
MANDATORY ACCESS AND THE INFORMATION INFRASTRUCTURE

Andrew D. Auerbach*

The First Amendment to the Constitution limits government action that diminishes the freedom to speak but creates no affirmative duties upon the government to promote speech.¹ The First Amendment now, however, is being recast as an invitation for active government regulation by those interested in creating a system where an active government improves our nation's discourse. This system is called mandatory access and is characterized by government regulations that compel media owners, such as cable television operators, to carry governmentally preferred programming.

This Article discusses existing and proposed mandatory access laws and the effect of mandatory access laws on the media. Part I describes existing mandatory access laws as well as congressional initiatives to enact additional mandatory access laws. Part II examines the constitutional and policy arguments fueling the mandatory access laws. Part III analyzes Congress' authority to promulgate the mandatory access laws through the spending power clause of the Constitution. Part IV examines the risks inherent in the progression from access regulation to the escalation of government control. This Article concludes that, while mandatory access proposals may appear to further the public interest, the

government's ability to engage in onerous content control of video programming results in pervasive harm that is both alarming and quite real.

I. HISTORICAL OVERVIEW: MANDATORY ACCESS AND THE INFORMATION INFRASTRUCTURE

Mandatory access is one process by which the government curtails the editorial discretion of cable companies, direct broadcast satellite servers, and telephone companies. Ironically, mandatory access laws that force telecommunication companies to be the mouthpieces of others are said to be required by the First Amendment.² Advocates for government-compelled access to the media are concerned that the First Amendment no longer effectively protects "First Amendment values." These advocates reason that if the media owners have the ability to restrict access, the First Amendment values of free and robust discussion will wither, because then the only substantive viewpoint that will be heard is the video publisher's.³

Other mandatory access proponents contend that media owners' speech is problematic because it is both homogeneous and inane.⁴ Such proponents

* Andrew D. Auerbach is a staff attorney for The Media Institute in Washington, D.C. The Media Institute is a non-profit organization specializing in communications policy and First Amendment issues.

¹ U.S. CONST. amend. I. "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

² Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642 (1967); CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1086 (1994).

³ JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 321 (1973); Dominic Caristi, *The Concept of a Right to Access to the Media: A Workable Alternative*, 12 SUFFOLK U. L. REV. 103, 109-10 (1988). "When a select few individuals have the ability to restrict access, freedom of expression is en-

dangered just as surely as if the restriction had been imposed by the government." *Id.*

⁴ Video programming suffers, it is said, from the need to entertain rather than inform. Ideas come dressed "in the carnival attire of the violent or bizarre." BARRON, *supra* note 3, at 7. In addition, television dependency on advertiser generated revenues translates into programming targeted to the largest audience. The largest audience is reached by appealing to the lowest common denominator. See Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087, 1095 (1990). The unelevated status of commercial television is bewailed most famously in FCC Chairman Newton Minow's May 9th, 1961 address to the National Association of Broadcasters:

When television is bad, nothing is worse. . . . I can assure you that you will observe a vast wasteland. You will see a procession of game shows, violence, audience partici-

claim that existing programs do not devote enough time to "local and national public affairs, [and] children's matters," and that the viewpoints disseminated by programmers reflect the "capitalistic goals of privately owned, for-profit media."⁵

[M]uch of the free speech 'market' now consists of scandals, sensationalized anecdotes, and gossip, often about famous movie stars and athletes; deals rarely with serious issues and then almost never in depth; usually offers conclusions without reasons; turns much political discussion into the equivalent of advertisements; . . . and reflects an accelerating "race to the bottom" in terms of the quality and quantity of attention that it requires.⁶

The problem is found with the content of the broadcasters' speech, thus resulting in solutions that themselves are aimed at regulating the content. Specifically, in the case of the newer media forums, such as cable, telephone company video platforms,⁷ and direct broadcast satellite ("DBS"),⁸ the solutions actually compel the carriage of government approved speech. By way of extreme example, some suggest co-opting an hour of prime-time television and drive-time radio each day for broadcasts by an "Audience Network," a dispenser of "truly diverse programming from a variety of sources which reflects the needs and interests of all citizens."⁹

Mandatory access laws, thus, are sought to improve what is considered to be "bad" television. Even assuming arguendo that correcting the poor quality of speech is a proper governmental function, the basic concept still misses the mark. It is the success of video providers like cable television that has spurred the demands for access. Yet, it is the very success of the cable industry that greatly has increased the

quality of video programming.

Prior to the advent of cable television, the major commercial broadcast networks were supported solely by advertising revenue, which traditionally has been measured by audience size. To effectively compete, each commercial network attempted to increase the size of its audience by programming to the lowest common denominator.¹⁰ Today, however, it is the vigorous competition between cable television, DBS, and telephone video platforms that will cause program quality to increase. The improvement of program quality will occur for two reasons. First, because these new providers have a dual revenue stream (i.e. they receive advertising dollars and they charge viewers), they are less dependent on audience size and are less in need of the mass audience response. The independence of multiple channel video providers enables them to program quality shows even if their appeal is limited to a smaller segment of the market. Second, an increase in programmers necessarily will create a greater variety of high quality television. As the number of programmers increases, it will become profitable to program for the smaller "upper end" of the viewing market.¹¹ The profound changes in the 1980's television market confirm this analysis. For example, during this time period, cable networks began to offer quality programs that were once the exclusive realm of public television.¹² This change illustrates that mandatory access increasingly is unnecessary as more and more viable commercial video providers enter the market.

Ironically, mandatory access laws threaten the viability of video providers and the high-quality television they deliver. Proposed mandatory access laws

pation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western badmen, western good men, private eyes, gangsters, more violence, and cartoons, and endlessly, commercials — many screaming, cajoling and offending. And most of all, boredom.

Reprinted in JONATHAN W. EMORD, *FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT* 198 (1991).

⁵ Caristi, *supra* note 3, at 108.

⁶ SUNSTEIN, *supra* note 2, at 23.

⁷ Video platforms are an "electronic platform" or "window" that opens to a broader network, giving the user access to video and non-video communication services provided by a multiplicity of competitive service providers. Through this platform, consumers could gain access to video programs (provided by entities other than the local exchange carrier), competing video and videotext gateways, videophone, and other communication services. *In re Telephone Company-Cable Television Cross-Ownership Rules, Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 300, para. 6 (1991) (hereinafter *Further NPRM*). Ultimately, the FCC envisions that telephone companies will create "video

common carriage," a switched broadband network. *Id.* paras. 6-7.

⁸ DBS distributors broadcast their signals from high powered satellites to homes equipped with small satellite-receive dish antennas. Currently, there are two competing providers of DBS service who share a satellite: DirecTV and U.S. Satellite Broadcasting. Both offer a package of basic, premium, and pay-per-view options similar to cable. Englewood, Colorado-based EchoStar Communications plans to launch a similar satellite service by the fall of 1995. See Nikhil Hutheessing, *Kamikaze Satellites*, *FORBES*, July 4, 1994, at 126.

⁹ Ralph Nader and Claire Riley, *Oh Say Can You See: A Broadcast Network for the Audience*, 5 J.L. & POL. 1, 5 (1988).

¹⁰ BRUCE M. OWEN & STEVEN S. WIDMAN, *VIDEO ECONOMICS* 142 (1992). The lowest common denominator is a term that refers to programming elements enjoyed by the most people. *Id.* So, while the science of Nova is appreciated by many, the violence of NYPD Blue may be capable of entertaining these same viewers and many more.

¹¹ *Id.* at 143.

¹² *Id.*

could burden telecommunication entities with prohibitously high costs.¹³ Unfortunately, such companies will not be able to build rapidly a comprehensive and advanced information infrastructure if they do not receive a return on their investment.¹⁴ The promise of the information superhighway, including a diverse selection of high quality programming, may prove impossible to keep under onerous governmental regulation and mandates.

