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Electronic Mass Media and Freedom of Expression in Germany, the United States and Canada

by Tarik Tabbara
Faculty of Law
McGill University, Montreal
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ABSTRACT

This thesis examines the constitutional guarantee of freedom of expression as applied to electronic mass media. It compares the different approaches adopted in Germany, the United States and Canada. After an overview of freedom of expression doctrine in general and the main features of the regulation of electronic mass media the rationalization of this regulation in freedom of expression doctrine is analyzed.

The focus of this analysis is how electronic mass media have changed the traditional understanding of fundamental rights and freedoms as purely negative individual guarantees. This change occasions and necessitates a closer look at governmental regulation and the role of the state, and the different conceptions of freedom of expression that can be used to justify it.

RESUME

Cette thèse examine la garantie constitutionelle de la liberté d'expression appliquée aux mass media électroniques. Elle compare les différentes approches adoptées en Allemagne, aux Etats-Unis et au Canada. Après une vue d'ensemble de la doctrine portant sur la liberté d'expression et les principaux traits de la règlementation des mass media électroniques, nous analyserons comment les relations entre cette doctrine et cette règlementation se trouvent rationalisées.

Ce travail aura pour objet de montrer comment les mass media électroniques ont changé la vision traditionelle des droits et libertés fondamentaux, vision traditionelle qui conçoit ces derniers de façon négative et individuelle. Ce changement occasionne et rend nécessaire une analyse plus poussée du rôle de l'état et de la règlementation gouvernementale, et nous permet d'envisager les différentes concéptions de la liberté d'expression qui peuvent les justifier.

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GERMAN ABBREVIATIONS

AöR	Archiv des öffentlichen Rechts
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
GG	Grundgesetz
JZ	Juristen Zeitung
NJW	Neue Juristische Wochenschrift
ZUM	Zeitschrift für Urheber- und Medienrecht

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Chapter 1: **Introduction**

A. Electronic Mass Media and Fundamental Rights and Freedoms

Electronic mass media[1] challenge the role and function of fundamental rights and freedoms in contemporary democratic societies. Since the beginning of radio it has been questioned whether the traditional liberal understanding of freedom of expression was the appropriate answer to that challenge. The concern is that freedom of expression understood as an individual negative right would ring hollow in the area of electronic mass media. Solely directed to protecting the individual from state intrusion, freedom of expression so understood could not sufficiently guarantee that private and public discourse in and through electronic media would be truly free.

The challenge of the traditional understanding of fundamental rights and freedoms is especially unsettling in this field. Traditionally, the formation of opinion in democratic societies is seen to be in special need of protection from manipulative state interference in order to guarantee the functioning of democracy itself. Freedom of expression in this model is the bulwark affording this necessary protection from the state; it is symbolized in the abolition of censorship.

But once freedom of expression is linked to the functioning of democracy, equality of opportunity in the formation of opinion becomes a second leading feature of communicative freedoms. The concern with providing a real, and not just a theoretical, opportunity

[1] Electronic mass media or electronic media is used in this thesis to describe radio and television regardless of the transmission technology used (airwaves, cable, satellites).

for all parts of society to influence the process of opinion-making is what complicates the role of freedom of expression with regard to electronic media. Liberal democracies have allowed more state activity attempting to safeguard these opportunities in the field of electronic media than they tolerate in the print media. Technology-based arguments are the predominant rationale for this differential treatment. However, a closer look reveals that it is also the modus operandi of electronic mass media which stands behind most governmental regulation: their fundamental importance for the self-definition of society.

The focus of this thesis is how the Janus-like role of the state, being a threat to and guarantor of freedom of expression, is conceptualized in Germany, the United States, and Canada. A comparison of these three jurisdictions is of special interest since they are almost prototypical of the different possible solutions for resolving this tension within a framework that cherishes the same traditional values of freedom of expression. Put simply, in the United States the constitutional guarantee of freedom of expression as applied to electronic mass media serves increasingly as a tool to control and reduce state action. Conversely, in Germany it is used to guide and extend it. The situation in Canada stands apart: an electronic media system with significant state involvement has evolved without the guidance or control of an explicit constitutional guarantee of freedom of expression.

In the following three chapters I will discuss freedom of expression as applied to electronic media in these three jurisdictions, focusing on decisions of the respective Supreme Courts. Each of the chapters consists of a short discussion of freedom of expression doctrine in general, followed by an outline of the main features of electronic media regulation, concluding with an analysis of the freedom of electronic media. The chapter on Germany

aims mainly to clarify the perspective for the analysis of the situation in the US and Canada.

The main feature of the German approach to electronic mass media is the 'objective understanding' of broadcasting freedom. This objective understanding was influenced by and influenced the development of basic rights[2] theory in Germany after the Second World War. In essence, this development can be described as a shift from the classical liberal understanding of basic rights, according to which they solely provide protection from the state, towards an understanding of basic rights as positive structuring principles of society. From this perspective the trend in the US jurisdiction to 're-individualize' freedom of expression in the area of electronic mass media is particularly interesting. With the American media system being the trend-setter for media systems all over the world, changes in the US understanding of the role of freedom of expression with respect to electronic media have an impact well beyond the US border. The theoretical foundations and implications of the 're-individualization' trend are therefore given special emphasis in this thesis.

Since the German objective understanding of basic rights (objektivrechtliche Grundrechtsauslegung) serves as a looking-glass for the analysis that follows it is summarily outlined in the next part of this introduction.

[2] 'Basic rights' is the translation that comes closest to the German term "Grundrechte". It is used in the following interchangeable with 'fundamental rights and freedoms' when I refer to the German jurisdiction.

B. Objective Understanding of Basic Rights in Germany

The development of the objective understanding of human rights corresponds to the development from a modern bourgeois society to a post-modern mass democratic society.[3] The objective understanding of human rights evolved as a response to the crisis of the liberal conception of state and society. The historic experience that self-regulation of society does not automatically lead to a just balance of interests was one of the driving forces in the development of the objective understanding. The problem of justice which liberalism thought to solve by notions of formal equality re-emerged in the post-War period as substantive problem and led once more to the intervention of the state.[4]

In the postmodern state neocorporative tendencies can be noticed. The strict distinction between state and society no longer holds.[5] With the shift of the tasks and duties of the state, the realm in which the use of individual rights and freedoms is dependent on material or organizational services of the state is growing. A concept of the protection of basic rights which is based solely on protection against state interference is therefore not only insufficient, but also counterproductive. On the one hand, individual freedom is not only endangered by the state, but also by other social forces. On the other hand, individual free-

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[3] The terminology concerning the transformation from modernity to post-modernity is very divided. The terminology used here is based on Panajotis Kondylis, *Der Niedergang der bürgerlichen Denk- und Lebensform: Die liberale Moderne und die massendemokratische Postmoderne* (Weinheim: VCH, 1991) at 49 ff.

[4] Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt am Main: Suhrkamp, 1991) at 167-68 [hereinafter Grimm, *Zukunft*]; see also Bernd Jeand'Heur, "Grundrechte im Spannungsverhältnis zwischen subjektiven Freiheitsgarantien und objektiven Grundsatznormen" (1995) 50 JZ 161.

[5] Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie* (Frankfurt am Main: Suhrkamp, 1991) at 408 ff.; Grimm, *Zukunft supra* note 4 at 170. This is also emphasized by US critics of the Supreme Court's first amendment jurisdiction: Owen M. Fiss, "Free Speech and Social Structure" (1986) 71 Iowa L.Rev. 1405 at 1413-14 [hereinafter Fiss, "Social Structure"]; Jonathan Weinberg, "Broadcasting and Speech" (1993) 81 Cal.L.Rev. 1103 at 1182 ff.

dom is not only endangered by state interference (abridgment of freedom), but also by the other ways in which the state acts (the provision of services etc.) are relevant for the protection of basic rights.[6]

Legal thinking in the German Empire and during the Weimar Republic was dominated by a strictly positivistic and formalistic approach. The Bundesverfassungsgericht took a clearly antipositivistic and material approach from the beginning of its jurisdiction in 1951. This was due among other reasons to a general antipositivstic tendency after the collapse of the Nazi regime and the experience of the late Weimar Republic when the formalistic approach towards constitutional law by the leading positivistic school had been unable to save the constitution from attacks dressed in constitutional garb.[7]

Since its early decisions the Bundesverfassungsgericht has seen the constitution as a whole as value order (Werteordnung). Unlike the Weimar constitution it is not seen as value-neutral. The Grundgesetz[8] (GG) (Basic Law) is described as a value order which recognizes the protection of individual freedom and human dignity as the ultimate goals of the law.[9]

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[6] Grimm, *Zukunft supra* note 4 at 168 ff.; Böckenförde, *supra* note 5 at 159 ff.

[7] Böckenförde, *supra* note 5 at 47 ff.; Dieter Grimm, "Human Rights and Judicial Review in Germany" in David M. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht: Martinus Nijhoff, 1994) 267 at 272 [hereinafter Grimm, "Human Rights"].

[8] *Grundgesetz für die Bundesrepublik Deutschland*, Mai 23, 1949 (Bundesgesetzblatt 1) last amendment 27. October 1994 (Bundesgesetzblatt 3146) [hereinafter GG]. A translation of the Grundgesetz can be found as an appendix in David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994).

[9] "Lüth", 7 BVerfGE 198 at 205 (1958); "Elfes", 6 BVerfGE 32 at 40 f. (1957); "Communist Party", 5 BVerfGE 85 at 134 ff. (1956); "Socialist Reich Party", 2 BVerfGE 1 at 12 (1952) [Cases of the Bundesverfassungsgericht are given no official name. The names given here in quotation marks are popular designations]; cf. Grimm, "Human Rights" *supra* note 7 at 272-73; Böckenförde, *supra* note 5 at 50 ff.; Currie, *supra* note 8 at 15-16.

Also since its early decisions, the Court has recognized that basic rights are not merely negative subjective rights, but are at the same time objective principles for the whole legal and social order.[10] According to this understanding, basic rights are not only negative entitlements which enable the individual to defend himself against government intrusions into his or her sphere of freedom.[11] The understanding of basic rights as objective principles preceded the first broadcasting decisions of the Bundesverfassungsgericht. The early objective understanding of basic rights served the Court as a valuable starting point in its first forays into the objective understanding of broadcasting freedom.[12] However, the main impetuses for the Court's departure from an understanding of broadcasting freedom as a purely individual right were the economic, social, cultural, and technological conditions of electronic mass communication.[13]

The Court has drawn four main conclusions from its objective understanding of basic rights:[14]

First, it decided that lower courts have to respect basic rights also in the interpretation of private law.[15] Private law, with its conflicts between private individuals, was traditionally seen as outside the realm of basic rights. They were therefore deemed not appli-

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[10] "Lüth", *supra* note 9 at 204 ff.
[11] Cf. Böckenförde, *supra* note 5 at 159 ff.; Grimm, "Human Rights" *supra* note 7 at 276; Jeand'Heur, *supra* note 4 at 163; Currie, *supra* note 8 at 13-14.
[12] See "1st Broadcasting Decision", 12 BVerfGE 205 at 259-64 (1961); "2d Broadcasting Decision", 31 BVerfGE 314 at 325-29 (1971).
[13] See especially "3rd Broadcasting Decision", 57 BVerfGE 295 at 319-27 (1981); see also "1st Broadcasting Decision", *ibid.*; "2d Broadcasting Decision", *ibid.* both focusing on technological and economic conditions.
[14] Grimm, "Human Rights" *supra* note 7 at 277 ff.; Böckenförde, *supra* note 5 at 161 ff.; cf. Jeand'Heur, *supra* note 4 at 162-63.
[15] "Lüth", *supra* note 9 at 198 ff.

cable to state action in private law (as in the civil code).[16] But the Court held that basic rights are a part of the value order of the constitution which influences the whole legal and social order.[17] Therefore, the lower courts in their interpretation of the private law must choose the interpretation that comes closest to the value protected by the basic right at stake.

Second, the Court held that basic rights can give the individual affirmative constitutional rights when the constitutionally guaranteed rights cannot be effectively exercised without affirmative state assistance.[18] Such an understanding of basic rights evolved especially in fields where the state takes care of social security or promotes the cultural identity of the citizens. The involvement of the state in these fields makes a negative concept of basic rights insufficient. The negative concept needs to be complemented by a concept of participation in public institutions or goods.[19] This is based on the material (substantive) understanding of basic rights that a guarantee of freedom includes the possibility of using that freedom. It is also an expression of the shift from a formal to a substantive understanding of the constitution.[20] The Court took this position in a case where it reviewed laws that limited the access to medical school. The application of these laws led to the result that many applicants, although they were formally qualified, were not accepted into medical school.[21] But it has to be noted that the Court has exercised a considerable degree of restraint in determining the scope of such affirmative rights. So far, only

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[16] Grimm, "Human Rights" *supra* note 7 at 277; Jeand'Heur, *supra* note 4 at 162. See also *infra* notes 46-52, and accompanying text.
[17] Cf. Currie, *supra* note 8 at 16.
[18] Grimm, *Zukunft supra* note 4 at 227 ff.; Currie, *supra* note 8 at 15 ff.
[19] Grimm, *Zukunft supra* note 4 at 227 ff.
[20] Grimm, "Human Rights" *supra* note 7 at 278.
[21] "Numerus Clausus", 33 BVerfGE 303 at 330 ff. (1972).

in rare cases has the Court found the government's affirmative action wanting.[22] The Court is especially cautious when its decisions have an impact on the state budget.[23]

That the legislator under some circumstances has a duty to protect basic rights is the third conclusion the Court has drawn from the objective understanding.[24] The first case in which protection duties (Schutzpflichten) were recognized was the initial abortion case.[25] In this very controversial decision the Court held that the state was obliged to protect (unborn) human life from violations by others. In the second abortion case, the Court ruled that the protection has to be a sufficient one in view of the rank and importance of the basic right at stake.[26] In this decision the Court recognized a test for the sufficiency of protection (Untermaßverbot) which can be described as a reversed proportionality test for limitations (Übermaßverbot).

The development of protection duties stems mainly from the insight that basic rights can be endangered by other social forces than the state, and that an effective protection of basic rights demands legislative protection.[27] The demand for those protection duties usually arises in fields where new technical, economical or social developments create new dangers for basic rights[28], e.g., nuclear power[29], airport noise[30] or telephone misuse[31].

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[22] See "Financial Aid for Private Schools", 75 BVerfGE 40 at 66-67 (1987); see also "Waldorf-school", 90 BVerfGE 107 at 115-16 (1994).
[23] Grimm, "Human Rights" *supra* note 7 at 278-79; Jeand'Heur, *supra* note 4 at 163 n. 18; Currie, *supra* note 8 at 16-17.
[24] Böckenförde, *supra* note 5 at 172 f.
[25] "1st Abortion Decision", 39 BVerfGE 1 at 42 (1975); see also "Schleyer", 46 BVerfGE 160 at 164 (1977).
[26] "2d Abortion Decision", 88 BVerfGE 203 at 281 ff. (1993).
[27] Böckenförde, *supra* note 5 at 174; Grimm, *Zukunft supra* note 4 at 234.
[28] Grimm, "Human Rights" *supra* note 7 at 280.
[29] "Mühlheim-Kärlich", 53 BVerfGE 30 at 57 ff. (1979); "Kalkar", 49 BVerfGE 89 at 130 ff. (1978).
[30] "Airport Noise", 56 BVerfGE 54 at 73 ff. (1981).
[31] "Telephone Misuse", 85 BVerfGE 386 at 400 f. (1992).

The protection of basic rights by procedural and organizational rules is the fourth conclusion drawn by the Court from the objective understanding of basic rights.[32] The focus on procedure and organization is a reflection of the difficulties in protecting basic rights by substantive provisions. This is especially true in multipolar conflicts, in highly complex fields and where the state is acting under conditions of uncertainty. Protection by procedure and organization is therefore a compensation for insufficient substantive protection. Fields where the court has applied the concept of protection through organization and procedure include: co-determination in private enterprises[33], universities[34], national census[35] and the constitutional right of asylum[36].

[32] Grimm, "Human Rights" *supra* note 7 at 281-82.
[33] "Co-determination", 50 BVerfGE 290 ff. (1979).
[34] "University Co-determination", 55 BVerfGE 37 at 58 ff. (1980); "Group University", 35 BVerfGE 79 at 114 ff. (1973).
[35] "National Census", 65 BVerfGE 1 at 44 (1984).
[36] "Asylum", 56 BVerfGE 216 at 235 (1981).

Chapter 2: **The German Perspective**

A. Freedom of Expression

In its first sentence Art. 5(1) GG[37] guarantees the right of freedom of opinion (Meinungsfreiheit) and in its second the "freedom of the press" and the "freedom of reporting through broadcasting". The Bundesverfassungsgericht interprets the (individual) freedom of opinion as an aliud to the (institutional) media freedoms.[38] However, opinions expressed in print, broadcasting, or other electronic media are governed by the constitutional clause relating to 'freedom of opinion' and scrutinized by the Court under this section.[39] Therefore, a short overview of the principles guiding its review is given below.

The Bundesverfassungsgericht applies a three-step test for deciding whether freedom of opinion is abridged unconstitutionally: First, the Court asks whether the expression at stake falls within the ambit of Art. 5(1) sentence 1 GG (Schutzbereich). Second, it asks the threshold question of whether the burden at issue constitutes an infringement (Eingriff).

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[37] Art. 5 GG, *supra* note 8 reads:
"(1) Everyone shall have the right to freely express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcast and films are guaranteed. There shall be no censorship.
(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor.
(3) Art and science, research, and teaching shall be free. Freedom of teaching shall not release anyone from his allegiance to the constitution."
(Official translation of the Basic Law published by the Press and Information Office of the Federal Government. Unlike older editions the new one from November 1995 translates "Rundfunk" with 'audio visual media' instead of 'broadcasting'. This might come closer to the interpretation of the Bundesverfassungsgericht but it seems to be to freely translated.)

[38] "Questions", 85 BVerfGE 1 at 11-13 (1991) "Press-boycott", 62 BVerfGE 230 at 243 (1982); contra, *e.g.*, Walter Schmitt Glaeser, "Die Rundfunkfreiheit in der Rechtsprechung des Bundesverfassungsgerichts" (1987) 112 AöR 215 at 228 ff.

[39] "Questions", *ibid.* at 11-13; Currie, *supra* note 8 at 227 n. 244.

Finally, the Court, in a balancing test, scrutinizes whether the infringement is a constitutionally justified limitation (Schranke).

1. Scope of Protection

The Bundeverfassungsgericht has given Art. 5(1) GG a broad interpretation. Despite its narrow wording (Art. 5(1) GG guarantees "freedom of opinion" which seems to be narrower than "freedom of expression") the Court interprets the provision to include all value judgments and contentions of facts (Tatsachenbehauptungen) that serve the formation of opinions.[40] This also applies to commercial speech. The Court held that advertisements fall in the ambit of Art. 5(1) GG "if an announcement entails an evaluation, opinion-forming content ... which serves the formation of opinions."[41] Categorically excluded have been only deliberate lies and contentions that are proven to be wrong.[42]

The American controversy whether the value of freedom of expression is to be located in individual self-determination or in collective self-government was already decided in *Lüth*, the first major case in this field, in favor of basing it on both values:[43]

> The basic right of freedom of opinion is the most immediate expression of the human personality [living] in society and, as such, one of the noblest of all human

[40] "Böll", 54 BVerfGE 208 at 219-20 (1980); "NPD of Europe", 61 BVerfGE 1 at 7-9 (1982), "Questions", *ibid.* at 14-16.
[41] "Advertising by Pharmacists", 71 BVerfGE 162 at 175 (1985) (internal citation omitted). See also Currie, *supra* note 8 at 176. Advertisements in press and broadcasting are not only protected according to the communicative content but as the basis of the financial situation of the medium: "Testifying by Members of the Press" 64 BVerfGE 108 at 114 (1983); "5th Broadcasting Decision", 74 BVerfGE 297 at 342 (1987).
[42] "Campaign Slur", 61 BVerfGE 1 at 7-8 (1982), "Böll", *supra* note 40 at 219.
[43] Dieter Grimm, "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts" (1995) 48 NJW 1697 at 1698.

> rights ... . It is absolutely constituent [schlechthin konstituierend] to a free democratic constitutional order for it alone makes possible the continuing intellectual controversy, the contest among opinions that form the lifeblood of such an order. In a certain sense it is the basis of all freedom whatever, "the matrix, the indispensable condition of nearly every form of freedom" (Cardozo).[44]

2. Infringement

The Court takes a broad view of which burdens upon expression constitute an infringement of freedom of opinion. Not only are direct prohibitions of expression encompassed, but also incidental burdens that can have a chilling effect on free expression.[45]

A constitutive element of the infringement prong is that some form of government action is involved. In light of the objective understanding of basic rights it is, as noted before[46], of special interest that the Court held that Art. 5 GG can also be infringed by court injunctions where only private parties are involved. However, the Court held that freedom of opinion could not be directly applied to norms of private law. Beginning with *Lüth* it applied the theory of indirect effect of basic rights on third persons (mittelbare Drittwirkung).[47]

Observers with a common law background are astonished by the difficulties the Bundesverfassungsgericht has in applying Art. 5 GG to private law.[48] For example, the first

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[44] "Lüth", *supra* note 9 at 208; translation based in part on Donald P. Komers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) at 371 and Currie, *supra* note 8 at 175. The Cardozo quotation, in English, is from *Palko* v. *Conneticut*, 302 U.S. 319 at 327 (1937); cf. also "Schmid-Spiegel", 12 BVerfGE 113 at 124-125 (1961).

[45] Ingo von Münch, "Kommentierung zu Art. 5" in Ingo von Münch, ed., *Grundgesetzkommentar Band. 1*, 2d ed. (München: C.H.Beck, 1981) 241 at n. 12; see also Grimm, "Human Rights" *supra* note 7 at 286-87 to a generally broadened understanding of the Court considers to be an infringement.

[46] See *supra* notes 15-17 and accompanying text.

[47] "Lüth", *supra* note 9 at 205 ff.

[48] See, *e.g.*, Currie, *supra* note 8 at 182.

amendment is applied as long as it is the state that makes a policy decision to declare an expression unlawful. It does not matter whether it does so in public or private law.[49]

The difficulties of the German Court in applying the constitutional free speech guarantee to private law stems from the basic assumption that individuals are not bound by basic rights and that therefore private autonomy is not constrained by the respect for basic rights. The mere fact that private individuals submit their disputes for resolution by courts which decide according to laws made by the state, does not change this assumption: "The primary purpose of the basic rights is doubtless to protect the liberties of the individual from invasion of public authority. They are defensive rights [Abwehrrechte] of the citizen against the state."[50] But the Court went on to emphasize that this was not the sole function of the basic rights of the Basic Law. The Basic Law is not a value-neutral order: "Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights."[51] As a part of this objective order of values basic rights impact on all areas of law, private as well as public. Especially influenced are those private law provisions containing binding rules that displace the will of the private parties. Technically, the lower courts have to bring the influence of the basic rights to bear in the interpretation of general clauses and broad legal terms that refer to standards outside the private law like, "good morals".[52]

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[49] *Ibid.* at 184; see also *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 265 (1964) [hereinafter *New York Times*] a defamation case where the US Supreme Court held that was the state that had made the policy decision to declare the offending expression unlawful; whether the sanctions it attached to the prohibition were sought by the state itself of by private parties should be immaterial.

[50] "Lüth", *supra* note 9 at 204, translation based in part on Currie, *supra* note 8 at 184.

[51] "Lüth", *ibid.* 9 at 205, translation by Komers, *supra* note 44 at 370. The view that the Basic Law established with its basic rights an objective order of values has provoked an American observer to speak of a "mystical notion". (Currie, *supra* note 8 at 184).

[52] "Lüth", *ibid.* note 9 at 205 f.

3. Limitations

Art. 5(2) GG expressly states three limitations of the freedoms guaranteed in Art. 5(1) GG: general laws, laws protecting youth, and the right to inviolability of personal honor. Among these, the "general laws" are the most important. The two other limitations have little if any significance.

General laws are laws that do not prohibit an opinion or the expression of an opinion as such, but are directed toward the protection of a legal interest regardless of any specific opinion.[53] This formula is the synthesis of two different schools of thought dating from the Weimar Republic.[54] The Bundesverfassungsgericht focuses on the second part of the formula, applying a balancing approach to test the constitutionality of general laws. With certain specifics the Court applies a proportionality test which is also applied to other basic rights: Limitations are only valid if they are adapted to the attainment of a legitimate purpose, if they are necessary to that end, and if the burden they impose is not excessive in light of the benefits to be achieved.[55]

Also since *Lüth*, the Court has applied a reciprocal effect theory (Wechselwirkungslehre) to limitations of free speech. Laws limiting freedom of speech have to be interpreted in recognition of the constituent value of freedom of expression for a democratic order.[56] Thus, on this prong, unlike on the first one, the Court differentiates in the protection af-

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[53] "Trial-exclusion", 50 BVerfGE 234 at 240-41 (1979); "Soldier Law", 28 BVerfGE 282 at 292 (1970); "Lüth", *ibid.* at 209 f.

[54] von Münch, *supra* note 45 at n. 47 a.

[55] General statement of the proportionality test: "Agricultural Pension", 78 BVerfGE 232 at 245-47 (1988); applications in the field of expression: "Advertising by Pharmacists", *supra* note 41 at 180-83.

[56] "Lüth", *supra* note 9 at 208 f.

forded according to the value of speech at stake. As a result of focusing on the crucial role of free expression in the functioning of democracy, the Court affords the greatest protection to speech concerning areas of public interest:

> The protection of speech is entitled to less protection where exercised to defend private interests - particularly when the individual pursues a selfish goal within the economic sector - than speech that contributes to the intellectual struggle of opinions. ... Here the assumption is in favor for speech.[57]

The comparison of two cases dealing with calls for a boycott well illustrate the German balancing approach. In *Lüth* Erich Lüth had called the public to boycott a film directed by Veit Harlan, who was a popular film director under the Nazi regime and the producer of the anti-Semitic film 'Jud Süß'. A civil court had enjoined Lüth to cease and desist from his call for a boycott. The Bundesverfassungsgericht invalidated the judgment since it violated Lüth's freedom of opinion. The interests at stake were, according to the Court, Harlan's financial interest and professional opportunities and Lüth's interest in participating in the formation of public opinion.[58] The Bundesverfassungsgericht found that the court had given insufficient attention to Lüth's motives; and the fact that the question of whether a former Nazi propagandist should continue to produce films was a question of great public importance affecting Germany's reputation in the outside world. The Court held that: "Where the formation of public opinion on a question important to the general

[57] *Ibid.* at 212: translation by Komers, *supra* note 44 at 374.
[58] *Ibid.* at 215 ff.

welfare is concerned, private and especially individual economic interests, in principle, yield."[59]

In *Blinkfüer* the powerful Axel Springer newspaper company sent a circular to kiosk operators, instructing them not to sell Blinkfüer, a small weekly paper that printed East German radio and television programs. Springer threatened to withdraw its own newspapers, including the biggest German daily paper, from dealers who did not comply with the order. The Bundesgerichtshof, the highest German civil court, held that the boycott was covered by freedom of opinion. The Bundesverfassungsgericht reversed this judgment holding that it violated Art. 5(1) GG.

The Court found that Springer's call for a boycott was not protected by Art. 5(1) GG. The use of economic power to compel others did not fall within the ambit of freedom of opinion, since it deprived those affected by the boycott of their ability to make their own decisions freely: "[When] the exercise of economic pressure entails severe disadvantages for those affected by it, and is aimed at preventing constitutionally guaranteed dissemination of opinions and news, it violates equality of opportunity in the process of forming [public] opinion."[60] But the Bundesverfassungsgericht not only reversed the judgment based on this reason, it also found that the court had failed to assess the importance of the freedom of the press for Blinkfüer's position:

> In order to protect the institution of a free press, the independence of organs of the press must be protected against infringements of economic power groups who seek to influence the content and distribution of press products by using inappropriate means. The purpose of the freedom of the press to facilitate and promote the unin

[59] *Ibid.* at 219; translation by Komers, *supra* note 44 at 375.
[60] "Blinkfüer", 25 BVerfGE 256 at 265 (1969); translation based in part on Komers, *supra* note 44 at 375.

> hibited formation of public opinion requires that the press be protected against at tempts to short-circuit the competition of ideas by coercive economic means.[61]

Thus, the freedom of the press as an institutional guarantee (or as an objective principle) imposes an affirmative duty on the state to protect the press against third parties, not merely to leave it alone.[62] In requiring the Bundesgerichtshof to consider on remand the importance of the freedom of the press for Blinkfüer's position, the objective content of this provision serves also to reinforce individual rights.[63]

The objective content of basic rights has an impact on the jurisdiction of the Court in the field of defamation, also. However, here it is not the objective side of freedom of expression that is considered by the Court. It held that Art. 1(1) GG which protects human dignity imposes an affirmative obligation upon the state to protect human dignity, not merely to refrain from abusing it by its actions.[64]

But just as in the US Supreme Court's catch-phrase "that debate on public issues should uninhibited, robust and wide-open",[65] the Bundesverfassungsgericht, especially in the political arena, affords high protection to speech even if the personal honor of those

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[61] *Ibid.* at 268 (internal citation omitted); translation based in part on Currie, *supra* note 8 at 189.
[62] Currie, *supra* note 8 189.
[63] Peter E. Quint, "Free Speech and Private Law in German Constitutional Theory" (1989) 48 Md.L.Rev. 247 at 277 notes that *Blinkfüer* in contrast to the American "state action " doctrine may "require the judiciary to *create* what is in effect a constitutional cause of action that will allow private individuals to *enforce* their constitutional interest against other private individuals." [emphasis in the original]. This might translate the objective content to easily into subjective positions of the individual rights bearer, since objective content in general required the state to act but does normally not give the individual a right to require this action.
[64] "Mephisto", 30 BVerfGE 173 at 194 (1971); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, Free Press, 1991) at 63 suggests that the German courts, like US courts, give great weight to freedom of speech but accord more protection to personal reputation than their American counterparts.
[65] *New York Times, supra* note 49 at 270.

attacked is severely affected.[66] In this area the Bundesverfassungsgericht developed the so-called counterattack (Gegenschlag) theory. A person has the right to defend himself against acrimonious and misleading criticism by employing equally abusive language if such speech is necessary to offset the rancor and misrepresentation of the attacker's original onslaught.[67]

Art. 5(1) sentence 3 GG states "there shall be no censorship". The Court has given this provision a rather narrow interpretation. It is seen by the Court as a limit on limitations (Schrankenschranke). It is understood only as prohibiting the government from imposing the requirement of governmental approval of the publications prior to their dissemination.[68]

B. Regulation of Electronic Mass Media

1. History of Broadcasting in Germany

After the Second World War the occupying powers made efforts to ensure that broadcasting was free from governmental manipulation.[69] Unlike in the United States, however, after the War radio was not organized on a commercial basis. A fee-financed public

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[66] See, *e.g.*, "Democrat by Compulsion", 82 BVerfGE 272 at 283-84 (1990): "Within the framework of an argument about [public] issues even a democratic politician must put up with the reproach inherent in the epithet 'democrat only by compulsion'." (translation by Currie, *supra* note 8 at 205.

[67] "Schmid-Spiegel", *supra* note 44; "Art Critic", 54 BVerfGE 129 (1980); "Credit Shark", 60 BVerfGE 234 (1982); see also Komers, *supra* note 44 at 380-81.

[68] "Advertisement of KPD/ML", 47 BVerfGE 198 at 236 (1978); "DEFA-movie", 33 BVerfGE 52 at 72 (1972); Ulrich Karpen, "Freedom of Expression", in: Ulrich Karpen, ed., *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principle of the Basic Law with a Translation of the Basic Law* (Baden-Baden: Nomos, 1988) 91 at 96.

[69] For a detailed overview of the history of the German broadcasting system after the second World War, see Peter J. Humphreys, *Media and Media Policy in Germany*, 2d ed. (Providence: Berg, 1994) at 24 ff.

broadcasting system, modeled on the British Broadcasting Corporation, was created. Due to the federal structure of West Germany a number of public outlets were set up. In 1950 the broadcasters joined together to form a network (ARD - Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten Deutschlands). A second nationwide public television broadcaster (ZDF - Zweites Deutsches Fernsehen) was established via treaties between the Länder (states) in 1963.[70]

The public broadcasters are noncommercial public service organizations. They are obliged to offer a program mix in which the different viewpoints of society are reflected. The program mix must be varied and balanced. All interests of society as a whole must be taken into account, including minority interests. Therefore, all the various topic formats must be covered (especially news and public affairs, entertainment, and education).[71] The pluralistic composition of the public broadcaster's internal supervisory councils is the main means of safeguarding that public broadcasters fulfill their pluralistic obligation (internal pluralism). Their function is to represent the general public. Broadcasting regulations seek to ensure a balanced representation of the different viewpoints and social and political groups.[72] In addition, the ability to offer diverse programming is backed up by the financing of public broadcasters. Most revenues come from licensing fees, which are

[70] Cf. *ibid.* at 155 ff.

[71] Wolfgang Hoffmann-Riem, "Federal Republic of Germany" in: Philip T. Rosen, ed., *International Handbook of Broadcasting Systems* (New York: Greenwood, 1988) 91 at 95 [hereinafter: Hoffmann-Riem, "Germany"].

[72] Cf. Humphreys, *supra* note 69 at 142 ff.; Silke Ruck, "Development of Broadcasting Law in the Federal Republic of Germany" (1992) 7 European Journal of Communication 219 at 225 [hereinafter: Ruck, "Broadcasting"], noting that from the introduction of public broadcasting political parties have been with some success attempted to dominate the supervisory councils.

compulsory for all persons owning a radio or television set. A smaller percentage of revenues comes from advertisements.[73]

Private enterprises, in particular press publishers, have repeatedly called for a privatization of the broadcasting system. They made several attempts to be licensed as broadcasters. Until 1984 these attempts failed.[74]

2. Dual Broadcasting System

Germany has seen the gradual emergence of a dual broadcasting system (public *and* private) since 1985. Public broadcasters still play an important role in this system.[75]

The 16 states (Länder) have enacted new media laws which permit the licensing of private broadcasters. As in the laws dealing with public broadcasting the main concern of these laws is to safeguard a plurality of viewpoints. The states established 15 independent supervisory and licensing authorities (Landesmedienanstalten) which are exclusively responsible for private radio and television in their respective states.[76] They have no authority over public broadcasters. The Landesmedienanstalten are independent agencies operating under only a limited governmental control. In order to ensure diversity in private

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[73] Hoffmann-Riem, "Germany" *supra* note 71 at 93; Humphreys, *supra* note 69 at 170 ff.

[74] Hoffmann-Riem, *ibid.* at 91-92; Humphreys, *ibid.* at 239 ff.

[75] Susanne Hiegemann, "Die Entwicklung des Mediensystems in der Bundesrepublik Deutschland" in: Bundeszentrale für politische Bildung (ed.), *Privat-kommerzieller Rundfunk in Deutschland* (Bonn: Veröffentlichungen der Bundeszentrale für politische Bildung, 1992) 31 at 69-70. Since the introduction of private television the viewing shares of public broadcasters have constantly decreased. In national television the viewing shares dropped from 68.8 per cent in 1990 to 44, 4 per cent in 1993. (Media Perspektiven Basisdaten, *Daten zur Mediensituation in Deutschland 1994*, Media Perspektiven Supplement 1994). However, in 1995 public television stations still had 39 per cent of the national TV audience and 44,9 per cent between 6 p.m. and 8 p.m. (See Wolfgang Darschin & Bernward Frank, "Tendenzen im Zuschauerverhalten" (1996) Media Perspektiven 174 at 176).

[76] Only Berlin and Brandenburg have created a Landesmedienanstalt with authority for both states.

broadcasting and to minimize state influence the composition of the Landesmedienanstalten is modeled after that of the supervisory councils of public broadcasters.[77]

All media laws contain a wide variety of provisions dealing with the content of private radio and television. They include duties of truth, care, fairness and protection, e.g. of young persons. Compared with the regulations for public broadcasters, private stations, especially nationwide television, must meet only relaxed standards of balance and diversity in their programming.[78] Diversity of viewpoints in private broadcasting is therefore mainly based on the competition between different stations (external pluralism) and not, as in public broadcasting, on obligations for internal pluralism.

Private broadcasters are exclusively financed by advertising revenues.[79] The German media laws contain regulations concerning the permissible amount of advertising, require that advertising is adequately identified and separated from the rest of the program, and prohibit advertisers from influencing the program contents.[80]

The details of the different states' media laws may vary, but there has been a harmonization in several treaties between the states in the last years, especially for nationwide private television.[81] Nationwide private television is based on satellite and cable distribution. However, two stations[82] have managed to obtain a nationwide 'over the air' diffusion as a

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[77] Wolfgang Hoffmann-Riem, "Freedom of Information and New Technological Developments in the Federal Republic of Germany: A Case Law Analysis" in Antonio Cassese and Andrew Clapham, eds., *Transfrontier Television: The Human Rights Dimension* (Baden-Baden: Nomos, 1990) 49 at 75-76 [hereinafter Hoffmann-Riem, "Freedom"].

[78] Ruck, "Broadcasting" *supra* note 72 at 226 ff.; cf. also Hoffmann-Riem, *ibid.* at 74-75.

[79] Humphreys, *supra* note 69 at 170 ff.

[80] See Hoffmann-Riem, "Freedom" *supra* note 77 at 74-75.

[81] The most important treaty is the *Rundfunkstaatsvertrag - Art. 1 des Staatsvertrags über den Rundfunk im vereinten Deutschland* as am. March 3, 1994, published, *e.g.*, Hamburgisches Gesetz- und Verordungsblatt 1994 at 217 ff [hereinafter *Rundfunkstaatsvertrag*]. Cf. for this development see Humphreys, *supra* note 69 at 239 ff.

