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The *Death of a Princess* Cases: Television Programming by State-Owned Public Broadcasters and Viewers' First Amendment Rights

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CASE COMMENT

The *Death of a Princess* Cases: Television Programming by State-Owned Public Broadcasters and Viewers' First Amendment Rights

The United States Court of Appeals for the Fifth Circuit consolidated and reheard en banc two cases in which state-owned public television stations cancelled scheduled broadcasts because of the program's content. After examining the first amendment issues that arise when the government exercises editorial discretion in selecting programs, the author concludes that the Fifth Circuit's opinion does not sufficiently protect viewers' interests.

I. INTRODUCTION	779
II. THE ISSUES	782
A. Governmental Editorial Discretion	782
B. First Amendment Protection	786
C. Censorship	794
D. Public Television as a Public Forum	802
III. CONCLUSION	804

I. INTRODUCTION

Death of a Princess was a television program destined to raise eyebrows and trigger controversy. It is hardly surprising that events surrounding the film sparked litigation, multiple appeals, and a consolidation of two factually similar cases in an en banc rehearing. The subject matter of the program was volatile: the July 1977 public execution of a Saudi Arabian princess and her commoner lover for adultery.¹ The Saudi Arabian government added to the uproar surrounding the film when it ordered the British ambassador to its country to return to London after the program was telecast in England² and temporarily recalled its ambassador to

1. *Muir v. Alabama Educ. Television Comm'n (Muir III)*, 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 51 U.S.L.W. 3466 (U.S. Mar. 8, 1983).

2. *Barnstone v. University of Houston (Barnstone I)*, 514 F. Supp. 670, 674 (S.D. Tex.

Britain in protest.³

The Alabama Educational Television Commission ("AETC"), a state agency created to promote and supervise educational television,⁴ scheduled the film⁵ for broadcast on May 12, 1980. Alabama residents who feared for the safety of Alabama citizens working in the Middle East protested⁶ the scheduled broadcast, and two days before the scheduled airing, AETC announced its decision not to broadcast the program.⁷ Several individuals who had planned to watch the program brought suit under the first and fourteenth amendments⁸ and 42 U.S.C. § 1983⁹ to compel AETC to broadcast

1980), *rev'd*, *Barnstone II*, 660 F.2d 137 (5th Cir. 1981), *aff'd on rehearing en banc sub nom. Muir v. Alabama Educ. Television Comm'n (Muir III)*, 688 F.2d 1033 (5th Cir. 1982) (consolidated rehearing), *cert. denied*, 51 U.S.L.W. 3466 (U.S. Mar. 8, 1983).

3. *Muir III*, 688 F.2d at 1053 (Johnson, J., dissenting).

4. AETC operates a statewide network of nine noncommercial, educational stations licensed by the Federal Communications Commission ("FCC") under the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976). The state statutory provisions related to the AETC provide, in pertinent part,

The commission is specifically charged with the duty of controlling and supervising the use of channels reserved by the federal communications commission to Alabama for noncommercial, educational use. It may designate the location of stations to utilize such channels and make rules and regulations governing the operation of such stations and the programs televised over such channels.

ALA. CODE § 16-7-5 (Supp. 1982).

5. The film, one of thirteen in the Public Broadcasting Service ("PBS") series *World*, was available to any PBS member, including AETC, that contributed to its funding. The decision whether to broadcast the program was left to contributing members.

6. "Protest," of course, is a vague term and can include anything from a few postcards to a well-oiled campaign that generates thousands of telegrams. The *Muir* and *Barnstone* cases analyzing the *Death of a Princess* controversy do not describe the kind or amount of protest.

7. *Muir III*, 688 F.2d at 1036.

8. The first amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The fourteenth amendment, section 1, provides,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV, § 1. The first amendment guarantees of freedom of speech and press are applicable to the states through the fourteenth amendment. See *Near v. Minnesota*, 283 U.S. 697 (1931); *Gitlow v. New York*, 268 U.S. 652 (1925).

9. 42 U.S.C. § 1983 (1976 & Supp. V 1981):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the juris-

the film, and seeking preliminary and permanent injunctions against "political" programming decisions on the part of AETC.

The United States District Court for the Northern District of Alabama denied a preliminary injunction because the plaintiffs had not shown the requisite likelihood of success on the merits. The court also refused to issue a permanent injunction, holding that the broadcaster's right to make programming decisions was protected by the first amendment. The mandatory order was denied because the court held that the plaintiffs had no first amendment right of access to the Alabama educational television network that would entitle them to compel the airing of the program.¹⁰

While the AETC decision to cancel *Death of a Princess* was being challenged, a virtually identical scenario was unfolding in Texas, where the University of Houston was defending its decision not to broadcast the film against a viewer attack. The University of Houston funds and operates KUHT-TV, a public television station licensed to the university by the FCC,¹¹ and is itself funded and operated by the State of Texas.¹² Unlike the Alabama district court, the United States District Court for the Southern District of Texas granted the injunction and ordered the defendant-licensee to broadcast the film, holding that the university-operated television station was a public forum.¹³

A Fifth Circuit panel¹⁴ affirmed the Alabama federal district court's decision, while another panel, bound to follow its sister panel, reversed the Texas federal district court's decision.¹⁵ The Fifth Circuit then granted petitions for rehearing en banc and consolidated the cases.¹⁶ On rehearing, in *Muir v. Alabama Educational Television Commission*, the United States Court of Appeals for the Fifth Circuit held that a state-operated public broadcast

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

10. *Muir III*, 688 F.2d at 1035.

11. *Id.* at 1033.

12. TEX. EDUC. CODE ANN. §§ 111.01-.85 (Vernon 1982).

13. *Barnstone I*, 514 F. Supp. at 670.

14. *Muir v. Alabama Educ. Television Comm'n (Muir II)*, 656 F.2d 1012 (5th Cir. 1981), *aff'g Muir I*, No. 80-G-0607-S (N.D. Ala. July 3, 1980), *aff'd on rehearing en banc, Muir III*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3466 (U.S. Mar. 8, 1983).

15. *Barnstone v. University of Houston (Barnstone II)*, 660 F.2d 137 (5th Cir. 1981), *aff'd on rehearing en banc sub nom. Muir v. Alabama Educ. Television Comm'n (Muir III)*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3466 (U.S. Mar. 8, 1983).

16. *Muir v. Alabama Educ. Television Comm'n*, 662 F.2d 1110 (5th Cir. 1981) (per curiam).

licensee possesses the same statutory rights and obligations to make programming decisions as private licensees, but is without first amendment protection.¹⁷

II. THE ISSUES

A. Governmental Editorial Discretion

In the *Death of a Princess* cases, the Fifth Circuit dealt with the respective rights of government-funded¹⁸ public television licensees and their viewers. Government participation in the electronic media has potential consequences to the rights of both the broadcaster and the viewing public.¹⁹ In *Columbia Broadcasting System v. Democratic National Committee*²⁰ (CBS), a case dealing with a commercial broadcaster's refusal to sell air time for editorial advertisements, the Supreme Court of the United States held that the exercise of editorial discretion in programming was protected by the first amendment.²¹ The government's role in *Muir* and *Barnstone* raised new questions about the permissible exercise of editorial discretion. The scope of first amendment protection applicable to government programming decisions had to be determined: Are programming choices of state-owned public broadcast licensees absolutely protected by statute or the first amendment, or do these choices sometimes constitute government censorship?

The government's involvement in *Muir* and *Barnstone* also presented issues concerning the existence and extent of the public's right of access to the public television medium.²² In CBS the would-be advertiser's right to the broadcast medium was held to be adequately protected by the fairness doctrine, which imposes on broadcasters the obligation to devote a reasonable amount of time to the discussion of controversial public issues and to afford reasonable opportunity for the presentation of opposing viewpoints.²³

17. *Muir III*, 688 F.2d at 1033.

