Mississippi College Law Review

Volume 4 | Issue 1 Article 11

1984

Constitutional Law - Editorial Discretion over Public Television - Muir v. Alabama Educational Television Commissioner

Robin L. Roberts

CONSTITUTIONAL LAW—Editorial Discretion Over Public Television—*Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983)

The United States' economic dependence on oil imports has led to reactions in unexpected places. A recent Fifth Circuit decision dealt with the first amendment issues raised by viewers' attempts to compel two public television stations to air a cancelled program critical of Saudi Arabian culture.[1] Public television's decision-makers should not be held hostage by fear of upsetting volatile Middle Eastern politics. First amendment principles cannot be compromised by intimidation. But, if public television editors makes a mistake, what remedy is appropriate? Does the first amendment invalidate the decision or should the political process remove the decision-maker?

The issues addressed by this note arose from an editorial decision which had strong political overtones. The novel aspects are whether public television is a governmental entity and how the first amendment analysis inverts when the "speaker" has decided to remain silent and the government is the speaker rather than the suppressor. Does the private citizen's right to see impose affirmative responsibility on the government to program what he wants to see?

FACTS

Muir v. Alabama Educational Television Commission[2] arose after the Alabama Educational Television Commission[3] (AETC) cancelled *Death of a Princess*,[4] a documentary-drama of the events which culminated in the public execution of a Saudi Ara-

---

1. Muir v. Alabama Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983); [hereinafter cited as *Muir II*].

2. *Id.*

3. The AETC was organized under ALA. CODE § 16-7-1 (1975) and has statewide duties for controlling educational television stations. The agency is funded through the state special education trust fund and matching funds from the Corporation for Public Broadcasting. *Id.* at 1036.

4. The show was one of a thirteen part series called *World*. It was funded through the station program cooperative and produced as a joint venture of WGBH-TV, a public broadcast station in Boston, Massachusetts, and ATV Network of London, England. *See Muir II*, 688 F.2d at 1036.

bian princess for her adultery with a commoner.[5] The program had been scheduled and announced when the decision to cancel was made, because Alabamians fearing retaliation against Americans in Saudi Arabia protested to the Commission.[6] In general, the United States did not want to jeopardize good relations with the oil exporter. The film had already created tension in world politics; Saudi Arabia temporarily recalled its Ambassador to England in protest of the film's showing in England.[7]

The suit in *Muir*[8] was brought by disgruntled viewers who had planned to watch the cancelled program, and sought to compel the AETC, through injunction, to air the program as scheduled. Relief was denied in the district court.[9]

KUHT-TV in Houston, Texas, a public station[10] operated by the University of Houston also decided[11] to cancel *Death of a*

---

5. *Muir II*, 688 F.2d at 1036.

6. *Id.* The chairman of the AETC, Jacob Walker, stated: "[B]roadcast[ing] of the program could expose Alabama citizens in the Middle East to physical assault or property damage." *Id.* at 1054 (Johnson, J., dissenting).

The propriety of the decision is not a matter considered here. Suffice it to say that the justification of the AETC is unpersuasive to this author. The decision was blatantly political. The issue discussed here is the power to cancel *Death of a Princess*, not the propriety of the decision.

7. *Id.* at 1053.

8. 656 F.2d 1012 (5th Cir. 1981) [hereinafter cited as *Muir I*].

9. *See Muir I*, 656 F.2d 1012, 1014 (5th Cir. 1981). The trial judge was J. Foy Guin, whose unreported decision is summarized: (1) The likelihood of success on the merits was low. (2) The first amendment protects broadcasters' decisions whether public or private. (3) The plaintiffs have no right of access and, therefore, no right to compel the programming.

10. *See* Barnstone v. University of Houston, 514 F. Supp. 670, 672 (S.D. Tex. 1980) [hereinafter cited as *Barnstone I*] (Fifty percent of the station's funds are appropriated by the State of Texas).

11. The decision to cancel was made by Patrick J. Nicholson, the administrative head of the station, who had never made a programming decision in his seventeen years in the position. *Barnstone I*, 514 F. Supp. at 674. Programming responsibility was ordinarily delegated to James Bauer, general manager, and Virginia Memre, programming director. Nicholson reviewed the film after a notice warning of the controversial material from PBS was called to his attention. *Id.* at 673. Neither of the ordinary programmers agreed with Nicholson's decision. *Id.* at 674.

Nicholson had the authority to make the decision and on this occasion felt the circumstances required intervention. In a press release he stated as his reasons for cancellation, "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and U.S. national interest all point to the need to avoid exacerbating the situation." *Id.*

Additionally, the district court found four possible reasons for the decision—all either arbitrary or blatantly political.

(1) The film was in bad taste. (2) The public might believe the docu-drama was true. (3) The University through its open university program had tailored an individual curriculum for a distant cousin of the executed princess. (4) The University had economic ties with major oil companies with large holdings in the Middle East. *Id.* at 675. *Compare*, note 6, *supra*.

Princess. Barnstone v. University of Houston,[12] which was consolidated with *Muir I* for the en banc rehearing, was decided in Texas[13] shortly after *Muir* was decided in Alabama. The issues were identical. Disappointed viewers also brought *Barnstone*; however, the district court granted relief,[14] which led to a series of appeals[15] finally laid to rest by *Muir II*.

STATE ACTION

Before reaching the merits of the first amendment claims in the *Muir* cases, each court grappled with the threshold state action issue. The implications of the government's entering mass media are far-reaching: may government consistent with the principle of liberty embodied in the first amendment, participate in the marketplace of ideas?

A. Government Involvement Through Regulation and Funding

During the infancy of electromagnetic communications, government made a fundamental choice to regulate rather than own the airwaves.[16] Government action was necessary because radio technology was primitive and competition for airspace was keen, resulting in a chaotic overlap; the spectrum was inefficient without regulation.[17] Through regulation,[18] the government sought to avoid the inherent problems of government ownership, yet gain some order for private sector use. In effect, Congress established a

---

12. 660 F.2d 137 (5th Cir. 1981) [hereinafter cited as *Barnstone II*].
13. *Barnstone I*, 514 F. Supp. 670 (S.D. Tex. 1980).
14. *Id.* at 692.
15. The history of this litigation is complex. For the sake of clarity a synopsis is given: (1) Barnstone v. University of Houston, 487 F. Supp. 1347 (S.D. Tex. 1980) (Injunction granted compelling KUHT-TV to show *Death of a Princess*).
(2) Order of the Fifth Circuit No. 80-1527 (May 12, 1980) (The court stayed the injunction on the condition that the program be taped for possible airing after a judicial decision).
(3) Barnstone v. University of Houston, 446 U.S. 1318 (1980) (Justice Powell refused to vacate the order of the Fifth Circuit).
(4) *Barnstone I*, 514 F. Supp. 670 (S.D. Tex. 1980) (After remand a trial on the merits was held and the court ordered *Death of a Princess* to be shown within thirty days).
(5) Order of the Fifth Circuit No. 81-2011 (January 14, 1981) (The Fifth Circuit stayed the order of the district court until an appeal could be heard).
(6) *Barnstone II*, 660 F.2d 137 (5th Cir. 1981) (The Fifth Circuit reversed the district court decision).
(7) *Muir II*, 688 F.2d 1033 (5th Cir. 1982) (*Barnstone II* consolidated and heard en banc with *Muir I*; the court upheld its reversal of the district court).
16. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377, 395 (1969).
17. *Id.* at 375-76.
18. Federal Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162. The Act was later codified and often amended under Title 47 U.S.C.