A. Current Mandatory Access Requirements

Many mandatory access laws already are in place. This section analyzes each media forum that is affected by existing mandatory access laws. In each case, the government has reduced the editorial options available to media operators in order to foster a greater number of speakers, or what the government believes to be a more delicate balance of opinions than the free market might provide.

¹³ See, e.g., S. 2195, 103d Cong., 2d Sess. (1994) (taxing cable, DBS, and telephone company video platforms, proposing to use the money to fund public broadcasters, governments, and nonprofit organizations that create educational and cultural programming, and conscripting up to 20% of channel capacity to carry the programming).

Testimony by bill advocates reveals that mandatory access could prove to be extremely expensive. In his testimony in support of S. 2195, Anthony Riddle, Chair of the Alliance for Community Media, questioned:

If, in order to use the network, one needs a video camera, editing equipment and playback equipment, who will have access to it, even if the fiber link is built to every home? If, in order to take advantage of the network, one requires a computer, who will provide the computers to those who will cannot afford them now? . . . This suggests that from the start the network must be designed so that its basic services include facilities, equipment and services required to make the information highway accessible to the entire community.

Anthony Riddle, Chair, Alliance for Community Media, Testimony in support of S. 2195, (June 22, 1994). See also S. 1822, 103d Cong., 2d Sess. § 201B(c)(1) (1994). This bill, passed by the Senate Commerce Committee, reserves up to 5% of the capacity of telecommunications entities for certain groups and allows telecommunication companies to recover out-of-pocket costs only.

¹⁴ Nearly 20 years ago, the FCC acknowledged the retardant effect expensive mandatory access regulations had on system construction. *In re Cable TV Channel Capacity and Access Requirements*, 59 F.C.C.2d 294 (1976).

¹⁵ See *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969) (holding that the fairness doctrine and its corollaries—the personal attack and political editorial rules—did not

1. Terrestrial Broadcasters

Broadcasters are forced to surrender a substantial amount of editorial discretion in order to allow the government to inject “balance” into our national debates.¹⁵ The now-inoperative fairness doctrine,¹⁶ the personal attack rule,¹⁷ the equal opportunities rule,¹⁸ and the political editorials rule¹⁹ all require broadcasters to relinquish their facilities for use as a pulpit by others.

Broadcasters’ unenviable position in the First Amendment’s hierarchy of protection stems from its chaotic birth. The interference caused by dueling broadcasters and the limited capacity of the spectrum was held to justify “differences in the First Amendment standards applied to them.”²⁰

2. Cable Television Systems

Local governments may bar a cable operator from constructing a cable system if the operator refuses to provide free channels for public, educational, or gov-

violate the First Amendment, and that, in adopting the fairness doctrine legislation, the FCC simply was implementing Congressional policy).

¹⁶ See *In re Report on Editorializing by Broadcast Licensees, Report*, 13 F.C.C. 1246, para. 7 (1949). The fairness doctrine required broadcasters to present coverage of controversial issues of public importance in their communities, and to provide reasonable opportunities for the expression of contrasting viewpoints on those issues. The FCC stopped enforcing the doctrine in *In re General Fairness Doctrine Obligations of Broadcast Licensees, Report*, 102 F.C.C.2d 145, 147 (1985). This decision was affirmed in *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

¹⁷ 47 C.F.R. § 73.1920 (1993). Section 73.1920 provides that:

When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time . . . transmit to the persons or group attacked: . . . (3) an offer of a reasonable opportunity to respond over the licensee’s facilities.

¹⁸ 47 U.S.C. § 315 (1993). Section 315 provides that: If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.

¹⁹ 47 C.F.R. § 73.1930 (1993). Section 73.1930 provides that: Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit . . . (C) an offer of reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee’s facilities.

²⁰ *Red Lion*, 395 U.S. at 386-87.

ernmental ("PEG") use.²¹ Local authorities have the right to deny a franchise to a potential cable operator²² if it does not promise to provide "adequate" public, educational, and governmental access channels, facilities, and financial support.²³ Consequently, potential cable operators cannot build a facility without being used as an organ of the local government.²⁴ Nor can cable operators exercise any editorial control over PEG programming.²⁵

Cable systems also are bound to carry local commercial and noncommercial broadcast stations as well as qualifying low power stations whose programming meets with governmental approval.²⁶ In addition, cable operators are obligated to reserve channel capacity to be leased by commercial programmers.²⁷ Finally, editorial discretion over the content of the programming of the leased channel also is prohibited.²⁸

A recent U.S. district court case, *Daniels Cablevision, Inc. v. U.S.*,²⁹ upheld the constitutionality of PEG and leased access regulations because the requirements enable "a broad range of speakers to

reach a television audience that otherwise would never hear them."³⁰

3. Direct Broadcast Satellite Servers

In one of its boldest forays into content control, Congress commanded DBS providers to carry programming of a specific subject matter, requiring them to set aside four to seven percent of their channel capacity for "noncommercial programming of an educational or informational nature."³¹ As of this writing, one district court has held these requirements to be unconstitutional.³²

4. Telephone Companies' Video Platforms

Telephone companies ("telcos") suffer egregious access requirements in providing video programming. Currently, telcos are not permitted to offer their own video programming directly to subscribers in their calling region,³³ but may provide their own

²¹ 47 U.S.C. § 531 (1988).

²² 47 U.S.C. § 541(b)(1) (1988) (stating that a "cable operator may not provide cable service without a franchise").

²³ 47 U.S.C. § 541(a)(4) (1988 & Supp. IV 1993).

²⁴ See *Century Fed. Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1553 n.3 (N.D. Cal. 1987), *appeal dismissed*, 484 U.S. 1053 (1988) (striking PEG requirements using strict scrutiny partially because PEG channels are, in fact, controlled by the government and "could very well provide a conduit for criticism of the [cable] operator," which the operator would be forced to carry).

PEG channels are compelled by the government and, unsurprisingly, serve the government. In Washington, D.C., District Cablevision, to win the right to provide cable services, agreed to dedicate three channels to PEG, along with funding. Of the annual \$1.8 million fund, 83% goes to the government channel. The public shares the rest of the fund, plus occasional access to a tiny, dilapidated studio with antiquated equipment.

Nearly a decade of such lopsided funding has allowed the mayor's TV operation to expand into a mini-newsroom outfitted with the latest in video equipment, a state-of-the-art studio and a full staff - in other words, a reelection engine that purrs, on your dime, 24 hours a day.

Christopher Georges, *The Incumbents' Channel*, WASH. POST, July 17, 1994, at C1.

²⁵ 47 U.S.C. § 531(e) (1988).

²⁶ 47 U.S.C. §§ 534, 535 (Supp. IV 1993). The provision requiring carriage of low power television stations is codified at 47 U.S.C. § 534(c). To qualify for carriage, low power stations must "address local news and informational needs which are not being adequately served by full power television broadcast stations." 47 U.S.C. § 534(h)(2)(B).

²⁷ 47 U.S.C. § 532(b)(1) (1988). Mid-sized systems (36-54 activated channels) must reserve 10% of their free channels (i.e., channels that have not already been co-opted by must-carry or PEG requirements or the use of which is prohibited by law). *Id.*

Larger systems (50-100 activated channels) must dedicate 15% of their free channels. *Id.* § 532(b)(1)(B). The systems with the greatest capacity (over 100 activated channels) must dedicate 15% of all their channels for lease to commercial programmers. *Id.* § 532(b)(1)(C).

²⁸ 47 U.S.C. § 532(c) (allowing cable operators to consider content only in charging fees).

²⁹ 835 F. Supp. 1 (D.D.C. 1993).

³⁰ *Id.* at 6. *Contra Century Fed. Inc.*, 710 F. Supp. at 1552; *Group W Cable v. Santa Cruz*, 669 F. Supp. 954, 968-69 (N.D. Cal. 1987) (holding that the policies of the city of Santa Cruz, CA of granting only a monopoly franchise and conditioning the award of a franchise on the provision of concessions violated the First Amendment).