18. AETC is funded through state appropriations, federal matching grants, and public contributions. *Muir III*, 688 F.2d at 1036. Similarly, KUHT-TV is licensed to the University of Houston, which is funded by the State of Texas. *Id.* at 1037.

19. See generally Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974).

20. 412 U.S. 94 (1973).

21. *Id.* at 121-33.

22. *Muir III*, 688 F.2d at 1041-43.

23. See CBS, 412 U.S. at 100-01; 47 U.S.C. § 315(a) (1976) (codification of the fairness doctrine); see also *infra* note 124. See generally *Communications Regulation—The Future of Content Regulation Broadcasting*, 69 CALIF. L. REV. 555, 556, 561-65 (1981) (tracing the evolution of the fairness doctrine).

The Court in *CBS* held that this obligation did not require the broadcaster to adopt the specific format of the editorial advertisement simply because the proponent of a particular political platform wished to employ that format to air its views.²⁴ When the government acts as broadcaster, however, the public arguably has a more extensive right of access to the airwaves, based on the analogy to a "public forum"²⁵ and the presence of state action.

The issues before the Fifth Circuit in *Muir* and *Barnstone* were different than those confronting the Supreme Court in *CBS*. Although the plaintiffs asserted a public forum argument, both the majority and dissenting opinions rejected the theory.²⁶ In fact, the court's phrasing of the issue in the introductory section indicates that the public access/public forum analysis stemming from *CBS* was not the issue that divided the judges and prompted the decision to rehear the case en banc:

The two appeals before this Court on consolidated rehearing raise the important and novel question of whether individual viewers of public television stations, licensed by the Federal Communications Commission to state instrumentalities, have a First Amendment right to compel the licensees to broadcast a previously scheduled program which the licensees have decided to cancel.²⁷

The factual backgrounds of the two cases are especially significant because the purported reasons given for the cancellations were challenged by the viewers and are, in fact, open to serious questioning. AETC cancelled the broadcast because of the direct threat the scheduled telecast allegedly posed to the safety of Alabama citizens in the Middle East.²⁸ The "personal safety" justification may appear reasonable at first glance, but it is questionable whether the safety of Alabama residents living in Saudi Arabia would be jeopardized by the broadcast of *Death of a Princess* in the United States.²⁹ Judge Clark, in his dissent to the Fifth Circuit

24. *CBS*, 412 U.S. at 110.

25. See generally Comment, *Access to State-Owned Communications Media—The Public Forum Doctrine*, 26 U.C.L.A. L. REV. 1410 (1979).

26. For a discussion of the public access/public forum issue, see *infra* text accompanying notes 136-49.

27. *Muir III*, 688 F.2d at 1035.

28. *Id.* at 1036.

29. Television station officials in both cases cited national security and personal safety reasons for cancelling the broadcast. For example, the official responsible for cancelling the film in Houston testified that his major reason for the decision was his concern that the telecast might "exacerbate the situation" in the Middle East. The district court was not

opinion in *Muir II*, noted that the decision to cancel the controversial film was not based on a reasonable judgment that another program would better suit the needs of the audience, or on a belief that the film was unfair or nonobjective.³⁰ Because the decision was based solely on content, Judge Clark concluded that Alabama, in effect, "had supplied a surrogate censor for the Saudi regime."³¹

Even if AETC's personal safety justification is valid, the reasons for cancellation advanced by KUHT-TV in *Barnstone* are suspect and demonstrate the conflicts of interest that arise when a government entity operates a television station. The identities of the parties involved in the KUHT-TV decision not to air the film raise the appearance of impropriety. Acting against the advice of both the station's general manager and its director of programming, the Vice President for Public Information and University Relations decided to cancel the scheduled broadcast. It was the first time in seventeen years of supervising the station's operation that he had ever decided what was to be televised.³² In a press release, the vice president cited Saudi Arabia's strong objection to the film as one of the reasons for cancelling the broadcast during a time of mounting tension in the Middle East.

The *Barnstone I* panel, however, found other reasons why the vice president might have decided to cancel the program. The University of Houston had entered into a lucrative contract with the Saudi Arabian royal family to instruct a particular princess whom the vice president believed to be a "distant cousin" of the princess whose public execution was depicted in the film.³³ Moreover, the trial court found other plausible explanations for the cancellation decision: Fifteen to twenty percent of the school's private contributions come directly from major oil companies and a significant percentage of the remaining contributions are received from individuals in oil-related companies; the vice president testified that he considered the program to be "in bad taste"; and there was con-

persuaded by this argument, which paralleled the rationale offered by the AETC officials. "The showing . . . made in regard to the national security exception was unacceptable as a matter of law. The Court cannot ignore the fact that 'Death of a Princess' was aired in most of the other 285 public television stations as originally scheduled." *Barnstone I*, 514 F. Supp. at 691.

30. *Muir II*, 656 F.2d at 1027-28 (Clark, J., dissenting). Judge Clark also joined the dissenters in *Muir III*. Twenty-three judges participated in the en banc hearing. One judge took senior status in July 1982 and did not participate in the decision. Of the remaining twenty-two judges, seven dissented.

31. *Id.* at 1028 n.5.

32. *Barnstone I*, 514 F. Supp. at 674.

33. See *Barnstone I*, 514 F. Supp. at 675; *Muir III*, 688 F.2d at 1037 n.5.

cern that some people might treat the "docu-drama" as a true documentary.³⁴

In the minds of the dissenters, the facts of both cases "reveal dramatic departures from established editorial practice in direct response to the urgings or implied threats of a foreign government."³⁵

Any reasoned analysis of the issues framed in the *Death of a Princess* cases must recognize that competing interests are at stake whenever government transcends its traditional role by funding and operating entities that are usually controlled by private citizens.³⁶ "Put another way, how may constitutional provisions designed to control the acts of those operating a government be applied to the acts of those operating a government sponsored television station?"³⁷ The dilemma inherent in permitting the government to operate a television station (as opposed to merely providing financial assistance to public broadcasters for programming and operating requirements) formed the substantive underpinnings for the plaintiffs' argument. Characterizing the conduct of the government-operated stations' officials as state action,³⁸ the plaintiffs argued that the decisions to cancel *Death of a Princess* were subject to judicial scrutiny, even though a private commercial broadcaster taking the same action would have been immune from any similar inquiry.³⁹

When operating a television station, however, the government (as does any licensee) needs to exercise editorial discretion.⁴⁰ The

34. *Muir III*, 688 F.2d at 1037 n.5; *Barnstone I*, 514 F. Supp. at 674-75.

35. *Muir III*, 688 F.2d at 1058 (Johnson, J., dissenting). The dissent's characterization of the editorial judgments is particularly relevant in light of "the ability of the defendant usually to offer a colorably permissible reason for its actions." *Id.* at 1059.

36. See, e.g., *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (government operation of a utility); *Parker v. Brown*, 317 U.S. 341 (1943) (state-approved price-fixing).

37. *Muir II*, 656 F.2d at 1015.

38. The existence of state action was apparently not disputed. See *Barnstone I*, 514 F. Supp. at 672. The effect of the state action, of course, was very much in dispute.

39. *Muir III*, 688 F.2d at 1037, 1043. "The right to the free exercise of programming discretion is, for private licensees, . . . constitutionally protected." *Id.* at 1041. Furthermore, a private licensee's decision to cancel *Death of a Princess* would be protected under FCC regulations, which provide that licensees have the sole right and nondelegable responsibility to select programming. *Id.* at 1040.

