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## OPINION

### THE CABLE TELEVISION "PRESS" AND THE PROTECTION OF THE FIRST AMENDMENT— A NOT SO "VEXING QUESTION"

JOHN P. COLE, JR.\*

#### ABSTRACT

The Supreme Court recently declared that cable television operators engage in "speech within the scope of the First Amendment to the Constitution and . . . constitute a part of the press." The limits imposed by the Speech and Press clause on the exercise of governmental power notwithstanding, the Congress, the Federal Communications Commission, and innumerable states and cities impose content-based regulations of varying severity upon the cable media. When challenged, most of these regulations have been "justified" by the maker, and sometimes by reviewing courts, on the basis of interests-balancing formulas in the style of *United States v. O'Brien*. Under such formulas, facial infringement on speech freedoms have been determined to be more than off-set by the public-interest benefits expected to accrue from the restraint. Many lower courts, where the constitutional issue has been joined, appear confused, especially in deciding upon the appropriate standard of First Amendment review. This confusion has resulted in a patchwork of inconsistent and, in some cases, irrational decisions. The author's position is that *O'Brien* and its interests-balancing analysis are inapposite to First Amendment review of any regulation that on its face limits the exercise of speech or press freedoms. The purpose of the First Amendment is foremost to insulate expressive activity from the influence of public officials and thereby to assure an independent press and thus a free society. When reviewing courts, confronted with deliberate abridgments on communicative freedoms, defer to the "substantiality" of public-interest findings made by legislative bodies, judges relinquish their essential role in the tripartite system of constitutionally limited government; and the constraint of the First Amendment and the freedoms guaranteed to the people become sham.

The precise level of First Amendment protection due a cable television operator is clearly an issue of much moment . . . . However . . . we conclude that we again need not resolve this vexing question.<sup>1</sup>

#### I. FRAMING THE FIRST AMENDMENT QUESTION

When then Chief Judge Patricia Wald of the District of Columbia Circuit

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1. *Century Communications Corp. v. FCC*, 835 F.2d 292, 298 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (1988), *cert. denied*, 486 U.S. 1032.

handed down that court's *Century Communications* opinion, ruling for the second time in less than three years that the "must carry" regulations of the Federal Communications Commission were an unconstitutional abridgment of cable television operators' First Amendment freedoms, she did so on the limited ground that the agency had "fail[ed] . . . to satisfy even the less-demanding First Amendment test of *United States v. O'Brien*."<sup>2</sup> The question of whether *O'Brien* constitutes the appropriate standard by which such constitutionality is measured is one, she observed, of "much moment" but also "vexing."<sup>3</sup>

Other lower courts in the federal system have been wrestling with this question for nearly thirty years and have run the full gamut of possible dispositions of the constitutional issue.<sup>4</sup> On numerous occasions, the Federal Communications Commission (FCC) has ruled that its authority to impose content-based restraints on the publication or distribution of communications via the cable television media is subject to constitutional review solely under the *O'Brien* standard. The agency has concluded in every such instance that its "public interest" findings more than offset any abridgement of the cable operator's First Amendment freedoms.<sup>5</sup> To date, the U.S. Supreme Court

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2. *Id.* at 298 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)) ("Must-carry" regulations required that cable television operators give special priority to the carriage of the broadcast signals of certain "local" television stations over their closed-circuit distribution facilities, even to the potential preclusion of other "equally protected" speakers.). The test in *O'Brien* is that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," regulation of the conduct is justified if "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 376-77. See *infra* notes 45-48.

3. The D.C. Circuit's first encounter with must-carry regulation came in *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1448 (D.C. Cir. 1985) (per curiam), *cert. denied*, 476 U.S. 1169 (1986), where, striking down the agency's predecessor version of the rules, it said: "our review leaves us with serious doubts about the appropriateness of invoking *O'Brien*'s interest-balancing formulation. . . ." There too, however, the court found that because the must-carry rule could not withstand scrutiny even under the less demanding *O'Brien* test, it was unnecessary to decide whether the more exacting standard was the appropriate one. *Id.*

4. In contrast to the D.C. Circuit's cautious uncertainty, the Seventh Circuit, upholding communicative regulation by the city of Chicago of the cable television media, has determined that *O'Brien* is the proper standard of First Amendment review. *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). The Tenth Circuit, without reference to *O'Brien*, has openly urged the proposition that the cable-television press may be treated differently than the print media where there exists "a long-standing and powerful tradition that government's hands off is the best way to" uphold the principles of a free press. *Community Communications Co. v. Boulder*, 660 F.2d 1370, 1379 (10th Cir. 1981), *cert. dismissed*, 465 U.S. 1001 (1982). The best discussion of the state of the law is contained in the Ninth Circuit's opinion in *Preferred Communications v. Los Angeles*, 754 F.2d 1396, 1403-11 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986), where that court took a narrow view of *O'Brien*'s applicability to the central question. As might be expected, the federal district courts are all over the lot on the issue. See also *infra* note 133.

5. See, e.g., *Effective Competition Standard For the Regulation of Cable Television Basic Service Rates*, 6 F.C.C.R. 4545, 4558 (1991), where the FCC, in one brief paragraph, relies upon *O'Brien* to justify rate regulation of services provided by the cable media. See also *id.* at 4575-76 (separate statement of Chairman Alfred C. Sikes): "*Quincy* holds that, to pass constitutional muster as an incidental burden on speech, any must carry rules we devise must

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has declined to speak to the issue definitively.<sup>6</sup> The purpose of this article is to explore this fundamental First Amendment question and to advocate a position. For the electronic press, including its cable-television component, represents today the dominant vehicle by which information and opinion, as well as entertainment, are distributed to and accessed by the masses in the United States.<sup>7</sup>

The electronic media are at least as crucial to the functioning of democratic institutions today as were the print periodicals and pamphleteers of two hundred years ago. The essential difference between 1791, when the First Amendment was ratified, and today is that the diversity of local, national, and international information sources and the variety of viewpoints and outlets have grown astronomically. The most dramatic expansion in the multiplicity of speakers has transpired over the past fifteen years and is the direct product of mass media distribution through cable television circuits. Today the public has instantaneous access to "volumes" of video information as well as virtually unlimited access to literally tens of thousands of print publications. For fast-breaking news and opinion, the electronic media, and in particular its cable television component, serve literally as a window on the world, not only for the masses but also for governments.<sup>8</sup> Within the

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vindicate some important governmental interest." In both the *Quincy* and *Century Communications* cases, the FCC, in support of its content-related regulations, relied solely upon an *O'Brien* analysis contending that the must-carry rules served important public-interest goals. According to the FCC, facial infringements upon "speech" or "press" freedoms, so long as they are adequately balanced or "vindicate[d]" by some "important governmental interest," constitute a constitutionally permissible exercise of legislative power. Beginning with *In re Carter Mountain Transmission Corp.*, 32 F.C.C. 459, 462 (1962), the FCC established a thirty-year tradition of summarily rejecting all First Amendment claims by cable television operators either by invoking its "wide range of discretionary authority [to license radio in the] public interest," *id.*, or by citing to *O'Brien*. See *infra* note 133.

6. In *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 495 (1986), the Court, deferring resolution of the constitutional question put to it in that case, said: "We think that we may know more than we know now about . . . the present uses of the public utility poles and rights-of-way and how [the cable operator] proposes to install and maintain its facilities on them." See *id.* at 496 (Blackmun, J., concurring) (*Preferred Communications* "leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities"); *Quincy Cable TV*, 768 F.2d at 1443 ("the [Supreme] Court has never confronted a challenge to the constitutional validity of the must-carry rules or any other regulation affecting cable television") (footnote omitted). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968) (where the Court first entertained the regulation of cable television and in which it observed that there was "no claim" before it that the contested governmental action was "in any way constitutionally infirm").

7. See, e.g., *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) ("The electronic media have swiftly become a major factor in the dissemination of ideas and information. . . . To a large extent they share with the printed media the role of keeping people informed."). A recently published national survey demonstrates that sixty-five percent of the population relies upon television (including cable television) as its primary source of news while only forty-two percent referred to newspapers as the primary source. THE ROPER ORGANIZATION, THE 1989 TIO/ROPER REPORT, 14, 23, 27 (1989).

8. Be it war in the Persian Gulf or a coup in the Kremlin, Cable News Network is the service that the Government and the people generally turn to for fast-breaking information. See, e.g., Howard Kurtz, *On Television, Gunfire is Heard, but Not Seen*, WASH. POST, Jan. 17, 1991, at A-28 ("The official confirmation of what CNN's viewers had been hearing for nearly half an

context of concentrated ownership or control of mass media interests, there is today a far greater diversity of information sources coming into the American home electronically than is the case regarding print publications.<sup>9</sup> The United States has entered the Age of Information.

Concurring then in Judge Wald's assessment that the issue of the appropriate constitutional standard for judicial review of regulations that impinge on the cable communicator's freedom to publish and to distribute information to the public is one of "much moment," it is respectfully suggested that resolution of the question falls far short of "vexing." The Supreme Court has laid down an unambiguous, well-lit path of precedent leading to the conclusion that cable television operators, when performing "communicative" functions, engage in "speech" and constitute a "part of the press" entitled to that constitutional protection traditionally afforded publishers, editors, and distributors operating in the other media of mass communication.<sup>10</sup>

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hour came at 7:07 p.m. when White House spokesman Marlin Fitzwater told reporters, "The liberation of Kuwait has begun." This of course is not to imply that the electronic press, in particular its cable television component, is in relevant context superior to the other communications media. As is the case with the print media, the electronic press traverses the full range of quality and integrity of journalistic product.

9. *See, e.g.*, *Miami Herald Pub. Co. v. Tomillo*, 418 U.S. 241, 249 n.13 (1974). Anyone in this country over thirty-five years of age, especially those who did not grow up in one of the two or three very largest metropolitan areas, well recalls the availability of a very limited number of television channels on the home receiver—generally in the range of two to five outlets. The nation operated in a three-network dominated video society. For example, in 1969, Kansas City, Missouri, the twenty-second largest of the nation's 226 television markets, had three commercial television stations, as did the Buffalo (No. 27), Columbus, Ohio (No. 28), and Memphis (No. 32) markets. TELEVISION FACTBOOK NO. 40, at 42-a - 44-a (1970). Utica, New York, ranked as the 130th largest market, had but one commercial television station. *Id.* at 44-a. With the development of cable television services, the number of available channels and program sources has leaped at least ten-fold, most of which growth has occurred since 1975 with the advent of satellite-delivered cable networks. Today, there are seventy-six video program networks offered nationwide for cable distribution. National Cable Television Association, *Cable Television Developments 7-A* (1992). More than any other component of the video-communications complex, cable television is responsible for this dramatic increase in the diversity of speech sources. Indeed, most of the progress attained to date has been achieved over the unrelenting objections of the broadcasting industry and the efforts of its friends in both Congress and the regulatory agencies to place road blocks in the way. *See infra* notes 123 & 137. While the cable publisher/editor, like those in any medium of mass communication, exercises control over the selection of information and programming sources, the decisions are largely dictated by the desires of existing and potential subscribers, virtually all of whom are attracted to the medium by the abundance of program selection. In no vehicle of mass media communication is there a greater range of independent speakers and sources than is the case with the typical cable television offering. Rather than being a gatekeeper, cable television's greatest contribution to the commonweal lies in the proliferation of programming and the increased diversity of "speech" sources. It is the dilution in the influence of those few who previously dominated the home distribution of video programming and commercial messages in the United States that has led to many of the regulatory restrictions confronted by the cable television media. An old-fashioned range-war over turf has been in progress since the mid-1960s and many of those restraints currently proposed for the cable television media are a continuation of that highly politicized conflict. *See, e.g.*, *Cable Television Report and Order*, 36 F.C.C.2d 143, 168-176 (1972); 138 Cong. Rec. S654-56 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

10. *Cf. Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991).

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applicable constitutional constraints, the orderly use of its public streets is generally conceded, even when an "incidental" effect of such regulation may be to limit the exercise of speech and press freedoms. This of course recognizes the authority of cities and other local governments appropriately to oversee the use of public property by private interests who would permanently install cable television facilities thereon. However, existing and proposed regulatory measures that facially restrict the discretion of the cable-television publisher/editor to implement communicative decisions, including such matters as "must carry," "access," "retransmission consent," subscriber rate regulation, exclusivity of intellectual product, "customer service" standards, and indeed any content-related supervision of the media, raise serious First Amendment issues.<sup>11</sup> The subject of this constitutional examination is the *ad hoc* intrusion of government into that panoply of activity often characterized as the "editorial process."

The holdings of some lower courts, and the very heart of the First Amendment question joined here, are perhaps best capsulized by the Seventh Circuit's opinion in *Chicago Cable Communications v. Chicago Cable Commission*.<sup>12</sup> With respect to content-based regulation of the cable communications media by the city of Chicago, that court summarily concluded: "As other [lower] courts have held, *O'Brien* is an appropriate standard-bearer for dealing with questions of local regulation of cable television."<sup>13</sup> According to the Seventh Circuit, municipal supervision of the cable television media, without inquiry into the particular nature or purpose of the regulation, is subject to a simple, interests-balancing analysis. This concept of lumping all cable regulations into one neat basket for First Amendment review is the focus of this article.<sup>14</sup>

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11. Each of these regulatory measures are contained in S.12, 102d Cong., 1st Sess. (1991), passed by the U.S. Senate in January 1992, 138 Cong. Rec. S760 (daily ed. Jan. 31, 1992) [hereinafter S.12]. The House of Representatives, where similarly intrusive bills are pending (e.g., H.R. 1303, 102d Cong., 1st Sess. (1991)), had not taken floor action as of the date this article went to press.

12. *Chicago Cable Communications*, 879 F.2d at 1548.

13. *Id.* *Chicago Cable Communications* involved municipally-imposed requirements that the cable operator originate a prescribed amount of "locally produced" programming. The court there was called upon to decide, *inter alia*, what particular programs fit that description. After describing the cable operator's First Amendment claim of impermissible content regulation as raising a novel question, the court proceeded to adopt the district court's finding that *O'Brien* provides the framework by which such an issue is determined. *Chicago Cable Communications*, 879 F.2d at 1547-48. Without discussion, the Seventh Circuit, as did the district court below, assumed that content-based supervision of the cable television media "is within the constitutional power of the Government." *Id.* (quoting *O'Brien*, 391 U.S. at 377). See also *infra* notes 37, 38.

14. That a newspaper, for example, is unquestionably subject to local zoning laws or to the federal antitrust statutes does not open the door to government's regulation of the communicative or editorial aspects of the publication. The fact that maintenance of newsracks on public property may require a permit or that such physical occupation might reasonably be supervised, *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), does not provide a bridge to government's regulation of the content or price of the newspapers dispensed via those newsracks. Yet some authorities have reasoned that because cable television is subjected to local regulation when establishing its wire-line complex over and under public rights-of-way, it follows that all

The protection afforded the editorial process under the Speech and Press clause of the First Amendment is not determined by the particular means by which the communicative activity is conducted.<sup>15</sup> If government is constitutionally foreclosed from intruding upon the communicative judgments of editors in the print media, it likewise is prohibited from proscribing that segment of the press which opts to publish its speech-product electronically. That one editor may choose to speak through a particular distribution vehicle while another communicates via a different technology is a distinction lacking constitutional significance.<sup>16</sup> Nor does the First Amendment discriminate between speakers or press organs that originate their own expression and those who, with appropriate authorization, present or distribute primarily the speech of others.<sup>17</sup> "Communication" and "communicative activity" are protected from governmental intrusion without reference to the identity of the communicator or the distribution vehicle of choice. The fact that there unquestionably has been a tradition of abridging the First Amendment freedom of the cable television press<sup>18</sup> is hardly persuasive precedent for judicial vindication of the unconstitutional governmental action.<sup>19</sup>

The "precise level of First Amendment protection due a cable television operator," again to quote the *Century Communications* opinion, will ultimately depend upon the particular standard of judicial review to be applied by judges adjudicating the constitutionality of content-based supervision of the medium. The fundamental question is whether public

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aspects of the media business must similarly be subject to supervision. See, e.g., *Community Communications Co.*, 660 F.2d at 1379 ("[The cable] industry has always been regulated in many respects. There is no tradition of nearly absolute freedom from government control.").

