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Myths and Misunderstandings

Michael I. Meyerson
University of Baltimore School of Law, mmeyerson@ubalt.edu

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The development of a body of law for a new communications techology is an odd experience for American jurisprudence. Stare decisis is designed to ensure that both common law and constitutional law develop sequentially, with principles of the past adopted, and adapted, for current usages. Peculiarly, even though we have but one First Amendment, there has long been recognition that the principles that are bedrock for one medium are irrelevant to another.

The clearest statement of this concept came in *Metromedia, Inc. v. San Diego* when the Supreme Court stated, "Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method."[1] The problem, of course, is how to discern this "law unto itself" for any particular form of communication.

Cable television has been in existence for four decades and there is not yet a consensus, or definitive Supreme Court opinion, elucidating cable's "law." Advocates, scholars and judges always begin with a search for analogies to pre-existing technologies. Those in favor of governmental regulation compared cable television to that other form of television, broadcast television, in the hope that the relative ease with which broadcast regulations were traditionally upheld would rub off on cable. Those opposed to regulation compared cable to the most protected form of communication, the print medium, and tried to use the concept of an "electronic newspaper" to create a constitutional shield against governmental intervention.

When finally faced with the question of whether cable was "like a broadcaster" or "like a newspaper," the Supreme Court managed the seemingly difficult feat of further confusing the issue. In *City of Los Angeles v. Preferred Communications, Inc.*,[2] the Court acknowledged that the operation of a cable system did "implicate First Amendment interests." On the critical question of how cable implicates the First Amendment and what standard should be used for judging the constitutionality of regulation, the Court punted, stating that cable was like a newspaper *and* like a broadcaster:

> Cable television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book

> publishers, public speakers and pamphleteers. [Preferred's] proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters....

These two sentences are, in a legal sense, contradictory. Because the print and broadcast media have such different standards for regulation, it is unedifying to say that the newer technology resembles both. Perhaps the more helpful language comes from the concurring opinion in *Preferred,* in which Justices Blackmun, Marshall and O'Connor stressed that the Court had "left open the question of the proper standard" for analyzing cable television. The three Justices presented the possibility that no analogy to other forms of communication may prove to be appropriate and that the characteristics of cable television may, "require a new analysis."

With this opening, comes a new question: which timeless principles should be used to create the new analysis? Unfortunately, the myths that have grown around certain classic First Amendment cases make this formidable task even more difficult.

For example, in *Red Lion Broadcasting Co. v. FCC,*[3] the Supreme Court upheld the constitutionality of the Fairness Doctrine as applied to broadcasters. When a similar, though not identical, "right of reply" for newspapers was struck down five years later in *Miami Herald Publishing Co. vs. Tornillo,*[4] the dichotomy between broadcasting and the print medium was constitutionalized. In countless articles and briefs discussing cable television's location in this dichotomy, the "holding" of *Red Lion* has been red lined to the simple test that only media with a "spectrum scarcity" are subject to governmental regulation. "Economic scarcity," though, because it also affects newspapers, is deemed insufficient to permit governmental regulation, even if it creates a limit on the voices in a community.

One of the more blatant misuses of this distinction is by those who argue that there is no scarcity in cable television because the cable can offer 100 channels, while broadcasters have a far more limited number of channels available. The fallacy here is that the "scarcity" of cable lies in the number of gatekeepers not in the number of speakers the gatekeeper lets through. As long as there is only one cable operator, there is a scarcity in that most critical function, the selection of the programming. Even in those rare communities with two cable operators, at least temporarily, the existence of two bottlenecks hardly bespeaks the end of scarcity.

There is also something misleading about basing the discussion on "scarcity" at all. Such an analysis ignores the last section of *Red Lion,* Section III E. (arguably one of the least read sections of any landmark decision). This part of the Court's opinion was meant to

answer the argument, made in 1969, that scarcity was a problem of the past. First, the Court noted there continued to be more uses for the spectrum that it could accommodate and that "wise planning is essential." Then, the Court held that, even where there is empty spectrum space, regulation is still permissible.

The reason that even broadcasters operating in an environment free from spectrum scarcity can still be subject to Fairness-type regulation is that the existing broadcasters have an unnatural advantage over potential competitors due to the original assistance of the government. The three networks do not control a majority of the viewing eyes due to mere survival of the fittest; they are special beneficiaries of governmental largesse:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others ... Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are *the fruit of a preferred position conferred by government.*

Thus, the analysis of cable's place in the legal spectrum should not be limited by an analysis of why cable is "scarce." Rather, the appropriate question is whether existing cable operators are beneficiaries of "the fruit of a preferred position conferred by government."

The vast majority of the more than 2500 cable operators are enjoying a governmentally-granted, governmentally-protected monopoly. Even if those who argue that cable is a "natural monopoly" are correct, so that the monopoly situation cannot fairly be called the handiwork of government, it is unmistakable that the monopolist was selected by the governmental franchising process. The primary benefit of governmental license to use public rights-of-way does not exhaust the benefits utilized by the cable operators. Compulsory licenses and mandated pole attachment rates have further assisted the cable operators in their communications business.

Thus, governmental assistance, rather than "physical vs. economic" scarcity, lies at the heart of the broadcast/newspaper dichotomy. Where newspapers have become powerful due to their own abilities, government has no claim. But where newspapers are assisted by governmental actions, like the Newspaper Preservation

Act,[5] otherwise inconceivable governmental regulation becomes acceptable.

