

Essays

The Market for Loyalties: Electronic Media and the Global Competition for Allegiances

Monroe E. Price[†]

This Essay is about a market—I call it the “market for loyalties”—in which large-scale competitors for power, in a shuffle for allegiances, often use the regulation of communications to organize a cartel of imagery and identity among themselves. Government is usually the mechanism that allows the cartel to operate and is often part of the cartel itself. This market produces “national identity,” to use the European term, or “community,” to use the less discriminating Americanism.¹ Management of the market yields the collection of myths, ideas, and narratives employed by a dominant group or coalition to maintain power. For that reason alone, control over participation in the market has been, for many countries, a condition of political stability.

The market for loyalties has existed everywhere and at all times. What differs about today’s market is the range of participants, the scope of its boundaries, and the nature of the regulatory bodies capable of establishing and enforcing rules for participation and exclusion. This market metaphor may help to explain the legal and political responses to the dramatic transformations now underway in media industries as telecommunications become more global,

[†] Joseph and Sadie Danciger Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. My thanks to Ad Van Loon, Legal Expert of the Audiovisual Observatory of the Council of Europe, who provided helpful comments on earlier drafts. A grant from the John and Mary R. Markle Foundation supported research for this Essay.

1. I develop this definition of national identity in *TELEVISION, THE PUBLIC SPHERE AND NATIONAL IDENTITY* (forthcoming 1995); see also PHILIP SCHLESINGER, *MEDIA, STATE AND NATION: POLITICAL VIOLENCE AND COLLECTIVE IDENTITIES* 137–75 (1991).

eluding the reach of national legislation. As new forms of communication—satellites, electronic highways, relentlessly global telephony—transcend existing political boundaries, they call into question historic political ties and threaten to destabilize existing national and multilateral regimes.²

In Part I of this Essay, I describe the workings of a market for loyalties, distinguishing it from a market for goods and from a marketplace of ideas and illustrating its operation in countries, particularly in Western Europe. In Part II, I focus on constitutional, statutory, and administrative aspects of media regulation in the United States to demonstrate that the market for loyalties functions within the context of the First Amendment. In Part III, I argue that changes in media technology are creating new global pressures in the market for loyalties, altering the capacity of governments to perform their historic function of regulating their own segment of the market and transforming local, national, and global regulatory arrangements.

I. DEFINING THE MARKET

A. *Elements of the Market for Loyalties*

The market for loyalties must be contrasted with the “marketplace of ideas,” the compelling metaphor that has played so substantial a role in the development of First Amendment jurisprudence in the twentieth century. The marketplace of ideas is a particular incarnation of the market for loyalties, one that has an established definition and a history of proponents and detractors.³ An active, thriving bazaar with atomized buyers and sellers, the marketplace of ideas is, in its purest form, free from anticompetitive conduct. Ease of entry is assumed, and the government plays a limited role, if it plays any role at all. Because truth is thought to prevail in the resulting competition among ideas, no governmental regulation of competition is justified. The market for loyalties, as a model, more closely approximates actual market practice than does the marketplace of ideas. Like the market for goods, the marketplace of ideas frequently reflects monopolistic and oligopolistic practices, including efforts by competitors to exclude new entrants.

2. See generally THOMAS L. MCPHAIL, *ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING AND COMMUNICATION* (1981).

3. See *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting) (advocating free exchange of ideas). For a critique of the marketplace metaphor, see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); see also MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 106–12 (1991) (suggesting that Holmes’ dramatic use of marketplace metaphor failed to solve constitutional dilemma of free speech); JOHN KEANE, *THE MEDIA AND DEMOCRACY* 123 (1991) (arguing that rich vocabulary of market liberalism should neither be neglected nor accepted uncritically). See generally Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1405–06 (1986).

It is easier to describe a market for goods than a market for loyalties.⁴ In a market for automobiles or sugar, well-developed traditions identify buyers and sellers, determine a market-clearing price, and describe the means for settling accounts. Extensive literature exists on monopolistic and oligopolistic practices affecting markets for goods and on the legal, regulatory, and negotiated arrangements governing prices and the division of markets. For centuries, theorists have debated the power of the state to favor domestic products and shield industries from foreign competition. Even in countries that pride themselves on their commitment to a free-market economy, government can play a dramatic role in establishing the rules of the game, encouraging production, and striking a balance between protectionism and unregulated competition.⁵

There is little in the way of a similar literature identifying the buyers and sellers of ideology and the nature of transactions among them.⁶ For example, the supply side in the market for loyalties has a structure that is badly served by reductionist terms like "state," or "government," or "political party." The sellers in this market are all those for whom myths and dreams and history can somehow be converted into power and wealth—classically states, governments, interest groups, businesses, and others. The "buyers" are the citizens, subjects, nationals, consumers—recipients of the packages of information, propaganda, advertisements, drama, and news propounded by the media. The consumer "pays" for one set of identities or another in several ways that, together, we call "loyalty" or "citizenship."⁷ Payment, however, is not expressed in the ordinary coin of the realm: It includes not only compliance with tax obligations, but also obedience to laws, readiness to fight in the armed

4. For efforts to relate economic analysis to speech issues, see BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975); R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PAPERS & PROC. 384 (1974). For a discussion of the market for speech itself, see Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373 (1993).