15. Under the "scarcity doctrine," created by the Supreme Court in the early days of radio to justify the Federal Communications Commission's licensing jurisdiction over the broadcasting media, station licensees have been treated differently in a First Amendment context than have all others engaged in mass communication. See *infra* pp. 369-71 and accompanying text and *infra* note 173. Some commentators have urged that an identical or similar form of public interest analysis be applied to the cable television media in evaluating First Amendment claims. See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1008-10 (2d ed. 1988); Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329 (1988). Ironically, these same constitutional scholars have suggested that modern communications technology and the plethora of speakers and outlets now available to the public via the electronic media render the scarcity rationale obsolete in its application to the broadcasting press. See *infra* note 95. Scarcity is the sole ground upon which the Court has condoned limited regulatory abridgment of the First Amendment freedoms of those conferred by the FCC with valuable broadcast licenses.

16. *Quincy Cable TV*, 768 F.2d at 1448 ("the core values of the First Amendment clearly transcend the particular details of the various vehicles through which the messages are conveyed").

17. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("the press . . . comprehends every sort of publication which affords a vehicle of information and opinion"); *Griswold v. Connecticut*, 381 U.S. 470, 482 (1965) ("the Freedom [of speech] includes not only the right to utter or to print, but the right to distribute [and] the right to receive"). See also *Preferred Communications*, 476 U.S. at 494 (a cable operator "exercis[es] editorial discretion [when deciding] which stations or programs to include in its repertoire").

18. See *supra* note 14.

19. See *infra* note 133.

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officials are to be left relatively free to label their facial abridgements of speech and press freedoms as promoting "public interest" objectives, and thereby constitutionally justify their intervention. Or, are deliberate infringements to be held to a higher standard of scrutiny? The constitutional issue, which far transcends the bounds of communication via cable television lines, is whether the First Amendment constitutes in relative terms a command or an advisory. Is the exercise of discretion by public authority, whether a legislator, an administrator, or a judge, to play a meaningful role when the governmental action under review facially conflicts with the express provisions of the constitutional command?

The thesis developed here is not contingent upon any suggestion that public-interest judgments made by legislators or regulators are generally, or even sometimes, rendered in bad faith. For purposes of this article, it is conceded that the regulatory abridgments of the cable television operator's speech and press freedom may arguably advance the articulated public-interest goals. But public-interest projections, however well founded, are irrelevant to the far more fundamental question of whether the government, absent some extraordinary or compelling reason, is enabled under the Constitution to enact laws that are, on their face, speech-proscriptive or press-restrictive. Decision-makers "must not confuse what is 'good', 'desirable', or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication."<sup>20</sup>

*O'Brien's* interests-balancing formula is not a device by which the constitutionally guaranteed freedom of speech or press may be manipulated to accommodate the preference of the majority or that of the politically powerful. Nor is *O'Brien* a tool to circumvent those limits that the Constitution fixes upon the exercise of governmental power. The author is not unmindful of the fact that his premise challenges an article of faith long held by many in the communications establishment as well as in government. But fundamental constitutional questions ought not to be decided on the basis of unquestioned assumptions. Dogma, however comforting, is not a substitute for rational examination.

Judges do a disservice to the principle of an independent communications media when they even suggest that *O'Brien's* more lenient standard of First Amendment review may be the appropriate test for justification of those

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20. *Houchins v. KQED, Inc.*, 438 U.S. 1, 13 (1978). The question is not whether content-restrictive supervision of the cable television "press" may be good public policy but rather whether the government, under the Constitution, is legally capacitated to make such regulations. The First Amendment, read in conjunction with Article I, Section 8 and the Tenth and Fourteenth Amendments, plainly says that it is not. While there undoubtedly are individuals and groups within the cable television press inflicted with that avarice only too common to the general business establishment, such societal failings are not a basis for the suspension of constitutionally guaranteed freedoms. *See infra* note 27.



regulations that facially abridge the exercise of speech and press liberties.<sup>21</sup> That the D.C. Circuit, in both of its must-carry cases, reached the right result for the wrong reason has served chiefly to compound the confusion leading other lower courts as well as regulators to apply erroneous, misleading, and potentially dangerous concepts of constitutional theory.<sup>22</sup> More significantly, the suggestion of an *O'Brien* test to review any content-based supervision of the press reveals a fundamental misunderstanding of the role of courts when it is the express provisions of the First Amendment that are directly confronted.<sup>23</sup>

The following is not so much about communication by cable television as it is an examination into the role that government and public officials, the First Amendment notwithstanding, play in the contemporary media of mass communication in America. This is about the use of political power, expediency, and the erosion of constitutional principle—a phenomenon that ought not pass unnoticed.

## II. COMMUNICATION BY CABLE TELEVISION IS “SPEECH” AND “PRESS” WITH ENTITLEMENT TO THE PROTECTIONS OF THE FIRST AMENDMENT

In a case raising a First Amendment challenge to a state excise tax, the Supreme Court recently said: “Cable television provides to its subscribers news, information, and entertainment. It is engaged in ‘speech’ under the First Amendment, and is, in much of its operation, part of the ‘press.’”<sup>24</sup> *Preferred Communications* involved the local franchising of cable television

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21. See *infra* note 46. The *O'Brien* standard of First Amendment review is the most overworked, least understood, and most misused constitutional doctrine applied by the lower courts today. For many judges seemingly believe that its interests-balancing formula is little more than a roadmap to nullification of the constitutional command that the government “shall make no law . . . abridging the freedom of speech, or of the press.” See, e.g., *Century Communications Corp.*, 835 F.2d at 300, where the D.C. Circuit conducts a protracted examination of the “substantiality of the governmental interest” regarding the presumptively unconstitutional rule before it. Some obviously presume the express provisions of the speech and press clause to carry so little weight when placed on the *O'Brien* scales as consistently to be outbalanced by the public-interest visions of legislators or bureaucrats.

22. See, e.g., *Chicago Cable Communications*, 879 F.2d at 1549, citing both *Century Communications* and *Quincy* for adoption of an *O'Brien* test to justify the content-based, speech-intrusive cable regulations there at issue.

23. Cf. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S. Ct. 501, 513 (1991) (Kennedy, J., concurring in the judgment) (“Borrowing the compelling interest and narrow tailoring analysis is ill-advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so.”).

24. *Leathers*, 111 S. Ct. at 1442. Although a cable television operator may be something less than a full-fledged part of the press when, for example, installing or maintaining its electronic distribution facilities over and under public streets, e.g., *Preferred Communications*, 476 U.S. at 495, the cable operator would appear to attain such status when engaged in the process of making and implementing communicative judgments. While the Supreme Court has hinted strongly in *Preferred Communications* that cable television’s use of public right-of-way to lay its cable lines provides a basis for relevant regulation, the Court has never suggested that such supervision may extend to control over the communicative aspects of the medium.

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systems and the parameters of the First Amendment protection afforded the media in that context. In that case, the Court observed that cable operators engage in the "communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers," further explaining that, "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable-television operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats."<sup>25</sup> While the Court has never focused directly on the question of what First Amendment protection is due the cable television press, certainly, when the media engages in communicative functions, those functions are at least *presumably* immunized from government restriction.<sup>26</sup>

The fact that those privileged few conferred by the government with valuable licenses to use scarce radio frequencies in the conduct of their commercial broadcasting businesses have been placed by the Court in a unique category and treated somewhat differently than have the other media of mass communications, even where First Amendment freedoms are implicated, is neither overlooked nor discounted.<sup>27</sup> The Court has never suggested, however, a mandate of greater responsibility on those who speak or edit outside of the print media. Nor has the Court implied that the constraint by which the First Amendment firmly limits the exercise of governmental power is somehow lifted when the target of the legislature's restraint is the cable television press.

Those protections constitutionally afforded speakers and the press are not exclusive to the print media but rather pertain to all who engage in the process of communicating to the public, whatever the chosen means of expression or promulgation.<sup>28</sup> In *Miami Herald*, the Court stated that regulation of an editor's discretion over communicative matters "can[not] be

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25. *Preferred Communications*, 476 U.S. at 494. See also *supra* note 6.

26. See *infra* pp. 371-75 and accompanying notes. Even broadcast licensees retain a substantial degree of their constitutional protection. See *infra* pp. 369-71.

27. *Miami Herald Pub. Co.*, 418 U.S. at 256. See also *id.* at 258 ("[R]egulation of [editorial discretion] can[not] be exercised consistent with First Amendment guarantees of a free press."). In *Miami Herald*, Mr. Tornillo in support of the content-based, viewpoint-neutral state statute there at issue, argued, *inter alia*, "that government has an obligation to ensure that a wide variety of views reach the public," *id.* at 247, and that "national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become non-competitive and enormously powerful," *id.* at 249 (footnote omitted). In the face of these assertions of monopoly power and the suggested affirmative obligation of government to advance First Amendment "values," the Court held: "However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment . . ." *Id.* at 254 (footnote omitted).

28. See *Lovell*, 303 U.S. at 452 ("The liberty of the press is not confined to newspapers and periodicals . . . . The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion."). See also *supra* note 16.

exercised consistent with First Amendment guarantees of a free press. . . ."<sup>29</sup> In the context of the broadcasting media, where the authority of the government through its licensing jurisdiction is relatively more pervasive, the Court notably has reaffirmed its commitment to the constitutional guarantees of free expression for station licensees finding that were it to uphold the intrusions advocated in the case before it, there would be a contradiction of the First Amendment's command.<sup>30</sup> That same command is not to be ignored when the communications are distributed to the public via the medium of cable television lines. In *Columbia Broadcasting Systems*, the Court further explained that editors in the print and electronic media perform essentially identical functions, they exercise dominion over content.<sup>31</sup> Cable television editors, when making those same judgments, come within the scope of the First Amendment; and their activities, with rare exception, are likewise protected from *ad hoc* regulation of a communicative character. It is suggested that the constraint and immunities of the First Amendment retain their potency even when confronted by the legislature's public-interest findings.

The freedom of "speech" and "of the press" applies equally to the distribution of another's speech.<sup>32</sup> This "freedom . . . includes not only the right to utter or to print, but the right to distribute [and] the right to receive."<sup>33</sup> While "each method [of expression or distribution] tends to present its own peculiar problems . . . the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."<sup>34</sup>

Like their counterparts in the other media of mass communication, cable television publishers exercise those freedoms uniquely protected from governmental intrusion under the Speech and Press clause of the First Amendment. Designed by the Founding Fathers as a restraint on the law-making powers of government, the First Amendment structurally limits the authority of the government to enact regulations intended to abridge the

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29. *Miami Herald Pub. Co.*, 418 U.S. at 258.

30. *Columbia Broadcasting Sys.*, 412 U.S. at 120-21. See also *id.* at 125 ("Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.").

31. *Id.* at 124 ("For better or worse, editing is what editors are for; and editing is selection and choice of materials."). See also *Quincy Cable TV*, 768 F.2d at 1452, where the D.C. Circuit found that the FCC's must-carry rules coerce speech but that the "more certain [constitutional] injury stems from the substantial limitations the rules work on the [cable] operator's otherwise broad discretion to select the programming it offers its subscribers.").

32. *Lovell*, 303 U.S. at 452 (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)) ("Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

33. *Griswold*, 381 U.S. at 482.

34. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

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freedom of speech or press.<sup>35</sup> Because the "press . . . comprehends every sort of publication which affords a vehicle of information and opinion,"<sup>36</sup> the limits constitutionally placed on the powers of government pertain to all elements of the mass media including cable television.

These time-honored constitutional principles notwithstanding, it is "speech" and it is "the press," albeit the cable television model, that the Congress, the FCC, and numerous local governments seek to restrict. An increasing number of legislators and public officials urge that their perceptions of societal goals furnish a sufficient legal basis upon which to override the constraint that constitutionally limits their powers. In those purely communicative areas of product selection and distribution practices—activities falling squarely within the traditionally protected sphere of editorial discretion—it is openly urged that the judgments and mandates of legislators and government administrators supersede those of the private communicator.<sup>37</sup>

The theory of those supporting communicative supervision of the cable-television press is that government may selectively abridge the freedom of the cable editor or publisher provided that the results predicted to flow from the restraint are perceived, on balance, as satisfying a greater public interest.<sup>38</sup> But were the constraint by which the First Amendment limits governmental action only so firm (or soft) as the elected representative or bureaucrat of the moment judges it to be, then the freedom of speech and press, and indeed the very proposition of constitutionally limited government,

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35. *Columbia Broadcasting Sys.*, 412 U.S. at 114 (The First Amendment "is a restraint on government action."). In the Bill of Rights, only the First Amendment is cast as an unconditional constraint on the law-making powers of the government. While the other nine Amendments focus largely on the enumerated rights of the people, the First imposes a limitation on governmental action. The liberty of speech and press as well as that of religion were so uniquely "protected because [the forefathers] knew of no other way" to guard against the anticipated intrusion of government. *Thomas v. Collins*, 323 U.S. 516, 545-46 (1945) (Jackson, J., concurring). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press [and] speech . . ." *Id.* at 545. See also Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) ("[T]he Free Press guarantee is, in essence, a structural provision of the Constitution.").

36. *Lovell*, 303 U.S. at 452.

37. See, e.g., *Chicago Cable Communications*, 879 F.2d at 1550-51, where the Seventh Circuit said: "The City [of Chicago] is not seeking a dominant interest in [the cable operator's] programming, nor even a substantial interest, but simply a few hours a week." The court of appeals then found direct intrusion into the programming judgments of the cable operator to be only a "limited restriction" on First Amendment freedoms and one "really no greater than essential to further substantial City interests." *Id.* What if this same scenario ("simply a few columns a week") were to be applied to *The Chicago Tribune*?

38. In the view of some, projected public-interest goals can, and often do, offset the constitutionally inscribed constraint on the government's powers. For example, the court of appeals in *Chicago Cable Communications*, found the facial abridgment of First Amendment freedoms to be permissible provided that it furthers a "substantial [governmental] interest" and is "no greater than essential" to achieve that end. It is this "end justifies the means" rationale that is so "wholly foreign" to First Amendment principle. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). A guaranteed freedom or Bill of Rights that may be counterbalanced (or canceled) by the assertion of a governmental interest is meaningless.

become little more than celebratory rhetoric.<sup>39</sup> Any action of government designed to abridge the freedom of speech or press, whomever the target and whatever measure of popular support it may enjoy, is at odds with the First Amendment and, at minimum, presumptively unconstitutional.<sup>40</sup>

That amorphous concept of "constitutional due process," where often there is latitude for extrapolation and even sharp disagreement, is not under examination here. This article is not an attempt to delineate those unenumerated rights that may be encompassed under the penumbra of the constitutionally recognized "right to privacy"—a question calculated to provoke school-yard brawling among even our most learned judges and scholars. The challenge is not to identify those punishments that transcend the line into the "cruel and unusual" within the meaning of the Eighth Amendment.<sup>41</sup> The issue is, rather, whether regulations made deliberately to restrict the "communicative" activity of the cable television media abridge the freedom of speech, or of the press, a point on which there is no dispute.<sup>42</sup> The essential inquiry then is whether public officials, on the basis of their public interest judgments, are at liberty to evade unequivocal constitutional command. Do the findings of legislative or administrative bodies, however prescient, counteract the express provisions of the First

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39. *Cf. Columbia Broadcasting Sys.*, 412 U.S. at 133 (Stewart, J., concurring).

The First Amendment prohibits the Government from imposing controls upon the [electronic] press . . . . Yet [the court below] held . . . that the First Amendment requires the Government to impose controls upon private broadcasters—in order to preserve First Amendment "values." The appellate court accomplished this strange convolution by the simple device of holding that private broadcasters *are* Government. This is a step along a path that could eventually lead to the proposition that private *newspapers* "are" Government. Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment "values" to require. It is a frightening specter.

*Id.* (footnote omitted).

40. *See id.* at 145-46 (There are grave "dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.' . . . For if those 'values' mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.").

41. This is not even a question of whether a nativity scene in the public square confronts the Establishment Clause of the First Amendment, U.S. CONST., amend. I, or whether the Second Amendment's "right of the people to keep and bear Arms," U.S. CONST., amend. II, encompasses the AK-47 assault weapon or other cannon.

42. *See, e.g.,* Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864, 886 (1986), where the FCC candidly "recognize[d] that [they] must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights." Nonetheless, the FCC, for yet the third time, proposes a new set of such rules. Carriage of Television Broadcast Signals by Cable Television Systems, 6 F.C.C.R. 4545 (1991). And the U.S. Senate passed such a bill (S.12) on January 31, 1992. 138 Cong. Rec. S760 (daily ed. Jan. 31, 1992). *See also supra* note 37.

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Amendment?<sup>43</sup> May the legislature or its administrative delegee, based on the "substantiality" of the perceived interest, exceed those powers constitutionally conferred or exercise that authority which the Constitution explicitly withholds?

