Structural Implications of Telephone Content Regulation: Lessons from the Audiotex Controversy

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Structural Implications of Telephone Content Regulation: Lessons From the Audiotex Controversy

by

PATRICK O'NEILL*

Table of Contents

I. Background: The Electronic Publishing Issue .................. 381
II. Role of the Federal Government .................................. 383
   A. Audiotex as a Telephone Service ............................ 383
   B. The Broadcasting Analogy: Pacifica Foundation .......... 385
   C. Challenges to Audiotex Legislation:
      The Carlin Cases ....................................... 386
   D. Obscenity Bans v. FCC Guidelines ............................ 387
   E. Restricting Indecent Speech .................................. 388
III. The Role of State Government ................................... 390
    A. State Regulation of Audiotex ............................... 391
    B. States Balance Competing Interests ........................ 392
IV. The Role of Telephone Companies .................................. 394
    A. Risks & Liabilities of Dial-a-Porn Service ............... 394
    B. The Carlin Cases: Private Action and Enhanced Services ............................................. 396
    C. In the Aftermath of Carlin I and II: Editorial Control for Local Exchanges? ......................... 398
    D. California Public Utilities Commission's Proposal: A Workable Solution? ............................ 400
V. State and Private Action ........................................ 401
VI. The Concept of Common Carriage .................................. 405
VII. Conclusion .......................................................... 409

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Introduction

Despite being regulated under the same federal statute and by the same federal agency, electronic mass media and common carriers have historically taken separate legal and regulatory paths. Mass media law and common carrier law share some characteristics, but they have generally evolved as separate substantive areas. Specifically, the first amendment has rarely been an important factor in telephone law.2

However, this separation is becoming less clear. For example, one of the major issues on the current communications policy agenda is telephone company entry into video distribution.3 This issue currently commands the attention of the telephone, cable television, and broadcasting industries, sending a strong signal that the “convergence” of electronic media, much discussed over the years, is now upon us.4 Inevitably, mass media law and common carrier law will also converge and, at times, are likely to conflict.

Two issues in the 1980s brought these two lines of electronic communications law together. One was electronic publishing, centering on the ability of the local telephone exchange carriers to offer public information services to their subscribers. A second involved content control of telephone-delivered information services, a debate that has so far fo-

cused on the sexually-explicit audiotex services commonly known as "dial-a-porn.”

This Article focuses on the roles of the government and the private telephone companies in the regulation of audiotex. Dial-a-porn has raised many intriguing questions about the regulation of offensive content and has, therefore, generated a good deal of analysis. However, it will be dealt with here primarily as a means for examining the structural regulation of the telephone medium and the impact of that structure on the control of content. The debate over structural regulation of telephone information services began in earnest with the electronic publishing issue. Accordingly, it is useful to begin this analysis with a summary of that debate.

I Background: The Electronic Publishing Issue

The electronic publishing issue emerged in the wake of the FCC's Computer II decision of 1980, under which the American Telephone and Telegraph Company (AT&T) was permitted to provide “enhanced services,” including information services, under a separate subsidiary. By permitting AT&T to enter some competitive markets, Computer II apparently removed some of the restrictions placed on the Bell System under the 1956 consent decree, which had generally prohibited the company from entering fields outside of regulated common carrier service.

5. A mass communication service provided through the telephone network. It supplies recorded information to those who call a designated number.


One result of Computer II was the emergence of the American Newspaper Publishers Association (ANPA) as a major player in telecommunications policy. The newspaper industry was especially concerned about the perceived ability of the telephone companies to compete in the local advertising market. Consequently, ANPA embarked on a lobbying campaign to promote the "diversity principle," which stated that companies controlling a monopoly distribution system should not be permitted to manufacture content in that system.

This issue was debated during several rounds of Congressional hearings on the reform of telecommunications regulation. Although no comprehensive legislation was enacted, clear signals emerged from Congress in support of the basic tenets of the diversity principle.

One reason for the lack of Congressional action was the 1982 settlement of the AT&T antitrust case. The Modified Final Judgment included a ban on entry into the information services market by the divested Operating Companies, which then controlled the local "bottlenecks." Judge Greene's decisions on this subject are in line with the


14. Following the practice of the U.S. District Court for the District of Columbia, this Article will refer to the twenty-two divested Bell System exchange carriers as the "Operating Companies" and the seven regional holding companies that control them as the "Regional Companies".

15. American Tel. & Tel., 552 F. Supp. at 189-90 (A "bottleneck" occurs where one common carrier controls the facilities that competitors require to provide communications or enhanced services to their customers. Note, California v. FCC: A Victory for the States, 13 HASTINGS COMM/ENT L.J. 233, 245 n.79 (1991)(authored by Ann E. Rendahl) (citing Note, A Comparative Study of the Regulatory Treatment of Enhanced Services in the United States and the European Community, 9 N.W. J. Int’l L. & Bus. 415, 416 (1988))). In addition, the Modified Final Judgment (MFJ) placed a seven-year ban on entry by AT&T into information services, despite the fact that the post-divestiture company would no longer control local ex-
ANPA position, justifying the ban on a combination of economic and first amendment grounds.\footnote{16}

The electronic publishing issue is essentially one of structural regulation, as opposed to an attempt to regulate specific content. The dial-a-porn issue, on the other hand, is clearly a matter of content regulation. However, further examination reveals the makings of an important debate over the structure of the telephone system as it converges with the realm of mass media. While controversies over specific types of content will undoubtedly persist,\footnote{17} serious questions are also unfolding around the issue of who will have the authority to make those kinds of decisions.

Telephony, the control of audiotex content, involves a complex interaction of constitutional law, federal and state common carrier regulation, and the actions of private companies. In attempting to understand the ways in which first amendment principles are beginning to be applied to the telephone, it is necessary to consider the impact of these various sources on content regulation.

II
Role of the Federal Government

A. Audiotex as a Telephone Service

Audiotex services, have been an innocuous staple of telephone service for many years. Prior to the 1980s, audiotex consisted primarily of time and weather lines, supplemented by the occasional dial-a-prayer or dial-a-joke. Time and temperature services were often offered by the telephone company itself as a public service.\footnote{18}

By the early 1980s, these dowdy offerings were joined by newer revenue-generating services. Local exchanges began designating specific exchanges (usually 976) for mass announcement services and began offering lines devoted to sports scores, racing results, stock prices, and astrological forecasts.\footnote{19} Prior to divestiture, some of these lines were programmed by the exchange operators themselves, while others were operated

\footnote{16} American Tel. \& Tel., 552 F. Supp. at 180-86; United States v. Western Elec. Co., 673 F. Supp. 525, 585-92 (D.N.C. 1987), \textit{modified}, 900 F.2d 283 (D.C. Cir. 1990) (The district court’s decision concerning the provision of information services by the Regional Companies subject to the MFJ was affirmed in part and reversed in part).

\footnote{17} Members of Congress have expressed concern about various practices of the audiotex industry, including overcharging and fraudulent contests. Mason, \textit{Congress Inspects 900 Industry}, \textit{Telephony}, Oct. 1, 1990, at 9.