public trust in the licensees[19] implemented by a policy of fairness in content.[20] The actual regulation was to be accomplished through the Federal Communications Commission,[21] which was to oversee[22] the phenomenon. The agency could devote the requisite time to developing expertise[23] with the public interest as its paramount concern.[24]

Commercial broadcasting, because of popular tastes and the profit motive, did not fully meet the public need. The educational potential of television was unexplored.[25] Because these needs were not being met, Congress deviated significantly from the regulation model. Public radio and television[26] were created. Both public and private licensees were regulated in the same way.[27]

Funding public television has been a persistent dilemma: how could government support a broadcast media with taxes,[28] and, at the same time, avoid claims of censorship? The Carnegie Report of 1967[29] gave a proposed solution. Its theme was the insulation of public television from state action concurrent with governmental

---

19. *Muir II*, 688 F.2d at 1040 (citing Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C. Cir. 1978)).

20. *Red Lion*, 395 U.S. at 377. *Compare* Miami Herald Co. v. Tornillo, 418 U.S. 241 (1974). There is no fairness doctrine for private electronic communications. This points up the disparate treatment which the latter has received: courts are more circumspect concerning electronic media because the finite technology and governmental licensing requirements erect entrance barriers, whereas anyone may print a newspaper.

This rationale is outdated and incorrect. First, modern advances in technology have rapidly expanded the technological capability of electronic media. Second, to be a newspaper with a circulation of any consequence requires a large capital investment. The entrance barrier is *de facto* just as high.

See also Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring). Justice Douglas saw regulation of private electronic media as no different from regulating the written press. He would have limited governmental regulation to the technology of electronics, its only really unique characteristic.

21. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976).

22. *See Muir II*, 688 F.2d at 1047. (The FCC has authority to review licensees periodically, *sua sponte* or on request).

23. *Red Lion*, 395 U.S. at 385. The courts have traditionally deferred to the FCC; it is reviewed only under the substantial evidence standard.

24. 47 U.S.C. § 309(a) (1976); *Red Lion*, 395 U.S. at 383.

25. *See generally* Alexander, *Public Television and the "Ought" of Public Policy*, 1968 WASH. U. L.Q. 35.

26. *Barnstone I*, 514 F. Supp. at 680 (Radio frequencies reserved in 1939; television in 1952).

27. Accuracy In Media, Inc. v. FCC, 521 F.2d 288, 291 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

28. Initially there was no direct funding; however, the Educational Broadcast Facilities Act of 1962 provided grants to build and equip public stations. This marks the first conjunction of ownership and regulation. The Act did not alleviate the funding problems. *See Barnstone I*, 514 F. Supp. at 680-81.

29. Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967) [hereinafter cited as *Carnegie Report*].

funding. Congress passed legislation based on the Carnegie Report,[30] which sought to bring television to the "full service of man."[31] The Report envisioned public television as a competitive alternative to the commercial networks with program offerings governed not by commercial necessity but by dedication to cultural and educational development and public service.[32] It is, as Judge Rubin says in *Muir II*,[33] geared to a more sophisticated audience.

The legislation, following the recommendation of the Carnegie Report, created a private, non-profit corporation through which substantial government funds could be channeled yet would allow the government to remain isolated from political involvement and the concomitant first amendment problems.[34] The most salient feature in the system[35] was the non-delegable, mandatory autonomy for programming discretion.[36]

Congress failed to enact one provision of the Carnegie Re-

---

30. Congress implemented the *Carnegie Report* through the Public Television Act of 1967, 47 U.S.C. §§ 390-99 (1976).

31. *Carnegie Report* at 13.

32. *See* Alexander, *supra* note 25, at 37. The theme of one section of the report was drawn from E.B. White:

> Noncommercial television should address itself to the idea of excellence, not the idea of acceptability—which is what keeps commercial television from climbing the staircase. I think television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills.

Carnegie Report at 13.

33. 688 F.2d at 1050.

34. *See* Note, *Editorial Discretion of State Public Broadcasting Licensees*, 82 COLUM. L. REV. 1161, 1162-67 (1982). (The author gives an excellent discussion of the political history of public television and the attenuated distinctions between the public interest and political intervention).

35. *See Carnegie Report* at 36.

36. 47 U.S.C. § 396 (g)(1)(B).

> No license shall be granted to a television broadcast station having any contract agreement or understanding express or implied with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest or (2) substituting a program which, in the station's opinion, is of greater importance.

47 C.F.R. § 73.658 (e). *See also Barnstone I*, 514 F. Supp. at 682 (The court recognized the aim of Congress as being local autonomy).

Also, Congress proscribed political advocacy on the network. 47 U.S.C. § 396 (f)(3) (1976). *Cf.*, FCC v. League of Women Voters, 547 F. Supp. 379, *reconsidered on jurisdictional grounds*, 460 U.S. 1010 (1983).

port, the excise tax on television sales.[37] The tax was to have supplied steady funding on a non-appropriative basis. This omission undermined public television's independence—consequently, there has been a lack of definition of authority, especially in program content.[38] Subsequent developments and needs have led to modifications in the public television structure.[39] The result is a funding cloverleaf which, followed to its end, finds public television hopelessly entangled with government action.

B. The State Action Decision in Muir II

The Corporation for Public Broadcasting funded *Death of a Princess*, at least partially with public funds.[40] *Muir II* tested the congressional system's efficacy for eliminating state action.

Justice Douglas' dicta in *Columbia Broadcasting System v. Democratic National Committee*,[41] a decision involving a private licensee's denial of time for political advocacy, foreshadowed the problems raised in *Muir II*. The Supreme Court, in an analytically difficult case which resulted in several opinions, held that private licensees had discretion over their programming.[42]

Justice Douglas, concurring, said:

---

37. *See* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1155 (1974).

38. *Id.* at 1156-64. A struggle resulted when the corporation tried to exercise content control over PBS (*See infra* note 39). The tension seemed to reach a pinnacle in 1973. A compromise was reached whereby a review system was established calling for a committee appointed by CPB and PBS to decide any controversy regarding a program's objectivity. *Id.* at 1157-58. When PBS had program control, disputes arose concerning political satirism and, in another program, frontal nudity in a ballet. *See generally* Chase, *Public Broadcasting and the Problem of Government Influence: Towards a Legislative Solution*, 9 U. MICH. J. L. REF. 64 (1975). *See also* Note, *supra* note 34, at 1166 n.33.

