern, first amendment protects him against undue action by his employer, such as dismissal).

46. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

47. See, e.g., *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 103 S. Ct. 948 (1983).

48. The relevant limits are set by *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (constitutional to punish speech directed at inciting or producing imminent lawless action and likely to incite or produce such action); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public official cannot recover damages for libel unless statement made with actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (states may set own standard for libel of private person, so long as they do not impose liability without fault); *Miller v. California*, 413 U.S. 15 (1973) (materials are obscene, and therefore unprotected by the first amendment, if the average person would find them appealing to the prurient interest of sex, they are patently offensive, and they lack any serious social value).

49. See Note, *supra* note 11, at 1172.

50. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). "[T]he First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned." *Id.* at 259 (White, J., concurring).

51. See *infra* note 91.

52. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of viewers and listeners, not the right of broadcasters, which is paramount."); see also *CBS v. FCC*, 453 U.S. 367, 397 (1981) (by balancing the rights of speakers, listeners, and broadcasters, statute requiring reasonable access for individual candidates makes a contribution to freedom of expression by increasing candidates' right to speak and public's right to receive information).

The Court views the broadcaster as a conduit for speech rather than as a speaker. Consequently, listeners' interests in diverse speech outweigh the broadcaster's interests.<sup>53</sup>

## 2. *The Right to Hear*

The right to hear at least protects a willing listener's interest in receiving information and ideas from willing speakers without governmental interference.<sup>54</sup> Again, the justification for the right is that it is essential to the process of free expression, for without it, the express guarantee of free speech would be meaningless.<sup>55</sup>

The listener's right to hear, taken together with the speaker's right to speak, generally prevents the government from inhibiting communication.<sup>56</sup> The listener's interests may, however, conflict with the interests of the speaker. This conflict is apparent in the cases upholding government regulation of broadcasting,<sup>57</sup> at least if broadcasters are considered to be speakers. The broadcaster's interest in making autonomous editorial choices conflicts with society's interests in disseminating diverse information and ideas. In those situations, the Supreme Court has found the public's interest to be paramount on the grounds that those receiving a license to use a scarce public resource should act as trustees for the public.<sup>58</sup>

53. *Red Lion*, 395 U.S. at 390; cf. *infra* notes 196-203 and accompanying text (criticizing notion of public broadcasters as public trustees).

54. See D. O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* (1981); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Kushner, *Freedom to Hear: The First Amendment, Commercial Speech and Access to Information*, 28 WAYNE L. REV. 137 (1981); Emerson, *supra* note 44; Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 861 (1970).

55. See *supra* note 44.

56. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (reversing conviction for possession of pornography in home).

57. See *CBS v. FCC*, 453 U.S. 367 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

58. See *Red Lion*, 395 U.S. at 386 ("[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973) (scarcity of broadcasting frequencies). But see *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3116 n.11 (1984) (acknowledging criticism of scarcity rationale but awaiting signal from Congress or FCC that technological change warrants rethinking). The FCC views the first amendment as requiring listeners' interests to outweigh speakers' in broadcasting: "[T]he purpose of the First Amendment is not simply to protect the speech of particular individuals, but rather to preserve and promote the informed public opinion which is necessary for the continued vitality of our democratic society and institutions." *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974); see also Note, *Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly*



In a few cases, the Supreme Court has protected listeners' rights not to hear speech they find offensive.<sup>59</sup> Generally, however, courts require offended listeners to turn off the radio, throw away offensive mail, or avert their eyes.<sup>60</sup> The right-not-to-hear theory illustrates the difficulty of enforcing a general right to hear: if one group of listeners wants to hear an idea that another group finds offensive, it is impossible to decide which group should win.<sup>61</sup>

The right to hear is often "little more than artistic camouflage to protect the interests of the willing speaker."<sup>62</sup> Nonetheless, listeners' rights have been protected even when the speaker has no right to speak.<sup>63</sup> Protection of the right to hear thus cannot be based entirely on its correlation to the right to speak.

*Owned Forum*, 55 N.Y.U. L. REV. 517 (1980) (arguing that market forces are not sufficient to protect public's constitutional right derived from ownership of the airwaves).

59. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (allowing FCC to protect listeners from words they might find indecent); *Rowan v. United States Post Office*, 397 U.S. 728 (1970) (allowing addressees to decline to receive mail to which they object by registering with the post office); *cf. Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983) (invalidating federal statute excluding unsolicited advertising of contraceptives from mail; the Court distinguished *Rowan*, holding that the government itself rather than the addressee was attempting to stop the flow of information to protect recipients from offensive speech).

60. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971) (government cannot suppress speech to protect unwilling listeners unless the speech impinges on substantial privacy interests).

61. In *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983), for example, a television program was cancelled in response to listener protests. Other potential listeners then challenged the action, based on their right to hear. 688 F.2d at 1035-36.

The listeners' rights concept has been articulately challenged by FCC Commissioner Robinson:

The First Amendment may indeed belong to everybody—as the listeners' rights theory suggests—but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor. To be sure, this interference is intended to further the "spirit" and "larger purposes" of the First Amendment. For my part, however, I prefer to entrust my political freedoms to the Constitution rather than to the ardent schemes of well-meaning persons. . . .

[W]e err when we stray beyond the simple proposition that the First Amendment is a *restraint* on government—nothing less, but also nothing more . . . . [R]ejection of the listeners' rights idea expressed in *Red Lion* . . . would, at least, have the clear virtue of removing from the debate over fairness the misleading and mischievous notion that the First Amendment is an expression of the right of the public, through their government, to regulate speech in the interest of listeners.

Memorandum Opinion and Order on Reconsideration of the Fairness Report, 588 F.C.C.2d 691, 706-77 (1976), *aff'd in part*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

62. M. YUDOF, *supra* note 3, at 46.

63. *See* L. TRIBE, *supra* note 6, § 12-19, at 675-76 (noting that in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the mail that Lamont had a right to receive came from persons or organizations abroad whose speech was unprotected).

Perhaps, as Justice Blackmun has recently written, "the principle involved . . . is both narrower and more basic than the 'right to receive information.'"<sup>64</sup> If the first amendment is a structural limitation on government power, or a liberty doctrine,<sup>65</sup> it may include a right to be free from unwarranted governmental censorship in the system of expression.<sup>66</sup> This right could be asserted by listeners when government acts "for the sole purpose of suppressing exposure to . . . ideas."<sup>67</sup> Recognition of such a right eliminates the conceptual and practical difficulties with affording listeners a general right to receive information.<sup>68</sup> A right to be free from unwarranted governmental censorship, coupled with the concept that some purposes for governmental speech are illegitimate,<sup>69</sup> could limit government's ability to speak and to censor speakers in its operation of public broadcasting outlets.<sup>70</sup>

## II. THE THEORY OF A RIGHT TO ACCESS

The theory that government has an affirmative obligation to encourage freedom of expression<sup>71</sup> encompasses both speakers' rights to effective forums and listeners' rights to hear diverse views. The issues are analogous to those raised by government broadcasting.<sup>72</sup> The only difference is that government broadcasting may involve state action violating speakers' and listeners' first amendment rights.<sup>73</sup>

The access theory promotes both the instrumental and the au-

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64. *Board of Educ. v. Pico*, 457 U.S. 853, 878-79 (1982) (Blackmun, J., concurring).

65. *See Baker, supra* note 34, at 966.

66. *L. TRIBE, supra* note 6, § 12-19, at 675-76.

67. *Pico*, 457 U.S. at 877 (Blackmun, J., concurring).

68.

The denomination of a concrete constitutional public's right to know, or press privileges and affirmative rights of access, not only commits the Court to extraconstitutional decision making and violates the principle of separation of powers. Concomitantly, the inevitability of judicial delimitation of the scope of the public's right to know poses the potential for more restraints and dilution of First Amendment freedoms.

D. O'BRIEN, *supra* note 54, at 166.

69. *See infra* notes 115-32 and accompanying text.

70. *See infra* notes 204-69 and accompanying text.

71. *See B. SCHMIDT, supra* note 38, at 3 ("Demands for access challenge the laissez-faire premises of the First Amendment, asking whether a largely unregulated dissemination of ideas should give way to legal guarantees of effective expression.").

72. Access rights to both public and private media involve the question of whether monopoly or near-monopoly power over information should give rise to an affirmative obligation to present the viewpoints of some persons that the broadcaster would not otherwise present as a matter of editorial discretion. *B. SCHMIDT, supra* note 38, at 3.