[82] RTL and Sat 1.

result of having been allocated licenses from the 15 Landesmedienanstalten.[83] These stations belong to the two biggest German media enterprises, which dominate the private broadcasting sector.[84] In recent years, the high concentration of ownership in the private radio and television market has been the main target of public critique.[85] The 15 Landesmedienanstalten have so far acted without success in the implementation of anti-concentration rules. Their enforcement has been significantly impeded by the decentralized structure of the supervision. The 15 different authorities are only loosely connected by a duty to cooperate.[86] For motives of local protectionism most Landesmedienanstalten tend to obstruct the enforcement of anti-concentration provisions if they affect a station located in their respective state.[87] Therefore, the states are currently discussing the creation of a central authority for the licensing and supervision of nationwide television programs, in order to enhance the effectiveness of the multiple ownership and cross-ownership regulations.[88]

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[83] Tarik Tabbara, "Zur Verfassungsmäßigkeit der Errichtung einer Bundesmedienanstalt" (1996) 40 ZUM 378 at 379 n. 7.

[84] The Bertelsmann group and the Springer-Kirch group. See Hoffmann-Riem, "Germany", *supra* note 71 at 94-95. Current data on the ownership of private media can be found in Horst Röper's annual reports ("Formationen deutscher Medienmultis") published in Media Perspektiven.

[85] Tabbara, *supra* note 83 at 378 ff.

[86] See *Rundfunkstaatsvertrag*, *supra* note 81, § 30(2).

[87] Tabbara, *supra* note 83 at 382.

[88] For an overview of the propositions see Magarete Schuler-Harms, *Rundfunkaufsicht im Bundesstaat* (Baden-Baden: Nomos, 1995) at 236 ff.; Tabbara, *ibid.* at 378-79.

C. Broadcasting Freedom

1. Broadcasting Freedom as Serving Freedom

That Germany has still a high degree of regulation for television and radio is not in least part due to the jurisdiction of the Bundesverfassungsgericht over broadcasting freedom.[89] In eight so-called broadcasting decisions the Court has set out a framework for the broadcasting system in Germany.[90]

Since the first decision the Court held that broadcasting freedom not only has a subjective element - the protection against state influence - but that it has also an objective element[91], which is reflected in the conception of broadcasting freedom as a serving freedom (dienende Freiheit).[92] Broadcasting freedom is said to serve the free formation of individual and public opinion and is not a right to individual self-fulfillment.[93]

According to this objective understanding the state not only is required to respect this freedom, but also has a duty to pass statutes to flesh out the contours of this right, which

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[89] Wolfgang Hoffmann-Riem, *Erosionen des Rundfunkrechts* (München: C.H. Beck, 1990) at 8-9; Ruck, "Broadcasting" *supra* note 72 at 222.

[90] See "8th Broadcasting Decision", 90 BVerfGE 60 (1994); "7th Broadcasting Decision", 87 BVerfGE 181 (1992); "6th Broadcasting Decision" 83 BVerfGE 238 (1991); "5th Broadcasting Decision", 74 BVerfGE 297 (1987); "4th Broadcasting Decision", 73 BVerfGE 118 (1986); "3rd Broadcasting Decision", 57 BVerfGE 295 (1981); "2d Broadcasting Decision", 31 BVerfGE 314 (1971); " 1st Broadcasting Decision", 12 BVerfGE 205 (1961).

[91] "1st Broadcasting Decision", *ibid.* at 259 ff.

[92] "8th Broadcasting Decision", *supra* note 90 at 87; "6th Broadcasting Decision", *supra* note 90 at 295 ff.; "4th Broadcasting Decision", *supra* note 90 at 152; "3rd Broadcasting Decision", *supra* note 13 at 319 ff.; Grimm, "Human Rights" *supra* note 7 at 282.

[93] "7th Broadcasting Decision", *supra* note 90 at 197. For a critique of the Court's conception of broadcasting freedom see, *e.g.*, Christian Starck, "Grund- und Individualrechte als Mittel institutionellen Wandels der Telekommunikation" in Ernst-Joachim Mestmäcker, ed., *Kommunikation ohne Monopole II* (Baden-Baden: Nomos, 1995) 291; Ernst-Joachim Mestmäcker, "Über den Einfluß von Ökonomie und Technik auf Recht und Organisation der Telekommunikation und der elektronischen Medien" in Ernst-Joachim Mestmäcker, ed., *Ibid.*, 13; Martin Bullinger, "Elektronische Medien als Marktplatz der Meinungen" (1983) 108 AöR 161. All authors are arguing for an understanding of broadcasting freedom as an individualistic right.

safeguard an effective exercise of broadcasting freedom.[94] The Court has therefore deemed it necessary that the legislator pass substantive, organizational and procedural rules for the broadcasting system. However, the Court emphasized that the legislator has wide latitude as to how to fulfill this constitutional duty.[95]

The underlying assumption of this constitutional duty for the legislator is that the free process of communication in and through broadcasting is not only endangered by state interference, but must be protected from other social powers.[96] In particular, the Court assumes that the unwritten laws of the marketplace do not sufficiently protect the formation of public opinion from the danger of influences of one dominant social group. The Court is also doubtful that the (economic) market would provide viewers and listeners with a sufficient diversity of opinions without further regulation.[97]

However, the Court acknowledges the double-edged role of the state. Art. 5 GG prevents the state from acting as a broadcaster itself.[98] Although broadcasting freedom requires the state to enact guiding principles for broadcasters' programs, it prohibits the state from being an overall arbiter exercising a controlling influence on broadcasters' programs. The government is specifically prevented from making use of broadcasters for its political

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[94] "8th Broadcasting Decision", *supra* note 90 at 88; "6th Broadcasting Decision", *supra* note 90 at 296; "3rd Broadcasting Decision", *supra* note 13 at 320; Grimm, "Human Rights" *supra* note 7 at 282-83.
[95] "8th Broadcasting Decision", *ibid.* note at 94; "6th Broadcasting Decision", *ibid.* at 315-16; "3rd Broadcasting Decision", *ibid.* at 321-22; "1st Broadcasting Decision", *supra* note 12 at 262.
[96] "8th Broadcasting Decision", *ibid.* at 88; "3rd Broadcasting Decision", *ibid.* at 320; "1st Broadcasting Decision", *ibid.* at 262.
[97] "4th Broadcasting Decision", *supra* note 90 at 295, 322 ff.
[98] "1st Broadcasting Decision", *supra* note 12 at 263.

purposes.[99] The legislator must not influence the content and form of programming beyond the enactment of provisions that safeguard the serving function of broadcasters.[100]

In its first broadcasting decision the Bundesverfassungsgericht ruled that the public monopoly was lawful.[101] Early attempts to introduce private broadcasting were struck down by the Court since they contained only insufficient safeguards for the free formation of individual and public opinion.[102] Since the Court, in its fourth broadcasting decision, upheld in part a law that allowed the licensing of private broadcasters[103] it focused in subsequent judgments on safeguards for the role of public broadcasters in the dual broadcasting system.

The Court held that the relaxed standards for private broadcasters are only so long constitutionally acceptable as the public broadcasters offer a program in compliance with the traditional, higher normative standards (e.g., comprehensive variety instead of basic standards of balanced variety).[104] It held that public broadcasters are charged with the 'essential basic provision' (unerläßliche Grundversorgung) in the dual broadcasting system.[105] 'Basic provision' does not mean 'minimum provision'. Public broadcasters have to ensure that the entire population is offered programming that provides comprehensive information and that the variety of opinions is maintained.[106] The legislator has the duty to

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[99] "8th Broadcasting Decision", *supra* note 90 at 88.
[100] *Ibid.* at 89.
[101] "1st Broadcasting Decision", *supra* note 12.
[102] "3rd Broadcasting Decision", *supra* note 13; "1st Broadcasting Decision", *ibid.*
[103] "4th Broadcasting Decision", *supra* note 90.
[104] *Ibid.* at 159-60; "5th Broadcasting Decision", *supra* note 41 at 325; "8th Broadcasting Decision", *supra* note 90 at 90.
[105] "4th Broadcasting Decision", *supra* note 90 at 123.
[106] "5th Broadcasting Decision", *supra* note 41 at 325-26; "6th Broadcasting Decision", *supra* note 90 at 297-98.

provide public broadcasters with the means to enable them to fulfill the 'basic provision'.[107] In order to ensure that the public broadcasters fulfill the 'basic provision' in a developing media market they are afforded a constitutional existence and development guarantee (Bestands- und Entwicklungsgarantie).[108] This guarantees that public broadcasters can take part in new technological developments.[109] The existence and development guarantee is also a constitutional financing guarantee for public broadcasters.[110] The funding must be sufficient and adequate with respect to its duties. Thus, exclusive financing by advertising revenue would not be adequate.[111] In its most recent broadcasting decision the Court struck down the regulation for the determination of the broadcasting fee.[112] Based on the proposition of an advisory body the governments determined the amount of the fee. The Court found that this procedure did not guarantee that the public broadcasters were provided with the necessary funding, since it contained no safeguards against attempts of the states to use their decision about the amount of the fee to influence the programming of the public broadcasters. The Court required the states to establish a procedure in which the public broadcasters have the initiative in establishing the amount of the fees.[113]

Dealing with 'new' media, the Court has pointed out that whether they will fall under the protection of broadcasting freedom, and therefore trigger protection duties for the leg-

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[107] "6th Broadcasting Decision", *ibid.* at 298; "4th Broadcasting Decision", *supra* note 90 at 158.
[108] "8th Broadcasting Decision", *supra* note 90 at 91; "6th Broadcasting Decision", *ibid.* at 298.
[109] For a detailed discussion of new services see Michael Libertus, "Grundversorgungsauftrag und elektronische Benutzungsführungssysteme" (1996) 40 ZUM 394 at 395-397.
[110] "8th Broadcasting Decision", *supra* note 90 at 91; "7th Broadcasting Decision", *supra* note 90 at 198.
[111] See "8th Broadcasting Decision", *ibid.* at 90.
[112] *Ibid.* at 87 ff.
[113] *Ibid.* at 102 ff. The Court required a procedure which safeguards that the initiative of the broadcasters serves as the framework for the final decision and that changes of this initiative could only be made in justified exceptional circumstances.

islator. will depend on whether the new media have the potential to influence the free formation of individual and public opinions to a comparable degree as television and radio.[114] This shows the specific concern of the Bundesverfassungsgericht for the conditions and peculiarities of modern (electronic) mass communication in distinction to ordinary (face-to-face) communication.

The special concern for mass communication stems partly from the suggestive powers of electronic media. the danger of manipulative abuse, and the unequal access to the means of mass communication (scarcity of distribution means; amount of money that is necessary to participate).[115] As the Court's conception of broadcasting freedom can be characterized as an endeavor to prevent basic rights and freedoms from becoming idle promises for a large part of the population[116]. it is likely that the Court will try to transfer a part of the regime of broadcasting freedom to new electronic media. especially when new forms or ways of mass communication are being established.[117] It is important. in this context. that the fact that the (technical) scarcity of distribution means could be overcome by new media would not automatically lead to a change in the jurisdiction of the Court.[118] Unlike the US Supreme Court. the German Bundesverfassungsgericht has never held that 'broadcasting' and 'cable' require a different treatment by the legislator.[119] Thus. the mere fact that there is no 'technical' scarcity on the 'Information Highway' will not likely cause

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[114] "5th Broadcasting Decision", *supra* note 41 at 350 ff.
[115] "3rd Broadcasting Decision", *supra* note 13 at 322.
[116] Cf. Grimm, "Human Rights" *supra* note 7 at 227 ff.
[117] See Hubertus Gersdorf, *Der Verfassungsrechtliche Rundfunkbegriff im Lichte der Digitalisierung der Telekommunikation* (Berlin: Vistas, 1995) at 106 ff.
[118] "3rd Broadcasting Decision", *supra* note 13 at 322..
[119] Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 114 S.Ct. 2445 (1994) [hereinafter *Turner*].

major changes in the manner in which the Court exercises its jurisdiction, as long as the conditions for the production of mass communication still lead to a de facto scarcity.

2. Doctrinal Distinction Between Limitation and Contouring Laws

The Bundesverfassungsgericht divides the laws which have an effect on broadcasting into two categories: limitation laws (Schrankengesetze) and laws that flesh out the contours (Ausgestaltungsgesetze) of broadcasting freedom.[120] The distinction between these different types of laws depends on the nature of the rule at stake.

Limitation laws are laws that deliberately infringe upon the broadcasting freedom in order to protect a non-communicative good (minors, personal reputation, property etc.).[121] The constitutionality of those laws depends on the question of whether or not they meet the requirements of Article 5(2) GG.[122] They have to protect a value which can in the specific case prevail over the broadcasting freedom.

The laws that flesh out the contours of broadcasting freedom (contouring laws) are laws that protect the communication process (in and through broadcasting) itself.[123] These laws correspond to the objective element. Since they flesh out the contours of broadcasting freedom they cannot be a limitation of broadcasting freedom.[124] This, however, does

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[120] "3rd Broadcasting Decision", *supra* note 13 at 321 ff.
[121] "4th Broadcasting Decision", *supra* note 90 at 166; "3rd Broadcasting Decision", *ibid.* at 321.
[122] See *supra* notes 53-67 and accompanying text.
[123] Helge Rossen, *Freie Meinungsbildung durch den Rundfunk* (Baden-Baden: Nomos, 1988) at 75; Wolfgang Hoffmann-Riem, "Medienfreiheit und der außenplurale Rundfunk" (1984) 109 AöR 304 at 315-317.
[124] "4th Broadcasting Decision", *supra* note 90 at 166; Wolfgang Hoffmann-Riem, *Rundfunkrecht neben Wirtschaftsrecht* (Baden-Baden: Nomos, 1991) at 71-72 [hereinafter Hoffmann-Riem, *Wirtschaftsrecht*]; Rossen, *ibid.* at 285 ff.

not mean that contouring laws cannot be unconstitutional.[125] But unlike the limitation laws, their constitutionality does not depend on whether they only limit the freedom of broadcasters only proportionally; rather they must provide a sufficient protection of the free formation of individual and public opinion.[126] The Court has recognized a prerogative of the legislator to determine how it can best fulfill its protection duties. The legislator does not have to attain the goal of broadcasting freedom perfectly. The Court only requires a high probability of achieving this goal.[127] If the legislation turns out after time to be insufficient, then the legislator has the duty to improve it (Nachbesserungspflicht).[128]

[125] Silke Ruck, "Zur Unterscheidung von Ausgestaltungs- und Schrankengesetzen im Bereich der Rundfunkfreiheit" (1992) 117 AöR 543.
[126] "3rd Broadcasting Decision", *supra* note 13 at 321-22.
[127] "4th Broadcasting Decision", *supra* note 90 at 169.
[128] "5th Broadcasting Decision", *supra* note 41 at 344; "4th Broadcasting Decision", *ibid.* at 169, 203.

Chapter 3: **United States of America**

A. Freedom of Expression

1. Free Speech as Ideology

The first amendment's guarantee of free speech[129] is more than simply one constitutional provision among others. It is the outstanding provision of the American Constitution,[130] its most celebrated individual right, or, as Laurence Tribe puts it, its "most majestic guarantee"[131].

Frederick Schauer argues that free speech discourse in the United States treats the first amendment as ideology.[132] Participants in that discourse are required to adhere to the broadly protective understanding of the first amendment. To challenge the particular notion of an unbalanced freedom of speech becomes a sacrilege in this environment which does not allow "as much free speech about free speech as free speech advocates urge about everything else".[133]

But this is not the only ideological dimension of free speech discourse in the United States. In the second half of the 20th century, the first amendment has become the para-

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[129] The term 'first amendment' is used in the following only in reference to its speech and press guarantee.
[130] See Glendon, *supra* note 64 at 42; Fiss, "Social Structure" *supra* note 5 at 1405.
[131] Laurence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, New York: Foundation Press, 1988) at 785.
[132] Frederick Schauer, "The First Amendment As Ideology" in David S. Allen & Robert Jensen, eds., *Freeing the First Amendment: Critical Perspectives on Freedom of Expression* (New York: New York University Press, 1995) 10.
[133] Schauer, *ibid.* at 24; cf. also his examples of scholars who departed from the prevailing doctrine, arguing for a more restrictive understanding of free speech, and who were not only criticized but branded by the 'first amendment community', *ibid.* at 15- 18.

digm of the American version of liberalism. For Americans, free speech discourse reflects and produces this liberal worldview.[134] It provides the matrix for and contains the quintessence of this particular notion of a liberal state and society.

First amendment discourse features individualism and the marketplace. It is the most distinctive accent of "the American dialect of rights talk", which in general envisages human beings as "the lone rights-bearer": as a loner wandering through the marketplace without any social ties.[135] Looking at the United States through the first amendment one encounters a world of monads seeking self-fulfillment and truth in a 'marketplace of ideas'.

The 'marketplace of ideas' has become the dominant metaphor for freedom of expression in the United States.[136] The marketplace theory attempts to describe itself as the legitimate descendent of an old tradition - the struggle for freedom-[137] and claims to require absolute protection. The debate on 'absolutism' in the protection of free speech and disputes over the values underlying the first amendment form the bulk of the legal discourse on freedom of expression.

The contemporary preoccupation of the American debate with these two questions strikes a German observer as somewhat curious. Since the analogous debates in Germany are generally seen as resolved since the early decisions of the Bundesverfassungsgericht, at least neither of the two questions plays an important role in the German debate.

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[134] Cf. Weinberg, *supra* note 5 at 1109; Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993) xi [hereinafter Sunstein, *Democracy*].
[135] Glendon, *supra* note 64 at 47 ff. and passim.
[136] Weinberg, *supra* note 5 at 1108; Fiss, "Social Structure" *supra* note 5 at 1413; Marc A. Franklin & David A. Anderson, *Mass Media Law*, 4th ed. (Westbury: Foundation Press, 1990) at 36.
[137] See, *e.g.*, Zechariah Chafee, *Free Speech in the United States* (Cambridge, Massachusetts: Harvard University Press, 1941) at 29.

Usually three major values underlying the first amendment are distinguished:[138] 1) the search for truth in the marketplace of ideas, 2) democratic self-government, and 3) individual self-fulfillment. The different values stand for different nuances or versions of liberalism. The debate ranges from claiming exclusiveness, to the top-position of a hierarchical order, or the outstanding position in the orchestra of the different values. The Supreme Court did not base its decisions exclusively on one of the values but made use of all of them without following a coherent theory.[139]

The debate on absolutism reveals the deep-rooted mistrust of government in the United States:[140] The 'marketplace of ideas' has to be kept free from government interference. The state is perceived as a constant source of danger for freedom of expression.[141] In this setting, the first amendment is the weapon of the 'people' to keep government in its place. Since the state is believed to be always ready and eager to find the smallest loophole to skew public discourse and manipulate the beliefs of the citizens, absolute protection is often deemed necessary.[142] Although no absolute position has ever been the ratio of a Su-

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[138] Jerome A. Barron & C. Thomas Dienes, *First Amendment Law* (St. Paul, Minn.: West Publishing, 1993) at 15 [hereinafter Barron & Dienes, *First Amendment*]. There are many differences in details and also a number of subvalues and additional values. Frequently mentioned are the 'checking value' and the 'safety valve'. Cf. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, vol. 4, 2d ed. (St. Paul, Minn.: West Publishing, 1992) at 14-18; Geoffry R. Stone et al., *Constitutional Law*, 2d ed. (Boston: Little, Brown and Company, 1991) at 1017-24; Thomas I. Emerson, "First Amendment Doctrine and the Burger Court" (1980) 68 Cal.L.Rev. 422 at 423-24; T. Barton Carter et al., *Mass Communication Law*, 4th ed. (St. Paul, Minn.: West Publishing, 1994) at 5-7 (not mentioning the self-fulfillment value).

[139] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, ed., Jamie Kalven (New York: Harper & Row, 1988) at 3; Barron & Dienes, *ibid.* at 15.

[140] See, for the mistrust of government in the United States as a driving force in first amendment law, Fiss, "Social Structure" *supra* note 5 at 1413 ff.; see generally Glendon, *supra* note 64 at 103.

[141] Cf. Fiss, *ibid.* at 1422; cf. also the tendency to conceive freedom of expression from a pathological perspective. Vincent Blasi, "The Pathological Perspective and the First Amendment" (1985) Colum.L.Rev. 449 at 513: "The strategy of targeting first amendment doctrine for the worst times ... ."; see also Martin H. Redish, "The Role of Pathology in First Amendment Theory: A Skeptical Examination", (1988) 38 Case W.Res.L.Rev. 618.

[142] See Glendon, *supra* note 64 at 42.

preme Court decision[143] the theme reoccurs over the years, since the basic concerns of the debate are shared by the Court.

Once the distrust of government is discerned as one of the crucial creeds of first amendment protection, the focus of the American debate is easier to understand. The first amendment is the negative liberty par excellence, directed against the state and based on a sharp public-private distinction.[144] This classical liberal distinction focuses the first amendment and its protective power solely on the state. Other social forces are not in the spectrum of the danger-detector of the first amendment.

However, these liberal assumptions have been challenged over the years, especially with regard to mass communication.[145] They are seen to be based on a misconception of the necessary conditions for freedom of expression in a modern mass democracy. The association of the private sphere with 'freedom' and the 'state' with danger is the starting point for those critics. They argue that the public and the private are no longer two sealed spheres and that the traditional first amendment doctrine does not respond adequately to the distribution of power in contemporary society. Traditional first amendment theory is accused of neglecting economic disparities and their effects on the outcome of the competition in the 'marketplace of ideas'. The first amendment assumes a 'free' marketplace of ideas; whereas it is in fact a very constrained playing-field, and the first amendment sets the rules that constrain public discourse in such a way that it is "dominated, and thus constrained by the same forces that dominate social structure." [146] The first amendment

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[143] Rotunda & Nowak, *supra* note 138 at 21, 52; Melville B. Nimmer, *Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment* (New York: Bender, 1984-1996, loose-leaf) at § 2.06[3].
[144] Fiss, "Social Structure" *supra* note 5 at 1413 f.; Weinberg, *supra* note 5 at 1109.
[145] See, *e.g.*, the articles of Fiss, "Social Structure" *supra* note 5 and Weinberg, *supra* note 5.
[146] Owen M. Fiss, "Why the State?" (1987) 100 Harv.L.Rev. 781 at 786.

thus becomes a powerful tool for the major players but keeps substitutes on the bench as the viewing audience.

2. History

Modern first amendment law and theory, as it is now known, only began to develop after World War I.[147] Prior to that time there were few decisions on freedom of speech.[148] The enactment of the first amendment is generally seen as a response to the colonial experience: the suppression of freedom of expression in Great Britain and the colonies. Although the British Parliament refused to renew the last of the licensing acts in 1695, the press remained controlled by the Crown through the imposition of taxes, the refusal to permit the introduction of printing presses in many American colonies, and especially the enforcement of seditious libel. Under this law the criticism of the government was punishable regardless of the truth of the statements.[149]

So far, several attempts have been made to resolve modern disputes about the interpretation of the first amendment with a look to its history, but the historical materials concerning the meaning of the first amendment leave many questions open.[150] It is even dis-

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[147] Carter et al., *supra* note 138 at 4; Sunstein, Democracy note 134 at 5.

[148] Rotunda & Nowak, *supra* note 138 at 13, fn. 14, 53; an exception is the time of the Alien and Sedition Acts in the 1790s. The *Sedition Act of July 14, 1798* provided punishment for the publication of false, scandalous, and malicious writings against the government. The *Alien Act of June 25, 1798* allowed the president to deport any alien judged dangerous to the security of the United States. These acts were enforced by lower courts.

[149] See: T. Barton Carter, Marc A. Franklin & Jay B. Wright, *The First Amendment and the Fourth Estate: The Law of Mass Media*, 5th ed. (Westbury: Foundation Press, 1991) at 24-31 [hereinafter Carter, Franklin & Wright, *Fourth Estate*]; Carter et al., *supra* note 53 at 3 f.; Stone et al., *supra* note 138 at 1011-17.

[150] This is not in least part due to the fact that there are no records of the debates in the Senate or the states on its ratification. See Rotunda & Nowak, *supra* note 138 at 10-11.

puted whether the founders had any particular conception of freedom of speech in mind when they adopted the first amendment.[151] Zechariah Chafee contends that they had.[152] He argues that the amendment was intended to serve the dual purpose of eliminating all vestiges of censorship and destroying the viability of the doctrine of seditious libel. Because the practice of censorship was abandoned before the enactment of the first amendment Chafee thinks that it expresses that the founders highly valued the principle of free speech, since it would be unlikely that the first amendment was only a prohibition of a non-existent practice.[153]

Leonard Levy on the other hand argues that it is a "sentimental hallucination" to contend that historical studies reveal a broad libertarian understanding of freedom of speech.[154] He thinks it is not even sure whether the founders had any particular conceptions of the aim of freedom of speech.[155]

A major influence on the initial development of first amendment doctrine was William Blackstone's *Commentaries on the Laws of England.*[156] Blackstone's *Commentaries* were

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[151] See Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Belknap Press of Harvard University Press, 1960) at 236; Lillian R. BeVier, "The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle" (1978) 30 Stan.L.Rev. 229 at 307.

[152] Chafee, *supra* note 137 at 18 ff.

[153] *Ibid.* at 19-21.

[154] Levy, *supra* note 151 at 176 ff., 236 ff.; republished and revised: *Emergence of a Free Press* (New York: Oxford University Press, 1985) at 281.

[155] Robert C. Palmer, "Liberties as Constitutional Provisions" in William E. Nelson & Robert C. Palmer, eds., *Liberty and Community: Constitution and Rights in the Early American Republic* (New York: Oceana Publications, 1987) 55 at 117-123, in a more recent research supports Chafee's view. He thinks that two speeches in the First Congress reveal a broader understanding of the freedom of the press at that time, but the sources he refers to are no explicit statements of a libertarian view of the freedom of the press. It seems therefore unlikely that Palmer's research is a step to put an end to the debate on the original meaning of the first amendment. Contra Rotunda & Nowak, *supra* note 138 at 11 f., but see Nimmer, *supra* note 143 at § 1.04[1]; Carter et al., *supra* note 138 at 4; Sunstein, *Democracy supra* note 134 at xiv.

[156] Carter, Franklin & Wright, *Fourth Estate supra* note 149 at 26; Kenneth C. Creech, *Electronic Media Law and Regulation* (Boston: Focal Press, 1993), at 30; Sunstein, *Democracy supra* note 134 at xiii.

the major source of legal doctrine (and hence, law) of the time of the founding of the United States. Since published reports of American decisions were not available until the early 19th century, his treatment of common law was often the only reference. It was more widely read in the United States than in Britain and had a pervasive influence on generations of American lawyers until the late 19th century.[157]

His understanding of natural liberty echoed John Locke[158] and had some form of an 'absolute' notion[159] for he wrote: "[N]atural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature..."[160] And he declared: "[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature ... ."[161] However strongly Blackstone might have inspired and influenced contemporary debates on absolutism, his own writing is not completely clear on this point, for he went on that the absolute rights "could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities."[162]

It is thus questionable how far contemporary 'absolutists' can claim to be the legitimate heirs of Blackstone - but at least the reception of his *Commentaries* introduced and kept alive some notion of 'absolutism' in the 'American dialect of rights talk'.[163]

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[157] Glendon, *supra* note 64 at 22-24; cf. Daniel Boorstin, *The Mysterious Science of the Law* (Cambridge, Massachusetts: Harvard University Press, 1941) at 3: "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law."

[158] Glendon, *ibid.* at 23.

[159] *Ibid.* at 23-24; Nimmer, *supra* note 143 at § 1.02[3].

[160] William Blackstone, *Commentaries on the Laws of England*, 21st ed. by John F. Hargrave, vol. 1 (New York: Harper & Brothers, 1857) at 125 [the page numbers refer to the original edition of 1765-69).

[161] *Ibid.* at 124.

[162] *Ibid.*

[163] Glendon, *supra* note 64 at 22-24, 43-44.

The dissemination of the 'illusion of absoluteness', as Mary Ann Glendon puts it,[164] is not the only contribution of Blackstone to modern first amendment thinking. The 'clear and present danger test', one of the major tests for the constitutionality of limitations of freedom of speech, can be traced back to the *Commentaries*.[165] and, maybe even more influential, was his definition of freedom of the press as the absence of "previous restraint on publications":[166]

> [W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, ... the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done ... is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry, liberty of private sentiment is still left; the dissemination ... of bad sentiments, destructive to the ends of society, is the crime which society corrects.[167]

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[164] *Ibid.* at 18 ff.

[165] Creech, *supra* note 156 at 31.

[166] Cf. T. Barton Carter, Marc A. Franklin & Jay B. Wright, *The First Amendment and the Fifth Estate: Regulation of Electronic Mass Media*, 3rd ed. (Westbury, New York: Foundation Press, 1993) at 26 [hereinafter Carter, Franklin & Wright, *Fifth Estate*]; Chafee, *supra* note 137 at 29; Creech, *supra* note 156 at 41.

[167] William Blackstone, *Commentaries on the Laws of England*, 21st ed. by W.N. Welsby, vol. 4 (New York: Harper & Brothers, 1857) at 151-53 [emphasis in the original; the page numbers refer to the original edition of 1765-69)

The ambivalence in speaking of the liberty of the press in absolute terms, while at the same time maintaining the legitimate power of the state to prosecute the dissemination of certain ideas, has left its imprint on modern first amendment theory. It is reflected in the tendency of first amendment doctrine to present itself in absolute terms, thereby concealing the actual process of balancing.[168] Therefore, the difficulty in finding a coherent doctrine for the constitutionality of limitations upon first amendment rights can, at least in part, be traced back to Blackstone's definition of the liberty of the press.

3. Text

The text of the first amendment[169] is of categorical form. Its formulation has served to legitimize absolutist understandings of freedom of speech.[170] Justice Hugo Black, most prominent proponent of a stark absolutist position, wrote in *Smith* v. *California*:

> Certainly the First Amendment's language leaves no room for inference that abridgements of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law ... abridging the freedom of speech, or of the press." I read "no law ... abridging" to mean *no law abridging*.[171]

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[168] See Glendon, *supra* note 64 at 42; Tribe, *supra* note 131 at 792. Cf. Charles L. Black, Jr., "Mr. Justice Black, The Supreme Court, and the Bill of Rights" Harper's Magazine, February 1961, 63 at 68., defending an absolutist position without any recognition of a need to balance freedom of speech, since this could lead to the slippery slope of censorship. Therefore, he argued, a judge might say: "'What we are doing is not an abridgment of freedom of speech; it is something else' - and offer reasons for this conclusion that can be swallowed by people who speak standard English."

[169] U.S.C.S. *Constitution*, Amendment 1 (1986): "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [emphasis added].

[170] Cf. Glendon, *supra* note 64 at 42-43; Rotunda & Nowak, *supra* note 138 at 21; Barron & Dienes, *First Amendment supra* note 138 at 5; Sunstein, *Democracy supra* note 134 at xii.

[171] *Smith* v. *California*, 361 U.S. 147 at 157 (1959) [emphasis in the original; hereinafter *Smith*].

Alexander Meiklejohn, on the other hand, has pointed out that the first amendment does not forbid the abridging of speech, but abridging the *freedom of speech*.[172] Many scholars argue therefore that although the wording seems very simple and clear, it leaves room for many interpretations.[173] It is true that the formulation allows different interpretations, but it has to be borne in mind that its unqualified form has nurtured absolutist tendencies in first amendment discourse. This form has left its particular imprint on the contemporary debates of hate-speech and pornography.[174]

4. Theoretical Foundation

a) The Tradition

In first amendment discourse a tendency can be noticed to perceive this discourse and its different elements, values and competing doctrines as part of an all-encompassing Tradition of free speech.[175] This Tradition is a source of authority: "Everything is included - nothing is left out, not the dissents, not even decisions overruled. Every encounter between the Court and the first amendment is included. There is, however, a shape, a direction or point to the Tradition."[176]

The Tradition began to develop with decisions of the Supreme Court during and after World War I, but has sought to anchor itself in earlier philosophical writings. Nearly all

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[172] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948) at 19 [hereinafter *Free Speech*].
[173] BeVier, *supra* note 151 at 306; Rotunda & Nowak, *supra* note 138 at 14; Barron & Dienes, *First Amendment supra* note 138 at 5; Sunstein, *Democracy supra* note 134 at xii..
[174] Glendon, *supra* note 64 at 42.
[175] Fiss, "Social Structure" *supra* note 5 at 1405; see generally Kalven, *supra* note 139 .
[176] Fiss, *ibid.* at 1405.

commentators see the roots of the Tradition in John Milton's *Agreopagitica* (1644) and John Stuart Mill's Essay *On Liberty* (1859).[177]

Mill's essay had an especially strong influence on the present shape of the first amendment. This treatise on the preservation of individual liberty in a democracy was absorbed by many leading American jurists. Through the opinions of Supreme Court Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis Millian ideas, like the marketplace of ideas and the clear and present danger test, were "turned into catchphrases" of the first amendment.[178]

Mill offered the matrix for an understanding of freedom of speech as a realm which is free from government coercion, a realm where different life-styles can compete and where truth, as a result of the competition, can arise in a democracy:

> First if any opinion is compelled to silence, that opinion for aught we can certainly know, be true. To deny this is to assume our own infallibility.
> Secondly, though, the silenced opinion be in error, it may, and very commonly does, contain a portion of the truth; and since the generally prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth had any chance being supplied.
> Thridly, even if the received opinion be not only true but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little com prehension of feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground and pre venting the growth of any real and heartfelt conviction from reason or personal ex perience.[179]

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[177] See, *e.g.*, Kent Greenwalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton: Princeton University Press, 1995) at 3.
[178] Glendon, *supra* note 64 at 54.
[179] John Stuart Mill, *On Liberty*, ed. by Elizabeth Raport (Indianapolis: Hackett Publishing, 1978) at 50.

Rightly, Mary Ann Glendon has pointed out that Mill's elitist justification of his concept of freedom has often been forgotten and is not mentioned when Mill is quoted as an authority for contemporary first amendment theory.[180] Like Tocqueville, Mill was concerned with the 'new' threats for liberty in a democracy. Both feared that a tyranny of the majority could be the end for all individual liberty[181]; and both regarded with distrust the public discourse in democracies where the vote has been given to the 'masses' and public opinion would be mediated and formed through the means of mass communication.[182] This meant for Mill that "the mass do not ... take their opinions form dignitaries in Church or State, from ostensible leaders, or from books. Their thinking is done for them by men much like themselves, addressing them or speaking in their name, on the spur of the moment, through the newspapers."[183]

Mill feared that this development would consign the state to mediocrity. He saw the solution of this dilemma in the ability of the 'mass' to follow individual leadership:[184] Mediocrity could be avoided

> as the sovereign Many have let themselves be guided ... by the counsel and influence of highly gifted and instructed *one* or *few*. The initiation of all wise or noble things come and must come from individuals; generally at first from some one in

[180] Glendon, *supra* note 64 at 53.
[181] Mill, *supra* note 179 at 63-64 and passim; Alexis de Tocqueville, *De la Démocratie en Amérique*, vol. 1 (Paris: Granier-Flammarion, 1981) at 348 ff. and passim [first published 1835].
[182] Tocqueville, *ibid.* at 264: "J'avoue que je ne porte point à la liberté de la presse cet amour complet et instanté qu'on accorde aux choses souverainement bonnes de leur nature. Je l'aime par la consideration des maux qu'empêche bien plus que pour les biens qu'elle fait." He also noted with astonishment the disproportional relation in American newspapers between a minimal coverage of general political debates and an immense proportion of advertisements; *ibid.* at 268; Mill, *ibid.* at 63.
[183] Mill, *ibid.* at 63.
[184] See Glendon, *supra* note 64 at 54.

> dividual. The honor and glory of the average man is that he is capable of following that initiative; that he can respond internally to wise and noble things, and be led to them with his eyes open.[185]

For individuals to be capable of leadership they need a great deal of personal freedom to flourish. The "eccentric" individual is the "counterpoise and corrective" to the "tyranny of opinion" of the average man.[186] Since their life-styles may seem suspicious to the average man they need to be protected in the pursuit of their individuality: "It is in these circumstances most especially that exceptional individuals, instead of being deterred, should be encouraged in acting differently from the mass."[187] It was the concern with the preservation of conditions that allow individual leadership which formed the basis of Mill's understanding of liberty. Thus, in the very concept the enjoyment of liberty was a privilege of the 'few' to distinguish themselves from the 'mass'.[188] It was the dissenting intellectual, not much unlike himself, whom Mill had in mind when he conceived freedom of speech as a marketplace of ideas as a test for truth.[189]

However strongly today the marketplace metaphor evokes the impression of a vibrant trade and exchange of ideas, where everyone 'can meet to sell and buy ideas', Mill's marketplace was one with a fixed distribution of roles: few 'eccentric' leaders who sell their ideas to the many 'average' consumer.

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[185] Mill, *supra* note 179 at 63 [emphasis in the original].
[186] *Ibid.* at 64.
[187] *Ibid.*
[188] Glendon, *supra* note 64 at 54.
[189] A modern echo of Mill's justification of liberty can be found in Steven Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge: Harvard University Press, 1990) at 5: "If the first amendment is to have an organizing symbol, ... let it be the image of the dissenter." According to Shiffrin the major purpose of the first amendment "is to protect the romantics - those who would break out of classical forms: dissenters, the unorthodox, the outcasts."

b) Whose Interests are Paramount in the Marketplace of Ideas?[190]

The different theories underlying the first amendment are often categorized as being either consequentualist or non-consequentualist.[191] In the context of electronic media a categorization which focuses more specifically on the relation between communicator and recipient seems more helpful. In a modification of a famous statement of the Supreme Court in its seminal *Red Lion* decision one could ask: Are the rights of the speaker or those of the listener paramount?[192]

The dominant metaphor of the first amendment leaves this question formally open. The marketplace theory wants to leave all that what will be heard and all that what will be said to the competition in the marketplace. The listeners have to search for bargaining power to find speakers they want to listen to, and the speakers have to respond to the listeners to survive in the competition.