\footnote{19} Carlin Comm., Inc. v. FCC, 749 F.2d 113, 115 (2d Cir. 1984) [hereinafter \textit{Carlin I}].
by third parties. Concurrently, AT&T began offering long-distance audi-
otex service on its 900 numbers.\textsuperscript{20}

Controversy over dial-a-porn originated in New York, where the
New York Telephone Company held a lottery for available audiotex
lines.\textsuperscript{21} Carlin Communications, a company owned by adult magazine
publisher Gloria Leonard, "won" one of these lines. Carlin used this 976
line to offer a service in which women attempted to titillate callers with
sexually-explicit fantasies. Callers were billed for each call, with the lo-
cal exchange and the message provider sharing the revenue.\textsuperscript{22} Leonard's
High Society and similar magazines heavily promoted the service, and
Carlin was soon receiving over 100,000 calls daily.\textsuperscript{23} Carlin and other
companies established similar services in other cities, and dial-a-porn
quickly became a multimillion dollar business.\textsuperscript{24}

Dial-a-porn's popularity inevitably led to controversy, as reports of
children reaching the services spread. The first attempt to restrict dial-a-
porn occurred in 1983, when the County Executive for Suffolk County,
New York petitioned the FCC to terminate Carlin's service as a violation
of a provision of the Communications Act prohibiting "any comment,
request, suggestion or proposal which is obscene, lewd, lascivious, filthy,
or indecent."\textsuperscript{25} The FCC dismissed this complaint on the grounds that
the statute applied only to those who use obscene or indecent words dur-
calling calls they place.\textsuperscript{26}

In December 1983, section 223 of the Communications Act was re-
vised to apply to recorded messages. At the same time, Congress estab-
lished limitations on the ability of the federal government to prosecute
message providers. Section 223 provides, in part,

(1) Whoever knowingly-
   (A) . . . by means of telephone, makes (directly or by recording device)
   any obscene or indecent communication for commercial purposes to
   any person under eighteen years of age or to any other person without
   that person's consent, regardless of whether the maker of such commu-
   nication placed the call . . . . shall be fined not more than $50,000 or
   imprisoned not more than six months, or both.

\textsuperscript{20} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} 1 UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON
PORNOGRAPHY, FINAL REPORT 78 (1986); 134 CONG. REC. E270-71 (daily ed. Feb. 17, 1988)
\textsuperscript{25} 47 U.S.C. § 223(b) (1984 Supp.).
\textsuperscript{26} In re Application for Review of Complaint Filed by Peter F. Cohalan, FCC File No.
E-83-14, Memorandum Opinions and Orders (adopted May 13, 1983 and Mar. 5, 1984) cited in
Carlin I, supra note 19, at 115 n.5.
(2) It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.27

Congress attempted to conform to Supreme Court rulings that allowed differential treatment of adults and minors in the regulation of pornography,28 while concurrently warning that material available to adults must not be reduced to a level appropriate for children.29 The law concerning restrictions on access by minors to explicit communication developed from cases involving printed material and theaters. In these instances, it was feasible for businesses to enact screening mechanisms to restrict access by minors. Audiotex’s ease of accessibility by children was problematic, however, and led to the public’s demand for action.

B. The Broadcasting Analogy: *Pacifica Foundation*

In light of the easy accessibility of telephones, it is not surprising that comparisons were made with broadcasting. Several years earlier, in *FCC v. Pacifica Foundation*,30 the FCC had been successful in taking action against a broadcast licensee for content that fell short of the legal definition of obscenity. The Commission crafted a definition of indecency to be applied to offensive, but not obscene, sexual material. Indecent material was defined as “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”31

The FCC found its authority for such a policy in 18 U.S.C. § 1463, which prohibits the utterance of “obscene, indecent, or profane language” over the airwaves.32 Since this phrase was written in the disjunctive, the Commission reasoned that obscenity and indecency could refer to separate classes of material. In the landmark *Pacifica* decision, the

29. Butler v. Michigan, 352 U.S. 380 (1957). Representative Kastenmeier, who proposed the language of subsection (2), referred to this concern in his remarks on the House floor: Congress intends that the FCC promulgate reasonable time, place, and manner restrictions calculated to restrict access to prohibited communications by persons under 18 years of age. . . . [W]e have carefully constructed section 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. 129 CONG. REC. E5966-67 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier).
Supreme Court upheld the Commission's action, acknowledging that the unique accessibility of the medium allowed the government to impose restrictions on the broadcast of indecent content, despite the fact that such content generally enjoyed constitutional protection. Due to the apparent similarities between the dial-a-porn and broadcast indecency issues, Pacifica became a focal point in the efforts of the federal government to curb objectionable audiotex communication. In fact, the words "lewd," "lascivious," and "filthy" were removed from the legislation in order to focus attention on the terms "obscene" and "indecent," which had been defined and accepted in legal precedent. According to Representative Bliley, the sponsor of the Communications Act revisions, "it is not necessary to keep the litany of terms as currently in the statute to prohibit that kind of material. It was necessary, however, to maintain the term 'indecent' since the Supreme Court upheld the FCC's assessment of a fine based on indecent material in the Pacifica case."  

C. Challenges to Audiotex Legislation: The Carlin Cases

The original tests of the 1983 statute, in Carlin I and Carlin II, centered on the FCC's attempts to establish defenses to prosecution as mandated by Congress. Since the court found fault with the Commission's specific policies in each case, the constitutional issue of indecency regulation in telephony was not reached. In Carlin III, however, the court generally upheld the FCC's reliance on credit cards and scrambling devices as acceptable methods of restricting access by minors. The court then turned its attention to the first amendment question.

The court noted that the Pacifica opinion emphasized the narrowness of its own holding. The broadcast in question was judged not only on its content, but on its context, including such factors as the nature of the program, the time of the day, and the probable composition of the audience.

35. Carlin I, 749 F.2d 113 (2d Cir. 1984).
36. Carlin Comm., Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) [hereinafter Carlin II].
More significantly, the Supreme Court in *Pacifica* considered the nature of the broadcast medium itself. Broadcasting was found to have "a unique, pervasive presence" and to be "uniquely accessible to children."\(^4\)\(^1\) Supporters of the dial-a-porn legislation were hopeful that a similar analysis would be applied to the telephone medium. However, subsequent decisions involving mail\(^4\)\(^2\) and cable television\(^4\)\(^3\) stressed the uniqueness of broadcasting and confined the *Pacifica* rationale to that medium.