73. *See infra* notes 105-08 and accompanying text.

tonomy values of the first amendment. Individual speakers' rights are enhanced by assuring them an opportunity to speak in some forums<sup>74</sup> that are arguably more effective than would otherwise be available to them.<sup>75</sup> Societal values are furthered by guaranteeing greater diversity of expression, creating competition in the search for truth, and promoting intelligent self-government.<sup>76</sup>

### A. Access to Private Media

In a society that fears monopoly power and the pervasive influence of the media,<sup>77</sup> a right of access to private media is attractive. The concentration of media ownership in a few hands,<sup>78</sup> the dwindling number of newspapers,<sup>79</sup> and the predominance of the three

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74. Access rights of speakers include a right of guaranteed or equal access to public forums, a right to reply to defamation, a right to advertise a product in a medium which has monopoly power over the product's market, and a right to publish or broadcast opposing views on important public issues. B. SCHMIDT, *supra* note 38, at 15-16.

75. "The most powerful and persuasive forums—television, radio, and newspapers—are to a great extent beyond the reach of most political and social minority groups." Comment, *supra* note 39, at 1411-12.

76. B. SCHMIDT, *supra* note 38, at 33. But see T. EMERSON, *supra* note 31, at 671 (any effort to solve the problem of a monopolistic press by forcing access is likely to undermine the press' independence without achieving diversity; government encouragement of a greater number of outlets, rather than compelling access to a few outlets, would be preferable).

77. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (antitrust laws are based on belief that "great industrial consolidations are inherently undesirable" and are designed to stop "great aggregations of capital because of the helplessness of the individual before them"); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (courts must favor "the dissemination of news from as many different sources, and with as many different facets and colors as is possible [because] right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection"), *aff'd*, 326 U.S. 1 (1945); Kaufman, *Reassessing the Fairness Doctrine: Should the First Amendment Apply Equally to the Print and Broadcast Media?*, N.Y. Times, June 19, 1983 (Magazine), at 17 (broadcasters "exert substantial influence over how we perceive the world" so that the purpose underlying the fairness doctrine "is particularly significant in the context of political campaigns, where the impact of expensive media advertising threatens the viability of our democratic system"); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978) (allowing FCC determination that midday broadcast of a profane comic monologue was offensive, because broadcasting is uniquely pervasive and available to children). But see *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 79 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("we should recall that the printed press was the *only* medium of mass communication in the early days of the Republic . . . . To argue that a more effective press requires a more regulated press flies in the face of what history has taught us."), *cert. denied*, 412 U.S. 922 (1973).

78. National newspaper chains and wire services now dominate newspaper publishing, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249 (1974), and the three major networks produce most of the programs shown on commercial television. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 260 (1978).

79. Fewer than 30 cities currently have competing, separately owned newspapers. N.Y. Times, June 18, 1982, at A18, col. 1.

major television networks<sup>80</sup> all raise the specter of monopoly control over information by the traditional mass media.<sup>81</sup> As a result, accepted majority views have many effective outlets for expression, but controversial and minority views have far fewer and less effective forums.<sup>82</sup> Further, the public increasingly perceives the press as being subjective and biased; this perception makes required access appealing to those who believe more balanced views would result.<sup>83</sup>

As early as 1945, the Supreme Court found that the government had an affirmative obligation to offset media power.<sup>84</sup> But even more important for access proponents was the Court's statement more than twenty years later that "[i]t is the right of viewers and listeners, not the right of broadcasters, which is paramount."<sup>85</sup>

Practical problems would overwhelm a broad access right that assured all citizens an opportunity to express their views effectively.<sup>86</sup> Instead, the Supreme Court has upheld only narrowly drawn statutory rights of access to the electronic media,<sup>87</sup> under which broadcast licensees have been allowed broad discretion.<sup>88</sup>

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80. See Robinson, *supra* note 78, at 260.

81. "As I see it, AT & T's First Amendment rights are secure; we have to be concerned that it does not use its economic clout to deny the First Amendment rights of others." Wicklein, *Electronic Censors*, COLUM. JOURNALISM REV., July-Aug. 1983, at 54.

82. Comment, *supra* note 39, at 1411-12.

83. B. SCHMIDT, *supra* note 38, at 2.

84. *United States v. Associated Press*, 326 U.S. 1, 20 (1945); see L. TRIBE, *supra* note 6, § 12-22, at 694 ("government may, and perhaps must, act positively to reduce" suppression of expression by private interests).

85. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

86. Such a broad access right presumably would mean that denying a broadcast license to anyone would amount to a denial of free speech. Yet, with a limited number of radio frequencies, this is obviously an impossible reading of the requirements of the first amendment. See *id.* at 388. See also B. SCHMIDT, *supra* note 38, at 19 ("Resolute equality of access would end only in access to the Government Printing Office.").

87. In *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the Court held that the Constitution did not require access to radio and television for political advertisers, but a majority of the Court thought the first amendment was not a barrier to such a right if it were created legislatively or administratively.

The Court upheld a statutory and limited right of access to the electronic media for candidates for federal office in *CBS v. FCC*, 453 U.S. 367 (1981). However, it invalidated FCC rules requiring access to cable television, not on constitutional grounds, but because the FCC had exceeded its statutory authority. *FCC v. Midwest Video*, 440 U.S. 689, 708-09 (1979).

88. The FCC has only once mentioned the fairness doctrine in rejecting an application for renewal of a broadcast license. Note, *The Future of Content Regulation in Broadcasting*, 69 CALIF. L. REV. 555, 563 n.70 (1981). Despite this lack of enforcement, the fairness doctrine may still chill broadcast speech. Market forces may better ensure a diversity of voices. See, e.g., Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

In general, courts have treated private broadcasters as something less than speakers. In contrast, they have treated newspaper editors as speakers, affording them full first amendment protection.<sup>89</sup> The Supreme Court has resoundingly rejected a speaker's right of reply in the print media.<sup>90</sup> However, courts have granted access rights when newspapers perform noneditorial functions such as selecting advertisements for their commercial sections.<sup>91</sup>

### B. Access to Public Media

Speakers have been granted a limited right of access to state-owned media, such as student newspapers of state-operated universities. As one commentator has noted, "The First Amendment has not required state media to subsidize the costs of an individual's public expression."<sup>92</sup> When access has been ordered, the courts have limited it to the placement of paid advertisements by the groups which the publication serves.<sup>93</sup>

Moreover, the access rights granted generally have not collided with state employees' initial editorial choices. Instead, the courts have protected both speakers' rights and student editors' rights to be free from censorship by their superiors.<sup>94</sup> In fact, student editors have enjoyed more protection from their publishers than editors and reporters for private publications.<sup>95</sup> Courts also have recognized that student editors must make choices for legitimate government purposes, such as assuring quality or relevancy of subject matter,<sup>96</sup> and have therefore held that student editors may deny ac-

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89. Some commentators view the differing standards of protection as an accommodation of the values of diversity and autonomy, with the press enjoying autonomy and the electronic media being responsible for diversity. B. SCHMIDT, *supra* note 38, at 36.

90. *Tornillo*, 418 U.S. at 258.

91. See, e.g., *Home Placement Serv., Inc. v. Providence Journal Co.*, 682 F.2d 274 (1st Cir. 1982) (newspaper not allowed to refuse to run rental service advertisement because it had monopoly on advertising of home rentals).

92. B. SCHMIDT, *supra* note 38, at 240.

93. *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971) (state college student newspaper which accepted commercial advertisements could not reject editorial advertisements); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school newspaper cannot refuse advertisements opposing Vietnam War when paper has run stories on war-related matters).

94. *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (state university cannot punish editor of student newspaper for publishing a segregationist statement; "if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment").

95. See *M. YUDOF*, *supra* note 3, at 218 ("From the perspective of blunting government's communications powers, it is quite sensible to see student editors as having First Amendment rights that . . . reduce the capacity of school officials to control the information transmitted to student listeners.").

96. *Avins v. Rutgers*, 385 F.2d 151 (3d Cir. 1967) (state university law review can reject

cess to speakers.

### III. GOVERNMENT SPEECH AND GOVERNMENT FORUMS

For first amendment purposes, government operation of communications media can be viewed either as government speech or as government sponsorship of a forum for expression.<sup>97</sup> Government speech by definition involves content control;<sup>98</sup> government operation of a forum almost by definition precludes content control.<sup>99</sup> As a speaker, government may act illegitimately by drowning out private speech, thus distorting the political process or infringing on individual choice.<sup>100</sup> As sponsor of a forum for expression, government may act illegitimately by censoring the content of speech, again distorting the political process and infringing on individual choice.<sup>101</sup>

Both views require limitations on government operation of communications media, but the remedies may differ.<sup>102</sup> When government speech dominates the marketplace, an injunction against such speech or a guarantee of equal access for opposing points of view is a possible remedy.<sup>103</sup> When government operates a forum, the usual remedy is an assurance of access.<sup>104</sup>

#### A. State Action

Constitutional guarantees generally protect individual rights

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article because exercise of editorial discretion is essential), *cert. denied*, 390 U.S. 920 (1968). "With respect to government-owned or -operated media, access guarantees derived from the Constitution may be invoked if the government has *no legitimate interest* in exclusion." B. SCHMIDT, *supra* note 38, at 240 (emphasis added).