39. The station interconnection system established by Congress, 47 U.S.C. § 396 (h)(2), had become the primary source of program production due to a lack of funding at the local level. *See* Canby, *supra* note 37. To help alleviate these problems a third organization called the Station Program Cooperative (SPC) was formed. *See Barnstone I*, 514 F. Supp. at 672-73.

The mechanics of the SPC are roundabout. Through this organization the CPB grants money directly to stations to use consistently with the local autonomy concept. A producer introduces his program to PBS, which makes up a catalogue of possible program listings. PBS then sends the catalogue to its member stations. The local stations each vote on whether they wish to participate in the funding of the programs. If enough vote to fund the program PBS airs the programs via satellite and those stations that voted to share the cost of the programs have the right to show the program. *Id.* This funding system is not completely ineffective; but it offers only repetitive protection since both Congress and the Station Users Agreement *mandate* local control. *See Muir II*, 688 F.2d at 1036 n.4.

40. *See Muir II*, 688 F.2d at 1036.

41. 412 U.S. 94, 149 (1973) (Douglas, J., concurring).

42. *Id.* at 120.

> [Public Broadcasting] is said not to be an agency or establishment of the United States Government. Yet, since it is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment . . . . The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired.[43]

Justice Stewart echoed this theme in his concurrence and drew a conclusion:

> The First Amendment protects the press from Governmental interference; it confers no analogous protection on the Government . . . . [W]ere the Government really operating the electronic press, it would, as my Brother DOUGLAS points out, be prevented by the First Amendment from selection of broadcast content and the exercise of editorial judgment.[44]

The *CBS* decision is difficult precedent for *Muir II* because of fragmentation on the state action question in the private licensee context.[45] Some members of the Court thought that the government involvement, which is substantially less in *CBS* than in *Muir II*, was state action.[46] If unanimity had been reached on the state action issue, the decision might have been unfavorable to the network. However, the denial of certiorari in *Muir II* indicates that the *CBS* adjudication did not hinge on the state action analysis. The Fifth Circuit was, of course, without this guide.

In *Muir II*, the Fifth Circuit had to decide the state action issue as well as the proper application of the first amendment to a public licensee. In this connection, Professor Canby has argued that the first and most likely place to look for contortions in state editorial adjudication is the state action requirement.[47] Canby states that "no permissible torture"[48] of the requirement could elude state action in public television. The intermingling described

---

43. *Id.* at 149.
44. *Id.* at 139, 143.
45. Four Justices, Burger, Stewart, Rehnquist, and Douglas, two of whom indicated the significance of state action on the outcome of the litigation, found no state action. *CBS*, 412 U.S. at 97, 148. Two Justices, Brennan and Marshall, found state action and would not have allowed the editing. *Id.* at 170. Three Justices, Blackmun, Powell and White, decided the case on statutory grounds "assuming" or not deciding the threshold question. *Id.* at 146-48.
46. Canby, *supra* note 37, at 1126.
47. *Id.* at 1125.
48. *Id.* at 1126.

by Justice Douglas leads ineluctably to the conclusion that state action exists in public television.

The various opinions took several approaches to state action in the *Muir* decisions. In *Muir II* the majority did not address the existence of state action *per se*; rather, the opinion assumes state action and concentrates on its import. The majority rationalized its decision on non-constitutional grounds of statutory construction.[49] Much of the majority opinion was spent developing the statutory background,[50] which is important for two reasons. The opinion implicitly recognized Justice Douglas' theory of intertwining, but did not reach the conclusion, as did Justice Stewart, that content editing is forbidden.[51] For this reason, the state action position of the majority is less important than its final analysis. Also, the statutory background provided a basis for deference to the congressional balance already in place.

A second reason for finding state action is found in *Barnstone I*:[52] even if the public television structure were adequate to divorce state action from federal funding, none of the safeguards were enacted to protect stations at the state level. The court stated: "the fox has been asked to guard the henhouse."[53] The Carnegie Report, which structured an umbrella to prevent "federal" action, even though ineffective under the Douglas view, offered no shelter from the blowing rain of local funding. The court correctly applied the analysis because both of the stations in this litigation were directly funded by the state government;[54] federal funding is only one avenue of state action.

Judge Markey focused on state control in *Muir I*. As long as the station functioned independently of governmental control, the fact of funding did not create state action. The state ownership was reason for a vigilant watch, but the function of the station was essentially private, not governmental. Therefore, the acts of the station managers were not state action.[55] A different analysis, Judge Markey intimates, would disallow public television as an unconstitutional entity.[56]

This analysis is a variant of the majority's view, stated above,

---

49. *Muir II*, 688 F.2d 1037-38, 1043.
50. *Id.* at 1038-41.
51. *Id.* at 1037-38, 1043.
52. 514 F. Supp. 670.
53. *Id.* at 683.
54. *See* notes 3 and 10, *supra*.
55. 656 F.2d at 1018.
56. *Id.* at 1018 n.11.

but it differs fundamentally. The majority said that because of the function, state action had no effect; *Muir I* held that because of the function, state action did not exist. The former, given the funding structure, is more consistent with ordinary definitions of state action.

The effect of state action presents a more difficult analytical problem. The difficulty is capsulized in Chief Justice Burger's profundity in *CBS*: "[F]or better or worse, editing is what editors are for; and editing is selection and choice of material."[57] When the government decides content, the decision can arguably be called censorship, repugnant to the first amendment. In this sense, *Muir II* decided the constitutionality of public television as an entity.

C. *Implications of State Action in Mass Media*

The wisdom of governmental involvement in funding an electronic mass media is debatable. Does this violate the first amendment or is it merely a legislative decision based on the public interest?

Several advantages can be posited for allowing governmental ownership of the medium.[58] First, the untapped educational and cultural potential seems enormous. Second, public awareness of political and community issues could be increased. Last, public television could be an alternative to the commercial proselytizing of private television.

On the other hand, the presence of a governmental medium in almost every American living room, if used as a political tool, is awesomely frightening.[59] It conjures visions of indoctrination, the ultimate propaganda vehicle. Even subtle doses of indoctrination over long periods may be cancerous to liberty. Congress presumably considered these reasons in its initial choice not to own the electronic media. Were there an indicia of these fears becoming reality in public television, the first amendment would be the proper antidote; public television as an entity would be unconstitutional.

But public television is not the forerunner of a ministry of truth. Congress created public television with laudable intentions, and the accomplishments and contributions of public television to date are worthwhile. Public television hints at the medium's pos-

---

57. 412 U.S. at 124.
58. *See generally* note 32, *supra.*
59. Alexander, *supra* note 25; *see* Canby, *supra* note 37, at 1127, 1151.

sibilities. Television's technology surpasses the average person's ability to utilize it for more than passing entertainment. Government sometimes takes taxes to do, for public good, that which could not be supported privately, e.g., public education. When this exchange of liberty for public benefit occurs, the people must assume a risk equal to, but not to exceed, the benefit derived. In the public television context, the risk requires deference to minor administrative errors which exist because of the discretionary "public good" standard for programming announced by Congress.