The marketplace theory descended from Milton's creed that "in a free and open encounter"[193] truth would prevail over falsehood, through Justice Holmes' famous reformulation of Mill's *On Liberty* right into the heart of the first amendment:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the

[190] The following remarks are restricted to the three major theories of the first amendment. For a short overview over some other theories see Barron & Dienes, *First Amendment supra* note 138 at 15-19.
[191] See *ibid.* at 8 ff.; Tribe, *supra* note 131 at 785 ff; Greenwalt, *supra* note 177 at 3 ff.
[192] See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 at 390 (1968): "It is the right of the viewer and listeners, not the right of the broadcasters which is paramount." [hereinafter *Red Lion*].
[193] John Milton, *Areopagitica and of Education*, ed. by George H. Sabine, (New York: Appleton-Century-Crofts, 1951) at 50.

> competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[194]

The standard answer for disproportionalities in the speech-market under this theory has become another Millian creed in a restatement by Justice Brandeis:[195] "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[196]

It is crucial to understand that the more-speech remedy does not mean that conditions have to be provided to ensure that more speech, more speakers, or more viewpoints are available: quite the contrary is the case. The more-speech remedy is the justification for non-interventionist policies: it is simply a reaffirmation of confidence in the marketplace.

Although it is in principle possible to distinguish between free competition in the marketplace of ideas and in the economic marketplace,[197] the marketplace metaphor has served in the times of the deregulation of electronic media in the United States a as legitimizing source for the shifting from a regime of 'public interest' to one of the 'forces of the economic market place'.[198]

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[194] *Abrahams* v. *United States*, 250 U.S. 616 at 630 (1919) (Holmes, J., dissenting) [hereinafter *Abrahams*].
[195] More-speech as the standard answer: Sunstein, *Democracy supra* note 134 at 9.
[196] *Whitney* v. *California*, 274 U.S. 357 at 377 (1926) (Brandeis J., concurring, joined by Holmes, J.) [hereinafter *Whitney*].
[197] See the distinction of the Bundesverfassungsgericht between journalistic (publizistischem) and economic competition ("5th Broadcasting Decision", *supra* note 41 at 332. For a discussion of this distinction see Hoffman-Riem, *Wirtschaftsrecht supra* note 124 at 28- 37.
[198] See the deregulation of radio and television by the FCC: Report and Order in the Matter of Deregulation of Radio, 84 F.C.C. 2d 968 (1981); Report and Order in the Matter of the Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C. 2d 1076 (1984); see especially the article of the former FCC chairman and his legal assistant Mark .S. Fowler & David L. Brenner, "A Marketplace Approach to Broadcast Regulation, (1982) 60 Tex.L.Rev. 207; see from a German perspective Wolfgang Hoffmann-Riem, "Deregulierung als Konsequenz des Marktrundfunks: Vergleichende Analyse der Rundfunkrechtsentwicklung in den USA" (1985) 110 AöR 528 [hereinafter Hoffmann-Riem "Deregulierung"]. Sunstein, *Democracy supra* note 134 at xviii, notes that free speech law has been transformed "into a species of neoclassical economics".

A stronger emphasis on the rights of the listeners and viewers can be found in the theory that sees democratic self-government as the pivotal value of the first amendment. This view is put forward most prominently by the philosopher Alexander Meiklejohn.[199] In his concept the search for truth is replaced by the best furtherance of an informed vote. According to Meiklejohn the only speech protected by the first amendment is political speech, which for him is speech relating to the electoral process: "The First Amendment does not protect a "freedom to speak". It protects the freedom of those activities of thought and communication by which we "govern". It is concerned, not with a private right, but with a public power, a governmental responsibility."[200]

Meiklejohn's theory, with its focus on political speech and the relatedness of free speech and democracy, has left its imprint on the first amendment.[201] Although Meiklejohn is an adherent of an absolutist protection of free speech[202] his concept is not hostile towards regulatory intervention in the same way as is the marketplace theory: "The freedom that the First Amendment protects is not ... an absence of regulation."[203] With regard to the deficiencies of the actual state of public discourse in the United States Meiklejohn even favors some sort of positive role of the government, but his propositions, like the installation of a regular state-sponsored town-meeting,[204] are more an attempt to reestablish

[199] Alexander Meiklejohn, "The First Amendment is an Absolute" (1961) Sup.Ct.Rev. 245 [hereinafter "First Amendment"]; Meiklejohn, *Free Speech supra* note 172.
[200] Meiklejohn, "First Amendment" *ibid.* at 255.
[201] See especially *New York Times, supra* note 49; Carter et al., *supra* note 138 at 6-7.
[202] Meiklejohn, "First Amendment" *supra* note 199 at 257 ff.
[203] *Ibid.* at 253.
[204] *Ibid.* at 260.

political forms of the ancient polis than an appropriate answer to the challenge of mass media for the 'quality' of public discourse.[205]

In recent years several authors, sharing Meiklejohn's concern with the 'quality' of public discourse, have attempted to free the first amendment from its purely 'negative' prison better to prepare it for the mass media challenge.[206] Where Meiklejohn appears in these critiques more as the helpless helper the marketplace theory is attacked for being naive in its confidence in the marketplace or, at best, indifferent to economic disproportionalities and their effects on the outcome of competition in the 'marketplace of ideas'.[207] In the eyes of these critics classical first amendment theory is not only based on flawed empirical premises, but also underestimates the role of electronic mass media in the formation of public opinion. The marketplace theory as well as Meiklejohn picture a public discourse based on rational deliberation, but in the age of electronic mass media the packaging and penetration of ideas have become at least as important as the rationality of an 'idea'.[208]

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[205] For the impossibility to reestablish political forms of the ancient polis in modern societies, see already Benjamin Constant, "De la liberté des anciens comparée a celle des modernes" (Paris, 1819) republished in Benjamin Constant, *Political Writings*, ed. by Biancamaria Fontana (Cambridge: Cambridge University Press, 1988) at 309 ff.

[206] See Fiss, "Social Structure" *supra* note 5; Weinberg, *supra* note 5; Sunstein, *Democracy supra* note 134; Monroe E. Price, *Television: The Public Sphere and National Identity* (Oxford: Clarendon Press, 1995); see also Glendon, *supra* note; Ronald K.L. Collins & David M. Skover, *The Death of Discourse* (Boulder: Westview Press, 1996); Mathew D. Bunker & Charles N. Davis, "The First Amendment as Sword: The Positive Liberty Doctrine and Cable Must-Carry Provisions" (1996) 40 Journal of Broadcasting & Electronic Media 77.

[207] Fiss, *ibid.* at 1408 ff.; Weinberg, *ibid.* at 1108 f.; see also Glendon, *ibid.* at 30-31.

[208] Weinberg, *ibid.* 1108 f.; Fiss, *ibid.* at 1410 ff.

So far, these critiques have not resonated in the jurisdiction of the Supreme Court. More successful in this regard have been the critiques of authors who see in individual self-fulfillment the primary value underlying the first amendment.[209]

The starting point in the Tradition for the individualistic theories is the famous concurring opinion of Justice Brandeis in *Whitney* v. *California*:[210] "Those who won our independence .... valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."[211]

To deduce the protection of free speech from its political function is in this view an unnecessary detour since "individual dignity and choice [are the premise] upon which our political system rests"[212] The first amendment should therefore rather be focused directly on individual self-fulfillment to afford to it the full scope of first amendment protection. Individual self-fulfillment is not seen as the only value underlying free speech, but the other values are altered into subvalues.[213] This is not without consequence for the shape of the first amendment. Democratic values are rephrased in terms of personal autonomy and individual choice. Collective and public action is atomized into "private self-government"[214].

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[209] See Martin H. Redish, "The Value of Free Speech" (1982) 130 U.Pa.L.Rev. 591 [hereinafter Redish "Value"]; Tribe, *supra* note 131 at 785 ff.; C. Edwin Baker, "Scope of the First Amendment Freedom of Speech" (1978) 25 U.C.L.A. L.Rev. 964; Thomas Scanlon, "A Theory of Freedom of Expression" (1972) 1 Philosophy & Pub.Aff. 204; David A. Strauss, "Persuasion, Autonomy, and Freedom of Expression" (1991) 91 Colum.L.Rev. 334.

[210] See Tribe, *ibid.* at 788, Redish, *ibid.* at 598.

[211] *Whitney*, *supra* note 136 at 375 (Brandeis, J., concurring, joined by Holmes, J.).

[212] Tribe, *supra* note 788, quoting *Cohen* v. *California*, 403 U.S. 15 at 24 (1971) (Harlan, J.) [hereinafter *Cohen*]; see also Redish, "Value" *supra* note 209 at 594, 601, 610.

[213] So explicitly Redish, *ibid.* at 611 ff.; Tribe, *supra* note 131 at 788-89, criticizes approaches which base the first amendment solely on the individual self-fulfillment value, but restricts the other values virtually to a complementary function.

[214] Redish, *ibid.* at 610, 617 ff.

The difficulty for the individualistic theories is to explain and justify the special protection for speech afforded by the first amendment. When individual self-fulfillment is the primary goal, speech becomes indistinguishable from other forms of conduct that persons pursue for their self-fulfillment.[215] Redish offers the rather odd justification that "speech is less likely to cause direct or immediate harm to the interests of the others"[216]. This leads to the somewhat perverse result that speech enjoys primary constitutional protection because it has only secondary relevance.

The Supreme Court could so far avoid any of these justificatory difficulties, since it does not base its decisions explicitly on any theory.[217] The influence of the individualistic theory on the Supreme Court lies less in a reformulation of its doctrine in individualistic terms than in an emphasis of individual autonomy towards any form of government interference.[218]

Fiss describes the individualistic turn in the first amendment as follows:

> One part of this method is to see a threat to autonomy whenever the state acts in a regulatory manner. ... Another part of the method of the prevailing majority is to treat autonomy as a near absolute and as the only first amendment value. The en richment of public debate would be an agreeable by-product of a regime of autonomy ..., but what the first amendment commands is the protection of auton omy ... and if that protection does not enrich public debate, or somehow distorts it, so be it.[219]

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[215] See Barron & Dienes, *First Amendment supra* note 138 at 14 f.
[216] Redish, "Value" *supra* note 209 at 601.
[217] See references *supra* note 139.
[218] But see Kennedy J. writing for the Court in *Turner, supra* note 119 at 2459: "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." This is almost a direct quotation of Tribe's and Redish's reformulation of the first amendment values in individualistic terms.
[219] Fiss, "Social Structure" *supra* note 5 at 1422-23.

That the focus on the individual and the full development of its capacities fits so smoothly into the Tradition is not in least part due to the fact that it echoes Mill's justification of liberty, a justification where a collective dimension in the exercise of liberty has no place and the individual's eccentricity is celebrated.[220]

The individualistic turn has had a major impact on the regulation of media since it expanded the traditional distrust of government. Whenever the state acts in a regulatory manner it is perceived as a threat to autonomy.[221] In this course the endangered autonomy of cable companies becomes a nearly insurmountable hurdle for the state in its attempt to preserve diverse viewpoints for the listeners and viewers.[222]

5. The Doctrine: The Fear of Interfering

In the context of electronic media it is of special interest to note how much space to maneuver is left for the government by the doctrine of freedom of expression. In this respect the fiercely watched consensus of content-neutrality of any form of state regulation

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[220] See *supra* notes 179-90 and accompanying text. See also the ease with which Redish, "Value" *supra* note 209 at 617-18, reformulates the marketplace concept as promoting individual self-fulfillment: "[I]f viewed as merely a means by which the ultimate value of self-realization is facilitated, the concept may prove quite valuable in determining what speech is deserving constitutional protection. ... [T]he individual needs an uninhibited flow of information and opinion to aid him or her own life. Since the concept of self-realization by its very nature does not permit external forces to determine what is a wise decision for the individual to make, it is no more appropriate for external forces to censor what information or opinion the individual may receive in reaching those decisions. ... Therefore, the marketplace-of-ideas concept as protector of all such ideas make perfect sense."

[221] Fiss, "Social Structure" *supra* note 5 at 1422.

[222] Cf. *Turner, supra* note 119; for a discussion of this decision, see *infra* text accompanying notes 555-89.

in the first amendment area is remarkable.[223] It can be said to be responsive to the "liberalism of neutrality"[224]. A basic tenet of this kind of liberalism is that a "liberal society must be neutral on questions of what constitutes a good life."[225]

Ordinary first amendment doctrine treats regulations which have an impact on speech as exceptions.[226] They have to be few, narrowly tailored and sharply defined.[227] The Supreme Court applies today a variety of different tests for the review of limitations of the first amendment.[228] Over the recent years, they have undergone several changes and it is not always clear which are the tests presently applied, in which form, and how the different tests relate to each other.[229] However, it is possible to describe some general directions in the contemporary approach of the Supreme Court. It is now often said that the Supreme Court most frequently engages in some kind of balancing test.[230] However, it is mislead-

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[223] See especially Kalven, *supra* note 139 at 6 ff.; Sunstein, *Democracy supra* note 134 at 8 ff.; Weinberg, *supra* note 5 at 1112; Jerome A. Barron & C. Thomas Dienes, *Constitutional Law*, 3rd ed. (St. Paul, Minn.: West Publishing, 1995) at 296 ff. [hereinafter Barron & Dienes, *Constitutional Law*]; Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Belknap Press of the Harvard University Press, 1996) at 71 ff.

[224] Charles Taylor, *The Malaise of Modernity* (Concord: Anansi, 1991) at 17. Proponents of this kind of liberalism are, *e.g.*, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

[225] Taylor, *ibid.* at 17-18; see also Sandel, *supra* note 223 at 71.

[226] Cf. *Turner*, *supra* note 119 at 2458.

[227] Weinberg, *supra* note 5 at 1107f.; Sunstein, *Democracy supra* note 134 at 6 ff.; cf. *Turner*, *supra* note 119 at 2458.

[228] Rotunda & Nowak, *supra* note 138 at 25; Barron & Dienes, *Constitutional Law supra* note 223 at 296 ff.; Carter et al., *supra* note 138 at 19 ff, Franklin & Anderson, *supra* note 136 at 52. The first amendment is directly applicable only to the federal government, but in *Gitlow* v. *People of the State of New York*, 268 U.S. 652 at 666 (1925), the Supreme Court held that freedom of speech and the press are incorporated into the 14th amendment, which was only passed in 1868. Thus, if a state abridges freedom of speech or the press it abridges the first amendment as applied through the fourteenth amendment.

[229] See Barron & Dienes, *Constitutional Law supra* 223 note at 296 ff., esp. 302 ff.; 315; Carter, Franklin & Wright, *Fifth Estate supra* note 166 at 31; Carter et al., *supra* note 138 at 19 ff.; Franklin & Anderson, *supra* note 136 at 52, noting that there is a considerable blurring between the different tests.

[230] Carter, Franklin & Wright, *ibid.*; Franklin & Anderson, *ibid.* at 55; Barron & Dienes, *ibid.* at 297; Carter et al., *ibid.* at 19.

ing to conclude that in the battle between 'absolutists' and 'balancers' the latter may claim the victory.[231]

a) Categorical Exclusion versus Balancing

To assess the contemporary direction it is helpful to look back at some developments of first amendment doctrine since World War I. There, two different strings of permissible regulations can be distinguished. One approach seeks to discern categories of speech which do not fall in the ambit of the first amendment from those which do.[232] The other approach is some form of balancing in which the court weighs the interest of the state to regulate against the interest in the protection of freedom of speech.

The categorical exclusion of certain types of speech as a general means to define the limits of freedom of expression is a specifically American approach. When the Supreme Court during and after World War I began to give a more vigorous protection to speech than it used to in former years under the 'bad tendency test'[233] it focused on political speech.[234] All cases in which the application of the 'clear and present danger test'[235] was

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[231] Cf. Stone et al, *supra* note 138 at 1065; Dwight L. Teeter, Jr. & Don R. Le Duc, *Law of Mass Communications: Freedom and Control of Print and Broadcast Media*, 7th ed. (Westbury, New York: Foundation Press, 1992) at 15, stating that 'absolutist' positions never found *official* acceptance.

[232] This approach is sometimes called 'definitional balancing', see William Cohen & Jonathan D. Varat, *Constitutional Law*, 9th ed. (Westbury: Foundation Press, 1993) at 1238; Carter et al., *supra* note 138 at 17 f.

[233] According to this test speech could be prohibited if it was a type that would tend to bring about harmful results. See, *e.g.*, *Abrahams, supra* note 194 at 629; *Turner* v. *Williams* 194 U.S. 279 at 294 (1904); *Shaffer* v. *United States*, 255 F. 886 (9th Cir. 1919); see generally David M. Rabban, "The First Amendment in its Forgotten Years" (1981) 90 Yale L.J. 514.

[234] Sunstein, *Democracy supra* note 134 at 2.

[235] The 'clear and present danger test' was developed by Justices Holmes and Brandeis. For many years it was the focus in the debate over the right formula for permissible limitations of the first amendment. A limitation was permissible when "the words used in such circumstances and are of such a nature as to create

discussed dealt with political speech, although the test had been designed for cases advocating crimes.[236] Also at that time, many areas of speech were thought to lie completely outside of the ambit of the first amendment.[237]

Most famous is Holmes' example of falsely shouting "fire" in a crowded theater.[238] But until the 1970s not much speech besides political speech was deemed protected by the first amendment.[239] At least, most of the important cases involved political dissidents from both ends of the political spectrum.[240] Excluded areas were for example obscenity[241], commercial speech[242], and 'fighting words'[243]. In those areas the first amendment did not hinder government regulation.[244]

It has been not only since *R.A.V.* v. *City of St. Paul, Minnesota* that this doctrine has been eroded. There, Justice Scalia for the Court held that no category of expression is

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a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (*Schenck* v. *United States*, 249 U.S. 47 at 52 (1919) [hereinafter *Schenck*]) The 'clear and present danger test' was finalized in *Brandenburg* v. *Ohio*, 395 U.S. 444 at 447 (1969) [hereinafter *Brandenburg*],a case dealing with a Ku Klux Klan leader: "[The state may not] forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting of producing imminent lawless action and is likely to incite or produce such action." However, its relevance for contemporary first amendment doctrine should not be overstated; see Carter, Franklin & Wright, *Fifth Estate supra* note 166 at 34; Franklin & Anderson, *supra* note 136 at 60; Gerald Gunther, *Constitutional Law*, 12th ed. (Westbury: Foundation Press, 1991) at 1009 [hereinafter Gunther, *Law*].

[236] Cohen & Varat, *supra* note 232 at 1236.

[237] Sunstein, *Democracy supra* note 134 at 6.

[238] *Schenck*, *supra* note 235 at 52.

[239] Sunstein, *Democracy supra* note 134 at 6; cf. *e.g. Tornill* v. *Alabama*, 310 U.S. 88 at 101 f. (1939) (holding that information concerning labor disputes is protected by the first amendment): "The freedom of speech and of the press ... embraces at the least the liberty to discuss publicly and truthfully matters of public concern ... . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

[240] Sunstein, *Democracy supra* note 134 at 2.

[241] *Roth* v. *United States*, 354 U.S. 476 (1957).

[242] *Valentine* v. *Chrestensen*, 316 U.S. 52 at 54 (1942).

[243] *Chaplinsky* v. *New Hampshire*, 315 U.S. 668 (1942) [hereinafter *Chaplinsky*].

[244] At least, this was the view of the Supreme Court until *R.A.V.* v. *City of St. Paul, Minn., 112 S.Ct. 2538* (1992) [hereinafter *R.A.V.*]; *ibid.*, at 2552-54 (White, J., concurring, joined by Blackmun, J., and O'Connor, J.); contra *ibid.*, at 2543 (Scalia, J., writing for the Court).

"entirely invisible" to the first amendment.[245] As long ago as the 1970s the focus of the first amendment shifted. The bulk of first amendment cases is no longer formed by victims of political censorship. Today, many free speech claims are brought forward by different claimants including to a large extent claims of corporate interests. Cass Sunstein describes this change in the first amendment claims as following:

> They involve free speech claims by owners of restaurants featuring nude dancing; by advertisers who have shown false, deceptive or misleading commercials; by companies objecting to securities laws; by pornographers and sexual harassers; by businesses selling prerecorded statements of celebrities via "900" numbers; by people seeking to spend huge amounts on elections; by industries attempting to export potential military technology to unfriendly nations; by speakers engaging in racial harassment and hate speech; by tobacco companies objecting to restrictions on cigarette advertising; by newspapers disclosing names of rape victims, and by large broadcasters resisting government efforts to promote quality, public affairs programming, and diversity in media.[246]

The Supreme Court has been quite responsive to many of these claims. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* the Court held that commercial speech is protected by the first amendment.[247] In *First National Bank of Boston* v. *Bellotti* the Court found corporate speech to be within the ambit of the first amendment[248] and *Buckley* v. *Valeo* included campaign expenditures[249]. In the area of non-obscene nudity the Court afforded first amendment protection to nude dancing[250] as well as to 'dial-a-porn'-services[251]. The Court also afforded first amendment protection to

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[245] *Ibid.* at 2543.
[246] Sunstein, *Democracy supra* note 134 at 2-3.
[247] 425 U.S. 748 (1976).
[248] 434 U.S. 765 (1978) [hereinafter *Bellotti*].
[249] 424 U.S. 1 (1976) [hereinafter *Buckley*].
[250] *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) [hereinafter *Barnes*].
[251] *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115 (1989) [hereinafter *Sable*].

forms of illegal speech which formerly were thought to lie outside its scope: e.g., the advocacy of illegality[252], publication of the names of rape victims[253], and the flag-burning.[254].

The extension of the first amendment protection in new areas and the shift in the focus of the first amendment are in part a legacy of the battle over absolutism in the Court in the 1950s and 1960s.[255] Justices Felix Frankfurter and John Marshall Harlan argued most prominently for a balancing approach in which the conflicting interests at stake are weighed.[256] Balancing was seen as an inevitable part of the protection of freedom of expression.[257] According to the balancers 'reasonable regulation' should be upheld.[258] The government should be able to regulate speech that causes real harm.[259]

The absolutists, led by Justices Hugo Black and William O. Douglas, argued that all speech that falls within the ambit of the first amendment enjoys absolute protection, meaning that government was banned from any kind of regulation.[260] The driving forces behind this conception are the distrust of government and the commitment to neutrality-liberalism.[261] A basic tenet of this conception is that all speech is of the same value, or, as stated in later decisions echoing this tenet, "above all else, the First Amendment means

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[252] *Brandenburg, supra* note 235.
[253] *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).
[254] *Texas* v. *Johnson*, 491 U.S. 397 (1989) [hereinafter *Johnson*].
[255] Cf., *e.g.*, *Cohen, supra* note 212; *Konigsberg* v. *State Bar*, 366 U.S. 36 (1961) [hereinafter *Konigsberg*]; *Barenblatt* v. *United States*, 360 U.S. 109 (1959) [hereinafter *Barenblatt*]; for an overview see Rotunda & Nowak, *supra* note 138 at 21-25.
[256] Cohen & Varat, *supra* note 232 at 1237; Sunstein, *Democracy supra* note 134 at 7.
[257] *Konigsberg, supra* note 255 at 50-51 (Harlan, C.J., for the Court); *Barenblatt, supra* note 255 at 126 (Harlan, C.J., for the Court); *Dennis* v. *United States*, 341 U.S. 494 at 524-25 (1951) (Frankfurter, J., concurring).
[258] *Dennis*, *ibid.* at 540 (Frankfurter, J., concurring).
[259] *American Communications Assn.* v. *Douds*, 339 U.S. 382 at 396 (1950).
[260] Cohen & Varat, *supra* note 232 at 1237; Sunstein, *Democracy supra* note 134 at 7.
[261] Sunstein, *ibid.* at 5 ff.

that government has no power to restrict expression because of its ideas, its subject matter, or its content."[262] Every form of speech-regulation appears in this view as a suspicious first step on a 'slippery slope':

> While it is "obscenity and indecency" before us today, the experience of mankind - both ancient and modern - shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe the religious unortho doxy of tomorrow. Censorship is the deadly enemy of freedom and prog ress. The plain language of the Constitution forbids it.[263]

Thus, to prevent the state and the courts from entering this 'slippery slope' it is deemed necessary to expand first amendment protection to types of speech other than political speech. The distinction between political and non-political speech necessarily implies some sort of evaluation of the speech at stake, which is not only adverse to the principle of neutrality, but bears the danger that distinctions of this kind might be used covertly to suppress 'politically' unpopular speech.

As noted[264], the 'absolutists' never gained a (formal) majority in the Supreme Court, "but many of the basic commitments of the absolutist position are now cliches, even dogma."[265] But the victory of the absolutists was not thorough, since in rare cases the Supreme Court engages in balancing even in the "once sacrosanct category of content-based regulations."[266]

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[262] *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 at 95 (1971) [hereinafter *Mosley*]; see also *Turner*, *supra* note 119 at 2458; *R.A.V.*, *supra* note 244 at 2542; *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 112 S.Ct. 501 at 508 (1991).

[263] *Smith*, *supra* note 171 at 160 (Black, J., concurring).

[264] See *supra* note 143.

[265] Sunstein, *Democracy supra* note 8; cf. also Teeter & Le Duc, *supra* note 231 at 15; Nimmer, *supra* note 143 at § 2.06[4] sees "pockets of absolutism" in the Supreme Court's jurisprudence.

[266] T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96 Yale L.J. 943 at 967.

However, this should not be overrated. A purely absolutist position is very difficult to harmonize with a broad scope of freedom of expression.[267] The more the Supreme Court rejected excluding whole categories of speech form first amendment protection[268] - one of the aims of Justices Black and Douglas - the less feasible became pure absolutism. This approach was anyway not only criticized as engaging in a covert form of balancing outside the first amendment[269], it also did not necessarily lead to a greater protection of freedom of speech than the balancing approach. In *Street* v. *New York*, a flag-burning case, Justice Harlan wrote the majority opinion sustaining the first amendment challenge while Justice Black dissented. In his view the conviction did not violate the first amendment because it did not rest on spoken words but on conduct.[270] In *Cox* v. *Louisiana* Justice Black denied a "constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property."[271]

b) Different Levels of Scrutiny

Although the Supreme Court today uses different tests (prior restraint[272], clear and present danger[273], void-for-vagueness and overbreadth[274], and least restrictive-means[275] test)

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[267] Justice Stevens in his concurring opine in *R.A.V.*, *supra* note 244 at 2567, states that the extension of the first amendment protection to former excluded categories "indicates that the categorical approach is unworkable and the quest for absolute categories of "protected" and "unprotected" speech ultimately futile." See Cohen & Varat, *supra* note 232 at 1238, n 13, arguing that "Justice Black was forced to manipulate the boundaries separating expression and action". See, *e.g.*, *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (1949); *Cohen*, *supra* note 212 at 27-28.

[268] *R.A.V.*, *supra* note 244 at 2543; *ibid.*, at 2567 (Stevens, J., concurring).

[269] See Rotunda & Nowak, *supra* note 138 at 24; Tribe, *supra* note 131 at 792.

[270] 394 U.S. 576 at 610 (1969) (Black, J., dissenting).

[271] 379 U.S. 536 at 578 (1965) (Black, J., dissenting).

[272] The doctrine of prior restraint lies a heavy presumption against censorship in advance of publication: see *CBS, Inc.* v. *Davis*, 114 S.Ct. 912 at 914 (1994); *Nebraska Press Association* v. *Stuart*, 423 U.S. 1327 at

and it is not always clear which test it is applying, a general grid can be described which the Supreme Court follows in most cases. The Court distinguishes three different kinds of restrictions and according to this distinction applies different levels of scrutiny.[276] The different restrictions are: 1) content-neutral restrictions, 2) content-based restrictions, and 3) viewpoint-based restrictions. The highest level of scrutiny applies to the latter category. Regulations which the Court finds discriminatory against certain viewpoints are almost automatically found unconstitutional.[277] To content-neutral restrictions a balancing test is applied. The Court uses intermediate level scrutiny to examine restrictions that are unrelated to the content of speech.[278] To satisfy this standard the regulation must promote a substantial government interest. The Court weighs the importance of this interest against the extent of the restriction.[279] By contrast, the Court applies strict scrutiny-standard to content-based restrictions. Under the strict-scrutiny standard the Supreme Court requires

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1329-30 (1975); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). In *Madsen* v. *Women's Health Center*, 114 S.Ct. 2516 at 2524 ff. (1994) the Supreme Court, per Chief Justice Rehnquist, eroded traditional prior restraint by refusing to characterize a state court injunction as impermissible prior restraint; see Barron & Dienes, *Constitutional Law supra* note 223 at 309.

[273] See *supra* note 235.

[274] The Supreme Court often applies the overbreadth and void-for-vagueness doctrine together. (*Keyishian* v. *Board Regents*, 385 U.S. 589 at 609 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479 at 486 (1965); *NAACP* v. *Button*, 371 U.S. 415 at 433 (1963)). Both tests are concerned with the possible chilling effects of overbroad and vague regulations. Under the overbreadth doctrine the Supreme Court does not only scrutinize the law as applied, but it also scrutinizes a statute as applying to other persons or situations. The vagueness-test requires laws regulating expression to be especially clear.

[275] Under this test the Court requires the legislator to use means which are 'least restrictive' of speech: "The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (*Shelton* v. *Tucker*, 364 U.S. 479 at 488 (1960)); for an overview and further references see Rotunda & Nowak, *supra* note 138 at 39-40.

[276] Sunstein, *Democracy supra* note 134 at 11 ff.; cf. also Barron & Dienes, *Constitutional Law supra* note 223 at 297-302; *Turner*, *supra* note 119 at 2458-59 (explicit distinction between content-based and content-neutral restrictions); for the distinction between content-based and viewpoint-based restrictions, see *R.A.V.*, *supra* note 244 at 2547.

[277] Sunstein, *Democracy ibid.* at 13; see, *e.g.*, *R.A.V.*, *ibid.*

[278] *Turner*, *supra* note 119 at 2459; *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 at 293 (1984); intermediate level scrutiny is sometimes also referred to as the *O'Brien*-test, developed in: *United States* v. *O'Brien*, 391 U.S. 367 at 377 (1968) [hereinafter *O'Brien*].

that the restriction promote a compelling interest and that the regulation is narrowly tailored.[280] Content-based restrictions are presumptively invalid.[281]

How demanding this 'balancing' approach for the content-related restrictions is can be illustrated by a few famous cases. In 1977, the National Socialist Party of America planned a parade through Skokie, a predominantly Jewish suburb of Chicago where many Holocaust survivors live. The village of Skokie attempted to seek injunctions prohibiting the Nazis from wearing uniforms and displaying swastikas, and announced ordinances to prevent such marches in the future. In the following court proceedings the Nazis contended that these measures violated their first amendment rights, and prevailed with their claims.[282]

How strongly the absolutist's fear to interfere influences the substance of the Court's balancing can be learned from the flag-burning case *Texas* v. *Johnson*. The case displays the Supreme Court's fear of engaging in any evaluation of the content of speech, in order not to influence the outcome of the debate in the 'marketplace': "If there is a bedrock principle underlying the First Amendment, it is that Government should not prohibit the expression of an idea simply because society finds the idea itself offensive or disagree-

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[279] *Turner*, *supra* note 119 at 2469; *Ward* v. *Rock Against Racism*, 491 U.S. 781 at 799 (1989); *O'Brien*, *ibid.* at 377.

[280] *R.A.V.*, *supra* note 244 at 2549-50; *Burson* v. *Freeman*, 504 U.S. 191 at 198 (1992) (plurality opinion); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 at 45 (1983); see Michael W. Maseth, "The Erosion of First Amendment Protections of Speech and Press: The "Must Carry" Provisions of the 1992 Cable Act" (1995) 24 Cap.U.L.Rev. 423 at 442-43.

[281] *R.A.V.*, *supra* note 244 at 2542; see Sunstein, *Democracy supra* note 134 at 13; Barron & Dienes, *Constitutional Law supra* note 223 at 302.

[282] *Skokie* v. *National Socialist Party of America*, 373 N.E.2d 21 (1978) (invalidating a lower injunction which enjoined the party from displaying swastikas); *Collin* v. *Smith*, 578 F.2d 1197 (7th Cir. 1978), aff'd 477 F.Supp. 676 (N.D. Ill. 1978); Supreme Court denied to stay the ruling of the Court of Appeals, *Smith* v. *Collin*, 436 U.S. 953 (1978).

able."[283] The fact that the Court invalidated the conviction for the burning of the flag under the Texan Penal Code is less remarkable than the justification which suggests that any evaluation of the content of speech by the government - and subsequently by the courts - would be an impossible and dangerous project:

> "To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, pro hibit the burning of state flags? Of copies of the Presidential seal? Of the Consti tution? In evaluating these choices under the First Amendment, how could we de cide which symbols were sufficiently special to warrant unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citenzery, in the very way the First Amendment forbids us to do so."[284]

It is hard to reconcile statements of this kind with apparently distinct treatment of different types of speech, e.g., commercial and political speech by the Supreme Court. Political speech is seen as lying at the 'core' of the first amendment[285] and therefore may only be regulated in exceptional circumstances, whereas several tests do not apply to commercial speech[286]. In general, the Supreme Court finds more extensive regulation of commer-

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[283] *Johnson*, *supra* note 254 at 414 (Brennan, J., writing for the Court, joined by Marshall, Blackmun, Scalia, and Kennedy, JJ.).
[284] *Ibid.*, at 417.
[285] *R.A.V.*, *supra* note 244 at 2554 (White, J., concurring, joined by Blackmun, J., and O'Connor, J.); *Meyer* v. *Grant*, 486 U.S. 414 at 425 (1988); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214 at 222-23 (1989); *FCC* v. *League of Women Voters California*, 468 U.S. 364 at 375-76 (1984) [hereinafter *League of Women Voters*]; see also Sunstein, *Democracy supra* note 134 at xvii..
[286] "[C]ommercial speech receives only a limited form of First Amendment protection." (*Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 at 340 (1986)); Non-applicable are: least restrictive means test (*Board of Trustees of the State University of New York* v. *Fox*, 492 U.S. 469 at 477 ff. (1989)), overbreadth doctrine (*Ohralik* v. *Ohio State Bar*, 436 U.S. 447 at 462 f. (1978)), and prior restraint doctrine *Central Hudson Gas & Electric* v. *Public Service Commission*, 447 U.S. 557 (1980) [hereinafter *Central Hudson Gas*].

cial speech acceptable.[287] For example it upheld content-based restrictions like the regulation of false and misleading advertisements.[288]

Another illustrative case of the distinctions according to the type of speech at stake is *Barnes* v. *Glen Theatre, Inc.* The Supreme Court upheld 5-4 a state law prohibiting non-obscene nude dancing although it found the conduct to be protected by the first amendment. Chief Justice Rehnquist in a plurality opinion described the dancing to be "within the outer perimeters of the First Amendment, though only marginally so."[289] Therefore the Court was willing to accord a lower level of justification to this 'low' value speech.

The Supreme Court has never made explicitly a distinction between 'low' and 'high' value speech[290], but as Justice Stevens noted[291], the Court tends to overstatements in self-descriptions when it declares all differentiations based on the content of speech to be contradictory to the first amendment.[292] However, what the Court lacks is a coherent theory to qualify when speech is of 'low' or 'high' value.[293]

In summary, it can be said that the first amendment doctrine is much more in flux than many of the Supreme Court's descriptions of its doctrine seem to suggest. Although the overall first amendment review with its different levels of scrutiny can be formally described as some form of balancing, the substance of the tests applied tends to be more of a

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[287] Barron & Dienes, *Constitutional Law supra* note 223 at 373.
[288] The Supreme Court does not apply strict scrutiny in these cases but the less stringent intermediate level scrutiny: *Central Hudson Gas, supra* note 286 at 563; *Bates* v. *State Bar*, 443 U.S. 350 at 383 (1983).
[289] *Barnes, supra* note 250 at 566.
[290] Sunstein, *Democracy supra* note 134 at 8; argues that such a distinction is made in the balancing of the Court. See also: Stone et al., *supra* note 138 at 1024 ff.; Carter et al., *supra* note 138 at 20; *R.A.V., supra* note 244 at 2564 (Stevens, J. concurring).
[291] *R.A.V., ibid.* at 2563 (Stevens, J. concurring).
[292] See, *e.g., Turner, supra* note 119 at 2458-59; *Johnson, supra* note 254 at 414; *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 at 55-56 (1988); *Mosley, supra* note 262 at 95.
[293] Sunstein, *Democracy supra* note 134 at 9; cf. also Gunther, *Law supra* note 235 at 1146-47.

rigorous 'absolutist' review, especially when it comes to content-related regulations.[294] The 'balancing' of the US Supreme Court is therefore still quite different from balancing-regimes in which the constitutional value of free speech is weighed sensibly against other constitutional values without affording speech a dominant role but 'only' respecting the special role and needs of speech in a deliberative democracy.[295]

How much first amendment doctrine is in flux and how little space to maneuver the government has to regulate speech becomes obvious in the *R.A.V.* decision. The Supreme Court invalidated an ordinance of the City of St. Paul which made speech punishable that insulted or provoked violence "on the basis of race, color, creed, religion, or gender." The ordinance had been applied to white youths who had burnt a cross in the yard of a black family. The city sought to defend the ordinance claiming that it punished 'fighting words'.