40. The original Fifth Circuit opinion, in fact, concluded that AETC's refusal to broadcast *Death of a Princess* is "itself constitutionally protected." *Muir II*, 656 F.2d at 1020. Compare *Barnstone II*, 660 F.2d at 138 (Reavley, J., concurring) (quoting *CBS*, 412 U.S. at 139 (Stewart, J., concurring)), where this holding is criticized as having "no precedent in American constitutional jurisprudence. 'The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.'"

government's programming supervisors and editors enjoy protection in the exercise of editorial responsibility delegated to them.⁴¹ Yet such discretion seems to be directly contrary to the traditional first amendment doctrine that condemns government control.⁴² "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content The essence of this forbidden censorship is content control."⁴³ Although the first amendment may protect a government-funded licensee, judicial inquiry into the exercise of the state's editorial power is not foreclosed.⁴⁴

B. *First Amendment Protection*

The plaintiffs' state action argument in *Muir* and *Barnstone* was that government-owned stations do not enjoy private broadcasters' virtually unchecked freedom to determine programming content. Although the plaintiffs conceded that the state officials may exercise some editorial discretion, they argued that officials must be assiduously neutral in deciding which speakers or viewpoints to broadcast.⁴⁵ Such precautions were not taken in either of the two cases, the plaintiffs contended, because the officials "censored" *Death of a Princess* by deciding to cancel the scheduled broadcast for an impermissible reason: opposition to the program's

41. The court concluded that state-operated licensees are afforded statutory protection for programming decisions—but not first amendment protection. *Muir III*, 688 F.2d at 1041.

42. See Canby, *supra* note 19, at 1125. Although the *Muir III* court quoted some of the often-cited maxims of first amendment law that recognize the dangers naturally arising when a medium is owned by the government, it emphasized that the control was not ominous because the government was controlling its own medium of expression.

Compare Judge Clark's dissenting opinion in *Muir II*:

Besides the possible fear of an outside enemy, our greatest fear—like that of any people—is that of oppression by our own government. The framework of our government was designed by our founders to protect us from government. AETC's casual disdain for our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," although no doubt accompanied by sincere motive and infrequent occurrence, is no less repugnant to the Constitution than a studied design of thought control.

656 F.2d at 1029 (Clark, J., dissenting) (footnote omitted).

43. *Muir III*, 688 F.2d at 1043 (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972)).

44. Canby, *supra* note 19, at 1148. In a concurring opinion, Judge Rubin clarified the scope of the holding by explaining that the two cases involve only one program, not a licensee practice or policy: "Judicial intervention might be required if these or other licensees should adopt or follow policies or practices that transgress constitutional rights." *Muir III*, 688 F.2d at 1053 (Rubin, J., concurring).

45. *Muir III*, 688 F.2d at 1044.

political content.⁴⁶

The censorship argument is subject to a classically simple response, however. Without delving into the complex relationships involved when the government funds a public broadcaster, the most logical answer to the viewers' challenge is that the station was free not to schedule *Death of a Princess*. The noncommercial licensee could have declined to contribute to the funding of the program. Moreover, the licensee was free not to broadcast the program even after it agreed to contribute.⁴⁷ The suggestion that a government-owned licensee, which is not required to broadcast a program, is subject to judicial scrutiny when it does not air the scheduled offering may seem odd, but it is hardly revolutionary. As one author specializing in first amendment analysis explained,

once the limited interconnection offering is established and the station has elected to broadcast a series, it is possible that a state-operated station should not be able to interrupt the offering by refusing to broadcast one program of a series^[48] or specific segments of a program. The station would then be engaged in censorship of the works of program producers who had otherwise been delegated the editorial responsibility for creation of the program content.⁴⁹

The distinction between not selecting an offering and cancelling after acquisition is not illusory. In fact, the substantive difference has been recognized in cases in which school board officials remove books that the librarian has placed on the shelf.⁵⁰

46. *Id.* at 1043. The plaintiffs suggested that the court adopt the evidentiary standard established in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). The *Mt. Healthy* approach places the initial burden on the plaintiffs to demonstrate that unconstitutional motivations were a "substantial" or "motivating" factor in the cancellation decision. If the plaintiffs meet this burden, then the *Mt. Healthy* standard requires the defendants to show that "the decisions would have been the same if the improper factor had not been considered." *Muir III*, 688 F.2d at 1044.

47. AETC and KUHT-TV are members of the Public Broadcasting Service ("PBS"), a nonprofit corporation distributing public, noncommercial television to its members by satellite. They also belong to the Station Program Cooperative ("SPC"), a PBS-operated funding mechanism. SPC members are permitted to participate in the selection and funding of national public television programs distributed by PBS. Each licensee has the option of contributing to the cost of purchasing broadcast rights. Although a member-licensee must contribute or else be precluded from broadcasting, those licensees who do contribute are free not to broadcast. *Muir III*, 688 F.2d at 1036-37.

48. *Death of a Princess* was one of thirteen offerings in the *World* series distributed by PBS. *Id.* at 1036.

49. Canby, *supra* note 19, at 1163 (footnotes omitted); see also *Board of Educ. v. Pico*, 102 S. Ct. 2799 (1982) (plurality opinion).

50. Justice Brennan explicitly recognized the distinction in *Pico*, pointing out that the

Before fully analyzing the case, the Fifth Circuit recognized that first amendment protection extends to private expression, not government expression: "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."⁵¹ Nevertheless, the court dismissed the argument, concluding that "it in no way resolves the issue before us."⁵² The lack of first amendment protection for government speech does not mean that government may not speak, nor does it mean that individuals may limit government expression. In the absence of legislative limitation, the court explained, there is nothing to suggest that government may not speak as freely as citizens.⁵³ Although the first amendment is designed to protect private expression, the court emphasized that "nothing in the guarantee precludes the government from controlling its own expression or that of its agents."⁵⁴

Because the government is not prevented from expressing itself, albeit without first amendment protection, AETC and KUHT-TV are free to make programming decisions. Under the Fifth Circuit's analysis, the only constraint is the possible existence of a constitutional right inhering in the plaintiff-viewers. As a result, the court's resolution of the competing values did not depend on determining whether the state-operated licensees are vested with first amendment rights; instead, "[t]he fundamental question . . . is whether . . . the defendants violated the First Amendment rights of the plaintiffs" when making the challenged programming decisions.⁵⁵

The conclusion of the full court that the first amendment does not confer rights on the government when it speaks directly contradicts the holding of the Fifth Circuit panel in *Muir II*. In fact, the original panel expressly recognized that "AETC's refusal to broadcast 'Death of a Princess' is itself constitutionally protected."⁵⁶ The court's conclusion regarding the relationship be-

issue presented involved the removal of books, not their acquisition.

51. *CBS*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) (emphasis in original).

52. *Muir III*, 688 F.2d at 1038.

53. "In the absence of a violation of a constitutional right inhering in the plaintiffs, AETC and the University of Houston are free to make whatever programming decisions they choose, consistent with statutory and regulatory requirements." *Id.*; see also *Community Serv. Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (government may contribute its own views to the market place of ideas).

54. *Muir III*, 688 F.2d at 1038 (quoting *CBS*, 412 U.S. at 139 n.7 (Stewart, J., concurring)).

55. *Id.*

56. *Muir II*, 656 F.2d at 1020. One possible explanation for the differing results is that

tween government speakers and the first amendment parallels its conclusion in another section of the opinion discussing Congress's regulatory framework. In outlining the broadcast legislation history, the court referred to several key cases explaining that the "scarce resource"⁵⁷ rationale is the basis for regulation originally geared toward allocation of radio frequencies. Moreover, the court explained that the Communications Act of 1934⁵⁸ was designed to "promote a balance between the First Amendment interests of the public and of the broadcast licensees."⁵⁹ In response to the expressed goal of guaranteeing first amendment protection to broadcast licensees, the court explained, the FCC views licensees as having the nondelegable responsibility to select programs to be broadcast.⁶⁰ The regulations applicable to commercial licensees are

the initial court opinion failed to adequately evaluate the state action factor. For example, the conclusion that the cancellation is constitutionally protected was prefaced by a reference to "non-commercial public licensees." *Id.* A noncommercial public licensee is not necessarily a state-operated public licensee; this difference may account for the divergent holdings.