5. The move towards "industrial policies" in many countries and the development of trade arrangements, including the General Agreement on Tariffs and Trade (GATT), the North American Free Trade Agreement (NAFTA), and the European Union (EU), represent a renaissance in the collaboration of government and business to organize markets.

6. One example is ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 207-76 (1957) (arguing that information always imposes some costs on consumers, at least of time and attention; and the problem, in terms of efficiency, is to convert these costs into payments to producers); see also CHARLES LINDBLOM, *POLITICS AND MARKETS* 13 (1977) (comparing role of persuasion in communist and liberal democratic societies). But cf. *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) ("Truth and understanding are not wares like peanuts or potatoes."). Justice Frankfurter contended that the constraints on the market for speech "call . . . into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect." *Id.*

7. See generally GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* (1993) (examining tension between allegiance to community and self-centered solutions, including exiting from institutions).

services,⁸ or even continued residence within the country.⁹ The buyer also pays with his or her own sense of identity.

The payment of taxes as evidence of one's loyalty provides an interesting example. In most modern societies, because of the complexity of social and business transactions, strict compliance with tax regimes is somewhat voluntary. Since New York City charges an income tax over and above that of its state, some residents move to Long Island, New Jersey, or Connecticut to avoid it. Many of those who remain have, for complex reasons, no choice. But for others, there is a degree of loyalty manifested by their willingness to pay the additional cost of adhesion.¹⁰

Compliance with the draft is not a perfect sign of a community's loyalty to its government because of a history of exemptions, deferrals, inequities, and, ultimately, the end of conscription. But studies of compliance, desertion, or the burdens of raising an army through means other than conscription suggest that the cost of loyalty is sometimes quite high.¹¹ History is studded with cases where mass desertion has meant the end of an empire; where, all of a sudden, the duty to fight for a particular cause can no longer be enforced.¹²

B. *Media Law and Restrictions on Competition*

Legislation is commonly used by the controlling group or groups in the market to enforce and reinforce identities useful to them. Such legislation allocates market shares, with the intent of creating cartels of allegiances where possible. As in the market for goods, competitors in the market for loyalties seek to use the force of law, as well as collusion, to restrict supply and

8. This assumes consumer choice, exercised by an autonomous individual with some modicum of preference. For an example, see the discussion on personal choice in Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979). Loyalty becomes obedience in the most authoritarian of markets.

9. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (studying alternatives open to citizens). For a review of human rights provisions concerning the right to emigrate and its relationship to state sovereignty, see Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"*, 65 TUL. L. REV. 849 (1991).

10. The effect of tax rates and regulatory costs on mobility is the subject of debate in a series of recent articles. See, e.g., Vicki Been, *Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 516-25 (1991); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990). See generally Charles A. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418, 420 (1956).

11. For a survey, see Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 943-45 (1991); see also Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 936 (1985) (distinguishing alienable rights and duties of citizenship from inalienable rights and duties of citizenship).

12. Jacques Ellul recognized these notions of allegiance in describing the cost of modernity and its loyalties: The 20th-century citizen, he wrote, is "saddled by his government with . . . sacrifices, such as ever-increasing taxes" that are increasingly paid out of manufactured conviction, not overt force. The modern consumer of loyalties, he said of his time, must "participate in wars such as have never been seen before." JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN'S ATTITUDES* 142 (Konrad Kellen & Jean Lerner trans., 1965).

establish barriers to entry.¹³ For instance, worldwide, government-operated and -controlled companies with established monopolies over communications technology have fought the introduction of private competition or the expansion of cable television.¹⁴ Controlling which viewpoints have access to the means of mass communication either can serve as an integrating and assimilating influence that subtly reinforces a vision of cohesion, or can reinforce existing cultural divisions in society.¹⁵ In Italy, for example, the very architecture of public broadcasting was designed to accommodate the existing system of political parties, with the Christian Democrats controlling the first channel, the Socialists the second, and the former Communists the third.¹⁶ In Germany, by constitution and statute, public broadcasting corporations must adhere to a rule of "internal pluralism" supervised by a *Rundfunkrat*, or council, chosen in such a way that all of society's opinions, values, interests, and perspectives are adequately represented.¹⁷ The statutory

13. It is possible to view a number of techniques—defamation laws, discriminatory tax policies, ideology-based restrictions on travel—as methods of influencing the composition and operation of the market for loyalties. Integrating all of these interrelationships between state and narrative is beyond the scope of this Essay. Here, I focus on the subtle and virtually universal use of media law and regulation to control competition and to assure the presence, absence, and strength of particular producers of loyalties in the market. I postpone discussion of the American case until Part II because the use of media law to regulate competition has historically been far more transparent in the European context. See generally ELI NOAM, *TELEVISION IN EUROPE* (1991) (containing country-by-country analysis).

14. ERIC BARENDT, *BROADCASTING LAW* 13–14, 22, 25 (1993) (explaining how government-controlled communications companies fought expansion of private competition in France, Germany, Italy, and the United Kingdom).

15. The use of law to assure market access has its benign face: The Republic of Ireland, in not atypical language, requires its public broadcasting system to

be responsive to the interests of the whole community, be mindful of the need for understanding and peace within the whole island of Ireland, ensure that the programmes reflect the varied elements which make up the culture of people of the whole island of Ireland, and have special regard for the elements which distinguishes [sic] that culture and in particular for the Irish language.