It will be shown that constitutional review of content-based regulations, the facial purpose of which is selectively to abridge the exercise of speech and press freedoms, whatever the societal goals and however substantial the governmental interest, contemplates far more than *O'Brien's* costs/benefits analysis. At issue here are the basic principles of freedom of speech and the press, and these fundamental constitutional parameters do not vary merely because the editor in question elects to communicate through the medium of cable instead of by print,<sup>44</sup> or because the legislature finds the speech-restrictive law to further a constructive public purpose.

III. THE "INTERESTS-BALANCING" STANDARD OF *UNITED STATES V. O'BRIEN* IS INAPPOSITE TO CONSTITUTIONAL REVIEW OF ANY REGULATION THAT FACIALLY CONFRONTS THE EXPRESS PROVISIONS OF THE FIRST AMENDMENT

To date, the principal efforts by governmental authorities to justify content-based regulation of the cable television press involve the four-prong, interests-balancing formula set forth in *United States v. O'Brien*.<sup>45</sup> In every instance where the issue has arisen, it has been the government's position, sometimes confirmed by reviewing courts, that the restriction acknowledged to be placed directly upon the cable operator's exercise of speech or press freedoms is simply outweighed by those societal benefits projected to accrue from the infringement. But in order even to qualify for an *O'Brien* analysis, that most relaxed of all standards by which compliance with the First Amendment is measured, the threshold requirement is that the contested regulation be on its face "within the constitutional power of the Government."<sup>46</sup>

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43. See, e.g., *Schneider v. State*, 308 U.S. 147, 161 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of [First Amendment] rights so vital to the maintenance of democratic institutions.").

44. *Joseph Burstyn, Inc.*, 343 U.S. at 503.

45. 391 U.S. 367, 377 (1968) ("A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest.").

46. *Id.* That the *O'Brien* standard is typically characterized by the Court as "less stringent," "relatively lenient," or "less demanding" (as in *Texas v. Johnson*, 491 U.S. 397, 403, 407 (1989)), is only because it is inapposite to review of regulations that facially proscribe communicative activity. The very predicate of *O'Brien*, as articulated by the Court, is that the draft-card law there at issue "plainly [did] not abridge free speech on its face. . . . [Such law] on its face deals with conduct having no connection with speech." *O'Brien*, 391 U.S. at 375. Compare *O'Brien*, 391 U.S. at 375 ("A law prohibiting destruction of Selective Service

In contrast to the draft card law under consideration in *O'Brien*, content-based regulation of the cable television media facially confronts the express provisions of the First Amendment. The target of the legislature is the cable "press" and the regulatory objective is to limit the "speech" freedom of those who publish via that vehicle of expression. Within the framework of government's constitutional powers, the authority to place content-related restrictions on the media of mass communication may hardly be equated or analogized to that of raising an army.<sup>47</sup> Where the regulation of the communications media is at issue, the Constitution bars the government from making laws that abridge the exercise of the freedom of speech or press.<sup>48</sup>

That a law having a concededly or presumptively constitutional purpose (such as making it a crime to knowingly destroy or mutilate one's draft card),<sup>49</sup> and a regulation which facially conflicts with the First Amendment (such as placing content-related restrictions on the exercise of a private editor's discretion),<sup>50</sup> are not subject to the same, or even similar, First Amendment analysis, would seem but elementary.<sup>51</sup> While the former is frequently justified pursuant to a relatively forgiving balancing test (in which unspecified public-interest factors are subjectively weighted), the latter must

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certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.") with *Johnson*, 491 U.S. at 403 ("If the . . . regulation is not related to expression then the less stringent standard we announced in *United States v. O'Brien* for regulation of noncommunicative conduct controls. [Otherwise, we must apply] a more demanding standard."). Only after the law under challenge is found on its face to be "within the constitutional power of the Government" does *O'Brien's* interests-balancing exercise proceed to consider the remaining three criteria. *O'Brien*, 391 U.S. at 377. When the law at issue presumably exceeds "the constitutional power of the Government," *id.*, the *O'Brien* process is forthwith terminated and the more demanding standard is mandated.

47. Cf. *O'Brien*, 391 U.S. at 376 ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."); *Buckley*, 424 U.S. at 13-14 ("The constitutional power of Congress to regulate federal elections is well established.").

48. *O'Brien* weighs the legitimate governmental interest furthered by the presumptively constitutional law at issue *vis-a-vis* any limitation that the law's enforcement might incidentally occasion to the complainant's alleged rights of expression or distribution. *O'Brien* is inapposite to review of any law that facially poses a question of its constitutionality. *O'Brien*, 391 U.S. at 377. When government acts purposefully and selectively to abridge "press" freedoms, cites to *O'Brien* and thereby summarily forecloses examination of its capacity under the Constitution to promulgate the speech-intrusive law, as in *Chicago Cable Communications*, 879 F.2d at 1550-51, the First Amendment is made a nonentity.

49. *O'Brien*, 391 U.S. at 375.

50. *Miami Herald Pub. Co.*, 418 U.S. 241.

51. Compare, e.g., *Tornillo v. Miami Herald Pub. Co.*, 287 So. 2d 78, 82 (Fla. 1973) (where the State's highest court, faced with the viewpoint-neutral, content-based law there at issue, applied considerations of "broad societal interest in the free flow of information to the public" to find the access regulation constitutional) with *Miami Herald Pub. Co.*, 418 U.S. at 258 (where the Supreme Court, reversing without so much as an allusion to societal interest or principles of rationality, held the Florida law to facially offend the First and Fourteenth Amendments). The Court never found it necessary, or even appropriate, to venture into the morass of whether Florida's regulation of the press was intended to advance societal goals.

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undergo strict scrutiny.<sup>52</sup> If *O'Brien* is not an appropriate standard by which to gauge the constitutionality of a regulation abridging the freedom of a newspaper editor to make journalistic decisions, it is no less inappropriate because the editor in question happens to labor in the medium of electronic communication.<sup>53</sup> To contend that a law designed to restrain the freedom of speech and press, and one intended only to supervise noncommunicative conduct (but which, when enforced in a particular circumstance, is alleged incidentally to limit speech freedoms), are subject to the same deferential examination not only ignores *O'Brien* and the extensive body of law developed thereunder, but also loses sight of the First Amendment itself.<sup>54</sup>

Communicative supervision of the cable television press is not challenged on the ground that enforcement of a presumptively constitutional law "incidentally" limits the exercise of First Amendment freedoms. Rather, such supervision is challenged because it selectively and deliberately abridges the cable operator's freedom of speech and therefore facially confronts the constitutional command.<sup>55</sup> Whatever factual question may prevail as to the

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52. See, e.g., *Boos v. Barry*, 485 U.S. 312, 319-21 (1988) (content-based, viewpoint-neutral regulation subject to exacting scrutiny). Note, for example, that the FCC's must-carry proposal, the very purpose of which is to confer a cable-distribution preference on the speech of certain licensees of television broadcast stations, can hardly be characterized as neutral. See also *Buckley*, 424 U.S. at 48-49 (The "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment."). A must-carry regime not only restrains the First Amendment freedom of the cable operator/editor, it also abridges the rights of those other equally protected speakers who may adversely be affected by the preferential treatment accorded the broadcast-licensee speaker. See *Quincy Cable TV*, 768 F.2d at 1451-52.

53. The "basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc.*, 343 U.S. at 503. The government would never assert, for example, that it has the authority to regulate the subscription or commercial advertising rates charged by print periodicals in one-newspaper towns subject only to a satisfactory *O'Brien* examination. Nor would government act selectively to impose more-stringent "customer service" standards on newspapers or book-stores than were applied to the general business community. Yet, the Congress and the FCC assume such powers where it is the cable television press that is involved. With the exception of blatant censorship, nothing goes more directly to content than does the authority selectively to impose costs or to control revenues.

54. Cf. *Buckley*, 424 U.S. at 16-19. If money is "speech" then manifestly the communicative judgments of a cable editor are speech. See *id.* at 17 (quoting *O'Brien*, 391 U.S. at 382) ("Unlike *O'Brien*, where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged conduct of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'").

55. While government is constitutionally foreclosed from regulating of speech or press, there is no limit on making laws which have an incidental effect on speech. See, e.g., *O'Brien*, 391 U.S. at 377 ("to raise and support armies"); *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984) (to maintain order in public places); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (to abate a public nuisance by "control[ing] noise" levels); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (to maintain security on military bases through enforcement of "trespass" laws); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805, 809 (1984) (to reduce "visual clutter") ("It is well settled that the state may legitimately exercise its police power to advance aesthetic values."); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (quoting N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)) (to prohibit one from



degree or the wisdom of the government's restraint, there can be no question that the intent is to proscribe the exercise of the constitutionally protected freedom.<sup>56</sup>

The undisguised regulatory purpose of content-based regulation of the cable media is to restrain one component of the private press.<sup>57</sup> Instead of supervising a nonspeech element of the cable operator's conduct, the governmental interest lies in suppressing the operator's exercise of editorial discretion.<sup>58</sup> Instead of accidentally or incidentally affecting speech, abridgement of that freedom is the *raison d'être* of the regulation.<sup>59</sup> The

"knowingly [obscuring] . . . the figures or letters on any [automobile license] plate"). The critical distinction between those laws at bar in the foregoing cases (and indeed in all of those cases where the Court, confronting First Amendment claims, has applied a simple balancing test), and those laws selectively restricting the cable television media, is that the former do not target the press or even implicate communicative activity. In every case where *O'Brien's* less-demanding test is properly the standard of First Amendment review, the law under examination is facially and presumptively constitutional. See also *Barnes v. Glen Theatre*, 111 S. Ct. 2456, 2460 (1991) (Indiana "has not banned nude dancing as such, but has proscribed public nudity across the board."); *id.* at 2463-67 (Scalia, J., concurring) (Public nudity is not a right protected under the First Amendment and therefore the argument presented does not give rise to a constitutional question.).

56. *Compare Preferred Communications*, 476 U.S. at 496 ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.") with *City of Lakewood*, 486 U.S. at 755-57; *id.* at 774-75 (White, J., joined by Stevens and O'Connor, JJ., dissenting) (facial challenge appropriate only when conduct sought to be regulated is explicitly protected by First Amendment). In *City of Lakewood*, the dispute between the justices was confined to the "technical" question: "What is the scope of the peculiar doctrine that governs facial challenges to local laws in the First Amendment area?" *Id.* at 773 (White, J., dissenting). In contesting the majority's more expansive view, the dissent then urged: "The doctrine . . . applies only when the specific conduct which the locality seeks to license is protected by the First Amendment." *Id.* at 774. There is no question that the making of communicative judgments by a cable television editor is activity specifically protected under the First Amendment. Thus, whether one follows the rationale of the majority or the minority in *City of Lakewood*, content-based regulation of the cable television "press" is subject to facial challenge.

57. *Cf. O'Brien*, 391 U.S. at 376 ("On the assumption that the alleged communicative element in [Mr.] O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."). With regard to communicative regulation of the cable television media, there is no question that (1) the First Amendment applies, and (2) the activity targeted by the contested regulation is constitutionally protected. Thus, while burning one's draft card, or dancing in the nude, may well not be "speech," communication by cable television unquestionably is. It is also to a very large extent "press." *Leathers*, 111 S. Ct. at 1442.

58. *Cf. O'Brien*, 391 U.S. at 385 (quoting *McCray v. United States*, 195 U.S. 27, 59 (1904)) (balancing test inapposite "because the inevitable effect—the 'necessary scope and operation' [of the law at issue]—abridged constitutional rights"). See also *Vincent*, 466 U.S. at 809 (quoting *Schneider*, 308 U.S. at 160-61) ("Prohibition of [noncommunicative] conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."). Here, the liberty facially abridged is the cable operator's discretion to speak, to publish and to distribute protected communications free of governmental intrusion.

59. How, we ask, may a press-specific, speech-restrictive regulation crafted expressly to abridge communicative activity be said to limit the exercise of First Amendment freedoms only incidentally? See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1142 (1976) (defining "incidental" as "subordinate, nonessential, or attendant in position or calculation . . ."). "Incidental" is *not* a synonym for "small" or "modest." See also *Quincy Cable*

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overwhelming presumption is therefore one of unconstitutionality. Yet, the proponents of communicative regulation of the cable television press insist that the facial disregard of the First Amendment is benign because, in their view, it is calculated to produce results in the public interest.

*O'Brien* is not a talisman by which the government may make facially unconstitutional laws constitutional. As the *O'Brien* Court so pointedly recognized, "both the governmental interest and the 1965 [draft-card law] are limited to the noncommunicative aspect of [Mr.] O'Brien's conduct."<sup>60</sup> Yet *O'Brien* is invoked by public officials and some courts to constitutionally justify regulations that purposefully abridge the cable communicator's freedom of expression.<sup>61</sup> So used, *O'Brien's* relatively lenient test becomes an instrument for repeal of the First Amendment.<sup>62</sup>

In *West Virginia State Board of Education v. Barnette*,<sup>63</sup> the Supreme Court said: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."<sup>64</sup> Nowhere are these words more potent than with regard to the "certain subjects" of speech and press. The freedom to engage in these activities, as guaranteed to the people, has constitutionally been placed "beyond the reach of majorities and officials."<sup>65</sup> For the First Amendment occupies a "preferred place" in the scheme of government.<sup>66</sup> If this principle is to mean anything, it is that the people's exercise of these

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TV, 768 F.2d at 1450-52.

60. *O'Brien*, 391 U.S. at 381-82.

61. The analytical shortcoming in the *Century Communications* opinion is the court's preoccupation with the FCC's findings below. *Century Communications*, 835 F.2d at 293-304. Must-carry was not unconstitutional because five FCC commissioners collectively saw too much public benefit in those regulations and, thus, misread the *O'Brien* scales. *Id.* at 304. The constitutional transgression occurred at the instant the agency concocted rules the purpose and effect of which was to abridge the "speech" and "press" freedoms not only of the cable television operator but also other equally protected speakers—an action that facially exceeded its powers. The court of appeals, though ultimately viewing the substantiality of the landscape differently, went down that same dark path as did the FCC where all sight of the First Amendment's command was quickly lost. *Id.* at 300.

62. Were content-based regulations of the type considered here to be applied contextually to the print media (or more selectively to "faxed" newsletters), no one would in good faith contend that *O'Brien* is the appropriate standard for constitutional review. See, e.g., *Quincy Cable TV*, 768 F.2d at 1452 n.37. Yet, where cable is the medium of expression, freedoms now taken for granted by editors in the other media of mass communication as well as by the courts (e.g., editorial discretion to determine the content, packaging and pricing of communicative product) are said to be subject to governmental restraint. The proponents of such disparate regulation of the "press" make no effort to justify, nor do they even recognize, the patent lack of neutrality in the application of fundamental constitutional principles. Without discussion, they simply assume that the constitutional question is subsumed by public interest considerations.

63. 319 U.S. 624 (1943).

64. *Id.* at 638.

65. If, because of the First Amendment, "majorities and officials" may not "reach" speech and press, how then, we ask, may those same majorities and officials enter those crucial public-interest findings pursuant to which the once protected activities are returned to their jurisdiction?

66. *Thomas*, 323 U.S. at 530.

uniquely protected freedoms must not be subjected to the mood swings of politics or administrative discretion. The public interest, however appropriate that standard may be in other contexts, such as the federal licensing of radio frequencies<sup>67</sup> is not a narcotic generally dulling the protection constitutionally given the activities of speech or press. Nor does a public interest finding, however ingenious, nullify the constraint by which the exercise of governmental power is constitutionally limited.<sup>68</sup>

Above all, the First Amendment bars legislative intrusion.<sup>69</sup> Yet those types of regulations under examination, each enacted or proposed pursuant to the legislative powers of government, would intimately supervise the communicative aspects of the cable television media.<sup>70</sup> This contravention of the First Amendment's command is simply glossed over with invocation of an interests-balancing test and the official proclamation of ample public-interest rewards. The fundamental error committed by those who would apply *O'Brien* to constitutionally justify content-based regulation of the cable television media is the threshold failure to distinguish between laws that on their face implicate speech or press freedoms and those that do not.<sup>71</sup>

*O'Brien's* interests-balancing standard, of course, has its proper place in constitutional jurisprudence. Appropriately applied, courts can, but seldom do, find actionable infractions of First Amendment freedoms incidentally resulting from enforcement of otherwise constitutionally compliant laws.<sup>72</sup> *O'Brien's* less demanding test is misused, however, when applied for the purpose of constitutionally validating a regulation that on its face contradicts

67. 47 U.S.C. §§ 303(r), 309 (1988).