In 1942 in *Chaplinsky* v. *New Hampshire* the Supreme Court held that words which by their very utterance may provoke a fight fall outside the first amendment.[296] The fighting words doctrine has been weakened over the years[297] and no conviction based on that doctrine has been upheld by the Court since *Chaplinsky*[298]. Justice Scalia's opinion for the Court in *R.A.V.* came nonetheless as a 'surprise'.[299] The concurring opinions criticized Scalia for turning the first amendment on its head[300] when he held that no category of

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[294] Cf. Sunstein, *ibid.* at 8; *R.A.V.*, *supra* note 244 at 2562 (Stevens, J. concurring).
[295] See text accompanying *supra* notes 53-68 and *infra* notes 652-80.
[296] *Chaplinsky*, *supra* note 243 at 571-72.
[297] Barron & Dienes, *Constitutional Law supra* note 223 at 345; *R.A.V.*, *supra* note 244 at 2567 (Stevens, J., concurring); cases that narrowed *Chaplinsky*: *Houston* v. *Hill*, 482 U.S. 451 (1987); *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Cohen*, *supra* note 212.
[298] Stone et al., *supra* note 138 at 1100.
[299] The 'usual' way to deal with St. Paul's ordinance would have been the approach taken by Justice White in his concurring opinion. He found the ordinance to be overbroad and therefore unconstitutional (*R.A.V.*, *supra* note 244 at 2558 ff. (White, J., concurring, joined by Blackmun, J., O'Connor, J., and Stevens, J.)).
[300] *R.A.V.*, *ibid.* at 2560 (Blackmun, J., concurring); *Ibid.*, at 2564 (Stevens, J., concurring).

speech is "entirely invisible to the Constitution"[301]. The ordinance was invalidated by the Court because it did not punish all fighting words but only a subset (messages of bias-motivated hatred and especially messages based on virulent notions of racial supremacy)[302]. This was according to the Court an unconstitutional content regulation, crossing the line to "actual viewpoint discrimination"[303]. The Court saw in the subcategory of 'fighting words' made punishable by the ordinance a regulation "based on hostility ... towards the message expressed."[304]

Since the Court after *Chaplinsky* struck down several attempts to criminalize fighting words as overbroad and vague, the creation of an "underbreadth" doctrine evoked some astonishment. Justice White wrote in his concurrence: "[T]he Court's insistence on inventing its brand of First Amendment underinclusiveness puzzles me."[305]

B. Regulation of Electronic Mass Media

Many difficulties in the regulation of electronic media result from the fact that broadcast regulation conflicts with ordinary free speech doctrine.[306] Where ordinary free speech philosophy emphasizes the rights of the speaker, at least early broadcasting regulations follow a trustee concept which emphasizes the rights of the public. Ordinary first amendment doctrine requires also sharp-edged, clear, and objective criteria for the regulation of

[301] *Ibid.* note at 2543.
[302] *Ibid.* at 2548.
[303] *Ibid.* at 2547.
[304] *Ibid.* at 2549.
[305] *Ibid.* at 2553 (White, J., concurring, joined by Blackmun, J., and O'Connor, J.).
[306] Weinberg, *supra* note 5.

speech, especially when the regulation is content-related.[307] Thus, when government employs a licensing system, it bears a heavy burden of justification.[308] The Supreme Court requires that adequate standards be provided in the law to guide the administrator. The licensing criteria must thus be clear and precise[309] and viewpoint-neutral[310].

The public-interest standard governing broadcast licensing is vague, difficult to operationalize and gives the FCC wide discretion.[311] So far, neither the courts nor the FCC have been able to reconcile these conflicts. Moreover, the FCC over the years, especially since the various trends of deregulation beginning in the 1970s, has tried to incorporate and apply traditional first amendment theory to the regulation of electronic media.[312] In recent years, the courts have widely approved these attempts.

1. Historical Development

Compared to the German media system the most striking difference is the lack of a strong tradition of public broadcasting in the United States. Although the beginning of radio was mainly educational, a trend towards commercialization of this medium prevailed even in the early days of radio regulation.

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[307] *Ibid.* at 1107-1108.
[308] *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Lovell* v. *City of Griffin*, 303 U.S. 444 at 451 (1938); see Barron & Dienes, *Constitutional Law supra* note 223 at 368.
[309] *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123 at 131-36 (1992); *Kunz* v. *New York*, U.S. 290 at 295 (1951).
[310] Forsyth County, *Ibid.*; *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 at 763 (1988).
[311] Weinberg, *supra* note 5 at 1108.
[312] Cf. *ibid.* at 1114 ff.

a) Beginnings of Radio

In 1897, institutions of higher education began experimenting with radio transmission. These early stations were usually located in physics and engineering departments. They were mainly interested in the hardware and not in programming. By 1920, some educational stations began broadcasting local weather reports to farmers. In 1924, already 100 educational stations were offering this service in cooperation with the US Department of Agriculture and agricultural schools.

Some schools brought microphones into the classroom and broadcasted lectures on history, government, economics, psychology, and foreign languages. Audience reception to these early services was far from enthusiastic. The programs were criticized for their boring content. During the educational experimentation phase the Commerce Department sought to develop an efficient spectrum management policy. At that time it was not clear in which direction radio would evolve: if radio would evolve into commercial service, a sustaining service (noncommercial), or a common carrier. Tensions between the supporters of each model grew in the early and mid-1920s. Soon it became clear that noncommercial educational broadcasting would have to give way to more powerful commercial interests.[313]

[313] See Creech, *supra* note 156 at 155-56.

b) Beginnings of Radio Regulation

In the 1920s, Commerce Secretary Herbert Hoover had designated more frequencies for broadcast use, but by 1923 every channel was filled and there was considerable interference among stations. Between 1922 and 1925 Hoover had called a series of four radio conferences.[314] At the beginning he hoped that state regulation could be avoided by industrial self-regulation, but at the Third National Radio Conference in 1924 he stated with resignation: "I think this is probably the only industry of the United States that is unanimously in favor of having itself regulated."[315]

Interests of noncommercial stations were only addressed in the fourth conference, but a resolution that called for the reservation of some channels for noncommercial use was not adopted. The number of noncommercial stations had begun to decline and in 1925 the number of lost licenses was bigger than the number granted. Also commercial interest started to exert pressure on the Commerce Department to acquire the valuable spectrum space occupied by noncommercial stations. The Federal Radio Commission (FRC) and later the Federal Communications Commission (FCC) developed rules and policies that favored the growth of commercial broadcasters. The rationale for the preference of commercial broadcasters was that noncommercial stations were inferior in coverage area and quality.[316]

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[314] See *Red Lion, supra* note 192 at 375.
[315] Cited after Erwin G. Krasnow & Lawrence D. Longley, *The Politics of Broadcast Regulation*, 2d ed. (New York: St. Martin's, 1978) at 9.
[316] Creech, *supra* note 156 at 156.

The Commerce Department's authority to regulate radio was the *Radio Act of 1912*.[317] This act provided for government regulation of the maritime industry and was largely motivated by the *Titanic* disaster. Although the *Radio Act of 1912* was weak and did not anticipate commercial radio broadcasting as it was to develop in the 1920s, it served as the only regulatory legislation passed by Congress until 1927.[318]

c) *Radio Act of 1927* and *Communications Act of 1934*

In *Hoover* v. *Intercity Radio Co. Inc.*[319] the Court of Appeals ruled that Hoover's attempt to reduce the overcrowding frequencies exceeded his authority. The ruling of the Supreme Court in *United States* v. *Zenith Radio Corp.*[320] led directly to the passage of the *Radio Act of 1927*.[321] This case made clear that it is Congress that must establish regulatory procedures to be applied to radio.

The *Radio Act of 1927* created the FRC to supervise broadcasting. An important feature of the act was the establishment of the 'public interest, convenience and necessity' phrase as the standard for licensing radio stations. The phrase originally came from public utility legislation[322] and was also incorporated in the *Communications Act of 1934*[323].[324]

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[317] Pub. L. No. 62-264, 37 Stat. 302.
[318] Creech, *supra* note 156 at 49; Carter et al., *supra* note 138 at 326-27.
[319] 286 F. 1003 (DC Cir. 1923).
[320] 12 F.2d 614 (N.D. Ill. 1926).
[321] Pub. L. No. 69-632, 44 Stat. 1162.
[322] The phrase was first used in an 1887 Illinois railroad statute and was later adopted in the Federal Transportation Act of 1920.
[323] Pub. L. No. 73-401, 48 Stat. 1064 (codified as amended at 47 U.S.C.S. §§ 151 et seq. (1995)) [hereinafter *Communications Act*].
[324] See, *e.g.*, 47 U.S.C.S. § 307(a) (1995).

In the early days of the regulation of electronic media a symbiotic relationship between supervisors and supervised was established. Kenneth Creech writes:

> Throughout the 1930s and 1940s, broadcasters and the FCC developed a working relationship with one another. The tensions between the two fostered a certain elasticity as broadcasters tested the limits of the regulatory system. Eventually, the FCC and broadcasters became partners in the regulatory process. The well-being of all parties was intertwined. The economic interest of broadcasters became a con cern of the Commission. Put simply, if broadcasting did not exist, neither would the Commission. In the early 1950s, this delicate balance began to shift with the advent of cable television.[325]

d) Advent of Cable Television: Protection of Commercial Broadcasting

Originally, Cable television was not intended as a means of providing programming to individual households. Coaxial cable, capable of delivering a number of different signals within a single wire, was first used in broadcasting as a means of interconnecting the television networks and the affiliate stations. The only FCC interest in cable stemmed from the requirement of an approval by the Commission of the microwave relay system used in importing the broadcast signals.[326]

That cable became popular as a means of delivering TV signals into homes was not in least part due to a problematic policy of the UHF[327] television allocation scheme of 1952. The aim of this scheme was to establish a nationwide system of local TV stations, but the

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[325] Creech, *supra* note 156 at 70-71.; see also Hoffman-Riem, "Deregulierung" *supra* note 198 at 530-31.
[326] Carter et al., *supra* note 138 at 449-51.
[327] Ultra High Frequency band (300 -3,000 Mhz).

Commission allocated UHF stations to markets too small to support network affiliates. Thus, it created the perfect conditions for an alternative distribution system.[328]

It was not before the mid-1960s that the FCC attempted to regulate cable TV. In 1958, in *Frontier Broadcasting* v. *Collier*[329], the FCC held that cable was not a common carrier and therefore was outside its jurisdiction. Then, the main concern of the Commission's cable regulation was the protection of the broadcasting industry against the competition from the cable industry. In 1965, the Commission implemented the first must-carry rule, which required cable systems to carry all local broadcast signals. The FCC also restricted the importation of distant television signals by cable systems. In *United States* v. *Southwestern Cable Co.*[330], the Supreme Court upheld the FCC's authority to regulate cable under the mandate in the *Communications Act*, which required regulation of all wire and radio communication.

By the late 1960s, the Commission had promulgated rules that required large cable systems to originate local programming. In *United States* v. *Midwest Video Corp.*[331], the Supreme Court upheld these rules, but noted that the FCC had reached the outer limits of its authority to regulate cable. Two years later, the FCC repealed the local origination rule, but issued new rules that required new cable systems to allocate channels for public access. In 1979, the Supreme Court held that these provisions went beyond the Commission's regulatory powers.[332]

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[328] Creech, *supra* note 156 at 71; Carter et al., *supra* note 138 at 449.
[329] 24 F.C.C. 251 (1958).
[330] 392 U.S. 157 (1968).
[331] 406 U.S. 649 (1972).
[332] *FCC* v. *Midwest Video Corp. (Midwest Video II)*, 440 U.S. 689 (1979).

In 1975, the FCC adopted antisiphoning rules designed to keep cable from taking sports and movie programming away form broadcasters. The FCC promulgated rules that prohibited cablecasters from airing films less than 3 years old. They were also barred from devoting more than 90 per cent of their schedules to films or sports. In *Home Box Offices Inc.* v. *FCC*[333], the court ruled that the FCC had exceeded its authority and the antisiphoning rules were a violation of the first amendment. This decision paved the way for the growth of cable movie channels, which spearheaded cable's growth in the 1980s. In the late 1970s and early 1980s, the FCC eliminated many of the rules affecting cable television.[334]

e) The Era of Deregulation

The 1970s and 1980s saw an era of deregulation in the electronic media. During this period the *Communications Act*, a product of New Deal legislation, changed its face. Many regulations were simplified or completely repealed, and content related regulations were particularly attacked. Governmental regulation was abandoned in favor of regulation by the 'free' market forces. Major features of the US regulation such as the formal community ascertainment and the fairness doctrine were given up in the 1980s.[335]

Deregulation began in 1972 under FCC Chairman Richard Wiley. He called his policy "reregulation" and wanted to reregulate the industry by eliminating burdensome adminis-

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[333] 567 F.2 9, 44-45 (DC Cir. 1977), cert. denied, 434 U.S. 829 (1977).
[334] See esp. Economic Relationship Between TV Broadcasting and CATV, 71 F.C.C.2d 632 (1979); Creech, *supra* note 156 at 72.
[335] Creech, *supra* note 156 at 76.

trative procedures.[336] During the Carter administration, FCC chairman Charles Ferris made deregulation the official policy. It was under his chairmanship that radio was deregulated and the Commission began to deregulate television.[337]

Under the chairmanship of Mark Fowler, the Commission began to dismantle much of the monitoring enforcement structure that had evolved so far. Fowler's policy of "unregulation" fitted well in the Reagan era with his pledge do "get government off the backs of the people". The only area of broadcast regulation that remained untouched was the public interest responsibility. It was, however, reinterpreted.

Beginning in 1981 the FCC deregulated radio.[338] After eliminating the formal ascertainment of community needs, the FCC repealed the requirement to survey the general public and community leaders in their city of license and generate programming that met community needs. Deregulation of television and noncommercial broadcasting followed 1984[339] and from 1985 to 1987 the Commission dropped most of its cable rules, including the must-carry rules.[340]

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[336] "Making Life a Bit Easier; Reregulation Gets Under Way," Broadcasting, November 6, 1972, 19.
[337] "The Laissez Faire Legacy of Charles Ferris", Broadcasting, January 19, 1981, 37.
[338] See *supra* note 198.
[339] *Ibid.*
[340] Creech, *supra* note 156 at 75.

2. Current Regulation of Electronic Mass Media

a) Federal Communications Commission

The FCC was established by the *Communications Act*.[341] It is one of 48 federal independent regulatory agencies. Currently, it consists of five members who are appointed by the President. The appointment has to be confirmed by the Senate. No more than three members may be from the same political party and the five-year terms are staggered so that no two terms expire in the same year. The chairperson of the FCC is chosen by the president and is responsible for setting the agenda of the FCC.[342] The FCC consists of four bureaus: Mass Media, Common Carrier, Private Radio, and Field Operations. Most matters concerning radio, television, and cable are handled by the Mass Media Bureau.[343]

Stations which violate FCC rules or policies may suffer a variety of different punishments up to the revocation their license.[344] Sine the FCC does not monitor programming, non-technical violations come to its attention via listener and viewer complaints. When a complaint is received, the FCC asks the broadcaster to respond to the accusation. If the Commission decides to pursue the issue, the broadcaster may be required to rectify the situation in some way. For example, an apology to offended parties may be necessary. At this stage the Commission does not normally levy a fine, but its requests serve officially to put the station 'on notice' not to repeat the transgression. In more severe cases, a cease and

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[341] 47 U.S.C.S. § 151 (Supp. 1996).
[342] 47 U.S.C.S. § 154(a), (b) (1995).
[343] Carter et al., *supra* note 138 at 333-34.
[344] See 47 U.S.C.S. § 303 (Supp. 1996)

desist order may be issued. This is a legal notice that requires the licensee to stop a specified activity. Failure to obey such an order carries a fine.[345]

b) Broadcasting

aa) Commercial Broadcasting

aaa) Licensing Broadcast Stations

The *Communications Act* requires that in order to run a broadcasting station a license from the FCC has to be obtained.[346] There are two main ways to obtain such a license. It may be sought for a new facility or for an existing facility. Normally, the staff of the Mass Media Bureau handles the licensing process. The grant of a broadcast license must be in the public interest.[347] Potential applicants must prove that they have the legal, technical, financial and character qualifications.[348]

Broadcasting licenses are granted for not more than 8 years.[349] Before the deregulation of the 1980s, broadcasters were required to submit a "composite week" of program logs to the Commission and results of formal community ascertainment-of-needs studies were to be placed in their public files. Stations were measured against the yardstick of "promise versus performance".[350] The FCC almost always granted the renewal of the license.[351]

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[345] Cf. Creech, *supra* note 156 at 69.
[346] 47 U.S.C.S. § 301 (1995).
[347] 47 U.S.C.S. § 307(a) (1995).
[348] 47 U.S.C.S § 308(b) (1995); for an overview of the application of these stipulations by the FCC, see Carter et al., *supra* note 138 at 364-62.
[349] 47 U.S.C.S. § 307(c) (Supp. 1996).
[350] Creech, *supra* note 156 at 94.
[351] Michael A. McGregor, "Assessment of the Renewal Expectancy in FCC Comparative Renewal Hearings" (1989) 66 Journalism Quarterly 295.

Outside parties, e.g. citizens' groups, have a right to participate in the licensing process and are afforded "standing" before the FCC.[352] Citizens' groups are most active in license renewal situations. They and broadcasters sometimes enter into agreements specifying how the broadcaster will serve the community during the license period. The FCC considers these agreements at renewal time.[353]

Before the enactment of the *Telecommunications Act of 1996* the Commission had to designate a hearing if two or more parties filed for use of the same interfering frequencies.[354] In the comparative hearings the Commission mainly considered:[355] (1) the extent and size of the applicants' holdings in other media outlets[356]; (2) the extent to which the station owners would personally participate in the management, had participated in local civic affairs, had experience in the broadcast field[357]; and (3) the size of the audience that the applicants' proposed signals could reach.[358]

In the comparative hearings the FCC granted the incumbent licensee a "renewal expectancy" preference on a showing that its past record has been "sound, favorable and substantially above ... mediocre."[359] Despite a ruling of the Court of Appeals for the District of Columbia which held that "renewal expectancy is to be a factor weighed with all other

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[352] See 47 U.S.C.S. § 309(d) (Supp. 1996).
[353] Creech, *supra* note 156 at 94.
[354] Weinberg, *supra* note 5 at 1120. See *Citizens Communications Ctr.* v. *FCC*, 447 F.2d 1201 (DC Cir. 1971) (interpreting 47 U.S.C. § 309(e))
[355] See Policy Statement on Comparative Hearings, 1 F.C.C.2d 393 (1965) [hereinafter Comparative Hearings]; Weinberg, *supra* note 5 at 1116-17.
[356] In Comparative Hearings, *ibid.* at 394, the Commission stated that it would disfavor applicants with outside media holdings, in order to promote "a maximum diffusion of control of the media of mass communications."
[357] *Ibid.* at 395-96.
[358] See, *e.g.*, Susan S. Mulkey, 4 F.C.C.R. 5520 at 5521 (1989).
[359] *Monroe Communications Corp.* v. *FCC*, 900 F.2d 351 at 353 (1990).

factors"[360] and "that renewal expectancy will be factored in for the benefit of the public, not for incumbent broadcasters"[361] the FCC almost always favored the holder of a license.[362] Congress approved this policy of preferring the incumbent. The *Telecommunications Act* provides that in its renewal decisions the Commission "shall not consider whether the public interest, convenience, and necessity might be served by the grant of license"[363] to a competitor. Only after denying a renewal application can the Commission now accept and consider competing applications for the license.[364]

bbb) Regulation of Programming

Since the deregulation in the 1980s the programming of broadcasters is widely unregulated.[365] The Commission only enforces some basic content regulations in the areas of political programming, sexual content, and children's television.

aaaa) Political Programming

According to s. 315 of the *Communications Act* broadcasters must afford candidates for public office equal opportunities in the use of broadcast facilities.[366] The rates charged

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[360] *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 at 506 (1982), cert. denied 460 U.S. 1084 (1983).
[361] *Ibid.* at 507.
[362] Weinberg, *supra* note 5 at 1121; Creech, *supra* note 156 at 98; McGregor *supra* note 351.
[363] *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 [hereinafter *Telecommunications Act*], see esp. 47 U.S.C.S. § 309(k) (Supp. 1996).
[364] See In the Matter of Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 11 F.C.C.R. 6363 (1996).
[365] Cf. Carter et al., *supra* note 138 at 370-73.

must be equal and during election campaigns candidates must be given the "lowest unit charge" that is offered by the station to commercial advertisers for comparable time.[367]

The same section was thought to have codified the fairness doctrine, which was for decades the 'heart' of American broadcasting regulation.[368] The Commission required each licensee not only to devote a reasonable percentage of time to covering "controversial issues of public importance" in its service area, but to cover those issues "fairly", by providing a "reasonable opportunity" for the presentation of opposing views.[369] In 1985, the Commission issued a report in which it concluded that fairness doctrine inhibited robust pubic discussion and that it rather would rely on the marketplace to ensure that the public was exposed to controversial issues.[370] In 1987, the FCC repealed the fairness doctrine holding that it violated the first amendment[371] after a United States of Court of Appeals held that the fairness doctrine was not a congressionally mandated statutory obligation.[372]

Although the fairness doctrine is no longer in effect, the FCC still enforces the 'personal attack' rule[373] which was part of this doctrine.[374] The personal attack rule takes effect when a broadcaster attacks the character, integrity, honesty, or similar personal

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[366] 47 U.S.C.S. § 315(a) (1995).
[367] 47 U.S.C.S. § 315(b) (1995). For details see Carter et al., *supra* note 138 at 400-23.
[368] Carter et al., *supra* note 138 at 423.
[369] See Handling of Public Issues Under the Fairness Doctrine, 48 F.C.C.2d. 1 at 10-17 (1974); see also *Red Lion*, *supra* note 192 at 378.
[370] Report Concerning General Fairness Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985) (Fairness Report).
[371] The decision of the FCC was upheld on narrower, non-constitutional grounds by *Syracuse Peacecouncil* v. *FCC*, 867 F.2d. 654 (D.C. Cir. 1989), cert. denied 493 U.S. 1019 (1990).
[372] *Telecommunications Research and Action Center* v. *FCC*, 801 F.2d 501 at 517 (DC Cir. 1986) cert. denied, 482 U.S. 919 (1987) [hereinafter *TRAC*].
[373] 47 C.F.R. § 73.1920 (1996).
[374] Carter et al., *supra* note 138 at 427-28.

qualities of an identifiable person or group, during the presentation of a controversial public issue. Within one week of the broadcast the station must notify the person of the broadcast and provide a script or tape of the attack. The station has to offer a reasonable opportunity to respond through its facilities.

A similar rule is the 'political editorializing' rule which provides that, when a licensee endorses a political candidate in an editorial, he must give other candidates or their spokesmen an opportunity to respond.[375] However, the viability of this rule has been questioned after the Commission repealed the fairness doctrine.[376]

bbbb) Obscenity and Indecency

The Criminal Code of the United States prohibits broadcasting "obscene, indecent or profane language."[377] The most problematic has been the enforcement of the indecency section. Unlike obscenity, which was thought to lie outside the free speech guarantee, indecency is not deemed devoid of first amendment protection.

In *FCC* v. *Pacifica Foundation*, a sharply divided Supreme Court approved the power of the FCC to ban radio broadcast that is indecent but not obscene. The majority of the Court agreed that broadcasting receives "the most limited" free speech protections of all

[375] 47 C.F.R. § 73.1930 (1996).
[376] Carter et al., *supra* note 138 at 421.
[377] 18 U.S.C.S. § 1464 (1994).

forms of communication because it has a "uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read."[378]

After this decision, the FCC limited its definition to the specific "seven dirty words" at issue in *Pacifica*. No broadcaster was found guilty of indecent programming until 1987.[379] In 1987, the Commission revised its indecency standard after being publicly criticized for its policy. This new standard was not longer limited to the seven dirty words. The FCC gave notice that it would take action if indecent programming was broadcast at a time of day when there was a reasonable risk that children were in the audience. Indecency was defined as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs".[380] The Commission took action in several cases against broadcasters for airing indecent programs.[381]

Responding to pressure from broadcasters and other organizations, the Commission created a "safe harbor" between midnight and 6 a.m. for the broadcast of programming that might otherwise be banned as indecent. During these hours, broadcasters were required to provide a warning that offensive material might be contained in a given program. In December 1988, the FCC adopted a 24-hour ban on indecent programming shortly after Congress passed a law requiring the FCC to act.[382] However, the 24-hour ban has not yet

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[378] 438 U.S. 726 at 749 (1978) [hereinafter *Pacifica*]. This decision has been criticized as a "disquieting and a significant departure from traditional first amendment theory" (Rotunda & Nowak, *supra* note 138 at 100).

[379] Carter et al., *supra* note 138 at 430; Creech, *supra* note 156 at 124.

[380] New Indecency Enforcement Standards To Be Applied To All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987).

[381] Cf. Pacifica Foundation Inc., 2 F.C.C.R. 2698 (1987); The Regents of University of California, 2 F.C.C.R. 2703 (1987); Infinity Broadcasting Corp. of Pennsylvania, 2 F.C.C.R. 2705 (1987).

[382] *Act of October 1, 1988*, Pub. L. No. 100-459, § 608, 102 Stat. 2186 at 2228.

been enforced. In *Action for Children's Television* v. *FCC (I)* the Court of Appeals found that while the FCC has the power to regulate indecent speech it has to create a "safe harbor" for adults.[383] Shortly after the Supreme Court denied certiorari[384], Congress again intervened, passing the *Public Telecommunications Act of 1992*[385]. This act required the FCC to promulgate regulations to prohibit the broadcasting of indecent programming between 6 a.m. and midnight with an exception for public broadcasters (6 a.m. to 10 p.m.). In *Action for Children's Television* v. *FCC (II)* the Court of Appeals held that the distinction between public and private broadcasters was an unconstitutional distinction. The court remanded the case to the FCC with instructions to limit its ban on indecent broadcasting to the period from 6 a.m. to 10 p.m.[386]

cccc) Children's Television Programming

Beginning in 1974, the FCC, acting upon public pressure from groups like Action for Children's Television, started to regulate children's television programming urging broadcasters to increase the amount and quality of children's programming.[387] In keeping with the deregulatory spirit of the Reagan years, the Commission abandoned its former policy, preferring to allow the marketplace to respond to children's needs. The Commission no longer expected television stations to provide any children's programming.[388]

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[383] 932 F.2d 1504 (D.C. Cir. 1991).
[384] 503 U.S. 913 (1992).
[385] Pub. L. No. 102-356, 106 Stat. 949.
[386] 58 F.3d 654 (D.C. Cir. 1995); cert. denied U.S. 133 L.Ed.2d 658 (1996). The FCC has accordingly changed its rules. See Broadcast Indecency, 60 Fed.Reg. 44439 (1996), 47 C.F.R. § 73.3999 (1996).
[387] See for more details Creech, *supra* note 156 at 134-35.
[388] Children's Television Programming and Advertising Practices, 96 F.C.C.2d 634 (1984).

Despite a veto by President Reagan, Congress passed the *Children's Television Act of 1990*.[389] It limits commercial time in children's programming (programs originally produced and broadcast primarily for children under 13 years). This is the only existing time restriction on advertising.

In renewing a license of a commercial television station the FCC must consider the extent to which the applicant has served the educational and informational needs of children. However, the FCC in its regulation concerning this section is relatively vague and generous.[390]

ccc) Diversification of Media

Since the FCC relies heavily on the marketplace for the regulation of electronic media ownership rules are of special concern. The Commission acted on the theory that diversification of mass media ownership served the public interest by promoting diversity of program and viewpoints.[391] This policy often conflicted with the Commission's aim to ensure "the best practicable service to the public"[392]. Moreover, the Commission had given considerable weight to a policy of avoiding undue disruption of existing services.[393]

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[389] Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C.S. §§ 303a-b (1995).

[390] See In the Matter of Policies and Rules Concerning Children's Television and Commercialization Policies, Ascertainment Requirements and Program Log Requirement for Commercial Television Stations, 6 F.C.C.R. 2111 (1991). For shortcomings of broadcasters in satisfying their programming obligations, see Dale Kunkel & Julie Canepa, "Broadcasters' License Renewal Claims Regarding Children's Educational Programming" (1994) 38 Journal of Broadcasting & Electronic Media 397.

[391] See *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 at 780 (1978) [hereinafter *National Citizens Committee*].

[392] Comparative Hearings, *supra* note 355 at 394

[393] See *National Citizens Committee*, *supra* note 391 at 782 (1978).

Over the past two decades the Commission constantly relaxed the regulation of electronic media ownership.[394]

aaaa) Ownership Restrictions

Multiple ownership was for a long time (1953-85) restricted by the "rule of sevens" which limited ownership of stations to 7 AM, 7 FM and seven television stations. From 1985-92 the rule was changed from seven to twelve. In 1992 the radio portion was amended to allow a single entity to own 20 AM, 20 FM stations, and 12 television station.[395] The *Telecommunications Act*[396] required the FCC to repeal most of its multiple ownership regulations. Eliminated were the restrictions on the number of national radio and television stations a single entity can hold. Now, the only restriction applying to national television is that no license shall be granted to an entity if that had the result that the TV stations owned by this entity would reach more than 35 per cent of the national audience.[397] Restricted is further the ownership of radio stations in a local market.[398]

To foster the diversification of media voices, the FCC has since 1975 prohibited common ownership of broadcast stations and daily newspapers.[399] When the Commission en-

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[394] Creech, *supra* note 156 at 83; Carter et al., *supra* note 138 at 369-70.
[395] Revision of Radio Rules and Policies, 57 Fed.Reg. 42701 (1992). For details of the older regulations see Carter et al., *ibid.* at 362-66.
[396] *Telecommunications Act*, *supra* note 363 § 202.
[397] See 47 C.F.R. § 73.3555(e) (1996).
[398] See 47 C.F.R. § 73.3555(f) (1996).
[399] In the Matter of Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046 (1975). The regulation was upheld in *National Citizens Committee*, *supra* note 391. For the current regulation see 47 C.F.R. 73.3555(d) (1996).

acted the cross-ownership rule, it allowed many existing newspaper-broadcast corporations' cross-ownerships to continue until the corporation sold the broadcast station. When a transfer of license results in a violation of cross-ownership rules, the FCC often grants a temporary waiver, giving the new licensee 2 years in which to divest the property.[400]

The *Telecommunications Act* repealed the cross-ownership prohibition for cable operators and television broadcast stations .[401]

bbbb) Minority Preferences

The FCC policy of considering minority ownership in granting or transferring a license, is another attempt to increase diversity of ownership in broadcasting.[402] It is based on the assumption that a wider variety of ownership will lead to greater diversity in programming content. This relatively new policy is a reaction to several decisions of the Court of Appeals fot the District of Columbia[403] as well as to a Resolution of Congress[404] directing the FCC to use racial and gender preferences. In *Metro Broadcasting, Inc.* v. *FCC*[405], a five to four majority of the Supreme Court upheld the policy. It found that certain minority pref-

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[400] Creech, *supra* note 156 at 85.
[401] *Telecommunications Act, supra* note 363 §§ 202(i), 302(b).
[402] See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849 (1982).
[403] See, *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973) (minority preferences), cert. denied 419 U.S. 986 (1974); *West Michigan Broadcasting Co.* v. *FCC* 735 F.2d. 601 (D.C. Cir. 1984) (minority preference upheld), cert. denied 470 U.S. 1027 (1985).
[404] H. R. Conf. Rep. No. 97-765.
[405] 497 U.S. 547 (1990).

erence policies did not violate the equal protection component of the fifth amendment's due process clause.[406]

bb) Public Broadcasting

'Public broadcasting' is the exception in the profit-driven electronic media system in the United States. However, the viewing shares attracted by American public broadcasters are significantly below those of their German and Canadian counterparts.[407] Their role is that of a stop-gap not of an equal competitor of the commercial broadcasters.[408]

Public broadcasters must be nonprofit entities[409] and cannot broadcast commercials[410]. They are funded through donations from the industry and from viewers and listeners.[411] They can also receive funding from the Corporation for Public Broadcasting (CPB).[412] The CPB is a private nonprofit corporation. The 9 members of the board are appointed by the president with the advice and consent of the Senate.[413] The goal of the CPB is to en-

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[406] See for a discussion of this decision: Neal Devins, "*Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight" 69 Tex.L.Rev. 125 (1990); Robert A. Sedler, "The Constitution, Racial Preference, and the Supreme Court's Institutional Ambivalence: Reflections on *Metro Broadcasting*" 36 Wayne L.Rev. 1187 (1990).

[407] Between October and November 1995 the prime time viewing share of public broadcasters was 4 per cent (2.3 ratings) ("The Facts About PBS Viewership", *PBS Online* <http://www.pbs.org/insidepbs/viewers.html>).

[408] See Carter et al., *supra* note 138 at 443-44.

[409] 47 C.F.R. § 73.621(a) (1996).

[410] Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, Second Report and Order, 86 F.C.C.2d. 141 (1981) allows public broadcasters to air promotional announcements on behalf of a commercial entity when they are in the public interest and no consideration for airing the announcement is received. Nonetheless, the announcement is often indistinguishable from sponsoring in commercial television. See also 47 C.F.R. § 73.621(e) (1996).

[411] Carter et al., *supra* note 138 at 444-45.

[412] The CPB was created by the *Public Broadcasting Act of 1967*, Pub. L. No. 90-129, 81 Stat. 365 (codified in 47 U.S.C.S. §§ 390-399b (1996 Supp.)).

[413] 47 U.S.C.S § 396 (Supp. 1996).

courage the growth and development of noncommercial radio and television. The CPB receives its funding from the government. It is not a program source, but a clearinghouse for funding program producers and qualified stations.

In *FCC* v. *League of Women Voters*, the Supreme Court in a 5-4 decision invalidated a section of the Public Broadcasting Act which prohibited stations which receive a grant from the CPB from engaging in "editorializing". The majority found that the provision was not narrowly tailored to protect public broadcasters from the risk of undue governmental interference. "Moreover, the public's "paramount right" to be fully and broadly informed on matters of public importance through the medium of noncommercial educational broadcasting is not well served by the restriction."[414] The majority found that the structure of the system for financing public broadcasting already operated to insulate local stations from governmental interference.[415]

c) Cable Television

In 1984, Congress enacted the *Cable Communications Policy Act of 1984*[416]. The act codified many of the cable regulations that had been developed during the period beginning in the 1960s. It gave the FCC jurisdiction over cable television. As a result, the FCC no longer had to justify its regulation of cable television because of cable TV's interface with broadcasting.[417]

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[414] *League of Women Voters, supra* note 285 at 399.
[415] *Ibid.* 388-89.
[416] Pub. L. No. 98-549, 98 Stat. 2779.
[417] Creech, *supra* note 156 at 72-73.

In the end of the 1980s, cable threatened to unseat traditional broadcasting. The penetration of cable television systems increased constantly over the last decades. In 1970 only 10 per cent of the households with televisions subscribed to cable; in 1992 it were over 60 per cent.[418]. Broadcasters argued for a "level playing field", which would allow them to more effectively compete with cable.

In 1992, Congress enacted the *Cable Television Consumer Protection and Competition Act of 1992*[419]. Already its name points to the main areas of cable regulation under this act. The act is based on the premise that prior regulation and its enforcement were insufficient in ensuring a diverse and competitive video marketplace. The act is designed to promote competition. Its goal is "diversity of views and information through cable television."[420] The way to get there is to "rely on the marketplace, to the maximum extent feasible."[421] Viewers are perceived by the act as consumers; consumers that have to be protected from "undue market power for the cable operator."[422]

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[418] Cf. *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, § 2(a)(3), 106 Stat. 1460 [hereinafter *Cable Act of 1992*]. In 1994, 96 per cent (91.6 million) of all television households in the United States were capable of receiving a cable system. 65.2 per cent (59.7 million) of them subscribed to cable. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 F.C.C.R. 2060 at 2068 (1996) [hereinafter Annual Assessment].

[419] *Cable Act of 1992, ibid.* For an analysis of this act, see: Donald J. Boudreaux & Robert B. Ekelund, "The Cable Television Consumer Protection and Competition Act of 1992: The Triumph of Private Over Public Interests" 44 Ala.L.Rev. 355 (1993).

[420] *Cable Act of 1992, ibid.* § 2(b)(1).

[421] *Ibid.* § 2(b)(2).

[422] *Ibid.* § 2(a)(2).

aa) Franchising

Cable systems must obtain a franchise.[423] The *Communications Act* gives state and local governments the power to award franchises and to determine the qualifications necessary for systems to be awarded local franchises. The cable operators are subject to the franchise renewal process by local municipalities.

In the early 1980s, there was fierce competition over cable franchises. Cable companies often made grandiose promises to municipalities in order to obtain the exclusive franchise. Once the franchise was granted, many cable companies broke their promises.[424]

In *City of Los Angeles* v. *Preferred Communications, Inc.*[425], the Supreme Court rejected a city's claim that its refusal to grant a franchise to a cable television company raised no first amendment concerns. The city did not claim that there was no physical capacity available for more than a single franchise, but it claimed that multiple cable systems would cause visual blight, traffic delays and traffic hazards. The Supreme Court ruled that the trial court on remand must balance the first amendment values against competing societal interests. Beyond that the court offered no hint of the ultimate resolution of the controversy except to emphasize that the city ordinance would not be saved merely because it is rational.[426]

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[423] 47 U.S.C.S. § 541(b) (Supp. 1996)
[424] Creech, *supra* note 156 at 169.
[425] 476 U.S. 488 (1986).
[426] Rotunda & Nowak, *supra* note 138 at 106. See also *Central Telecommunications* v. *TCI Cablevision, Inc.*, 800 F.2d. 711 (8th Cir. 1986).

The *Cable Act of 1992* prohibits the award of exclusive franchises. The franchising authority "may not unreasonably refuse to award an additional competitive franchise".[427] S. 531(a) of the *Communications Act* empowers the local franchising authority to require the cable system to establish access for public, educational, and governmental access.[428]

bb) Must-carry Rules

The first must-carry rules date from 1962. In the early days of cable both broadcasters and cable companies benefited from these rules. Broadcasters, especially those using UHF, could overcome some transmission problems and cablecasters were given a free source of quality programming. The must-carry rules were criticized by the cablecasters when the penetration of cable increased and more attractive sources of programming became available.[429]

In 1980, Quincy Cable TV dropped two broadcasters it carried under the must-carry rules. It argued that the stations did not carry programming of interest to the community. In *Quincy Cable TV, Inc.* v. *FCC*[430] the court found the must-carry rules to be a violation of cable operators first amendment right of editorial discretion and that the FCC had exceeded its power.