Following these decisions, the Second Circuit in *Carlin III* concluded that *Pacifica* "does not justify the regulation of indecent telephone messages."\(^4\)\(^4\) As a result, the words "or indecent" in section 223(b)(1)(A) were struck down as unconstitutional, while the remainder of the statute was permitted to stand.\(^4\)\(^5\)

D. Obscenity Bans vs. FCC Guidelines

Technically, *Carlin III* upholds the federal regulation of dial-a-porn.\(^4\)\(^6\) However, the court's removal of the word "indecent" from the statute creates an unusual situation. Since obscenity falls outside first amendment protection,\(^4\)\(^7\) total bans on such material are theoretically permissible. In the wake of *Carlin III*, defenses to prosecution were in place for those who followed the FCC guidelines for restricting access to audiotex services, even those containing content judged to be legally obscene. This was hardly what the supporters of the 1983 legislation had in mind.\(^4\)\(^8\)

This "loophole" was duly noted by Representative Bliley as he continued his efforts to curb dial-a-porn.\(^4\)\(^9\) Even before the *Carlin III* deci-

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41. *Id.* at 748-49.
43. *See, e.g.*, Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Community TV v. Roy City, 555 F. Supp. 1164 (D. Utah 1983).
44. *Carlin III, supra* note 38, at 560.
45. *Id.* at 560-61.
46. *Id.* at 555-57.
48. The FCC was not completely handcuffed by *Carlin III*. In March 1988, the Commission assessed forfeitures of $600,000 each against two dial-a-porn providers. In each case, the FCC found that the material was obscene and that no precautions to restrict access by minors had been employed. Intercambio, Inc., *Notice of Apparent Liability*, 3 FCC Rcd. 7247 (1988); Audio Enterprises, Inc., *Notice of Apparent Liability*, 3 FCC Rcd. 7233 (1988). After *Carlin III*, each of these factors apparently had to be present for the FCC to constitutionally restrict dial-a-porn. The size of the forfeitures, especially as applied to small companies, raised the possibility that the Commission was using this opportunity to send a message to other providers whose material might border on the legally obscene.
sion was handed down, Congress was considering a removal of the distinction between communication received by minors and adults, substituting instead a flat ban on dial-a-porn. According to Representative Bliley, the 1983 amendment had mistakenly legalized some obscene and indecent communication by instituting the defenses to prosecution. Representative Bliley continued to rely on Pacifica, stating that the "[t]elephone is like radio and television because it is easily accessible to children and it is almost impossible for parents to monitor its use." Following this reasoning, Representative Bliley contended that Congress could constitutionally restrict indecent telephone communication.

E. Restricting Indecent Speech

The problem with relying on Pacifica to support a ban on telephone indecency is two-fold. First, restrictions on indecency have not been upheld in any medium but broadcasting. While the principles of Pacifica could reasonably be applied to telephony, Bolger and Cruz indicated a reluctance on the part of the courts to extend that rationale to other media. Second, Pacifica itself did not involve a flat ban on broadcast indecency. In fact, the Court was explicit on this point. "We have not decided that an occasional expletive . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables." Pacifica held that, even in the broadcast medium, indecency could be restricted only under carefully considered circumstances. Even then, this class of material could not be banned, but instead could be channeled to times of the day when children were less likely to be in the audience. This holding stands in contrast to the attempts of Congress to outlaw all indecent communication on the telephone system.

In the wake of Carlin III, however, Congress passed a flat ban on obscene and indecent telephone communication. Section 223(b) read

(1) Whoever knowingly
   (A) in the District of Columbia or in interstate or foreign communica-
   tion, by means of telephone, makes (directly or by recording device)
   any obscene or indecent communication for commercial purposes to

50. Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Tele-
    communications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 1st
51. Id. at 13.
52. Id. at 13-15.
53. See supra text accompanying notes 42-43.
55. Id.
any person . . . shall be fined not more than $50,000 or imprisoned not more than six months, or both.\textsuperscript{56}

No distinctions were made between messages received by minors and adults and, consequently, no defenses to prosecution were established.

The passage of such constitutionally suspect legislation probably reflected a combination of frustration over the \textit{Carlin} decisions and the realities of election year politics. In any case, preliminary injunctions against enforcement of the statute were quickly granted by two district courts.\textsuperscript{57} In \textit{Sable}, the Supreme Court considered the constitutionality of the ban.\textsuperscript{58} The Court's decision dealt separately with obscenity and indecency. Since obscenity was unprotected by the first amendment, the Court found no fault with the statute as applied to such material.\textsuperscript{59}

The Court also acknowledged that nonobscene material could be shielded from minors, and that such efforts should include the channeling of indecent broadcasting.\textsuperscript{60} However, this legislation went beyond these bounds by instituting a total ban on nonobscene material. The Court unanimously concluded that "the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages."\textsuperscript{61}

The long-term impact of \textit{Sable} and the \textit{Carlin} cases is difficult to assess. On one hand, the cases appear to restrain the federal government in its efforts to regulate the content of public telephone communication. On the other, the Supreme Court may have left the door open for federal regulation of dial-a-porn by noting that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest \textit{if it chooses the least restrictive means to further the articulated interests}."\textsuperscript{62}

Accordingly, Congress revised section 223, continuing the flat ban on obscene audiotex and authorizing the FCC to adopt rules restricting access by minors to indecent material.\textsuperscript{63} In June 1990, the Commission adopted yet another set of dial-a-porn rules.\textsuperscript{64} These new guidelines, sim-

\textsuperscript{58} Sable Comm. v. FCC, 109 S. Ct. 2829 (1989).
\textsuperscript{59} \textit{Id.} at 2835.
\textsuperscript{60} \textit{Id.} at 2836-37.
\textsuperscript{61} \textit{Id.} at 2839.
\textsuperscript{62} \textit{Id.} at 2836 (emphasis added).
\textsuperscript{64} Regulations Concerning Indecent Communications by Telephone, \textit{Report and Order}, 5 FCC Red. 4926 (1990).
ilar to those enacted in Carlin III, establish a defense to prosecution for those indecent audiotex content providers who require payment by credit card, require a user identification code, or scramble the message.65

The federal legislative actions, largely unsuccessful to date, raise a number of questions concerning the ways in which the first amendment is to be applied to the telephony medium. Congress chose to assume that, for purposes of indecency regulation, telephony could be compared to broadcasting. The Second Circuit chose instead to compare it to cable, applying standards developed for that medium.66 Eventually, the telephone must come to be recognized as a unique form of mass communication. The first amendment model for telephony cannot be adequately borrowed from another medium. Instead, policymakers would be well advised to consider the technology, functions, and regulatory traditions of the telephone in attempting to craft regulations.

Guidance in this regard might be found from the history of broadcast regulation. A host of policies, ranging from licensing to ownership rules to content regulation, have been enacted and upheld on the basis of the unique characteristics of broadcasting, rather than on characteristics "borrowed" from other media.67 The system of broadcast regulation in place today exists because government and industry alike recognized in the 1920s that this new medium would require a fresh regulatory approach.

As telephony becomes a mass medium, it seems just as apparent that first amendment applications must take into account the uniqueness of the telephone. This is especially true in light of the fact that telephony has long been a regulated industry and, therefore, has its own regulatory traditions. Any meaningful attempt to craft policy for telephonic mass communication should consider these traditions, along with the technical and functional characteristics of the medium.

III
The Role of State Government

One key difference between telephony and the traditional mass media is that the telephone system is closely regulated at the state level.

65. Id. at 4928-31.
66. See supra text accompanying notes 39-44.
Audiotex services provided by local exchange carriers originate as intrastate communication and, as such, are subject to regulation by state legislatures and utility commissions.