97. See Note, *supra* note 11; see also Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U.L. REV. 237, 244 (1978): "Nor can an acceptable free speech theory demand that government be an ideological eunuch; the theory must be subtle to distinguish government as *censor* from government as *speaker*, and discerning enough to distinguish the government voice that merely *adds* to public debate from the government voice that *monopolizes* it."

98. See M. YUDOF, *supra* note 3; Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Shiffrin, *supra* note 4; Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1970); Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980).

99. See *infra* notes 133-53 and accompanying text.

100. M. YUDOF, *supra* note 3, at 260-61.

101. *Id.* at 235.

102. See Note, *supra* note 11, at 1173-74.

103. See *infra* notes 115-32 and accompanying text; see also Ziegler, *supra* note 98, at 598-600 (urging comprehensive legislation to eliminate such government speech in political elections).

104. See *infra* notes 143-53 and accompanying text.

against detrimental government action.<sup>105</sup> To reach either governmental speech or governmental forum analysis, a court must find that the government has acted in a manner that amounts to "state action." Public broadcasting stations operated by state or local governments have been viewed by courts and commentators as state actors.<sup>106</sup> The speech of an individual government employee, however, may not meet the state action requirement necessary for it to be subject to constitutional restraints; indeed, sometimes such speech is constitutionally protected.<sup>107</sup> Similarly, private print media not infused with the concept of public ownership are not subject to attack by those claiming a constitutional right to speak.<sup>108</sup>

### B. *Government Speech*

Government speech is neither constitutionally protected nor constitutionally prohibited.<sup>109</sup> However, it must be limited when it conflicts with the societal and individual interests protected by the first amendment.<sup>110</sup>

The concept of government speech is closely allied with that of state action. To qualify as government speech, an activity must at least be state-supported, though it need not be expressly endorsed nor represent the government's official policy.<sup>111</sup>

Government speech can promote first amendment values. It provides more information for the political process and can ensure a diversity of information to counter the power of large media organi-

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105. *See, e.g.,* *Lugar v. Edmondson Oil Co.*, 457 U.S. 393 (1982) (to find state action, deprivation of right must be caused by exercise of right or privilege created by state or rule of conduct imposed by state and the party charged with deprivation must fairly be considered to be a state actor).

106. *But see infra* notes 172-73 and accompanying text (discussing whether operation of publicly funded broadcast media constitutes state action).

107. *Ziegler, supra* note 98, at 606.

108. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

109.

[T]here is nothing in the negative force of the First Amendment, as a general matter, that would prevent the government from using public funds to support various features of the system of freedom of expression. On the other hand, the negative features of the First Amendment do impose some restrictions upon the way government funds are expended. In general these limitations would be the same as in the case of the government furnishing physical facilities: there could be no discrimination among users and no regulation of content.

T. EMERSON, *supra* note 31, at 651.

110. *Shiffrin, supra* note 4, at 607 ("If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace.").

111. *Shiffrin, supra* note 4, at 565 n.\*; *see infra* note 173.

zations.<sup>112</sup> Government speech also helps to achieve other societal goals, for example, by promoting community values.<sup>113</sup> However, it can distort the political process. When government's voice is too strong, it can indoctrinate citizens, overpower private sources of information, manipulate the electoral system, infringe on individual judgment, and force taxpayers to support points of view with which they disagree.<sup>114</sup>

### C. *Limits on Government Speech*

The sources of constitutional limitations on government speech are unclear. Most commentators agree that although government has no constitutional right to speak,<sup>115</sup> the Constitution does not prohibit government speech.<sup>116</sup> Thus, those individuals who wish to challenge government speech must assert that the speech infringes on their personal constitutional rights. Potential sources of limitations on government speech advanced by commentators include the press clause,<sup>117</sup> the guaranty clause,<sup>118</sup> equal protection,<sup>119</sup> political rights,<sup>120</sup> an implied right against political establishment,<sup>121</sup> or, more generally, the speech clause.<sup>122</sup>

Until recently, few commentators have attempted to devise a theory of limitations on government expression.<sup>123</sup> The pervasiveness of governmental communication, coupled with some recent abuses, has brought about renewed debate.<sup>124</sup>

Most objections to government speech focus on the idea that

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112. See *supra* note 13 and accompanying text.

113. Shiffrin, *supra* note 4, at 568.

114. *Id.* at 588-605.

115. M. YUDOF, *supra* note 3, at 44-45 (first amendment is a source of limitations on government, not a source of government rights; "it is inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community").

116. "[G]overnment as speaker is not constrained by the First Amendment, nor need it provide access to the channels of communication employed by government. . . . [T]he First Amendment [currently restricts] the government only when it plays the role of regulator and not when it itself communicates . . . ." G. GUNTHER & F. SCHAUER, *CONSTITUTIONAL LAW* 381 (Supp. 1983).

117. Shiffrin, *supra* note 4, at 618-19.

118. Ziegler, *supra* note 98, at 618.

119. Shiffrin, *supra* note 4, at 619-21.

120. *Id.* at 619.

121. Kamenshine, *supra* note 98, at 1104.

122. Shiffrin, *supra* note 4, at 621.

123. "Students of the Constitution endlessly debate whether small groups of Nazis may march. But the march of government, a communicator immensely more powerful than a small group of malcontents, is ignored." M. YUDOF, *supra* note 3, at 16.

124. See sources cited, *supra* note 98.



some kinds of expression are beyond the scope of government's regular functions and limited powers under a democratic system of government.<sup>125</sup> When government seeks to intervene too directly or too powerfully to influence citizen opinion, its speech is suspect.<sup>126</sup> Thus, direct governmental intrusion into the electoral process, by financing campaigns for legislation, referendums, or constitutional amendments, or by endorsing particular candidates, is viewed as outside government's proper sphere and therefore unconstitutional.<sup>127</sup>

Another major objection to government speech is that it can dominate the marketplace.<sup>128</sup> Government speech could distort public opinion and unduly influence public decisions. In most situations, however, the government's structure prevents it from overpowering other voices.<sup>129</sup> Government does not speak with a single voice. The legislature, for example, can counteract executive domination and distortion of the political process.<sup>130</sup> In addition, there often are many decisionmakers within the governmental structure, ensuring that a single monolithic view is not presented.<sup>131</sup>

The third objection to government speech is that it may impinge on individual autonomy. However, the Supreme Court has made it clear that government cannot compel speech or coerce an individual into carrying a government message.<sup>132</sup>

#### D. *Government Forums*

The public forum doctrine provides the foundation for the second set of first amendment limitations on government-operated media.<sup>133</sup> The doctrine imposes both affirmative and negative

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125. T. EMERSON, *supra* note 31, at 699 ("government's right of expression does not extend to any sphere that is outside the governmental function").

126. *See id.* at 579; Comment, *supra* note 98, at 835-36.

127. *See* Ziegler, *supra* note 98, at 585.

128. L. TRIBE, *supra* note 7, § 12-4, at 590 (government can "add its own voice to the many that it must tolerate, provided it does not drown out private communication").

129. *See* Shiffrin, *supra* note 4, at 607.

130. M. YUDOF, *supra* note 3, at 47.

131. *Cf. infra* notes 159-62 and accompanying text (public broadcasting decisionmaking is sufficiently decentralized and restricted to limit government control of programming decisions).

132. *See, e.g.,* Wooley v. Maynard, 430 U.S. 705 (1977) (state cannot require citizen to display state motto on license plate); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state cannot compel flag salute).

133. *See* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247 (1976); Stone, *Fora Americana: Speech in Public Places*, 1974

obligations on the government's operation of public facilities; government must make some forums available for expressive purposes, and cannot regulate the content of speech in such forums.

As originally delineated, the theory recognized three kinds of government facilities. The purpose and function of each kind of facility determined the degree of access allowed to speakers.<sup>134</sup> Speakers have a guaranteed right of access to traditional public forums, such as streets and parks, subject only to content-neutral time, place, and manner regulations.<sup>135</sup> Speakers also are guaranteed access to quasi-public forums, which are not open to the general public but are used primarily for purposes compatible with peaceful expression.<sup>136</sup> In both public and quasi-public forums, speakers have a right of equal access; government cannot disallow access to a forum because of the content of speech when it has already allowed other views.<sup>137</sup> In nonpublic forums, however, government may totally bar expression or discriminate among speakers, even on the basis of content, as long as the regulation is reasonable in light of the forum's purpose.<sup>138</sup> Speakers' rights thus depend heavily on whether a government facility is found to be a public forum.<sup>139</sup>

The Supreme Court has applied several tests to determine whether a government-controlled facility is a public or quasi-public forum. If the facility traditionally has been used for expression, it is a true public forum.<sup>140</sup> Similarly, if government has designated the facility as a public forum by allowing speakers to use it, the facility may be treated as a public forum.<sup>141</sup> Finally, if the expression is

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SUP. CT. REV. 233; Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982); Note, *The Public Forum: Minimum Access, Equal Access and the First Amendment*, 28 STAN. L. REV. 117 (1975) [hereinafter cited as Note, *The Public Forum*]. On the relationship of public forum doctrine to state-owned communications media, see Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974); Comment, *supra* note 39; Note, *supra* note 11.