Broadcasting Authority Act, No. 10, § 17 (1960) (amended 1976); see Ad Van Loon, *Pluralism, Concentration and Competition in the Media Sector*, CDMM(92)8 at 208. Swedish television, by agreement between the state and the major national broadcasting service, must pay special consideration to linguistic and ethnic minorities so "as to meet to all reasonable extent, by its quality, accessibility and variety, the differing needs and interests of the population." *Id.* at 303. A Slovenian draft statute of the early 1990's imposes upon the public media responsibility "for the preservation of Slovenian national identity." At the same time, the draft, recognizing the rights of Italian and Hungarian minorities, provides that if a newspaper or television station is established to service these minorities, those communities must be consulted in the preparation of significant content as well as in the appointment and dismissal of the editor. See Monroe E. Price, *Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples*, 11 CARDOZO ARTS & ENT. L.J. 275, 301–03 (1993) (quoting Slovenia Draft Law on Public Media, Dec. 19, 1991, art. 2).

16. For a recent account of the crumbling of this architecture, see Robert Graham, *PM Rules the Airwaves: How Berlusconi Won Control of Broadcasting*, FIN. TIMES (London), July 2, 1994, at 4; see also Donald Sassoon, *Italy: The Advent of Private Broadcasting*, in *THE POLITICS OF BROADCASTING* 119 (Raymond Kuhn ed., 1985).

17. See VINCENT PORTER & SUZANNE HASSELBACH, *PLURALISM, POLITICS AND THE MARKETPLACE: THE REGULATION OF GERMAN BROADCASTING* 1–6 (1991). In practice, however, direct public participation is limited. See *id.* at 56.

ideal is for broadcasting to mirror society's composition, but the consequence has been a rough parceling out of licenses among dominant political parties.¹⁸

Issues of cohesion and identity arise in the broader context of European integration. Under Article 10(1) of the European Convention on Human Rights and Fundamental Freedoms, the right to freedom of expression embraces the right to receive information and ideas without regard to frontiers.¹⁹ In 1990, the European Court of Human Rights added teeth to this provision in *Groppera Radio A.G. v. Switzerland*²⁰ and *Autronic A.G. v. Switzerland*.²¹ In those cases, the Court ruled that Article 10 rights apply not only to the printed press but also to radio and television. Although the court acknowledged a limited right for receiving states to protect their technical licensing schemes, state-imposed barriers to transfrontier television would generally offend the principles set out in the Convention.²² The Television Broadcasting Directive of the European Community,²³ and the virtually equivalent European Convention on Transfrontier Television of the Council of Europe,²⁴ affirm a regional-market approach. In the 1990's, the focus has shifted from the regulation of transmission across the borders of individual European states to the protection, mainly through the imposition of quotas, of European program production from foreign attack.²⁵ During the negotiations of the Uruguay Round of the General Agreement on Tariffs and Trade in 1993, the European Union (EU) sought to exclude film and television programming from the general lowering of trade barriers on the ground that a European cultural space ought to be preserved, strengthened, and protected from the influx of American entertainment.²⁶

18. In Germany, the state regulating agencies have the obligation to assure that television, especially the public broadcasting system as a whole, represents the plurality of opinions and voices the views of the relevant political, ideological, and social groups. *See id.* at 16-17. For examples of the parceling out of channel time among interest groups, *see id.* at 69.

19. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10(1), 213 U.N.T.S. 221.

20. 12 Eur. Ct. H.R. (ser. A) at 321 (1990).

21. 12 Eur. Ct. H.R. (ser. A) at 485 (1990).

22. *See BARENDT, supra* note 14, at 223-25.

23. Council Directive 89/552 of 3 October 1989 on Television Without Frontiers, 1989 O.J. (L 298) 23 [hereinafter *Television Without Frontiers Directive*].

24. European Convention on Transfrontier Television, May 5, 1989, Europ. T.S. No. 132; *see also* *Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting Especially by Satellite and Cable*, COM(84)300 final [hereinafter *Television Without Frontiers Green Paper*]; BARENDT, *supra* note 14, at 222-36. *See generally* THE POLITICAL ECONOMY OF COMMUNICATIONS: INTERNATIONAL AND EUROPEAN DIMENSIONS (Kenneth Dyson & Peter Humphreys eds., 1990) (discussing international political economy of telecommunications).

25. *See BARENDT, supra* note 14, at 235.

26. *See* Laurence G.C. Kaplan, *The European Community's "Television Without Frontiers" Directive: Stimulating Europe To Regulate Culture*, 8 EMORY INT'L L. REV. 255, 341-45 (1994). Former European Commission President Jacques Delors has defended the EU's position by arguing "that cultural goods are not like other merchandise" and deserve protection because "[c]ulture is there to reassure, it is part of our roots." Hilary Clarke, *EU Vows to "Move Forward"; Consensus on Maintaining Cultural Identity Sought as AV Confab Opens*, HOLLYWOOD REP., July 1, 1994, available in LEXIS, Entert Library, Holrep File. For the American reaction, *see Hollywood Urges End to Film War*, THE GUARDIAN (London), Sept. 6,