A. State Regulation of Audiotex

The audiotex content controversy has prompted several states to attempt to regulate audiotex services. In many ways, these efforts have involved arguments similar to those present at the federal level. For example, Pennsylvania enacted a statute that placed several restrictions on providers of sexually explicit audiotex messages.\(^69\) Under the statute, all audiotex messages were required to include a preamble informing the listener of the cost of the call and, if appropriate, warning the caller that the message is sexually explicit.\(^70\) Furthermore, sexually explicit messages were available only to those adults who had obtained a nine-digit access code through a written application process.\(^71\)

In Fabulous Associates, two providers of adult services challenged the statute in federal district court.\(^72\) Despite the fact that the statute was passed after Carlin III, the state relied on Pacifica, arguing that this was simply an attempt to channel nonobscene offensive material away from children.\(^73\) The court disagreed with the state and affirmed that Pacifica was to be applied only to the broadcast medium.\(^74\) The decision followed the Carlin cases by reasoning that the statute placed undue restrictions on the ability of adults to receive legally-protected material.\(^75\)

The court also concluded that the statute did not represent the least restrictive alternative. In addition to describing the obstacles placed between providers and the adult audience, the court noted a pending action at the Pennsylvania Public Utilities Commission (PUC) as an example of a more acceptable approach.\(^76\) Under that proposal, audiotex services would be provided on two separate exchanges, 976 and 556.\(^77\) The telephone company would be permitted to define the types of services, presumably including adult messages, that would be placed on the 556 exchange.

\(^70\) 66 PA. CONS. STAT. § 2905(a) (1988).
\(^71\) Id. § 2905(b).
\(^73\) 693 F. Supp. at 336.
\(^74\) Id. at 337.
\(^75\) Id. at 337-38.
\(^76\) Id. at 339.
exchanges. Subscribers would be able to choose, without additional charges, whether or not they would have access to this exchange. 78

While not ruling on this type of scheme, the court in Fabulous Associates cited the PUC's approach as a less restrictive regulatory approach than that taken by the Pennsylvania legislature. 79 Consequently, the administrative proposal served as further evidence of the statute's overbreadth. 80

B. States Balance Competing Interests

The PUC's approach is similar to that adopted in other states. 81 While these regulations have yet to be fully tested in the courts, they offer examples of efforts to balance the competing interests in the dial-a-porn controversy. More importantly, perhaps, these actions suggest that the states may ultimately play a larger role than the federal government in the regulation of telephone content.

The state role covers several dimensions. One of the most intriguing of these dimensions is the protection accorded freedom of expression under state constitutions. The first amendment of the United States Constitution is written in negative terms, prohibiting the government from "abridging the freedom of speech, or of the press." 82 Most state constitutions also have some provision pertaining to free speech or press, but many of these provisions define the right in an affirmative way. 83 In a 1980 case involving an interpretation of the California Constitution, the United States Supreme Court acknowledged that state guarantees of free expression may actually grant more expansive rights of free expression than the federal Constitution. 84

This circumstance has affected at least one case involving audiotex. An Arizona statute required message providers to restrict access to those customers who had presubscribed to the service and to pay for the costs

78. Id. at 6-7.
80. The Third Circuit delayed its decision pending the resolution of Sable v. FCC, then upheld the District Court's decision. While finding the specific statute to be overbroad, the court did not "express any opinion as to the validity of other potential legislation designed to achieve the same end." Fabulous Assocs. 896 F.2d at 789.
82. U.S. CONST. amend. I.
of blocking audiotex services to nonsubscribers. In challenging the statute, audiotex providers argued that the restrictions violated both their rights under the United States Constitution and their even broader rights under the Arizona Constitution. According to the Arizona Supreme Court,

The words of art[icle] 2, [section] 6 of the Arizona Constitution . . . directly grant every Arizonan a broad free speech right: “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Thus, the providers argued, Arizona citizens have greater free speech rights than the United States Constitution requires.

Consequently, the case was decided under the state constitution and the statute was struck down. While a similar result might well have followed under the United States Constitution, it is significant that differences in state constitutions could lead to different results as state statutes and state utility commission policies are reviewed.

Similarly, differences in common carrier law occur from state to state. In another case originating in Arizona, Mountain Bell’s policy of denying access to adult message providers was upheld, in part, on the ground that state law allowed common carriers to make distinctions among customers “based on reasonable business classifications.” Although this case is more important for its holding on the distinction between private action and state action, it points out another aspect of state law that can be a factor in the regulation of telephonic mass communication.

Perhaps the most important factor in state regulation concerns the interaction between state regulators and private companies. Local exchange carriers must routinely file tariffs for new services or fees and are regulated by the utility commissions in many phases of their businesses. As a result, it is often difficult to determine the extent to which the services of a utility derive from the actions of the state or from the business decisions of a private company. This is a critical issue in light of the traditional role of the telephone companies as content-neutral common carriers.

86. Id. ¶ 26,171.
87. Carlin Comm. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1293 (9th Cir. 1987).
88. See infra text accompanying notes 109-11.
IV
The Role of the Telephone Companies

On the surface, the audiotex business has been a good one for the telephone industry. The "900" services of long distance carriers, for example, were projected to generate over five hundred million dollars in 1990. Independent programmers provide both the content and the promotion, while the telephone carriers share generously in the revenue. Dial-a-porn, while only one type of audiotex service, has generated large amounts of revenue for several telephone companies.

Yet this new line of business has had its downside. The political controversies surrounding dial-a-porn have led to public relations problems for the telephone industry. For example, an Arizona regulator compared Mountain Bell to "a frontier madam, earning a percentage of every trick the sex vendor turns."

A. Risks & Liabilities of Dial-a-Porn Service

A number of companies have spoken out against dial-a-porn. US West, Mountain Bell's parent company, acknowledged that dial-a-porn services were damaging the company's reputation "because consumers think of them as a Mountain Bell product." A Pacific Bell official referred to dial-a-porn as "filth," while AT&T executives expressed concern about the ability of children to gain access to sexual messages on its 900 lines.

Acting on these assertions has at times proven to be a more difficult matter. Prior to 1987, the telephone industry generally took the position that its obligations as a common carrier prevented it from taking action against audiotex providers on the basis of content. Robert Helgesen, representing NYNEX, presented the views of the telephone industry in his testimony before the House Telecommunications Subcommittee in 1987. NYNEX officially found dial-a-porn to be "repugnant" and sup-

89. Stroud, Popular Number, St. Louis Post-Dispatch, Aug. 5, 1990, at C1, col. 2.
90. See Carlin I, supra note 19, at 115; Wilke, A 'Dream' Business That's Just a Phone Call Away, BUS. WK., Mar. 31, 1986, at 70.
92. Mason & Wilson, AT&T Ready to Crack Down on Dial-a-Porn, TELEPHONY, Jan. 4, 1988, at 3.
95. Mason & Wilson, supra note 92.
96. Decency Hearings, supra note 50, at 56.
ported the efforts of Congress to restrict it.\footnote{97} At the same time, however, Helgesen expressed his concern over the proper role of the telephone companies. NYNEX contended that it should not be expected to act as a censor, nor should it be required to determine which messages were pornographic. Instead, the company supported efforts by the government to make such decisions and expressed its willingness to comply with these decisions by withholding its transmission services when so directed.\footnote{98}

NYNEX's concerns appeared to focus on the question of legal liability. Under existing common carrier statutes, the company was generally prohibited from discrimination in the provision of telephone services. If NYNEX denied service on the basis of its own judgment of the content, it would bear the responsibility of proving that the content was illegal.\footnote{99}

This concern was supported by Diane Killory, general counsel for the FCC. In a written response to the subcommittee, Killory stated, [A] common carrier must accept customers on a non-content oriented basis. The Commission has held, however, that this obligation does not apply where the common carrier has knowledge that its facilities are being used for unlawful purposes. In such a case, the carrier may refuse to carry a message if it believes that the message is being provided in violation of the law.