The Newspaper Preservation Act grants papers an exemption from antitrust liability, permitting competing newspapers to combine their publishing and business functions if one is in "probable danger of financial failure." If they do combine, the papers must keep their editorial and reporting staffs separate. Now, when else can government tell a newspaper editor which reporter she is barred from using? Only because government has provided assistance is such regulation permitted. In sum, courts and commentators seem to agree that where government has provided an anti-competitive benefit to a speaker, government is then permitted to impose content-neutral regulations that increase the diversity of voices.[6]

For cable television, the most important content-neutral regulation designed to increase the diversity of voices are public and leased access provisions that permit programmers unaffiliated with the cable operator to offer programs over the cable system. Those who oppose this form of regulation rely on a myth about another case, *Buckley v. Valeo.*[7] In striking down a provision of the Federal Election Campaign Act which limited personal annual expenditure on behalf of a candidate, the Supreme Court dismissed the argument that there was a governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections ... [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...."[8]

Some have tried to use this reasoning to argue that there is no governmental interest in promoting diversity of expression:

> Thus the Court recognized that it is not government's role to suppress the speech or speech-related activities of one individual or group in order to foster the ability of others to speak. As a result, no compelling interest can be based on such a goal, because the goal is antithetical to the First Amendment.[9]

The fallacy in this argument is that the Court recognized no such thing. The key concept in the condemnation of restricting one party's speech "in order to enhance the relative voice of others" is found in the phrase "*relative* voice." There was no increase in the volume or frequency of the voices that were intended to be aided. The constitutional sin in *Buckley* was that the goal and effect of the limitation on expenditure was to reduce the total amount of speech presented. The lessening of discussion is what was antithetical to the

First Amendment. By contrast, the Supreme Court has willingly permitted the government to "suppress the . . . speech-related activities of . . . one group in order to foster the ability of others to speak," by upholding a ban on newspaper acquisition of co-located broadcast licenses and a ban on A.T.&T.'s entry into electronic publishing.[10] The difference was that in the two cases where the restrictions were upheld the net effect of the regulation was more speech with more voices. Rather than being antithetical to the First Amendment, such an increase furthers the marketplace of ideas.

Unfortunately, even the Holmesian marketplace of ideas is not free from misuse at the hands of our precedential myth-makers. For it is the marketplace of Adam Smith that is the model for this line of reasoning, promising an invisible hand to pen messages we need. The problem however, is that the marketplace of ideas does not work in the same way as the marketplace for goods. There is no great danger to society if four cereal makers produce the vast majority of cereal consumed each morning. One need not be intuitively troubled that the same manufacturer is producing a highly-sweetened, chocolate confection for children to eat at breakfast and a high-protein, high-fiber, all-natural health fix for their parents.

By contrast, the domination of mass communications by a handful of editorial decision-makers would be more than a little troubling. We would not trust one editor accurately and competently to present the range of views from the radical left to the radical right and back to the middle again. As John Stuart Mill argued:

> It is not enough that [a person] should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. This is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them: who defend them in earnest, and do their very utmost for them.[11]

The ability to hear the enormous range of diverse opinions presented by those who actually believe them is made possible by cable television. The generous channel capacity permits a range of voices never before available through electronic mass communication. In creating a legal doctrine for analyzing governmental regulation of cable television, respect must be given to the centuries-old goals of the First Amendment. Content-neutral, pro-diversity regulation must be permitted and encouraged, else later generations will be bemoaning "the myth of freedom of expression."

1. *Metromedia, Inc. v. San Diego*, 453 US 490 (1981) (citations omitted).

2. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

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

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

5. 15 U.S.C. Sec. 1801.

6. The fact that the Fairness Doctrine is not content-neutral may argue against its constitutionality, even if the broadcast spectrum is still deemed "scarce" and broadcasters continue to enjoy the fruits of their preferred position.

7. *Buckley v. Valeo*, 424 U.S.1 (1976)

8. *Id.* at 47-49.

9. G. Shapiro, P. Kurland & J. Mercurio, *Cable Speech* 104 (1983).

10. *FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) and *U.S. v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub. nom. Maryland v. U.S.*, 460 U.S. 1001 (1983).

11. J.S. Mill, *On Liberty* 32 (R. McCallum, ed. 1947).

About the Authors

Blaga Dimitrova writes poetry and prose and is active in the Bulgarian organization Eco-Glasnot.

Irena Grudzinska Gross teaches literature and liberal studies at Emory University in Atlanta.

Václav Havel is the President of the Czecho-Slovakian Federative Republic.

Janos Kis is a Hungarian writer.

Ivan Klíma is the Czech author of *My Merry Mornings* and other novels and short stories.

György Konrád is the President of the International P.E.N. Club.

Michael I. Meyerson is a professor at the University of Baltimore Law School.

Adam Michnik is now the editor-in-chief of the first Polish independent daily, *Gazeta Wyborcza.*

Martin Palous is a former professor of natural sciences at Charles University in Prague. He signed the Charter in 1977, lost his university position, and for years worked as a manual laborer.

Monroe E. Price is the Dean of Benjamin N. Cardozo School of Law, Yeshiva University and writes on telecommunications policy and the law.

W. Michael Reisman is Wesley Newcomb Hohfeld Professor of Jurisprudence at Yale.

Christopher S. Taylor, is the Dean of Calhoun College, Yale University, and a lecturer in New Eastern Languages and Civilization there.

Laurence H. Tribe is the Tyler Professor of Constitutional Law at Harvard Law School.

Ludvik Vaculik wrote the famous "2000 Words Manifesto" that precipitated the 1968 Prague Spring.

John O. Voll is Chair of the Department of History at the University of New Hampshire.