³¹ 47 U.S.C. § 335 (Supp. IV 1993).

³² *Daniels Cablevision*, 835 F. Supp. at 8 (holding that "in the absence of a record identifying a valid regulatory purpose or some other legitimate government interest to be advanced by conscripting DBS channel space, there is no justification for any First Amendment burdens . . .").

³³ 47 U.S.C. § 533(b) (1988). Section 533 provides that:

(1) It shall be unlawful for any common carrier, subject in whole or in part to Subchapter II of this Chapter, to provide video programming . . . directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

(2) It shall be unlawful for any common carrier, subject in whole or in part to Subchapter II of this Chapter, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangement are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

video services that are dissimilar to television programming.³⁴ If telcos want to deliver video programming, they must build a video platform³⁵ that is operated as a common carrier. Compelled to carry the programming of every other video provider, telcos may find it impossible to show their own programs.³⁶

Four U.S. district court opinions³⁷ recently have found unconstitutional this prohibition against the provision of video programming by telephone companies in their service area. Thus, four telcos have, for the moment, the First Amendment right to build a video system and choose their own programming. However, based on recent congressional initiatives,³⁸ these newly established speech rights may be fleeting.

5. Print Media

Newspapers and magazines largely are exempted from mandatory access requirements. The Supreme Court has held that a government-compelled right of access to a newspaper brings about a confrontation with the express provisions of the First Amendment.³⁹ Despite the fact that newspapers and magazines currently do not suffer mandatory access requirements, there are those who have designs on

the news pages.⁴⁰

B. Legislative Proposals to Mandate Access

Existing mandatory access requirements may turn out to be merely the first trickle from the collapse of the constitutional dam. New and more comprehensive access requirements are being offered. The following discussion provides a look at the current legislative proposals.

1. Telephone Company Video Dialtone Systems

Under proposed legislation, telcos would be permitted to create a separate affiliate to build a video platform and to show its own programming.⁴¹ Even then, however, a telephone company would be forbidden to exercise a key First Amendment right—editorial control over unwanted programming.⁴² Before it even may commence building, a telco must assure the FCC that it is willing to meet all programming demands for carriage of video programming.⁴³ The telephone company must create sufficient capacity to meet the demand of all “bona fide requests” for carriage and then actually must

“Video programming” is defined as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(19) (1994). The FCC has interpreted this language “to prohibit only telephone company provision of programming comparable to that provided by broadcast television stations in 1984.” *In re Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order*, 7 FCC Rcd. 5781, para. 74 (1992) [hereinafter *Second Report and Order*]. Telephone companies are limited to a five percent ownership interest in providers of video programming. *Id.* para. 71.

³⁴ See 47 U.S.C. § 522(16) (1988) (prohibiting programming that is comparable to that provided by broadcast television stations); see also *Second Report and Order*, *supra* note 33, para. 74.

³⁵ See *Further NPRM*, *supra* note 7, paras. 25-7.

³⁶ *Second Report and Order*, *supra* note 33, para. 10 (permitting provision of video dialtone on a nondiscriminatory common carrier basis).

³⁷ *Ameritech Corp. v. U.S.*, No. 93 C 6642 (N.D. Ill. Oct. 27, 1994); *BellSouth Corp. v. U.S.*, No. 93-B-2661-S (N.D. Ala. Sept. 23, 1994); *U.S. West v. U.S.*, 855 F. Supp. 1184 (W.D. Va. 1994), *aff'd* ___ F.3d ___ (9th Cir.); *Chesapeake and Potomac Telephone Co. v. U.S.*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd* ___ F.3d ___ (4th Cir.).

³⁸ See *infra* notes 41-44 and accompanying text. The legislative proposals and the House Reports do not make clear why telephone companies are subject to lesser First Amendment rights than other mass media video providers. The telephone

companies' status as a common carrier of point to point communications, cross-subsidization fears, and other antitrust considerations neither explain nor justify restrictions on their speech. See Lawrence H. Winer, *Telephone Companies Have First Amendment Rights Too: The Constitutional Case for Entry into Cable*, 8 CARDOZO ARTS & ENT. L.J. 257 (1990).

³⁹ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

⁴⁰ See Barron, *supra* note 2, at 1642; JEROME A. BARRON, *PUBLIC RIGHTS AND THE PRIVATE PRESS* (1981). SUNSTEIN, *supra* note 2, at XIX.

⁴¹ H.R. 3626, 103d Cong., 2d Sess. § 401 (1994).

⁴² *Id.* § 635(b). Section 635(b) provides in pertinent part that:

Within one year after the date of the enactment of this section, the Commission shall prescribe regulations that — (A) consistent with the requirements of section 659, prohibit a common carrier from discriminating among video programming providers with regard to carriage on its video platform, and ensure that the rates, terms and conditions for such carriage are just, reasonable, and non-discriminatory

Section 635(F)(I) prohibits a common carrier “from discriminating among video programming providers with regard to material or information provided by the common carrier to subscribers for the purposes of selecting programming on the video platform, or in the way such material or information is presented to subscribers.”

⁴³ See *id.* § 653(a)(2).

carry all such requests.⁴⁴ Additionally, telcos must comply with the mandatory access provisions, such as carriage of local broadcasters and commercial leasing, to which the cable companies also are subject.

2. Cable Operators

Ironically, under proposed legislation, those cable operators who take the lead in building our nation's advanced infrastructure will be penalized for their investment. This is because upon constructing a switched, broadband video programming delivery system, cable operators would be subject to the same common carrier requirements as telephone video platforms.⁴⁵ As a result, cable operators may be stripped of even more of their right to choose the programming shown on their systems.

3. All Video Providers — Senate Bill 2195⁴⁶

One particularly ambitious bill introduced in this past legislative session mandates access to all three of the major video providers: cable television systems, telephone companies, and DBS servers. Senate Bill 2195, The National Public Telecommunications Infrastructure Act of 1994, compels cable companies, telephone video platform providers, and DBS systems to set aside up to twenty percent of their capacity to government, educational institutions, public libraries, and certain nonprofit entities.⁴⁷ To qualify for this preference, programming must provide "educational, informational, cultural, civic, or charitable services directly to the public without charge for such services."⁴⁸ In addition to free carriage, these preferred entities also would receive funding. The money would come from universal service funds and taxes on telecommunication operators, as well as from other sources.⁴⁹ In short, public TV stations, schools, and non-profit entities would be able to place their educational and cultural programming on all of the major sources of video programming free of charge, and would be funded primarily by the tele-

communication companies themselves.

4. DBS, Telephone Video Platforms

Senate Bill 1822,⁵⁰ passed by the Senate Commerce Committee, is similar to Senate Bill 2195, in that both mandate access for the same entities (with the exception of the governmental entities mandated in Senate Bill 1822) and for the same programming.⁵¹ Senate Bill 1822, however, is somewhat less generous with the assets of telecommunication companies. It only confiscates up to five percent of the capacity of a telecommunication entity and allows the providers to charge enough to recover their out-of-pocket costs.⁵²

II. MANDATORY ACCESS AND THE FIRST AMENDMENT

The recent Supreme Court decision on the must-carry rules, *Turner Broadcasting System, Inc. v. FCC*,⁵³ examined the constitutionality of certain mandatory access requirements. An analysis of *Turner* leads to the conclusion that mandatory access proposals have serious, if not insurmountable, First Amendment problems.