It should be noted, however, that carriers refuse service at their own risk. If the carrier incorrectly determines that provision of the message was unlawful, it could be subject to liability for failure to carry it.\footnote{100}

In view of the difficulties faced by Congress and the Commission in enacting constitutional dial-a-porn restrictions, it is hardly surprising that the telephone industry was less than confident that its own attempts to regulate content would pass judicial review.

While Helgesen concentrated his testimony on the specific issue of legal liability, his concerns raised broader questions about the role of the carriers in providing mass communication services. By attempting to separate itself from content judgments, NYNEX remained true to the common carrier tradition. However, the company was also professing a view of its role that stood in sharp contrast to that of the traditional mass media provider.

Much of mass communication law rests on the recognition that media operators edit the material they disseminate.\footnote{101} It is interesting that

\begin{itemize}
\item \footnote{97} Id.
\item \footnote{98} Id. at 56, 62.
\item \footnote{99} Id. at 56-57.
\item \footnote{100} Id. at 252-53 (citation omitted).


the dial-a-porn debate was unfolding at the same time that the Regional Companies were actively seeking repeal of the provisions of the divestiture consent decree that prohibited the companies from providing information services.\textsuperscript{102} Had those restrictions been removed, some of the Regional Companies would have surely entered the information services market and, therefore, would have become "publishers." In Congressional testimony on the electronic publishing issue, AT&T representatives had sought the right to originate content over AT&T's own transmission lines, comparing their right to do so to that of a newspaper.\textsuperscript{103} Yet, in a different arena, the telephone industry notably declined to assert the editorial rights normally associated with the publishing field.

In fact, the editorial rights argument was hardly evident in the audiotex content debate. By appearing to support dial-a-porn, the telephone industry surely would have put itself on the wrong side of public opinion. The electronic publishing issue had been debated in more general terms and, as such, could be approached as a matter of broad first amendment principle. Audiotex, in contrast, was strongly associated in the public mind with sexually-explicit services.

This association has had a significant impact on the early development of first amendment law for telephony, as so many of the early cases and actions have been centered specifically on this unpopular form of communication. The local exchange operators, facing a new competitive environment and waging political battles on many fronts, were hardly eager to take unpopular public positions that would appear to condone dial-a-porn.

In addition to their concerns over public opinion, the telephone companies were certainly influenced by the uncertain state of common carrier law. AT&T's strong first amendment position in the early 1980s was adopted as part of a campaign to influence Congress in the formulation of policy. In effect, AT&T had nothing to lose by taking such a position. However, the Regional Companies, after divestiture, were still obligated to act as common carriers and were generally precluded from a role in the origination or selection of content. Helgesen's concern over legal liability was, therefore, a very real factor.

B. The Carlin Cases: Private Action and Enhanced Services

In 1986 and 1987, decisions handed down in two circuit courts cast new light on the rights of local exchange carriers to deny access to infor-


\textsuperscript{103} See Diversity Hearings, supra note 9, at 103-05, 107-08 (testimony of Newton Minow for AT&T); Hearings on H.R. 5158, supra note 10, at 27-29 (testimony of Newton Minow for AT&T).
Information providers. In each of these cases, the specific service in question was allegedly pornographic. Significantly, however, neither court based its decision on the sexual nature of the content.

Carlin Communications v. Southern Bell involved a company policy, approved by the Florida Public Service Commission, excluding from its audiotex service any message that "'implicitly or explicitly invites, describes, simulates, excites, arouses, or otherwise refers to sexual conduct.'" Carlin, the same New York-based provider that was then appealing the FCC actions, challenged this policy as a "prior restraint of free speech without constitutionally required procedural safeguards."

Since the first and fourteenth amendments only prevent abridgement of constitutional rights by the government, and not private persons or entities, the key issue in this case was the extent to which the denial of access was state action. The Eleventh Circuit relied on Jackson v. Metropolitan Edison, in which the Supreme Court held that the approval of a company policy by the regulatory agency does not, by itself, constitute state action.

Similarly, in Carlin Communications v. Mountain States, Carlin challenged a policy under which the telephone company refused to offer its dial-it service to providers of "adult entertainment" messages. The Ninth Circuit determined that the policy was voluntarily enacted by Mountain States and, therefore, a private action. The court noted its agreement with the reasoning of the Eleventh Circuit in Southern Bell and allowed the policy to stand.

The first amendment was found to be inapplicable to these private actions; the question then became whether the denial of access was acceptable under common carrier law. In holding that the private company could exercise such discretion, both circuit courts relied primarily on the FCC's Computer II decision, which exempted enhanced services from statutory nondiscrimination requirements. Since audiotex fell into the enhanced classification, the carriers were not obligated to offer the service to all potential customers.

104. 802 F.2d 1352, 1355 (11th Cir. 1986) (quoting proposed amendment to Dial-It tariff proposal).
105. See supra text accompanying notes 35-38.
106. Id.
109. 827 F.2d 1291, 1293 (9th Cir. 1987).
110. Id. at 1297.
The holdings of *Southern Bell* and *Mountain States* are especially significant because they were not confined to the specific issue of dial-a-porn. Neither case upheld the action of the carrier on the grounds that the content was offensive or harmful. Instead, the actions were permitted to stand because neither the first amendment nor the state and federal common carrier statutes were found to bar the actions of the telephone companies. In fact, the Ninth Circuit stated that Mountain States' motivation for excluding certain audiotex providers was "immaterial."  

The holdings in *Mountain States* and *Southern Bell* apparently conferred to local telephone carriers editorial rights not traditionally associated with the telephone system. It is noteworthy that this result was not reached through the normal public policymaking process. The courts relied on an FCC policy that, though otherwise thorough and well-reasoned, did not specifically consider the issue of whether local exchange carriers should make editorial decisions.

In fact, there is much to suggest that the holdings of these cases are at odds with the electronic publishing policies. As of 1991, the Regional Companies were still prohibited from originating content on the grounds that they controlled information bottlenecks. Judge Greene's decisions in the divestiture and line-of-business cases have consistently rejected the notion that the local exchanges should exercise control over content.

C. In the Aftermath of *Carlin I* and *II*: Editorial Control for Local Exchanges?

Although Congress failed to enact any of the comprehensive bills it considered in the early 1980s, a clear sense also emerged that the separation of content and carriage should be maintained at the local exchange level. Consequently, questions can be raised about the holdings of *Southern Bell* and *Mountain States* and their place in the structure of telephonic mass communication, as the decision to allow local exchanges to exercise a degree of editorial control did not result from a broad examination of communication policy.