Turkey provides a recent and dramatic historical example of government efforts to maintain control over competition in the market for loyalties. Since the rise of Kemal Ataturk, the Turkish government has considered Islamic sects, groups now labeled "fundamentalists," a threat to the secular state and has sought to limit the use of the mass media by these religious competitors. Turkish Radio and Television Authority (TRT) has not only been monopolistic, "it [has] also essentially [been] the voice of the state, disseminating the unitary ideology and culture of Turkish republicanism and highly susceptible to government intervention."²⁷ Charged by statute with "promoting the values of country, unity, republic, public order, harmony, and welfare and [strengthening] the principles of Kemal Ataturk's reforms,"²⁸ TRT has been an instrument for "cohesiveness" in an environment in which there have been deep divisions about alternate national identities. When TRT was attacked for leaning to the left and for broadcasting programs that legitimated Islamic fundamentalism, the agency's director general was forced to resign.²⁹

Law also has been used to protect domestic producers of national identity from international competition. For most of the twentieth century, the international consensus was that radio transmissions should be contained primarily within the boundaries of one nation; the international function, performed mainly through the International Telecommunication Union (ITU), was to dispense frequencies so as to assure that conditions of market division along national borders could be realized and enforced.³⁰ International regulations and arrangements implemented the policy of limiting broadcasting, in large part, to "national service of good quality within the frontiers of the country concerned."³¹ In the interlude between the World Wars, there were bilateral and multilateral agreements to control propaganda subversive to the state system. For example, the League of Nations-sponsored Convention Concerning the Use of Broadcasting in the Cause of Peace provided that:

1994, at 7.

27. Asu Aksoy & Kevin Robins, *Gecekondu-style Broadcasting in Turkey: A Confrontation of Cultural Values*, INTERMEDIA, June-July 1993, at 15; see also Haluk Sahin & Asu Aksoy, *Global Media and Cultural Identity in Turkey*, 43 J. COMM. 31 (1992). In an ironic example of the competition in the market for loyalties, state-run TRT is now beaming secular programming—a vehicle to promote a collective, modernizing agenda—into the six Muslim republics of the former Soviet Union. Previously, the Turkish government had censored Islamic traditionalist signals that were being sent into Turkish territory. See Asu Aksoy & Nabi Avci, *Spreading Turkish Identity*, INTERMEDIA, Aug.-Sept. 1992, at 39.

28. NOAM, *supra* note 13, at 258.

29. *Id.*

30. Audrey L. Allison, *Meeting the Challenges of Change: The Reform of the International Telecommunication Union*, 45 FED. COMM. L.J. 491, 496-97, 513-14 (1993); see R.H. COASE, *BRITISH BROADCASTING: A STUDY IN MONOPOLY* 110-16 (1950) (explaining how British and international regulation was used to limit competition from radio signals originating in France and Luxembourg and to protect British nationhood).

31. *President Pushes TV Marti; ITU Pushes Back*, BROADCASTING, Apr. 9, 1990, at 37, 38 (concerning legality of TV Marti); see also Steven Ruth, Comment, *The Regulation of Spillover Transmissions from Direct Broadcast Satellites in Europe*, 42 FED. COMM. L.J. 107 (1989).

The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.³²

States today continue to struggle with the question of whether to use law to protect national systems or to enhance international freedom to communicate.³³

C. *Advertising as a Competitor for Identity*

In a market for loyalties, promoters of disparate national identities predictably have different attitudes toward ordinary commercial advertising on television.³⁴ European governments, long preoccupied with limiting advertising messages and protecting public broadcasters from competition,³⁵ tend to view the subtext of advertising as a substitute for more traditional packages of identity. To see why, recall the position of the citizen in the market for loyalties. Assume that a citizen can express loyalty in terms of willingness to pay taxes. In this case, the seller (the government) of the product (a kind of patriotism) must persuade the voter to spend more disposable income on the product (through higher taxes). Taxpayers can resist,³⁶ and instead decide that their religious salvation, for example, is more important than the public weal. They can vote to divert government expenditures from the defense industries or to lower the public revenues altogether. Or citizens can determine, through voting or other means, that they should spend more on local taxes and less on federal taxes. Governments can see that advertising can affect individuals' visions of the public good—for example, by persuading them to consume rather than to save and invest, teaching the primacy of satisfaction and loyalty to self rather than sacrifice and

32. International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, art. I, 186 L.N.T.S. 301. In the Litvinov Agreement between the United States and the U.S.S.R., both countries promised not to spread propaganda hostile to the other and not to harbor groups working toward the overthrow of the other. See *Exchange of Communications Between the President of the United States and Maxim M. Litvinov, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics*, 28 AM. J. INT'L L. 2, 3-4 (Supp. 1934).

33. See *infra* part III.

34. See generally STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE (1976) (discussing historical growth of advertising and its connection to mass culture); MICHAEL SCHUDSON, ADVERTISING, THE UNEASY PERSUASION: ITS DUBIOUS IMPACT ON AMERICAN SOCIETY (1984) (explaining current relationship between advertising and consumer culture). For a recent effort to rethink the relationship between advertising and free speech doctrine, see C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994).