68. The concept that the political majority may make laws facially abridging the freedom of speech or of the press merely by finding that the societal purpose of the conflicting regulation is weightier than is the constraint by which the First Amendment limits its powers is absurd. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

69. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. That the legislature may acquiesce in, or even mandate, the intrusion is thus not a factor in weighing the constitutionality of the government's action. *Sable Communications of California v. FCC*, 492 U.S. 115, 129 (1989) (quoting *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978)) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). See also *Thomas*, 323 U.S. at 530 ("[T]he usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."). See also *infra* note 151.

70. See, e.g., *Metromedia v. San Diego*, 453 U.S. 490, 502 (1981) ("Government has legitimate interests in controlling the noncommunicative aspects of the medium . . . , but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.").

71. Some authorities are of the mind that if the government's objective is in the public interest, the means employed to achieve that end, even though they conflict with the express provisions of the First Amendment, are "incidental." *O'Brien's* function, however, is to assure an appropriate hearing to those claiming abridgment of their freedom of expression as the incidental result of the enforcement of a facially constitutional law. Rather than constricting speech freedoms, *O'Brien* expands the protection to include, or at least to consider, conduct such as symbolic speech. *O'Brien*, 391 U.S. at 376.

72. For example, of those seven cases cited *supra* note 55, only *Maynard*, 430 U.S. 705, finds an actionable infringement of "speech" freedoms.

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the command of the First Amendment. Where it is the deliberate abridgment of communicative activity that is under review, strict scrutiny is necessarily the standard.

IV. CONTENT-RELATED REGULATION OF THE CABLE TELEVISION  
"PRESS" DOES NOT FIT UNDER ANY OF THE COURT ESTABLISHED  
CONSTITUTIONAL DOCTRINES OR EXCEPTIONS THAT MAY JUSTIFY SOME  
DIMINISHMENT IN FIRST AMENDMENT PROTECTION

If, as courts hold and the First Amendment says, government is foreclosed from making any law abridging the freedom of speech, or of the press, how then may the legislature enable itself to make those very laws? The answer to this question is that specific, carefully delineated exceptions to the constitutional rule have evolved through Supreme Court precedent. Although relatively rare, there are conditions under which the command of the First Amendment is subject to a test of rationality. Thus the protection constitutionally afforded speech and press, though comprehensive, is in no sense absolute.

Generally, laws and governmental actions that facially restrict the exercise of a constitutionally guaranteed freedom, but which nonetheless have been adjudged constitutional, have some asserted relationship to national security or public safety. Such measures more often result from war-like conditions, either hot or cold, where the infringement on the freedom of select individuals is held necessary to assure the security of society as a whole.<sup>73</sup> In other circumstances, restrictions on the individual's exercise of a First Amendment freedom have been justified to preserve an equally fundamental right held by others.

Proponents of speech restrictive regulation of the cable media have never asserted national security as a consideration.<sup>74</sup> Nor have they presented any

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73. The most unrestrained example of expediency and compromise of the individual's freedom, at least in the past fifty years, was the World War II mass internment of American citizens of Japanese descent into concentration camps. *Korematsu v. United States*, 323 U.S. 214 (1944). See also those World War II cases cited *infra* note 76.

74. Cf., *New York Times Co. v. United States*, 403 U.S. 713 (1971). Note, however, that John C. Danforth, U.S. Senator from Missouri and then chairman of the Senate committee having jurisdiction over the FCC, advised in a fourteen-page, single-spaced letter to the FCC Chairman that: "Few communications issues have attracted as much attention in Congress, or are as important to society, as the Federal Communications Commission's 'must carry' proceeding." Letter from Senator John C. Danforth to Mark S. Fowler, Chairman, FCC (July 22, 1986) (FCC Docket No. 85-349). See also joint letter from the leadership and the overwhelming majority of the members of the House Committee on Energy and Commerce to Chairman, FCC (June 26, 1987) in which the agency was informed: "we believe it is imperative that the FCC take final action on the must-carry issue by August 7, 1986 and we fully expect the Commission to act no later than this date." (FCC Docket No. 85-349). Needless to say the "independent" regulatory agency acted precisely on August 7, 1986 to adopt those must-carry rules ultimately declared unconstitutional by the D.C. Circuit. *Carriage of TV Signals by Cable Television Systems*, 1 F.C.C.R. 864 (1986), *rev'd*, *Century Communications*, 835 F.2d 292. More than anything else, these excesses reflect the political clout of the broadcasting industry. See *infra* notes 123, 137. There have now been no must-carry rules since 1985 and society

claim of a "compelling governmental interest."<sup>75</sup> They do not suggest that the speech at issue "create[s] a clear and present danger," or that the republic or any of its institutions are in "grave and immediate danger" and, but for the compromise of First Amendment liberties, may topple.<sup>76</sup> The "speech" in question does not fall under any known categorization doctrine (*e.g.*, "obscenity" or even "indecenty," "fighting words," "time, place and manner," or "false and misleading") holding a lesser entitlement to the protection of the First Amendment.<sup>77</sup> To the contrary, the particular communications as well as the communicative activity under consideration are, so far as it is known, fully protected "speech" and "press."

The instant circumstances implicate no potentially countervailing or "co-equal" constitutional interest that might justify some diminishment in the freedom of speech.<sup>78</sup> Cable television regulation does not, for example, involve the tension between free speech and the long-standing common law remedy of a private action for libel to vindicate fundamental personal rights.<sup>79</sup> Nor has there been any suggestion that regulation of the cable television media is intended to prevent a "noxious use" of property or to control a "public nuisance," restrictions that in other contexts have been upheld even though they may impinge on generally recognized constitutional rights.<sup>80</sup>

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appears to have survived the oversight. Upwards of ninety-five percent of local television broadcast stations are carried by cable television systems. *See, e.g.*, Comments of Federal Trade Commission, filed November 26, 1991 in FCC MM Docket 90-4. The constitutional question has never been one of whether local stations should be carried but rather whether the government, consistent with the First Amendment, may mandate the preferential treatment of select speakers—especially those already privileged to use scarce radio frequencies.

75. *Cf.*, *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (The Court sustained on a First Amendment challenge, a confidentiality agreement entered into between the government and a CIA agent as a condition of employment on the ground that "Government has a compelling interest in protecting both the secrecy of information important to our national security and . . . so essential to the effective operation of our foreign intelligence service."); *Sable Communications*, 492 U.S. at 126 ("[G]overnment may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

76. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.). *See also Debs v. United States*, 249 U.S. 211 (1919) (Holmes, J.).

77. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 742-43 (1978); *Home Box Office v. FCC*, 567 F.2d 9, 48 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

78. *See, e.g.*, *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2745 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors."). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

79. *See, e.g.*, *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

80. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (involving municipal restrictions on operation of a brickyard); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (involving the banning of an animal rendering plant from residential areas). Both cases consider claims of an uncompensated "taking" under the Fifth Amendment where a preexisting business-use was significantly curtailed by regulation, and where the Court found no right to compensation. While there are innumerable contextual differences between making bricks or rendering animals and the distribution of speech, one decisional distinction is that the former activities are not constitutionally protected and the latter is. *See infra* note 146 and cases cited therein. The

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For all of its faults and aggravations, cable television neither pollutes the environment nor harms any person in a manner that mobilizes the overriding right of society, the First Amendment notwithstanding, to restrict communicative activity. As Justice Kennedy, so incisively summing up the foregoing principles of constitutional jurisprudence, recently said:

[Where] a law is directed to speech alone [and] where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm [such law exceeds the] substantive power [of the Government and is presumptively unconstitutional].<sup>81</sup>

Assessed under these established constitutional standards, content-based restrictions selectively imposed upon the cable television press are, in their very best light, presumptively unconstitutional.

The cable operator advances the First Amendment neither as a shield nor as a sword whereby an exception from, or special privilege under, the generally applicable laws is asserted.<sup>82</sup> The challenge to regulation of the cable television media does not present a circumstance where the First Amendment is alleged to insulate the press from the sweep of general

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legislature may not label "speech" and "press" activity as antisocial and thereby do away with the First Amendment.

81. *Simon & Schuster*, 112 S. Ct. at 513 (Kennedy, J., concurring).

82. *Cf. Employment Division, Dept. of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595, 1599-1606 (1990) (those engaged in activity protected by the First Amendment, while guarded against selective regulation, are not by virtue of such pursuits placed beyond the reach of those laws universally governing society). At issue in *Employment Division* was the contention "that [respondents'] religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to others who use the drug for other reasons." *Id.* at 1599. Reasoning that "we have never held that an individual's religious beliefs excuse . . . compliance with an otherwise valid law," *id.* at 1600, and rejecting the application of any rationality test as the appropriate measure of constitutionality, *id.* at 1603-04, the Court upheld the application of the criminal law banning the use of peyote. There were three separate opinions rendered in this case, Scalia, J. for the Court, O'Connor, J., concurring in the judgment, partially joined by Brennan and Marshall, JJ., without concurring in the judgment, *id.* at 1606, and Blackmun, J., joined by Brennan and Marshall, JJ., dissenting, *id.* at 1615. The lone principle upon which all nine justices concur is that had the State's ban on the use of peyote been religious-specific, it would have been unconstitutional as a facial abridgment of a First Amendment freedom. *See also Branzburg v. Hayes*, 408 U.S. 665, 681-83 (1972) (laws that target only the press are not constitutionally comparable to those that impose obligations shared by all citizens, including a reporter's duty to respond to a grand jury subpoena and answer questions even though such inquiry may intrude upon "press" activity); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.").

business regulations such as the antitrust laws.<sup>83</sup> No “speaker’s immunity” from the universal application of, for example, Fair Labor Standards legislation is claimed.<sup>84</sup> Nor is there urged any special accommodation within the criminal laws under the Free Exercise Clause.<sup>85</sup>

The exercise of “speech” or “press” freedoms comprehends no prerogative to impair the rights or freedoms of other persons. While these particular freedoms are specially preserved, there are *no* elite under the Constitution, not even the press. In the celebrated Montesquieu’s classic definition set forth nearly 250 years ago: “Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.”<sup>86</sup> Cable operators, when claiming title to those liberties guaranteed by the First Amendment, act not to invade or diminish the lawful rights of others but only to implement their own. They seek to secure their constitutionally guaranteed right to edit and to distribute speech free of governmental intimidation.<sup>87</sup>

The laws considered here are solely those intended to curb the communicative activity of one component of the press.<sup>88</sup> Only these unique regulatory measures, from which the general community (including other competitive

83. *Associated Press v. United States*, 326 U.S. 1 (1945). A favorite and frequently misused precedent for those supporting content-based regulation of the press is the *Associated Press* case. *See, e.g., Effective Competition Standard For the Regulation of Cable Television Basic Service*, 6 F.C.C.R. 4545, 4558 n.78 (1991). But citing *Associated Press* for the proposition that facial abridgment of expressive activity is permissible provided only that the restraint predictably may contribute to the commonweal is a gross departure from the facts and holding of that case. *Associated Press* holds only that the “press” is subject to those laws generally applicable to business and that it has no special license under the First Amendment to engage in conduct barred to all others. The case is inapposite to constitutional review of any press-specific or content-based regulation of speech. *See also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981) (FCC has no affirmative First Amendment power to protect “listeners” through restricting the freedoms of broadcast licensees). *See also Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (“Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”).

84. *E.g., Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 194 (1946). *Compare, e.g., Citizen Pub. Co. v. United States*, 394 U.S. 131, 139 (1969) (upholding application of antitrust laws to the press) *with Grosjean v. Am. Press Co.*, 297 U.S. 233, 250-51 (1936) (striking as unconstitutional a license tax specially applied to the press). *See also Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

85. *E.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972).

86. 11 CHARLES MONTESQUIEU, *DE L’ESPIRIT DES LOIS* 3 (Thomas Nugent trans., 1899) (1748).

87. In short, cable operators, like “print” publishers and other mass communicators, are no better and likely no worse than the general populace. In the context of those laws universally governing society, they assert no privileged or superior position *vis-a-vis* the ordinary people. All that is claimed is that the government is foreclosed by the First Amendment from selectively restricting their “press” endeavors.

88. *Compare Leathers*, 111 S. Ct. 1438 (holding “generally applicable” state excise tax constitutional even though selectively applied to different components of the communications media) *with Grosjean*, 297 U.S. 233 (holding unconstitutional a state tax specially applied to the press).

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press organs) is exempt, are at issue.<sup>89</sup> Rather than urging exception from any law of general applicability, the objection made to content-related regulation of the cable television media is one directed to restraints aimed exclusively at those who distribute constitutionally protected speech via that medium of expression. When it is the cable press that is consciously "targeted . . . in a purposeful attempt to interfere with its First Amendment activities," the law is presumptively, if not conclusively, unconstitutional.<sup>90</sup>

If the guarantee of the First Amendment is to have credence, then the press, especially a particular sub-class thereof, may not be singled out for imposition of disparate, content-related regulatory burdens.<sup>91</sup> Selective suppression of the media of mass communications by government, whatever the rationale, cannot constitutionally be justified through an imprecise balancing exercise where miscellaneous public-interest factors are subjectively weighted.<sup>92</sup>

The FCC does not license the establishment of cable television systems. Accordingly, there has been no suggestion that locally franchised cable television operations are subject to that agency's radio-licensing standard of "public interest, convenience and necessity,"<sup>93</sup> pursuant to which it allocates

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89. Cf. *Minneapolis Star & Tribune Co.*, 460 U.S. at 592-93 ("A tax that singles out the press or that targets individual publications within the press, places a heavy burden on the State to justify its action."). Here, we are concerned with *censorial* restrictions on a single component of the press, something far more confrontational in a First Amendment context than is a subtle, or even a burdensome, tax. Cf. *Leathers*, 111 S. Ct. at 1444 (rejecting constitutional claims on ground that "Arkansas has [not] targeted cable television in a purposeful attempt to interfere with its First Amendment activities").

90. *Leathers*, 111 S. Ct. at 1444. See also *Simon & Schuster*, 501 S. Ct. at 508. ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech . . . . [T]he Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.")

91. See, e.g., *New York Times Co.*, 403 U.S. at 730-31 (White, J., concurring) (The "press" is entitled to perhaps even greater First Amendment protection than the individual and it is only the most extraordinary reason that might justify a prior restraint.). While the government has asserted a variety of public interest justifications for its admittedly speech-intrusive regulations, it has never confronted the fact that the regime is principally one of supervising the cable television "press" through a system of content-based prior restraints. See also *Gentile*, 111 S. Ct. at 2748 (O'Connor, J., concurring) (Whatever "speech" restrictions may properly be placed on an attorney in the performance of duty as an officer of the court is not precedent for restriction on the "press.").

92. Any interests-balancing test, especially one so undisciplined as to be characterized by the Court as "relatively lenient" or "less demanding," *supra* note 46, is often little more than a euphemism for the exercise of discretion. The First Amendment manifestly imposes a more strict scrutiny when, as here, the regulations under consideration squarely confront the constitutional command. In those cases where *O'Brien's* formula has been applied by the Court, the preponderance of decisions is to sustain the law under examination. This primarily is because such laws are on their face constitutional and therefore presumptively lawful. The government's burden is materially different, and far more difficult, when the regulation under review is presumptively unconstitutional.

93. 47 U.S.C.S. § 309(a) (Law. Co-op. 1981).



the private use of radio frequencies.<sup>94</sup> Neither is communication by cable television subject to the "scarcity doctrine" pursuant to which the federal licensing agency has been permitted to impose limited public-interest obligations upon those privileged few it authorizes to utilize the scarce broadcasting spectrum, even when First Amendment interests are implicated.<sup>95</sup> While the "broadcast licensee has a large measure of journalistic freedom [it is] not as large as that exercised by a newspaper."<sup>96</sup> Nevertheless, the FCC in its regulation of the broadcast media "must oversee without censoring,"<sup>97</sup> and any supervision of "speech" is constitutionally limited to the "evaluation of [the licensee's] overall performance under the [statutory] public interest standard."<sup>98</sup> Any mandated "right-of-access" or "means . . . of favoring access by [some over others]," even under the more forgiving scheme of broadcast regulation, would create substantial First Amendment problems.<sup>99</sup>

With respect to the FCC's regulation of the broadcasting media, the Supreme Court has explained "that although [the Communications Act] prohibits the Commission from editing proposed broadcasts in advance, it

94. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978). However broad may be the FCC's discretion to make rules implementing its public-interest jurisdiction over the licensing of radio broadcast frequencies, the placing of content-based restrictions on the cable television media is not licensing. Nor do such restraints relate to the orderly use of the radio spectrum.

95. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17, 226-27 (1943); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-90 (1969); *Columbia Broadcasting Sys.*, 412 U.S. at 101-11. The scarcity doctrine is uniquely confined to the process followed by the FCC in the licensing of broadcast stations under the Communications Act of 1934 (current version at 47 U.S.C. §§ 151-613 (1988)). "Without government control, the medium [of radio] would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion Broadcasting Co.*, 395 U.S. at 376 (footnote omitted). See also *Quincy Cable TV*, 768 F.2d at 1449 (citing *Red Lion Broadcasting Co.*, 395 U.S. at 389) ("[Q]uite independent of the objective of bringing communicative order to the otherwise chaotic airwaves, the First Amendment tolerates a modest degree of government oversight of broadcast radio and television because such regulation assures that broadcasters, privileged occupants of a physically scarce resource, act in a manner consistent with their status as fiduciaries of the public's interest in responsible use of the spectrum."). The Supreme Court consistently has recognized the narrowness of the scarcity doctrine even in its unique application to the federal licensing of the broadcasting media. *Columbia Broadcasting Sys.*, 412 U.S. at 105-10; *Pacifica Found.*, 438 U.S. at 750. See *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 74 (1983) ("Our decisions have recognized that the special interests of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.") (footnote omitted); *Quincy Cable TV*, 768 F.2d at 1449 ("the 'scarcity rationale' has no place in evaluating government regulation of cable television"). See also *TRIBE*, *supra* note 15, at 1005-06 ("reconsideration [of the scarcity rationale] seems long overdue"); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 1, 221-26 (1982) (with the advent of cable and satellite services and the multiplicity of video programming sources now available to the public, the "scarcity" rationale is obsolete).

96. *Columbia Broadcasting Sys.*, 412 U.S. at 117.

97. *Id.* at 118.

98. *Id.* at 120. See also *id.* at 126 ("Although the use of a [scarce] public resource . . . permits a limited degree of Government surveillance . . . , the Government's power over licensees . . . is by no means absolute.") (citation omitted).

99. *Id.* at 127.

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does not preclude subsequent review of [a licensee's] program content."<sup>100</sup> In the case of cable regulation, whether it, for example, be rate regulation or must carry, the content-based order is prospective in application (*i.e.*, a restraint on distribution of constitutionally protected communications unless the cable publisher defers to the government's restrictive condition) as well as being one that is wholly unrelated to any licensing review.<sup>101</sup> The public-interest findings of legislative and regulatory bodies, it is said, obviate the need for rational discourse on the constitutional question.<sup>102</sup>

#### V. CABLE OPERATORS DO NOT RELINQUISH THEIR FIRST AMENDMENT FREEDOMS IN EXCHANGE FOR GOVERNMENTAL AUTHORITY TO CONSTRUCT AND OPERATE THEIR COMMUNICATIONS DISTRIBUTION SYSTEMS

At least two federal circuit courts have held that when a cable television operator and a local governmental entity reach agreement upon the terms and conditions of a franchise permitting installation of the private cable-communications complex over the public right-of-way, the operator, either as a matter of law or as part of the negotiating process, surrenders or waives

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100. *WNCN Listeners Guild*, 450 U.S. at 597 n.38. The Court's discussion in *WNCN* was related to its prior opinion in *Pacifica Foundation*, the case generally acknowledged to represent the outer limits of content-based regulation of broadcast stations by the FCC in the exercise of its radio licensing jurisdiction. *But see New York Times Co.*, 403 U.S. at 730-32 (White, J. concurring) (while the press enjoys "extraordinary protection against prior restraints" and while the government undertakes a "very heavy burden," there may be "express and appropriately limited congressional authorization for prior restraints").

101. *See, e.g., Miami Herald Pub. Co.*, 418 U.S. at 256 ("The Florida [access] statute operates as a command in the same sense as a statute or regulation forbidding [the publication of] specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."). *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 64 (1976) (quoting Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972)) ("The essence of . . . forbidden censorship is content control."). The content-related decisions of a cable television publisher are no more, and no less, entitled to the protection of the First Amendment than are those of an editor of *The New York Times*, the National Broadcasting Network or the *National Enquirer*.

If Senate Bill S.12, as passed by that body on January 31, 1992, is any measure of government's constitutional capacity to supervise the cable television press, then there are virtually no limits to the legislature's power. For S.12 can withstand First Amendment scrutiny only if it is determined that public officials, where it is the cable press that is targeted, hold *carte blanche* to restrict whatever speech activity is deemed to serve the public's interest. S.12 is significantly more intrusive than even that regulation of the broadcasting media found impermissible under the scarcity doctrine. The constitutional question therefore is whether it is open season on the cable television press, the First Amendment notwithstanding.

102. Even under the scarcity doctrine—that most permissive and limited of all First Amendment tests—the Court has made it clear that while the broadcast "licensee is . . . held accountable for the totality of its performance of public interest obligations," it retains its day-to-day "journalistic independence." *Columbia Broadcasting Sys.*, 412 U.S. at 121. "That editors—newspaper or broadcast—can and do abuse [their editorial] power is beyond doubt, but that is no reason to deny the discretion. . . ." *Id.* at 124.

certain of its First Amendment freedoms.<sup>103</sup> The necessary corollary of this novel proposition is that the public franchising authority to whom the constitutional rights are surrendered is enabled thereby to do that which the First Amendment forbids, namely to abridge the cable operator's now unprotected freedom of speech and press.

Over the past century, however, the Supreme Court consistently has condemned as unconstitutional all efforts by government to condition its favor upon the relinquishment or surrender of a constitutionally guaranteed right.<sup>104</sup> In *Frost & Frost Trucking Co. v. R.R. Commission of California*,<sup>105</sup> the Court said:

The naked question . . . therefore, is whether the state may . . . impos[e] the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend . . . .

. . . In reality, [such choice is] no choice, except a choice between the rock and the whirlpool . . . .

. . . It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>106</sup>

Reaffirming this proposition in the case of *Perry v. Sindermann*,<sup>107</sup> the

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103. See *Paragould Cablevision v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991) ("By entering into the franchise agreement [the cable television operator] effectively bargained away some of its free speech rights . . . [and] cannot now invoke the First Amendment to recapture surrendered rights."), *cert. denied*, 112 S. Ct. 430; *Erie Telecommunications v. City of Erie*, 853 F.2d 1084, 1096 (3rd Cir. 1988) (finding "a valid contractual waiver" of future First Amendment claims).

104. The general rule was first stated by the Supreme Court in *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 456 (1874). See also *Barron v. Burnside*, 121 U.S. 186, 197 (1887).

105. 271 U.S. 583 (1926).

106. *Id.* at 592-94. See also *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 282 U.S. 311, 328-29 (1931).

107. 408 U.S. 593 (1972).

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Court there emphasized its very special application to the freedom of speech.<sup>108</sup>

That one, for example, might voluntarily concede his or her Sixth Amendment right to trial by an impartial jury, or accept less than the Fifth Amendment's just compensation for a taking of property, does not mean that the constraint by which the First Amendment limits governmental power is similarly to be neutralized. The Speech and Press clause confers no right on the person to be surrendered or traded away.<sup>109</sup> Instead, it commands that government "make no law" restricting the specially protected activities. The restraint by which the First Amendment structurally proscribes the government's power to supervise "speech" or "press" is thus not within the province of the individual to vacate, waive, or even moderate. Government, therefore, can derive no authority from the individual that would empower it to make laws regulating speech or press.<sup>110</sup>

Accordingly, cases such as *D.H. Overmyer Co. v. Frick Co.*<sup>111</sup> and *Fuentes v. Shevin*,<sup>112</sup> which itemize the criteria for individual waiver of constitutional rights, but which do not touch upon freedoms guaranteed under

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108.

[T]hough a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

*Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (brackets in original). See also *Elrod v. Burns*, 427 U.S. 347, 361 (1976) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

109. While courts and commentators in discussing the First Amendment loosely interchange the terms "rights" and "freedoms," the only "right" conferred thereunder is that of "the people peaceably to assemble, and to petition the Government." Where the activities of speech, press or religion are at issue, the constitutional "freedom" is secured not by vesting any "right" in the people but through restraining the power of government. *But see Schneider v. Irvington*, 308 U.S. 147, 161 (1939) ("This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties.") (footnote omitted).

110. The Eighth Circuit's opinion in *Paragould* presents a striking example of that court's fundamental misunderstanding of the First Amendment. After inferring that the cable television operator there, "[b]y entering into the franchise agreement . . . effectively bargained away some of its free speech rights," the court then finds that the operator "could have bargained [with the city] for an unqualified right to solicit and transmit advertisements." *Paragould*, 930 F.2d at 1315. The court, without discussion of the obvious constitutional implications, thus holds that local governments are at liberty to extract concessions from the cable press (e.g., a prior restraint on the distribution of commercial speech) that would be unconstitutional *per se* if imposed on any other media of mass communication. The Eighth Circuit apparently assumes that (1) the cable television press lies outside the scope of First Amendment protections, and (2) the city, despite the constraint by which the First Amendment limits its powers, may "bargain" to restrict speech provided that the object of the restraint is the franchised cable operator.

111. 405 U.S. 174, 185 (1972).

112. 407 U.S. 67, 80-81 (1972).

the First Amendment, are inapposite. While the people clearly may decide to forego the exercise of those uniquely guarded freedoms of speech, press, and religion, the government acts unconstitutionally when it attempts to coerce, or even to influence, the individual's decision.<sup>113</sup>

To reason otherwise would only encourage public officials, through the device of creative enticements, to intrude on the freedom of speech and press thereby "produc[ing] a result which [they] could not command directly."<sup>114</sup> However irresistible the consideration (e.g., a special zoning exception to establish a printing press, an exclusive permit to distribute publications on public property, a franchise to construct a cable television system on public right-of-way, or a compulsory copyright license), and whatever the will of the individual to exchange his speech freedom therefor, the transaction cannot enable the government to do that which the First Amendment forbids. Government may not negotiate for the power to enact those very laws that the Constitution bars.<sup>115</sup> That the individual may accept valuable consideration, and even knowingly consent to or acquiesce in the supervision of speech and press, are factors irrelevant to the threshold question of the government's constitutional capacity to make the facially offending regulation.<sup>116</sup>

Whatever the participation or intent of the concerned parties, there is no consensus, short of that prescribed under Article V of the Constitution, by which governmental authority may generally be enabled to make laws

113. Cf. *Engle v. Vitale*, 370 U.S. 421, 430 (1962).

114. *Speiser*, 357 U.S. 513, 526.

115. Were government, merely through striking a bargain with the individual, able to attain that power over speech, press, or religion which the Constitution explicitly withholds, the constraint and the protections of the First Amendment would be a sham. *But see* *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) (holding that "a legislature's decision not to subsidize [through appropriation of public funds] the exercise of a fundamental right does not infringe the right"). *See also* *Rust v. Sullivan*, 111 S. Ct. 1759, 1172 (1991) (quoting *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)) (The Court upheld as constitutional the government's selective funding of "certain activities it believes to be in the public interest" on ground that, "A refusal to fund [constitutionally] protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."). *See also* *Public Broadcasting [Funding] Bill is Sidelined*, N.Y. TIMES, Mar. 5, 1992, at A14 ("Senate Republicans . . . say public broadcast stations display a consistent liberal bias in their . . . programs."). While the First Amendment tolerates the legislature's "funding" determinations, even though such debate impacts free expression, it bars the more direct intrusion. Here, of course, cable television regulation is not "funding." It is a series of content-related burdens and restraints affirmatively imposed on one component of the press as a precondition to distribution of constitutionally protected speech.

116. In light of the Supreme Court's reliance on constitutional doctrine to resolve the question, it seems unnecessary to discuss fundamental and obviously relevant principles of contract law regarding overriding public policy and contracts of adhesion. *See, e.g.,* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1515, at 727-29 (1951); *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1179-80 (3rd Cir. 1979). Cable television franchises are traditionally let by local government authorities on a "take it, or leave it" basis. *See, e.g.,* 47 U.S.C. §§ 541, 546 (1988). By definition, applicants for cable television franchises are largely without bargaining power. Exacting or inferring the surrender of existing or potential First Amendment freedoms as a condition to governmental award of a cable television franchise not only lacks a rational basis, it would constitute bad public policy per se.

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abridging the freedom of speech, or of the press. A governmental interest, however shaped or labeled by well-meaning public officials, is not a license to abrogate those limits constitutionally fixed on the exercise of legislative power.

VI. CONTENT-BASED REGULATION OF THE CABLE TELEVISION "PRESS" CONFLICTS WITH LONG-ESTABLISHED, CONSISTENTLY FOLLOWED CONSTITUTIONAL PRECEDENT AND VALUES, AND IS CONTRARY TO THE PUBLIC INTEREST

Given the choice between an independent press and one that is vulnerable to the pressures of those holding public office, the Framers chose freedom. Their decision was implemented by *constitutionally foreclosing* the alternative.<sup>117</sup> The Federal Communications Commission, many in the Congress, numerous states and their political subdivisions, and some courts obviously believe that "ancient" judgment to have been extreme or, at least, to be outmoded; and they advocate a more dependent, congenial relationship between the contemporary press and government. Who is to say that their theories, however incompatible with those of the Framers, lack merit or are undeserving of consideration? It is urged only that Article V of the Constitution prescribes the *exclusive* process by which the First Amendment may be abandoned and those more "modern" views accommodated.

Chief Justice Marshall, when he so elegantly framed the preeminent proposition of constitutionally limited government in the United States, said:

The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

. . . The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. . . .

. . . [I]f the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable . . . .

[T]he theory of . . . [American] government must be, that an act of

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117. See, e.g., *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the Framers] amended the Constitution so that free speech . . . should be guaranteed."). See also *supra* note 35.

the legislature, repugnant to the constitution, is void.<sup>118</sup>

Nowhere does the Constitution manifest more specificity or less ambiguity than when it restrains the power of the government to "abridg[e] the freedom of speech, or of the press." If "ordinary legislative acts" are insufficient to overcome a constitutionally imposed limitation upon the powers of government, then, *a fortiori*, legislative findings or the exercise of discretion by administrative bodies through agency rulemaking are likewise impotent. The invocation of a public-interest rationale hardly cures this fundamental deficiency.<sup>119</sup> Clearly then, regulations that by calculation and effect abridge the peoples' freedom of speech, or of the press, whatever their dressings, are "repugnant to the constitution."<sup>120</sup>

Some nonetheless persist in the view that those structural limitations constitutionally proscribing government's power to restrict speech and press are little more than guidelines for the exercise of discretion, the proviso for deviation being a substantial public-interest rationale.<sup>121</sup> Societal objectives, as articulated and then weighted by legislators, are said not only to neutralize constitutionally-imposed limitations on public authority, but also affirmatively to restore to government the requisite powers to supervise speech and press. Expediency thus supersedes the proposition of constitutionally limited government.<sup>122</sup>

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118. *Marbury*, 5 U.S. (1 Cranch) at 176-77.

119. When courts recognize public-interest considerations as overriding explicit constitutional command, they reduce the First Amendment to a statute beneath that of ordinary laws. *See, e.g., Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982) ("When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."); *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)) ("In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'").

120. *Marbury*, 5 U.S. (1 Cranch) at 177. In the sixty years that have passed since the Court's watershed decision in *Near v. Minnesota*, 283 U.S. 697 (1931), First Amendment law in the United States has moved steadily closer to the more expansive Madisonian concept of freedom of the press and much further away from Blackstone's more limited concept (*viz.*, "liberty of the press . . . consists in laying no previous restraints upon publications," *id.* at 713 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1733))). Especially pertinent here, however, is that the subject regulation of the cable television press constitutes a system of previous restraints upon the publication of information via that medium of mass communication. As Chief Justice Hughes observed in *Near*: "the constitutional guaranty of the liberty of the press gives immunity from previous restraints. . . ." *Near*, 283 U.S. at 719.

121. *Cf., Columbia Broadcasting Sys.*, 412 U.S. at 122 ("[T]he public interest standard necessarily invites reference to First Amendment principles."). In the case of cable television regulation, constitutional principles often are subordinated to the public-interest judgments of legislators and bureaucrats thereby fundamentally inverting the established priority. *See also Nebbia v. New York*, 291 U.S. 502, 524-25 (1934) ("[T]he power to promote the general welfare is inherent in government," but such power is limited by "constitutional restraint.").

122. *Cf. Marbury*, 5 U.S. (1 Cranch) at 180 ("[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.").