Another serious problem which unfortunately is beyond the scope of this note, arises from the taxpayer's right to be free from associating with a point of view with which he disagrees. Freedom from association implicates a liberty which the courts are beginning to recognize.[60]

Living in a pluralistic society, the government editor cannot make programming decisions to please everyone. When broadcasting programs that contain thought provoking material, like *Death of a Princess*, a station cannot possibly present every viewpoint, even if adhering meticulously to a fairness policy. Government, it may be validly argued, should give information only in its official capacity; entering the marketplace of ideas just invites problems. But the problems caused by public television broadcasting involve propitiousness and not the Constitution. The role of maximizing benefits while minimizing infringements on liberty, within constitutional limits, falls to the Congress.

Congress addressed the problem by setting a policy of local autonomy with editorial discretion used by the local authorities who were to follow the guideline of the "public good." This system contemplates error and gives an administrative review via the FCC to correct it.[61]

The benefits to society thus far outweigh the first amendment imperfections and the rights of a handful of viewers to program the station. Perhaps *Muir II* makes obvious the system's greatest flaw in that cancellation of *Death of a Princess* was certainly "ill advised."[62] But a single wrong calls for administrative redress or

60. Canby, *supra* note 37, at 1128; *see generally* Young & Herbert, *Political Association Under the Burger Court: Fading Protection*, 15 U.C.D.L. REV. 53, 87-93 (1981-82).

61. *Muir II*, 688 F.2d at 1047.

62. *Muir II*, 688 F.2d at 1053 (Rubin, J., concurring). The distinction being made is between a single "call" and a policy or practice of poor choices. The former does not require intervention.

political rethinking from Congress about the system's operation. The majority in *Muir II* recommended the FCC as the correct forum.[63]

To declare that editorial discretion is unconstitutional would vitiate public television. Programming would be either so bland no one would care to watch it or its function would be merely that of a public stump to air personal opinions for an alotted time. Either would destroy the substantial benefit society now enjoys from public television.

First Amendment Analysis

A. The Government as Speaker

The majority in *Muir II* found that the government was the speaker and, as such, had the right to control the content of its own expression.[64] To carry out ordinary governmental functions, the government must speak; a mute government could not be effective. In its governmental capacity, it would be ludicrous to say that there can be no point of view expressed. It is little less ridiculous to contend that one private person could decide the content. Government would no longer be a democracy.

The plaintiffs argued in *Muir II* that the first amendment placed duties *on the government* and afforded no rights *to the government*,[65] apparently in an attempt to capitalize on the statements made by Justice Stewart in *CBS*.[66] The courts, however, found the argument irrelevant to the issue of private parties compelling programming.[67] Justice Stewart's opinion itself counterbalances the viewer's argument: "[G]overnment is not restrained by the First Amendment for controlling its own expression . . . . '[T]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government

---

63. *See Muir II*, 688 F.2d at 1047-48. There are a number of administrative sanctions that the FCC could apply if the licensee engages in improper programming. These range from an admonition to a denial of license renewal.

64. *Muir II*, 688 F.2d at 1044. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4 (1978).

65. *Muir II*, 688 F.2d at 1038.

66. *See* text accompanying note 44, *supra*.

67. While this argument of the plaintiffs may be essentially correct it in no way resolves the issue before us. To find that the government is without First Amendment protection is not to find the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government.

Muir II, 688 F.2d at 1038.

from controlling its own expression or that of its agents.' "[68] Further, in a penetrating footnote, the Fifth Circuit revealed the policy underlying the majority's decision in *Muir II*:

> Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression. Yet there is nothing to suggest that, absent such limitations, government is restrained from speaking any more than are private persons. Freedom of expression is the norm in our society, for government (if not restrained) and for the people.[69]

The majority decided that the stations that had cancelled *Death of a Princess* had complete discretion to program on the basis of the statutory mandate.[70] The court's only application of the first amendment was that a government licensee could have restraints placed on it which would not be constitutional as applied to private licensees because the first amendment would limit, but not protect, public television. The majority gave no examples of what "restrictions" might be imposed, but perhaps the court contemplated a more serious political intervention that would activate constitutional restrictions: a move away from an alternative, cultural approach to television and toward being an arm of the government. If this is what the majority meant, it should have articulated the principle.

B. A Functional Analysis: The Public Forum Doctrine

Much of the difficulty surrounding the *Muir II* case derives from the district court's holding in *Barnstone I*.[71] The district court found that the originators of *Death of a Princess* were speakers in *Barnstone I* and that the characteristics of a public forum were met by public television.[72] The cancellation was therefore a prior restraint and a violation of the first amendment.[73]

Traditionally, the public forum doctrine has been used to adjudicate cases in which a willing speaker sought a right of access to public property to speak.[74] How closely analogous a speaker's

---

68. *CBS*, 412 U.S. at 139 n.7, quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 700 (1970).
69. *Muir II*, 688 F.2d at 1038 n.12.
70. *Id.* at 1038.
71. 514 F. Supp. at 689.
72. *Barnstone I*, 514 F. Supp. at 689.
73. *Id.* at 690-91.
74. *See generally*, J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW

chosen forum is to traditional public forums can be a decisive factor in determining the freedom accorded the speaker.[75] Justice Roberts first announced the public forum doctrine in his concurring opinion in *Hague v. CIO.*[76] The heart of public forum policy confirms that speech cannot be denied, regardless of content, in places traditionally held open for public comment. Although the accuracy of the history in Justice Roberts' sweeping statement is questionable, the public recognizes freedoms accorded in certain places which cannot be abridged.[77]

As the doctrine matured, the public forum issue became a problem of definition. Once the courts labeled the place a public forum, adjudication normally followed the pattern of allowing the speech.[78] The historical approach, however, restricted public forum analysis to instances where the property was recognized, historically, as well suited for communications, which left little room for expansion.

The Warren Court avoided the narrow precedent and expanded the doctrine through a right of access test,[79] instead of the *Hague* historical test. In other words, the definition of a public forum depended on a person's right to be in a particular place; if access were available, then the speaker could use reasonable methods to communicate while there. This expansion led to greater protection of free speech rights. Regulation of speech in a public forum is limited to time, place and manner restrictions to promote efficient use of facilities and to maintain order.[80] Content of speech cannot be regulated in a public forum.[81] The Warren Court even applied the public forum doctrine to private property;[82] this was the zenith of the expansive approach.

---

973 (2d ed. 1983).

75. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), where the Court noted: "[T]he nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03.

76. Hague v. CIO, 307 U.S. 496, 515-16 (1939) (Roberts, J., concurring).

77. *Id.*

78. *See* Karst, *Public Enterprise and the Public Forum: A Comment on* Southeastern Promotions, Ltd. v. Conrad, 37 OHIO ST. L.J. 247 (1976). In recognizing this trend, the author argues for non-absolutism in public forum adjudication and a pragmatic balancing approach using a compelling interest test to safeguard against government content control.