It is quite possible that the decisions turned out as they did precisely because of the nature of the content in question. While the decisions seem to have granted the carriers a broad right to refuse service on the basis of content, it is certainly possible that the courts acted as they did out of a revulsion for dial-a-porn. Judge Sneed, for example, may have

112. *Mountain States*, 827 F.2d at 1297.
115. *See supra* notes 6-11 and accompanying text.
tipped his hand in the opening paragraph of *Mountain States* when he wrote, “Modern telephonic technology permits the pervasive transmission of vast quantities of information, as well as Shakespeare, Shaw, and smut. The essential question before us is whether a regional telephone company, despite its public utility status, may refuse to carry smut on its dial-a-message network.”116

Given the manner in which the “essential question” was framed, it is not surprising that Judge Sneed issued an opinion that the company should not be required to carry “smut.” Yet, this decision did not turn on a finding of offensiveness or illegality. Instead, the court upheld the right of the utility to refuse service to any message provider for any reason.117 It is interesting to speculate whether the same result would have been reached if the company had denied the service because of a political disagreement or a business rivalry.118

In addition to fueling the discussion of broader communication issues, the *Southern Bell* and *Mountain States* decisions were immediately relevant to the control of dial-a-porn. The telephone companies’ arguments that they were powerless to act were significantly diminished after these decisions. Consequently, the focus in the dial-a-porn controversy began to shift toward the actions of the carriers.

In the wake of *Mountain States*, Mountain Bell began eliminating live and recorded sexually-explicit lines from its system.119 Some carriers have followed suit, while others have stopped short of expelling adult services, but have ceased to provide billing services.120 Although he had previously ruled that the billing of the Regional Companies could not be “discriminatory in any way,”121 Judge Greene upheld Bell Atlantic’s policy of denying billing and collection services only to providers of adult messages.122

116. Carlin Comm. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1292 (9th Cir. 1987).
117. Id. at 1297.
118. There are indications that dial-a-porn is not the only kind of audiotex content that might run afoul of telephone company policy. At least two companies, Southwestern Bell and Illinois Bell, currently refuse to provide billing services for audiotex services that are deceptive, racist, sexist, or “otherwise objectionable.” Stroud, supra note 88, at C1, col. 3.
119. Lannon, supra note 92, at p. 10.
120. E.g., Amparano, U.S. West to Ban ‘Dial-a-Porn’ Services On Its Network; Other Bells May Follow, Wall St. J., May 31, 1988, at 2, col. 2; Block That Call, supra note 80; Mason & Wilson, supra note 91.
D. California Public Utilities Commission's Proposal: A Workable Solution?

The ability of carriers to eliminate undesirable services is complex, involving constitutional rights, state law, and the actions of regulatory agencies. These difficulties are illustrated by the efforts of Pacific Bell regarding dial-a-porn. Despite the existence of a number of revenue-generating services in California, Pacific Bell embarked on a course intended to eliminate sexually-explicit services in order to protect its corporate reputation. However, the California Public Utilities Commission (CPUC) ruled that such a content-based action would violate the first amendment. While seeking a court decision supporting its efforts, Pacific Bell proposed an interim plan to segregate the objectionable services. This proposal was accepted, with modifications, by the CPUC in 1989.

Under these guidelines, general audiotex services would use prefix 844, while live chat lines would be placed on prefix 505 and services defined as "harmful" would be assigned to prefix 303. Blocking would be available for all three prefixes and the 303 prefix would be accessible only to those who presubscribe. Further safeguards were enacted to prevent the creation of large bills for audiotex service. Whether or not this policy survives judicial review, it does stand as an example of a compromise that might satisfy both sides of the controversy. It is certainly a more workable solution to the problem than the flat ban enacted by Congress in 1988.

This solution also says something about the role of the telephone companies. Pacific Bell’s stated intention was to “‘disconnect dial-a-porn.’” Instead, the company was required to develop a policy that allowed those services to remain on its system, albeit on a different footing than other audiotex services. State laws and regulations restricted the telephone companies' ability to make an editorial decision that would have been routine in another medium.

Perhaps more significantly, Pacific Bell’s effort points out the interaction between a private company and state government in the setting of policy for the telephone system. The California policy was produced by

125. *In re Application of Pacific Bell for Auth. to Establish a Tariff Schedule for Information Calling Servs.*, 31 C.P.U.C.2d 401, 1989 Cal. PUC LEXIS 193 (1989), (LEXIS, Cal Library, Capuc file) (this was an abstract in 31 C.P.U.C.2d 401; only available on LEXIS).
126. 1989 Cal. PUC LEXIS 193, at 7-10.
127. Id. at 12-13.
both Pacific Bell and the CPUC. The distinction, or lack of it, between public and private action is a critical one in first amendment law.

V

State and Private Action

The legal authority of the local exchange to restrict or eliminate undesirable content has not yet been fully defined. The results of the two lines of Carlin cases suggest that the companies may be more successful in restricting dial-a-porn (or other kinds of material) than the government. However, the close relationship between the private telephone system and the government raises significant questions about the distinction between state action and private action.

This distinction is important in mass communication law. Since the first amendment imposes a restriction on government activity, it does not interfere with the rights of media organizations to make editorial decisions. As a result, print or electronic media outlets may routinely reject objectionable or inappropriate material without prompting the first amendment debates likely to ensue if a government agency attempted to impose such restrictions.

The state-private distinction is considerably less clear in the telephone medium than in the traditional mass media. As the Pacific Bell example suggests, it is difficult for a public utility to enact a policy without first gaining approval from the state regulatory agency. In the process, the proposed action of the telephone company will be judged according to the constitution, statutes, and administrative policies of the state.

Consequently, the final result is likely to be a combination of private and state action. For example, the decision to treat "harmful" audiotex messages differently was enacted in the form of an approval by the CPUC of a tariff submitted by Pacific Bell. In fact, the approved tariff differed slightly from the one initially submitted by the company because of modifications suggested by the Commission.

Under existing law, this process of regulation does not necessarily confer the status of state action upon such a policy. The Supreme Court has ruled that "extensive regulation by the government does not transform the actions of the regulated entity into those of the government." In Jackson v. Metropolitan Edison, the Court determined that the action

of a private utility would be considered state action only if there is "a sufficiently close nexus between the [s]tate and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [s]tate itself." 132 There are two general circumstances in which such a "close nexus" might be found.

The first involves the possibility of coercion. The Supreme Court has held that a government agency "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [agency]." 133 Suggestions of such a role have surfaced in several of the key cases involving dial-a-porn.