134. See Note, *The Public Forum*, *supra* note 133.

135. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

136. See *Grayned v. City of Rockford*, 408 U.S. 104 (1979).

137. *Widmar v. Vincent*, 454 U.S. 263 (1981) (once a state university opened a forum to students generally, it could not exclude a student group because of the content of its speech).

138. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 103 S. Ct. 948, 957 (1983).

139. See *Karst*, *supra* note 133, at 248-52 (the Court tends to find public facilities are not public forums "[t]o escape this phantom of the all-devouring public forum"); cf. *Shiffrin*, *supra* note 4, at 588 ("the decisions . . . provide little by way of principle to determine how much or how little government control of content should be permitted").

140. See *Shiffrin*, *supra* note 4, at 574.

141. But see *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (government

compatible with the normal activity of the particular place at a particular time, the facility may be considered a public forum.<sup>142</sup>

### E. *Limitations on Government Forums*

As applied by the Supreme Court, the public forum doctrine has become an all-or-nothing proposition.<sup>143</sup> If a public forum is involved, government regulation is severely limited, but in a nonpublic forum, government can discriminate among users even on the basis of content.<sup>144</sup> Further, the Court appears to have abandoned any notion of access to nontraditional forums in which expression is compatible with the facility's main purpose and not substantially disruptive.<sup>145</sup> Last Term, the Court noted that the only kinds of government property that qualify as public forums are those that "by long tradition or by government designation [are] open to the public at large for assembly and speech."<sup>146</sup>

Justice Brennan has argued for a distinction between content-based discrimination and viewpoint discrimination.<sup>147</sup> The core of public forum analysis protects individuals against viewpoint discrimination, that is, government's restriction of particular viewpoints once it has allowed discussion of a general subject.<sup>148</sup> Viewpoint discrimination, according to Justice Brennan, is "censorship in its purest form."<sup>149</sup> Content-based discrimination, on the other hand, occurs when government distinguishes between the subjects of discussion. Apparently, the Court's current analysis proscribes only viewpoint discrimination,<sup>150</sup> abandoning its prior

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could ban political advertising on its buses even though it had allowed commercial advertising).

142. *Grayned*, 408 U.S. at 116.

143. *Karst*, *supra* note 133, at 248-52.

144. *See Perry*, 103 S. Ct. at 957.

145. *See M. YUDOF*, *supra* note 3, at 235 ("Where it is difficult to distinguish the economic costs . . . and the communications activity does not substantially impair the functioning of government, any distinction [between ordinary use and use for expression] is motivated by a desire to limit expression.").

146. *Minnesota Bd. v. Knight*, 104 S. Ct. 1058, 1064 (1984).

147. *Perry*, 103 S. Ct. at 961-64 (Brennan, J., dissenting).

148. *Id.* at 962. The distinction appears to parallel guaranteed access and equal access rights under public forum theory. If a place is a public forum, so that government must provide guaranteed access to it, Justice Brennan apparently would require content-neutral selection among speakers. If a place was not a public forum, but the government had allowed some speakers, he likely would require that government not discriminate between viewpoints, but might allow government to make subject matter distinctions.

149. *Id.* at 964.

150. "It is possible to claim [the discrimination allowed in *Lehman*, 418 U.S. 298] is a discrimination among types of speech rather than among viewpoints, but the effect seems indistinguishable." L. TRIBE, *supra* note 6, § 12-21, at 692.

position that government must remain content-neutral in choosing among speakers seeking access to public forums.

A requirement of content-neutrality in its most extreme form would treat government-owned media as common carriers. In *CBS v. Democratic National Committee*,<sup>151</sup> two Justices espoused this view. Justice Douglas argued that "[t]he Government as owner and manager [of a publicly owned medium] would not . . . be free to pick and choose such news items as it desired."<sup>152</sup> Justice Stewart went further: "Were the government really operating the electronic press, it would . . . be prevented by the First Amendment from selection of broadcast content and the exercise of editorial judgment."<sup>153</sup> Under these views, government-operated media could make no distinctions among speakers seeking access to its facilities.

#### IV. PUBLIC BROADCASTING: GOVERNMENT SPEECH OR FORUM

##### A. *History of Public Broadcasting*

Fear of federal government censorship was a primary motive for the creation of a decentralized system of public broadcasting.<sup>154</sup> The Public Broadcasting Act of 1967<sup>155</sup> established the basis for the current system. The Act created the nonprofit, nongovernmental Corporation for Public Broadcasting (CPB)<sup>156</sup> to provide funding for noncommercial stations. In 1970, another independent, nonprofit organization, the Public Broadcasting Service (PBS), was organized to distribute programs nationally among a membership cooperative of noncommercial licensees, with funding from CPB.<sup>157</sup>

151. 412 U.S. 94 (1973).

152. *Id.* at 149-50 (Douglas, J., concurring).

153. *Id.* at 143 (Stewart, J., concurring).

154. See Canby, *supra* note 133, at 1150-56.

155. Pub. L. No. 90-129, 81 Stat. 365 (1967) (codified as amended at 47 U.S.C. §§ 390-99 (1982)). The Act resulted primarily from the Carnegie Commission's report on public television, *supra* note 13.

156. Pub. L. No. 90-129, tit. II, 81 Stat. 365, 367-73 (1967) (codified as amended at 47 U.S.C. § 396 (1982 & West Supp. 1984)). The Act bars the CPB from owning or operating stations and networks, and specifies that CPB is not a government agency and that its board members are not government employees. 47 U.S.C. §§ 396(b), 396(g)(3) (1982). The Act also prohibits any government department or officer from interfering with the corporation. *Id.* § 398(a).

The Carnegie Report recommended a guaranteed source of funds from an excise tax on television sets to further remove the CPB from government control, but Congress left the corporation subject to annual appropriations. See CARNEGIE COMM'N, *supra* note 13, at 68.

157. See Canby, *supra* note 133, at 1156. PBS has asserted some control over programming content. *Id.* at 1156-57.

Scattering programming decisions among various independent agencies, and allowing individual licensees to control their own programming, substantially diminish the danger that the federal government will attempt to control program content. Moreover, other statutory restrictions preclude government censorship. These include a limitation on federal government contributions to noncommercial stations of no more than forty percent of a station's budget,<sup>158</sup> a mandate on the CPB to present objective, balanced programming about controversial issues,<sup>159</sup> and an express ban on censorship by government officers and agencies.<sup>160</sup> Public television licensees also are subject to most of the regulations applicable to commercial licensees, including the fairness doctrine.<sup>161</sup>

Even though the system was designed to ensure that the federal government did not control programming decisions, at least one administration has attempted to influence the content of public broadcasting. CPB responded by trying to drop the controversial programming.<sup>162</sup>

Beyond the concern with federal government control is that of state or local government control. Of the approximately 285 public television stations, 132 are licensed to state or municipal agencies, and 77 are licensed to colleges and universities, many of which are public.<sup>163</sup> As one court noted, "with state and local governments firmly entrenched as gatekeepers to the public's access to information, the fox has been asked to guard the henhouse."<sup>164</sup>

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158. 47 U.S.C. § 396(k)(3) (1982).

159. *Id.* § 396(g)(1)(A). However, this mandate is not enforceable against the CPB by the FCC, *Accuracy in Media v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), or by the courts, *Network Project v. CPB*, 561 F.2d 963 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1068 (1978).

Recently, 47 U.S.C. § 399 (1982), which prohibited noncommercial licensees from editorializing, was found to be unconstitutional in *FCC v. League of Women Voters*, 104 S. Ct. 3106 (1984). The Court did not decide whether a similar ban restricting only state and local government-operated stations would be constitutional. *See id.* at 3125 n.24. The Court noted that the Administration had proposed a 1977 amendment to the statute to allow editorializing by all public broadcasting stations except those licensed to government entities. *Id.*

160. 47 U.S.C. § 398(c) (1982).

161. *Accuracy in Media*, 521 F.2d 288, 295-96 (programs broadcast on noncommercial station held subject to FCC review, despite CPB funding).

162. *See Canby, supra* note 133, at 1157-58. In 1973, the Nixon administration and some members of Congress criticized the "objectivity and balance of some PBS network programming." *Id.*

163. *Barnstone v. University of Houston*, 514 F. Supp. 670, 683 (S.D. Tex. 1980), *rev'd*, 660 F.2d 137 (5th Cir. 1981), *aff'd on rehearing sub nom. Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983).