79. *See* Zillman and Imwinkelried, *The Legacy of* Greer v. Spock*: The Public Forum Doctrine and the Principle of the Military's Neutrality*, 65 GEO. L.J. 773, 777-79 (1977).

80. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 74 at 977.

81. *Id. See also* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

82. Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968),

Even during this broadening process, however, the courts allowed limitations of expressive behavior on public property, if necessary, to preserve the property to its intended use. Mere government ownership does not classify publicly owned property as a public forum. As Justice Black noted in *Adderley v. Florida*:[83] "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[84] By invoking this limitation, the Court rejected the prison property on which demonstrations were held in *Adderley* as a public forum. The intended use exception goes beyond time, place and manner restrictions since it presupposes a government-owned place where speech could be curtailed based on content if the purpose of the property is detrimentally affected by the speech and the public interest in the preserved purpose outweighs the first amendment value involved.

With the advent of the Burger Court, the public forum doctrine began to contract. The Court's decisions showed a trend toward the older historical approach or at least a broader definition of the dedicated use exception.[85] Given the Court's decisions in *Greer v. Spock*,[86] where the public forum argument was rejected in spite of a general right of access found to the streets of a military base, and, more recently, in *United States Postal Service v. Council of Greenburgh Civic Association*,[87] where the Court decided that mail-boxes are not public forums even though they are used primarily for the dissemination of information, there can be little doubt that the doctrine is now being applied selectively.[88]

Public forum status in electronic media depends on a speaker's right of access.[89] The right of access is an indispensable element, for how can one be denied speech in a place where he has

---

overruled by Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

83. 385 U.S. 39 (1966).

84. *Id.* at 47.

85. *See* Zillman and Imwinkelried, *supra* note 79.

86. 424 U.S. 828 (1976); *But see* Flower v. United States, 407 U.S. 197 (1972).

87. 453 U.S. 114 (1981). *See also Lehman*, 418 U.S. 298 (The card space at issue would have been used for dissemination of ideas.).

88. *But see* Widmar v. Vincent, 454 U.S. 263 (1981) (upholding religious activity on a university campus under the public forum doctrine).

89. *But see* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L.R. 117 (1975). The author argues for a minimum right of access in contrast with the court's conception of equal access. The latter seems to be more of an estoppel principle or is at least in the same genre. The author's thesis is that the first amendment requires an affirmative right of access if the forum is open. However, the threshold hurdle of classification must be met.

no right to be?[90] The public forum doctrine does not create a Hyde Park of every publicly owned place that may in some way be used to convey a message.[91]

This is a pragmatic limitation. The efficiency of government may not properly be weighed against the liberty of free speech except where the right must be limited in order for the benefit to accrue. The limitation assumes that were public television thrown open, the result would be rigorous competition for free speaking space. One may safely assume that were public television defined as a public forum, there would be a congregation vying for an allotment of time. Government, in that situation, could not suppress the ideas merely because it disagreed with the content of the message.[92] To foreclose the operation of public television by allowing a cacophony of uninhibited speech would be ironic.[93] Government by consent requires that the people give up a degree of liberty in exchange for public good. Therefore, speech should be "robust and wide open"[94] but the public forum doctrine is limited by the public's compelling interest in having quality education programming.

To have a colorable claim under the public forum doctrine, the viewers in *Muir II* had to assert a right of access. In *CBS v. Democratic National Committee*, the plaintiff sought limited access to a private licensee's network which had a policy banning the sale of air time for broadcasting political advertisements.[95] The plaintiffs claimed that the *Red Lion* fairness doctrine,[96] allowing response time for personal attacks, had created a limited right of access to broadcast mediums.[97] The Supreme Court upheld the fairness doctrine because it promoted the public interest

---

90. Avins v. Rutgers, 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (dealt with a right of access to publish a law review article which the editor had rejected at a state university); *see also* Advocates for the Arts v. Thompson, 532 F.2d 792 (1st Cir. 1976), *cert. denied*, 429 U.S. 894 (1976) (rejection of funding for a literary magazine; the court held that the magazine had no affirmative right to the money); Houchins v. KQED, 438 U.S. 1 (1978).

91. *Lehman*, 418 U.S. at 304.

92. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

93. *See CBS*, 412 U.S. at 103 (citing 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 640, 641 (1947)).

94. New York Times v. Sullivan, 376 U.S. 254 (1964).

95. *CBS*, 412 U.S. at 97.

96. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The fairness doctrine, in general, has been applied to give a right of access to rebut by presenting an opposing view. *Compare CBS*, 412 U.S. at 123. The Court recognizes that there are not two, but a multitude of views on almost any issue.

97. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 74, at 894-902.

and had at least arguably articulable standards to be administered by the FCC.[98] The majority in *CBS* reasoned that a limited right of access, however, was antithetical to the broadcast licensee's autonomy.[99] A right of access for everyone would place broadcasting rights in the hands of politically irresponsible speakers rather than professionals with statutory mandate, enforced through the FCC,[100] to program for public good. Congress rejected common carrier status for broadcasting licensees[101] and built in administrative accountability as a condition for continued licensure. Thus the first amendment balance relies on administrative oversight.

FCC v. Midwest Video[102] reinforces the denial of a right of access. The Supreme Court invalidated an FCC regulation which required cable television franchises to have a minimum number of public access channels. The Court deferred to Congress; the statute denying common carrier status prevailed over a regulation in conflict with the statute.

Precedent requires a right of access before a fathomable claim can be made. Nevertheless, the *Muir II* plaintiffs did not seek a right of access,[103] but rather looked to a quasi-public forum theory to compel broadcast of *Death of a Princess*. The court reasoned that without a right of access the plaintiffs had no rights under the public forum doctrine and refused to accept the plaintiffs' position.[104] Likewise, the court disagreed with the district court's opinion in *Barnstone I*, in which the court held that the two salient features of a public forum had been met: public ownership of property; and the use of that property for the dissemination of ideas.[105]

The *Muir II* majority used an amalgamation of the historical and access public forum tests: "A facility is a public forum only if it is designed to provide a general public right of access to its use, or if such public access has historically existed and is not incompatible with the facility's primary activity."[106] Since the test for public forums as promulgated required a right of access, then *a*

98. *Red Lion*, 395 U.S. at 376.
99. 412 U.S. at 120.
100. *Id.*
101. 47 U.S.C. § 3(h). *But see* 47 U.S.C. § 312(a)(7) (creating a limited right of affirmative and not merely responsive access for candidates for federal office). *See also* CBS, Inc. v. FCC, 453 U.S. 367 (1981).
102. 440 U.S. 689 (1979).
103. 688 F.2d at 1041.
104. *Id.*
105. 514 F. Supp. at 683-89.
106. *Muir II*, 688 F.2d at 1042.

fortiori, the plaintiffs had no claim. The quasi-public forum argument did not convince the court to delete the access requirement. The majority relied on the authority of *CBS* to find that the station's first amendment rights would be contracted by allowing right of access,[107] following the rationale that accountable editors best served the public interest. *Lehman v. City of Shaker Heights*[108] and *Greenburgh*[109] harmonize with the court's decision since both of those cases contain the combination of government ownership with the primary purpose of idea dissemination, but did not implicate the public forum doctrine.