In *Mountain States*, the Ninth Circuit ruled that the company's policy of refusing service to adult message providers was private action. 134 That case was complicated, however, by a finding that Carlin's service had initially been terminated after a deputy county attorney, in a letter to Mountain Bell, threatened to prosecute the company under a state statute prohibiting the dissemination of sexual material to minors. Less than two weeks after receiving this letter, Mountain Bell announced a change in policy, under which it would no longer carry such services. 135 The court determined that, due to the action of the county official, state action did exist in the original termination of Carlin's service. 136 On the other hand, Mountain Bell's subsequent policy revision was held to be voluntary and, therefore, a private action. 137

Similarly, there was a suggestion of "overt or covert" encouragement in the *Southern Bell* case, although the court again declined to find state action present. At least two Florida Public Service Commissioners expressed reservations about Southern Bell's proposed tariff for audiotex service during a prehearing conference. The commissioners were concerned that the service could be used for "'High Society' type messages." 138 The original audiotex proposal was subsequently amended to prohibit such messages. 139 During the meeting at which the tariff was approved, the commissioners again stated their concerns about the en-

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134. *Carlin Comm. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 (9th Cir. 1987).
135. *Id.* at 1293.
136. *Id.* at 1295-97.
137. *Id.* at 1297.
139. *Id.* at 1359.
forceability of the new provision, and questioned company officials about
the methods to be used in reviewing material. \footnote{140}

A similar situation occurred in Texas, where a provider offered live
conversations on a service originally intended for prerecorded pro-
grams. \footnote{141} A staff attorney in the Texas Public Utilities Commission told
Southwestern Bell to disconnect the service. \footnote{142} According to the state
court, the subsequent disconnection could not be attributed to the action
of the state, since only the full Commission could have required the com-
pany to drop the service. \footnote{143}

In each of these cases, the company “voluntarily” enacted policies
knowing that they conformed to actions desired by state officials. It is
impossible to know all the ways in which a regulatory agency’s wishes
might be transmitted to a utility, but surely commissioners and other
officials are capable of making their views known. The arguments
presented in \textit{Southern Bell} and \textit{Mountain States} indicate that a finding of
state action by virtue of coercion is a matter of judgment and that, at
least regarding dial-a-porn, the courts may be reluctant to rule that coer-
cion was present.

A second circumstance in which state action might be found in-
volves the public function test. According to the Supreme Court, state
action may be present when the private entity performs functions that
have been “traditionally the exclusive prerogative” of government. \footnote{144}
One dilemma presented by this test in regard to the control of audiotex
content is that it requires an assessment of the company’s motives. In
\textit{Carlin Communications v. South Central Bell (SCB)}, for example, a state
court found the company’s policy of refusing access to an adult audiotex
service to be state action. \footnote{145} This action was distinguished from that
present in \textit{Jackson}:

\begin{quote}
In \textit{Jackson}, the utility company cut off plaintiff’s electricity to serve its
own private economic interest. By contrast, SCB censored Carlin’s
phone messages to protect the public interest. The stated purpose of the
tariff’s prohibition of sexually explicit messages is to prevent minors
from gaining access to such material. The protection of minors from
exposure to obscenity is a \textit{state} concern. Thus, SCB is exercising a
state function. \footnote{146}
\end{quote}
Consequently, the policy was struck down as a violation of Carlin's rights under the first and fourteenth amendments.

The result reached in SCB is atypical, however. In Southern Bell, the Eleventh Circuit dismissed Carlin's contention that the company was exercising a public function. Instead, the court determined that "Southern Bell was motivated by a desire to protect its own corporate image," a decidedly private function. Furthermore, the court emphasized the fact that Jackson defined the public function as one exclusively performed by the state:

While "public" censorship may be a function traditionally performed by the state, it is clear that restriction of message content by a private company based on a determination that it does not wish to do business with another company is not a traditional state function, much less one exclusively reserved to the state. A private business is free to choose the content of messages with which its name and reputation will be associated and such a choice is not the exercise of a public function.

Similarly, the Maryland Public Service Commission dismissed a claim by adult audiotex providers against Chesapeake and Potomac that selectively denied access to generally available billing and computer services. Since there had been a "public outcry" over dial-a-porn, the Commission reasoned that Chesapeake and Potomac acted to "maintain the good will of its customers . . . and [to] protect its own corporate image."

Perhaps the broadest rejection of the public function argument came in Mountain States. According to the Ninth Circuit, the company's motivations were "immaterial." Furthermore, the court concluded that the kind of content control at issue could not be considered a state function. In any event, officials of telephone companies wishing to curtail adult dial-a-porn service have consistently stated their arguments in terms of protecting their corporate images. It is, of course, entirely possible that this has been their primary motivation. After all, the companies controlling the local exchanges entered into a variety of competitive markets and certainly desires to reduce the negative publicity attending dial-a-porn.

On the other hand, a reading of the denial of access cases would surely encourage a company to state its position in terms calculated to

148. Id. (citation omitted).
150. 1988 Md. PSC LEXIS 125, at 11.
151. Carlin Comm. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1297 (9th Cir. 1987).
avoid a finding of state action under the public function test. Absent clear evidence to the contrary, it would be difficult for a court to conclude that a company’s motivations were different from those publicly expressed.

It is important to note that none of the audiotex access cases turned on a finding that the material in question was harmful, obscene, or otherwise illegal. Instead, each of these cases focused on the ability of a private company to choose its business partners. As such, these are not really “indecency” cases in the manner of *Sable* or *Carlin III*. Instead, they are cases affirming, at least in certain jurisdictions, the right of a telephone company to deny access to audiotex providers. The holdings of *Southern Bell* and *Mountain States* are not limited to instances of sexually explicit material.

The extent to which private companies can restrict audiotex services on the basis of content is still subject to the variations in state common carrier law. However, the general thrust of the audiotex access cases is that the first amendment does not guarantee access to the telephone system by providers of mass communication services.

## VI

### The Concept of Common Carriage

The concept of common carriage is important in the development of a first amendment model for telephonic mass communication. The tradition of common carriage distinguishes the telephone system from other media. To a large extent, the emerging law of free expression for telephony will be determined by the ways in which first amendment law and common carrier law are reconciled.

It is useful, therefore, to consider whether the underlying theory of common carrier law is undergoing a fundamental change. *Southern Bell* and *Mountain States*, building on the foundation laid by *Computer II*, can be read as indications that the telephone companies may no longer be confined to the role of neutral carrier. Indeed, those cases appeared to confer on the telephone exchanges a right of editorial control comparable, at least in certain circumstances, to that enjoyed by the mass media. Yet, this is too sweeping a conclusion to base on a handful of early court cases. In fact, it is possible to interpret the overall course of common carrier policy in the 1980s as reinforcing many of the basic common carrier concepts.

In *Computer II*, the FCC allowed predivestiture AT&T to establish a subsidiary for the provision of enhanced services. While such a com-

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152. *Computer II Final Decision*, supra note 6, at para. 228.
pany was not bound by the traditional nondiscrimination requirement, it was required to abide by a series of guidelines. The subsidiary, for example, was required to obtain all of the basic services it used under tariff, thus assuring its access to the basic network on the same terms as its potential competitors.\textsuperscript{153} Furthermore, AT&T was also instructed to publicly disclose information on network design and management.\textsuperscript{154} These requirements were enacted to assure all potential users that the telecommunications system would be able to operate on a competitive basis. Accordingly, it can be argued that the essential precepts of common carriage were maintained in \textit{Computer II}, despite the fact that the policy led to circumstances under which the carriers were able to deny service on the basis of content.

It must again be recognized that content issues were not under serious consideration in \textit{Computer II}. Instead, the Commission was seeking a way to allow carriers to price certain services on a competitive basis.\textsuperscript{155} The additional safeguards enacted at the time clearly indicate that the Commission was not trying to allow the carriers to exercise undue control over the use of the system.