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The inevitable result, if the government's position is to be sustained, is that the legislator or public official, by virtue of that pervasive sway held over the cable television press, becomes a special force to be reckoned with.<sup>123</sup> In the quest to stake out politically appealing ground, cable television has become perhaps the safest of targets for the crusading politician. Under the populist banner of consumer protection, legislators assert a crucial role directly in the communicative aspects of the privately-owned cable television media. Their avowed objective, as well as the crux of their political theatre, is to make laws restricting the discretion of the cable television editor over matters of a communicative character, including the pricing, arrangement, distribution, and security of intellectual product.<sup>124</sup> These intrusions not only confront the constitutional command, they go directly to the core value of a free, uninhibited press thereby compromis-

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123. From inception, the history of cable television has been written largely in the context of political strife and regulatory restraints. See generally, John P. Cole, Jr., *Community Antenna Television, The Broadcaster Establishment, and the Federal Regulator*, 14 AM. U.L. REV. 124 (1965); William E. Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867 (1983); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Home Box Office*, 567 F.2d at 44-46; Cable Television Report and Order, 36 F.C.C.2d 143, 306-311, 317-320 (1972) (Johnson, Comm'r, concurring in part and dissenting in part); H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984), reprinted in 1984 U.S.C.C.A.N. 4655. ("The Committee notes that FCC policies in the 1960s and early 1970s unfairly inhibited the growth and development of cable."). Apart from the perpetual trials of the local franchising relationship (including the constantly looming, often vocalized threat of non-renewal and eviction), the highly publicized introduction of bills in the Congress proposing restrictive, content-based regulation of the cable media has become a perennial ritual. See, e.g., S.12 (a bill introduced "to ensure carriage of local news and other programming"); H.R. 3380, 102d Cong., 1st Sess. (1991). If nothing else, these activities stimulate generous political contributions. For example, the 1989-90 Report of the Federal Election Commission shows that the National Cable Television Association's "CablePac" alone raised \$570,475. The fact that all of this money was channeled to sitting, sensitively positioned members of the House and Senate would seem to belie any inference that the contributors were motivated only by their interest in good government. This is not to suggest that our traditional political process is unlawful or even unseemly. The point is only that the manifest dependency of the electronic press on the good will of incumbent legislators and officials, at all levels of government, reflects adversely on the fundamental role of the First Amendment, viz. the maintenance of a free and truly independent press. This dependency is only greatly exacerbated when the most prominent players in the competitive market (i.e., the rival television broadcasting networks) wield a disproportionate power to influence public opinion and thus to shape the political process. What now has been in progress over three decades, and that which continues to the present day, is a show-down of power politics between media interests over television ratings and dollars. The arena has largely been the Congress and the FCC. The public interest has played, at best, only a bit part in the contest. The Supreme Court teaches that the constitutionally guarded liberties of speech and press must not be subjected to "the vicissitudes of political controversy" but instead have been placed "beyond the reach of majorities and officials." *West Virginia State Bd. of Educ.*, 319 U.S. at 638. Measured in the crucible of reality, the Court's declaration takes on mythical qualities.

124. The First Amendment gives the cable television press no immunity from the criticism of legislators or public officials, however harsh or politically motivated that may be. The constitutional protection is breached only when such rhetoric translates into laws substantively interfering with the cable operator's exercise of "speech" or "press" freedoms. Cf. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) ("[First Amendment freedoms] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."). There of course is little subtlety when public officials invade a private cable editor's discretion to oversee the selection or packaging of the communicative product or to set the price that the operator may charge therefor.



ing the essential purpose of the First Amendment.<sup>125</sup>

Independence and vigilance give way to dependence and obsequiousness. Courage becomes timidity. And prudent business judgment is made the order of the day. All of this results from regulatory and franchising measures calculated to sensitize the cable operator to the capacity of government officials selectively to affect the direction and vitality of the media business.<sup>126</sup> The free exercise of communicative activity and the financial productivity of one vehicle of information are thus squarely placed in the political cauldron.<sup>127</sup> The result is a sycophantic press. Yet we are taught that the basic law of the land is to "withdraw [press and speech] from the vicissitudes of political controversy."<sup>128</sup>

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125. *New York Times Co.*, 376 U.S. at 254. See also *Near*, 283 U.S. at 720 ("[T]he administration of government has become more complex, the opportunities for [official] malfeasance and corruption have multiplied . . . , and the danger of its protection by unfaithful officials . . . emphasizes the primary need of a vigilant and courageous press.").

126. This recurring spectacle of the cable television press being induced to importune the political establishment for fair treatment, whether at the federal or local level, is itself at odds with the First Amendment. When the focus of this process constitutes a veritable parade of legislative proposals selectively and comprehensively restricting the communicative and economic aspects of the media, it takes on the attributes of a shake down. For example, conferring authority on the FCC or local governments to establish cable television subscription rates is tantamount to placing the cable press under the thumb of public officials. See 47 U.S.C.S. § 543(b) (Law. Co-op. Supp. 1991).

127. If "speech" and "press" are not constitutionally to be subjected to "the vicissitudes of political controversy," how then may the Federal Communications Commission lawfully exercise unbridled discretion in a free-wheeling, highly politicized rulemaking to establish federal standards for rate regulation of the cable television press? See 47 U.S.C.S. § 543(b) (Law. Co-op. Supp. 1991); Effective Competition Standard For the Regulation of Cable Television Basic Service Rates, 6 F.C.C.R. 4545 (1991). How may locally elected officials, whatever their resources or ethical fortitude, realistically be expected to set cable subscription rates independent of political influence or consequence? The constraint by which the First Amendment limits the intrusion of government into select activities is either real or it is illusory. The press is subject to the vagaries of content-related rulemakings and ratemakings or it is not. The editorial judgments of private communicators may, or may not, be countermanded by public officials. Either there are established boundaries of permissible law-making or the principle of constitutionally limited government is largely window dressing.

128. *West Virginia State Bd. of Ed.*, 319 U.S. at 638. The depth of the cable television industry's dependence upon legislators is perhaps most vividly depicted by circumstances arising during the course of the *Century Communications* appeal in the D.C. Circuit. The cable operator petitioners there applied to the circuit court for a stay of the effective date of the FCC's must carry rules pending resolution on the merits. The National Cable Television Association, Inc., the principal trade organization of the cable television industry and an intervenor in that case, submitted its "opposition to motion for stay," filed May 18, 1987. The trade association explained to its membership that it had negotiated with competitive industries under the informal aegis of the FCC Chairman and prominent members of Congress regarding must-carry regulation and was obliged, it felt, to demonstrate support for such "consensus" rule or suffer the consequences. The political astuteness of the Association's judgment is not questioned. Nonetheless, we have the unprecedented display of the cable "press" sufficiently intimidated by the specter of legislative retaliation as to encourage a content-based restraint on publication ultimately declared unconstitutional by the reviewing court. That similarly contrived and mislabeled "consensus" agreements between the rival factions of the electronic press are not a rare or recent phenomenon. See, e.g., Cable Television Report and Order, 36 F.C.C.2d 143, 284 (1972); and *id.* at 313-18 (Johnson, Comm'r, concurring in part and dissenting in part). Political duress and compromise are expected, often constructive and constitutionally acceptable ingredients of the legislative process, *except* where the target of government's coercion is the

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Whether a contested mayoral campaign, a Senate confirmation hearing, or a Presidential election, the effective use of the television media through "sound bites," "photo ops," and the like, all skillfully choreographed by the "media consultant," is generally the single most critical ingredient in achieving success.<sup>129</sup> The amount and nature of the news coverage (*i.e.*, exposure) given by the television media to a particular personality or cause more than often determines public reaction.<sup>130</sup> Today, as much or more than ever before, a truly independent video press is essential to the institution of democratic government. Yet there are those who seriously contend that the communications media primarily relied upon by today's masses to access information and opinion are significantly less entitled to the protection of the First Amendment than are the more traditional press vehicles.<sup>131</sup> Whether knowingly or not, some advocate regulatory policies that, if followed, must ultimately sacrifice the independence of the press and inevitably lead to the co-option of the electronic media by the incumbent political establishment.<sup>132</sup>

The reality that cable operators "have always been regulated in many

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individual's exercise of a First Amendment freedom. *Cf.* *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1142 (S.D. Cal. 1976), *vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980) (First Amendment rights may be unlawfully abridged "through formal regulation or backroom bludgeoning.").

129. *See, e.g., Television is the Campaign*, N.Y. TIMES, Dec. 15, 1991, at 4-14; Charles Hagan, *The Photo Op: Making Icons or Playing Politics*, N.Y. TIMES, Feb. 9, 1992, at H-1.

130. In the selection and arrangement of product as well as in the expression of opinion, editors generally reflect their personal predilections. Some who exercise the prerogatives of the press are arrogant, misguided or motivated largely by self-interest. Not just a few place a "spin" on the "news" to promote their own personal or political agendas. Objectivity or journalistic integrity may very well be the least common credential of the press. The cable television component of the communications media very likely is no different from the more traditional model. But the institution of a free press has never been conditioned upon any norm of behavior. "A responsible press . . . cannot be legislated." *Miami Herald Pub. Co.*, 418 U.S. at 256. Freedom from the intrusion of government, despite the acknowledged, inevitable risks of abuse, is the one essential to an independent press. *See supra* note 30. That this "guaranteed freedom" may be compromised on a ground so slippery as the "substantiality" of a governmental interest, is expediency of the most base character.

131. No one, for example, would contend that the Church of Latter-Day Saints is exempt from, or subjected to a lesser protection under, the Free Exercise clause because that particular denomination had not been established at the time the First Amendment was ratified. It is "speech," "the press," and "religion" that the Constitution protects from the law-making powers of the government. And the peoples' freedom to engage in those generic activities, so long as their actions do not unduly infringe upon the security or "rights" of others, may not be abridged. *See supra* pp. 366-71 and accompanying notes.

132. *Cf. Sullivan*, 376 U.S. at 270 (the First Amendment manifests "a profound national commitment to the principle that debate should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks in government and public officials"). This goal is wholly subverted when those in office hold the power to selectively oversee the media and to impose *ad hoc* burdens or rewards—especially when it is only the public interest that limits the exercise of their discretion. The carrot-and-stick style of rule may well keep the people in line; but it is unconstitutional when applied to suppress First Amendment freedoms.

respects" does not justify content supervision of the media.<sup>133</sup> That newspapers have enjoyed "a long standing and powerful tradition that keeping government's hands off is the best way to" preserve an independent media,<sup>134</sup> is only that much more reason (the Tenth Circuit's lapse in logic notwithstanding) to extend the tradition to all elements of the press. Selectively regulating the judgment or revenues of a cable television publisher is no more palatable under the First Amendment, and no less injurious to the "profound national commitment to . . . uninhibited, robust and wide-open" debate,<sup>135</sup> than would be the same intrusion into the deliberations of a newspaper editor.<sup>136</sup>

The independence of the press is constitutionally assured, not because those who engage in the activity are deemed especially virtuous or even responsible, but because the Framers perceived the potential for governmental interference in this crucial area to constitute a grave threat to a free society. Their solution, acknowledged to be extreme and to entail risk, was to foreclose even the specter of such intrusion through constitutionally barring the regulation of speech and press. Cooperation between one faction of the electronic press and well placed legislators or administrators to promulgate policies hampering the effectiveness of the competitive cable television media is precisely the type of intervention that is prohibited by the First Amendment.<sup>137</sup> For the effect, if not the motive, of such selective

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133. Cf. *Community Communications Co.*, 660 F.2d at 1379. The early history of cable television regulation is replete with the summary rejection by the courts of First Amendment claims made on behalf of cable television interests. See, e.g., *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963) cert. denied, 375 U.S. 951; *Idaho Microwave v. FCC*, 352 F.2d 729 (D.C. Cir. 1965); *Buckeye Cablevision v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967); *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). Judicial recognition that cable operators just might have "speech" rights first came in *Home Box Office*, 567 F.2d at 44-48, a case decided on other grounds. See *id.* at 45 n.80, where the appeals court acknowledges "incorrectly treating" the constitutional question in a compendium of prior cases. See also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979), where the Supreme Court, in *dictum*, noted that claims that content-based regulation of the cable television media raised First Amendment issues were "not frivolous." Thus any tradition of regulation of the cable media resulting from a failing of lower courts correctly to perceive the issue is hardly a rational basis upon which to perpetuate the unconstitutional practice.

134. *Community Communications Co.*, 660 F.2d at 1379.

135. *Sullivan*, 376 U.S. at 270.

136. Cf. *Lovell*, 303 U.S. at 452 ("The press . . . comprehends every sort of publication which affords a vehicle of information. . ."). See *City of Lakewood*, 486 U.S. at 757-59, 769-71 (loose standards, including specifically a "public interest" test, that authorize public officials to exercise discretion over conduct related to speech, pose a "real and substantial" threat to a free press and, for that reason, are facially unconstitutional).

137. There is nothing tawdry in "cozy" or mutually beneficial relationships among the "press" and particular politicians. Neither is there indiscretion in the peoples' exercise of "the right . . . to petition the Government," as guaranteed by the First Amendment, even when the prayer may be for business advantage. The constitutional impropriety arises only when the government exceeds its law-making powers to burden select elements of the press or to discriminate among "equally protected" speakers. See, e.g. *Columbia Broadcasting Sys.*, 412 U.S. at 127 n.21 ("We see no principal means under the First Amendment of favoring access by organized political parties over other groups and individuals."). The transgression is grievously aggravated when the speech-restrictive law is enacted at the behest of one component

regulation is to make both factions of the press beholden to the political establishment, one hopefully to escape or mitigate the legislature's shackles and the other to maintain the contrived advantage. In each instance, it is the core value of an independent press that is improvidently compromised. The making of any law facially abridging the freedom of speech, or of the press requires a basis beyond hard-ball politics.

Speech, religion, and the press are protected in the United States not because the government promotes, or even encourages, those activities but because the First Amendment bars its intrusion. Those who publish periodicals, or who produce books, motion pictures or programming, or who hold governmental licenses to operate broadcasting or cable television media, while enabled to broadly propagate their own views and thereby disproportionately to influence public opinion, are not morally or intellectually superior to other citizens. Their speech, however wise or important, is not "better" than the speech of others—certainly not in any constitutional sense. The fact that some of these mass-communicators are able to coalesce their formidable tools into a politically effective lobby able to work its will on a pliant legislature is not a reason to subjugate the command of the First Amendment.<sup>138</sup>

In the venerable words of Chief Justice Marshall, constitutions are "superior paramount law" enacted in order that "those limits" imposed by the people on the authority of government "may not be mistaken or forgotten." Whether one regards the Constitution from the perspective of a strict or lenient constructionist, whatever prejudices these labels may be

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of the media to disadvantage another. See, e.g., 138 Cong. Rec. S655 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth) ("What this debate [on cable television bill S.12], then, is all about is those who want to use the political process, as has been done since the beginning of telecommunications, . . . to limit one group of people, to keep them out of growing."). See *id.* at S654-S656. See also *Face-off on Must Pay*, BROADCASTING, Apr. 2, 1990, at 43, 43 ("CBS President Laurence Tisch was on Capitol Hill last week plugging the legislation. . . ."); *id.* at 44 ("If broadcasters succeed in winning must pay, Larry Tisch's right-hand man will get major credit, he's become a major force in company, in industry and in Washington.").

138. Any must-carry regime, under which the government substantively classifies and prefers select speakers over others, constitutes an egregious, indefensible infringement on First Amendment freedoms. Television broadcast stations and cable television operators are unquestionably "press." *Columbia Broadcasting Sys.*, 412 U.S. at 116; *Leathers*, 111 S. Ct. at 1442. National broadcasting networks (e.g., CBS) and cable television networks (e.g., CNN, C-SPAN, ESPN, BET and, yes, MTV), which affiliate with cable systems to distribute communications to mass audiences, are equally "press." *Lovell*, 303 U.S. at 452 (the "press . . . comprehends every sort of publication which affords a vehicle of information and opinion."). Each of these media enjoys the protection of the First Amendment. Yet the Senate has passed (S.12), and the House is considering, a provision one purpose of which is to restrict the discretion of the cable television editor by mandating an official pecking order on these speakers. The dogma is that the speech of local television stations is of greater public benefit than that of the other speakers and, accordingly, warrants governmental preference. But even were this value-judgment to be verified, the scheme is flagrantly unconstitutional. While legislators may individually opine their preference for the "speech" or "press" of those favored with broadcasting licenses, they violate the First Amendment when they legislate that priority. *Buckley*, 424 U.S. at 48-49; *Pacific Gas and Electric Co. v. Public Utilities Comm. of California*, 475 U.S. 1, 14 (1986); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973).

intended to impart, the Supreme Court has never inferred from the First Amendment the proviso, "unless the law shall be deemed to serve the public interest." The constitutional command makes no distinction between good and bad laws. It says: "no law." The theory that First Amendment values may result from, and thereby vindicate, the facially unconstitutional abridgment is a *non sequitur*.<sup>139</sup> Regulatory restrictions on "speech" freedoms, whatever the motivation or promise, are without a constitutionally redeeming quality.<sup>140</sup>

Writing for the Court specifically in the context of broadcast-licensing regulation, where the government's authority over speech is significantly greater than with respect to any other media of mass communication, Chief Justice Burger, bowing to the underlying theme of the First Amendment, stated: "Calculated risks of abuse are taken in order to preserve higher values . . . ."<sup>141</sup> It is precisely those "higher values" that are sacrificed when deliberate intrusions on "the guaranteed freedom of expression" are rationalized on the basis of an interests-balancing analysis.<sup>142</sup> The cable television press is not exempt from the protection of the First Amendment; and likewise, the government, where cable speech is involved, is not relieved of its constraint.