35. For a review, see BARENDT, *supra* note 14, at 188-212.

36. Because compliance with tax obligations is not wholly voluntary, individuals cannot freely substitute their predilections for the collection of goals established by the state.

loyalty to community. In this sense, marketers of "pure" national identities or ideologies compete with sellers of consumer goods, who are trying to impress another identity upon the citizen. The question is how a person decides, at the margin, whether a higher or lower percentage of disposable income should go to the state to pay for education or environmental protection or to the purchase of personal goods like food, television sets, and automobiles.³⁷

In the market for loyalties, promoters of some patriotic identities recognize the indirect supporting role that the barrage of traditional commercials might play in connection with their own visions of future happiness. Take, for example, a rather simple one-dimensional view of the Republican Party in the United States, or the Conservative Party in the United Kingdom, or the parties advocating a more rapid transition to a marketplace economy in Russia. These aspirants for power may sense political benefits in a citizenry saturated with the culture of advertising that contains indirect messages of political support. The messages of the sellers of toothpaste and automobiles reinforce a national identity claiming that the opportunity to have maximum choice to consume is good. We see assertions of national identity in the interstices of commercials, in their depiction of an idealized home life, or their depiction of a certain idea of traditional family values.³⁸ If the images of a consumer society bolster the party in power, then that is reason enough for advocating an increase in advertiser-supported broadcasting.³⁹

Alternatively, a ruling party may see the images of advertising and the foreign programs surrounding them as a threat both to its culture and, more centrally, to its continued hold on power.⁴⁰ In some settings, foreign programs (usually labeled "American" for convenience and often originating in Hollywood) are characterized as subversive; their story lines advocate a view of the individual that is wholly at odds with the perspective of the ruling regime.⁴¹ The regime may fear that the successful penetration of the world

37. The notion of elasticity of demand comes into play here. Sellers of ordinary goods often want to know whether and how much an increase in price will decrease demand for their product. Manufacturers of national identities—including the state itself—must (in the economic model) ask the same question.

38. See generally SCHUDSON, *supra* note 34; CECILIA TICH, *ELECTRONIC HEARTH: CREATING AN AMERICAN TELEVISION CULTURE* (1991).

39. The Conservative Party in the United Kingdom and the Christian Democratic Union in Germany favored the introduction of a competing private channel partly on these grounds. See BARENDT, *supra* note 14, at 12; PORTER & HASSELBACH, *supra* note 17, at 7.

40. MARIKA N. TAISHOFF, *STATE RESPONSIBILITY AND THE DIRECT BROADCAST SATELLITE* 12–13 (1987).

41. Certainly this is the view of the influence of Western television in Malaysia, Singapore, and much of the Islamic world. See, e.g., ERHARD U. HEIDT, *MASS MEDIA, CULTURAL TRADITION AND NATIONAL IDENTITY* 157, 160–63 (1987); JAMES LULL, *CHINA TURNED ON: TELEVISION, REFORM, AND RESISTANCE* 165–66 (1991). The BBC published excerpts of recorded prayer sermons at Teheran University on September 16, 1994:

Satellite transmission, broadcasting the programmes of foreign television networks, is not designed to increase the scientific knowledge of nations. Rather it has been developed to mislead the youth. . . . They sell obscene films either at a very low price or give it to you free of charge, whereas the scientific films are so expensive that one cannot afford to buy them. They [the West] do not transfer their knowledge . . . [or] their experience of modernizing

view contained in Western advertising (and in Western news) will yield instability and calls for internal political change.⁴² Islamic fundamentalists are not the only ones who acknowledge the transformative power of Western broadcast imagery. Supporters of Radio Free Europe and Radio Liberty as well as avid proponents of free-market television have credited the images of Western society, including its advertising, for contributing to the collapse of the Soviet Union.⁴³

D. *Government as Speaker*

To say that a government is a participant in the market for loyalties implicates propaganda theory. Propaganda is the name that we give to the use of symbols to influence or manipulate public opinion,⁴⁴ at home or abroad. Among scholars, there are conflicting attitudes toward this kind of speech. Many writers argue that the use of propaganda should not be condemned categorically; they see it as a mainstay of all modern governments, including democratic ones.⁴⁵ But most writers on propaganda do not use a marketplace approach,⁴⁶ as they are usually concerned with propaganda's behavioral

technology. What they transfer is something which drags families into corruption.

He [the Westerner] is planning to make the Islamic countries give up the ownership of their chastity . . . [H]e wishes to make our young people addicted to drugs . . . irresponsible towards their parents, spouses and their living conditions.

Emani-Kashani: West Interested in Transfer Not of Technology But of Corruption, BBC SUMMARY OF WORLD BROADCASTS, available in LEXIS, News Library, BBCSWB File.

42. According to an official at China's Ministry of Radio, Film, and Television:

International satellite dissemination conducted by Western developed countries threatens the independence and identity of China's national culture . . . [which includes] loving the motherland, hard work, advocating industry and thrift, . . . taking a keen interest in science, attaching importance to culture, . . . and stressing moral courage. . . . Precisely because of this, we take seriously the infringement of overseas radio and television and the influence they bring which hampers the national spirit to expand.

Zhao Shuifu, *Foreign Dominance of Chinese Broadcasting—Will Hearts and Minds Follow?*, INTERMEDIA, Apr.–May 1994, at 8, 9.

43. See, e.g., PRESIDENT'S TASK FORCE ON U.S. GOV'T INT'L BROADCASTING, U.S. DEP'T OF STATE, PUB. NO. 9925, at 5–6 (1991).

44. Richard A. Falk, *On Regulating International Propaganda: A Plea for Moderate Aims*, 31 LAW & CONTEMP. PROBS. 622, 623 (1966). Of course, the definitions of propaganda are myriad. Jacques Ellul's definition is "a set of methods employed by an organized group that wants to bring about the active or passive participation in its actions of a mass of individuals, psychologically unified through psychological manipulations and incorporated in an organization." ELLUL, *supra* note 12, at 61; see also L. JOHN MARTIN, INTERNATIONAL PROPAGANDA 10–20 (1958) (surveying proposed definitions).