The primary function of the station was to program in the public interest, not to become a soapbox for the community—the station invited the viewer to watch or not to watch, but an individual viewer had no right to program the station.[110] Thus, even if the public forum factors had been *prima facie* indicated, public television, because of its peculiar function, seemingly falls within the dedicated use exception.

Judge Rubin's concurrence is a variation on the public forum analysis but the focus is different. He analyzes the case by looking at public television as a specific informational function of the government (e.g., a governmentally published tax manual) rather than a general news conduit.[111] The former allows content control based on reasoning not unlike the dedicated use exception; the latter is constitutionally required to be neutral.[112] This rationale requires public television to be more closely analogous to a published pamphlet than to the commercial television network.[113] The majority opinion reasons conversely and more logically. Public television is not purely informational and surely need not be to comply with the first amendment.

C. *The Procedural Approach*

The basic procedural approach advocated by the plaintiffs in *Muir II* was that of *Mt. Healthy City School District v. Doyle*.[114] Under that analysis, if a plaintiff proved that the programming

---

107. *Id.*
108. 418 U.S. 298. *See supra* note 87.
109. 453 U.S. 114.
110. *Muir II*, 688 F.2d at 1042.
111. *Id.* at 1050.
112. *Id.*
113. *Id.*
114. 429 U.S. 274 (1977). The case involved a dismissal of a teacher for expressive behavior protected by the first amendment.

was motivated by an intent to suppress ideas, the burden would shift to the government to show that the program would have been cancelled for some independent reason, consistent with the public interest and the first amendment.[115] Judge Johnson's dissent in *Muir II*, and the concurrence in the Fifth Circuit panel adjudication of *Barnstone I* accepted this approach.[116] The majority in *Muir II* rejected the *Mt. Healthy* test.[117]

On first blush the shifting approach is appealing: the decision to cancel *Death of a Princess* was so blatantly political that it seems to require the government to come forward with a plausible explanation. However, the reasoning of the majority is more sound. Setting in place this analytical formula, based on blatant facts, incites an avalanche of claims. Even though the original burden would be on the plaintiff, the public television system would be hurled in to the litigious conundrum of what is "political." The administrative burden of having every decision litigated would be more than public television could endure.

The district court in *Barnstone I*[118] took a second procedural approach which erected even more difficult barriers than *Mt. Healthy*. The district court applied *Southeastern Promotions, Ltd. v. Conrad*,[119] in which the Supreme Court invalidated a decision to cancel a theatrical production of "Hair" in a municipal auditorium because it contained anti-establishment messages.[120] *Conrad* makes all prior restraints presumptively infirm, and requires the government to run a procedural gauntlet to rebut the presumption.[121] First, the burden of instituting judicial proceedings to declare the speech unprotected is on the censor. Second, prior restraint is allowed only for a short time to preserve the status quo. Third, a speedy and final judicial determination is required.[122] The Court found the suppression of "Hair" invalid based on these procedures.[123]

---

115. *Compare, Id.* at 284-87.

116. *Muir II*, 688 F.2d at 1059; *Barnstone I*, 660 F.2d at 141 (Reavley, J., concurring). The opinion states that the decision, if based on suppression of a point of view, is presumptively unconstitutional even if no impermissible motive is found. *See also Muir II*, 688 F.2d at 1060.

117. 688 F.2d at 1044.

118. 514 F. Supp. at 683-89.

119. 420 U.S. 546 (1975).

120. *Id.* at 564. *But see* Justice White's dissent where he compares the cultural worth of "Hair" to that of Aristophanes' work. *Id.*

121. *Id.* at 558.

122. *Id.* at 560; *see also* Freedman v. Maryland, 380 U.S. 51 (1965).

123. *See Conrad*, 420 U.S. at 563. (Justice Douglas characterizes the decision as a procedural band aid. He would have allowed no content regulation.).

Conrad presented similar facts to *Muir II*: a publicly owned facility which is customarily used for communications had been denied use for dissseminating a particular message. *Conrad's* test, wielded in broad strokes and strictly applied to every editorial decision public television made, would litigate public television into oblivion. *Muir II* glossed *Conrad* with necessary pragmatism for operating public television and properly limited its scope. Public television simply cannot go to court every time a programming decision is made.[124]

As a second distinction, in *Conrad* a willing speaker sought access to a forum controlled by the government, whereas in *Muir II*, a listener sought to compel an unwilling speaker, the government. The outcome of *Muir II* might have been, but not necessarily should have been, different if the program's *originators* had sought a right of access.[125] However, precedent from *CBS*, as examined, made it unlikely that a right of access was present. Also, the Supreme Court decided in *Conrad* that the auditorium was a public forum.[126] The *Muir II* majority followed the specific congressional enactment and did not treat public television as a public forum. The statute relied on has no analogue relating to municipal auditoriums.

D. The Government's Role as Editor

Governmental editing of printed publications provides fertile ground for exploration of judicial treatment of the state as editor. An examination and reconciliation of these cases, to the extent that they are apposite because of their medium, is necessary to complete this analysis.

Bazaar v. Fortune[127] concerned the withholding from publication of a magazine which contained material written by students under supervision of an English professor[128] because it contained words which administrators of the University of Mississippi thought were unbecoming to the image of the University. The system of funding was unusual in that the magazine was supposed to pay back from sales the original production costs, with a deficit

---

124. *See Muir II*, 688 F.2d at 1044.

125. The interesting omission of fact made by the *Barnstone I* court was that the program was originated through SPC funding. Thus, it seems the government was also the "speaker" in its pristine sense, not just a conduit.

126. *Conrad*, 420 U.S. at 555.

127. 476 F.2d 570, *modified*, 489 F.2d 225 (5th Cir. 1973).

128. *Bazaar*, 476 F.2d at 572.

being underwritten by the English Department.[129] Nevertheless, the Fifth Circuit found state action and struck down the administrative decision to cancel the publication,[130] reasoning that limiting words was only one step away from limiting ideas.[131]

Several enigmatic suggestions were made by the court in deciding the case. For instance, consider the statement that, "This opinion [does not] mean to say that no language or conduct short of legal obscenity can be regulated by a college or university."[132] However, the court stated paradoxically: "The first amendment . . . took the power to make such judgment out of the hands of the state."[133]

The inconsistent policy of the administration toward the very words sought to be restrained may be one explanation of the decision. These words appeared in works required or recommended by the school faculty.[134] Perhaps, too, the court scrutinized the decision more carefully because the university plays a fundamental part in the growth of thought in free society and courts are more circumspect of suppression of ideas in the university context. Publication of avant garde literature furthers the university's purpose of broadening educational exposure. However, given that the university necessarily makes content decisions daily, drawing a principled line for judicial intervention is practically impossible and will have to be done on a case by case basis.[135] Also, the framers of the Constitution gave textual sanctity to a free press whereas

---

129. *Id.* at 571-72.