57. The scarcity rationale is based on the fact that the broadcast spectrum is limited in size, necessitating regulated allocation of frequencies to prevent interference. The scarcity doctrine has always been the subject of criticism and is especially susceptible to attack with the advent of cable television.

The scarcity rationale was used as the basis for upholding the personal attack rule in *Red Lion Broadcasting v. FCC*, 395 U.S. 368 (1969). A similar right to reply statute that applied to newspapers was struck down in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). *Tornillo* does not even cite *Red Lion* or explain the contradiction between the two "right to reply" cases. Some commentators explain this apparent contradiction on scarcity-type grounds: Although there are more broadcast stations than newspapers operating in the United States, the ability to print is only limited by financial entry barriers and the availability of resources such as paper and ink, while the ability to broadcast is limited by the scarcity of frequencies.

The recent revolution in cable television growth has made the scarcity doctrine unconvincing. The only scarcity involved in cable systems is the limit on the number of stations that a cable can carry. See, e.g., Note, *The Future of Content Regulation in Broadcasting*, 69 CALIF. L. REV. 555, 578 (1981). Furthermore, the scarcity rationale justifies the allocation of frequencies only to prevent interference, a problem not affecting cable television. Nevertheless, courts still refer to the scarcity doctrine when dealing with broadcasting issues. For example, the *Muir III* court explained that "'because the broadcast media utilize a valuable and limited public resource' they 'pose unique and special problems not present in the traditional free speech case.'" 688 F.2d at 1043 (quoting *CBS*, 412 U.S. at 101).

58. 47 U.S.C. § 151 (1976).

59. *Muir III*, 688 F.2d at 1039.

60. *Id.* at 1040. The court cited *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978), for the proposition that "[t]he Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee." That case, however, involved the extreme circumstance of a licensee who relinquished virtually all interest in, and control over, programming to time brokers, religious broadcasters, and commission salesmen.

AETC once lost its license because, among other reasons, it failed to maintain exclusive authority over all of its programming decisions. Alabama Educ. Television Comm'n, 50

generally applicable to public television licensees⁶¹ and the FCC "has made no distinction between private and public licensees"⁶² when demanding licensee control over programming.

Focusing on the specific category of public broadcasters, the court noted that the legislative history of the Public Broadcasting Act of 1967⁶³ demonstrates that programming responsibility is retained by the local station: "[E]ach station would be required to make its own decision as to what programs it accepts and broadcasts and at what time."⁶⁴ While both private and government-operated licensees possess identical rights and duties to make programming decisions under the legislative and regulatory framework, the court held that only private broadcasters—not state instrumentalities—enjoy first amendment protection.⁶⁵

Nevertheless, the court stated that "[t]his lack of constitutional protection implies only that government could possibly impose restrictions on these licensees which it could not impose on private licensees."⁶⁶ The court did not explain how it arrived at this assessment, nor did it even cite any authority; it merely stated its conclusion in unequivocal terms.⁶⁷ In the same vein, the court did not proffer any reason for its bold statement that the presence of state action and the resulting lack of first amendment protection "does not result in individual viewers gaining any greater right to influence the programming discretion of the public licensees."⁶⁸ Nor did the court respond to the point that there is nothing in the Communications Act or FCC regulations that precludes judicial

F.C.C.2d 461 (1975). Nevertheless, it does not follow that AETC (or the University of Houston) would be violating its obligation to maintain exclusive authority over programming if it allowed the plaintiffs to persuade it to broadcast the documentary film. The prior violation should not suggest that a violation would occur in the *Death of a Princess* cases, because it was AETC's discriminatory practices against black-oriented programming and a failure to ascertain the needs of blacks in the audience that were largely responsible for the FCC's refusal to renew the license. See JONES, *ELECTRONIC MASS MEDIA* 214 n.11 (1977).

61. *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975).

62. *Muir III*, 688 F.2d 1040 (citing *City of New York Mun. Broadcasting Sys.* 56 F.C.C.2d 169 (1975)).

63. 47 U.S.C. §§ 390-399 (1976).

64. S. REP. No. 222, 90th Cong., 1st Sess. 14-15, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 1772, 1786.

65. *Muir III*, 688 F.2d at 1041.

66. *Id.*

67. The dissent criticized the court's failure to explain its conclusion: "The majority commits fundamental error when it permits state broadcasters to ride on the coattails of their private counterparts. . . . [I]t offers no principled reason" for its conclusion. *Muir III*, 688 F.2d at 1056 (Johnson, J., dissenting).

68. *Id.* at 1041.

scrutiny.

Besides the questionable scarce resource doctrine, the electronic media possess other characteristics that have led to "an unusual order of First Amendment values."⁶⁹ In fact, the Fifth Circuit recognized that the same type of first amendment analysis cannot be applied to all methods of expression because "each method tends to present its own peculiar problems."⁷⁰ In addition, the broadcast medium is dynamic and the state of the art is constantly in flux; solutions that were adequate a decade ago are not necessarily adequate now, and those acceptable today may well be outmoded in a few years.⁷¹ The relationship among producer, licensee, and consumer mandates a balanced first amendment analysis encompassing the realities of the electronic age. Because the purchaser of programming (the licensee) is not the ultimate consumer, the licensee's programming practices screen out information from the viewer. This screening, though an exercise of first amendment rights that falls under the general rubric of editorial discretion, also works against the first amendment values of both the speaker (the party who originated the film)⁷² and the listener. In addition, any first amendment analysis must weigh the rights of viewers. As the *Red Lion* Court stated, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁷³

Thus framed, the *Muir III* court's analysis focused on competing first amendment values. The actual formulation of the issue presented differed among the courts considering the case, and foreshadowed the result. For instance, the district court in *Barnstone I* phrased the issue as "whether a state, albeit operating in the capacity of a state owned and operated television station, is somehow excused from recognizing the protections of the First Amendment."⁷⁴ The Fifth Circuit panel in *Muir II* made it appear that the plaintiffs were asserting a constitutional right to view every program that appears on a preannounced schedule by stating the

69. *CBS*, 412 U.S. at 101.

70. *Muir III*, 688 F.2d at 1043 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

71. See, e.g., *CBS*, 412 U.S. at 101.

72. Compare *Barnstone I*, 514 F. Supp. at 689 (the "true" speaker is the film maker, not the licensee) with *Muir II*, F.2d at 1019 (plaintiffs described as viewers "seeking to force an unwilling speaker to speak").

73. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969); see also Note, *The Listener's Right to Hear in Broadcasting*, 22 *STAN. L. REV.* 863 (1970). For cases involving the right to receive information, see *Stanley v. Georgia*, 394 U.S. 557 (1969), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

74. 514 F. Supp. at 691.

issue as "whether a public television station may cancel an announced, scheduled program without violating the constitutional rights of viewers who were expecting to see it."⁷⁵ A third formulation of the issue was presented by Judge Reavley in his concurrence with the Fifth Circuit panel's decision in *Barnstone II*. He stated that the primary inquiry "should be whether the government has attempted to silence a message because of its political content."⁷⁶ Finally, the formulation of the issues in the en banc proceeding strongly suggests the outcome. The majority's approach toward formulating the issue was to couch the question in relatively neutral terms: "whether in making the programming decisions at issue here, the defendants violated the First Amendment rights of the plaintiffs."⁷⁷ On the other hand, one of the dissenters viewed the legal issue in more emotional terms: "whether the executive officers of a state operated public television station may cancel a previously scheduled program because it presents a point of view disagreeable to the religious and political regime of a foreign country."⁷⁸

The plaintiffs argued that, because of the presence of state action, government-funded noncommercial stations deserve special treatment.⁷⁹ As outlined by the district court in *Barnstone I*, Congress was aware that "federal funding brought with it the danger of governmental control"⁸⁰ and, therefore, authorized creation of the nonprofit, nongovernmental Corporation for Public Broadcasting to act as a funding mechanism for noncommercial broadcasting.⁸¹ The Corporation established another independent organization to develop suitable programming, the Public Broadcasting Service.⁸² The Station Program Cooperative⁸³ was formed to prevent govern-

75. 656 F.2d at 1018.

76. 660 F.2d at 141 (Reavley, J., concurring).

77. 688 F.2d at 1038.

78. *Id.* at 1053 (Johnson, J., dissenting).

79. *Barnstone I*, 514 F. Supp. at 680-83.

80. *Id.* at 681-82.

81. Public Broadcasting Act of 1967, Pub. L. No. 90-129, § 201(9), 81 Stat. 365, 368-73 (codified as amended at 47 U.S.C. § 396 (1976 & Supp. V 1981)).

82. *Barnstone I*, 514 F. Supp. at 681-82.

83. Under the Station Program Cooperative, certain programming will be produced only if individual local stations jointly decide to fund the production. "The aim of this cooperative is to reinforce the existing licensee responsibility for programming discretion. Through this plan the local stations will eventually assume the responsibility for support of the cooperative and the Corporation [for Public Broadcasting] will concentrate on new programming development." *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 292 n.14 (D.C. Cir. 1975).

mental control of the content of programs on public television stations.⁸⁴ By relieving the recipient of federal funds, PBS, of control over programming content, the local broadcast licensees could determine their own programming and thus avoid the real or imagined threat of government pressure. The solution, however, was flawed because many local licensees belonging to the Station Program Cooperative are owned and operated by state and local governments.⁸⁵

This incongruous situation is not limited to a handful of stations, such as the ones operated by AETC and the University of Houston. There are approximately 285 public television stations, of which 132 are licensed to state or municipal instrumentalities and seventy-seven are licensed to colleges and universities having government affiliations.⁸⁶ The *Barnstone* and *Muir* cases illustrate the inability of many public broadcast licensees to be completely independent of government control.⁸⁷

After pointing out the unique aspects of the broadcast media, the Fifth Circuit conceded that it was "not convinced" that the state should be subject to traditional restrictions on regulatory activity affecting speech when it makes editorial judgments for its own broadcast stations.⁸⁸ The first amendment bars content control by government when the government sponsors and supports speech-oriented facilities.⁸⁹ If government-operated broadcasters were subject to the traditional constitutional analysis, then content-based cancellations would arguably be improper, even if the licensee has no duty to schedule a film. For instance, *Bazaar v. Fortune*⁹⁰ involved a controversy between students and officials at

84. *Barnstone I*, 514 F. Supp. at 682.

85. "[S]ince many public broadcasting stations are themselves governmentally owned and operated, it is difficult to imagine their achieving constitutional insulation from the state." Canby, *supra* note 19, at 1126.

86. *Barnstone I*, 514 F. Supp. at 683 (citing statistics from the PBS's amicus curiae brief).

87. In the *Muir* cases, the licensee is a state agency. In the *Barnstone* decisions, the licensee is the University of Houston, which operates KUHT-TV. The station obtains its power from the university and is housed in a building maintained by the school and located on campus. Approximately 50% of the university's operating budget comes directly from the state's general revenue funds. Public funds from the Association for Community Television account for approximately 60% of the station's annual budget. *Barnstone I*, 514 F. Supp. at 672.

88. *Muir III*, 688 F.2d at 1043.

89. *Id.*

90. 476 F.2d 570 (5th Cir.), *aff'd as modified on rehearing en banc*, 489 F.2d 225 (5th Cir. 1973) (university allowed to place or stamp on the cover of a literary magazine the disclaimer "[t]his is not an official publication of the university," though not allowed to ban

a state university concerning the content of a particular issue of a student publication. The magazine was staffed and run by students and was university-chartered and recognized. The university refused to allow distribution of the publication because of two stories concerning interracial love and black pride. The university also asserted that the words used were tasteless and inappropriate. In affirming the lower court order preventing school officials from interfering with the distribution, the court explained that "once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent [sic] with First Amendment constitutional guarantees."⁹¹

Similarly, *Brooks v. Auburn University*⁹² could support the argument that the government abridges first amendment rights when it reverses a decision to broadcast a film it could have declined to schedule in the first place. In *Brooks* a student organization requested approval from a university-funded, student-faculty board to have Reverend William Sloan Coffin speak at the state university. The board approved the request. The university president vetoed the invitation, citing Reverend Coffin's record as a convicted felon and a fear that he might advocate breaking the law. These reasons had never before been used to bar a speaker at the school. As in the *Muir* and *Barnstone* cases, where the licensees were not required to schedule the film, the court concluded that the school was under no obligation to bring the speaker to the ultimate consumers. The president's veto, however, was deemed a prior restraint and the trial court's decree requiring that the Reverend be permitted to speak and be paid the agreed honorarium and travel expenses was affirmed.⁹³

C. Censorship

By stating it was "not convinced" that the traditional pro-

publication or distribution), *cert. denied*, 416 U.S. 995 (1974).

91. *Bazaar v. Fortune*, 476 F.2d at 574. The *Muir III* appellants contended that *Bazaar v. Fortune* presented analogous facts. The court cited the case in a footnote, impliedly distinguishing it on the grounds that it does not suggest that the government may not exercise control over its own expression. *Muir III*, 688 F.2d at 1043-44.

92. 412 F.2d 1171 (5th Cir. 1969).

93. *Id.* at 1175. The *Muir III* court also cited *Brooks* in a footnote, 688 F.2d at 1043 n.27, but apparently did not find it persuasive, presumably because it did not relate to the precise factual scenario: government exercising editorial discretion over its own medium of expression. "There is a clear distinction between a state's exercise of editorial discretion over its own expression, and a state's prohibition or suppression of the speech of another." *Id.* at 1047.

scriptions on government regulation of speech were completely controlling, the *Muir III* court implicitly places great trust in editors employed by a government-owned licensee. In fact, the court does not discuss the dangers inherent in a government-operated television station; the opportunity for censorship is never expressly acknowledged.⁹⁴

In contrast, the *Barnstone I* district court openly recognized the menace of government censorship. Its analysis was premised on the belief that the potential for abuse is sufficient justification for differing treatment. That court set forth its fears in graphic terms:

The possibility of government content control from above has appeared so ominous that the possibility of government content control from below has been entirely overlooked. This case is a direct result of that oversight. In effect, with state and local governments firmly entrenched as gatekeepers to the public's access to information, the fox has been asked to guard the henhouse.⁹⁵

The decision to cancel a scheduled broadcast, the Fifth Circuit concluded, is a programming decision "no less editorial in nature than an initial decision to schedule the program."⁹⁶ The unavoidable need for editors to make programming decisions inevitably means that state officials exercising editorial discretion will make choices characterized as "politically motivated."⁹⁷ The licensee must reject some programs in favor of others. Moreover, all broadcast licensees are required to provide news and public affairs programs dealing with the community's political, social, and economic concerns.⁹⁸ As a result, broadcast licensees (whether private, public, or state-operated) routinely and inherently make subjective value judgments about their programming's responsiveness to the community's needs. Referring to an often-quoted statement from the Supreme Court's *CBS* opinion, the Fifth Circuit emphasized that "for better or worse, editing is what editors are for; and editing is selection and choice of material."⁹⁹

Allowing courts to review programming decisions would create

94. Even the initial Fifth Circuit panel, which also rejected the viewers' constitutional attack, recognized that the situation "may be cause for concern, for vigilance with vigor, for seeking of safeguards" before concluding that the possibility and opportunity for censorship is not itself censorship. *Muir II*, 656 F.2d at 1019.