A. *Turner Broadcasting* and its Effect on Mandatory Access

In *Turner Broadcasting*, the Supreme Court reviewed the constitutionality of the mandatory access provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").⁵⁴ Sections 534 and 535 of the 1992 Cable Act require cable television systems to reserve more than one-third of their channels for the retransmission of local commercial and noncommercial broadcast stations.⁵⁵ Cable company operators and programmers responded by attacking the 1992 Cable Act on First Amendment grounds before a three judge panel in U.S. district court.⁵⁶ The district court held that the must-carry regulations were content-neutral and

⁴⁴ *Id.* § 653(a)(3).

⁴⁵ *See id.* § 653 (b)(2).

⁴⁶ S. 2195, 103d Cong., 2d Sess. (1994).

⁴⁷ *See id.* § 714(c)(1).

⁴⁸ *Id.* § 714(d)(2).

⁴⁹ *See id.* § 714(c)(1).

⁵⁰ S. 1822, 103d Cong., 2d Sess. (1994).

⁵¹ *Id.* § 201B(c)(1).

⁵² *Id.* § 201B(a). Section 201B(a) provides that:

The Commission shall promulgate regulations to require

owners and operators of telecommunications networks to reserve, for public uses, up to 5% of the capacity on such networks used for the delivery of information services, for use by eligible entities at incremental cost based rates for the delivery of information services to the general public.

⁵³ 114 S. Ct. 2445 (1994).

⁵⁴ Pub. L. No. 102-385, 106 Stat. 1460, 1465 (1992) (codified at 47 U.S.C. §§ 521-59).

⁵⁵ 47 U.S.C. §§ 534-35.

⁵⁶ *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp.

therefore subject to intermediate constitutional scrutiny. The district court then concluded that the must-carry rules survived intermediate scrutiny because they were a narrowly tailored means of furthering a significant government interest.⁶⁷

The Supreme Court disagreed, in part, with the district court's decision. The Court agreed that the regulations were content-neutral because they were not enacted to favor programming of a particular content but rather, to preserve free over-the-air television.⁶⁸ The Court disagreed, however, that the government had proven that it met the test for content-neutral regulations.⁶⁹ Therefore, it vacated the judgment and remanded the case to require the government to prove that the fate of free television is in serious jeopardy, and thus, that its preservation is a real governmental interest.⁶⁰

If the government is successful in proving these requirements on remand, in order to prevail, it then must prove that the must-carry regulations are a narrowly tailored means of furthering this interest. The Court intimated that if cable companies were forced to drop some cable programming to make room for certain broadcasters, this fact would be "critical" to determining that the regulations are not narrowly tailored.⁶¹ As discussed *infra* Section II. B, C and D, applying *Turner Broadcasting* to Congress' latest mandatory access proposals reveals the constitutional infirmities of the mandatory access legislation.

B. Content Neutrality

Except for broadcast regulations,⁶² courts apply

either of two levels of scrutiny to speech restrictions. If a law is content-neutral, it will be tested against the intermediate level of scrutiny. A law is content-neutral even if its operation censors or compels speech, or its application is triggered by the content of speech, if it is "justified without reference to the content of the speech."⁶³ Thus, courts will look to the justification, rather than the operation, of a law to determine if it is content-neutral and, therefore, subject to intermediate scrutiny. Under intermediate scrutiny, a speech restriction will be upheld if it furthers an important or substantial governmental interest,⁶⁴ if the governmental interest is unrelated to the suppression of free expression,⁶⁵ and if the restriction does not burden substantially more speech than is necessary to further the governmental interest.⁶⁶ A restriction is not narrowly tailored if it does not leave open ample alternative channels of communication.⁶⁷ Moreover, the government will not be able to sustain a speech restriction unless it "demonstrates that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁶⁸

If a law is content-based, it will be subject to the higher standard of strict scrutiny. If the purpose of the legislation is to compel or censor speech of a particular subject matter or viewpoint, the legislation is content-based.⁶⁹ Even if the government's purpose is not to compel or censor speech, a law will be subject to strict scrutiny if it "restrict[s] unduly" First Amendment rights,⁷⁰ or falls on a small group of speakers.⁷¹ Under strict scrutiny, laws will be struck down as unconstitutional,⁷² unless the government proves "that the regulation is necessary to serve a

32 (D.D.C. 1993).

⁶⁷ *Id.* at 45-7.

⁶⁸ *Turner Broadcasting*, 114 S. Ct. at 2461.

⁶⁹ *Id.* at 2471-72.

⁶⁰ *Id.*

⁶¹ *Id.* at 2472.

⁶² See, e.g., *FCC v. National Citizens Communications Comm. for Broadcasting*, 436 U.S. 775, 796 (1978) (asserting that regulations that are a reasonable means to further the public interest in diversified mass communications, are constitutional).

⁶³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 48 (1986) (holding that a zoning limitation on the location of adult theaters was "unrelated to the suppression of free expression" and, therefore, escaped strict scrutiny because the ordinance was justified as a means of preventing various secondary effects of adult theaters, like crime).

⁶⁴ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁶⁵ *Id.* The *O'Brien* test, as originally cast, also required that the regulation be "within the constitutional power of the Gov-

ernment," and burden no more speech "than is essential to the furtherance of the governmental interest." *Id.* The first of these requirements has no independent significance and the latter has been modified to require a looser fit between the regulation and the governmental interest. See *Ward*, 491 U.S. at 799.

⁶⁶ See *id.*

⁶⁷ See *id.* at 791.

⁶⁸ *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

⁶⁹ *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992).

⁷⁰ *City of Ladue v. Gilleo*, 114 S. Ct. 2039 (1994) (holding unconstitutional a residential sign ban because it prohibited "too much protected speech" without determining whether the ban was content-based or content-neutral); see also *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1982).

⁷¹ *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-29 (1987).

⁷² See *Burson v. Freeman*, 112 S. Ct. 1846, 1852 (1992) (plurality opinion) (stating that a law subject to strict scrutiny rarely survives such scrutiny).

compelling state interest and is narrowly drawn to achieve that end."⁷³

Mandatory access laws are unlikely to be deemed content-neutral because, through them, some speech is preferred and much is excluded. For example, the mandatory access proposals of Senate Bill 1822 give a programming preference to public television stations, public libraries, schools, and public access channels, all of which are educational entities.⁷⁴ Furthermore, Senate Bill 2195 proposes to confiscate channel space for governmental programming.⁷⁵ The educational entities designated by these two bills are entitled to access for educational programming only, with such programming limited to the "provision of educational, informational, cultural, civic, or charitable services."⁷⁶ Cultural, civic, and charitable services are not defined, but they appear to encompass only speech of a more elevated and instructive level, thus excluding all other types of speech. One clear indicator of the content-based nature of the mandatory access laws contained in these bills is that such laws require the government to scrutinize the content of the programming to see if it would be eligible for mandatory access.⁷⁷

The government, by singling out educational and cultural speech over all other speech, clearly is making a content preference. All speech involves the communication of ideas and information. Educa-

tional speech involves the communication of academically accepted ideas and information. The government may not, however, compel the carriage of certain speech based on its perceived worth.⁷⁸ Thus, unlike the must-carry rules upheld in *Turner Broadcasting*, which benefitted broadcasters of all programming and were not strictly scrutinized "merely because they treat[ed] operators and programmers different from other components of the media,"⁷⁹ mandatory access laws that benefit only educational programming are content-based and will be held to the highest scrutiny.

Of course, laws that make content-based distinctions may in fact be deemed content-neutral because they are justified without reference to content. Proponents of mandatory access argue that access laws are content-neutral because they are enacted for a neutral reason: to create diverse voices in the media.⁸⁰

C. The Diversity Principle

The diversity principle,⁸¹ in the words of the Supreme Court, encourages "the widest possible dissemination of information from diverse and antagonistic sources."⁸² The diversity principle does not render access laws content-neutral, because access laws do not increase diversity. The operation of ac-

⁷³ *Simon & Schuster*, 112 S. Ct. at 509; see also *Arkansas Writers' Project*, 481 U.S. at 231.