The general public has never advocated, nor shown an interest in, a cable must-carry regulation. The intense political pressure for this unique speaker-preference comes solely from an effective broadcasting lobby. Yet the lone justification given for this special-interests exception to the constitutional rule is that must-carry is a public necessity.<sup>143</sup> In contrast, the public has expressed interest in the subject of cable television subscriber rates. But price increases for media publications, whatever the consumer reaction, do not vitiate the freedom that the First Amendment guarantees to the press. Constitutional constraints on governmental power are not

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139. *Cf. Marbury*, 5 U.S. (1 Cranch) at 176 (The Constitution represents the will of the people and "is the basis on which the whole American fabric has been erected . . . . The principles, therefore, so established, are deemed fundamental."). When legislators compromise these principles, even when their action may reflect overwhelmingly the popular will or truly serve the public interest, the Constitution becomes anything and everything but "fundamental" or "supreme." *Id.*

140. Laws that intrude indiscriminately to facilitate distribution of or public access to speech or press, such as postal regulations that authorize lower mail rates for "educational" or "informational" publications (39 U.S.C. § 3622 (1988)), do not conflict with the First Amendment. Laws that facially proclaim such goals but which in purpose or substance selectively classify and favor certain speakers or press organs over others, do abridge the constitutionally guaranteed freedoms of those less favored. Thus while the legislature may make laws regarding "speech" or "press" activities, it may not do so when the intention or effect of its action is to restrict the activity or to discriminate among those who hold those guaranteed freedoms. Public funding is the one exception to the rule. *See supra* note 115.

141. *Columbia Broadcasting Sys.*, 412 U.S. at 125 (1973).

142. *Id.* *See also supra* notes 38 & 39.

143. Blurring the distinction between special interests and the public interest is an age-old political tactic but one hardly sufficient to lull courts into a constitutionally submissive role—especially when it is the command of the First Amendment that the legislature facially overrides.

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subsumed because, in context, they implicate consumer issues or generate politically attractive causes.<sup>144</sup> Placing cosmetically pleasing titles on laws that overtly abridge the freedoms of speech and press<sup>145</sup> neither conceals the substance of the legislation nor deflects the demanding scrutiny required by the First Amendment.<sup>146</sup>

Content-related restrictions on the distribution of "fully protected" speech via the media of mass communication, especially those applied at the discretion of government officials, affront the express provisions of the First Amendment. The fact that those who exercise their discretion may do so pursuant to authority delegated by the legislature is inconsequential. For such creation, being in excess of the legislature's charter, is itself unconstitutional.<sup>147</sup> Equally unavailing is the legislature's proclamation that the press-restrictive law will serve the best interests of the people. A constitutional command is not something to be manipulated "when the legislature shall please to alter it," particularly not on the basis of a standard so susceptible to subjective construction as the public interest.<sup>148</sup>

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144. When in 1991, *The New York Times* increased its daily newsstand price one hundred percent, the First Amendment was not nullified. Yet a far smaller rise in cable television subscription rates over a six-year span (*i.e.*, "40 percent") has recently persuaded the U.S. Senate to pass a bill regulating the charges of the cable television press. 138 Cong. Rec. S760 (daily ed. Jan. 31, 1992) (S.12, § 2(1)). *See also id.* at S762 (S.12, § 623) ("Regulation of Rates"). Were there no barrier to rate regulation of the electronic media, why has not the Congress focused on the skyrocketing costs of broadcast advertising? *See, e.g.*, Michael Lev, *Super Bowl 25: The Football Hoopla Yields to Hype*, N.Y. TIMES, Jan. 6, 1991, at F5 (On the biggest ad day of the year, advertising time during the Super Bowl cost \$800,000 for 30 seconds. While ratings decrease, advertising costs have doubled since 1984 and tripled since 1980). Any such intrusion into the revenue stream of private broadcast networks or stations would affect program creativity, thereby unconstitutionally imposing a censorial restraint on the freedom of speech and press. The rationale pertains no less to the cable television media.

145. *See, e.g.*, S.12, § 1 ("This Act may be cited as the 'Cable Television Consumer Protection Act of 1992.'").

146. None of this discussion is to suggest that the press is immune from the antitrust statutes or from any other laws generally governing the society. Exception is taken under the First Amendment only to those regulations specially designed to burden the communications media. *See supra* notes 88-90 and cases cited therein. Describing press-specific, content-based laws as "economic regulations," S. Rep. No. 92, 102d Cong., 1st Sess. (1991) (accompanying S.12 to the Senate floor), does not alter the substantive fact that they purposefully and selectively abridge the cable operator's freedom of speech and press and thus facially confront the command of the First Amendment. *Cf. Leathers*, 111 S. Ct. at 1444; *Miami Herald Pub. Co.*, 418 U.S. at 254. Not even those adjudged unlawful monopolists under Title 15 of the U.S. Code are stripped of their First Amendment freedoms. Rate regulation of water, electric power or telephone services does not implicate speech or press; regulation of the cable television media does. *Cf. Columbia Broadcasting Sys.*, 412 U.S. at 120 (There is a "basic distinction" between regulation of the communications media and a "utility that itself derives no protection from the First Amendment.").

147. *See, e.g.*, TRIBE, *supra* note 15, at 285 ("Congress can give away only what is its to give, [and] the most obvious limits on legislative delegation [include] action . . . inconsistent with constitutional prohibitions. . . ."). No action of government is more squarely prohibited than is "abridging the freedom of speech, or of the press."

148. *Marbury*, 5 U.S. (1 Cranch) at 177. The fallacy, indeed grave danger, in basing First Amendment protections on the judgments of men (*see infra* note 158) rather than on law and principle is readily illustrated by the *Century Communications* case itself. There a five-person regulatory commission and a two-judge appellate court, each acting in good faith on the same

Denigration of loose standards when it is the exercise of constitutionally guaranteed rights or freedoms that is at issue is hardly original to the author. In circumstances involving "equal protection" claims under the Fifth Amendment, where a significantly lesser scrutiny is required, then Justice Rehnquist once said:

How is this Court to define what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.<sup>149</sup>

Can any standard, we ask, be more "diaphanous" or "elastic" than is the "substantiality of the governmental interest"? Could there be a more direct invitation to construe subjectively the Constitution than to charge reviewing judges with balancing the public interest *vis-a-vis* the express provisions of the First Amendment? Does the command of the First Amendment have any meaning at all when the principal function of judges and justices is made one of weighing assorted interests? Are legislatures or their delegates afforded any ascertainable measure of constitutionality when it is the *ad hoc* estimation of judges that is controlling? Such standard is, in truth, no standard at all.

In the considered opinion of not just a few (now including several federal circuit courts, a large majority of the U.S. Senate and the federal agency primarily charged with the regulation of electronic communications), the question of the protection constitutionally due a cable television operator is already, as Mr. Justice Stewart in a slightly different context feared, little more than what "a majority of th[e] Court [or a political body] at any particular moment might consider First Amendment 'values' to require."<sup>150</sup>

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set of facts and both ruling unanimously, reached diametrically opposite conclusions regarding the central question of where the public interest comes down on the *O'Brien* scale. Except for cursory summations neither body explains how it arrives at its particular reading. And either could reverse its finding with a similar lack of elaboration.

149. *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

150. *See supra* note 39. Wholly apart from the question of constitutionality and the political advocacy of the special-interests, do the people truly need, or want, their public servants to designate those "speech" or "press" sources that may, or must, be accessible over their home television receiver sets? That legislators may label the governmental interest in such a regulatory scheme as "substantial," or even "compelling," is by itself hardly sufficient to nullify the solemn obligation of judges "to discharge [their] duties agreeably to the constitution of the United States." *Marbury*, 5 U.S. (1 Cranch) at 180. The very idea of the government inviting the broadcast licensees and their lobbyists to debate, whether in the halls of Congress, in formal legislative hearings or through agency rulemakings, the establishment of an officially constituted hierarchy for speakers, is itself incompatible with the First Amendment. *See, e.g., "Show and Tell Time" S-12 Still On Track in Senate, As Lobbying Accelerates*, COMM. DAILY, Jan. 10,

Thus, that "frightening specter," which Justice Stewart only hypothesized, has in some circles become a reality. The premise of this commentary is that the Constitution is due considerably more deference than has been accorded by these lower courts and legislative bodies.

When the First Amendment is perceived as authority for the legislature affirmatively to make laws abridging the "speech" or "press" freedom of a select few provided that the restriction is deemed to enhance the convenience or freedom of a greater portion of the people, the limitation constitutionally placed on the exercise of governmental power is corrupted. For that which the Framers put into the Constitution solely to restrain the law-making power of the government talismanically becomes the source for exercise of that very power. Those who see the *constraint* of the First Amendment as all things for all people not only demonstrate extraordinary imagination, they disavow its stated purpose.

Liberties guaranteed to all the people by the First Amendment, especially that of a press free from governmental control or intimidation, are not objects of patronage to be selectively dispensed (or withheld) by public officials depending upon their perception of societal goals or the public interest. Laws enacted purposefully to abridge anyone's freedom of speech or press, even though they may be public spirited, are presumptively unconstitutional and, unless justified by a vital, compelling governmental interest and narrowly drawn to preserve that articulated interest, are void.<sup>151</sup> There has never been the first attempt so to justify the content-

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1992, at 2; *House Prospects Not Clear*, COMM. DAILY, Jan. 14, 1992, at 1, 1 ("House Minority Leader Michel (R-Ill.) at NAB legislative forum . . . endorsed must-carry and retransmission consent."). See also Randy Sukow, *NAB Has Steam Up for Cable Showdown*, BROADCASTING, Jan. 13, 1992, at 10-11 (quoting a prominent broadcast-industry lobbyist) (discussing the power-politics of pending "must carry and retransmission consent" legislation and the concept that "to a member of Congress, a person who runs a TV or radio station is a very important fellow."). If the First Amendment is to stand for anything at all it is that the uniquely guarded activities of speech, press and religion are insulated from politics. There of course is no misbehavior when individual politicians pay homage to industry gatherings voicing support for the groups' legislative agenda. The constitutional infraction occurs when they, as a legislative body, enact content-based laws that target a select component of the press for the benefit of the favored media-constituency. Not only are such laws defective under the First Amendment they are in the nature of a Bill of Attainder and barred under Article I, Section 9, Clause 3 of the Constitution. Cf. *United States v. Lovett*, 328 U.S. 303, 315 (1946).

151. *Marbury*, 5 U.S. (1 Cranch) at 177. See also *West Virginia State Bd. of Educ.*, 319 U.S. at 639 ("[F]reedoms of speech and of the press . . . may . . . be infringed only to prevent grave and immediate danger to interests which the state may lawfully protect."). Officially favoring one fully protected speaker over another is anathema to the First Amendment. *Buckley*, 424 U.S. at 48-49. See also *Pacific Gas & Electric Co.*, 475 U.S. at 14 (quoting *Buckley*, 424 U.S. at 49) (While public utility has no "right to be free from vigorous debate" it "does have the right to be free from government restrictions that abridge its own [speech] rights in order to 'enhance the relative voice' of its opponents."). If "consumer protection" regulations cannot justify a utility's compelled publication of another's speech then, *a fortiori*, mandating an independent component of the press to distribute the programming and commercial advertisements of another is likewise unconstitutional. See *San Antonio School District*, 411 U.S. at 17 (Where governmental classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution," the test must be one of "strict judicial scrutiny.").



based regulation of the cable television media.<sup>152</sup>

### CONCLUSION

Speech is "speech" and press is "press." And the particular means by which one engages in the expressive activity, so long as it is lawful, is not a consideration material or relevant to the question of the protection constitutionally due the communicator, the communication, or the mass-media consumer.<sup>153</sup> No one has suggested that communication via cable television circuits is unlawful or even unsavory.

In every instance where a restriction on "speech" or "conduct" is contested on First Amendment grounds, there arises a preliminary inquiry: Is the subject regulation on its face content-related, press-specific, or communicative in its reach? When the answer is in the negative, the "alleged," incidental impingement on First Amendment freedom is then reviewed under *O'Brien's* more lenient standard. When this threshold inquiry is resolved in the affirmative, however, and it is the "press" or "speech" that is "targeted . . . in a purposeful attempt to interfere with . . . First Amendment activities," the constitutional analysis must be searching and exacting.<sup>154</sup> To construe the First Amendment's command as conferring discretion on the legislative branch of the government to make laws restricting speech and press whenever it is in the public interest to do so, subject to the deferential review of the judicial branch, is to reject not only the notion of a "written constitution" but the theme of constitutionally limited government as well.<sup>155</sup>

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152. The question treated here is not what might, or might not, constitute a "compelling governmental interest" sufficient to justify government's deliberate abridgement of "speech" freedoms, see, e.g., *Boos*, 485 U.S. at 319-21, but rather whether intentional abridgement is always and minimally to be "subjected to the most exacting scrutiny," *id.* at 321. See Justice Kennedy's analysis of First Amendment principles in the review of New York's Son of Sam law, *supra* text accompanying note 81. The one exception to this rule arises when the speech-restrictive regulation is directed to those licensed by the Federal Communications Commission to use radio broadcasting frequencies. In those situations, an analysis of the constitutional question within the confines of the scarcity doctrine may be appropriate. See *supra* notes 93-102 and accompanying text.

153. For example, intentionally defacing one's draft card, *O'Brien*, or engaging in public nudity, *Barnes*, 111 S. Ct. 2456, is conduct legislatively restricted and declared unlawful. In neither case is there any question relating to the constitutional capacity of the respective legislatures to so restrict the targeted conduct. Where persons nevertheless chose to communicate through such conduct, they do so consciously accepting the consequences of their action. In contrast, where the cable television "press" is targeted for communicative regulation, there arises not only a question as to the legislature's power to enact the speech-intrusive measure, but also the strong presumption that the enactment facially exceeds the authority of government, as limited by the First Amendment, and is thus unconstitutional.

154. *Leathers*, 111 S. Ct. at 1444. See also *Minneapolis Star & Tribune Co.*, 460 U.S. at 592-93; *Grosjean*, 297 U.S. 233; *Simon & Schuster*, 112 S. Ct. 501.

155. *Marbury*, 5 U.S. (1 Cranch) at 176-77. See also *id.* at 178 ("If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."). No one, for example, has a "First Amendment right" to *The New York Times*, to *Gone with the*

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If the making of laws that facially and selectively "abridg[e] the freedom of speech, or of the press" requires nothing more than interests balancing, then it follows that government may make "law[s] respecting an establishment of religion, or prohibiting the free exercise thereof" subject to the same forgiving standard. For the Speech and Press clause and the Establishment and Free Exercise clauses of the First Amendment originate from a common constitutional source and impose the identical stricture on the law-making powers of government.<sup>156</sup> Either the express provisions of the First Amendment are substantive or they may be cast aside on the basis of result-driven findings duly entered by legislators or their delegates and endorsed by reviewing judges.<sup>157</sup>

Introducing the variable of discretion to the protection afforded speech and press, whether it be of the administrative or judicial variety, is to exalt the predilections and bias of personality over the constitutional command. When the express provisions of the First Amendment are made secondary and the protection constitutionally due the press a judgment call, then the particular person making the call becomes the dominant factor in the equation.<sup>158</sup> Politics and establishment politicians ascend at the direct cost

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*Wind* (the book or the motion picture) or to a ticket to a political convention or the Super Bowl, even when the event may take place in a publicly owned arena. The First Amendment provides the people no right of access to express themselves in the pages of *The Washington Post* or in any other private publication including the broadcasting media. What the First Amendment does affirmatively do is guarantee that the government "shall make no law" selectively interfering in those activities or relationships. "Speech," "the press," and "religion" are uniquely set aside as private preserves where the *ad hoc* intrusion of restrictive governmental regulation is constitutionally prohibited. *But see* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967), suggesting a creative concept along those same lines as that rejected by the Court in *Miami Herald Pub. Co.* as "a confrontation with the express provisions of the First Amendment. *See Miami Herald Pub. Co.*, 418 U.S. at 254.