95. 514 F. Supp. at 683.

96. *Muir III*, 688 F.2d at 1045.

97. *Id.* at 1044.

98. See Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26,371 (1974).

99. *Muir III*, 688 F.2d at 1044 (quoting *CBS*, 412 U.S. at 124).

practical problems. No programming decision pleases everyone. The parade of horrors resulting from a refusal to grant discretion to government-owned broadcast licensees is not difficult to imagine. Licensees could conceivably become swamped with challenges to their programming decisions. The expense of defending the legal challenges could be the death-blow to government-owned television stations. Broadcast editors who recognize that their programming judgments are susceptible to challenge might try to avoid defending such attacks by opting for noncontroversial formats.¹⁰⁰ As the *Muir III* court succinctly explained, "A general proscription against political programming decisions would clearly be contrary to the licensee's statutory obligations, and would render virtually every programming decision subject to judicial challenge."¹⁰¹

Furthermore, granting the plaintiffs' demand for an order compelling the broadcast of *Death of a Princess* might be an undesirable foray into extensive judicial intervention. Granting relief here would necessarily incorporate the flip side of the constitutional coin: If one person could compel the broadcast of a program, "another person could use the courts to enjoin the broadcast of that program solely because that person considered it objectionable."¹⁰² Still others could seek damages for the showing of programs to which they objected. Such a demand was made, in fact, although the court did not refer to it. In *Fahd Al Talal v. Fanning*,¹⁰³ the plaintiffs, claiming that they represented "a class of 'nearly one billion persons,'" ¹⁰⁴ sought damages of \$20 billion because of the national television broadcast of *Death of a Princess*. They alleged that the film was insulting and defamed the Islamic religion. The court dismissed the complaint, but the case illustrates the potential for abuse in permitting viewers to challenge

100. The tendency for speakers to engage in self-censorship has been a significant factor in constitutional analysis in other settings. For example, in the defamation area, the constitutional privilege requiring public officials and public figures to prove that the defendant acted with knowledge of falsity or reckless disregard for the truth is based on the fear that self-censorship would occur without protection. "[W]ould-be critics of official conduct may be deterred from voicing their criticism They tend to make only statements which 'steer far wider of the unlawful zone.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

101. *Muir III*, 688 F.2d at 1044. The description of the consequences is similar to the initial Fifth Circuit panel's analysis: "If initial rejection of some programs were considered a form of constitutionally forbidden censorship, every public television station would violate the Constitution with virtually every choice it made." *Muir II*, 656 F.2d at 1017.

102. *Muir II*, 656 F.2d at 1024.

103. 506 F. Supp. 186 (N.D. Cal. 1980).

104. *Id.*

editorial discretion. In effect, courts would be converted into super-editors. Granting courts the power to look over the shoulders of editors employed by government-operated television stations would present obvious problems. "Courts are not equipped, staffed, or trained to meet the public interest by choosing among the programming interests to be served."¹⁰⁵

The fear that judicial scrutiny of programming decisions will lead to continual interference with editorial discretion is a legitimate concern.¹⁰⁶ Nevertheless, the plaintiffs' challenge is not frivolous; the Fifth Circuit's decision to rehear *Muir* and *Barnstone* en banc is evidence enough of the legitimacy of the viewers' claim. In addition, it should be stressed that the challenge was not directed at the licensee's general programming scheme or at a failure to initially select any program for broadcast. Instead, the plaintiffs' claim focused on a narrower issue: the allegation that a scheduled program was cancelled for content-oriented reasons.¹⁰⁷ But even if a court assumes that government-owned or operated broadcast licensees are susceptible to constitutionally based claims for content-based cancellations, the complaining viewers still face a legal paradox: If the licensee has no duty to schedule a film, how can a subsequent election not to broadcast be constitutionally improper? Although the prior Fifth Circuit panel in *Muir II* explained the apparent anomaly by branding the initial scheduling decision a "different animal from a subsequent decision to cancel"¹⁰⁸ when the decision is tinged with an element of official censorship, the Fifth Circuit en banc rejected attempts to distinguish the two types of editorial decisions. To do this, however, the court also had to reject the many recent federal cases involving challenges to the

105. *Muir II*, 656 F.2d at 1024.

106. See generally *CBS*, 412 U.S. at 116-26; B. SCHMIDT, *FREEDOM OF THE PRESS V. PUBLIC ACCESS* (1976); Canby, *supra* note 19, at 1134.

107. *Muir III*, 688 F.2d at 1043. Just as the majority pointed out the flaws in the plaintiffs' argument by carrying it to its logical extreme, i.e., every programming decision could be the target of a first amendment-based attack, taking the licensees' argument to its logical extreme produces equally adverse results:

[T]he answer to the question of state action is no different in this case than it would be if the licensee were alleged to have engaged in a systematic censorship of all views aired under its auspices that were, for instance, contrary to those of the political party of a controlling majority of the members of the Commission. If such were the allegations here, the plaintiffs would not have to wait idly by while the FCC, in a lengthy hearing procedure, decided whether such conduct was consistent with a public broadcaster's obligations. Section 1983 would reach the actions of these persons acting under color of state law. It does so here.

Muir II, 656 F.2d at 1027 (Clark, J., dissenting) (footnote omitted).

108. *Id.* at 1028.

removal of books from public school libraries.¹⁰⁹

As legal support for distinguishing the two types of editorial judgments, the plaintiffs cited recent cases holding that school officials are subject to a first amendment claim if books are excluded in order to suppress an ideological or religious viewpoint with which officials disagree. In fact, the Supreme Court handed down a public library book-removal case¹¹⁰ while the Fifth Circuit was rehearing *Muir and Barnstone* en banc. In *Board of Education v. Pico*,¹¹¹ a plurality opinion, three members of the school board had attended an out-of-town conference, where they obtained a "crudely typed and reproduced"¹¹² list of books containing supposedly objectionable material that was "improper fare for school students."¹¹³ Acting against the advice of the superintendent of schools and a book committee appointed by the school board,¹¹⁴ the board removed several books¹¹⁵ from the district's school libraries. Students filed an action challenging the board's decision as a violation of their first amendment rights. The United States Court of Appeals for the Second Circuit reversed the district court's order granting summary judgment for the school board. Whether the exclusion of the books was based on a substantial and reasonable governmental interest was, according to the court, a material factual issue precluding summary judgment.¹¹⁶

109. See generally *Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982) (summarizing recent cases involving elimination of books and films from public school libraries).

110. *Board of Educ. v. Pico*, 102 S. Ct. 2799 (1982) (plurality opinion).

111. 102 S. Ct. 2799 (1982).

112. *Board of Educ. v. Pico*, 638 F.2d 404, 407 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982).

113. 102 S. Ct. at 2802. The school board and the individual board members who were sued "concede that the books are not obscene." *Id.* at 2802 n.2.

114. The superintendent posited that it was wrong for the board—or any other single group—to remove books without "prolonged prior consideration" of the views of the parents and teachers. In addition, he stated during a public meeting that it was wrong to judge a book on the basis of brief excerpts and to take action based on a list prepared by someone outside the community. *Board of Educ. v. Pico*, 638 F.2d at 410. The "Book Review Committee," composed of four parents and four members of the school's staff, recommended that five of the listed books be retained. The board substantially rejected the report but gave no reasons for its refusal to follow the committee's recommendation. *Pico*, 102 S. Ct. at 2803.