In 1987, the Commission introduced new rules which were a compromise between broadcasters and cable operators. Small cablecasters were exempted, while the others were

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[427] 47 U.S.C.S. § 541(a) (1995).
[428] 47 U.S.C.S. § 531(a) (1995).
[429] Creech, *supra* note 156 at 174; see also *Century Communications Corp.* v. *FCC*, 835 F.2d 292 at 293-95 (D.C. Cir. 1987) [hereinafter *Century Communications*] for the history of muss-carry provisions.
[430] 768 F.2d 1434 (D.C. Cir. 1985), cert. denied 108 S.Ct. 2014 (1988).

granted more leeway in determining which stations they would be required to carry. Only those broadcast stations within 50 miles of a cable system, capable of delivering a high-quality signal to the cable system, would be considered for carriage. Commercial stations were required to demonstrate a significant viewership. However, cablecasters had to carry at least one public television station, regardless of distance or signal quality. In addition, the FCC required the cable companies to sell and install A/B switches to ensure an easy access to the programs that were not carried on cable. The must-carry rules and the A/B switch requirement were to expire after five years. It was assumed that this was sufficient time for subscribers to be properly informed in the method of switching between cable and over-the-air broadcasting.[431]

In the same year, the Court of Appeals for the District of Columbia struck down the rules. The court held that the "reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the *O'Brien* test for incidental restrictions on speech."[432]

The *Cable Act of 1992*[433] contained must-carry provisions for local commercial and for noncommercial educational stations. They are premised on promoting localism and diversity.[434] In *Turner Broadcasting, Inc.* v. *FCC*[435] the Supreme Court ruled that the gov-

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[431] Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 2 F.C.C.R. 864 (1986); see also Creech, *supra* note 156 at 177.
[432] *Century Communications*, *supra* note 429 at 304.
[433] See *supra* note 418.
[434] David J Saylor, "Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour Through the Maze" (1994) 12 Cardozo Art & Entertainment L.J. 321 at 327.
[435] *Turner*, *supra* note 119.

ernment had not provided sufficient evidence to justify the rules. It vacated the judgment of the District Court for the District of Columbia[436] that had granted a summary judgment for the government and remanded the case for further proceedings.[437]

cc) Program Exclusivity

In 1990, new program exclusivity rules became effective. These rules are the syndicated exclusivity (Syndex) and network nonduplication rules. The FCC had abolished similar rules in 1980s as part of the deregulation of cable.

The Syndex rules protect local broadcasters from distant signal importation of syndicated programs that are broadcast locally. The geographic area protected by Syndex is dependent on the terms negotiated between the program supplier and the purchaser.[438] The FCC rules[439] allow networks and affiliates to enter into agreements that prohibit cable systems from duplicating network signals in a single market.

§ 76.67[440] of the FCC rules prohibits a cable system from carrying a live sports event if that event is not being broadcast by a station carried on the cable system. In order to invoke prohibition, the broadcast station must request that the event be not carried on the cable system.

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[436] *Turner Broadcasting System, Inc.* v. *FCC*, 819 F.Supp. 32 (D.D.C. 1993).
[437] *Turner*, *supra* note 119 at 2472.
[438] See: 47 C.F.R. §§ 76.151-76.163 (1996).
[439] 47 C.F.R. § 76.92 (1996).
[440] 47 C.F.R. § 76.67 (1996).

dd) Rates Regulation

The *Cable Act of 1992* imposed a more stringent system of rate regulation. As before the franchising authority may regulate the rates of a local cable system in absence of effective competition, but the act tightened the definition of 'effective competition.[441] The *Cable Act of 1992* also directed the Commission to issue regulations ensuring reasonable rates for basic cable on systems which are not subject to effective competition.[442] If the franchising authority, which has to carry out the actual regulation, does not regulate properly, the FCC can claim jurisdiction.

ee) Obscenity and Indecency

S. 559 of the *Communications Act*[443] prohibits the transmission of obscene material over cable. Attempts to forbid indecency on cable by local ordinances have been struck down by the courts. In *Cruz* v. *Ferre*[444], the US Court of Appeals for the Eleventh Circuit distinguished between cable and broadcasting. The court noted that while broadcast signals are pervasive and may "intrude" on the privacy of the home, cable is invited.

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[441] 47 U.S.C.S. § 543(a)(2) (1995). Effective Competition is defined in 47 U.S.C.S. § 543(l) (1995); see also Carter et al., *supra* note 138 at 463-66.
[442] 47 U.S.C.S. § 543(b) (1995).
[443] 47 U.S.C.S. § 559 (Supp. 1996).
[444] 755 F.2d 1415 (11th Cir. 1985) [hereinafter *Cruz*]; see also *Jones* v. *Wilkinson*, 13 Med.L.Rptr. 1913 (10th Cir. 1986), the court struck down the Utah Cable Television Programming Decency Act which authorized nuisance actions against cable systems that transmitted indecent programming.

The *Cable Act of 1992* required the Commission to promulgate regulations permitting cable operators to prohibit indecent material on cable channels.[445] Also required were regulations requiring cable operators to place on a single channel all indecent programming intended to be carried on leased access channels and to block access to that channel in the absence of a written request for access from the subscriber.[446] The *Telecommunications Act* requires cable programming distributors to scramble indecent programming on channels primarily dedicated to sexually-oriented programming.[447]

ff) Common Rules for Broadcasting and Cable

Cable operators that originate their own programs are according to FCC regulations subject to the political broadcast regulations. Especially applicable are the 'equal time', 'lowest unit rate' requirements[448] and the personal attack rule.[449] Also applicable are the time limitations for advertising in children's programming.[450]

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[445] 47 U.S.C.S. § 532(h) (1995).

[446] 47 U.S.C.S. § 532(j) (1995). The Commission's indecency rules adopted in compliance with these regulations were invalidated by a panel of the Court of Appeals on first amendment grounds (*Alliance for Community Media* v. *FCC*, 10 F.3d 812 (D.C. Cir. 1993). This judgment was reversed by the full Court (56 F.3d 105 (D.C. Cir. 1995)).

[447] 47 U.S.C.S. § 561(a) (Supp. 1996). 47 U.S.C.S. § 561(b) (Supp. 1996) provides that unless the indecent programming is scrambled it must not be distributed during hours of the day when a significant number of children are likely to view it. The Commission issued an interim rule with an indecency ban in the time between 6 a.m. and 10 p.m. (In the Matter of Implementation of Section 505 of the Telecommunications Act of 1996: Scrambling of Sexually Explicit Adult Video Service Programming, 11 F.C.C.R. 5386 (1996)).

[448] 47 C.F.R. § 76.205 (1996). See *supra* note 448 and accompanying text.

[449] 47 C.F.R. § 76.209 (1996). See *supra* note 373 and accompanying text.

[450] 47 U.S.C.S. § 303a(d) (1995).

d) New Technologies

aa) Alternative Multichannel Video Programming Distribution (MVPD)

Direct Broadcast Satellites (DBS) have been a potential means of program distribution in the United States since the early 1980s. But, unlike in Europe and Japan, DBS have long remained a stalled technology in the United States.[451] However, the subscribership to MVPD technologies, which encompass basically all technologies other than cable[452], has increased over the last years. In 1994, the overall subscribership to MVPD was 5.7 million.[453] The MVPD technologies which compete with the cable industry have so far been widely unregulated.[454]

The cable industry worries about the entry of telephone companies (telcos) into the video delivery business. Cable companies fear that if telcos offered a "video dial tone" on fiber optic cable, with the potential of over 100 channels in a true common carrier environment, cable television would suffer the same economic woes that they had inflicted on broadcasters.[455] The *Cable Communications and Policy Act of 1984* prohibited telephone companies, and their affiliates, from providing video programming to subscribers within their service areas.[456] After several courts held that this provision was an unconstitutional

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[451] Creech, *supra* note 156 at 167.
[452] DBS, Multichannel Multipoint Distribution Service (MMDS) (often referred to as "wireless cable"); Satellite Master Antenna Television (SMATV); Television Receive Only dish (TVRO). For a description of these technologies see Carter et al., *supra* note 138 at 488-99.
[453] Annual Assessment, *supra* note 418 at 2180.
[454] See Carter et al., *supra* note 138 at 488-99. The *Cable Act of 1992*, *supra* note 418, imposed some content regulation on DBS, including equal opportunity for candidates and reasonable access. (47 U.S.C.S. §§ 315 and 312(a)(7) (1995)).
[455] Cf. Creech, *supra* note 156 at 168.
[456] 47 U.S.C.S. § 533(b) (1995).

infringement of telephone companies' first amendment rights[457] the FCC relaxed the application of the restriction.[458] The *Telecommunications Act* repealed this restriction.[459]

bb) Internet

The Internet is a world-wide network of computer networks operated by governmental, educational, and commercial entities, including entertainment firms.[460] The last years have seen a tremendous growth of the Internet. Currently, it is estimated that 40 million people world-wide use the Internet.[461] With improvements in the technology more complex data types, such as voice and video, as well as more traditional data may be distributed over the Internet.[462] However, it is still too early to predict whether the Internet will replace traditional forms of electronic mass communication, integrate them on the Internet, or will mainly offer additional services.[463]

The FCC has so far played no role in the development of the Internet which was originally designed as a computer network for the US military.[464] Discussions about the regulation of the Internet have recently focused on the availability of pornography on the net-

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[457] See, *e.g.*, *Chesapeake & Potomac Tel. Co.* v. *United States*, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, 42 F.3d 181 (4th Cir. 1994), cert. granted 115 S.Ct. 2608 (1995); *US West, Inc.* v. *United States*, 855 F. Supp 1184 (W.O. Wash. 1994), aff'd, 48 F.3d 1092 (9th Cir. 1995).
[458] Annual Assessment, *supra* note 418 at 2098-2100.
[459] *Telecommunications Act, supra* note 363 §§ 202(i), 302 b(1).
[460] See, *e.g.*, Annual Assessment, *supra* note 418 at 2120.
[461] See *ACLU* v. *Reno*, 1996 U.S. Dist. Lexis 7919 at 10 (E.D. Pa. 1996) [hereinafter *Reno*]. In its finding of facts this case offers a good description of the Internet, its services, and its history and development.
[462] Annual Assessment, *supra* note 418 at 2121.
[463] Cf. *ibid.* at 2122.
[464] Meredith Leigh Friedman, "Keeping Sex Safe on the Information Superhighway: Computer Pornography and the First Amendment" (1996) 40 N.Y.L.Sch.L.Rev. 1025 at 1027.

work.[465] In February 1996, President Bill Clinton signed the much criticized *Telecommunications Act*[466] into law which entailed as Title V the so called "*Communications Decency Act*"[467] (*CDA*). The *CDA*, inter alia, made it a criminal offense to make "indecent" material available for minors on the Internet.[468] It provided for several defenses for content providers on the Internet[469] Most specific are the defenses of the use of credit card verification[470] and adult verification by password or adult identification number[471].[472] The

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[465] See, *e.g.*, Friedman, *Ibid.*; Debra D. Burke, "Cybersmut and the First Amendment: A Call for a New Obscenity Standard" (1996) 9 Harvard J.L. & Tech. 87; Jeffrey E. Faucette, "The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet", (1995) 44 Duke L.J. 1155; Barbara M. Ryga, "Cyberporn: Contemplating the First Amendment in Cyberspace" (1995) 6 Const.L.J. 221.

[466] See *supra* note 398; for a critique see, *e.g.*, David M. Nadler & Kendrick C. Fong, "Wrong Way to Pull Plug on Smut" National Law Journal (August 7, 1995) A 25.

[467] *Telecommunications Act, supra* note 3363 § 501.

[468] The two most criticized provisions read:

47 U.S.C.S. 223 (Supp. 1996): "(a) Whoever -- (1) in interstate or foreign communications....

(B) by means of a telecommunications device knowingly --

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;...

(2) ... shall be fined under title 18, United States Code, or imprisoned not more than two years, or both. ...

[The term "telecommunications device" is specifically defined not to include "the use of an interactive computer service,"(§ 223(h)(1)(B) as that is covered by § 223(d)(1). However, in the litigation following the enactment of the *CDA* (*Reno, supra* note 461 at 6 n. 5) the court interpreted § 223(a)(1)(B) to encompass the use of a modem as "telecommunications device" and that thus the section applies to individual Internet users.]

(d) Whoever--(1) in interstate or foreign communications knowingly--

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms *patently offensive* as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the use of such service placed the call or initiated the communication; ...

(2) ... shall be fined under title 18, United States Code, or imprisoned not more than two years, or both." [emphasis added]. (In *Reno, supra* note 461 at 36, the court found that the terms "indecent" and "patently offensive" were interchangeable.).

[469] A defense to prosecution is according to the general provision 47 U.S.C.S. § 223(e)(5)(A) (1996 Supp.) that a person "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors ... which may involve any appropriate measures to restrict minor from such communications, including any method feasible under available technology ... ."

[470] This is a method by which a user types in his or her credit card number, and the content provider, *e.g.*, a Web site, ensures that the credit card is valid before it allows the user to enter the site. Verification by credit

CDA authorized the FCC to "describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications ... ."[473] Yet the Act expressly provides that the FCC has no authority to approve or enforce such measures.[474]

The 'indecency ban' has not been enforced so far. In *ACLU* v. *Reno* a three-judge panel of the US District Court for the Eastern District of Pennsylvania granted a preliminary injunction holding that the indecency-ban of the *CDA* violated the first amendment.[475] One of the judges suggested in his opinion that the costs for age verification would "drive from the Internet speakers whose content falls within the zone of possible prosecution."[476] As a result of the *CDA* only "commercial entities who can afford the costs of verification, or who would charge users to their sites, or whose content has mass appeal" would remain on the Internet.[477] This suggests that the 'indecency ban', like earlier electronic media regulation, would serve to allocate 'property rights' for the media industry.[478] However, big computer companies[479] and commercial Internet service providers[480] were among the plaintiffs in *Reno*. This might indicate that the *CDA* came too early to protect or allocate market positions, since the main 'players' have not yet positioned themselves satisfacto-

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card is difficult for non-commercial content providers, since the credit card verification agencies decline to process a card unless it is accompanied by a commercial transaction. The agencies also require a fee for each verification. (See *Reno, supra* note 461 at 30).

[471] Existing systems charge users for the verification. (See *Reno, supra* note 461 at 31).

[472] 47 U.S.C.S. § 223(e)(5)(A)(B) (Supp. 1996).

[473] 47 U.S.C.S. § 223(e)(6) (Supp. 1996). This provision only refers to the "patently offensive" provision: § 223(d).

[474] *Ibid.*

[475] *Reno, supra* note 461. See also *ACLU* v. *Reno*, 24 Med.L.Rptr. 1379 (E.D. Pa. 1996) (temporary restraining order).

[476] *Reno, ibid.* at 72 (Dalzell, J.).

[477] *Ibid.*

[478] See *ibid.* Dazell, J., for such a scenario: "[T]he Internet would ultimately come to mirror broadcasting and print, with messages tailored to a mainstream society ... ." See generally for the relationship between media industry and regulation in the U.S.: Hoffmann-Riem, "Deregulierung" *supra* note 198 at 530-33.

[479] *E.g.*, Apple Computer, Inc.; Microsoft Corporation.

[480] America Online, Inc.; Compuserve; Prodigy Services Company.

rily in the new market to view a regulatory mechanism like that of the *CDA* to be in their interest.[481]

C. Electronic Mass Media and the First Amendment

Unlike the Bundesverfassungsgericht the US Supreme Court did not choose to rationalize the distinct regime for electronic media on the basis that the constitutional guarantee of freedom of expression provides separately for media (press) and individual (speech) freedom. As noted before the Bundesverfassungsgericht interprets broadcasting freedom in Art. 5(1) sentence 2 GG as an aliud to the general freedom of expression in Art. 5(1) sentence 1 GG. In contrast, the US Supreme Court rejected attempts to give the 'press-clause' in the first amendment a specific meaning.[482]

The Supreme Court deals with the freedoms of mass media as subcategories of freedom of speech. However, the Court recognizes the historical and actual differences of the media and applies scrutiny standards which are responsive to the media specifics. It emphasizes thereby the differences in the technologies of the dissemination of information.

In a recent controversy in Germany the question was raised whether or not the treatment of radio and television under the first amendment rests on an 'objective' understanding similar to that of the Bundesverfassungsgericht. Dieter Grimm, judge of the Bundesverfassungsgericht, who has been responsible for the recent decisions on broadcasting

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[481] See the attempts of Microsoft to gain the hegemony in market of Web browsers which has so far been dominated by Netscape. (Joshua Cooper, "Winner Take All" *Time* (September 16, 1996) 36; Michael Krantz, "The First Web War" *Time* (September 1996) 42).

[482] See especially *Bellotti, supra* note 248 at 797-802 (Burger, C.J., concurring); see also Gerald Gunther, *Individual Rights in Constitutional Law*, 11th ed. (Westbury: Foundation Press, 1992) at 1127-29.

freedom, argues in favor of such a similarity. According to him, the Supreme Court jurisdiction displays that fundamental rights are not restricted to negative rights, and the 'objective' notion of fundamental rights as goals for the social order is not foreign to the United States.[483] The differences between the German and the American understanding, Grimm contends, lie in the conclusions drawn from the 'objective' understanding. The Bundesverfassungsgericht deduces from this understanding the duty for the legislator to pass regulation that fleshes out the contours of broadcasting freedom in order to protect the free formation of private and public opinion ('protection duty'). Whereas the Supreme Court only recognizes a 'protection right' of the legislator. The government has the power to flesh out the contours of the first amendment through regulation, to ensure the free formation of opinion in and through electronic media, but the government stands under no obligation deduced from the first amendment to do so.[484]

Ernst-Joachim Mestmäcker, one of the most distinguished critics of the 'objective' understanding of broadcasting freedom, who bases his critique largely on the US understanding, attacked Grimm's interpretation. He contends that the US Supreme Court views freedom of speech also in the context of electronic media purely as an individual right and does not recognize an 'objective' notion of the first amendment.[485]

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[483] Dieter Grimm, "Schutzrecht und Schutzpflicht: Zur Rundfunkrechtsprechung in Amerika und Deutschland" in Herta Däubler-Gmelin et al., eds., *Gegenrede: Aufklärung - Kritik - Öffentlichkeit: Festschrift for Ernst Gottfried Mahrenholz* (Baden-Baden: Nomos, 1994) 529 at 538.
[484] *Ibid.* at 538-39.
[485] Mestmäcker, *supra* note 93 at 148-51.

1. Structural Regulation

"It is the right of the viewers and listeners and not the right of the broadcasters, which is paramount."[486] This is the pivotal phrase of the *Red Lion* decision, marking the change in perspective to ordinary free speech doctrine. It is not the communicator, the individual speaker, who fashions the first amendment but the recipient, "the people as a whole"[487]. It is thus the Meiklejohn perspective with the basic creed that it is not essential "that everyone shall speak, but that everything worth saying shall be said"[488], which is operating here.

This "unusual order of First Amendment values" [489] had its fullest development in *Red Lion* but can be traced back to earlier decisions. The first important broadcasting decision of the Supreme Court is *National Broadcasting Co., Inc.* v. *United States* which upheld the chain broadcasting regulations of the FCC. The Court dealt with the first amendment issue in less than two pages. It found that because broadcasting "[u]nlike other modes of expression, ... [is] inherently ... not available to all ... is subject to governmental regulation."[490] The Court could dismiss the first amendment claims of the appellants so briefly because it found, given the characteristics of the broadcasting media, that "[t]he right of free speech does not include ... the right to use facilities of radio without a license."[491]

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[486] *Red Lion, supra* note 192 at 390.
[487] *Ibid.*
[488] Meiklejohn, *Free Speech supra* 172 note at 25; see also *Columbia Broadcasting* v. *Democratic National Committee*, 412 U.S. 94 at 122 (1973) [hereinafter *Columbia Broadcasting*] quoting Meiklejohn's famous phrase.
[489] *Columbia Broadcasting, ibid.* at 101.
[490] 319 U.S. 190 at 226 (1943) [hereinafter *National Broadcasting*].
[491] *Ibid.*, at 227.

Thus, the government in its effort to provide a regulatory regime for broadcasting which serves the "public interest" was not restricted by the first amendment rights of would-be-broadcasters, and gave thereby the government room to maneuver. Government regulation was not primarily perceived as a threat and the Court even ascribed a positive role to the government. After describing the frequency chaos in the 1920s the Court stated: "With everybody on the air, nobody could be heard. ... Regulation of radio was therefore as vital to its development as traffic control to the development of the automobile."[492]

However, the Court indicated that although the government has more leeway to regulate in the broadcasting field it is obliged to respect certain first amendment principles in its regulation. Although the Court denied a first amendment right to broadcast it indicated that the government could not have chosen a licensing regime based on viewpoint discrimination.[493]

Already earlier decisions of lower courts display a distinction between the first amendment rights of ordinary speakers and the role of the first amendment in broadcasting. In *KFKB Broadcasting* v. *Federal Radio Commission* the court in upholding the denial of license renewal on the ground that the station had not operated in the 'public interest' found that "the right of the public is paramount"[494]. And in a similar case the same court found that denial to renew the license "is not a denial of freedom of speech"[495].

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[492] *Ibid.*, at 212-13.

[493] *Ibid.*, at 226 "[C]ongress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or any other capricious basis. If it did ... the issue before us would be wholly different."

[494] 47 F.2d 670 (D.C. Cir. 1931).

[495] *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932)

In *Red Lion* the Supreme Court dealt with the fairness doctrine, the former center-piece of the US broadcasting regulation. Developed by the FCC the fairness doctrine required broadcasters to present discussion of public issues, and that each side of those issues must be given fair coverage. In a unanimous decision the Supreme Court upheld the personal attack and political editorializing rule which were the two challenged aspects of the fairness doctrine.[496]

The Court emphasized the positive role of the government. It found that the regulations "enhance rather than abridge the freedoms of speech and press"[497]. To recognize that a certain category of regulations which does not limit free expression but which promotes it is one of the basic assumptions of the German approach. The reason why the Court could recognize a promotional function of the government is the focus in this decision on the political and social function of speech. It is the first amendment concern with an "uninhibited, robust, and wide open"[498] public debate that is operating here.

In addition to the recognition of the promotional function of governmental regulation *Red Lion* contains another important similarity to the German approach: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether by the Government itself or a private licensee."[499] Thus, the Court recognizes that the purpose of the first amendment ("producing an informed public capable of conducting its own affairs"[500]) is not only endangered by the government but also by other social forces:

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[496] See *supra* notes 373-76 and accompanying text for details regarding these reply rights.
[497] *Red Lion, supra* note 192 at 375.
[498] *New York Times, supra* note 49 at 270.
[499] *Red Lion, supra* note 192 at 390.
[500] *Ibid.* at 392.

"There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."[501] The broadcaster's autonomy or his or her interest in self-fulfillment counts therefore for little, if anything, on the first amendment scale, and they especially do not prevent the government from implementing safeguards against forms of private 'censorship' and 'monopolization':

> It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum. ... There is nothing in the First Amendment which prevents Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred form the airwaves.[502]

The concept of the broadcaster as a proxy or fiduciary comes close to the German concept of internal pluralism, and that the first amendment plays a major role in the permission of government "to put restraints on licensees in favor of others whose views should be expressed" has its parallel in the concept of broadcasting freedom as 'serving freedom'.

Red Lion even contains statements which could well be understood as recognizing a governmental duty deduced from the first amendment, requiring the government to provide a regulatory regime that safeguards the well functioning of the 'marketplace of ideas'. In dealing with the role of the first amendment in the broadcasting area the Court stated, after it dismissed "a First Amendment right to a license or to monopolize a radio frequency":

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[501] *Ibid.*
[502] *Ibid.* at 389.

> [T]he people as a whole retain their interest in free speech by radio and their col lective right to have the medium function consistently with the ends and purposes of the First Amendment. ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.[503]

Ronald Rotunda and John Nowak argue that the Court in *Red Lion* did not deduce positive duties for the government from the first amendment.[504] They rely on the Court's acknowledgment that it would reconsider the constitutionality of the fairness doctrine if evidence were provided that broadcasters, because of that regulation, would avoid the presentation of controversial issues.[505] It is questionable whether this alone is sufficient to invalidate "the Court's earlier strong language"[506] but that can be left open here, since the Supreme Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*[507], and following decisions largely drew away from the notion that the government is compelled by the first amendment to provide a regulatory regime protecting first amendment goals.

In *Columbia Broadcasting* the Supreme Court dealt with claims of groups which wanted to buy air time to express their views opposing the involvement of the United Sates in the Vietnam war. The FCC rejected the claim to declare that "responsible" individuals and groups have a right under the first amendment to purchase advertising time to comment on public issues. The groups sought such a declaration since they experienced that most stations refused to accept editorial advertising. The Court of Appeals for the

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[503] *Ibid.* at 390.
[504] Rotunda & Nowak, *supra* note 138 at 94.
[505] *Red Lion, supra* note 192 at 393.
[506] Rotunda & Nowak, *supra* note 138 at 94.
[507] *Columbia Broadcasting, supra* note 488.

District of Columbia reversed the Commission.[508] It found a ban on editorial advertising to be in violation of the first amendment. According to the court the first amendment mandated a right to present editorial advertisements. It did not, however, rule in favor of the individual claims presented before the court, but it remanded the cases to the Commission to develop "reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air."[509]

The majority of the Supreme Court reversed the judgment of the Court of Appeals. Chief Justice Burger, who delivered the opinion of the Court, wanted to dismiss the first amendment claims on the ground that the denial of editorial advertisements by the broadcasters is no governmental action and that therefore no first amendment concerns were raised, but he could not find a majority for this part of his opinion. The part of the opinion which was joined by a majority of the Court could at first sight be understood as an inquiry into whether the first amendment compels the government to provide a right of access. This part of the decision is introduced as following:

> There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertise ments or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment.[510]

However, there are several indicators that show that the Court not even in its hypothetical inquiry ("assuming governmental action") assumed, as the Court of Appeals did, that

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[508] *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (1971) [hereinafter *Business Executive's Move*].
[509] *Ibid.* at 646.
[510] *Columbia Broadcasting, supra* note 488 at 121.

the first amendment could require governmental action. Despite the introductory remark the Court was only reviewing the statutory question. Only the very last sentence of the opinion seems to be concerned directly with the first amendment issue: "At the very least, courts should not freeze this necessarily dynamic process [search for a right of access] into a constitutional holding."[511] That the Court does not endorse a first amendment duty comparable to the German 'contouring duty'[512] becomes clearer through remarks of Justice Stewart in his concurring opinion. He describes as "a frightening specter" the holding of the Court of Appeals and the dissenters "that the First Amendment *requires* the Government to impose controls upon broadcasters - in order to preserve First Amendment "values."'"[513] And later: "The Court of Appeals held that the First Amendment compels the Commission to require broadcasters to accept such advertising ... This holding ... seems to me to reflect an extraordinary odd view of the First Amendment."[514]

The Court largely deferred to the decision of the FCC and the regulatory framework imposed by Congress. In reviewing whether the "public interest" requires a right of access the Court relied on the fairness doctrine as sufficiently serving the "public interest". Although the Court conceded "[t]hat the doctrine admittedly has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues"[515] it did not even ask whether views such as those of the appellants were not represented in broadcasting, or whether other views were likely to be systematically underrep-

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[511] *Ibid.* at 93.
[512] See *supra* notes 94-100 and accompanying text.
[513] *Columbia Broadcasting, supra* note 488 at 133 (Stewart, J., concurring) [emphasis in the original].
[514] *Ibid.* at 138-39 (Stewart, J., concurring) [emphasis in the original]; see also "I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court", *ibid.* at 145.
[515] *Ibid.* at 130-31.

resented. In his dissenting opinion Justice Brennan attacked the Court vigorously based on fundamental assumptions concerning media economy which are close to that of the Bundesverfassungsgericht:

> [I]n light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, and in the commercial world of mass communications, it is simply "bad busi ness" to espouse - or even to allow others to espouse - the heterodox or the contro versial."[516]

Although the Court restated and quoted many of the basic tenets of *Red Lion* it departed from this precedent in certain aspects significantly.[517] As in ordinary free speech doctrine, but unlike in *Red Lion*, the Court emphasized the threats to the first amendment by the government. In the holding of the Court of Appeals the Supreme Court saw a "risk of an enlargement of Government control over the content of broadcast discussion of public issues".[518] It found that this risk is not outweighed by so "speculative a gain".[519] The focus on governmental threats is even more remarkable since the Court made no reference to the threats of 'private censorship' or 'monopolization'.

On the contrary, the Court seems to undermine the *Red Lion* precedent in emphasizing "journalistic discretion". The Court found that Congress had based its broadcasting regulation on "a traditional journalistic role."[520] A limited access right such as was at stake in

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[516] *Ibid.* at 187 (Brennan, J., dissenting, joined by Marshal, J.).
[517] See also *ibid.* at 199 (Brennan, J., dissenting, joined by Marshal, J.).
[518] *Ibid.* at 126.
[519] *Ibid.* at 127.
[520] *Ibid.* at 116 (Burger, C.J., joined by Stewart and Rehnquist, JJ.).

Columbia Broadcasting was seen by the Court to "be a further erosion of journalistic discretion of broadcasters in the coverage of public issues".[521] By this, the Court lays a strong layer of protection around the autonomy of broadcasters[522] whereas *Red Lion* had emphasized that "the licensee has no constitutional right to ... monopolize a radio frequency to the exclusion of his fellow citizens."[523]

The majority in *Columbia Broadcasting* pointed out that a right of access to editorial advertisement is "heavily weighted in favor of the financially affluent, or those with access to wealth."[524] This reasoning is almost cynical if one considers that the Court dealt with a measure which was intended to broaden the access to a medium to which access is already restricted by the huge economic resources necessary to run a broadcasting station. The purchase of advertising requires considerably less money than the foundation of a broadcasting station. The reasoning of the Court appears even more cynical, in light of the holding of the Court of Appeals that the Commission would have to develop "'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints."[525] In a footnote the Court briefly dismissed this proposition and the propositions to subsidize those who cannot afford normal air time as "raising "incredible administrative problems.'"[526]

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[521] *Ibid.* at 124.
[522] Cf. Fiss, "Social Structure" *supra* note 5 at 1409.
[523] *Red Lion, supra* note 192 at 389; see also *Columbia Broadcasting, supra* note 488 at 199 (Brennan, J., dissenting joined by Marshal, J.).
[524] *Columbia Broadcasting, ibid.* at 123.
[525] *Business Executives' Move, supra* note 508 at 664.
[526] *Columbia Broadcasting, supra* note 488 at 123 n. 17, quoting Louis L Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access" (1972) 85 Harv.L.Rev. 768 at 789.

Two decisions not dealing with broadcasting further weakened the *Red Lion* rationale. In *Miami Herald Publishing Co.* v. *Tornillo*, the Supreme Court in a unanimous decision invalidated Florida's "right of reply" statute that granted political candidates a right to answer criticism and attacks on their record by a newspaper. In a relatively short decision the Court, like in *Columbia Broadcasting*, emphasized journalistic discretion: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment."[527]

The Court found this process to be "crucial" and Florida's statute to be "a compulsion to publish that which "'reason' tells them should not be published", and that such a compulsion was unconstitutional under the first amendment.[528] It is noteworthy that the Court refers at no point expressly to *Red Lion* despite the similarity of the cases. Remarkably different to *Red Lion* is the treatment of the possible avoidance of controversial issues by newspapers and broadcasters. In *Red Lion* the Court found this danger to be "at best speculative" and only indicated that it would reconsider its decision when evidence was provided that the rules "have the net effect of reducing rather than enhancing the volume and quality of coverage".[529] In *Tornillo*, on the other hand, the Court did not insist on any such evidence. It was satisfied with the mere possibility of such an effect to invalidate the statute:

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[527] 418 U.S. 241 at 258 (1974) [hereinafter *Tornillo*].
[528] *Ibid.* at 256.
[529] *Red Lion, supra* note 192 at 393.

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under operation o the Florida statute, political and electoral coverage would be blunted or reduced.[530]

In *Tornillo* the Court "returned" to the negative role of government when it stated: "Government-enforced right of access inescapable "dampens the vigor and limits the variety of public debate" ... ."[531] Although the Court was not dealing with broadcasting the sweep of the statements in this decision[532] has affected *Red Lion* as a valid part of the Tradition.

In *Buckley* v. *Valeo*, the Court invalidated a statute limiting the permissible contributions to candidates for federal offices. The Court in a per curiam decision found "that the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment ... ."[533] In *Red Lion* the Court had held that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[534] This finding was based on the role of the first amendment in broadcasting and not as an exception to it.[535] In *Buckley* the Court referred to *Red Lion* in a footnote but without reference to this passage; it only referred to the statement in *Columbia Broadcasting* "that broadcast media pose unique and special prob-

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[530] *Tornillo*, *supra* 527 note at 257.
[531] *Ibid.*, quoting *New York Times*, *supra* note 49 at 279 (1964).
[532] See also *Tornillo*, *ibid.* at 258: "It has yet to be demonstrated how governmental regulation of this crucial process [journalistic discretion] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."
[533] *Buckley*, *supra* note 249 at 48-49.
[534] *Red Lion*, *supra* note 192 at 390.
[535] *Ibid.* at 389.

lems not present in traditional free speech"[536] and the *Red Lion* denial of an individual right to broadcast[537]. Here again the Court did not formally reverse *Red Lion*, but its broad language and merely selective treatment of the decision alienated *Red Lion* from the first amendment bedrock.

In *FCC* v. *National Citizens Committee for Broadcasting*,[538] the Court upheld the cross-ownership regulations of the FCC. The regulations bar the formation or transfer of co-located newspaper-broadcast combinations. Existing combinations were only in exceptional circumstances required to divest of either the newspaper or the broadcasting station. The Court of Appeals upheld the prospective ban but vacated the limited divestiture rules, and ordered the Commission to adopt regulations requiring dissolution of all existing combinations that did not qualify for a waiver.[539]

In upholding the prospective ban the Supreme Court relied on *Red Lion*'s denial of a first amendment right to broadcast, finding that the regulations are a "reasonable means of promoting the public interest in diversified mass communications" and that they therefore "do not violate the First Amendment rights of those who will be denied a broadcast license pursuant to them".[540]

In reversing the judgment of the Court of Appeals concerning the "grandfathering" of existing combinations the Supreme Court was deferring to the weighing of the different policies ('diversification' and 'effective use of radio frequencies') by the FCC:

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[536] *Buckley*, *supra* note 249 at 49-50 n. 55, quoting *Columbia Broadcasting*, *supra* note 488 at 101.
[537] *Ibid.*, quoting *Red Lion*, *supra* note 192 at 388.
[538] *National Citizens Committee*, *supra* note 391.
[539] *National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977).
[540] *National Citizens Committee*, *supra* note 391 at 802.

> [T]he weighing of policies under the "public interest" standard is a task that Con gress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment ... that would re quire the Commission to "presume" that its diversification policy should be given controlling weight in all circumstances.[541]

Also in *FCC* v. *WNCN Listeners Guild* the Court of Appeals for the District of Columbia[542] found a FCC policy insufficiently directed towards the first amendment goal of viewpoint diversity. Again, the Supreme Court reversed the judgment of the Court of Appeals and afforded broad discretion to the FCC. The FCC had issued a Policy Statement announcing that it would rely on market forces to promote diversity in radio entertainment programming and that it would therefore no longer consider changes in entertainment programming as a material factor that should be considered when it rules on an application for renewal or transfer of a license. The Court of Appeals concluded that the market would only imperfectly reflect listeners' preferences. Broadcasters' dependence on advertising revenue would lead to market disruptions, since the broadcasters tend to serve that part of the audience which has large incomes at their disposal.[543]

The Supreme Court on the other hand approved the reliance of the FCC on market forces. It found that "[t]his policy does not conflict with the First Amendment."[544] That the FCC relied without exceptions on market forces[545] was, according to the Court, "in

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[541] *Ibid.* at 810.
[542] *WNCN Listeners Guild* v. *FCC*, 610 F.2d 838 (D.C. Cir. 1979).
[543] *Ibid.* at 851.
[544] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 at 604 (1981) [hereinafter *WNCN*].
[545] The Court of Appeals held that the FCC was obliged to review changes in the entertainment program whenever there is "strong prima facie evidence that the market has in fact broken down." 610 F. 2d at 851. The dissenters, too, criticized that the Commission's policy lacked a "safety valve" procedure. (*WNCN*, *supra* note 544 at 582 ff. (Marshall, J., dissenting, joined by Brennan, J.)).

harmony with cases recognizing that the Act seeks to preserve journalistic discretion while promoting the interest of the listening public."[546]

The approval of this pure reliance on market forces as not contradicting the first amendment gave the FCC's general deregulation policy further drive and reinforced the Commission in fashioning its deregulation policy as constitutionally mandated, or at least endorsed, by the first amendment.