164. *Id.*

### B. *The Muir Decision*

In *Muir v. Alabama Educational Television Commission* (AETC),<sup>165</sup> two state-operated public television stations scheduled and then cancelled a controversial program, *Death of a Princess*.<sup>166</sup> Viewers of public stations operated by the AETC and by the University of Houston sought to compel the broadcast, claiming that the cancellation violated the first and fourteenth amendments. One district court ordered the University of Houston to broadcast the program,<sup>167</sup> but another district court dismissed a similar complaint against AETC.<sup>168</sup> In separate appeals, the dismissal was affirmed and the order to show the program was reversed.<sup>169</sup> After consolidation and rehearing en banc, the Fifth Circuit, in *Muir III*, denied

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165. 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1274 (1983). See Comment, *The Death of a Princess Cases: Television Programming by State-Owned Public Broadcasters and Viewers' First Amendment Rights*, 36 U. MIAMI L. REV. 779 (1982); 13 CUM. L. REV. 397 (1982).

166. *Death of a Princess* was part of a regularly scheduled series on the stations involved. 688 F.2d at 1036. It depicted the execution for adultery of a Saudi Arabian princess and her lover. In response to Saudi Arabian government protests, the Carter administration pressured PBS to change or cancel the program, see Note, *supra* note 11, at 1165-66 n.32, and PBS notified public broadcasting stations that the program contained controversial material. *Id.* at 1165 n.5. Alabama citizens and at least one Alabama businessman with Saudi interests expressed concern to the AETC about the program's content. 688 F.2d at 1053-54 (Johnson, J., dissenting). Commissioners of the AETC, who presumably are not involved in regular programming decisions, made the decision to cancel the program. In Texas, a university vice-president, who had never made a programming decision in his 17 years with the university, decided to cancel the program. *Id.* at 1054. The university had recently entered into a contract to instruct a member of the Saudi Arabian royal family. *Id.* at 1037 n.5. Both Alabama and Texas officials justified their decisions on the grounds of fear for the safety of Americans in the Middle East, and fear of exacerbating tensions in the Middle East. *Id.* at 1036-37. Thus, they seemed to be protecting the sensitivities of the Saudi government, not the sensitivities of American viewers.

If the reason for cancellation was fear of repercussions in the Middle East, the stations' management may have been engaged in foreign policy decisions, an area reserved to the federal government. The stations' actions thus arguably were in pursuit of an illegitimate state purpose. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190 (1983) (state economic requirements for nuclear power plants not preempted by federal government because NRC regulated safety only and Congress intended limited state control); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state alien registration statute preempted by federal government).

167. *Barnstone v. University of Houston*, 514 F. Supp. 670 (S.D. Tex. 1980) [hereinafter cited as *Barnstone I*], *rev'd*, 660 F.2d 137 (5th Cir. 1981) [hereinafter cited as *Barnstone II*], *aff'd on rehearing sub nom. Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc) [hereinafter cited as *Muir III*], *cert. denied*, 103 S. Ct. 1274 (1983).

168. *Muir v. Alabama Educ. Television Comm'n*, No. 80-G-0607-S (N.D. Ala. July 3, 1980) [hereinafter cited as *Muir I*], *aff'd*, 656 F.2d 1012 (5th Cir. 1981) [hereinafter cited as *Muir II*], *aff'd on rehearing* 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983).

169. *Muir II*, 656 F.2d 1012; *Barnstone II*, 660 F.2d 137.

potential viewers the right to compel the stations to broadcast the program.<sup>170</sup>

### 1. State Action

First amendment protection is triggered only by state involvement in the infringement of constitutional rights.<sup>171</sup> The court in *Muir III* assumed that operation of a public television station by a state agency constituted state action.<sup>172</sup>

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170. *Muir III*, 688 F.2d 1033.

171. See *supra* notes 105-09 and accompanying text.

172. Apparently, the parties did not dispute the existence of state action in either case. Instead, they disagreed over whether the stations were public forums, a problem which presupposes state action. See *infra* notes 177-81 and accompanying text. Under recent Supreme Court decisions, the *Muir III* stations might have argued that the cancellation of *Death of a Princess* was not state action, even though the stations were licensed to state government agencies and run by state government employees.

A comprehensive review of the state action doctrine as articulated by the Supreme Court in a series of recent decisions is beyond the scope of this Note. Those recent decisions apparently make it necessary not only to assess the involvement of a statutorily established agency, state employees, state funding, and state regulation, but also to assess the functions being performed by the putative state actors. See *Polk County v. Dodson*, 454 U.S. 312, 320-22 (1981) (the public defender was a state employee but not a state actor because she performed a private function and was not amenable to state supervision); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 710 (1984) (arguing that *Polk* may indicate that state action will be based on a private-public function distinction, releasing formally public actors from constitutional restraints if their operations are intrinsically private); see also *Blum v. Yaretsky*, 457 U.S. 991 (1982) (decision by statutorily established committee of nonstate employees to transfer patients between private hospitals not state action despite state funding and regulation); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (discharge of employees by private school administrators not state action although the school received nearly all its students under the authority of a state statute and more than 90% of its income from public funding); cf. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939-42 (1982) (private creditor was state actor in obtaining ex parte writ of attachment issued by clerk of court under state statute and executed by sheriff).

As to the application of state action to the *Muir III* stations, the AETC controls and supervises a statewide network of nine noncommercial educational television stations licensed to the state of Alabama. See ALA. CODE § 16-7-1 (1975 & Supp. 1984) (establishing AETC). The AETC has authority to control and supervise the use of channels reserved to the state for noncommercial educational use, to make rules and regulations governing station operations and programming, and to own and operate noncommercial television and radio stations. *Id.* § 16-7-5. Members of the Commission are appointed by the governor and paid a stipend by the state. *Id.* § 16-7-2; see also *id.* §§ 16-7A-1, -4, -5 (creating the Alabama educational television foundation authority to receive and distribute donated money, but not for carrying out propaganda, attempting to influence legislation, or engaging in political campaigns). AETC is funded by state appropriations, matching federal grants, and private contributions. *Muir III*, 688 F.2d at 1036. Texas funds and operates the University of Houston; the University, as licensee, funds and operates the public television station. *Id.* at 1037. The University of Houston is overseen by a Board of Regents appointed by the governor; the Board can appoint and remove any faculty member, officer, or employee. TEX. EDUC. CODE ANN. §§ 111.11, -12, -19 (Vernon 1972).

The only one of the recent Supreme Court decisions finding no state action in the activi-

Whether the operation of other publicly funded television stations constitutes state action is not clear.<sup>173</sup> Indeed, the CPB itself is not considered a state actor<sup>174</sup> even though it is governmentally created and funded and its board members are appointed by the President.<sup>175</sup>

## 2. *Government Forum*

The *Muir* and *Barnstone* decisions leading up to *Muir III* applied different public forum tests to reach different results. The

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ties of a state employee emphasized that a public defender's professional responsibility mandated the exercise of independent judgment and rendered her unamenable to administrative direction. *Polk*, 454 U.S. at 321. Although it could be argued that the officials involved in *Muir III* were necessarily exercising independent judgment in carrying out their responsibility to operate stations in the public interest, the government editors involved were amenable to administrative direction. Only that administrative direction, not the government editors' initial decision, was challenged.

The actions of the editors' superiors based on political considerations meet the *Polk* test: the superiors appear to be carrying out state policy and are amenable to political direction. Conceding that government editors generally are not state actors should not preclude an assertion that they were unduly influenced by political considerations rather than a legitimate communicative purpose. In *Muir III*, for example, the decision to cancel *Death of a Princess* should not have escaped scrutiny even if it had been made by the responsible editors under pressure from their superiors.

In the context of government editors, it has sometimes been argued that there is no state action in the activities of student editors of state university student newspapers. See, e.g., *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (no state action when state university student newspaper rejected an advertisement about homosexual counseling services because no university official was involved in the rejection), *cert. denied*, 430 U.S. 982 (1977); Comment, *Student Editorial Discretion, the First Amendment, and Public Access to the Campus Press*, 16 U.C.D. L. REV. 1089, 1098-112 (1983) (arguing that student editors are not state actors when editorial decisions are made without administrative oversight). Like student editors, government employee editors of state broadcasting stations are not always expected to do what higher government officials tell them to do. Government editors are to some extent isolated from political pressures—and removed from direct state supervision—by the layers between them and elected officials and by the more objective, professional standards they use to guide their editorial decisions. See *infra* notes 234-42 and accompanying text. Because the editors do not behave like state actors who are under the direction of the state and are carrying out what appears to be state policy, there is less need to restrain their actions.

173. It is clear, however, that the speech of other noncommercial stations is constitutionally protected. See *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3127 (1984) (ban on editorializing by noncommercial stations overbroad by taking in wide range of speech by "wholly private" stations).