After the AT&T divestiture went into effect, the Commission undertook yet another major inquiry into telecommunications services. Under the policies adopted in \textit{Computer III},\textsuperscript{156} the requirement that Regional Companies must offer enhanced services only through a separate subsidiary was removed.\textsuperscript{157} The local exchanges controlled by the Regional Companies would be permitted to integrate their enhanced service offerings with the operation of the basic network. Ideally, this would provide incentives to the exchange carriers to upgrade their systems.\textsuperscript{158}

In order to protect the interests of competitive service providers, the Commission required local exchanges to provide basic services under the principle of Open Network Architecture (ONA).\textsuperscript{159} Each of the Regional Companies was required to submit a plan under which it would break the operation of the network into its most basic elements.\textsuperscript{160} Each of these elements would then be made available on an equal and unbundled basis to all service providers. Ideally, ONA would allow all providers to gain use of the telephone network on equally favorable terms.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{153} \textit{Id.} paras. 233-46.
\item \textsuperscript{154} \textit{Id.} paras. 247-50.
\item \textsuperscript{155} \textit{Id.} para. 282.
\item \textsuperscript{156} \textit{In re} Amendment of § 64.702 of the Commission’s Rules and Regs. (Third Computer Inquiry), \textit{Report and Order}, 104 F.C.C.2d 958 (1986) [hereinafter \textit{Computer III Order}].
\item \textsuperscript{157} \textit{Id.} paras. 5-8, 98-99.
\item \textsuperscript{158} \textit{Id.} paras. 95-97.
\item \textsuperscript{159} \textit{Id.} paras. 111-16.
\item \textsuperscript{160} \textit{Id.} para. 114.
\end{itemize}
\end{footnotesize}
ONA would exist only after a technological and economic restructuring of the system. In the meantime, the Regional Companies would still be permitted to provide enhanced services on an unseparated basis if competitive providers were offered the same access on equal terms.\textsuperscript{161} One key difference between this concept, known as Comparably Efficient Interconnection (CEI), and ONA is that CEI applied only to the kinds of services provided by the local exchange carrier.\textsuperscript{162} ONA, on the other hand, would apply to all enhanced services, whether or not such services were offered by the carrier.\textsuperscript{163}

Each of the Regional Companies took advantage of the opportunities presented by Computer III by eliminating their separate subsidiaries and implementing CEI policies.\textsuperscript{164} These companies were also in various stages of planning for ONA when, in June 1990, the U.S. Court of Appeals for the Ninth Circuit overruled Computer III.\textsuperscript{165} The court determined that the FCC did not offer adequate justification for eliminating the separate subsidiary requirement.\textsuperscript{166} Furthermore, the court ruled that the FCC infringed on the authority of state regulators by involving itself in rate regulation for enhanced services.\textsuperscript{167} While this action casts a shadow on the future of ONA as a guiding principle, it is still useful to consider Computer III as part of the continuing effort to reform and restructure telecommunications policy. In many respects, telecommunications policy in recent decades has been focused on an attempt to separate the regulated and the competitive components of the system. Even before divestiture, policies were enacted that removed the equipment manufacturing and long-distance segments from the integrated Bell System and placed them in a competitive environment. Only local service remained under the control of a regulated monopoly.

Computer II can be viewed as an effort to further divide local service into basic and enhanced components. Basic services, still considered to be a natural monopoly, were regulated under the traditional common carrier structure, while enhanced services were permitted to be offered in a competitive market. Computer III took this process slightly further by

\begin{enumerate}
\item Id. paras. 5-6.
\item Id. para. 112. While the Regional Companies were permitted to provide enhanced services, they were still bound by the provisions of the AT&T consent decree. Consequently, they were not permitted to provide those enhanced services that could be classified as information services.
\item Id. paras. 113-15.
\item California v. FCC, 905 F.2d 1217 (9th Cir. 1990).
\item Id. at 1231-39.
\item Id. at 1239-45.
\end{enumerate}
dividing basic service into a set of building blocks that could be utilized selectively for service providers.

As in *Computer II*, the local exchange carriers of the Regional Companies were required to use all basic services under tariff and to manage the system in such a way that those services would be available to competitors on a "functionally equal" basis. While these new policies were designed to enable the carriers to function in competitive markets, they were not intended to allow basic telecommunications system operators to obtain advantages over their competitors.

This thread also runs through the issues and decisions raised in the Bell System divestiture. The consent decree established line-of-business restrictions that were clearly intended to prevent the Operating Companies from using their local exchanges to gain an unfair advantage over competitors in information services, as well as those in equipment manufacture and long distance service.

This rationale was followed all the way through the 1987 decision reaffirming the line-of-business restrictions. Since the local exchanges still controlled a bottleneck, Judge Greene determined that it was necessary to retain restrictions on content control. "Control by one entity of both the content of information and the means for its transmission... would enable it to disadvantage and to discriminate against rival electronic information providers and thus to pose a substantial threat to the first amendment diversity principle." Consequently, when the Operating Companies were permitted to enter the information services field as gateway providers, they were specifically ordered not to "discriminate between and among providers of information."

A similar approach was discussed in Congress. Although no final action was taken, the direction of the debate clearly indicated that Congress favored a policy of separation of content and conduit, at least for local exchange carriers. In addition, when dealing with the dial-a-porn controversy, Congress consistently sought to restrict such services by direct government action rather than by amending the Communications Act to grant carriers the authority to regulate content. However, Congress has yet to take any action that fundamentally alters the common carriage requirements of local exchange services.

While the regulatory rules have been changed by administrative and judicial actions, the essential notion of the common carrier remains. In

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171. Id. at 586.
the overall picture, the dial-a-porn access cases appear to be the exceptions. Allowing the exchange companies to take care of "censorship" might prove to be a legally and politically acceptable solution to the problem in the short run. It remains unanswered, however, whether these precedents could also be used to restrict other types of content.

VII
Conclusion

The dial-a-porn issue contains many of the hallmarks of content regulation issues in mass communication. Once again, a balance must be struck between the power of government to regulate offensive material and the first amendment rights of individuals to send or receive it. In the telephone medium, government regulation may occur at either the state or federal level. As such, the development of policy is influenced by state and federal statutes, administrative regulations, and constitutions, as well as by political factors.

The issue is further complicated by uncertainty over the role of the private media operators, in this case the local telephone exchanges. While many controversies over media content are diffused somewhat by industry standards and practices, the traditions of the telephone industry seem to preclude such self-regulation.

The model that emerged from the electronic publishing proceedings was centered on a system of local exchanges, each one providing the conduit to information providers on equal terms and without regard to content. This model appeared to be a product of a virtual political consensus, as Congress, the FCC, and the courts all weighed in the issue of content-conduit separation.

Yet this consensus may have broken down on the single issue of dial-a-porn. As attempts by government agencies to restrict this form of communication were frustrated on first amendment grounds, the carriers themselves emerged as the entities best able to exert control.

The dial-a-porn issue can be viewed as an exception, involving a single unpopular service that had been thrust into the political limelight. However, policy does not emerge only from the careful consideration of broad issues. More often it evolves from decisions made on specific matters. Controversies such as dial-a-porn might offer as many clues about the developing structure of telecommunications in the age of convergence as will more general discussions in other forums.

It is also possible that this issue has served to call attention to the subject of editorial control by the carriers at a relatively early stage in the history of telephonic mass communication. As additional mass media
services come to be offered through the telephone network, the policies ultimately enacted as a result of this controversy may well have a major impact on the shaping of a first amendment model for telephony.