⁷⁴ The public access channel may be used only by nonprofit entities that are "formed for the purpose of providing nondiscriminatory public access to noncommercial educational, informational, cultural, civic, or charitable services." S. 1822, *supra* note 13, 201B(c)(1). See also S. 2195, *supra* note 13, § 714(d)(1).

⁷⁵ S. 2195, *supra* note 13, § 714(d)(1).

⁷⁶ *Id.* § 714(d)(2).

⁷⁷ "Official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Simon & Schuster*, 112 S. Ct. at 508 (quoting *Arkansas Writers' Project*, 481 U.S. at 221). See also *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1983) (noting that one of "two central features of the ban against editorializing [by public television stations] is that 'the scope of Section 399's ban is defined solely on the basis of the content of the suppressed speech Consequently, . . . enforcement authorities must necessarily examine the content of the message that is conveyed'"). *Id.*

⁷⁸ See *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (holding that a statute that prohibited photographing currency, but made an exception for "philatelic, numismatic, educational, historical, or newsworthy purposes" was content-based and therefore unconstitutional); *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 96 (1972) (stating that "[a]ny restriction on expressive activity because of its content" is invalid); *West Virginia*

State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (declaring that, under the First Amendment, the state may not compel schoolchildren to pledge allegiance to the flag). See also *National Ass'n of Indep. Television Producers and Distrib. v. FCC*, 516 F.2d 526, 536-37 (2d Cir. 1975) (holding valid certain exceptions to the Prime Time Access Rule's prohibition on network programming for certain public affairs, documentary, and children's programming, because of the FCC's broad power over broadcasting and because broadcasters could choose not to air the preferred programming).

⁷⁹ *Turner Broadcasting*, 819 F. Supp. at 43.

⁸⁰ See S. 2195, *supra* note 13, § 2(11). This section provides in part that: "[a]ssuring access to a diversity of voices, viewpoints, and cultural perspectives over telecommunications networks benefits all members of the public who use telecommunications networks to disseminate or receive information." *Id.* See also S. REP. NO. 367, 103d Cong., 2d Sess. 114 (1994).

⁸¹ The diversity principle has been used successfully by the government to justify various speech-related laws. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990) (holding that the FCC may provide a preference for minority broadcasters); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 374-79 (1969) (declaring that the FCC may require broadcasters to give reply time to individuals subjected to personal attacks); *Associated Press v. United States*, 326 U.S. 1, 18-20 (1945) (stating that Associated Press ("AP") members may not combine to refuse to supply non-AP members with news).

⁸² *Associated Press*, 326 U.S. at 20.

cess laws, in short, belies their justification. Even if the government has an interest in creating access for new voices in certain media,⁸³ there is no justification for limiting that access specifically to cultural, educational, or governmental voices.⁸⁴ The content-based distinction between educational and noneducational speech is unrelated to the content-neutral purpose of creating diverse voices and, as a result, the diversity principle does not justify mandatory access laws.

The diversity principle never has sustained laws that prefer speech of a particular content. In *Associated Press v. United States*,⁸⁵ the seminal case on the diversity principle, the government successfully used antitrust laws to compel the Associated Press to sell its news to competitors, on the theory that all of the news must be sold to all buyers.⁸⁶ The fairness doctrine and its corollaries—the equal time rule, the prime time access rule, and commercial time limits—all seriously encroach on a broadcaster's right to speak. None of these rules, however, forces a broadcaster to air programming of a specific nature or identified content. The must-carry rules, themselves of undetermined constitutionality, made full-power commercial and noncommercial broadcasters eligible for carriage, regardless of their programming. These laws *alter* the content of the affected medium, but do not compel programming of a specified content.

Ultimately, proponents of mandatory access requirements must prove the existence of a real, not abstract, problem.⁸⁷ They will rely on the diversity principle, arguing that government has a compelling interest in providing broad access for "a diversity of voices, viewpoints, and cultural perspectives."⁸⁸ The government must, therefore, prove that individuals

do not have access to diverse voices.

Turner Broadcasting reveals that the government will have difficulty proving that there is not a diverse variety of voices. The government cannot prove that access laws increase diversity simply by pointing out that access laws by operation ensure greater variety within the regulated medium. If so, the must-carry rules could have been upheld on the same reasoning. In light of the FCC's renunciation of the fairness doctrine in 1985, on the ground that there is no scarcity of broadcast outlets,⁸⁹ and the explosive growth of the telecommunications industry since then, it is difficult to conclude that lack of diversity is a real problem. As a result, even truly content-neutral laws that seek to increase the diversity of voices by making all speech (even the non-educational kind) eligible for mandatory access, are unconstitutional.

D. Narrow Tailoring

Laws that compel speech must be narrowly tailored so as not to burden other speech unnecessarily.⁹⁰ Senate Bill 2195, like other mandatory access laws, may act to promote certain speech while silencing other speech. As the Supreme Court indicated in *Turner Broadcasting*:

If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped By reserving a little over one-third of the channels on a cable system for broadcasters, [the 1992 Cable Act] ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained.⁹¹

In *Turner Broadcasting*, the amount of cable-

⁸³ See *Century Fed. Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1555 (N.D. Cal. 1987), *appeal dismissed*, 484 U.S. 1053 (1988). The court stated that :

[T]he [PEG] channels forced upon plaintiff by the Cities carry the inherent risk that a franchisee's speech will be chilled and the direct, undeniable impact of intruding into the franchisee's editorial control and judgment of what to cablecast and what not to cablecast. Neither result can be tolerated under the First Amendment in the name of an "attitude that government knows best how to fine tune the flow of information to which [the people] have access".

⁸⁴ See, e.g., *Simon & Schuster*, 112 S. Ct. at 510-11 (stating that a compelling interest in compensating crime victims from the fruits of crimes does not justify a statute that limits such compensation to the proceeds of the wrongdoers' speech about the crime only); *Arkansas Writers' Project*, 481 U.S. at 231, 231 (holding that an important interest in taxation does not justify a statute that only taxes certain magazines and newspapers); *Carey v. Brown*, 447 U.S. 455, 464-65 (1980) (asserting that an important interest in privacy does not justify a statute that only

prohibits nonlabor picketing).

⁸⁵ 326 U.S. 1 (1944).

⁸⁶ *Id.* at 20. The Court asserted that "[f]reedom to publish means freedom for all and not for some." *Id.*

⁸⁷ See *Turner Broadcasting*, 114 S. Ct. at 2470 (stating that "[the Government] must do more than simply 'posit the existence of the disease' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." (internal citations omitted)).

⁸⁸ S. 2195, *supra* note 13, § 2(12).

⁸⁹ See *In re Syracuse Peace Council v. Television Station WTVH, Memorandum Opinion and Order*, 2 FCC Rcd. 5043, para. 37 (1987), *aff'd sub nom.*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

⁹⁰ See *Turner Broadcasting*, 114 S. Ct. at 2469; *Ward*, 491 U.S. at 799.

⁹¹ See *Turner Broadcasting*, 114 S. Ct. at 2475 (O'Connor J., dissenting).

speech silenced by the must-carry rules was said to be a "critical" issue on remand.⁹³ Mandatory access laws like Senate Bill 2195, which co-opts twenty percent of a video provider's capacity, face similar constitutional hurdles if their carriage displaces other speakers. Of course, even a content-neutral mandatory access law will be unconstitutional on these same grounds.