174. *Network Project v. CPB*, 4 Media L. Rep. (BNA) 2399 (D.D.C. 1979); see also Canby, *supra* note 133, at 1152 n.170 (discussing Carnegie Commission's concerns about applicability of first amendment to CPB). But see Note, *Freeing Public Broadcasting from Unconstitutional Restraints*, 89 YALE L.J. 719 (1980) (arguing that both CPB and PBS are state actors and that current public broadcasting system creates unconstitutional prior restraints on noncommercial broadcasters).

175. 47 U.S.C. § 396(b), (k) (1982); see *supra* notes 155-62 and accompanying text.



court in *Barnstone I* used a compatability test: since the forum was controlled by government and was an appropriate place for the communication of ideas, it was a public forum. Therefore, the station could not deny access based on the content of speech without violating the prohibition on prior restraints.<sup>176</sup> The *Muir II* court, in contrast, found that the AETC station was not a public forum, because public forums include only places dedicated to general public use.<sup>177</sup> In *Muir III*, the Fifth Circuit, sitting en banc, found that access rights to public television stations would be incompatible with the government's primary purpose in operating the stations, and inconsistent with the essential task of exercising editorial discretion.<sup>178</sup>

The decision in *Muir III* was grounded in a two-part public forum test: whether the facility was a traditional public forum or designed to accommodate a general public right of access, and whether access was not incompatible with the facility's primary activity.<sup>179</sup> Applying the second part of the test, the court said: "The pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered."<sup>180</sup> In light of the court's finding that there was no public forum, viewers could not challenge the station's programming decisions, even if those decisions were based on the communicative impact of the speech involved.<sup>181</sup>

### 3. *Government Speech*

Although the *Muir II* court had found that government broad-

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176. 514 F. Supp. at 685.

177. 656 F.2d at 1020. One commentator has suggested the public forum argument was doomed to failure; public forum doctrine generally secures a right of access to *speech* in certain public facilities, and the *Muir II* and *Barnstone I* plaintiffs were asserting a right to *hear*. See Comment, *supra* note 167, at 802-04.

178. 688 F.2d at 1042.

179. *Id.*

180. *Id.*

181. "If a speaker does not have a right of access to a facility, that facility by definition is not a 'public forum' and the speaker is without grounds for challenge under the public forum doctrine." *Id.* at 1043. In other words, the state broadcaster is functioning like a private broadcaster, and should be limited only to the same extent. This argument appears close to the public-private function distinction in state action theory. See *supra* note 172. Perhaps the court's holding that there was no public forum and thus no first amendment right was a disguised finding of no state action.

casters were entitled to first amendment protection,<sup>182</sup> the court in *Muir III* found that only statutory rights and obligations protected the public licensees' free exercise of programming discretion.<sup>183</sup> This lack of constitutional protection did not mean that speakers' or listeners' rights automatically outweighed the government's interest in exercising editorial discretion;<sup>184</sup> it meant only that the federal government might be able to impose greater restrictions on public licensees than on private ones.<sup>185</sup>

According to the court, cancellation of the program was not censorship even though it was based on the program's content.<sup>186</sup> A public television station must "necessarily make discriminating choices," and some of those choices can be characterized as "politically motivated."<sup>187</sup> In essence, the court found no relevant differences between the roles of private broadcasters and public broadcasters—both are required to operate in the public interest, providing sufficient protection for speakers' and listeners' rights.<sup>188</sup>

The *Muir III* court refused to apply *Board of Education v. Pico*,<sup>189</sup> a case which suggests that governmental discretion is limited when government acts as speaker, as well as when it operates a public forum.<sup>190</sup> In *Pico*, a plurality of the Supreme Court found that students' first amendment rights may have been abridged when a school board committee removed books from the school library.<sup>191</sup> The school board's motive for removing the books would determine whether its actions were constitutional. "[L]ocal school boards may not remove books from school library shelves simply

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182. *Muir II*, 656 F.2d at 1016.

183. 688 F.2d at 1041.

184. "To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government." *Id.* at 1038.

185. *Id.* at 1041.

186. *Id.* at 1043-47.

187. *Id.* at 1044.

188. "[I]t is clear that Congress concluded that the First Amendment rights of public television viewers are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest." *Id.* at 1041. If listeners believe their rights are being infringed, they may petition the FCC. *Id.* at 1047-48.

189. 457 U.S. 853 (1982).

190. The Fifth Circuit first distinguished the case and then dismissed it because the "Supreme Court decided neither the extent nor, indeed, the existence . . . of First Amendment implications in a school book removal case." *Id.* at 1045 & n.30. The court noted that a majority of the Justices did not join any opinion in the case. *Id.* at n.30.

191. A plurality said that the constitutionally protected right to receive information and ideas was a corollary of the right to speak, necessary if the listener is to exercise his rights of speech, press, and political freedom meaningfully. 457 U.S. at 867.

because they dislike the ideas contained in those books."<sup>192</sup>

This limitation does not apply to public television stations, said the *Muir III* court, because public broadcasters, unlike libraries, must comply with the fairness doctrine, and public broadcasters, again unlike libraries, have many legitimate reasons for canceling a previously scheduled offering.<sup>193</sup>

### C. Public Trustee

Congress did not envision public broadcasting as either a common carrier<sup>194</sup> or a forum for government speech.<sup>195</sup> Instead, it created the public broadcasting system to bring greater diversity and excellence to programming, by supplementing commercial broadcasting with high-quality offerings that might appeal only to limited audiences.<sup>196</sup> To do this, Congress prescribed a system virtually parallel to private broadcasting.<sup>197</sup> The *Muir III* court agreed that public broadcasters have essentially the same rights and obligations in making programming content decisions as private broadcasters have.<sup>198</sup>

Nevertheless, it is difficult to understand how a regulatory scheme designed to balance the constitutional rights of speakers, listeners, and private broadcasters can be applied to a state-operated broadcasting station.<sup>199</sup> Private broadcasters may be public trustees, but the Constitution protects their editorial choices.<sup>200</sup> In contrast, the *Muir III* court found that the Constitution does not protect state broadcasters' editorial choices.<sup>201</sup> Only by finding that no one has any constitutional right to speak or hear in the context

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192. *Id.* at 872.

193. 688 F.2d at 1045-46.

194. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (Communications Act of 1934 prohibits FCC from imposing common carrier obligations through access requirements).

195. *See* M. YUDOF, *supra* note 3, at 124-29 ("government only funds public broadcasting in America; it has not sought to play an editorial role").

196. *CARNEGIE COMM'N*, *supra* note 13, at 13-14.

197. *See supra* notes 155-65 and accompanying text.

198. 688 F.2d at 1041-43.

199. In first amendment terms, there is a conceptual difference between private broadcasters, even if they have great power over the market of ideas, and state employees subject to state supervision. *See supra* note 173. Repression of diversity by private broadcasters does not encounter the central first amendment proscription against censorship by government. *See supra* note 1. *But cf.* Shiffrin, *supra* note 4, at 585 n.14 (arguing that *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) "amounts to a holding that a finding of state action does not preclude content judgments").

200. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

201. 688 F.2d at 1038. *But see* *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3120 (1984) (holding that public broadcasters have first amendment protection).

of state broadcasting can government's interest outweigh the public's.<sup>202</sup> Yet that finding would contradict a basic premise of broadcast regulation in general—that listeners' rights predominate over private broadcasters'.<sup>203</sup>

## V. PROTECTING RIGHTS IN THE GOVERNMENT-OWNED MEDIA

The merger of government speech and government forum analyses in a case like *Muir* suggests a series of first amendment limitations on a government's operation of communications media. Like government speech, state public broadcasting is presumptively constitutional.<sup>204</sup> As long as government is not attempting to manipulate political opinion or to coerce private choices, and sufficient structural safeguards exist, there is no need to limit its speech.<sup>205</sup> Government forum analysis then provides additional reasons for restricting government power over its communications medium access rights for speakers and limitations on content-based regulations.<sup>206</sup> The two modes of analysis thus help to balance the rights of speakers, listeners, and government editors, providing a safeguard against undue government interference with the system of free expression.<sup>207</sup>

### A. *Speakers' Rights*

Private speakers could be guaranteed a right of access to state public broadcasting stations under either the prior restraint theory or the public forum doctrine.<sup>208</sup>

#### 1. *Prior Restraints*

Government bears a heavy burden of justification whenever it imposes prior restraints on speech.<sup>209</sup> This prohibition against prior restraints does not guarantee a forum for the speaker, but instead

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202. 688 F.2d at 1038.

203. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (arguing that listeners' interests are paramount to broadcasters').