130. *See also* Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1979). The court found a constitutional violation in the cancellation of funding for a speaker on campus on the basis of a content based discrimination.

131. *Bazaar*, 476 F.2d at 576.

132. *Id.* at 580.

133. *Id.* at 579.

134. *Id.* at 577-78. This solace in itself is bittersweet in that the constitutional principle on government editorializing has been decided on grounds not unlike estoppel.

135. *See* Canby, *supra* note 37. Professor Canby in his article offers an explanation of this genre of cases based upon the structure of the editorial system used. He says the real necessity for strong first amendment scrutiny arises when there is outside interference with the previously delegated editorial functions. His thesis is that editing involves by its very nature content control which must be allowed in order to promote a designated purpose and efficiency, yet the exercise of content control must not be sporadically exercised by the delegating authority in a manner that displaces the delegatee's editorial function. The delegator should only make subject matter proscriptions which are prospective and general. The superficial distinction may be quickly noted. If an editor has the authority to delegate, then supervise, there is no analytically principled distinction to sporadic exercise of the authority. This would be a functional liability. Again this is a mutation of estoppel and should have no place in first amendment jurisprudence. This analysis also fosters surreptitious action and the first amendment principle involved should not rest on ingenuity.

the electronic media must be sanctified circumstantially.[136]

Bazaar is further puzzling because of the rehearing modification[137] which allowed a disclaimer to be stamped on the outside of the magazine denying an imprimatur of the University on its content. As Judge Bell's dissent aptly points out, this judicial afterthought has a vitiating effect on the entire opinion because it evades the issue of government sponsorship.[138] May the University merely refuse to sponsor initially if any indication of first amendment problems exists? Reciprocally, may the government be compelled to sponsor communications as attempted in *Muir II*?

Advocates for the Arts v. Thomson[139] considered the question of whether a state's refusal to fund a publication due to content appearing in a previous issue is constitutionally impermissible. The governor's council in charge of fund disbursal to the artistic community allocated a grant-in-aid to a literary magazine. The council withheld an additional grant because the book contained an "item of filth."[140] The publishers unsuccessfully sought judicial relief based on a prior restraint.[141] The First Circuit reasoned that the plaintiffs did not have an absolute right to the grant and that discretion of the council was the best way to obtain managerial efficiency.[142] Expressing regret that the managers of the money had used discretion poorly by basing their decision to cancel the grant solely on one poem, the court held, with apparent reluctance, that there was no constitutional ground for relief.[143] In short, the court concluded that artistic standards do not lend themselves to first amendment adjudication.[144] Thus, judges should defer to the discretion of those who have been chosen through the political process to make these decisions.[145]

The *Muir II* majority chose not to align itself with the *Bazaar* precedent, but did not state why. It would have been super-

136. U.S. CONST. amend. I.
137. 489 F.2d 225 (5th Cir. 1973).
138. *Id.* at 228.
139. 532 F.2d 792 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).
140. *Thomson*, 532 F.2d at 793.
141. *Id.* at 795.
142. *Id.* at 796.
143. *Id.* at 797.
144. *Id.*; *see also* Avins v. Rutgers, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). The plaintiff sought to have his law review article published claiming covert discrimination against his conservative viewpoint, but the court deferred to the editor's discretion. To decide the case otherwise would have made constitutional principle an evidentiary second-guessing proposition. The courts cannot use hindsight to second-guess inherently subjective decisions.
145. *See* Note, *supra* note 34, at 1180, 1181.

fluous in one sense because of the decision's tenor towards government speech. On the other hand, failing to face squarely all the issues and precedent detracts from *Muir II*'s credibility. For that reason, the problems raised by the dissent concerning the *Bazaar* case and its progeny should have been discussed by the majority. Judge Johnson, dissenting, found public television editing indistinguishable from censoring a school magazine or rescinding funding for a speaker based on the content of his message.[146]

Valid, but not altogether convincing, differences distinguish *Muir II* from *Bazaar*. First, the unique forum of television should never be forgotten. "[I]n broadcasting every compulsion carries restraint, every compelled program necessarily replacing and thus restraining the program that would otherwise have been chosen."[147] Retreat to this begins to sound tautologous; nevertheless, speech is often classified based on its context. There can be some content regulation if the message is electronically broadcasted even if the language is merely indecent (not confined to accepted moral standards) rather than legally obscene. The Supreme Court in *FCC v. Pacifica*[148] relied on the invasiveness of the medium and the government's interest in protecting children to justify a sanction against the broadcaster which had aired a satiristic view of "dirty" words by humorist George Carlin. Content and context are equally weighty.

Second, deference, or at least great weight, should be given to the prescribed congressional balance for public television whereas none has been undertaken for written publications. Third, the character of the university and its traditional role in wide-open access to ideas should be considered. However, public television also attempts to broaden horizons. Thus, the distinction is unsatisfying. Last, university publications circulate to only a few, most of whom, it may be reasonably assumed, are adults, while electronic broadcasting is much more pervasive. This distinction is ambivalent: it justifies the government's interest in protecting particular classes of persons such as children. But, on the other hand, once education is accepted as the function of both the university and public television, dissemination of *Death of a Princess* furthers the same purpose as forward looking literature.

Bazaar and *Advocates for the Arts* are examples of the di-

146. *See Muir II*, 688 F.2d at 1059 (Johnson, J., dissenting).
147. *Muir I*, 656 F.2d at 1024 (footnote omitted).
148. 438 U.S. 726 (1978).

verse treatment of state editorial cases: the range is from abdication to active intervention. The courts face a Hobson's choice, accentuated when the facts show an incumbent bias, of allowing what is arguably censorship or crippling necessary editorial functions with judicial substitution.

Professor Karst has suggested that the reconciliation lies in the state's compelling interest in quality editing by government agents.[149] He states that government or private media without editing would be a "printed bulletin board."[150] His requirement that editing be done in a professional manner,[151] is desirable but superficial. Even the most conscientious professional will never please everyone. Karst properly identifies the problem as one of personnel but uses this as a rationalization for judicial intervention. On the contrary, professionalism of editors is outside judicial competence and should activate the political process. When editors make bad choices, they should be replaced. Perhaps the real problem is one of degree, i.e., how egregious and obvious does the decision have to be before action is taken?