Another push for the Commission's deregulation policy stems from *FCC* v. *League of Women Voters of California*. Relying on *Red Lion* and later decisions the Court found spectrum scarcity to be the prevailing rationale for broadcasting regulation. In a footnote it recognized that this rationale had come under criticism but stated: "We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that revision of the system of broadcast regulation may be required."[547]

The *Fairness Report of 1985*,[548] in which the FCC declared that it would rather rely on market forces and abandon the fairness doctrine, was a direct response to this remark.[549] Later, the US Court of Appeals for the District of Columbia upheld the decision of the FCC to repeal the fairness doctrine although it did not approve the holding of the FCC that the abandonment was required by the first amendment.[550] In another footnote the Court in *League of Women Voters* had declared: "Of course, the Commission may, in the

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[546] *WNCN*, *ibid.* at 596.
[547] *League of Women Voters*, *supra* note 285 at 468 n. 11.
[548] See *supra* note 370 and accompanying text.
[549] See *Meredith Corp.* v. *FCC*, 809 F.2d 863 at 867 (D.C. Cir. 1987); Franklin & Anderson, *supra* note 136 at 814; Carter, Franklin & Wright, *Fifth Estate supra* note 166 at 89.
[550] *TRAC*, *supra* note 372. See also *supra* note 368-72 and accompanying text.

exercise of its discretion, decide to modify or abandon these rules [fairness doctrine], and we express no view on the legality of either course."[551] However, the Court did not grant certiorari and has not since reviewed the abandonment of the fairness doctrine.[552] In *Turner Broadcasting System, Inc.* v. *FCC* the Court declared that it had declined in *League of Women Voters* to question the continuing validity of the scarcity rationale for the broadcasting regulation and that it saw "no reason to do so here."[553]

In this decision the Court dealt with must-carry provisions for cable operators of the *Cable Act of 1992*[554]. S. 4 imposed must-carry rules for local commercial television stations and s. 5 for noncommercial educational television stations like public broadcasters. A highly divided Court held that these provisions could be constitutionally justified, but thought that it was impossible to decide the case without a better factual record.[555] It therefore held that the District Court erred in granting summary judgment in favor of the Government, and remanded the case for further proceedings consistent with its opinion.[556]

Turner is the first major decision of the Supreme Court dealing with cable television and its first amendment status, which it sees somewhere between broadcasting and press. In refusing to apply the *Red Lion* rationale to cable the Court described this rationale as solely based on the "unique physical limitations of the broadcast medium."[557] By this was

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[551] *League of Women Voters, supra* note 285 at 379 n. 12.
[552] 482 U.S. 919 (1987).
[553] *Turner, supra* note 119 at 2457.
[554] 47 U.S.C.S. §§ 534-535 (1995).
[555] Five different opinions were filed and Justice Stevens, who would have rather upheld the provisions, only concurred because otherwise "no disposition of this appeal would command the support of a majority of the Court." *Turner, supra* note 119 at 2475 (Stevens, J., concurring in part and concurring in the decision).
[556] *Ibid.* at 2472.
[557] *Ibid.* at 2456.

meant the scarcity of frequencies and the necessity of regulation to prevent chaos on the airwaves.[558]

The Court relies on *National Broadcasting*, *Red Lion*, *Columbia Broadcasting*, and *League of Women Voters* for its conclusion that the justification of broadcasting regulation is solely based on the unique physical characteristics of the broadcasting medium.[559] As we have already seen, *National Broadcasting* and *Red Lion* emphasized in many statements the physical characteristics of broadcasting, and it is unquestionable that later decisions such as *Columbia Broadcasting* or *Buckley* exclusively mentioned these characteristics as the justification for broadcasting regulation. Nonetheless it is questionable whether this is also true for the two earlier decisions.

In *National Broadcasting* the Court started its review of FCC regulations with the observation of "the far-reaching rôle which radio plays in our society ... ."[560] Also the conclusion that radio is a scarce and thus valuable resource, and so "cannot be left to wasteful use without detriment to the public interest",[561] indicates that the reason for the necessity of regulation was not seen by the Court in mere 'technicalities' but, at least in part, in the social function and importance of broadcasting.

The whole ambiguity of *Red Lion* on this point is captured in one part of the decision which followed the denial of a first amendment right to broadcast and found that "as the

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[558] *Ibid.* at 2457.
[559] *Ibid.* at 2456.
[560] *National Broadcasting, supra* note 490 at 193.
[561] *Ibid.* at 216; cf. also, *ibid.*: "The Commission's licensing function cannot be discharged ... merely by finding that there are no technological objections to the granting of a license."

first amendment is concerned those who are licensed stand no better than those to whom a license is refused":[562]

> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." *Because of the scarcity of radio frequencies*, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this *unique medium*. But *the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consis tently with the ends and purposes of the First Amendment.*[563]

By only mentioning the "scarcity of radio frequencies" the Court seems to indicate that this is the only justification for governmental regulation, but in recognizing a "collective right" of "the people as a whole" to have a broadcasting system which operates according to first amendment goals the Court seems to leave this narrow path. The recognition of this collective right puts the government in a position to safeguard the fulfillment of a social function by the broadcasters. Thus, this strong holding broadens the basis of governmental regulation; its role is not merely to implement some traffic rules and implement regulation to chose among the applicants (on grounds not contradicting first amendment values), but it is mandated to act upon the needs of society as a whole in the well-functioning of discourse in and by broadcasting. The characterization of the Supreme Court's broadcasting jurisprudence by the *Turner* Court as "a less rigorous standard of

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[562] *Red Lion, supra* note 192 at 389.
[563] *Ibid.* at 389-90 [emphasis added].

First Amendment scrutiny"[564] ignores that part of the *Red Lion* which ascribed a more active and positive role to the government.

The *Turner* Court also rejected the government's claim that the Court's broadcasting jurisprudence is founded more on the "'market dysfunction' that characterizes the broadcast market" than on the physical limitations of the medium.[565] Although the Court conceded that the "cable market suffers certain structural impediments", it did not follow the government's argument that the similarities in the markets of cable and broadcasting would justify the application of the *Red Lion* standard to cable.[566] The Court did not deal with statements in *National Broadcasting* and *Red Lion* which indicate that the Court had earlier given some weight to the "fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.'"[567] Although the *Turner* Court declared that the physical and not the economic characteristic of the medium underlies its jurisprudence, it found it necessary to state that "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield speech regulation from First Amendment standards applicable to non-broadcast media."[568] This is somewhat inconsistent since it could well be understood as indicating that the evidence of market failure or dysfunction could justify the application of *Red Lion* standards.

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[564] *Turner, supra* note 119 at 2456.
[565] *Ibid.* at 2457.
[566] *Ibid.* at 2457-58.
[567] *Red Lion, supra* note 192 at 395, quoting *FCC* v. *Potsville Broadcasting Co.*, 309 U.S. 134 at 137 (1940); see also *National Broadcasting, supra* note 490 at 219 quoting the same passage.
[568] *Turner, supra* note 2458.

According to its physical rationale for broadcasting regulation, the Court, in distinguishing cable from broadcasting, relied only on the "different technologies through which they reach viewers."[569] The question of whether that which 'reaches the viewers' differs significantly in form, content, and the way it impacts on society was consequently not addressed. The Court found that the *Red Lion* standard was inapplicable since "cable television does not suffer from inherent limitations that characterize the broadcast medium."[570] The "fundamental technological differences" according to the Court are the absence of the danger of signal interference in cable and that because of technological advances there "soon ... may be no practical limitations on the number of speakers who may use the cable medium."[571] The reliance on unlimited carriage capacities in the future is surprising enough, since the Court only four paragraphs earlier found that the speech-restrictive character of the must carry-rules lies in the reduction of channels over which cable operators have control and that they limit the number of channels for cable programmers.[572]

However, the Court rejected cable industry claims to subject the must-carry rules to the heightened scrutiny of *Tornillo*. The Court found that because of the bottleneck control which cable operators exercise over television programming they have a greater control over the availability of information than a newspaper, which enjoys monopoly status. Unlike a cable operator a newspaper cannot obstruct readers' access to other publications. This "unique physical characteristic ... of cable transmission"[573] is in the eyes of the Court

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[569] *Ibid.* at 2457-58.
[570] *Ibid.* at 2457.
[571] *Ibid.*
[572] *Ibid.* at 2456.
[573] *Ibid.* at 2457.

a "potential for abuse of their private power over a central avenue of communication that cannot be overlooked."[574]

The Court held that the proper standard of scrutiny for the must-carry provisions was an intermediate level of scrutiny since it found the provision to be content-neutral.[575] The majority of the Court found that the objective of the must-carry provisions was content-neutral since it saw the aim of the regulation to be the preservation of 'free' over-the-air television services for those who cannot afford or do not want to subscribe to cable television. This finding was the main target of the dissenters' attacks who argued with good reasons that the provisions were content-related. The dissenters relied mainly on the findings of the Congress which are enacted as s. 2 of the *Cable Act of 1992*. There it says with respect to commercial local broadcasters: "Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[576] And with respect to noncommercial educational stations: "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens."[577]

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[574] *Ibid.* at 2466. In this context the Court also seems to echo a *Red Lion* tenet concerning the active role of government in the first amendment area (see *supra* note and accompanying text), but not only does the Court not cite *Red Lion*, it draws no further conclusion other than not to apply the heightened scrutiny of *Tornillo*: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas. ... We thus reject appellants' contention that *Tornillo* and *Pacific Gas & Electric* require strict scrutiny of the access rules in question here." (*Ibid.*, internal citations omitted).

[575] *Ibid.* at 2469.

[576] *Cable Act of 1992*, *supra* note 418 § 2(a)(11).

[577] *Ibid.* § 2(a)(8)(A).

The majority saw these statements as expressing merely that the government viewed broadcast television to be of some value, so that it is worth pursuing it.[578] The dissenters rightly pointed out that the statute displays that Congress based its decision to promote broadcasters at least in part on the content of those stations (local, educational, public affairs, and informational programming) and gave weight to the fact that it is "rare enough that Congress states, in the body of the statute itself, the findings underlying its decision."[579]

However, although the Court took some pains to find the must-carry provisions content-neutral, it was nonetheless "unable to resist the temptation of fact-intensive analysis."[580] After holding that viewed in the abstract the provisions would pass intermediate scrutiny the leading opinion went on to review whether the provisions "will in fact advance" the abstractly important government interests.[581] The leading opinion found that the government had not provided enough evidence to prove that the asserted dangers for the broadcasters were real. Therefore, it vacated the judgment of the District Court and remanded the case to resolve further factual questions. How exacting the standard of proof for the government is can be seen in the following statement:

> We think it significant, for instance, that the parties have not presented any evi dence that local broadcast stations have fallen into bankruptcy, turned in their broadcast license, curtailed their broadcast operations, or suffered a serious reduc tion in operating revenues as a result of their being dropped from, or otherwise dis advantaged by, cable systems.[582]

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[578] *Turner, supra* note 119 at 2462.
[579] *Ibid.* at 2477 (O'Connor, J., dissenting, joined by Scalia, Ginsburg, Thomas, JJ.).
[580] Mathew D. Segal, "First Amendment and Cable Television" (1995) 18 Harv.J.L. & Pub.Pol'y 916 at 924.
[581] *Turner, supra* note 2470.
[582] *Ibid.* 2472.

Justice Stevens disagreed on this point with the leading opinion and remarked critically that "[a]n industry need not be in its death throes before Congress may act to protect it from harm threatened by a monopoly."[583]

But even more remarkable than the application of such exacting scrutiny standards under the intermediate-level scrutiny is the fact that the leading opinion did not differentiate between the two different must-carry provisions.[584] Whereas some suspicion might be justified as to whether the provision concerning the commercial stations is merely a protectionist regulation in the garb of promoting first amendment goals,[585] the provision concerning public broadcasters rests on a wholly different first amendment basis.[586] Not only are those stations not suspicious of using governmental regulations to protect their profit interests; the programs provided by these stations - inter alia assured by their noncommercial form of operation - lie at the 'core' of the first amendment purpose "of producing an informed public capable of conducting its own affairs"[587].

In ignoring the differences between the two provisions the Court departs remarkably from principles set out in *Red Lion* and which it reiterated in later decisions. At the expense of first amendment goals related to the democratic process the *Turner* Court protects "cable operators' ... unfettered control"[588] over their cable systems. Despite its rhetoric that the "First Amendment ... does not disable the government from taking steps to ensure

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[583] *Ibid.* at 2474 (Stevens, J., concurring in part and concurring in the judgment).
[584] Cass R. Sunstein, "The First Amendment in Cyberspace" (1995) 104 Yale L.J. 1757 at 1775.
[585] *Ibid.* at 1767; Collins & Skover, *supra* note 208 at 209.
[586] Sunstein, *ibid.* at 1775-77; see also Monro E. Price & Donald W. Hawthorne, "Saving Public Television: The Remand of *Turner Broadcasting* and the Future of Cable Regulation" (1994) 17 Hastings Comm. & Ent.L.J. 65 at 91-95, arguing that on remand, the district court should uphold s. 5 even if it finds s. 4 unconstitutional.
[587] *Red Lion, supra* note 192 at 392.
[588] *Turner, supra* note 119 at 2456.

that private interests not restrict ... the free flow of information and ideas" the *Turner* Court gives no particular weight to governmental attempts seeking to safeguard that 'all ideas will be heard'. At least, in *Turner* the Court shows the government no way to pursue these goals effectively while remaining consistent with the Court's understanding of the first amendment.[589]

2. Regulation of Offensive Content

A broader basis for the regulation of broadcasting might be found in the area of offensive content. In a 5-4 decision in *FCC* v. *Pacifica Foundation* the Supreme Court upheld the power of the FCC to regulate broadcasts that are indecent but not obscene. A radio station broadcasted, during the afternoon, a monologue by comedian George Carlin entitled "Filthy Words" which included language describing sexual and excretory activity.[590] The FCC had issued an order holding that the station could have been the subject of administrative sanctions. Ordinary first amendment doctrine draws the line separating unpro-

[589] The recommendation of Justice O'Connor in her dissenting opinion that government could pursue its goals by subsidizing "broadcasters that it thinks provide especially valuable programming" (*Turner, supra* note 119 at 2480 (O'Connor, J., dissenting, joined by Scalia, Ginsburg, Thomas, JJ.)) is in the face of tight budgetary situations only of limited help. And it is also quite questionable whether big scale subsidies of this kind would pass the scrutiny of the Court. So far the Court treated subsidies far more generously than regulatory measures. But as Fiss, "Social Structure" *supra* note 5 at 1424, remarked the Supreme Court "[w]hen subsidies are involved ... allows the state to act [but] - the Court's torn, and the opinions incoherent ... ." The subsidy-recommendation does not lead the government to safe first amendment ground. In *League of Women Voters, supra* note 285, the Supreme Court in a narrow 5 to 4 decision dealing with subsidies for noncommercial, educational broadcasters the members of the majority and the dissenters could not even agree on an approach how to test the constitutionality of provisions setting conditions for subsidies. See especially Chief Justice Rehnquist's (then Justice) furious attack of the majority in which he compares the review of the majority with the telling of the fairy tale of the "Little Red Riding Hood"; *ibid.* at 402 ff.

[590] *Pacifica, supra* note 378 at 729-30.

tected from protected content between obscenity, as defined by *Miller* v. *California*,[591] and indecency, which the Court defined as "nonconformance with accepted standards of morality."[592] The Court relied in its decision on the distinctions between broadcasting and other media of expression. It found that "[t]he reasons for these distinctions are complex ... ."[593] The Court did not describe them any further but only mentioned two elements which it found important in that case; both of which differ from the scarcity and signal-interference rationale. The Court found it important that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"[594], and that "broadcasting is uniquely accessible to children ... ."[595] The Court held that these reasons justified the Commission's regulation to channel indecent programming to those times of day when children are most likely not exposed to it.[596]

In *Turner* the Court did not refer to the rationales given in *Pacifica* for the regulation of broadcasting. In dealing with content regulation the Court only stated that "our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming."[597]

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[591] 413 U.S. 15 at 24 (1973). According to *Miller*, material is obscene when (1) the average person, applying contemporary community standards would find the work, taken as a whole, appeals to prurient interest in sexual activity; (2) the work depicts or describes, in a patently offensive way, real or simulated sexual conduct; and (3) the material, taken as a whole, lacks serious literary, artistic, political or scientific value. The *Miller* test is still used today. See, *e.g.*, Friedman, *supra* note 464 at 1033).

[592] *Miller*, *ibid.* at 740.

[593] *Pacifica*, *supra* note 378 at 748.

[594] *Ibid.*

[595] *Ibid.* at 749.

[596] *Ibid.* at 750.

[597] *Turner*, *supra* note 119 at 2464.

Cases following *Pacifica* did not apply its rationale to other electronic media. In *Cruz* v. *Ferre*, the court stroke down as overbroad an ordinance which banned the distribution of obscene and indecent programming on cable television. The court held that the pervasiveness rational of *Pacifica* did not apply to cable. Cable, unlike broadcasting, required the affirmative decision to subscribe and children could be protected through the use of lockboxes that permit the parents to lock channels out of their reach.[598]

Several law suits filed by Carlin Communications dealt with restrictions on dial-a-porn services. The courts did not apply the *Pacifica* rationale to the various attempts of the FCC to restrict access of children to these services. The FCC regulations were a response to an amendment of the *Communications Act* which prohibited "by means of telephone ... any obscene or indecent communication for commercial purposes to any person under eighteen years of age ... ."[599] A regulation limiting the dial-a-porn services to the hours between 9. p.m. and 8 a.m. was invalidated as not sufficiently narrowly tailored,[600] as was the requirement to either send messages only to adults who had obtained an access code from the provider, or, alternatively, to require credit card payment before access could be obtained.[601] A third decision upheld a regulation which added to the access code or credit card requirement the possibility for the service provider to scramble the messages, so that they would be unintelligible unless the customer used a descrambler. But the court held

[598] *Cruz*, *supra* note 444.
[599] *Federal Communications Commission Authorization Act of 1983*, Pub. L. No. 98-214, § 8(b), 97 Stat. 1467 at 1470.
[600] *Carlin Communications, Inc.* v. *FCC (I)*, 749 F.2d 113 (2d Cir. 1984).
[601] *Carlin Communications, Inc.* v. *FCC (II)*, 787 F.2d 846 (2d Cir. 1986).

that the regulation could not be applied to non-obscene speech, and that the FCC had to change the regulations when less restrictive technology becomes available.[602]

In 1988 Congress amended s. 223(b) of the *Communications Act* and imposed a total ban on indecent as well as obscene interstate commercial telephone messages. In *Sable Communications of California, Inc.* v. *FCC* The Supreme Court invalidated the ban on indecent messages, since it was not sufficiently narrowly drawn and thus violated the first amendment. The government asserted that "nothing less [than a total ban] could prevent children form gaining access to such messages."[603] It sought to defend the provision by relying on *Pacifica*. The Court rejected that claim. It described *Pacifica* as "an emphatically narrow holding" and found that it was based on the "unique" attributes of broadcasting which would not apply to telephone communications. [604] The telephone medium especially lacked the unique pervasiveness of broadcasting, since the listener had "to take affirmative steps to receive the communication."[605] The Court in *Sable* made clear that the pervasiveness rationale of *Pacifica* is nothing more than a 'protection from surprises' and does not refer to the importance of the medium as 'a pervasive means in public discourse':

> Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broad cast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding expo sure.[606]

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[602] *Carlin Communications, Inc.* v. *FCC (III)*, 837 F.2d 546 (2d Cir. 1988).
[603] *Sable, supra* note 251 at 129.
[604] *Ibid.* at 127.
[605] *Ibid.* at 128.
[606] *Ibid.*

Pacifica, at least in the version of the *Sable* Court, does not offer the government a starting point for regulations safeguarding the democratic function of broadcasting which impose duties on the broadcasters, e.g., in form of content-related programming principles.[607] The restrictive interpretation of *Pacifica* by the Supreme Court and lower courts reduced its importance as a model for regulation in other electronic media. In *ACLU* v. *Reno Pacifica* in combination with *Sable* and *Turner* it served the US District Court to justify its holding that the 'indecency' ban on Internet-communication was unconstitutional.[608]

The three judges unanimously found that the ban violated the first amendment. Although they filed three separate opinions they were in general agreement and only emphasized different aspects. Both Skloviter, C.J., and Dalzell, J., relied heavily on *Pacifica*. They rejected the government's claim that *Pacifica* authorized it to regulate indecent speech in this area. In his opinion the Chief Judge pointed out that Internet communication resembles more the telephone communication at issue in *Sable* than broadcasting.[609] Dazell, J., found that the government had ignored "*Pacifica*'s roots as a decision addressing the proper fit between broadcasting and the First Amendment."[610] And went on:

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[607] The regulations meant here are mainly positive requirements concerning the programming of broadcasters, like requirements to cover certain subjects and/or to do this in a certain manner, *e.g.*, "fair", "objective", "respecting human dignity". For adherents of an individualistic or purely marketplace oriented understanding of the first amendment the best way for the government to safeguard democratic goal is of course to refrain from any regulation other than anti-trust enforcement. Thus, in their view, *Sable* is a good starting point to assure the democratic function of broadcasters - by leaving the regulation to the forces of the market place.

[608] See *supra* notes 467-75 and accompanying text for a description of the facts of this case.

[609] *Reno*, *supra* note 461 at 37.

[610] *Ibid.* at 66.

> The legal significance to this case of *Turner*'s refusal to apply the broadcast rules to cable television cannot be overstated. *Turner*'s holding confirms beyond doubt that the holding in *Pacifica* arose out of the scarcity rationale unique to the under lying technology of broadcasting, and not out of the end product that the viewer watches. That is, cable has no less of a "uniquely pervasive presence" than broadcast television, nor is cable television more "uniquely accessible to children" than broadcast. From the viewer's perspective, cable and broadcast television are identical: Moving pictures with sound from a box in the home.[611]

Consequently, to this interpretation which resembles the view of the former FCC Chairman Mark Fowler that "television is just a toaster with pictures",[612] the panel in its expansive fact findings gave only a very brief and general description of pornographic material available on the Internet.[613]

Dazell, J., who focused more strongly than the other judges on the Internet as a new, evolving mass medium, found that "[a]ny content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."[614] The *CDA* would, contradictory to the first amendment, interrupt the "never-ending worldwide conversation", since "[a]s the most participatory form of mass speech yet developed, the Internet deserves the highest protection form governmental intrusion."[615]

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[611] *Ibid.* at 69 (internal citation omitted).
[612] Bernard D. Nossister, "Licenses To Coin Money: The F.C.C.'s Big Giveaway Show", (1985) 240 Nation 402 (quoting Mark Fowler).
[613] See *Reno, supra* note 461 at 27: "The parties agree that sexually explicit material exists on the Internet. Such material includes text, pictures, and chat, and includes bulletin boards, newsgroups, and the other forms of Internet communication, and extends from the modestly titillating to the hardest-core. There is no evidence that sexually-oriented material is the primary type of content on this new medium." The court did not mention the controversial study of the Carnegie Mellon University (CMU) which suggested that pornographic communication formed a main (if not *the* main) part of the actual use of the Internet. (See Marty Rimm, "Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories" (1995) 83 Geo.L.J. 1849; see also *ibid.* for a detailed description of pornography available on-line). The controversy about the CMU-study is documented on the Internet: Project 2000, <http://www2000.ogsm.vanderbilt.edu>.
[614] *Reno, supra* note 461 at 76.
[615] *Ibid.* at 78.

And, perhaps somewhat carried away by the Information Superhighway hype, he concluded by equating the 'Net' and free speech in popular 'cyberian' fashion: "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects."[616]

3. Conclusion: Autonomy in the Marketplace

The treatment of electronic mass media under the first amendment has undergone dramatic changes in the last 25 years. Without 'officially' reversing its decision in *Red Lion* it has become a lonely stranger in the first amendment Tradition.[617] The mention of the democratic goal of self-government, in *Red Lion* still overwhelmingly the purpose of the first amendment, is sought for in vain in *Turner*. Instead Justice Kennedy praised individual autonomy for the Court: "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."[618]

But the shift from democratic values to individual autonomy and, as Cass Sunstein put it, "the extraordinary transformation of the First Amendment ... into a species of neoclassical economics" [619] has mostly not been as explicit. More often the change happened

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[616] *Ibid.*
[617] Fiss, "Social Structure" *supra* note 5 at 1416; Weinberg, *supra* note 5 at 1103 ff.; see also Syracuse Peace Council, 2 F.C.C.R. 5042 at 5056 (1987), where the FCC stated with respect to *Red Lion*: "[I]t cannot be reconciled with well-established constitutional precedent."
[618] *Turner, supra* note 119 at 2458.
[619] Sunstein, *Democracy supra* note 134 at xviii.

through a selective and restrictive reading of precedents which reduced their former vigor. Similar results occur in the application of principles that rest soundly on democratic values, in contexts where these values are in doubt. This is maybe most obviously displayed in the justification of the new protection of commercial speech: "It is a matter of public interest that those [consumer] decisions, in the aggregate, be intelligent and well informed. To this end the free flow of information is indispensable."[620] This reads almost like a satirical 'commercialization' of "an informed public capable of conducting its own affairs."[621]

Another example of this transformation is the 'export' of 'journalistic discretion' from *Tornillo* to the cable operators in *Turner*. Justice O'Connor in her dissenting opinion explicitly speaks of the "editorial discretion" of cable operators and rightly observes that the protection of this discretion is what underlies the decision of the majority.[622] The process of evaluating information, choosing material for publication, and deciding about the form of the presentation, is beyond doubt the most vital part of a free press, and there are good reasons to shield this process from external pressures. However, it is quite questionable how comparable the choices of journalists and editors are to those of cable companies. Although the choices cable companies make have a large influence on what kind of information gets published, they are not involved in the same kind of delicate and sensitive process which takes place every day in the editorial offices of newspapers or television stations. Regulatory interference with value-judgments and choices which often have to be

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[620] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 at 765 (1976).
[621] *Red Lion, supra* note 192 at 392.
[622] *Turner, supra* note 119 at 2480 (O'Connor, J., dissenting, joined by Scalia, Ginsburg, Thomas, JJ.); see also *ibid.* at 2456 and *supra* note 572 and accompanying text.

made in minutes seems to be far more at risk of resulting in actual censorship than in the imposition of clear-cut obligations on cable companies' choices. This is not to say that regulation of those decisions does not bear any risk of censorship, or that those choices are only made according to economic interests whereas journalists and editors engage in 'pure' first amendment activity, but there is nonetheless a qualitative difference between the two processes, and there is also enough reason to believe that there is a significant difference in 'quantity': although newspapers and television stations are big business it seems fair to say that the number of decisions taken in editorial offices considering the intrinsic value of the 'idea' rather than how to maximize the shareholders' profits is significantly higher than those taken by the management of cable companies.[623]

An implicit acceptance that economic interests are now ruling the first amendment may be seen in the fact that listeners and viewers, who were once paramount, are now perceived as 'consumers'; and what was once 'vital regulation' is now labeled 'consumer protection'.[624]

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[623] Both majority and dissenters in *Turner* recognized that there is a specific danger that cable operators would choose or drop TV stations according to strategic company interests, *e.g.*, to drop broadcasters which compete directly with TV stations that are owned by the cable companies. As noted above the leading opinion found that there was not enough evidence provided for the conclusion that there is a 'real' risk. Justice Stevens, who wanted to affirm the must-carry provisions, pointed out that to remand the case "may actually invite the parties to adjust their conduct in an effort to affect the result of this litigation (perhaps by opting to drop cable programs rather than seeking to increase total channel capacity).": *Turner, supra* note 119 at 2475 (Stevens, J., concurring in part and concurring in the judgment); see also Segal, *supra* note 580 at 927-28.

[624] Cf. President George Bush's disapproval of the Children's Television Act, *supra* note:"[The Constitution] does not contemplate that government will dictate the quality or the quantity of what Americans should hear - rather, it leaves this to be decided by free media responding to the free choices of individual consumers." (Government Printing Office, Weekly Compilation of Presidential Documents, vol. 26, no. 2, at 1611 (Oct. 22, 1990)) ; cf. also Cable Television *Consumer* and Protection Act of 1992; see also Justice Stevens dissenting in *United States* v. *Edge Broadcasting* Co. 113 S.Ct. 2696 at 2710 (1993) (upholding a ban on lottery advertising): "[T]he United States has selected the most intrusive, and dangerous, form of regulation possible - a ban on truthful information regarding a lawful activity imposed for purpose of manipulating, through ignorance, the *consumer choices* of some of its citizens." (Stevens, J., dissenting, joined by Blackmun, J.) [emphasis added].

The recent controversy among German commentators[625] over whether or not the US Supreme Court recognizes a 'protection right' in its first amendment jurisprudence has, to be answered in the negative, at least in regard to decisions after *Red Lion*. *Red Lion*, with its sweeping language concerning the rights of listeners and viewers on the one hand, and on the other the emphasis on 'technical' scarcity, had the potential for both directions. The Supreme Court chose to emphasize technological differences.

A good description of the status of the first amendment on this path is Judge Dazell's opinion in *Reno*:

> Most marketplaces of mass speech ... are dominated by a few wealthy voices. These voices dominate -- and to an extent, create -- the national debate. Individual citizens' participation is, for the most part, passive. Because most people lack the money and time to buy a broadcast station or create a newspaper, they are limited to the role of listeners, i.e., as watchers of television or subscribers to newspapers. Economic realities limit the number of speakers even further. Newspapers compet ing with each other and with (free) broadcast tend toward extinction, as fixed costs drive competitors either to consolidate or leave the marketplace. As a result, peo ple receive information from relatively few sources. ... Nevertheless, the Supreme Court has resisted governmental efforts to alleviate these market dysfunctions.[626]

The reason for this resistance is that the "goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what shall be voiced largely into the hands of each of us"."[627]

And while *Red Lion* saw governmental and private censorship as equal threats to freedom of expression, Justice O'Connor seems to speak for the whole Court, when after not-

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[625] See *supra* notes 483-85 and accompanying text.
[626] *Reno*, *supra* note 461 at 74 (internal citations omitted).
[627] *Ibid.* at 76, quoting *Leathers* v. *Medlock*, 499 U.S. 439 at 449 (1991) quoting *Cohen*, *supra* note 212 at 24.

ing that she has "no doubt that there is danger in having a single cable operator decide what millions of subscribers can or cannot watch"[628], she wrote in her dissent in *Turner*:

> But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat of free ex pression; and as a consequence, the Amendment imposes substantial limitations on the Government even when its trying to serve concededly praiseworthy goals.[629]

[628] *Turner, supra* note 119 at 2480 (O'Connor, J., dissenting, joined by Scalia, Ginsburg, Thomas, JJ.)
[629] *Ibid.*

A. Freedom of Expression

Freedom of expression as an express constitutional guarantee has a short history in Canada. It was only with the enactment of s. 2(b) of the *Charter of Rights and Freedoms* in the 1982 Constitution Act[630] that freedom of expression gained undoubted constitutional status.

The 'implied Bill of Rights' theory gave freedom of expression and especially political speech in pre-*Charter* law some kind of constitutional status.[631] This theory suggested that the preamble of the Constitution Act, 1867, which gave Canada a "Constitution similar in principle to that of the United Kingdom", and the very notion of parliamentary government itself, were evidence of constitutional protection of fundamental freedoms. They were seen as removed from Parliament's sovereignty and the courts could invoke them to strike down legislation violating those freedoms. Although the theory was approved in a series of Supreme Court cases[632] it was never ratio of any of these decisions.[633] Freedom

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[630] *Canada Act 1982*, c. 11 (U.K.), Schedule B (the Constitution Act, 1982) [hereinafter *Charter*].

[631] See Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 958-59; Roderick A. Macdonald, "The New Zealand Bill of Rights Act: How far does it or should it stretch?" in 1993 New Zealand Law Conference, *The Law and Politics: Conference Papers Volume 1* (Wellington, New Zealand, 2 to 5 March 1993) 94 at 122-23; Irwin Cotler, "Freedom of Assembly, Association, Conscience and Religion (s. 2(a), (c) and (d))" in Gérald-A. Beaudoin & Walter S. Tarnopolsky, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982) 123 at 131-33.

[632] *Re Alberta Statutes*, [1938] S.C.R. 100 (province could not require newspapers to give government right of reply to criticism of government's policies); *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299 (province cannot prosecute for seditious libel the distribution of religious tracts); *Switzman* v. *Elbing*, [1957] S.C.R. 285 (province cannot prohibit the use of a house to propagate communism).

[633] Macdonald, *supra* note 631 at 122; Cotler, *supra* note 631 at 133. However, in Switzman, *ibid.* Abott, J., based his concurring opinion on the 'implied Bill of Rights' theory.

of expression under the 'implied Bill of Rights Theory' was a purely negative right. It was only invoked by the Court in cases where provincial governments attempted to restrict freedom of expression. Thus, the 'implied Bill of Rights' theory offers no starting points for a positive or 'objective' understanding of freedom of expression.

In 1978, *Attorney General of Canada and Dupond* v. *City of Montreal* seemed to have buried the theory when Beetz, J., stated for the majority that no principle of fundamental freedom "is so enshrined in the Constitution as to be beyond the reach of competent legislation."[634] Irwin Cotler, a prominent *Charter*-proponent, argues that *Dupond* left fundamental freedoms vulnerable since the competent legislator could "circumscribe, or even abolish" them.[635] *Charter*-critic Roderick A. Macdonald on the other hand notes that several post-*Charter* decisions indicate a resurrection of the theory.[636] Without mentioning the term 'implied Bill of Rights theory' these decisions are using a language with clear reference to that theory.[637] Nonetheless, since the enactment of the *Charter* the Supreme

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[634] [1978] 2 S.C.R. 770 at 796 (upholding a by-law that imposed a temporary prohibition on assemblies. Parades and gatherings).

[635] Cotler, *supra* note 631 at 133. But see Hogg, *supra* note 631 at 959, who argues that *Dupond* only refused to include freedom of assembly in the 'implied Bill of Rights'.

[636] Macdonald, *supra* note 631 at 122-23. He (*ibid.* at 98 ff.) is skeptical whether the constitutional entrenchment of rights and freedoms is necessary for the protection of civil libertarian values in society. In giving them constitutionally a formal superior status their actual status is not necessarily enhanced but can be worsened compared to their status without formal override 'protection'.

[637] *Re Fraser and Public Service Staff Relations Board* [1985] 2 S.C.R. 455 at 462-63: "[F]reedom of speech is a deep rooted value in our democratic system of government. It is a principle of our common law Constitution, inherited from the United Kingdom by virtue of the preamble to the Constitution Act, 1867."; *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 584: "Prior to the adoption of the *Charter*, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status."; *OPESU* v. *Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 57: Beetz, J., writing for the majority, explicitly approved earlier jurisprudence supporting the notion of an 'implied Bill of Rights' and went on: "[Q]uite apart from *Charter* considerations, the legislative bodies ... must conform with these basic structural imperatives [relating to freedom of expression] and can in no way override them."

Court has focused on s. 2(b) of the *Charter* for the protection of freedom of expression as a fundamental, constitutional right.

S. 2(b) expressly guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[638] From the beginning of its review of s. 2(b) the Canadian Supreme Court considered and consulted first amendment jurisprudence.[639] Although the Canadian Court gave it some weight it departed from the American path in important aspects. Already in the earliest *Charter* cases the Canadian Supreme Court rejected any notion of freedom of expression as an absolute right.[640] In its search for a sound balance between freedom of expression and other constitutional values the Canadian approach resembles more that of Germany. Also the constitutional muster for limitations of freedom of expression entails, at least in its form, significant parallels to the jurisdiction of the Bundesverfassungsgericht. After deciding whether a certain activity falls within the sphere of s. 2(b) the Court asks whether an infringement of this activity can be justified under the limitation clause of s. 1 of the *Charter*.[641]

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[638] *Charter, supra* note 630.

[639] *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 756-60 [hereinafter *Ford*]; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 738-744 [hereinafter *Keegstra*].

[640] See *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 980 [hereinafter *Irwin Toy*]; *Ford, supra* note 639 at 769-70; *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136 [hereinafter *Oakes*]: Dickson, C.J., stated generally: "The rights and freedoms guaranteed by the *Charter* are not, however, absolute."

[641] S. 1 simultaneously secures and limits the enumerated rights and freedoms of the *Charter, supra* note 630: "The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

1. Scope of Protection

The Supreme Court found that "expression" in s. 2(b) means every activity that conveys meaning.[642] In deciding the scope of protection of the rights and freedoms under the *Charter* the Court emphasized the importance of a purposive interpretation. The *Charter* guarantees have to be interpreted in light of their larger objects.[643] With an eye to the American first amendment jurisprudence the Supreme Court sees the purpose of s. 2(b) in all three major values of the first amendment:

> 1) seeking and attaining truth is an inherently good activity; 2) participation in so cial and political decision-making is to be fostered and encouraged; and 3) diver sity in forms of individual self-fulfillment and human flourishing ought to be cul tivated in a tolerant and welcoming environment ... .[644]

In basing freedom of expression expressly on both individual and collective values the Canadian approach dovetails with German jurisprudence.[645]

As a result of this purposive approach the Court affords s. 2(b) protection to any expression regardless of its content.[646] The Court expressly rejected the (older) American approach of excluding whole categories of speech from constitutional protection. The

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[642] *Keegstra, supra* note 639 at 731-33; *Irwin Toy, supra* note 640 at 969-70 (excluding only expressions which are violent in *form*)

[643] See *e.g., R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344 [hereinafter *Big M*]; *Hunter* v. *Southam*, [1984] 2 S.C.R. 145 at 156; with respect to freedom of expression: *R.* v. *Zundel*, [1992] 2 S.C.R. 731 at 752 [hereinafter *Zundel*]; *Ford, supra* note 639 at 766

[644] *Keegstra, supra* note 639 at 728; *Irwin Toy, supra* note 640 at 976; see also *Ford, supra* note 639 at 765-67.

[645] See *supra* notes 43-44 and accompanying text.

[646] *Keegstra, supra* note 639 at 760; See Hogg, *supra* note 631 at 964-65 for content neutrality as the governing principle of the Supreme Court's definition of expression.

Court held that it is analytically preferable to keep apart the question of the scope of s. 2(b) and the question of constitutional limitations of freedom of expression.[647] Thus, the Court considers the content of speech only under the limitations clause of s. 1 of the *Charter*.[648] Consequently the Court has found hate speech[649], pornography[650], and commercial speech[651] to be prima facie protected expression under s. 2(b).

2. Limitations

Once an action falls into the ambit of freedom of expression the plaintiff must prove governmental infringement upon his or her right.[652] If the government's purpose was to limit freedom of expression the Court automatically assumes an infringement.[653] Otherwise the plaintiff must prove that the governmental actions had the effect of violating his or her right.[654]

After an infringement has been found the Court engages in a s. 1 analysis to examine whether it "can be demonstrably justified in a free and democratic society"[655]. Applying

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[647] *Keegstra*, *ibid.* at 733-34.
[648] *Ibid.* at 732.
[649] *Zundel*, *supra* note 643 at 753-60; *Canada* v. *Taylor*, [1990] 3 S.C.R. 892 at 914; *Keegstra*, *supra* note 639 at 730-34.
[650] *R.* v. *Butler*, [1992] 1 S.C.R. 452 at 489 [hereinafter *Butler*].
[651] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R 199 at 326 [hereinafter *MacDonald*]; *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 241-45[hereinafter *Rocket*]; *Irwin Toy*, *supra* note 640 at 971; *Ford*, *supra* note 639 at 766-67.; for details see Hogg, *supra* note 631 at 969-972.
[652] *Irwin Toy*, *ibid.* at 970-71.
[653] *Keegstra*, *supra* note 639 at 729; *Irwin Toy*, *ibid.* at 973.
[654] *Keegstra*, *ibid.* at 729-30; *Irwin Toy*, *ibid.* at 976.
[655] S. 1 of the *Charter*, *supra* note 630. For a detailed overview of the limitations of s. 2(b) see Hogg, *supra* note 631 at 965-988.

the test developed in *Oakes*[656] the Court requires that the limitation serve a pressing and substantial objective in a free and democratic society. The Court then continues to apply a three-prong proportionality test. First, there must be rational connection between the measure adopted and the objective of the limitation. Second, the limitation must only minimally impair freedom of expression. Third, the Court requires a proportionality between the government's objective and its effects. Only when the Court is satisfied that the salutary effects outweigh the deleterious effect will it uphold the measure.