III. MANDATORY ACCESS AND GOVERNMENT SPENDING

The previous section described why mandatory access proposals fail traditional First Amendment review. This does not, however, end the debate. Mandatory access proponents also seek to justify access laws by invoking the government's spending power.⁹³ The government constitutionally may use its money to fund speech of any particular content. For example, while the government may not compel a television station to air only anti-abortion commercials, it may purchase a timeslot and air the advertisement itself.⁹⁴ Similarly, the government may impose conditions on the receipt of benefits.⁹⁵ For example, employees of a federally funded clinic may be forbidden to engage in abortion counseling while on the job.⁹⁶

Mandatory access proponents argue that the government's spending power should be used to save access laws. They argue that use of the public rights-of-way is a benefit and, therefore, the government may condition the use of this benefit on carriage of

certain speech.⁹⁷ Proposed legislation points to the telecommunication entities' use of public rights-of-way.⁹⁸

The builders of these new networks will use real public property for laying copper wires, coaxial cable, and fiber optic cable, and [will] use previously unused electromagnetic frequencies. The public has a right to demand compensation in the form of public access to such networks by entities that provide substantial benefits to the public The obligation to reserve capacity is a reasonable quid pro quo for the right to use available public rights-of-way.⁹⁹

Nevertheless, there are two reasons why the government's spending power cannot save mandatory access provisions. One is the dissimilarity between government spending and government grants of public rights-of-way. The other is the doctrine of unconstitutional conditions.

A. Public Rights-of-Way

Government spending is not analogous constitutionally to grants of public rights-of-way. When the government subsidizes speech, either through direct grants¹⁰⁰ or through tax exemptions,¹⁰¹ there is a limit on how much speech is created and how much is silenced. The amount of control that the government exerts over speech is limited by the size and duration of the grant or exemption. By contrast, mandatory access regulations, in theory, create in the government a perennial right of content control through the one-time grant of a public right-of-way.¹⁰² For this reason, mandatory access laws are

argument that a telephone company, as a beneficiary of a government-sanctioned monopoly, has accepted a *quid pro quo* and therefore may be prevented from providing cable television).

⁹³ S. 2195, *supra* note 13, § 2(13), requires owners and operators of telecommunication networks (including cable, DBS, and telephone companies) to reserve up to 20% of capacity in exchange for "use of public right-of-ways." S. 1822, *supra* note 13 § 201B(a), reserves up to 5% of capacity on telephone companies and DBS systems for public use "in exchange for the use of public rights-of-way."

⁹⁴ H. REP. NO. 367, 103d Cong., 2d Sess. 13 (1994).

¹⁰⁰ See, e.g., *Rust*, 500 U.S. at 173.

¹⁰¹ See, e.g., *Leathers v. Medlock*, 449 U.S. 439 (1991); *Arkansas Writers' Project*, 481 U.S. at 221; *Regan*, 461 U.S. at 540.

¹⁰² Money grants and tax exemptions are a direct cost to government and these spending decisions are subject to scrutiny by voters and attack by political opponents. Therefore, spending decisions are subject to political checks. In contrast, content-based speech conditions on land use provide no natural limit to the amount of speech either created or silenced, and no direct cost to the taxpayers that would trigger periodic legislative reconsideration. Laws that burden the media and are not subject to

⁹³ *Id.* at 2472.

⁹⁴ See S. REP. NO. 367, 103d Cong., 2d Sess. 42 (1994).

⁹⁵ See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1990) (providing an overview of the constitutional distinction between government spending and government regulation).

⁹⁶ See *Regan v. Taxation with Representation*, 461 U.S. 540, 544-45 (1983) (holding that § 501(c)(3) of the Internal Revenue Code of 1954, which grants a tax exemption to certain nonprofit organizations, is not unconstitutional where Congress simply decides not to subsidize Taxation with Representation of Washington's (TRW) lobbying out of public funds).

⁹⁷ See *Rust*, 500 U.S. at 193. The Court explained that: [t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id.

⁹⁸ See, e.g., *Chesapeake and Potomac Tel. Co. v. United States*, 830 F. Supp 909, 919-21 (E.D. Va. 1993) (rejecting the

more analogous to traditional regulation than to spending power actions.

B. Doctrine of Unconstitutional Conditions

Even if a grant of a public right-of-way is a form of government spending, the government still cannot condition the use of such rights-of-way on mandatory access. The doctrine of unconstitutional conditions forbids the government from requiring an individual to relinquish a constitutional right on the condition that the individual confer a discretionary benefit on the government.¹⁰³ Thus, in *Speiser v. Randall*,¹⁰⁴ the Supreme Court struck down a taxing scheme that provided an exemption for veterans who declared they did not advocate the overthrow of the government.¹⁰⁵ Similarly, in *Arkansas Writers' Project v. Ragland*, the Supreme Court struck down a tax on the media that exempted "religious, professional, trade and sports" publications.¹⁰⁶ As the Court explained in *Leathers v. Medlock*, selective taxation is suspect constitutionally when it "discriminates on the basis of the content of taxpayer speech."¹⁰⁷

Mandatory access laws that condition use of the public rights-of-way on the carriage of educational and cultural speech discriminate on the basis of content. Such laws threaten to "suppress the expression of particular ideas or viewpoints."¹⁰⁸ Because the government constitutionally cannot compel a telecommunications operator to carry particular programming, it also cannot condition a benefit on the operator for agreeing to carry such programming.

Most significantly, if a telecommunications company rejects the speech condition and, therefore, loses the right-of-way, it is thereby completely silenced

within its chosen medium.¹⁰⁹ Under all of the proposed mandatory access laws, access is characterized as a *quid pro quo* for the use of the right-of-way. Telecommunication companies face a Hobson's choice of either carrying the government's preferred message or not speaking at all.

The government violates the Constitution when it conditions a benefit on a grantee giving up speech, unless the government makes available alternative channels of expression.¹¹⁰ In *FCC v. League of Women Voters*,¹¹¹ public television stations that received government funds were prohibited from all editorializing.¹¹² The Court struck down the law, stating that:

[a] noncommercial educational station that receives only 1% of its overall income from CPB [Corporation for Public Broadcasting] grants is barred absolutely from all editorializing [S]uch a station is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializing activities.¹¹³

Telecommunication companies, such as newspaper and magazine publishers, simply are unable to distribute their product without using public rights-of-way. Therefore, the government cannot condition the use of these rights-of-way on the carriage of favored programming.

IV. THE ESCALATION OF GOVERNMENTAL CONTROLS

Professor Lawrence Tribe identified the dangers of access requirements, asserting that such requirements invite "manipulation of the media by whichever bureaucrats are entrusted to assure access . . .

political checks are invalid. See *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983) (holding invalid a tax applicable only to certain members of the press). *Leathers*, 449 U.S. at 439, (stating that taxes that apply "only to a single constituency [are] . . . insulated from . . . political constraint"). In these cases, the Court discussed the failure of political checks when the press' role as a government watchdog is weakened and when small blocks of voters are disproportionately burdened by regulation. This reasoning is applicable to the loss of a political check that occurs when content-based laws cost the public nothing, but escape First Amendment review under the selective spending doctrine.

¹⁰³ *Dolan v. City of Tigard*, US., 114 S. Ct. 2309, 2317 (1994).

¹⁰⁴ 357 U.S. 513 (1958).

¹⁰⁵ *Id.* at 528-29.

¹⁰⁶ *Arkansas Writers' Project*, 481 U.S. at 224.

¹⁰⁷ *Leathers*, 449 U.S. at 447.

¹⁰⁸ *Id.*

¹⁰⁹ See *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), in which the court stated that:

[o]ur prior decisions have voiced particular concern with laws that foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality; handbills on the public streets; the door-to-door distribution of literature; and live entertainment. . . . Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.

Id. at 2045 (internal citations omitted).

¹¹⁰ *Rust*, 500 U.S. at 196-99.

¹¹¹ 468 U.S. 364 (1984).

¹¹² *Id.* at 400.