204. See *supra* notes 109-14 and accompanying text.

205. See *supra* notes 115-32 and accompanying text.

206. See *supra* notes 133-53 and accompanying text. Under the public forum doctrine, content discrimination might be limited unless it is essential to avoid substantial disruption of the forum's purpose. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

207. See *supra* notes 62-70 and accompanying text.

208. See Comment, *supra* note 39 *passim*; Note, *supra* note 11, at 1175-81.

209. See Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 658 (1955).

removes a bar to the speaker's publication.<sup>210</sup>

In *Southeastern Promotions, Ltd. v. Conrad*,<sup>211</sup> the Supreme Court applied the prior restraint prohibition against a state communications medium, holding that a municipal theater unconstitutionally restrained speech when it refused to allow the presentation of a musical.<sup>212</sup> Application of the prior restraint theory to state public broadcasting is difficult because it would virtually nullify any government editorial discretion; the procedural safeguards required to impose a valid prior restraint<sup>213</sup> would substitute the courts' judgment for that of the government editors.<sup>214</sup>

## 2. Access Theory

Treating government broadcasting as a pure public forum would be problematic, because unlimited public access would disrupt the operation of a broadcasting outlet;<sup>215</sup> editorial discretion is a necessary element of broadcasting.<sup>216</sup> Nonetheless, it is possible to require that a government-owned communications medium provide access to private speakers to the extent that speech is not incompatible with the facility's effective operation.<sup>217</sup>

Professor Canby has proposed a two-part test for determining speakers' rights of access to government-run communications media<sup>218</sup>—"whether the facility to which access is sought is an appropriate forum for speech . . . [and] whether the medium is one in which the state *necessarily* exercises an editorial function."<sup>219</sup> If editorial discretion is necessary, and alternative modes of expression are available, access should be denied.<sup>220</sup> Thus, access would be

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210. See *Near v. Minnesota*, 283 U.S. 697 (1931).

211. 420 U.S. 546 (1975).

212. *Id.* at 556.

213. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) requires that (1) the state bear the burden of proving that the speech is not constitutionally protected; (2) any restraint before judicial review be brief and limited to preserving the status quo; and (3) prompt, final judicial review be available.

214. See Note, *supra* note 11, at 1180-82 (noting this problem and suggesting an alteration of the *Freedman* safeguards to compensate for it).

215. See B. SCHMIDT, *supra* note 38, at 99:

The Supreme Court is increasingly inclined to protect the functions of the public place from potentially disruptive expressive activity. Judgments depend not so much on balancing the value of expression against impairment of public function, as on determining whether there is significant disruption. If there is disruption, the expressive activity is not protected.

216. See *Muir III*, 688 F.2d 1033, 1044 (1982).

217. See Comment, *supra* note 39.

218. See Canby, *supra* note 133, at 1133.

219. *Id.*

220. *Id.* at 1134.

required to government media that can function "as well or better as a truly open forum," such as advertising sections and auditoriums operated by government agencies.<sup>221</sup>

Other commentators have suggested an accommodation<sup>222</sup> or balancing<sup>223</sup> approach to access rights. These approaches also track the "compatibility" public forum test;<sup>224</sup> access would be guaranteed if the expressive activity is compatible with the primary use of the forum and does not substantially disrupt that use.

Just as access rights may be limited by the necessity of government's exercise of editorial discretion, governmental discretion also may be limited by individual access rights. Professor Karst would limit government's editorial discretion to that aimed at furthering professional, rather than personal or political, ends.<sup>225</sup> Those who are aware of the professional standards in a particular medium would make the decisions, decentralizing power and separating the decisionmaking from political considerations.<sup>226</sup> Discretionary decisionmaking is permissible, according to Professor Karst, only when its purpose is to achieve a compelling goal.<sup>227</sup> Thus, a municipal theater can choose to show only plays that meet the criteria for

221. *Id.* at 1133-34.

222. Under the accommodation approach, if the facility can continue to function "substantially uninterrupted when access is limited according to guidelines demanded by the forum's nature, then the court should not refuse some form of qualified access merely because total access would materially disrupt the forum." Comment, *supra* note 39, at 1455. If some form of access is compatible with the nature of the forum, the accommodation approach would allow access to the extent that it did not interrupt effective operation of the facility, and would permit editorial discretion to the extent necessary to continue operation of the forum.

The result . . . would be the impingement upon one first amendment interest for the purpose of obliging the other—to a greater or lesser degree depending on the forum. Such accommodation is not inconsistent with the first amendment, because it is not an "abridgement" of expression. If the sum total of speech interests is being advanced, presumably the first amendment is not being violated.

*Id.* at 1455-57.

223. Professor Karst has suggested balancing the speaker's interest in access against the state's interest in exercising editorial discretion. If government abuses its editorial discretion by excluding opposing views, courts should intervene to guarantee equal access. Karst, *supra* note 133, at 257-58.

Professor Karst has also argued that the need to exercise editorial discretion does not always necessitate exclusion of others from the forum. It only means that editorial discretion will normally outweigh access interests. *Id.* at 256-57.

224. See, e.g., *Grayned v. Rockford*, 408 U.S. 104 (1972).

225. Karst, *supra* note 133, at 257-58.

226. These decisionmakers would be more likely to base their decisions on legitimate content distinctions. *Id.*

227. "[W]hen government is the proprietor of any forum, it is constitutionally permitted to regulate speech content only to the degree necessary to further . . . a compelling state interest." *Id.* at 259.

a specific series, or only plays that a professional decisionmaker has determined to be well-written. But it may not, as in *Conrad*,<sup>228</sup> refuse to present a play because a governing board which has not seen or read the play determines that it is not suitable for the community.<sup>229</sup> When a government actor abuses its discretion, courts should not hesitate to intervene and grant access to speakers under equality principles.<sup>230</sup>

### B. *Editors' Rights*

The limitation on editorial discretion extends not only to state broadcasters but to private broadcasters as well. The limitation on the latter is derived from the idea that they are mere trustees of a publicly owned resource.<sup>231</sup> Logically, government broadcasters should be limited not only by the public trustee role, but also by constitutional principles. The actions of a government editor may be state action,<sup>232</sup> which may infringe others' rights to speak or hear. Nevertheless, a government editor can assert his own constitutional rights against the government,<sup>233</sup> and these rights also may limit government's power to suppress speech.

#### 1. *Delegation Doctrine*

Professor Yudof, who disfavors judicial control over government speech in most instances,<sup>234</sup> suggests that courts should enforce a structural limitation on governmental power to communicate. He advocates a limitation which arises from the traditional delegation of day-to-day decisions and editorial responsibility to lower echelon editors of government communications media.<sup>235</sup> Such delegation removes much of the threat of content

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228. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); see *supra* notes 211-14 and accompanying text.

229. *Id.* at 548.

230. Karst, *supra* note 133, at 257-58. "The first amendment interest in access to an audience is especially strong when other viewpoints are being presented to that audience. Correspondingly, government normally has no legitimate interest in presenting one point of view on an issue while excluding others." *Id.* at 255.

231. See *supra* notes 52-53 and accompanying text.

232. See *supra* note 172.

233. See, e.g., *Connick v. Myers*, 103 S. Ct. 1684 (1983) (when employee expression is about a matter of public concern, first amendment protects him from undue actions such as dismissal by employer).

234. See M. YUDOF, *supra* note 3, at 259.

235. Applying this principle to public broadcasting, Professor Yudof has indicated that "the charge that public broadcasting is a propaganda arm of the federal government is simply ill-founded." *Id.* at 133.

control; editors are less likely to be politically motivated, and decentralization of decisionmaking renders it more difficult to turn the medium into a uniform government propaganda mechanism.<sup>236</sup>

Delegation should be judicially enforced: "Where such delegation has voluntarily taken place, courts ought to treat its *ad hoc* withdrawal in order to censor particular communications as a violation of the First Amendment."<sup>237</sup> Withdrawal of delegation becomes unconstitutional when the purpose is not to make sure that the forum carries out a legitimate function, but instead to eliminate objectionable ideas.<sup>238</sup> Judicial enforcement of the delegation doctrine thus would limit government's ability to dominate the system of expression without "compromising the integrity of its communication efforts."<sup>239</sup>

## 2. *Protection of the Editorial Function*

Closely allied with the delegation doctrine is Professor Canby's suggestion that the editorial function should be protected from censorship by the editor's superiors.<sup>240</sup> A court should first determine how editorial responsibility has been delegated. Then, it must determine whether the editors themselves have first amendment protection from censorship, by considering the nature of the medium, its scope and purpose, and how much editorial responsibility has been delegated.<sup>241</sup> The state has a great deal of discretion in its initial decision to delegate editorial responsibility, but once it has been delegated, the state "cannot selectively intervene to delete material or discipline editors."<sup>242</sup>

### C. *Listeners' Rights*

Although speakers' and editors' rights can buttress listeners' claims of a right to be free of unwarranted governmental censorship, sometimes listeners' claims must stand alone. For example, no speaker may have a right to speak in the particular government-operated forum, and no editor may have a right to be free from censorship by his superiors.<sup>243</sup>

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236. *See id.* at 135-38.

237. *Id.* at 243.

238. *Id.*

239. *Id.* at 244.

240. *See Canby, supra* note 133, at 1134-49.

241. *Id.* at 1141.

242. *Id.* at 1148.