45. Jacques Ellul is certainly of this school, see ELLUL, *supra* note 12, *passim*, as was Walter Lippman, see WALTER LIPPMAN, PUBLIC OPINION (1922); cf. Kevin Robins et al., *Propaganda, Information and Social Control*, in PROPAGANDA, PERSUASION AND POLEMIC 8, 16 (Jeremy Hawthorn ed., 1987) (arguing that "propaganda and information management are normative aspects of modern democratic societies" but "inherently totalitarian").

46. For a recent article alluding to marketplace notions and encouraging the United States to mobilize radio to strengthen its position abroad, see Walter Laqueur, *Save Public Diplomacy: Broadcasting America's Message Matters*, FOREIGN AFF., Sept.–Oct. 1994, at 19. Somewhat disingenuously, Laqueur writes: "[W]hile America spends huge amounts selling cigarettes and soft drinks, it is not selling America." *Id.*

implications. They may use the metaphor of competition, but they do not examine its analytic consequences.

The function of the government in a market for loyalties ordinarily goes far beyond its role as regulator and enforcer for a cartel of identity producers. The government is frequently a participant in the market for loyalties in its own right. By my earlier definition of national identity and its role in reinforcing the status quo,⁴⁷ the government often depends on a specific range of outcomes for its very existence. Here, the relationship between the state as censor and the state as generator of images is important. Not only have governments sought to exclude a range of destabilizing narratives, they have also sought to ensure that a sense of national identity is available and, if possible, prevails. The preoccupation with flags, including their proper veneration, is the most obvious of such efforts. The establishment of churches, the investment in the writing of history, state patronage of the arts as a means of uniting a community—all of these are part of the process of reinforcing national identity. Much of what the state provides is a public good; for example, the benefits of security and peace are even available to those who do not pay taxes. Still, the marketing of loyalty tends to increase the costs of those who support the state's undertakings. There are many other reasons for the government to become a speaker—maintaining cohesion, correcting for widely perceived unfairness, introducing missing narratives—and thereby to strengthen its hold on power. Historically, however, the question has been not whether government should be a speaker, but whether it becomes a monopoly supplier of national identity.⁴⁸

To perform its functions in regulating and participating in the market for loyalties, government has a cluster of alternatives: It can subsidize messages that it deems important,⁴⁹ censor messages that it deems antagonistic,⁵⁰ or

47. See *supra* text accompanying note 1.

48. For a general account of the monopoly over information in the former Soviet Union, see BRIAN MCNAIR, GLASNOST, PERESTROIKA AND THE SOVIET MEDIA 9–29 (1991). In the recent *Informationsverein Lentia* case, the European Court of Human Rights affirmed the European Commission of Human Rights' invalidation of an Austrian law that maintained a state monopoly protecting a geographical area against competition. Austria did not license private radio and television stations, maintaining a monopoly for the public service provider. Austria argued that it was necessary, in a small country, to further democratic values by maintaining tight control over the market, including the market for advertising revenues. A monopoly could assure "the objectivity and impartiality of news, the balanced reporting of all shades of opinion and the independence of the persons and bodies responsible for the programmes." *Informationsverein Lentia v. Austria*, No. 36/1992/381/455–459 (Eur. Ct. H.R. Nov. 24, 1993).

49. See *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2478 (1994) (O'Connor, J., concurring in part and dissenting in part) (conceding that "the government may subsidize speakers that it thinks provide novel points of view"). The effort in the United States to ensure increased minority ownership of broadcasting licenses in order to encourage greater pluralism in the social narrative is another example. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding minority preferences in granting broadcast licenses).

50. But see International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 19(2), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) (right to freedom of expression).

even become a vocal contributor in the market.⁵¹ And these alternatives are interrelated: Other things being equal, the pressure for censorship increases where the government and other dominant suppliers have not successfully agreed on an acceptable range of narratives and the state itself has limited power to generate images of cohesion and loyalty.

E. *The Netherlands and Belgium as Examples*

The Netherlands and Belgium have elegant histories of media regulation that illustrate, in finer detail than most countries, the interaction between government and other suppliers of identity within a market for loyalties. The Dutch experience provides a graphic illustration of how broadcasting statutes, once instruments for mediating among long-established rival groups, can no longer effectively perform this function because of technological changes and shifts in European law. Dutch regulation had long protected a cartel of broadcasters from foreign competition. The rise of cable and satellite, in addition to the requirements of the Treaty of Rome,⁵² have prevented the state from continuing to promote a national identity through the media.

At the heart of the Dutch tradition is a vision of a society comprising "pillarized" segments—some religious groups, some secular groups—each of which maintains a stable identity. Rather than having a single state broadcaster, the Dutch long ago established a complex mechanism that gave each segment of society an unencumbered opportunity to broadcast to its own community, first on radio, then on television. Groups competed for broadcast time, with awards linked to the number of members or adherents each group could claim.⁵³ Through informal internal sanctions,⁵⁴ these broadcasting organizations reinforced separate visions of Dutch identity. As a result, Dutch society remained pluralistic, with each group speaking to its own members and not proselytizing the others.

51. See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 571 (1980) (exploring ways to "integrate government speech into our constitutional constellation").