¹¹³ *Id.*

and the danger of escalating from access regulation to much more dubious exercises of government control."¹¹⁴ Mandatory access is a clockwork orange; its public interest veneer looks appealing, but contains seeds for the luxuriant growth of content controls. Unfortunately, government oversight suffers from mission creep. One law inspires another. The broadcast television industry, in particular, has suffered from the tightening grip of government control. The government's power to define and parcel out portions of the spectrum has evolved into the power to coerce particular types of programming.¹¹⁵ For example, the government broke new ground in content control by enacting the Children's Television Act of 1990,¹¹⁶ which limited advertising during children's television programming¹¹⁷ and mandated programming of an educational and instructional content.¹¹⁸ If there is any doubt about the intrusiveness of this Act, the FCC's implementation of it should be conclusive. In response to this Act, the FCC proposed mandates for minimum amounts of educational broadcasting.¹¹⁹ The FCC also referred to legislative history for lists of programming containing government-approved themes and viewpoints, resulting in decisions that made programs such as *Fat Albert* and *Winnie the Pooh and Friends* acceptable,¹²⁰ while making unsuitable other programs, such as *The Jetsons*.

This progression from structural to content control

¹¹⁴ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1002 (1990).

¹¹⁵ See FCC, Public Service Responsibilities of Broadcast Licensees (1946) (establishing that a broadcaster's license would hinge on whether the broadcaster met preferred programming categories).

¹¹⁶ 47 U.S.C. § 303 (Supp. IV 1993).

¹¹⁷ See 47 U.S.C. § 303(a) (Supp. IV 1993).

¹¹⁸ See 47 U.S.C. § 303(b) (Supp. IV 1993).

¹¹⁹ The FCC has imposed an affirmative children's programming obligation on broadcasters and has restricted the amount of commercial time that may be placed in children's programming. See *In re Policies and Rules Concerning Children's Television Programming*, Notice of Inquiry, 8 FCC Rcd. 1841 (1993) [hereinafter *Notice of Inquiry*].

¹²⁰ *In re Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd. 2111, para. 26 (1991).

¹²¹ ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983).

¹²² *Id.* at 87.

¹²³ *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

¹²⁴ EMORD, *supra* note 4, at 225. See also LUCAS POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 121-41 (1987) (documenting President Nixon's use of antitrust law to silence anti-administration coverage by ABC, CBS and NBC). President Nixon also advocated using the license renewal procedure at the FCC to intimidate the Washington Post through the

was charted by Ithiel de Sola Pool in *Technologies of Freedom*,¹²¹ which discussed governmental control over the postal system, a common carrier. The government's ministerial duties in protecting the postal monopoly provided a handy cudgel for the imposition of content controls. At one point the government prohibited, among other things, the mailing of intoxicating liquor, liquor advertisements in places where liquor was illegal, solicitations that resembled bills, unsolicited contraceptives and advertisements for contraceptives, prize fight films, lotteries, obscene matter, sexually oriented advertisements, pandering advertisements, etc.¹²² The Supreme Court finally put an end to the most flagrant of the content controls over the postal system.¹²³ However, as one author noted, regarding governmental control over other areas such as the media, "affording the government authority to structure the media allows people with political power to punish those whose views they dislike and to reward those whose views they like."¹²⁴

The evolution of structural regulations reveals the escalation of government control. The Prime Time Access Rule¹²⁵ ("PTAR") was enacted to create diverse voices in the television broadcast industry.¹²⁶ In 1975, the FCC modified the PTAR to exempt from its coverage public affairs and children's programming.¹²⁷ Thus, the government used a structural reg-

Post's television stations. See CRAIG R. SMITH, *THE DIVERSITY PRINCIPLE: FRIEND OR FOE OF THE FIRST AMENDMENT* 18 (1989). In another instance of government abuse, Congress passed a law forbidding the FCC from extending any current grants of temporary waivers from its multiple ownership rules. EMORD, *supra* note 4, at 227. This law affected only an affiliate of Rupert Murdoch's News America Publishing Inc., and evidence adduced at trial revealed Congressional ill will against Murdoch. *Id.* The court struck the provision as violative of the Fifth Amendment's equal protection clause. *Id.*

¹²⁵ 47 C.F.R. § 73.658(k) (1993). Section 73.658(k) provides in pertinent part that:

[C]ommercial television stations owned by or affiliated with a national television network in the 50 largest television markets . . . shall devote, during the four hours of prime time, . . . no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films.

The constitutionality of PTAR was upheld in *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). The FCC has launched a proceeding to review the prime time access rule. *In re Review of the Prime Time Access Rule*, Notice of Proposed Rulemaking, MM Dkt. No. 94-123 (Oct. 25, 1994).

¹²⁶ *In re Docket No. 12782*, Report and Order, 23 F.C.C. 2d 382, 394 (1970).

¹²⁷ *In re The Prime Time Access Rule*, § 73.658(k), *Second Report and Order*, 50 F.C.C. 2d 829 (1975).

ulation as a vehicle to reflect its content preferences. Similarly, the must-carry rules of the 1992 Cable Act¹²⁸ deny must-carry status to television stations that are “[p]redominantly utilized for the transmission of sales presentations or program length commercials.”¹²⁹ Low power television stations are given a chance at must-carry privileges, if their programming meets governmental standards.¹³⁰

In a related area, the FCC’s 1972 cable access laws provided for first-come non-discriminatory access on public access channels.¹³¹ The mandatory access proposals outlined in Section I. B. of this Article confiscate the same channel space from cable operators, but reserve the space for preferred educational speech. During the second session of the 103d Congress, one senator attached a provision to a telecommunications bill that would force cable operators to scramble any programming on their channels that

they deem to be “unsuitable for children.”¹³² In short, mandatory access laws that are not themselves the vehicles for content preferences often evolve into such.

Even more insidious than the escalation from structural to content controls, are governmental threats and informal coercion. A regulated industry is vulnerable to threats and informal coercion because its financial viability is controlled by the government.¹³³ Moreover, the informality of government action¹³⁴ and the industry’s dependence on government licensing and other authorization¹³⁵ make later judicial challenge unlikely.

The broadcast industry is a good example of an industry susceptible to informal coercion.¹³⁶ Decades of governmental oversight have hampered broadcast competitiveness and this trend continues today.¹³⁷ Recently, FCC Chairman Reed Hundt publicly

¹²⁸ Pub. L. No. 102-385, 106 Stat. 1460, (1992) (codified at 47 U.S.C. §§ 521-59.

¹²⁹ 47 U.S.C. § 534(g)(1)(1992). Section (g)(2) directs the FCC to conduct a proceeding to ascertain whether such stations are serving the public interest, convenience, and necessity. If so, must-carry status is conferred. *Id.* § 534(g)(2).

¹³⁰ The provision requiring carriage of low power television stations is codified at 47 U.S.C. § 534(c). Under 47 U.S.C. § 534 (h)(2)(B), low power stations to qualify for carriage must “address local news and informational needs which are not being adequately served by full power television broadcast stations.”

¹³¹ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1978) (holding that, because the FCC’s access rules were not “reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasters,” the Commission was precluded from compelling cable systems to act as common carriers).

¹³² S. 1822, *supra* note 13. S. 1822 was passed by the Senate Commerce Committee and was amended to increase the penalty for obscenity on telecommunications devices from \$10,000 to \$100,000. See Jenny Honz, *Groups Hit Senate Bill Restrictions*, *ELECTRONIC MEDIA*, Aug. 22, 1994, at 23.

¹³³ In a classic example of coerced voluntarism, an FCC Chairman met with the three major broadcast networks and persuaded them to implement the “family viewing hour,” an hour of non-violent programming. This informal coercion was held to be unconstitutional. *Writers Guild of America v. FCC*, 423 F. Supp. 1064 (1976), *rev’d on other grounds*, 609 F.2d 355 (9th Cir. 1979).

¹³⁴ Only final agency action and agency action made reviewable by statute are subject to judicial review. 5 U.S.C. § 704 (1988).

¹³⁵ Cable franchisees have been less willing to challenge municipal regulations than FCC regulations because municipal regulations are a tolerable exchange for market protection. *EMORD*, *supra* note 4, at 250-51.