In applying the *Oakes* test in the area of freedom of expression the Court applies a contextual approach. The Court gives great weight to the factual and social context of each case. In the balancing it weighs the intensity of the limitation, the value of the speech at stake according to the purpose of freedom of expression, and the possible harm caused by the expression the government seeks to prevent.[657]

In a series of hate speech cases the Court displayed a remarkable sensitivity to the social effects of harmful speech.[658] In *R.* v. *Keegstra* the Court invoked s. 15[659] and 27[660] of the *Charter* to underscore the importance of the objective of a Criminal Code provision, prohibiting the willful promotion of hatred. Both *Charter* provisions "represent a strong

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[656] *Oakes, supra* note 640 at 138-139.

[657] *Keegstra, supra* note 639 at 737-38; *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1355-56 (Wilson J., concurring) [hereinafter *Edmonton Journal*].

[658] See references *supra* note 649.

[659] *Charter, supra* note 630: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[660] *Charter, supra* note 630: "This *Charter* shall be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians."

commitment to the values of equality and multiculturalism ... ."[661] The Court found that "promoting equality is an undertaking essential to any free and democratic society"[662] and that the s. 27 "commitment to multicultural vision of our nation" includes the "need to prevent attacks on the individual's connection with his or her culture, and hence upon the process of self-development."[663]

In assessing the value of the speech at stake the Court noted that "not all expression is equally worthy of protection."[664] Like the German and the American counterparts the Canadian Supreme Court emphasizes "[t]he connection between freedom of expression and the political process."[665] However, the Court noted that "expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values."[666] It therefore found hate speech to be "only tenuously connected with the values underlying freedom of speech."[667]

In *R.* v. *Butler*, a case dealing with pornography, Sopinka, J., writing for the majority stated that pornography "does not stand on equal footing with other kinds of expression which directly engage the "core" of the freedom of expression values."[668] Sopinka went on to say: "This conclusion is further buttressed by the fact that the targeted material is expression which is motivated ... by economic profit. This Court held ... that an economic

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[661] *Keegstra, supra* note 639 at 755.
[662] *Ibid.* at 756.
[663] *Ibid.* at 757.
[664] *Ibid.* at 760 quoting *Rocket, supra* note 651 at 247.
[665] *Ibid.* at 763.
[666] *Ibid.* at 764.
[667] *Ibid.* at 787.
[668] *Butler, supra* note 650 at 500.

motive for expression means that restrictions might "be easier to justify than other infringements."[669]

The *RJR-MacDonald* v. *Canada (Attorney General)* case, where the Court invalidated a complete ban on tobacco advertising, might indicate a significant shift in the application of the contextual approach. Writing for the majority McLachlin, J., generally accepts that the "impugned law must be considered in its social and economic context" and that "greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state."[670] But she emphasized that neither context nor deference "must be attenuated to the point that they relieve the state of the burden the *Charter* imposes of demonstrating that the limits imposed on our constitutional rights and freedoms are reasonable and justifiable in a free and democratic society."[671] While these general statements still comply with earlier decisions her application of these principles suggests a more burdensome standard of proof for the government. McLachlin, J., found that the government did not meet the minimal impairment requirement. In regard of this prong of the *Oakes* test in earlier decisions, LaFroest, J., in the dissenting opinion pointed out that "it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored *in the context of the infringed right.*"[672] McLachlin, J., concedes that "[t]he tailoring process seldom admits perfection and [that] the courts must accord some

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[669] *Ibid.* at 501, quoting *Rocket, supra* note 651 at 247.
[670] *MacDonald, supra* note 651 at 331.
[671] *Ibid.* at 333.
[672] *Ibid.* at 305 f. quoting *Butler, supra* note 650 at 504 f. [emphasis in the original].

leeway to the legislator." However, she rejects that the value of speech should be taken into consideration on this prong of the *Oakes* test:

> [T]o argue that the importance of the legislative objective justifies more deference to the government at the stage of evaluating minimal impairment, is to engage in the balancing between the objective and deleterious effect contemplated by the third stage of the proportionality analysis in Oakes.[673]

This is a significant change in the application of the contextual approach. As stated above the Court held earlier, in dealing with the minimal impairment of the measure, that it analyzes whether the measure is "appropriately tailored *in context of the infringed right*."[674] In summarizing the discussion of the minimal impairment in *Keegstra* Dickson, C.J., wrote: "[I]n light of the great importance of Parliament's objective and the discounted value of expression at issue, I find that the terms of s. 319(2) create a narrowly confined offence ... ."[675]

In addition, unlike in *Butler* or *Keegstra*, McLachlin, J., did not assess the value of the speech at stake before engaging in the analysis of the different prongs of the *Oakes* test.[676] Not only did McLachlin, J., expressly refuse to consider the value of speech on the second prong of the *Oakes* test, but she also stated that "motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of expression"[677]. This goes beyond a mere 'doctrinal' separation of the different prongs of the *Oakes* test. Her contention that while the Court has found

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[673] *Ibid.* at 347.
[674] *Butler, supra* note 650 at 505 [emphasis in the original.
[675] *Keegstra, supra* note 639 at 785-86.
[676] *Butler, supra* note 650 at 499-501; *Keegstra, ibid.* at 759-767.
[677] *MacDonald, supra* note 651 at 348.

that restrictions of commercial speech are easier to justify, "no link between the claimant's motivation and the degree of protection has been recognized" is in contradiction to the earlier cited statement in *Butler*[678]. What is more important, McLachlin's statement is not restricted to finding the profit-motivation irrelevant for assessing whether a measure is only a minimal impairment; it declares the motivation wholly irrelevant for the justification of the infringements of freedom of expression. Despite her own declaration not to engage in an evaluation of the speech on the second prong of the *Oakes* test her concern that "[c]ommercial speech, while arguably less important than some forms of speech, nevertheless should not be lightly dismissed"[679] seems to be what is really behind her insistence of the separation of the two prongs. In analyzing the minimal impairment question quasi-content-neutral commercial speech is given greater value. In this sense it is quite true when McLachlin states that "it may not be of great significance where the balancing takes place", but it might well be that it is of great significance whether the Court engages in a covert or overt form of balancing.

In contrast, the dissenters relied heavily on the necessary deference to Parliament's decisions in areas where policy-decisions have to be made among competing constitutional values and emphasized the low value of the speech at stake according to the purpose of s. 2(b).[680]

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[678] See *supra* note 669 and accompanying text.
[679] *MacDonald, supra* note 651 at 347.
[680] *Ibid.* at 268 ff. (LaForest, J., dissenting, joined by L'Heureux-Dubé and Gonthier, JJ.)

3. Freedom of Expression as a Positive Right

In two cases so far, the Supreme Court has dealt with the question whether s. 2(b) imposes positive duties on the government. In both *Haig* v. *Canada*[681] and in *Native Women's Association of Canada* v. *Canada*[682] the Court denied the claims based on a positive obligation for the government deduced from s. 2(b). But in neither of the two cases did the Court completely reject any positive notion of freedom of expression.

Haig dealt with the question of whether s. 2(b) required an affirmative role on the part of the state in providing the specific means of expression. Due to a change in residence - Mr. Haig had moved from Ontario to Quebec - he was not qualified to take part in either the Quebec referendum or the referendum held in all other provinces on a question relating to the Constitution of Canada. Writing for the majority L'Heureux-Dubé, J., held that "s. 2(b) of the *Charter* does not impose upon a government ... any positive obligation to consult its citizens through the particular mechanism of a referendum. ... A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone."[683]

L'Heureux-Dubé, J., took as a starting point for her reasoning "that case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather that positive entitlements."[684] "The traditional view, in colloquial terms, is that the

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[681] [1993] 2 S.C.R. 995 [hereinafter *Haig*].
[682] [1994] 3 S.C.R. 627 [hereinafter *Native Women*].
[683] *Haig, supra* note 681 at 1041 [emphasis in the original].
[684] *Ibid.* at 1034

freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones."[685]

However, while stating that "s. 2(b) of the *Charter* does not include the right to any particular means of expression",[686] L'Heureux-Dubé, J., cautiously embraced a positive notion of freedom of expression. She held "that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the free marketplace of ideas."[687] And referring to the purposive approach in *Big M*[688] she stated:

> Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action *might* be required. This *might*, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information. In the proper context, these *may perhaps* be relevant considerations leading a court to conclude that positive governmental action is required.[689]

L'Heureux-Dubé, J., did not further explore what a 'proper context' would be and since the context in *Haig* was not such a 'proper context' the Court did not have to decide whether s. 2(b) imposes positive obligations on the state enforceable by courts. However, L'Heureux-Dubé, J., in another obiter dictum made a less vague remark concerning possible implications of a positive reading of s. 2(b):

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[685] *Ibid.* at 1035.
[686] *Ibid.* at 1041.
[687] *Ibid.* at 1037.
[688] *Big M, supra* note 643 at 344.
[689] *Haig, supra* note 681 at 1039. [emphasis added]. See also *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 361 (Dickson, C.J., dissenting). With respect to the negative concept of freedoms he stated: "This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (*e.g.*, regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press)."

> The following caveat is, however, in order here. While s. 2 (b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in fashion that is consistent with the Consti tution. The traditional rules of *Charter* scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on ground prohibited under s. 15 of the *Charter*.[690]

But instead of assigning the government a more active role this only extends the traditional notion of an infringement of freedom of expression. It acknowledges that by the pervasive role of government in certain areas a violation of freedom of expression does not necessarily require a direct restriction, but can also be established by denying some 'speakers' support while supporting others.

The plaintiffs in *Native Women* were relying mainly on this moderate positive notion of freedom of expression.[691] In this case the plaintiffs, lobby groups of native women, demanded equal funding from a governmental fund established to facilitate the participation of aboriginal people in the review of the constitution. The women's groups alleged that the four groups funded under this program were male dominated and did not sufficiently represent the interest of aboriginal women.

In a unanimous decision Sopinka, J., writing for seven of the nine judges restated and quoted widely L'Heureux-Dubé's opinion in *Haig* and concluded:

> *Haig* establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in *Haig* leaves open the possibility that, in certain, in certain

[690] *Haig, supra* note 681 at 1041.
[691] *Native Women, supra* note 682 at 654-655.

> circumstances, positive governmental action may be required in order to make the freedom of expression meaningful.[692]

In her separate concurring opinion L'Heureux-Dubé, J., disagreed with the first part of Sopinka's conclusion from *Haig*:

> *Haig* rather stands for the proposition that the government in that particular case was under no constitutional obligation to provide for the right to a referendum un der s. 2(b) of the *Charter*, but that if and when the government does decide to provide a specific platform of expression, it must do so in a manner consistent with the *Charter*.[693]

Since Sopinka, J., also restated this part of *Haig*[694] the difference between L'Heureux-Dubé's conclusion from her reasons and that which Sopinka, J., drew seem marginal at first glance. With the emphasis on "the particular case" L'Heureux-Dubé, J., seems to imply that *Haig* accepted, in general, that s. 2(b) can impose positive duties on the government, whereas Sopinka's conclusion points in the opposite direction. The interpretation made above suggests that Sopinka's reading of *Haig* comes closer to the very cautious language used in that decision, or at least that *Haig* left room for the conclusions drawn by Sopinka, J.

However, other passages of Sopinka's reasoning display an even more restrictive view of *Haig*: "It will be rare indeed that the provision of a platform or funding to one or several organizations will have the effect of suppressing another's freedom of speech."[695]

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[692] *Ibid.* at 654.
[693] *Ibid.* at 667 [emphasis in the original].
[694] *Ibid.* at 655.
[695] *Ibid.* at 657.

This ascribes to such violations of freedom of speech an exceptional character that could be seen as contradicting L'Heureux-Dubé's formulation that "traditional rules of *Charter* scrutiny" would apply. A similar restriction in 'quantity' is the finding that if s. 2(b) required the government to extend each funded platform to include representatives of at least two opposite views "the ramifications on government spending would be far reaching indeed."[696] It is not so much the general statement that such a proposition would be "untenable" that departs from *Haig*'s cautious but open language concerning the positive implications of s. 2(b). But the budget-argument adds a restriction to the general openness of *Haig* without displaying the same sensitivity as *Haig* towards the (possible) necessity of government intervention to "make a fundamental freedom meaningful"[697].[698] Taking into consideration that the budget-argument is one of those typically invoked by opponents of positive notions of fundamental rights and freedoms (and also with the same penchant for exaggerations in their examples), with some overstatement it could be said that *Native Women* answers *Haig*'s open question concerning the positive implications of s. 2(b) in a very restrictive manner: "There might be some but it is very unlikely that the Supreme Court will ever come across any."

This, however, is not only overstated but also quite speculative. What should be noted is that so far the Canadian Supreme Court has not drawn any consequences from its find-

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[696] *Ibid.* 656.
[697] *Ibid.* at 655; *Haig, supra* note 681 at 1039.
[698] It is noteworthy that while L'Heureux-Dubé, J., is mainly quoting authors (inter alia Owen M. Fiss) who propagate far reaching positive obligations, Sopinka, J., is quoting largely a decision of the U.S. Supreme Court rejecting a positive notion of the first amendment (*Minnesota State Board of Community Colleges* v. *Knight*, 465 U.S. 271 (1984)).

ing that freedom of expression might impose obligations on the government and its judgments leave open whether it will draw any in the future.

The same openness is appropriate in answering the generalized question of whether the (young) Canadian freedom of expression jurisprudence comes down on the German or the American side. The contextual balancing before *MacDonald* and the non-rejection of a positive implication of freedom of speech indicate a closer affinity to the German jurisprudence, but *MacDonald* and *Native Women* display a potential for shaping s. 2(b) in a first amendment outlook.

B. Regulation of Electronic Mass Media in Canada

Geography has played a major role in Canadian broadcasting. The vast territory of the country and the relatively small population are challenges for the development of a flourishing broadcasting system. The cultural and linguistic differences of the regions add to this challenge. But it is not only the 'geographical' specifics of Canada which influence its broadcasting policy: probably the major challenge stems from its geographical location. Sharing an enormous border with the United States, the country of the world-leading and ever expanding cultural industry, has been and continues to be the driving force in Canadian attempts to regulate its electronic media.[699]

[699] See John Meisel, "Stroking the Airwaves: The Regulation of Broadcasting by the CRTC" in Benjamin D. Singer, ed., *Communications in Canadian Society*, 4th ed. (Toronto: Nelson, 1995) 265. See also the recommendations of the Information Highway Advisory Council with respect to Canadian Content, *Connection Community Content: The Challenge of the Information Highway: Final Report of the Information Highway Advisory Council* (Ottawa: Minister of Supply and Services, 1995) at 25-39).

From the earliest days of radio US broadcasters and program producers have expanded into Canadian territory, impeding the development of a national Canadian broadcasting system.[700] The massive presence of American programming is seen not only as an economic threat but as a threat for Canada's 'cultural identity'. This concern with national and cultural sovereignty lies at the heart of Canadian broadcasting regulation. It has pushed the struggle between public and private sector into the background or, at least given it its specific Canadian shape.[701]

In 1932, in a speech addressing the establishment of the first broadcasting act, then Prime Minister Bennett set out the programmatic principles of the broadcasting policy in years to come:

> First of all, this country must be assured of complete Canadian control of broad casting from Canadian sources, free from foreign interference of influence. Without such control radio broadcasting can never become a great agency for ... the diffusion of national thought and ideals, and without such control it can never be the agency by which national consciousness may be fostered and sustained.[702]

The same concern continues to frame Canadian broadcasting policy. At the end of the last decade, the dominance of American programming led a policy-maker to the alarming conclusion that Canada was a "culturally occupied country."[703]

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[700] Peter Desbarats, *Guide to Canadian News Media* (Toronto: Harcourt Brace Jovanovich, 1990) [hereinafter Desbarats, *Guide*].

[701] See Peter Desbarats, "Private Television: The Villain of the Pieces Seen in a New Light" in Helen Holmes & David Taras, eds., *Seeing Ourselves: Media Power and Policy in Canada*, 2d ed. (Toronto: Harcourt Brace, 1996) 302 [hereinafter Desbarats, "Television"].

[702] Prime Minister R.B. Bennett, "Speech in Support of Bill 94, Respecting Radio Broadcasting", *House of Commons Debates*,(18 May 1932) at 3035.

[703] Sheila Fineston, M.P. in a debate on communications policy, *House of Commons Debates*, (7 November 1989) at 5689.

1. History

Although, like in the United States, radio began as privately owned, the idea that broadcasters are fulfilling and have the obligation to fulfill a 'public service' had a strong influence from the beginning on the development of broadcasting in Canada.[704] Despite its private ownership, radio was not a commercial medium at that time.[705]

By the end of the 1920s large parts of Canada could only receive US border stations which broadcasted into Canada.[706] In reaction to this development the first Royal Commission on Radio Broadcasting, chaired by Sir John Aird, was established 1928.[707] This commission was the first of a series of national inquiries into broadcasting, all dealing more or less prominently with the influence of American broadcasting in Canada.[708] The Aird Commission recommended radical changes for the existing private broadcasting system. Rather than following the American model of commercial networks it favored the European, namely the British model.[709] It advised the government to expropriate the existing stations in order to create one national, publicly owned radio station. The government

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[704] Gail Henley, "Preferences about Preferences: A Positive Justification for Canadian Content Regulation" (1993) 3 M.C.L.R. 127 at 135. In 1929, the first Royal Commission on Radio Broadcasting recommended that "broadcasting should be placed on a basis of public broadcasting." (Canada, *Report of Royal Commission on Radio Broadcasting* (Aird Commission) (Ottawa: King's Printer, 1929) at 6 [hereinafter Aird Report].

[705] It was not before 1924 that 'indirect advertisement' (a form of sponsoring) was allowed by the minister of marine and fisheries. The airing of commercials remained prohibited. (Desbarats, *Guide, supra* note 700 at 30).

[706] Desbarats, *Guide supra* note 700 at 33.

[707] Aird Report, *supra* note 704.

[708] See Canada, *Report of the Royal Commission on National Development in the Arts, Letters, and Sciences* (Massey Commission) (Ottawa: King's Printer, 1951); Canada, *Report of the Royal Commission on Broadcasting* (Fowler Commission) (Ottawa: Queen's Printer, 1957); Canada, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986) [hereinafter Caplan-Sauvageau Report].

[709] Caplan-Sauvageau Report, *supra* note 708 at 7; Marc Raboy, *Missed Opportunities: The Story of Canada's Broadcasting Policy* (Montreal: McGill-Queen's University Press, 1990) 27-28.

did not follow the recommendation concerning private broadcasters but did establish a public broadcaster, the Canadian Radio Broadcasting Commission (CRBC).[710] In 1936, the CRBC was renamed Canadian Broadcasting Corporation (CBC). The CBC acted not only as a broadcaster but until 1958 also as a regulator of the private sector.[711] Then the Board of Broadcast Governors, a predecessor of the Canadian Radio and Television Commission (CRTC),[712] was established. The CRTC is a creation of the *Broadcasting Act of 1968*.[713]

In contrast to radio, television began in Canada as a public monopoly.[714] The CBC operates a national television system in English as well as in French. Private broadcasters were not granted television licenses before the late 1950s.[715] CBC television is financed through public funding and advertisement revenue.[716] With the advent of television CBC radio concentrated on news and information programming, and possesses a distinctly non-commercial character.[717]

Whereas CBC radio has thus established itself in a rather stable and unquestioned position, the role of public television is much under attack.[718] After the end of its monopoly

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[710] For details see: Raboy, *ibid.* at 48 ff.
[711] Caplan-Sauvageau Report *supra* note 708 at 8-9.
[712] In 1976, the name changed to Canadian Radio-television and Telecommunications Commission to reflect its expanded authority.
[713] Raboy, *supra* note 709 at 176.
[714] Desbarats, *Guide supra* note 700 at 38.
[715] *Ibid.* at 41.
[716] See Canada, *Making Our Voices Heard: Canadian Broadcasting and Film for the 21st Century* (Mandate Review Committee: CBC, NFB, Telefilm) (Hull: Communications Branch Department of Canadian Heritage, 1996) at 128-130 [hereinafter Juneau Report]. In 1995 the CBC received $ 951 million in annual appropriations and $ 297 million in advertising revenue.
[717] *Ibid.* at 48-50; Desbarats, *Guide supra* note 700 at 39.
[718] Juneau Report, *ibid.* at 48 ff.; Ross A. Eaman, "Putting the "Public" into Public Broadcasting: A Question of Means" in Holmes & Taras, eds., *supra* note 701, 314 at 323-324.

CBC television focused also on the production of news and information programming,[719] but in contrast with CBC radio still targets for large audiences.[720] While it has been relatively successful in this respect for several years, it became under critique for being not significantly distinguishable from its private competitors.[721] To a large extent the dilemma of CBC television is caused by the way it is financed. Robert Hackett, Richard Pinet, and Myles Ruggles describe lucidly the dilemma of CBC television:

> [T]he CBC has to fit into a pattern of mass communications and audience relations established by commercial media. The government expects it to operate a commercial television service to offset the costs of public service broadcasting. If it fails to attract large audiences, the CBC is vigorously criticized in the commercial media and in Parliament. Adherents of the commercial media resent paying for a service they do not use. As a result, the CBC tries to make itself more popular, and this means imitating the commercial media.[722]

But the problems CBC is facing are not only financial in nature. The elevated role the CBC is expected to play in maintaining Canadian culture in and through television would be ill served if it would not, at least attempt to target bigger audiences since television is essentially mass culture.

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[719] Desbarats, *Guide supra* note 700 at 44.

[720] CBC radio retained a more or less constant share over the last decade (about 11 per cent of anglophone listening and 9-10 per cent francophone listening). CBC's share of prime-time English-language viewing dropped from 20.6 per cent in 1989 to 13.9 per cent in 1994 television (see Eaman, *supra* note 718 at 323).

[721] Juneau Repot, *supra* note 716 at 129.

[722] Robert Hackett, Richard Pinet & Myles Ruggles, "News for Whom? Hegemony and Monopoly Versus Democracy in Canadian Media" in Holmes & Taras, eds., *supra* note 701, 257 at 269.

2. Maintaining Cultural Sovereignty in and through Broadcasting

a) The Framework of the *Broadcasting Act of 1991*

The *Broadcasting Act of 1991*[723] gives the regulation of Canadian content a prominent place. S. 3 of the *Broadcasting Act* sets out the principles of Canadian broadcasting policy. Most provisions of this lengthy section relate to Canadian content. S. 3(1)(b) states that "the Canadian broadcasting system ... comprising public, private and community elements ... provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty". S. 3(1)(b) makes clear that both public and private broadcasters have to carry out this public service. Their public service function is defined in terms of their role in maintaining Canada's cultural sovereignty. This has been interpreted as a shift in the justification of the broadcasting regulation from a technology-based rationale (scarcity) in earlier *Broadcasting Acts* to a content-based rationale (programming).[724] That broadcasters' programming and its cultural impact have become the basis for broadcasting regulation is already displayed in an earlier policy paper dealing with the new *Broadcasting Act*: "The Act needs to be freed from the restraints inherent in a snapshot of a broadcasting technology at any given time. A technology-neutral approach is necessary in which broadcasting is defined in terms of its content, its programming."[725]

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[723] *Broadcasting Act*, S.C. 1991, c. 11; as am. by S.C. 1993, c. 38 [hereinafter *Broadcasting Act*].

[724] Henley, *supra* note 704 at 135; cf. Jim Russel, "Demystifying Canadian Content: Challenging the Television Broadcast Regulator to "Say What It Means and Mean What It Says"" (1993) 3 M.C.L.R. 171 at 172 ff.; for a discussion of rationales for broadcasting regulation in Canada, see Pierre Trudel & France Abran, *Droit de Radio et de la Télévision* (Montreal: Édition Thémis, 1991) at 154-57.

[725] Communications Canada, *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* (Ottawa: Supply & Services Canada, 1988) at 51. The *Broadcasting Act of 1968*, S.C. 1967-68, c. 25, s.

In several explanatory clauses s. 3 specifies the broadcasters' public service duty. Broadcasters have to "safeguard, enrich and strengthen the cultural, political, social fabric of Canada" (s. 3(1)(d)(i)). The cultural obligations impose a duty on broadcasters to reflect a wide variety of aspects of Canadian life in their programming. They have to "encourage Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity" (s. 3(1)(d)(ii)). Therefore broadcasters are required to air a program that is "varied and comprehensive, providing a balance of information and entertainment for men, women and children of all ages, interests and tastes" (s. 3(1)(i)(i)); "provide a reasonable opportunity for the public to be exposed to the expression of different views on matters of public concern" (s. 3(1)(i)(iv)); and consider the "multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within in that society" (s. 3(1)(d)(iii)).

Every element of the broadcasting system shall "contribute in an appropriate manner to the creation and presentation of Canadian programming" (s. 3(1)(e)), and originate programming of "high standard" (s. 3(1)(g)).

S. 3 requires a higher profile of Canadian content from the CBC than from the private sector. Although s. 3(1)(f) states that "each broadcasting undertaking shall make maximum use, and in no case less than predominant use of Canadian creative and other resources in the creation and presentation of programming", s. 3(1)(s)(i) requires private broadcasters, to an extent consistent with their financial resources, to "contribute signifi-

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3(c), defined "broadcasting undertaking" as "broadcast transmitting and receiving and a network operation." The *Broadcasting Act of 1991*, *supra* note 723 s. 2(1) defines the term as including a distribution undertaking, a programming undertaking and a network; "programming undertaking" means an undertaking for the transmission of programs; and "programs" means a combination of images that are intended to inform, enlighten or entertain.

cantly to the creation and presentation of Canadian programming". In contrast, the CBC is required to provide a program that is "predominantly and distinctively Canadian" (s. 3(1)(m)(i)). Distribution undertakings (i.e. cable companies) should give priority to the carriage of Canadian programming services" (s. 3(1)(t)(i)).

S. 3(2) that all the different elements of the Canadian broadcasting system constitute a "single system" which is to be regulated and supervised by a single independent public authority. Accordingly, the CRTC supervises both private and public broadcasters.

The detailed enactment of Canadian broadcasting policy has been criticized as a fatal attempt "to be all things to all the people"[726] A legal counsel of the CRTC criticized that the "shopping list" approach to s. 3 reduces the flexibility of the CRTC in implementing the broadcasting policy.[727]

b) Regulatory Mechanism

First attempts[728] to maintain cultural sovereignty in and through broadcasting were based on ownership rules. Also the *Broadcasting Act of 1991* states that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians".[729] But the ownership regulations did not have the expected results. Although television stations were

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[726] Coined by Hudson N. Janisch; see also Henley, *supra* note 704 at 129, 146.
[727] Sheridan Scott, "The New *Broadcasting Act*: An Analysis" (1990) 1 M.C.L.R. 25 at 43.
[728] In the regulation concerning the maintenance of cultural sovereignty different phases can be distinguished. Although the different regulatory attempts were not strictly chronologically following each other they are presented here in a simplified chronological order for a better understanding of the general mechanism of the Canadian broadcasting policy. For a detailed overview see Thorsten Vormann, *Cultural Sovereignty and Broadcasting - Canadian Content Rules* (LL.M Thesis, McGill University, 1991) at 32 ff. [unpublished].
[729] *Broadcasting Act*, *supra* note 723 s. 3(1)(a).

controlled and owned by Canadian corporations they "served merely as conduits for American cultural material and provided an accessible window to American broadcasting interest."[730]

A different attempt was the implementation of time requirements for the broadcasting of Canadian content. Detailed regulations of this type began in 1959.[731] Today, after several changes,[732] broadcasters have to devote sixty per cent of the programming content of a broadcast year and any six-month period in a year to Canadian content.[733] The six month stipulation was added in 1987 to prevent broadcasters from airing all their Canadian content during the summer when audiences are lower anyway. Similarly, to prevent broadcasters from airing Canadian content only at times of the day when audiences are traditionally smaller, the regulations contain special requirements for 'prime time' (between 6 p.m. and midnight).[734] During that time private broadcasters have to devote 50 per cent of their program to Canadian content, whereas public broadcasters have to air 60 per cent.[735]

The CRTC developed a 'point-system' for determining Canadian content. In order to be recognized as a Canadian program the producer has to be Canadian and a program has

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[730] Henley, *supra* note 704 at 130. The Caplan-Sauvageau Report, *supra* note 708 at 691, noted in 1986 that 98 per cent of all drama on English-language television was foreign and only 28 per cent of all programming available on English-language television was Canadian.
[731] *Radio (TV) Broadcasting Regulations*, SOR/59-456, s. 6(1), (4).
[732] For an overview see Henley, *supra* note 704 at 136-138.
[733] *Television Broadcasting Regulations*, 1987, SOR/87-49, as am. by SOR/87-425; SOR/88-415; SOR/89-162; SOR/90-320; SOR/91-587; SOR/92-611; SOR/92-615; SOR/92-208; SOR/93-353; SOR/94-634, s. 4(6) [hereinafter *Television Broadcasting Regulations*]. Radio stations have to devote 30 per cent of their musical selection to Canadian content, see *Radio Regulations*, 1986, SOR/1986-982, as am. by SOR/88-549; SOR/89-163; SOR/91-517; SOR/91-586; SOR/92-609; SOR/92-613; SOR/93-209; SOR/93-355; SOR/93-358; SOR/93-517, s. 2.2(3) [hereinafter *Radio Regulations*].
[734] Colin Hoskins & Stuart McFayden, "Television in the New Broadcasting Environment: Public Policy Lessons from the Canadian Experience" (1989) 4 European Journal of Communication 173 at 176.
[735] *Television Broadcasting Regulations*, *supra* note 733, s. 7(a), (b).

to earn six out of ten possible points.[736] But also the fine-tuned hour-based requirements were facing significant problems. Stated shortly, Canadian programs were not sufficiently available for the broadcasters to fulfill their duties under the regulations.[737] It turned out that the time requirements were not sufficient stimulus for the production of Canadian content, given the fact that it costs 10 times as much to produce a Canadian show as it does to buy an American show.[738]

In addressing this (economic) dilemma the broadcasting policy shifted its focus from the broadcasters to the programming industry.[739] The aim of the current regulations is to produce a "critical mass" of attractive Canadian programming. Rather than creating regulations which the broadcasters attempt to avoid, the goal is to implement a mechanism in which it is in the broadcasters' self-interest to show Canadian content. The underlying assumption of this approach is that the success of Canadian content regulations depends on a competitive Canadian programming industry. Once the programming industry has the capacity of producing, to a sufficient extent, programs which attract large audiences and which can be sold abroad, the economic incentive to show (only) American programs would become less imperative even for commercial broadcasters.[740] The establishment of a vibrant programming industry is also essential to avoid broadcasters' seeking to fulfill

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[736] A Canadian director or writer each earns 2 points, and one point each is earned for a Canadian leading performer, second leading performer, head of art department, director of photography, music composer and editor. In addition, at least 75 per cent of the expenditures have to be made to Canadians, excluding the key personnel accounted for in other criteria. (*Television Broadcasting Regulations, supra* note 733, s. 2 definition of "Canadian program" which makes reference to Appendix to CRTC Public Notice 1984-94, "Recognition for Canadian Programs" C. Gaz. 1984.I.3493; as am. by the CRTC Public Notice 1988-105 C. Gaz 1988.I.2683).

[737] Henley, *supra* note 704 at 143.

[738] Caplan-Sauvageau Report, *supra* note 708 at 443.

[739] Hudson N. Janisch, "Aid for Sisyphus: Incentives and Canadian Content Regulation in Broadcasting" (1993) 31 Alta.L.Rev. 575 at 583.

[740] Henley, *supra* note 704 at 141-42.

the Canadian-program requirements by producing programs which are 'American clones'[741] (programs that only copy, e.g., an American game-show format and thus are Canadian in form but not in substance).

The current regulatory scheme consists of a variety of intertwined rules and incentives. It combines the older rules, in part applied with more flexibility to respond to the specific needs and capacities of the individual broadcasters, and it uses in part a more incentive-based approach.[742] Inter alia, this regulatory scheme contains a priority carriage on cable for Canadian stations;[743] the right to simultaneous substitution of local signals for distant signals on cable;[744] a tax concession on broadcast advertising;[745] the subsidization of Canadian programming[746] and tax incentives available for investments in Canadian produc-

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[741] Janisch, *supra* note 739 at 585.

[742] Robert Howse, J. Robert S. Prichard & Michael J. Treiblock, "Smaller or Smarter Government?", (1990) 40 U.T.L.J. 498 at 525, suggest that incentive-oriented instruments have increasingly prevailed in the regulation of Canadian content. More skeptical in this regard: Janisch, *supra* note 739 at 586.

[743] *Cable Television Regulations*, SOR/86-831, as am. by SOR/87-424; SOR/88-227; SOR/88-251; SOR/90-321; SOR/91-96; SOR/91-543; SOR/92-610; SOR/93-354; SOR/95-328, ss. 9-11.

[744] *Ibid.* s. 20 (When the same program is shown simultaneously on a Canadian and U.S. channel, the cable company is required to substitute the Canadian signal (with advertisements) for the U.S. signal.

[745] *Income Tax Act*, R.S.C. 1952, c. 148, s. 19.1. This provision disallows a business expense advertising by Canadian companies on U.S. stations that send signals into Canada.

[746] In 1983, the Canadian Broadcast Program Development Fund was established. It is administered by Telefilm Canada, a government agency initially established to support the production of feature films. In 1995, the Broadcast Fund had a total revenue of $ 152-million (the appropriation from Parliament decreased from $ 146-million in 1990 to 122-million, whereas the earned revenue of Telefilm increased during the same period from $ 15 to 30-million). The Broadcast Fund subsidizes drama, variety, children's programming and documentaries. At the discretion of Telefilm Canada, the funding can take the form of a loan, a loan guarantee or equity financing. Since 1985 productions that qualify for ten points on the CRTC Canadian content scale (see *supra* note 738) can be funded up to 49 per cent of the production costs. Before the funding could cover up only to on third. (See: Janisch, *supra* note 739 at 583-84; Juneau-Report, *supra* note 716 at 217 ff.). Recently, Sheila Copps, Minister of Canadian Heritage, announced the creation of a Canadian Television and Cable Production Fund with an annual volume of $ 200-million. $ 100-million will be contributed from existing funds. (See Harvey Enchin, Christopher Harris & Elisabeth Renzetti, "Copps pledges $ 100-million for TV" *The Globe and Mail* (10 September 1996) A 14.

tions[747]. In addition, the CRTC (still) enforces ownership rules, time-based and expenditure related regulations.

Since 1979, the CRTC has increasingly used its authority to impose "conditions of licence" to enforce Canadian content regulations.[748] In renewing the CTV license the CRTC required as a condition of license that CTV produces an additional 26 hours of original Canadian programming per year. In *CTV Television Network Ltd.* v. *CRTC* the Supreme Court approved this technique of imposing specific content demands as a condition of license.[749]

Also in the way of imposing a condition of license, the CRTC attempts to implement an expenditure-based regulation.[750] In 1989, the CRTC issued a "Canadian program expenditure formula".[751] For television stations whose total annual advertising revenues exceeded $ 10 million, the CRTC made a condition of license to spend a minimum level on Canadian expenditures. The minimum required level of spending is calculated yearly in accordance with a formula tied to each station's financial performance, as measured by its total advertising revenues in previous years.

The question of whether the current regulatory scheme to maintain and enhance cultural sovereignty is a success is widely disputed. Some authors defend the regulatory at-

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[747] In December 1995, the Film and Video Production Tax Credit replaced the Capital Cost Allowance tax incentive for the investment in Canadian productions. It has been estimated that the new tax credit will have an amount of about $ 60 million. (Juneau-Report, *supra* note 716 at 262).
[748] Janisch, *supra* note 739 at 681-82; Russel, *supra* note 724 at 176.
[749] [1982] 1 S.C.R. 530 [hereinafter *CTV Television Network*].
[750] Henley, *supra* note 704 at 143-44; Vormann, *supra* note 728 at 80-84.
[751] Public Notice CRTC 89-27, "Overview - Local Television for the 1990s" at 26. Modified by Public Notice CRTC 92-28, "New Flexibility with regard to Canadian Program Expenditures to Canadian Television Stations" (allowing broadcasters to underspend by 5 per cent the minimum amount in one year and adding the amount in the following year).

tempts as a step in the right direction, claiming that the regulation has succeeded in developing a competitive Canadian production industry.[752] The subsidization of productions is especially viewed as having had positive effects.[753] The CRTC's use of "conditions of licence", to which increases in the amount of Canadian drama available on prime time and in the viewing of Canadian programs have been attributed, has also been praised.[754]

Other critics are more skeptical about the success of the regulation. Hudson Janisch, while conceding that the subsidization had some success, draws overall a resigned picture: "[T]he regulators of Canadian content appear as Sisyphus, condemned to rolling a massive stone of regulatory aspiration up a steep hill of countervailing economic incentives, even in the face of continual failure."[755] A more fundamental critique is rooted in the fear that the current regulations lead to a 'bureaucratization' of culture. Jim Russel argues: "If culture is to flourish in a free and democratic society, then it must be permitted to evolve over time and it cannot be subjected to the imposition of a normative conception of what Canadian culture ought to be."[756] He concludes that the regulation of the content of private television broadcasters is unconstitutional censorship.[757]

The 1996 Committee Report 'Making Our Voices Heard' (Juneau-Report), while generally drawing a positive picture of the regulatory efforts it reviewed,[758] found it necessary

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[752] Henley, *supra* note 704 at 159; cf. also John Meisel, "Extinction Revisited: Culture and Class in Canada" in Holmes & Taras, *supra* note 701, 249 ; Juneau-Report, *supra* note 716 at 193 ff.
[753] Henley, *ibid.* at 160; Juneau-Report, *ibid.* at 202-205 (noting that in English televisions, Canadian programs increased their share of viewing between 7 p.m. and 11 p.m. by 30 per cent over the period from 1984-85 to 1988-89).
[754] Henley, *ibid.* at 160.
[755] Janisch, *supra* note 739 at 580. See also Hoskins & McFayden, *supra* note 734 at 176; Desbarats, "Television" *supra* note 701 at 307 ff.
[756] Russel, *supra* note 724 at 185.
[757] *Ibid.* at 203.
[758] The committee reviewed the CBC, Telefilm Canada and the National Film Board.

to recommend significant changes. In order to safeguard that the CBC could fulfill its cultural obligations, the committee, under the chairmanship of former CBC president Pierre Juneau, suggested that CBC television should phase out nearly all of its commercial advertising activities[759] and should instead be financed by a newly created tax[760]. The committee argued that these changes would not only free the CBC from its commercial imperative which impeded its performance as a distinctively Canadian broadcaster, but that the changes were also necessary to provide the private sector with much needed advertising revenue to play a more active role in Canadian production.