52. TREATY OF ROME, tit. II.

53. Currently, there are three categories of associations. Category A, which obtains the most time, is reserved for associations with 450,000 members or more; Category B encompasses associations with memberships ranging from 300,000 to 450,000; and Category C associations have from 150,000 to 300,000 adherents. Broadcasting time is divided in a ratio of 5:3:1. Netherlands Media Act, art. 34, 1987 Stb. 249 (Neth.); see Willem F. Korthals Altes, *European Law: A Case Study of Changes in National Broadcasting*, 11 CARDOZO ARTS & ENT. L.J. 313, 317 n.21 (1993). The modern practice is to become a member of an organization because one likes its radio and television programming, not because of a commitment to its principles. Exceptions are VPRO, a liberal entity supported by intellectuals because of its contribution to new ideas, and EO, an evangelical broadcasting organization.

54. During the period of radio dominance, for example, the bishops of the Catholic province of the Netherlands issued a "mandement" in which they recommended that their community not listen to the emissions of the socialist VARA broadcasting organization. See generally A.F. Manning, *Ult de voorgeschiedenis van hat mandement van 1954*, in JARRBOEK KATHOLIEK DOCUMENTATIECENTRUM (1971).

Included groups sought to protect against the extension of broadcasting rights to groups promoting alternative identities, recognizing that any expansion of the zone of narratives would challenge their ability to maintain the loyalty of their members. As elsewhere in Europe, so-called "pirates" attempted to compete outside the constraints of the legally sanctioned oligopoly by broadcasting radio signals from international waters. Their competing message incorporated elements of the new global culture: rock-and-roll and its siren call to youth. Traditional associations, draped in their commitment to historic Dutch identities, sought with the aid of the government to exclude the new entrants. They contended, for example, that the pirate broadcaster Veronica did not "'sufficiently address[] society's cultural, religious or spiritual needs,' as required by Article 13 of the Broadcasting Act."⁵⁵ An administrative judgment in favor of the intruders was based on a novel statutory interpretation: that the absence of a particular religious philosophy or view about the conduct of life did not prevent an organization from fulfilling the cultural needs of society.⁵⁶ As a temporary but ultimately doomed measure, the Dutch Parliament amended the Broadcast Law to require that an association or group seeking a broadcast license represent not just a commercial interest, but a social, cultural, religious, or spiritual viewpoint.⁵⁷

With the advent of cable television, attempts to raise barriers to entry resurfaced. The government-protected suppliers of particular national identities, already weakened by competition from the centrist, popular, and now legal pirates, feared transborder competition from foreign channels carried on cable franchises. To address these concerns, the government adopted rules precluding cable operators from carrying foreign programming containing commercial advertisements specifically directed at the Dutch market.⁵⁸ Ultimately, as a result of a decision of the European Court of Justice, the Dutch government could not forestall the entry of foreign programming.⁵⁹

As an example of the workings of the market for loyalties, this history of broadcasting in the Netherlands is illuminating. The Dutch system was explicitly designed to identify and promote alternative proponents of national identities, allocate markets among them, and exclude others who might reduce

55. Altes, *supra* note 53, at 318 (quoting Broadcasting Act, art. 13, 1967 Stb. 176 (Neth.)).

56. Royal Decree of Afdeling Contentieux van de Raad van State, KB 26.08.1975; *see also* Decision AB 77,29 (1977) (confirming Royal Decree KB 26.08.1975).

57. Joke J.A. Pelle & Piet W.C. Akkermans, *The Dutch Broadcasting System: A Basic Right Caught Between Dutch Constitutional Law and European Community Law*, 2 RED/ERPL 39, 41 (1990).

58. Three European Court of Justice cases discuss the complexity resulting from Dutch efforts to regulate transfrontier advertising. *See* Case 353/89, *Commission v. Netherlands*, 1991 E.C.R. I-4069; Case 288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat Voor de Media*, 1991 E.C.R. I-4007; Case 325/85, *Bond Van Adverteerders v. The State (Netherlands)*, 1988 E.C.R. 2085.

59. *See* *Commission v. Netherlands*, 1991 E.C.R. at I-4069 (holding as violative of Article 59 of the EEC treaty a Dutch regulation that sought to impose on foreign broadcasters obligations similar to those required of Dutch broadcasters). Under the European Union's Broadcasting Directive, no member government is permitted, except under extremely unusual situations, to prohibit the transmission of programs that are legally broadcast in a member country of origin. *See* BARENDT, *supra* note 14, at 234.

the identified proponents' market share. When foreign signals invaded, the "pillars" realized that commercial programming could displace the packages that promoted traditional and protected versions of national identity. As society evolved in the 1960's and 1970's, demand for traditional public service programming (provided by the pillarized groups) proved highly elastic. Whatever need existed for a bundle of national identity ideals could be otherwise satisfied, and audiences were not willing to pay in terms of quality, entertainment, or reduced satisfaction for the virtues of the groups with which they had long been affiliated. Increased competition reinforced and accelerated "depillarization."⁶⁰ Competition from abroad thus altered the capacity of the state to preserve a cartel among the existing competitors for loyalty, and limited the ability of local and regional providers, proponents of discrete and insular cultures, to use the media to market their particular identities.⁶¹

The Belgian experience parallels that of the Netherlands. The unitary system in Belgium began to fracture in as early as 1960, reflecting the gulf between the French-speaking and Flemish-speaking communities.⁶² Three public organizations supplanted the Belgisch Nationaal Instituut voor de Radio-Omroep (NIR): One was responsible for French-language broadcasting, the second was responsible for Flemish-language broadcasting, and a third targeted French- and Flemish-speaking communities as well as the German minority, also providing technical, administrative, and financial services to all broadcasters. A constitutional amendment in the early 1970's shifted control away from these organizations to the more local and discrete "Culture Councils" in Flemish-speaking Flanders and the French-speaking Walloon provinces.⁶³ By 1977, a pact among the competitors for national identity expanded opportunities for each group to reinforce loyalties. This pact weakened and finally dissolved the central coordinating mechanisms, so that each community could determine the structure of its own broadcasting organization.⁶⁴ At least formally, the potential competitors had successfully arranged a strict division of markets.