¹³⁶ S. REP. NO. 103-367, 103d Cong., 2d Sess. 99 (1994) (stating that “broadcasters and television networks operate their business subject to many complex rules limiting their freedom to grow and diversify”).

¹³⁷ Content controls often prevent broadcasters from providing a product best tailored to the market. See 47 U.S.C. § 303(b) (Supp. IV 1993) (directing the FCC to consider the extent to which a license renewal applicant has “served the educational and informational needs of children”); Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (1992) (note following 47 U.S.C. § 303 (Supp. IV 1993) (setting restrictions on indecent programming during certain hours); 47 U.S.C. § 307 (1988) (allowing license grants “if the public interest, convenience or necessity will be served thereby”); 47 U.S.C. § 308(b) (1994) (making license renewal contingent on findings that include citizenship and character); 47 C.F.R. § 73.658(k) (1993) (prohibiting commercial TV stations in the 50 largest markets from devoting more than three of the four prime time hours to network programs); 47 U.S.C. § 312(a)(7) (1988) (allowing the FCC to revoke a broadcast license or construction permit for willful failure or repeated failure to allow reasonable access to broadcast airtime for candidates seeking elective office); 47 C.F.R. § 73.1920 (1993) (requiring broadcasters to notify victims of on-air personal attacks and to provide victims with a reasonable opportunity to respond over-the-air); 47 C.F.R. § 73.1930 (1993) (requiring a broadcaster who endorses or opposes a candidate to notify an opponent and provide a reasonable opportunity to respond); 47 C.F.R. § 73.1941 (1993) (requiring a broadcaster who allows candidates to use its facilities to afford equal opportunities to all other candidates for that office to use the facilities); 47 C.F.R. § 73.1942 (1993) (requiring broadcasters to sell advertising time to candidates at the lowest unit charge of the station); *In re Programming Inquiry, Report and Policy Statement*, 44 F.C.C. 2d 2303, 2312 (1960) (requiring broadcasters to air programming that serves “the public interest, convenience or necessity”).

Structural regulations also have deleterious effects on broadcasters’ autonomy and profit potential. See, e.g., 47 U.S.C. § 303(b) (Supp. IV, 1993) (setting advertising limits on the duration of children’s television programming); 47 U.S.C. § 533 (1988) (prohibiting a television broadcaster from owning a cable system in its own market); 47 C.F.R. § 73.3555 (1993) (limiting the total number of broadcast stations (AM, FM or TV) that one can own in any given market (“multiple ownership

stated that it is time to take a "fresh look" at the "social compact between the public and the broadcasting industry."¹³⁸ Chairman Hundt wants television violence reduced and educational programming for children increased¹³⁹—measures the First Amendment makes suspect constitutionally. Broadcasters are soliciting government assistance to remove onerous restrictions on spectrum use and media ownership,¹⁴⁰ and to ease the transition to high definition television ("HDTV"). In the trading, backing, and filling, the potential for harm is real.¹⁴¹

The government's capacity to do harm is even greater with regard to information networks such as the Internet, which also is affected by proposed legislation.¹⁴² The evils of escalating controls and coerced "voluntarism" only will increase as the government gets a firm grip on the information infrastructure.

IV. CONCLUSION

Mandatory access laws have serious First Amendment problems and set an ominous precedent for future government regulation and coerced voluntarism. Mandatory access proponents base their arguments on the perceived poor quality of the news media. The premise of the access argument is, however, at odds with the reality of greater programming choices of higher program quality. The greater the number of commercial programmers, the greater the quality and diversity of programming. Governmental efforts

to compel carriage of certain programming are counterproductive because they threaten the viability of the regulated industries. There is an inverse relationship between costs placed on telecommunications companies and the number of programming choices they can offer. Mandatory access laws may have the effect, therefore, of reducing program quality.

Those who complain about the current status of video programming and who attempt to use the force of law to gain access for approved programming, are mourning what they perceive to be the failure of the marketplace of ideas. This perception is fundamentally at odds with the First Amendment, which is premised on the belief that the truth emerges from open debate,¹⁴³ and does not allow the government to prefer certain programming because of its perceived higher quality. Government-mandated access creates new speaking opportunities for some, at the expense of denying First Amendment rights to others.

The belief that the marketplace of ideas has failed is a value judgment most likely shared by everyone whose speech is rejected or ignored. In this case, the judgment is wrong. The existence of highly-commended programming such as A&E, Bravo, CNN, C-SPAN, C-SPAN II, The Discovery Channel, and The Learning Channel, to name just a few, proves that the marketplace of ideas has not deteriorated. The maturing of the DBS and telephone video platform industries promises to increase the supply of high-quality programming.

rule"), limiting the ownership of a television station to one per market ("duopoly rule"), limiting ownership of a daily newspaper by a regional broadcaster ("daily newspaper cross ownership rule"), limiting the total number of broadcast stations one can own nationwide); 47 C.F.R. § 73.658(j) (1993) (prohibiting broadcast networks from owning financial interests in programs they obtain from outside sources); 47 C.F.R. § 73.658(g) (1993) (prohibiting the ownership of more than one television network). Congress has proposed legislation to remove the ownership rules. See, e.g., S. 1822, *supra* note 13, § 701.

¹³⁸ Kim McAvooy, *Hundt's New Deal*, BROADCASTING & CABLE, Aug. 1, 1994, at 6.

¹³⁹ Kim McAvooy, *Hundt's Social Compact: "It Scares the Hell Out of Me,"* BROADCASTING & CABLE, Aug. 8, 1994, at 14.

¹⁴⁰ *Id.*

¹⁴¹ See SUNSTEIN, *supra* note 2, at 115. Sunstein asserts that:

[c]itizens may often find it in their interest to give up the right to free speech in return for government benefits. But if government is permitted to obtain a number of enforceable waivers of the free speech right, the aggregate effect may be substantial, and the deliberative processes of the public will be skewed. This skewing effect is intolerable even if individual citizens voluntarily agree to waive their rights.

Id.

¹⁴² H.R. 3626, *supra* note 41, § 308. This bill directs the Commission to:

study policies that will enhance civic participation through the national information infrastructure The study shall examine but is not limited to, the social benefits of flat rate pricing for access to computer and data networks, the policies which will determine how access to computer networks will be priced . . . and the appropriate role of common carriers in the development of national computer and data networks.

Id. S. 1822, reserves five percent capacity on "telecommunications networks" that transmit or carry "information services, including video services." *Id.* §§ 201(B)(a), (d). Thus, the legislation would appear to apply to information networks like the Internet. The legislation does not, however, explain how one calculates five percent of capacity on a switched network. In addition, S. 1822 would allow the FCC to create a separate definition of universal service only applicable to schools, libraries, health care facilities, museums, and public broadcast stations. *Id.* § 201(C)(a). S. 1822 also directs the Commission to "enhance . . . the availability of advanced telecommunication and information services" and to provide such entities with preferential rates. *Id.* § 201(C)(b).

¹⁴³ See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

More fundamentally, even if the entire video marketplace was comprised solely of situation comedies and game shows, governmental attempts to rectify the situation by coerced carriage of preferred programming would be contrary to the philosophical foundation of the First Amendment. Such attempts would ignore the fact that freedom of expression is a birthright, not a privilege earned by the quality of one's speech. The First Amendment protects equally the insightful, the tedious, and the inane. The First Amendment is a shield to protect us all, not a sword

to silence some.

Like using the Bible as a bludgeon, it is a grotesque misuse of the First Amendment to use it to make distinctions among speakers based on the perceived quality of their speech. Access laws, which use the force of government to strip editorial discretion from some, to silence others, and to promote the speech of a few, reflect a vision of the First Amendment "that is agreeable to the traditions of nations that have never known freedom"¹⁴⁴

¹⁴⁴ Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 163 (1973) (Douglas, J., concurring).