243. Even if the government editors do have an enforceable right against their employer,



*Board of Education v. Pico*,<sup>244</sup> despite its uncertain precedential value,<sup>245</sup> is important to the analysis of government-owned communications media because four Justices found that a listener, not a speaker or an editor, had a potential first amendment claim against the government.<sup>246</sup> The Court recognized that substantial discretion was necessary for effective operation of public schools. However, a plurality found an unconstitutional exercise of discretion when the school board intended to deny students access to ideas with which the board disagreed.<sup>247</sup> Similarly, Justice Blackmun in concurrence argued that government actors may not restrict access to information when their motive is disapproval of the ideas involved.<sup>248</sup>

The plurality's focus on a right to receive information is difficult to justify in the public school context, since public school officials have discretion to prescribe the curriculum and to choose textbooks.<sup>249</sup> Similarly, an unlimited right to receive information seems incompatible with the public broadcasting context, where government editors must exercise discretion unless they are to operate stations as common carriers.<sup>250</sup> Justice Blackmun's independent bar on "state action calculated to suppress novel ideas or concepts"<sup>251</sup> provides a first amendment source for viewers to challenge specific suppressions of speech on government-operated media when they could not challenge general selection of programming.

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it is unlikely that they will go into court to enforce it, at least in the absence of disciplinary action against them.

244. 457 U.S. 853 (1982).

245. The *Pico* plurality opinion, based on a right to receive information, was joined by only three Justices; Justice Blackmun concurred on the basis of a prohibition against state discrimination between ideas. The fifth Justice concurring in the result, Justice White, found it unnecessary to reach the first amendment issues. *Id.*

The *Muir III* court concluded "that *Pico* is of no precedential value as to the application of the First Amendment to these issues." 688 F.2d at 1045 n.30.

246. Although Justice Blackmun did not believe that there was a general right to receive information, he agreed that students' rights had been violated by the state's action. 457 U.S. at 878-79. "In effect, my view presents the obverse of the plurality's analysis: while the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it." *Id.* at 879 n.2.

247. *Id.* at 871.

248. *Id.* at 879-80.

249. The plurality limited the scope of its opinion to the removal of library books, which are optional rather than part of the curriculum. *Id.* at 862. Furthermore, the plurality said the inculcative functions of the schools are limited to the classroom, while libraries are intended to expose students to a diversity of ideas as well. *Id.* at 869.

250. See *supra* notes 151-53 and accompanying text.

251. 457 U.S. at 880.

### D. *Protecting the System of Expression*

#### 1. *Access Proposals*

The Constitution does not bar government from operating communications media;<sup>252</sup> government operation of media such as public television stations may even be "essential to fulfilling the government's role of assuring" diversity.<sup>253</sup> Once a legitimate governmental interest in operating media is recognized, some measure of governmental editorial discretion and control over program content becomes essential.<sup>254</sup> Thus, unlimited public access to state broadcasting outlets is questionable.<sup>255</sup> Although the limited public forum concept is attractive, it would require courts carefully to distinguish among different government forums to determine the appropriate degree of access that should be allowed.<sup>256</sup>

Even though general or limited public access rights may be impractical, the methods by which governments make their editorial judgments should still cause concern.<sup>257</sup> *Muir III*<sup>258</sup> is a poignant example. What seems so egregious about the cancellations of *Death of a Princess* is not that a controversial show was not televised; few would question an initial decision not to carry the program. But the circumstances under which the decisions were made and the status of the government officials making the decisions create the appearance that government was making a "conscious decision to exclude the public from exposure to facts or opinions because the governmental decisionmaker deem[ed] such exposure harmful."<sup>259</sup>

#### 2. *Proposed Substantive and Procedural Limits*

A system of first amendment limitations on government speech and censorship in its communications media should accommodate both the legitimate government interests in speaking and the concerns about undue governmental interference with the system of free expression. Several assumptions would underlie such a system.

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252. See Canby, *supra* note 133, at 1165.

253. See Comment, *supra* note 39, at 1450.

254. Canby, *supra* note 133, at 1150.

255. *Id.*

256. See Comment, *supra* note 39, at 1455 (arguing that public officials should affirmatively provide for access to state-owned communications media to eliminate the need to resort to the courts).

257. See Canby, *supra* note 133, at 1149-64 (applying this concern to public broadcasting).

258. 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983).

259. *Muir II*, 656 F.2d 1012, 1028 (Clark, J., dissenting). For the facts of *Muir*, see *supra* note 167.

First, government communication is a legitimate state purpose, and substantial editorial discretion is necessary to achieve that purpose.<sup>260</sup> The amount of editorial control necessary will differ with the nature and specific purpose of the forum itself, just as it does under public forum doctrine.<sup>261</sup>

Second, because effective operation of a communications medium requires substantial discretion, there should be a presumption against an individual right of access for speakers. Stated another way, the actions of government editors should be presumptively constitutional.<sup>262</sup>

Third, a speaker or viewer could overcome the presumption by demonstrating that government had refused access, not because the speech substantially interfered with government's legitimate communicative interests, but solely because government wanted to keep the message from the public.<sup>263</sup> Factors to consider in determining whether the speech was suppressed solely for an illegitimate purpose would include significant departures from the usual editorial process and evidence that the decisionmaking process was extraordinarily politicized and ad hoc.<sup>264</sup> Upon proof that government's

260. See Canby, *supra* note 133, at 1165 ("The end of public broadcasting as a coherent voice would only reduce the quantity, quality, and diversity of the total broadcasting offering.").

261. *Id.* at 1133-34.

262. Otherwise, they would have to justify initial programming decisions, which would make effective operation of the forum virtually impossible. See Note, *supra* note 11, at 1181.

263. See *supra* note 1.

264. The plurality in *Pico* noted that:

[T]his would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials . . . . [The students'] allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding petitioners' motivations.

457 U.S. at 874-75.

Professor Tribe, although agreeing with the result, criticized *Pico*.

[The decision revealed] very little that is enduring. The only thing to be found there is the existence of a bare majority of five Justices in search of some limits on book banning by school officials . . . . The upshot of all this . . . is to shift the power of censorship from school boards to Supreme Court Justices . . . .

Tribe, *Censorship of School Libraries: Intuition in Search of a Principle*, 1981-82 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 209 (1983). In *Pico*, however, the Supreme Court did not censor books. Rather, it compelled school board members to articulate legitimate motives before censoring books. See *Pico*, 457 U.S. at 876.

A similar concern was voiced by the *Muir III* court. "Judicial reassessment of the propriety of a programming decision made in operating a television station involves not only interference with station management but also reevaluation of all of the content-quality-audience reaction factors that enter into a decision to use or not to use a program . . . ." 688 F.2d at 1052.

sole purpose was to suppress speech, the government's decision would become presumptively unconstitutional, although it may still prove that the same action would have resulted from pursuit of legitimate purposes.<sup>265</sup>

Fourth, remedies would vary, depending upon the status of the person asserting the right to be free from the government's unconstitutional actions. Speakers would generally press an access claim, and thus would seek a guarantee of their right to speak in the forum. Government editors might seek to compel reinstatement or to enjoin future interference with their editorial judgments. Listeners might seek to compel the government to present opposing views, or to enjoin some forms of government speech.

A forum in which no one can exercise editorial discretion is an undesirable place to speak.<sup>266</sup> This approach avoids that problem by presuming that speakers have no right of access to government-operated media. Because the approach presumes the validity of decisions made by government editors under regular editorial procedures, it also promotes the government's interests in speaking, and avoids impinging on the first amendment rights of government editors.<sup>267</sup> Yet, it maintains first amendment protection by establishing that suppression of speech is an illegitimate government purpose.<sup>268</sup> When no legitimate government communication interests are at stake, this approach allows speakers and listeners to assert a right to be free from unwarranted governmental censorship.<sup>269</sup> It also ensures that when government suppresses expression, it must at least articulate better reasons than fear of the message.

## VII. CONCLUSION

When government operates a communications medium, it has the power not only to increase the diversity of views being expressed, but also to decrease diversity by suppressing views with which it disagrees. The first amendment provides a potential restraint on this power, reflecting the role of free speech in assuring a system of self-expression and self-government. This Note has sug-

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265. This standard was suggested by the plaintiffs and adopted by one of the dissenting opinions in *Muir III*. 688 F.2d at 1060 (Reavley, J., dissenting). It is based on *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977).

266. See Comment, *supra* note 39, at 1444.

267. See *supra* notes 45-53 and accompanying text.

268. See *supra* note 1.

269. See *supra* notes 62-70 and accompanying text.

gested a governmental speech analysis that would limit government's voice when it pursues an illegitimate purpose. Further, governmental forum analysis provides a limitation on governmental regulation of speech for the purpose of suppressing ideas and information. These limits can be applied to governmental operation of public broadcasting stations by speakers, listeners, and editors asserting a right to be free from unwarranted government censorship.

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