E. Cancellation v. Non-Programming: The Right to See

Board of Education v. Pico[152] raised new issues: is there a constitutional right to receive information, and if so, does the government have an affirmative duty to provide this information? *Pico* involved a school board's removal of allegedly unfit books from high school and junior high libraries. The Supreme Court said in *Stanley v. Georgia*[153] that a citizen had a right to see material in the privacy of his home even if the material is obscene. However, Justice Brennan mustered only three votes to support a plurality opinion in *Pico*, upholding the concept of a right to receive information. The plurality concluded that the right to receive information is "ineluctable," drawing an economic analogy to a market place with all sellers and no buyers.[154] Justice Brennan concluded that the right to receive information was a "necessary predicate" to the recipients' "meaningful" exercise of free speech.[155] The plurality narrowed the holding to library books[156]

149. *See* Karst, *supra* note 78, at 256.
150. *Id.*
151. *Id.* at 258.
152. 457 U.S. 853 (1982).
153. 394 U.S. 557, 564 (1969).
154. *Pico*, 457 U.S. at 867.
155. *Id.*

(i.e., optional material) and gave special protection to the library.

Pico split the Court, making it difficult to ascertain any coherent policy.[157] Four justices refused to accept the concept of a right to receive information from the government.[158] Justice Blackmun concurred in the judgment but strictly on the basis of finding content-based censorship, stopping short of endorsing a right to receive.[159]

Justice Brennan's distinction between the removal of books and non-acquisition of books[160] is sophistry. Under his "right to receive information" theory there should be no differentiation, yet he does not apply the standard equally to both. What is to prevent the acquisitions librarian from simply never buying books that, in his personal judgment, students should not read? How is that any different from taking a book off the shelf? In either case, the book is unavailable. As Chief Justice Burger noted, timing is no ground on which to adjudicate a constitutional principle.[161] *Pico* allows editors to do inconspicuously what is unconstitutional if obvious.

Justice Brennan, although recognizing the strong degree of deference usually accorded a local school board, stated that judicial intervention is justified only if "basic constitutional values" are "directly and sharply" implicated.[162] If the school board's decision in *Pico* implicates fundamental rights, then the school has a constitutional duty to buy every book any student may conceivably want to read; this, of course, is absurd.

In a remarkably similar case, *President's Council, District 25 v. Community School Board, No. 25*,[163] which involved book removal from a junior high library, the Second Circuit Court of Appeals took an opposite approach stating:

> The administration of any library whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly

156. *Id.* at 869.

157. *See Muir II*, 688 F.2d at 1045 n.30. (The court found no guidance from *Pico's* multiple opinions.).

158. *Pico*, 457 U.S. at 887. (Chief Justice Burger, dissenting, is joined by Justices Powell, Rehnquist and O'Connor.).

159. *Id.* at 878.

160. *Id.* at 870-71.

161. *Id.* at 892.

162. *Id.* at 866 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

163. 457 F.2d 289 (2d Cir. 1979).

> where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.[164]

Except for the medium, *Pico* and *President's Council* are very similar to *Muir II*. All involved content editing, removal as opposed to non-acquisition, and intervention from a party not ordinarily involved directly in editorial discretion. The diversity of opinion in *Pico* is indicative of the complex problems involved when first amendment rights compete. The right to receive ideas concept is best limited to cases where the government acts as a suppressor, not an editor, because holding that the government has an affirmative duty to provide the information is unharnessable. The majority in *Muir II* distinguished *Pico* on the contextual differences between a school library and a public television station, deferring to the congressional balance of first amendment rights in the broadcasting area.[165] The *Muir II* decision is not eloquent in distinguishing *Pico*, but the distinctions avoided repetition of a less than definitive and ill-founded decision by the Supreme Court.

F. The Trivialization Effect

The government in its role as editor of public television should be assiduously watched and afforded less deference than its private counterparts.[166] When the government edits, the people have more at stake than when the private media edits. Is the first amendment the proper adjudicatory tool? The court said in *Muir I*:

> It would demean the first amendment to find that it required a public referendum on every programming decision made every day by every public television station solely because the station is owned and partially funded by the state government. It would be equally Draconian to hold on that sole ground that programming decisions of public broadcasters constitute government censorship, with the concomitant necessity of declaring that public television stations exercising editorial freedom are themselves constitutionally prohibited.[167]

---

164. *Id.* at 293.

165. *Muir II*, 688 F.2d at 1045-46. *But see Muir II*, 688 F.2d at 1051 (Judge Rubin contended that his functional approach was in tune with *all* the opinions in *Pico*.).

166. *But see* Note, *supra* note 34, at 1179.

167. *Muir I*, 656 F.2d at 1017-18.

The trivialization effect has been expressly recognized by the Supreme Court in *Lehman v. City of Shaker Heights*, where the Court said, "[I]n these circumstances, the managerial decision . . . does not rise to the dignity of First Amendment violation."[168] The choice in *Muir II* was to allow editorial discretion, poor as it may have been, or subject the first amendment to the trivialization an opposite decision would impose.

Using the first amendment prudently prohibits demeaning application. As Judge Markey said: "The First Amendment is not a fetish."[169] Insubstantial violations should not trigger the first amendment—that would be overkill—but the threshold on so fundamental a principle should be low. Were the government even arguably trying to set up an "official news agency" the first amendment could purge the government's new arm. In the meantime, the people must tolerate poor governmental editing, or use administrative or political action for recourse. Congress created the opportunity, and exercise of the democratic vent, political action, constitutes the most direct route.

CONCLUSION

The majority of the Fifth Circuit decided to defer to the administrative decision to cancel *Death of a Princess* when challenged on first amendment grounds. Cancellation was apparently politically motivated and therefore detrimental to the public good, which public television is required to consider above all else. Public television's infusion with public funds denoted state action which raised difficult questions of first amendment application. The benefit of public television countervails minor editorial errors for which the people assume risk when their representatives undertake such a project for public benefit. Public television is not a functional arm of the government; if that were the case, the first amendment would forbid its existence. The government was the speaker in *Muir II* and had the right to control its own speech. The viewers who brought suit against the stations had no right of access to the stations and, therefore, public television, even though owned by the government and used for communications, is not a public forum. The majority failed to adequately address precedents which had disallowed governmental editing of written mate-

168. *Lehman*, 418 U.S. at 304.
169. *Muir I*, 656 F.2d at 1016.

rial, even though plausible grounds for distinction of those cases existed. The majority correctly rejected procedural approaches posited during the litigation as being overburdening to necessary daily editorial functions required for public television.

The first amendment is demeaned when applied to trivial matters which weakens application when the first amendment really counts. When other methods sufficiently redress a problem, prudent courts should reserve the first amendment. When editorial discretion is exercised in a flagrantly poor manner, especially involving blatant politically-oriented decisions, deference to that judgment is difficult. The courts must not succumb to intervention merely because the decision is bad and thereby set precedent which will ruin a workable, albeit imperfect, public television system substantially benefiting the public. Deference was the only workable posture for the court in *Muir II* since the case adjudicated competing first amendment rights. The cancellation of *Death of a Princess* was deplorable but the problems it has raised should call for review of the decision-makers through the political process. The court system is incompetent to judge matters of subjective taste and should not be called on to be public television's super-editors.

Robin L. Roberts