115. The books at issue were: BEST SHORT STORIES BY NEGRO WRITERS (L. Hughes ed. 1967); A. CHILDRESS, A HERO AIN'T NOTHING BUT A SANDWICH (1973); E. CLEAVER, SOUL ON ICE (1978); O. LAFARGE, LAUGHING BOY (1929); B. MALAMUD, THE FIXER (1966); A READER FOR WRITERS (J. Archer ed. 1971); P. THOMAS, DOWN THESE MEAN STREETS (1967); K. VONNEGUT, JR., SLAUGHTERHOUSE FIVE (1971); R. WRIGHT, BLACK BOY (1945); ANONYMOUS, GO ASK ALICE (1971).

116. 638 F.2d at 407; cf. *Presidents Council, Dist. 25 v. Community School Bd. No. 25*,

Justice Brennan's plurality opinion recognized the substantial discretion afforded school officials in determining curricula. Nevertheless, the Court affirmed the Second Circuit, explaining that the "First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."¹¹⁷ School officials must determine the content of their libraries, the Court stated, but they may not exercise that discretion in a narrowly partisan or political manner. The motive behind a decision to remove books determines whether a student's first amendment rights are denied. If the school board intends to deny students access to ideas, its decision is an impermissible use of discretion. Significantly, Justice Brennan distinguished between the acquisition and the removal of books.¹¹⁸ While the school board did not have to purchase books in the first instance, it was subject to constitutional attack for removing the books after purchase.

Despite the similarities between the book removal cases and the *Death of a Princess* cases, the Fifth Circuit stated that it was "unable to interpret the Court's opinion in *Pico* to give us guidance in the application of the First Amendment to the case at hand."¹¹⁹ The *Muir III* court's conclusion that *Pico* did not control the *Death of a Princess* cases was based on both prudential and substantive grounds. On the prudential aspect, the court determined that *Pico* "is of no precedential value"¹²⁰ as to the first amendment's application to the issues before it because Justice Brennan's plurality opinion was joined by only two other Justices and the four dissenters detected no constitutional difference between the removal of a book and a failure to acquire it.¹²¹

The differences between school libraries and television sta-

457 F.2d 289 (2d Cir. 1972) (removal of book containing vulgar language and explicit sexual allusions does not in itself violate first amendment), *cert. denied*, 409 U.S. 998 (1972). The defendant school board in *Pico* relied on this case.

117. 102 S. Ct. at 2807-08.

118. Justice Brennan made the distinction clear by mentioning it several times in his plurality opinion:

[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books.

Id. at 2810 (emphasis in original).

119. *Muir III*, 688 F.2d at 1045 n.30.

120. *Id.*

121. *Id.* The *Muir III* court declared that it followed the rule that, in no-clear-majority cases, it should look to the "position taken by those members who concurred in the judgment on the narrowest grounds." *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

tions, the *Muir III* court explained, are substantial and, therefore, sufficient to warrant differing analyses. The first contrast mentioned by the court involves the nature of the medium: Maintaining a volume on a library shelf does not preempt another volume (absent space limitations), whereas broadcast licensees are constantly required to make sensitive choices because there are only a limited number of broadcast hours in a day. And yet the court did not explain why the physical distinction between libraries and television stations does not *justify* constriction of editorial discretion for government broadcasters. Indeed, it is the scarcity doctrine that has been used to justify a more limited scope of first amendment protection for broadcasters. For example, a "right to reply" rule in the form of the FCC's "personal attack" doctrine was deemed constitutionally proper when asserted against a broadcaster.¹²² On the other hand, a Florida "right to reply" statute applicable to newspapers (which, like libraries, do not have the same type of physical limitations as broadcasters) was struck down as unconstitutional.¹²³

As pointed out by the *Muir III* court, there is no counterpart to the fairness doctrine¹²⁴ applicable to libraries. As a result, the Fifth Circuit explained, the editorial discretion of broadcasters is often limited by the requirement that equal time be allotted to an opposing viewpoint. A library, of course, faces no such constraint; it is not required to select books espousing differing viewpoints.¹²⁵ Although the fairness doctrine may be significant enough to make the library cases inapplicable to state-owned public broadcast licensees, the Fifth Circuit did not even mention that the doctrine is in disfavor and may well be abolished. The chairman of the FCC, in fact, describes the rule as the "censorship doctrine" and has designated the abolishment of content-oriented regulation as

122. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1968).

123. *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

124. [T]he doctrine imposes two affirmative responsibilities on the broadcaster: Coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable and must initiate programming on public issues if no one else seeks to do so.

CBS, 412 U.S. at 111 (citations omitted).

Although a controversy arose over the broadcast of *Death of a Princess*, the program itself does not appear to deal with a controversy within the meaning of the fairness doctrine. *Muir III*, 688 F.2d at 1057 n.3 (Johnson, J., dissenting).

125. *Muir III*, 688 F.2d at 1046.

his top priority.¹²⁶

The court also stated that the right to cancel a scheduled program is "far more integral a part of the operation of a television station than the decision to remove a book from a school library."¹²⁷ Because libraries usually have the opportunity to review a book before making it available to students, there are few legitimate reasons why a book should be removed from a library, other than pure space limitations. On the other hand, broadcasters frequently do not have an opportunity to review their programming before the station's schedule has been printed.

Having stressed several factors that subject libraries to constitutional standards different from those applied to television stations,¹²⁸ the court concluded that the decision to cancel *Death of a Princess* was not censorship.¹²⁹ The court emphasized the distinction between prohibiting or suppressing the speech of another and controlling one's own expression. In pointing out the contrast, the Fifth Circuit explained the conduct of the licensees in relatively innocuous terms: "[They] have simply exercised their statutorily mandated discretion and decided not to show a particular program at a particular time."¹³⁰ Stated differently, the viewers have no constitutional right to compel the broadcast of *Death of a Princess*. In positing such an absolute rule, however, the Fifth Circuit's opinion failed to create a legal safety valve for extreme situations. For example, what would be the court's approach if a licensee continually cancelled or failed to schedule programs advocating the use of solar energy as a substitute for oil?

To be sure, a licensee engaging in blatantly slanted programming practices would be subject to FCC review and sanctions.¹³¹ In

126. FCC Chairman Mark S. Fowler has repeatedly said that the agency should relinquish control over the content of broadcast programming and assume its proper role as a "technical traffic cop." See L.A. Daily J., Jan. 18, 1982, at 3, col. 4.

127. *Muir III*, 688 F.2d at 1046.

128. Judge Reavley found the factual differences between *Pico* and the *Death of a Princess* cases to make a *stronger* argument for subjecting the stations' cancellation decisions to judicial scrutiny. *Id.* at 1060 n.7 (Reavley, J., dissenting).

129. *Muir III*, 688 F.2d at 1046.

130. *Id.* at 1047. Moreover, the court pointed out that plaintiff Barnstone viewed the *Death of a Princess* program at an exhibition at Rice University in Houston. The court's mild-mannered conclusion starkly contrasts with Judge Johnson's dissent, which was joined by four other dissenters. Judge Johnson stated that the majority opinion "flies completely in the face of the First Amendment and our tradition of vigilance against governmental censorship of political and religious expression." *Id.* at 1053 (Johnson, J., dissenting).