156. Even to suggest that the legislature, however noble its goals or compelling its findings, may empower itself to enact laws establishing a state-preferred religion or interfering in the free exercise of another religion, would be constitutional heresy. Yet the FCC and some lower courts invoke precisely that rationale to justify facial abridgments on "speech" and "press" freedoms. There is no attempt even to discuss this radical inconsistency in the application of the First Amendment's command. *Cf. Engle v. Vitale*, 370 U.S. 421, 425, 429-30 (1962) (Black, J., for a unanimous Court) ("It is no part of the business of government to compose official prayers for any group of the American people. . .") ("The First Amendment . . . stand[s] as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say. . ."). Like prayer, the activities of speech and press are equally freed from governmental intimidation.

157. What is in the public interest according to one regulator, or judge, may not be when viewed from the perspective of another. The particular weight attached to the governmental interest at issue *vis-a-vis* the abridgment is purely the subjective opinion of the person making the judgment. What is perceived on the *O'Brien* scales as substantial today may be *de minimis* tomorrow. A guaranteed freedom so lacking in definition or stability as to take its vitality from the momentary perceptions of legislators or public officials is meaningless.

158. *Cf. Marbury*, 5 U.S. (1 Cranch) at 163. ("The government of the United States has been emphatically termed a government of laws, and not of men."). Giving free rein to legislators and administrators, or even to justices, creatively to apply unmistakable constitutional command is literally to make sovereigns of men. When the "substantiality of the governmental interest," *Century Communications Corp.*, 835 F.2d at 300, determines the extent of the protection afforded speech and press, the Constitution gives way to men.

of the rule of law. Principle becomes a transitory consideration. And the First Amendment is politicized.<sup>159</sup> Yet, constitutionally limited government is distinguished from the more totalitarian regime chiefly by the former's recognition that fundamental law must consistently be applied under objective principles of neutrality.<sup>160</sup> "Freedom of speech is indivisible; unless we protect it for all, we will have it for none."<sup>161</sup>

None of this is meant to discount the proposition that discretion plays a prominent, necessary role in deciding, for example, whether knowingly burning one's draft card may be "speech" or whether nude dancing is "expression," and, if so, the degree of constitutional protection to which those engaging in such conduct may be entitled when balanced against the legitimate governmental interests in maintaining a military or prohibiting

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159. With the possible exception of the Fin/Syn controversy in which the commercial television broadcasting networks and Hollywood are pitted against each other in a monumental battle at the FCC for the control of programming valued at billions of dollars annually, nothing has been more politicized than the regulation of the cable television media. See Evaluation of the Syndication and Financial Interest Rules, 6 F.C.C.R. 3094 (1991), *recon. granted in part and den. in part*, 7 F.C.C.R. 345 (1991), *appeal pending sub. nom. Schurz Communications, Inc. v. FCC*, No. 91-2350 (7th Cir.). See also Harry A. Jessell & Kim McAvoy, *White House Sends Loud and Clear Fin-Syn Signals*, BROADCASTING, Feb. 18, 1991, at 27; Harry A. Jessell, *FCC Plots End to Fin-Syn in Three Years*, BROADCASTING, Feb. 25, 1991, at 19; Harry A. Jessell, *Fin-Syn Looms as Disaster for Networks*, BROADCASTING, Mar. 11, 1991, at 19; Edmund L. Andrews, *Syndication Gain is Seen for Networks*, N.Y. TIMES, Feb. 16, 1991, at 33 (The FCC "will ultimately determine who will control the \$3 billion market for television reruns."). When dollars of such magnitude are at issue, and it is the discretion of public officials that is the decisive factor, the media participants by nature are hopelessly co-opted.

160. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 21 (1975). Is it even arguably constitutional for public officials to classify fully protected speakers or media forms and to prioritize those classifications in the context of relative rights to publication or distribution? Does anyone seriously contend that the freedom to communicate fully protected speech is, as a matter of legislative discretion, greater for some of the people than for others? Could it ever be respectably suggested that the legislature may selectively use its law-making power to place restraints on one "press" vehicle at the instance or for the benefit of another? When these fundamental questions are consciously avoided, whether the neglectful party may be the legislature itself or a reviewing court, there is an unconstitutional abuse of power or a default in constitutional responsibility, or both.

161. Harry Klaven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428, 432 (1967). Rate regulation of the cable television media might, on balance, produce salutary benefits to the public, as might laws guaranteeing every person's access to "good" newspapers, books, or motion-pictures at reasonable costs. Laws establishing the individual's right to expression in those publications, especially where they seek only to rebut representations impugning their person or to speak out on issues of community importance, may likewise be perceived as fulfilling substantial societal goals. Anticipating that a political body might find that Yankee and Met's fans have established their "right" to continue to view the games of those teams on their "free" home television receivers—notwithstanding any contrary interest that may be held by the owners or creators of those events—is hardly far-fetched. But such findings, however rationalized or popular, do not debilitate the constraint by which the First Amendment limits the making of laws that abridge the freedom of speech or press. Government, while at liberty to promote conditions conducive to achievement of those societal goals it deems worthy, may not in the process compromise *anyone's* First Amendment freedom. The greatest virtue of constitutional government is that the guaranteed freedom of a few may not consciously be sacrificed for the benefit of those who wield or are able to influence majority power.

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public nudity.<sup>162</sup> The discretion frowned upon here is only that where legislators or bureaucrats assume liberties to revise, and even to ignore, the express provisions of the First Amendment. The theory that legislatures and public officials are foreclosed from the regulation of the "press" or "speech" only when they, in good faith, choose to recognize that limitation constitutionally fixed upon their powers is one at odds not only with precedent but with plain common sense.<sup>163</sup>

"The precise level of First Amendment protection due a cable television operator," to revisit Judge Wald's *Century Communications* opinion, is likely a question that will go unanswered to everyone's satisfaction until the Supreme Court decides to meet the issue head-on. Whether the Court will turn to an established standard of constitutional review, or whether it may create an altogether new doctrine peculiar to the cable television press, is not known. What we must know, however, is that the *O'Brien* standard, applied to date by many courts as well as by the FCC in the review of communicative supervision of the cable television media, is inapposite to those regulations that on their face implicate the freedom of "speech" or "press."<sup>164</sup>

Constitutional jurisprudence would be well-served if courts and regulatory bodies (especially those professed to hold special expertise in communications) would desist from the notion that the First Amendment so readily yields to the temptation of majority power. When fundamental freedoms constitutionally guaranteed to the people are conditioned upon the machinations of the political process, there is more than a touch of duplicity. When the command of the First Amendment is subjugated to the "substantiality" of a governmental interest, and the legislature, depending upon its assessment of that interest, is *ipso facto* freed to make laws abridging the

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162. Government unquestionably possesses the power to raise an army or to restrict public nudity. In contrast, the Constitution deprives government of the power to make laws abridging the freedom of speech, or of the press. Yet some would apply the identical standard of review in assessing the constitutionality of these fundamentally distinctive governmental actions.

163. *Marbury*, 5 U.S. (1 Cranch) at 180 ("A law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument."). An act of the legislature that facially exceeds Article I powers or that breaches an explicit constitutional restraint, and which therefore is *ultra vires*, is not ratified by the legislature's accompanying determination that the law is intended to further an important governmental interest. When Article III judges defer to such legislative usurpation, they not only abdicate their designated responsibilities under the separation-of-powers doctrine, they contort the system of checks and balances that is the keystone of American constitutional government. See *id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). And it is "the constitution [that] must govern." *Id.* at 178.

164. The function of the Speech and Press clause is to delineate a constraint on the exercise of governmental power. Legislators who find in the First Amendment the power affirmatively to make laws abridging the freedom of speech, or of the press, do indeed draw blood from the proverbial turnip. There is manipulation of the very worst sort when legislatures rationalize that their deliberate transgression of the constitutional limitation is undertaken with good intentions and, therefore, is permissible. First Amendment dividends do not derive from laws that facially abridge an individual's freedom of speech or press. Unconstitutional restraints do not produce constitutional values.

liberties of speech and press, there is invitation to skulduggery. If, indeed, the regulation of speech and press is foreclosed by the First Amendment, the discretion of public officials, however constructively exercised, is insufficient to overcome the underlying want of authority. If government is constitutionally disabled from overseeing "speech" and "press" activities, or from establishing a "religion," the institutional void is hardly filled by declarations of public convenience, whether they emanate from legislators, regulators, or eminent jurists.<sup>165</sup>

Accepting the reality that elective politics and campaign funding are the driving force, perhaps even the principal virtue, of the legislative process, equally as certain is that such considerations sometime lead to the abuse of power. "[M]en entrusted with power tend to abuse it."<sup>166</sup> However, the enduring wisdom of the American system of government is that the separate-but-equal power of the judiciary stands, unencumbered by concerns of popular preference and political ambition, as the "check" on those unconstitutional excesses.<sup>167</sup>

Only the Congress and the individual states, acting in accordance with Article V of the Constitution, may enable the government in the general furtherance of societal goals directly to abridge the freedoms of "speech" and "press." Some obviously believe that the press (or select components thereof) should be restricted in constructive respects, and that the time is ripe for amendment of the First Amendment.<sup>168</sup> It has been done before (*e.g.*, the 21st Amendment repealing the 18th Amendment). The constitutionally prescribed procedures are clear and certain; legislatures and courts, even in concert, are powerless to abbreviate the process.<sup>169</sup>

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165. Reduced to essence, the theory of constitutional law espoused by those who would content-regulate the press is essentially one of self-help, *i.e.*, the findings of the legislative branch are sufficient to enable the government to make and execute those very laws that the First Amendment explicitly forbids. Put another way, the contention is that "speech" and "press" freedoms may be abridged provided the end-result is perceived by the perpetrator as manifesting First Amendment values. Mr. Justice Stewart, ever the gentleman, called this a "strange convolution." *Columbia Broadcasting Sys.*, 412 U.S. at 133 (Stewart, J., concurring).

166. 11 *MONTESQUIEU*, *supra* note 86, at 4. Those elected to public office as well as those appointed to positions of great trust and power take a solemn oath to uphold and defend the Constitution. For too many, that pledge, when it conflicts with prepossession, is a frivolity.

167. *Marbury*, 5 U.S. (1 Cranch) at 177-80. Any time an ordinary law and the Bill of Rights collide it is, with only the rarest of exception, the Constitution that survives. When popular ideals or political demagoguery, or a combination thereof, are sufficient to reverse this priority, Article I legislators seize "the very essence of judicial duty" that the Constitution reserves exclusively to Article III judges. *Id.* at 178. *See also id.* at 180 ("Why does a judge swear to discharge his duties agreeably to the constitution of the United States if that constitution forms no rule for his government?").

168. The proposition that television content is all too important to the national fabric to be left to the devices of the people may not entirely be lacking in popular appeal or even merit. More to the point, however, the First Amendment preempts any hard choice because the framers confronted and determined the alternative as the greater evil.

169. The "people have an original right to establish, for their future government," a constitution, and the "exercise of the original right is a very great exertion" manifesting "principles . . . deemed fundamental" and "designed to be permanent." *Marbury*, 5 U.S. (1 Cranch) at 176.

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The glaring weakness—and fatal constitutional infirmity—in the thesis of those who urge that governmental abridgments on the freedom of speech and press are acceptable when intended to advance constructive public goals, is the question of *who* is to make those *ad hoc* determinations. For what is acceptable or correct will inevitably be decided on the basis of politics. And that precisely is why the Speech and Press clause was framed as a structural restraint on the exercise of governmental power. The majesty of the First Amendment lies in its imperviousness to majority power. When this abiding neutrality is infected by perceptions of public good or through appeal to the prejudices or subjective interests of some, constitutional government is subverted.<sup>170</sup> Those who today search for ways to bend the First Amendment to accommodate their pet project or cause will, if successful, be among those who tomorrow decry the demise of its integrity.

If ever there were vindication for the Framers' fear of governmental intimidation and thus their resolve constitutionally to separate press and speech from the law-making powers of the legislature, it is the thirty-year travail of cable television regulation. The intricate involvement of the broadcasting, motion picture and cable television lobbies with the politicians belies anything approaching an independent media. When the legislature makes itself, or its administrative delegee, the source of selective business favors and sanctions as well as the arbiter of commercial rivalries among the electronic media, all elements of the press are compromised.<sup>171</sup> That a public official's relationship with the electronic press typically warrants the most careful cultivation is only that much more reason to give the First Amendment its due.<sup>172</sup>

The surest method by which to reverse the generally constructive course of First Amendment law since *Near* is to apply a less demanding or relatively lenient standard of judicial review to those laws that facially clash with the constitutional command. Nothing will better undermine the independence of "a vigilant and courageous press" than a forgiving standard of First Amendment review that permits, indeed invites, the mischief of politicians

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170. Could the Southern Baptist denomination, because of its origin or "localism" be officially preferred over Roman Catholicism or Judaism? The essential genius of the First Amendment, whether the subject is speakers or religions, is equality under the law.

171. That many in the mass media, including some cable television operators, find the present system to their individual liking is not reason to compromise the public's overriding interest in a free press. A "don't-rock-the-boat" mentality, however pervasive or commercially comfortable, is not the elixir that enables the legislature to exceed its constitutionally limited powers.

172. None of this discussion is intended to deprecate the legislator, the public official or the political process each of which is basic to any democracy. Nevertheless, the realities of public life and the underlying function of the First Amendment cannot be ignored. Were there no historically demonstrated potential for the abuse of governmental power, there would be no need for a First Amendment.

into the private media of communication.<sup>173</sup>

Contemporary legislators, public officials and judges may well be in a better position than were the Framers of two centuries ago to determine which of today's "press" and "speech" activities ought to be constitutionally protected and those that should not. With equal logic, one can contend that these same officials possess a greater, manifestly more modern insight into those powers that legislatures should be able to exert. But how may reviewing courts defer to legislative impulses that facially contradict the express provisions of the First Amendment and, at the same time, maintain even the semblance of constitutionally limited government? Why have an oath to uphold a constitution if that document is subjected to the caprice of those who wield political power? Why have a Bill of Rights if the restraints imposed on governmental authority and the freedoms guaranteed to the people may be extinguished by the legislature's public interest finding? Why even have a constitution? Chief Justice Marshall addressed each of these questions in an opinion that will mark its 190th anniversary this coming February, one that not only endures to the present day but is unmatched in its contributions to the American system of constitutional government.

If all that be required to make laws abridging the freedom of "speech" and "the press" is the well-founded public-interest proclamations of legislators or officials, supported by the concurrences of those who wear black robes, then the Constitution, in the words of the great Chief Justice, is indeed an absurd attempt to limit the power of the government.<sup>174</sup> If, on the other hand, the time-tested values and fundamental integrity of the First Amendment's command, despite the "[c]alculated risks of abuse," are

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173. Where regulations that facially abridge "speech" or "press" activities are involved, the virtue of First Amendment law lies in the premise that public officials not only are not called upon to make judgment calls, they are foreclosed from doing so. The encroachments made by the government over the past fifty years through its licensing of the broadcasting press and the unhealthy effects of communicative intrusions on the independence of that particular component of the mass media, as recently acknowledged by the Federal Communications Commission, is a subject matter reserved for another day. *See, e.g.,* Syracuse Peace Council, 2 F.C.C.R. 5043, 5043 (1987) ("[W]e conclude that the fairness doctrine [applicable to broadcasting licensees], on its face, violates the First Amendment and contravenes the public interest."), *aff'd on narrower grounds sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990) (upholding as dispositive agency's conclusion that fairness doctrine no longer served the public interest and therefore no need even to reach the constitutional issue). There is an inexplicable inconsistency when the FCC at the same time characterizes content-based restraints on the cable television press as merely incidental to speech activity, and purports to constitutionally justify them on the basis of a simplistic interests-balancing formula. *Cf. FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

174. *Marbury*, 5 U.S. (1 Cranch) at 177. When judges view their role in the constitutional trinity as that of creatively classifying "the press" and "speakers" into sub-categories with descending degrees of protection from governmental intrusion, they not only gratuitously inject their own personalities into the adjudication, they substantively edit the text of the First Amendment to accommodate those subjective views. *Cf. id.* at 180.

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deemed worthy of preservation, strict scrutiny is the appropriate course.<sup>175</sup> The choice would not appear a particularly "vexing" one. Among other considerations, the forefathers have already entered their constitutional judgment—one, at least at this stage, that presumably will influence the decision-making of regulators and judges.

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175. Cf. *Columbia Broadcasting Sys.*, 412 U.S. at 125. See generally Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 151 (1981) (concluding that "as long as the courts begin each case with the premise that expression may be regulated only in the presence of a truly compelling governmental interest, the values of free expression will be appropriately served").