C. Electronic Mass Media under the *Charter*

S. 2(b) of the *Charter* expressly guarantees the "freedom of the press and other media of communication." This indicates that electronic media are protected by the constitution as "other media of communication".[761] However, the Supreme Court has so far not given any special meaning to the press and media guarantee of the *Charter*.[762] The Court dealt with *Charter* claims by newspapers or broadcasters under the general freedom of expres-

[759] Juneau-Report, *supra* note 716 at 101.
[760] *Ibid.* at 149.
[761] Cf. Trudel & Abran, *supra* note 724 at 140.
[762] See Joseph Eliot Magnet, *Constitutional Law of Canada*, 5th ed. (Cowansville: Yvon Blais, 1993) at 694.

sion guarantee;[763] or referred to "freedom of the press" without giving it a specific meaning compared to "freedom of expression".[764]

However, since the enactment of the *Charter* there has been no case before the Court concerning explicit media regulation.[765] Thus, the Court has not been urged to clarify whether the media guarantees contain a special meaning different from the general freedom of expression guarantee. In pre-*Charter* cases the Court approved broad regulatory powers of the CRTC.[766] How the Court would address specific media regulations is thus far not clear.[767]

The implications of the *Charter* for the regulation of electronic media have so far drawn little attention in the academic literature in this field.[768] Thus, unlike in Germany or

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[763] See, *e.g.*, *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at 475 ff. (search warrant); *Edmonton Journal*, *supra* note 657 at 1336 ff. (publication ban); *Irwin Toy*, *supra* note 640 at 966 ff. (prohibition of television advertising directed at persons under 13 years of age.).

[764] *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R 835 at 876 ff (publication ban); *Canadian Newspapers Co.* v. *Canada (Attorney General)*, [1988] 2 S.C.R. 122 at 133 ff. (publication ban); *Canadian Broadcasting Corp.* v. *Lessard* [1991] 3 S.C.R 421 at 444 ff.

[765] Trudel & Abran, *supra* note 724 at 143; Russel, *supra* note 724 at 186-88, thinks that because of the highly symbiotic relationship between broadcasters and the CRTC they have not challenged the broadcasting regulations under the *Charter*. The regulations offer the broadcasters significant protection from competition with American broadcasters. (Henley, *supra* note 704 at 136 describes this situation as "regulatory bargain".) In case the costs to fulfill the regulatory duties will outweigh their benefits for the private broadcasters *Charter* litigation becomes more likely.

[766] *Capital Cities Communications Inc.* v. *CRTC* [1978] 2 S.C.R. 141 (approving CRTC's power to make detailed policy guidelines); *CTV Television Network*, *supra* note 749 (approving specific content demands as a "conditions of licence").

[767] Russel, *supra* note 724 at 175, suggests that the Court might decide the pre-*Charter* cases differently "under the auspices of the *Charter*".

[768] Standard textbooks on Canadian constitutional like Hogg, *supra* note 631, or John D. Whyte & William R. Lederman, *Canadian Constitutional Law*, 3rd ed. by Donald F. Bur (Toronto: Butterworths, 1992) contain no special section for questions concerning the freedom of (electronic) media, or contain only a short section on freedom of the press, see Gérald-A. Beaudoin, *La Constitution du Canada* (Montreal, Wilson & Lafleur, 1990) at 693-95. Trudel & Abran, *supra* note 724 at 135 -161, in their comprehensive study of Canadian radio and television law devoted only 26 out 1010 pages for the discussion of freedom and expression and electronic media; dealing at large with the general freedom of expression and US law. The implications of s. 2(b) of the Carter for broadcasting regulation are discussed, *e.g.*, in: Russel, *supra* note; Henley, *supra* note; Marie Finkelstein, "The *Charter* and the Control of Content in Broadcast Programming" in Neil R. Finkelstein & Brian MacLeod Rogers, eds., *Charter Issues in Civil Cases* (Toronto: Carswell, 1988) 213; Brenda M. McPhail "Canadian Content Regulations and the Canadian *Charter* of Rights and Freedoms" (1986) 12 Canadian Journal of Communication 41; a longer section on freedom of the press and

the United States, the regulation of electronic media has not yet been thoroughly constitutionalized. However, when the issue has been raised, similarities to the debate in Germany and the United States can be noted.

In rejecting media claims that the press and media guarantee in s. 2(b) of the *Charter* confers to news reporters and news outlets special rights which are not enjoyed by other members of the public, David Lepofsky emphasizes the wording of s. 2(b). He notes that of the various fundamental freedoms set out by s. 2(b), the freedom of the press and other media are the only guarantees which are not given their own separate and free-standing subsection: "It is the only freedom which is worded in "including" terms. S. 2(b) clearly states that the freedom of the press is included within the freedom of thought, belief, opinion and expression which is guaranteed to everyone."[769]

With opposing results Gail Henley and Jim Russel examined whether the regulation of Canadian content would survive a *Charter* challenge. Without mentioning the press or media guarantee Russel concludes that the Canadian content regulation for private broadcasters would violate their freedom of expression.[770] Russel applied the *Oakes* test, as developed by the Supreme Court in freedom of expression cases, without discussing the appropriateness of the *Oakes* test in the field of broadcasting.[771] He argues that the regulations fail to meet all three prongs of the proportionality test. With respect to the first and third prong Russel stresses the nationalistic bias of the regulations. Since they are based on citizenship, Russel claims, they exclude valuable contributions to Canadian culture

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electronic media contains the standard textbook Neil Finkelstein, *Laskins' Constitutional Law*, 5th ed., vol. 2 (Toronto: Carswell, 1986) at 1128-1147; cf. also Magnet, *supra* note 762 at 694-718.

[769] M. David Lepofsky, "The Role of "The Press" in Freedom of the Press" (1993) 3 M.C.L.R. 89 at 117.

[770] Russel, *supra* note 724 at 172 ff.

[771] See also Trudel & Abran, *supra* note 724 at 157-61.

made by recent immigrants or foreign visitors.[772] The goal of exhibiting the multicultural and multiracial nature of Canada is also ill served according to him, because the regulations make it economically unviable for ethnic broadcasters to seek a license. Instead of giving them the opportunity to rely on programs produced in their 'home' countries, they have to meet the same Canadian content quota requirements as other broadcasters.[773]

However, Russel does not draw the conclusion that the regulation of Canadian content has to be more responsive to the needs of immigrants or ethnic minorities, requiring, e.g., the regulator to allow exemptions to accommodate those needs. His conclusion that the whole regulation should be declared unconstitutional[774] and thus void[775], displays that Russel is merely dressing his argument in anti-nationalistic garb, while it is the freedom of private broadcasters to show economic attractive US programs that is really operating behind his argument.[776]

Gail Henley on the other hand seeks to provide a positive justification for Canadian content regulation in broadcasting. Like Russel she sees in the regulations an infringement

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[772] Russel, *supra* note 724 at 201 ff.
[773] *Ibid.* at 207 f.
[774] *Ibid.* at 203.
[775] See s. 52(1) of the *Charter*, *supra* note 630: "... any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
[776] It is noteworthy that Russel does not mention existing exemptions for ethnic broadcasters: *e.g.*, *Radio Regulations*, *supra* note 733, s. 13(4) (exemption from Canadian quotas for A.M. stations if seven per cent of the musical selections during ethnic programs are Canadian); *Television Broadcasting Regulations*, *supra* note 733, s. 4(8) (provides for an exemption from the 60 per cent overall and 50 per cent prime time quotas). For details see: Vormann, *supra* note, at 66-67; Trudel & Abran, *supra* note 724 at 926-30. Noteworthy is also that while immigrants and foreign visitors without doubt can contribute to Canadian culture, the production of US shows in Canada does so, if at all, only indirectly by channeling money into the Canadian production industry. In the worst case it can also impede the development of Canadian culture. In productions for the American market the US broadcaster usually takes substantial influence on the creative content. (Juneau-Report, *supra* note 716 at 214) While acknowledging the economic benefits of Canada's ability to attract significant numbers of American productions the Juneau-Report, *ibid.* at 225 warns: "[T]o the extent that productions made for the American market replace programming that would have made for a Canadian audience ... the result is damaging."

of s. 2(b) of the *Charter* which has to be justified under s. 1 of the *Charter*.[777] But Henley does not apply the *Oakes* test to examine the constitutionality of the regulation. Her argument is based on the "premise that broadcasting is central to culture"[778]. In her view the regulations are justified because they are developing a more "ample liberalism", one that "recognizes the need to develop in individuals a critical capability with respect to their preferences."[779] This is based on the presumption that 'consumer' preferences expressed in viewing ratings do not necessarily reflect the preferences of society as a whole about what the broadcasting system should be like: "[T]hose who crave American programs do so because of the diet of American programs they have been fed almost exclusively on prime time, they have adapted to a system in which other opportunities have been unavailable."[780] In such a situation collective action such as the regulation of Canadian content is justified because it "enhance[s] the capacities and opportunities of citizens to examine critically their existing values"[781].

Thus, although Henley is addressing formally the regulations as a limitation of freedom of expression which has to be justified under s. 1 of the *Charter*, her positive justification dovetails significantly with the German category of contouring laws which are not seen as limitation of broadcasting freedom but as necessary regulation to safeguard that broadcasting fulfills its social and cultural function guaranteed by the Art. 5 GG.[782]

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[777] Henley, *supra* note 704 at 152.
[778] *Ibid.* at 127.
[779] *Ibid.* at 159; quoting Richard B. Stewart, "Regulation in a Liberal State: The Role of Non-Commodity Values" (1983) 92 Yale L.J. 1537 at 1567.
[780] Henley, *ibid.* at 155.
[781] *Ibid.* at 158-59, quoting Stewart, *supra* note 779 at 1563.
[782] See text accompanying *supra* notes 94-100 and 123-28. But note that Henley, *ibid.* at 152, thinks that the content regulations impose "communitatrian or normative values on the whole population" without arguing

Lepofsky, who does not deal directly with Canadian content regulations, proposes a similar justification for broadcasting regulations. Much like the Bundesverfassungsgericht he views the press and media guarantee of s. 2(b) of the *Charter* as an 'objective' principle rather than a (pure) subjective right of broadcasters and newspapers:

> [S]ection 2(b) is not a libertarian guarantee that transforms newspaper chains and networks into constitutional corporate enclaves, with a presumptive immunity from the application to the news business of any ordinary laws which might interfere with or make more difficult the conduct of business. Instead, it conceives of freedom of the press as something which the *Charter* guarantees to everyone, i.e., *all* members of the public. It is a guarantee which seeks to assure to individuals a meaningful avenue for communicating diverse viewpoints to the public.[783]

Lepofsky argues that the purposive and contextual interpretation of s. 2(b) of the *Charter* could serve to construe the press and media guarantee not as conferring "special rights on certain individuals or groups", but as aiming to "establish in Canada an overall system of freedom of expression."[784] A contextual approach would in his view have to take into account the actual role of news outlets in society. Courts would have to "acknowledge the special power of these individuals and groups [news outlets and reporters] yield, and could impose special duties and responsibilities on them."[785] According to Lepofsky the relevant factual factors are the dependency of the public on getting their information from a highly concentrated media industry that itself is dependent on advertising revenues, and that journalists more often than not have to subordinate their reports to

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expressly that these values derive from s. 2 (b) of the *Charter* itself. This would most likely be the position taken by the Bundesverfassungsgericht confronted with similar regulations.

[783] Lepofsky, *supra* note 769 at 98 [emphasis in the original].

[784] *Ibid.* at 118.

[785] *Ibid.* at 119.

the corporate policies of the news outlet rather than being free to follow their professional discretion.[786]

As noted before, L'Heureux-Dubé, J., in *Haig* stressed the importance of the contextual approach for possible positive implications of freedom of expression.[787] Undoubtedly, a contextual approach as proposed by Lepofsky could serve the courts to conceive of the media guarantee of s. 2(b) of the *Charter* as not hindering media regulations like the Canadian content regulation but as a tool to safeguard that the broadcasting system will effectively achieve s. 2(b) purposes.[788]

New Brunswick Broadcasting Co. v. *CRTC*[789] in which the Federal court of Appeal held that the licensing requirement of the *Broadcasting Act* does not infringe s. 2(b) of the *Charter* shows that Canadian courts might be prepared to construe the *Charter's* media freedom not solely as a negative right of broadcasters. But the court's holding was based more on its finding that s. 2(b) gives broadcasters no right to use public property (airwaves) than on an 'objective' or positive conception of the *Charter's* media freedom.[790] In addition, the cautious position of the Supreme Court with respect to positive rights deduced from s. 2(b) of the *Charter* indicates that it is at least not clear whether the Supreme Court would embrace a more 'objective' understanding of the media freedom in a case dealing with specific regulations of electronic media. However, the Supreme

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[786] *Ibid.* at 112.
[787] See *supra* note 689 and accompanying text.
[788] Cf. Lepofsky, *supra* note 769 at 114, 118-19.
[789] [1984] 13 D.L.R. 77 at 89: The *Charter* guarantee of freedom of expression "gives not right to anyone to use the radio frequencies which, before the enactment of the *Charter*, had been declared by Parliament to be and had become public property and subject to the licensing and other provisions of the *Broadcasting Act*."
[790] Cf. Dorothy Zolf, "The Regulation of Broadcasting in Canada and the United States: Straws in the Wind" (1988) 13 Canadian Journal of Communication 30 at 33; Trudel & Abran, *supra* note 724 at 144.

Court's interpretation of the *Charter's* equality guarantee displays that the Court is prepared and willing to construe *Charter* rights and freedoms as going beyond their 'classical' role as a protection from government intrusion.[791]

The equality cases of the Supreme Court are marked by a rejection of the 'classical' concept of formal equality and the trend towards the development of a concept of substantive equality under s. 15 of the *Charter*.[792] This trend becomes even more obvious in cases that are not formally s. 15 cases but in which the Court invoked the equality guarantee in the context of other *Charter* rights and freedoms.[793]

The principles of the Court's equality jurisprudence were set out by McIntyre J in *Andrews* v. *Law Society of British Columbia*[794]. *Andrews* rejected the view that the meaning of equality is the sameness of treatment and also rejected the similarly-situated test.[795] Since *Andrews* the Court has emphasized that adverse effects discrimination is compre-

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[791] The argument made here that s. 15 jurisprudence offers starting points for an 'objective' understanding of the media freedom in s. 2(b) should not be confused with attempts to rely on s. 15 to justify limitations of freedom of expression in the context of broadcasting (*e.g.*, regulation of sex-role stereotyping). See Kathleen E. Mahoney & Sheila L. Martin, *Broadcasting and the Canadian Charter of Rights and Freedoms: Justifications for Restricting Freedom of Expression* (Research report for the Report of the Task Force on Broadcasting Policy, 1986) at XX [unpublished]; cf. also Trudel & Abran, *supra* note 724 at 161-64.

[792] Claire L'Heureux-Dubé, "Opening Address" (Canadian Bar Association Conference on Roads to Equality: New Challenges for the Legal System, 1994) (reprinted in Irwin Cotler, *Canadian Charter of Rights and Freedoms: Course Materials*, Faculty of Law, McGill University, 1996) at 11 ff. ; Kathleen E. Mahoney, "The Constitutional Law of Equality in Canada" (1992) 24 N.Y.U.J. Int'l L. & Pol. 759 at 760-61 and passim; cf. also *Symes* v. *Canada*, [1993] 4 S.C.R. 695 at 754 (Iacobucci, J., writing for the majority) [hereinafter *Symes*]: "s. 15 guarantees more than formal equality; it guarantees that equality will be mainly concerned with "the impact of the law on the individual or group concerned".

[793] Cf. L'Heureux-Dubé, *ibid.* at 29-44; Mahoney, *ibid.* at 785-792.

[794] [1989] 1 S.C.R. 143 at 163 ff. (McIntyre, J., dissenting in the result but not in the general principles) [hereinafter *Andrews*].

[795] *Ibid.* at 166 (McIntyre, J., dissenting); Mahoney, *supra* note 792 at 775 ff with references to the American equality jurisprudence. The similarly situated test is based on the Aristotelian principle that 'things that are alike should be treated alike and things that are unlike should be treated in proportion to their unlikeness'. The Court rejected the test because in its view it offers no guidance as to what should follow on a determination of 'unlikeness' is found. Being a purely formal concept it could even justify Hitler's Nuremberg laws as long as all Jews were treated similarly.

hended by s. 15[796] and that not every distinction constitutes a discrimination.[797] McIntyre, J., pointed out that "s. 15 has a much more specific goal than the mere elimination of distinctions."[798] S. 15 is seen as going beyond a neutral non-distinction guarantee:

> It is clear that the purpose of s. 15 is to ensure equality in the formulation and ap plication of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large re medial component.[799]

In assessing whether a distinction results in discrimination the Court does not focus narrowly on the legal grounds for the distinction, but also considers external factors such as the social and political status of a group in the overall fabric of society:[800]

> It is only by examining the larger context that a court can determine whether dif ferential treatment results in inequality or whether, contrawise, it would be identi cal treatment which could in the particular context result in inequality or foster dis advantage. A finding that there is discrimination will ... in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and inde pendent of the particular legal distinction being challenged.[801]

Thus, the Court recognizes that disadvantage may stem from outside the impugned provision and need not arise as a consequence of legislation.[802] In its s. 15 cases the Court does not focus on formally equal treatment by the government but on social and political

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[796] *Andrews*, *ibid.* at 551 (McIntyre, J., dissenting); *Symes*, *supra* note 792 at 755.
[797] *Symes*, *ibid.* at 754; *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1331 [hereinafter *Turpin*]; *Andrews*, *ibid.* at 164 (McIntyre, J., dissenting).
[798] Andrews, *ibid.* at 171 (McIntyre, J., dissenting).
[799] *Ibid.*
[800] *Turpin*, *supra* note 793 at 1331.
[801] *Ibid.* at 1331-32.
[802] L'Heureux-Dubé, *supra* note 792 at 23.

disadvantage in Canadian society.[803] Although not all cases focus on the disadvantaged group[804], the Court held historical disadvantage of groups to be relevant for a finding of discrimination.[805] And it has also been careful not to extend the guarantee too wide. L'Heureux-Dubé noted that the Court uses "equality rights as a fairly precise tool by which to address substantive equality concerns on behalf of those most needing it, rather than as a blunt tool which tries to provide equality for all and thereby risks providing substantive equality for none."[806]

The concern that an abstract focus on the legislative distinctions might undermine the purpose of s. 15 can be seen in *Weatherall* v. *Canada (Attorney General)*[807]. In a unanimous decision the Court held that s. 15 was not infringed because male prisoners were subjected to pat-down searches by female guards whereas female prisoners are only subjected to pat-down searches by female guards. The Court found that the effects of cross-gender searches for women are not comparable to those for men. It recognized that "women generally occupy a disadvantaged position in society in relation to men."[808] In denying an infringement of s. 15 the Court emphasized the social and political reality of women: "The reality of the relationship between the sexes is such that the historical trend

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[803] *Ibid.* at 18 ff; Mahoney, *supra* note 792 at 783-84.
[804] This was the position argued by L'Heureux-Dubé in her dissenting opinions when the majority focused on the purpose of the legislation to uphold distinctions: *e.g.*, *Egan* v. *Canada*, [1995] 2 S.C.R. 513 (upholding the denial of spousal supplement for homosexual couples); *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627 (requirement to pay taxes on alimony does not infringe s. 15 rights of the ex-wife); *Symes*, *supra* note 792, (disallowing child care as a tax-deductible expense for business women does not violate s. 15).
[805] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at 498 (unmarried partner); *Andrews*, *supra* note 794 at 152 (Wilson, J., concurring) (immigrants).
[806] L'Heureux-Dubé, *supra* note 792 at 28.
[807] [1993] 2 S.C.R. 872 [hereinafter *Weatherall*]; see also *Turpin*, *supra* note 793.
[808] *Weatherall*, *ibid.* at 877.

of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors."[809]

Whereas the s. 15 cases show that the Court goes beyond a formal-liberal understanding of fundamental rights which is rather insensitive to the social and political conditions of the realization of those rights, the application of s. 15 values in other contexts displays an understanding of fundamental rights which does not restrict them to negative individual rights but acknowledges their function as leading and structuring principles for their respective social areas.

This trend is most evident in *Keegstra* and *Butler*.[810] In *Keegstra* the Court found that s. 15 of the *Charter* lent further legitimacy to the government's goal of prohibiting hate propaganda. The Court found that the effects of s. 15's dedication to the promotion of equality was not "confined to those instances where it can be invoked by an individual against the state."[811] By this, s. 15 transcends the confined meaning of an individual right. It authorizes governmental promotion of its purposes.[812] In the context of hate speech s. 15 legitimizes governmental efforts to protect the victims of communicated racism.[813]

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[809] *Ibid.*

[810] Other cases are, *e.g.*, *Moge* v. *Moge*, [1992] 3 S.C.R. 813 (In clarifying the approach to spousal support under the Divorce Act the Court underlined that the feminization of poverty must be considered.); *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Decision under human rights legislation. The Court held that unfavorable treatment of pregnant women was sex discrimination notwithstanding the fact that only women get pregnant); equality-based arguments played also a role in *R.* v. *Lavallee*, [1990] 1 S.C.R. 852 (Dealing with the question of whether the 'battered wife syndrome' was an available self-defense, the Court indicated that the criminal law must take into account the differing experiences of women and men).

[811] *Keegstra, supra* note 639 at 755.

[812] L'Heureux-Dubé, *supra* note 792 at 33; see also Mahoney, *supra* note 792 at 791.

[813] See also *Ross* v. *School District No. 15*, [1996] 1 S.C.R. 826 (upholding an order against a school teacher who published anti-Semitic material in his off-duty time) at 874: "[T]he right of the children ... "to be educated in a school system that is free from bias, prejudice and intolerance", ... is underscored by s. 5(1) of the [New Brunswick Human Rights Act] and entrenched in s.15 of the *Charter*."

Also in *Butler* the Court invoked the *Charter's* equality values to legitimize obscenity legislation: the Court found that certain types of pornography have a negative impact on women's sense of self-worth and acceptance since they portray women as a class as objects for sexual exploitation and abuse.[814] Earlier in the judgment Sopinka, J., speaking for the majority, stated that the prevention of activities which "undermine another basic *Charter* right may indeed be a legitimate objective"[815] of governmental regulation. Based on the negative effects of obscene material for women's equality in society the Court found that the government is enabled to enact regulation seeking to prevent those effects: "[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material."[816]

Although the Canadian Supreme Court has not gone so far as the Bundesverfassungsgericht, which has deduced governmental protection duties from fundamental rights guarantees[817], it deduced a governmental protection power from the *Charter's* equality guarantee and in doing so altered the meaning of fundamental rights as being exclusively a shield of the individual against governmental intrusion. Thus, the Supreme Court recognized that under certain social and political conditions governmental action is necessary for an effective protection of *Charter* rights and freedoms. The Court's understanding of s. 15 of the *Charter* displays a sensitivity towards the social and political conditions of the reali-

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[814] *Butler, supra* note 650 at 497.
[815] *Ibid.* at 493.
[816] *Ibid.* at 497.
[817] See *supra* note 94 and accompanying text. But Mahoney & Martin, *supra* note 791 at XX, deduce a 'protection duty' from s. 15: "The absence of regulation and the widespread broadcasting of stereotypic images may constitute unconstitutional discrimination." See also Trudel & Abran, *supra* note 724 at 164.

zation of equality rights. It is especially concerned with existing power imbalances in society which can impede the exercise of those rights.

In sum, the Court's equality jurisprudence shows significant parallels to the German 'objective' understanding of basic rights relevant in the context of electronic media. The Supreme Court recognizes that to become effective a basic right requires more than a formal guarantee, it requires the courts to consider the conditions for the realization of the purpose of those guarantees, and that governmental action is not only a threat to those guarantees but can be necessary for their full realization.

However, the equality jurisprudence of the Supreme Court cannot be simply translated into the field of electronic media. The cautious position of the Court with respect to positive impacts of freedom of expression offers only limited starting points for such a translation. The equality jurisprudence merely shows that the Canadian Supreme Court is sufficiently equipped to consider the context of electronic media with its imbalance between communicators and recipients; and to draw doctrinal conclusions from basic rights guarantees which do not only restrict governmental action but can lend them additional legitimacy. Whether the Court will, confronted with specific media regulations, choose to give the freedom of electronic media a more 'objective' meaning remains an open question. The equality jurisprudence indicates only that it is not out of the question for the Court to pursue such a course.

Electronic mass media have changed the face of the constitutional guarantee of freedom of expression. Both the United States and Germany started from a shared feature: the essential role of freedom of expression for the democratic process. In modern mass democracies electronic media are vital for this process. Their pervasiveness shapes the formation of private and public opinion; their emergence has even altered the democratic process itself.

The dominant role of electronic mass media for democratic deliberation challenges the traditional understanding of the constitutional freedom of expression. The restricted access to this powerful resource raises the concern that the guarantee of freedom of expression as an individual right might ring hollow in this environment. Moreover, a guarantee of absolute protection from governmental regulation for those with access could be used to deny access to public deliberation to large parts of society.

Early regulations of radio and television in the United States, Canada, and Germany attempted to remedy these dangers by imposing a regime of public obligations for electronic mass media. In Germany as well as in the United States the first judicial responses sought to internalize these attempts in the concept of the constitutional guarantee of freedom of expression. Both endorsed an altered role of the state in this field, based on the democratic foundation of communicative freedoms.

However, more recent decisions by the courts reveal substantial differences between Germany and the United States. In the United States the Tradition, with its distrust of gov-

ernment, increasingly prevails in the field of electronic media. The marketplace of ideas and the economic marketplace have become interchangeable synonyms. Thus, ensuring that electronic media fulfill their democratic function has become a (welcomed) by-product of protecting the marketplace. Regulation that attempts to ensure the democratic function of electronic media enjoys no 'preferred position' in the judicial muster. The democratic reasoning of earlier decisions has been transformed into a protection of autonomous decisions in the marketplace. However, this 're-individualization' does not really reconcile the first amendment as applied to electronic media with the Tradition. Understood as an individual right the first amendment becomes a right of the 'few' in this environment. This is an important change in the meaning and content of the free speech guarantee. In bringing autonomy at the forefront the US Supreme Court detached the first amendment substantially from its former democratic foundation and transformed it increasingly into a tool for the protection of economic interests of the media industry.

A detachment is also characteristic for the German jurisdiction. In its attempt to ensure the democratic function of electronic media the Bundesverfassungsgericht largely detached the constitutional guarantee of broadcasting freedom from the individual rights bearer. Thus, freedom of broadcasting "guarantees a social state of affairs, not the action of an individual or institution."[818] Broadcasting freedom is not an individual right to broadcast, it is the guarantee of "the people as a whole" to have an electronic media system which functions according to the goals of freedom of expression in a democratic society. It obliges the state to act whenever the absence of state regulation is not sufficient to

[818] Fiss, "Social Structure" *supra* note 5 at 1411 referring to the first amendment. However, he points out that this is not the view of the Supreme Court.

ensure that all parts of society have an equal opportunity to participate in the formation of opinion in and through electronic media.

It is thus far not clear which course the Canadian Supreme Court will pursue in this field. So far, its jurisdiction under the *Charter* shows that the Court is prepared to alter traditional understandings of rights and freedoms when otherwise they are in danger of becoming futile promises. The Court has given the government some space to maneuver in areas where the social, political, and economic context is characterized by significant power imbalances. However, the Court has been very cautious in requiring affirmative steps of the state in the area of freedom of expression. Moreover, the Court's decision in *MacDonald* raises the question of whether the Court is prepared and willing to resist claims of economic interests dressed in freedom of expression rhetoric.

The prevailing first amendment theory in the United States developed only a highly constrained and insufficient framework for dealing with the way in which electronic mass media challenge the foundation of postmodern mass democracies. The theory is especially deficient in assessing the transformative potential of electronic mass communication. This century has witnessed a mediatization of society: electronic mass media are largely producing society's reality and are thereby framing the mode of participation in political, social and cultural contexts.

The response to mediatization by the dominant first amendment theory is based on a oversimplified conception of the process of mass communication and its relation to the proper functioning of democracy. The promotion of democracy has become "a hoped-for

product of market interaction."[819] The prevailing conception of the first amendment provides no counterweight to commercial broadcasters' view of the audience as a market. In contrast, it shares and even promotes this view. Distortions of mass communication by the market forces can hardly be detected by this conception; and when they are perceived, they do not trigger any consequences, especially not for the role of the state.

The Habermasian construct of a 'public sphere' which has to be kept free of restrictions from the state and the forces of economy is incompatible with the American conception of free speech.[820] The public sphere is in Habermas's theory the nonphysical locus in society which is governed by rational discourse to which all members of society have equal access. The public sphere is conceived of as an 'ideal speech situation'. Speakers in this situation are making four validity claims: what they say is comprehensible, true, sincere and appropriate. Speech associated with the ideal speech situation is 'communicative action' as opposed to 'strategic action' which is, inter alia, associated with the economic marketplace. In order for critical reason to become an effective control of state and economy a public sphere has to be preserved (or created) which is free from strategic action, i.e. instrumental action which treats human beings as things to be used efficiently and is rather coercive than persuasive. This distinction between communicative and strategic ac-

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[819] Price, *supra* note 208 at 36; cf. Fiss, "Social Structure" *supra* note 5 at 1423

[820] This concept was introduced in Jürgen Habermas, *Der Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Neuwied: Luchterhand, 1962). A recent application of this concept in the legal context is Jürgen Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992). For an application of Habermas's concept of a 'public sphere' to electronic media regulation see Price, *supra* note 208 at 21 ff.; see also Marc Raboy, Florian Sauvageau & Dave Atkinson, "Cultural Development and the Open Economy: A Democratic Issue and a Challenge to Public Policy", (1994) 19 Canadian Journal of Communication 291 at 303-10.

tion is rather meaningless to a theory which has blurred the differences between commercial and public spheres with the marketplace metaphor.

In contrast, the jurisprudence of the Bundesverfassungsgericht is largely compatible with Habermas's theory. The Court shares the concern with the preservation of an undistorted public sphere for which the state has to provide the infrastructure, so that communicative action as a precondition of democratic, collective action can be preserved and promoted by the media system. Thus, the objective understanding of broadcasting freedom allows a more complex assessment of the interrelation of electronically mediated mass communication and democracy. However, the jurisprudence of the Bundesverfassungsgericht shares the notorious weaknesses of the Habermasian model.

The orientation towards an ideal speech situation entails a utopian notion[821] which translates in the Bundesverfassungsgericht's jurisprudence into futile regulatory attempts to preserve a public sphere within an increasingly commercialized environment. However, although not always effective, the insistence of the Court on governmental countermeasures prevents the transformation of the constitutional guarantee of broadcasting freedom into an economic commodity. Thereby, an important framework for communicative action is preserved which has an impact well beyond the constitutional discourse.

Far more problematic is the Habermasian logocentrism.[822] Whereas the dominant first amendment theory presupposes a 'free' subject in the marketplace, Habermas presupposes an originally free subject which is deformed by the mediatization. This gears the regula-

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[821] See Stanley Fish, *There's No Such Thing as Free Speech: and it's a Good Thing, Too* (New York: Oxford University Press, 1994) at 302.

[822] See Mark Poster, *The Second Media Age* (Cambridge: Polity Press, 1995) at 11 ff.

tion of electronic mass media to attempt to re-establish earlier forms of the public sphere in bourgeois societies in which the subject was not deformed by constant mediatization and, thus, rational politics could prevail.

The Habermasian logocentrism which is largely shared by the Bundesverfassungsgericht is preoccupied with political discourse. It tends to subordinate the impact of technology on culture to the concern with pluralism in the political discourse, or at best, perceives the interrelation of culture and technology only from this perspective. Phenomena of mass culture are treated with a more or less concealed hostility. The subject in the electronic mass media audience - condemned to be the listener and viewer - cannot be seen as anything other than heteronomous.

The mediatization in this century has changed the way in which the subject is constituted. Rationality and autonomy are no longer the sole constituent elements of the postmodern subject; it is constituted and constitutes itself by media reception.[823] Electronic mass media do not encounter a pre-given rational and autonomous individual which they deform with their pervasive one-way communication. Reception, at least at the margins of society, is only inadequately described as passive. In subculture, in phenomena like graffiti or techno music, modes of active reception can be observed. New technologies, with their higher degree of interactivity, offer even an increased potential of active reception and participation. However, it is unlikely that technological developments are a sufficient safeguard for participatory modes of reception to emerge spontaneously. Trends towards a commercialization of new technologies with their restrictions of access maintain the need

[823] See *ibid.* at 23 ff.

for governmental intervention. If the objective understanding of broadcasting freedom succeeds in overcoming its preoccupation with political pluralism, it remains a useful grid for evaluating the proper functioning of mediatized communication and the necessary governmental interventions.

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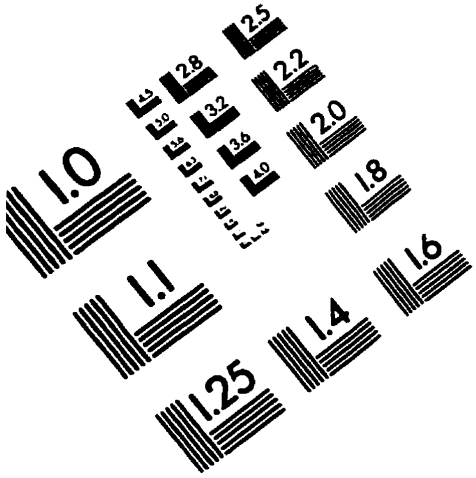

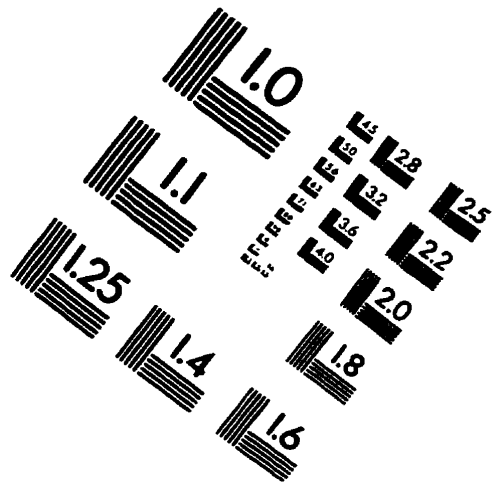

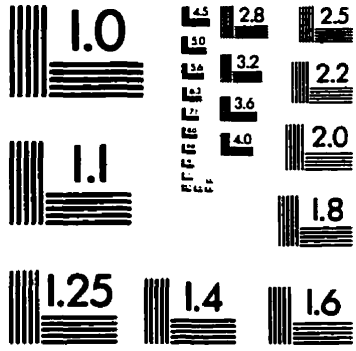

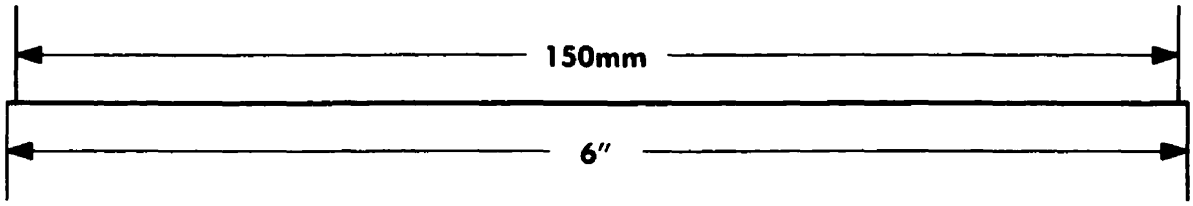

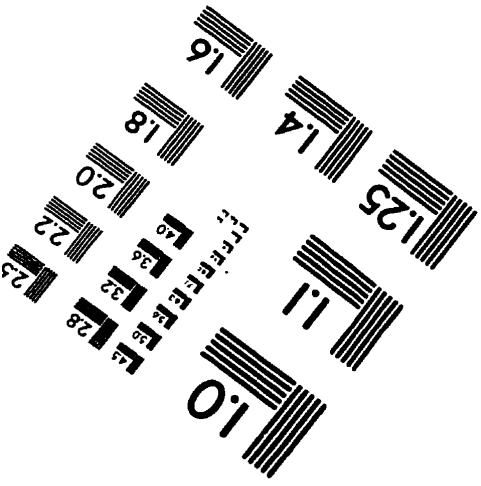

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Phone: 716/482-0300
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