131. FCC remedial action includes the following sanctions: admonishment, imposition of a forfeiture, a declaration of noncompliance with FCC policies, issuance of a "short-term" renewal, designation of license renewal application for full evidentiary hearing, and denial of

fact, the Fifth Circuit took pains to point out the viewers' right to a hearing before the FCC to challenge the decision to cancel. Although the court cited a string of cases¹³² demonstrating that the FCC does review programming complaints, it did not mention that "the FCC steadfastly refuses to depart from its 'longstanding policy of deferring to licensee discretion.'"¹³³ The consequences of the FCC's policy of deference are hardly surprising: Complaints regarding individual cancellation decisions are regularly denied.¹³⁴ On a practical level, the opportunity to seek relief through the FCC might be characterized as amounting "to nothing more than ' . . . a promise to the ear . . . ' which will most certainly be broken 'to the hope.'"¹³⁵

D. *Public Television as a Public Forum*

The *Muir III* court also rejected the plaintiffs' assertion that KUHT-TV and AETC are public forums prohibited from making content-based programming decisions.¹³⁶ The *Barnstone* district court, on the other hand, had found that the state-operated public television station was a public forum because the government operated it for public communication of public issues. The plaintiffs' argument on this issue may have been off-target because they were not seeking access to air their own views. In addition, the public forum argument, though successful in the Texas federal district court, faced an uphill battle because there is a basic difference between the right to hear and the right to have access to the media. "Unlike the right of access, which is an extension of freedom of speech, the right to hear is the reciprocal of freedom of speech."¹³⁷

Public forum analysis is based on the principle that the first amendment grants a right of access to certain public facilities. The doctrine stems from cases in which state and local governments

license renewal. *Muir III*, 688 F.2d at 1047-48.

132. The court cited 23 cases involving challenges of licensee programming. *Id.* at 1047-48 n.35.

133. *Id.* at 1056 (Johnson, J., dissenting) (quoting *Right to Life, Inc. v. WAVE-TV*, 59 F.C.C.2d 1103 (1976)).

134. *Muir III*, 688 F.2d at 1057 (Johnson, J., dissenting). Moreover, even when the licensee was alleged to be systematically censoring all views contrary to its own, viewers challenging programming formats would not obtain relief until the FCC conducted a lengthy hearing procedure. *Muir II*, 656 F.2d at 1027 (Clark, J., dissenting).

135. *Muir III*, 688 F.2d at 1057 (Johnson, J., dissenting) (quoting *Cuthbert v. United States*, 278 F.2d 220 (5th Cir. 1960)).

136. *Muir III*, 688 F.2d at 1041-43.

137. Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863, 867 (1970).

have attempted to stifle expression on government-owned property geared for communication.¹³⁸ Public forums require nondiscriminatory access; “[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”¹³⁹

The fact that government “owns” or financially supports property does not alone create a public forum.¹⁴⁰ The crucial query is whether the facility is an appropriate place for the exercise of first amendment rights.¹⁴¹ The nature of the forum and the conflicting interests involved are important factors in evaluating the degree of first amendment protection afforded to particular speech.¹⁴² The court in *Muir III* relied on the conclusion in *CBS*¹⁴³ that a right of public access is inconsistent with the broadcasters’ responsibilities to serve the public interest.¹⁴⁴

When discussing access to broadcast media, *CBS* appears to be an obligatory reference point, as it holds that would-be editorial advertisers have no constitutional or statutory right of access to television.¹⁴⁵ Despite its importance,¹⁴⁶ *CBS* does not control the issues raised by the *Muir* and *Barnstone* cases. First, *CBS* involves a private broadcaster; it is the presence of government operation that underlies the analysis in *Muir III*. Second, *CBS* concerns a demand to use the broadcast facilities to transmit a message—no such demand is involved in the *Death of a Princess* cases. Third, *CBS* produced six opinions; while a majority of the Court agreed that the refusal to accept editorial advertisements did not violate

138. See, e.g., *Police Dep’t v. Mosley*, 408 U.S. 92 (1972) (selective authorization of picketing near schools); *Brown v. Louisiana*, 383 U.S. 131 (1966) (peaceful protest at public library); *Schneider v. State*, 308 U.S. 147 (1939) (distribution of handbills on the street); *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.) (leaflet distribution at bus terminal), cert. denied, 393 U.S. 940 (1968). See generally Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980); Comment, *Access to State-Owned Communications Media—The Public Forum Doctrine*, 26 U.C.L.A. L. REV. 1410 (1979).

139. *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972).

140. See *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981) (mailboxes not public forums); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city’s mass transit system not a public forum).

141. *Muir II*, 656 F.2d at 1022; *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1019 (5th Cir. 1972).

142. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

143. 412 U.S. 94 (1973).

144. 688 F.2d at 1042-43. But see Comment, *supra* note 138.

145. 412 U.S. at 122-32.

146. “The most elaborate discussion of First Amendment rights as applied to television is found in *CBS v. Democratic National Committee*.” *Muir II*, 656 F.2d at 1026 (Clark, J., dissenting) (citation omitted).

the first amendment, there was no majority on the state action issue. Finally, the opinions are rambling and therefore susceptible to differing interpretations, all of which may be reasonable. Both sides in *Muir* quoted segments from one or more of the six opinions. As the *Muir II* court explained, "the quoted segments, standing alone, appear to support the position of the quoting party."¹⁴⁷ Although the plaintiffs were not seeking public access, they contended that the two stations were public forums. The plaintiffs were undone by their own argument, because "[i]t is the right of public access which is the essential characteristic of a public forum."¹⁴⁸ By definition, a facility is not a public forum if speakers do not have a right of access to it. The court branded as "untenable"¹⁴⁹ the argument that stations are public forums without public access.

III. CONCLUSION

Although the viewers were not asserting the right to put everything they demand on the air, a decision affirming the injunction in *Barnstone II* could have swamped state-operated broadcasters with demands for particular shows and complaints about cancellations. Nonetheless, the Fifth Circuit in *Muir III* handed down a virtually unequivocal rule that may not resolve adequately the conflicting interests. The courts may not be the most appropriate forum in which to air grievances about broadcast programming, but the courts were, in fact, used as the arena in which to balance the viewers' interests against those of the program producer and broadcast licensee. Having acknowledged that state-operated television stations are not protected by the first amendment, the court proceeded to give the stations carte blanche editorial discretion under statutory and regulatory authority. In effect, "the Court has elevated 'the Communications Act above the Constitution'"¹⁵⁰ by finding no restrictions on state-operated television other than those imposed by federal regulation, and by failing to explain why

147. *Muir II*, 656 F.2d at 1019 n.12.

148. *Muir III*, 688 F.2d at 1043. Public forums extend a general invitation to anyone who wishes to use the facility for communication. See, e.g., *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1019 (5th Cir. 1972). In the context of public television stations, the Fifth Circuit explained, "[t]he general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered." *Muir III*, 688 F.2d at 1042 (footnote omitted).

149. *Muir III*, 688 F.2d at 1043.

150. *Id.* at 1054 (Johnson, J., dissenting) (quoting *Barnstone I*, 514 F. Supp. at 686).

these regulations cloak the licensees with immunity from judicial review.

When evaluating first amendment rights in the electronic age, one should remember that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”¹⁵¹ On the other hand, a government broadcaster should not have to justify every programming decision. Any resolution of issues generated by content regulation of state-owned media must recognize the evils that could emanate from improper governmental program selection.

Viewers do not have the right to compel the broadcast of *Death of a Princess* or any other program. They do not have the right to demand that an offering not be aired. And they have no right to demand guarantees that scheduled selections will always be broadcast. But they do have the right to feel secure in the knowledge that “government broadcasters [do not have] more protection from private citizens than private broadcasters have from the government.”¹⁵²

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151. *Red Lion Broadcasting v. FCC*, 395 U.S. 368, 390 (1969).

152. *Barnstone II*, 660 F.2d at 139 (Reavley, J., concurring).