In the 1980's, an appetite developed, particularly in the Flemish-speaking community, for an alternative to the publicly financed monopoly. The means by which the community sought to assure an economic base for a Flemish commercial station and presumably to preserve and strengthen Flemish language use demonstrate the intricacy of market-sharing efforts. The Flemish business interests and political parties agreed on two principles: First, a

60. Predictably, the traditional associations attempted to maintain their audience by broadening their programming beyond a narrow conception of national identity.

61. See generally Aernout J. Nieuwenhuis, *The Crumbling Pillars of Dutch TV*, INTERMEDIA, Aug.-Sept. 1992, at 37 (discussing "depillarization" of Dutch broadcasting system).

62. See Christine De Keersmaecker, *Organisation and Structure of Radio and Television Broadcasting in Belgium*, ENT. L. REV., Sept.-Oct. 1992, at 164.

63. See Van Loon, *supra* note 15, at 81.

64. De Keersmaecker, *supra* note 62, at 164.

Flemish station required monopoly status in order to survive; second, the Flemish newspaper industry could only survive the introduction of the Flemish station if it owned fifty-one percent of the station. The decree incorporating this agreement, implemented in 1987, also would have barred local cablecasters from carrying programs of public television stations of European Community member states if the programs were not produced in the original language of the member state in which the station was located. The rule's purpose was to prevent foreign broadcasters, other than the Dutch, from targeting the Flemish-speaking audience in Flanders. The European Court of Justice, based on Article 59 of the Rome Treaty, held the language requirements discriminatory and illegal.⁶⁵ As in the Netherlands, the major elements of the finely crafted compromise formally remained in place, but technological and legal events rendered the delicate market divisions of marginal significance.

F. *The Market and Societies in Transition*

The dynamics of the market for loyalties are equally revealing in the so-called transition societies—those moving away from monopoly control over imagery to a more pluralistic competitive structure. Benedict Anderson's compelling insight that every nation is "an imagined political community"⁶⁶ helps explain trends in these emerging nations. The contest for control over a nation's identity is greatest where new-found independence leads to attempts to seize the popular spirit and fill it with ideas of loyalty. These public efforts have a special poignancy where a nation has the actuality of statehood, but not its full blossom. In Central and Eastern Europe, and in the independent states that have emerged from the former Soviet Union, wholesale transformations of the market for loyalties are occurring. These transformations discredit the old, substitute the new, and will have important consequences for issues of stability and the establishment of democratic values. These communities will not achieve cohesion without a substantial public involvement in defining, organizing, and propounding a credible and pluralistic national identity.⁶⁷

In each of the newly independent states of the former Soviet Union, centralized television, the residue of the state monopoly over imagery, is

65. Case 353/89, *Commission v. Netherlands*, 1991 E.C.R. I-4069.

66. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 6 (rev. ed. 1991); see also Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, *PUB. CULTURE*, Spring 1990, at 1.

67. In Belarus, a draft broadcasting bill in 1994 called for the mass media to "pursue a policy of strengthening public consent, avoiding extremist articles and abstaining from utterances that harm the spiritual and moral health of the masses." Oleg Manaev, *Belarus: New Principles, New Broadcasting Bill*, *POST-SOVIET MEDIA L. & POL'Y NEWSL.*, Apr. 30, 1994, at 2. As part of another transition, the document of accord in the Middle East provided for possible radio and television stations for the Palestinians. Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, *Isr.-P.L.O.*, annex 1, ¶ 2(c), 32 I.L.M. 1525, 1535 (1993).

searching for a role in shaping identity while a new market slowly emerges.⁶⁸ The dynamism of this new market is evidenced by the extent of efforts to restrain it. In Moscow, Russian nationalists rail against the incursion of images from the West that have followed "privatization."⁶⁹ The recently reconstituted Russian Duma, in one of its first initiatives, sought to compel state broadcasters to carry its proceedings, explaining that the President and other competing forces have their own modes of affecting the range of available narratives.⁷⁰ Control over at least some of the instruments of imagination symbolizes an attribute of sovereignty. As a result, throughout the former Soviet bloc, governments have placed limitations on foreign investment in broadcast stations. Poland caps foreign investments in broadcast stations at 33%, while Slovenia has an absolute bar on foreign investment in broadcast stations, though it is currently considering a more lenient rule.⁷¹ Governments also impose domestic content requirements. For instance, under temporary licenses granted by the Estonian government, private broadcasters cannot allocate more than 30% of air time to foreign programming.⁷² Also, Poland at one time required stations to allocate at least 30% of air time for domestically produced programming. Later, by decree of the National Broadcasting Council, the government set higher quotas: 60% for the national public television channel and 45% for the national commercial television channels.⁷³

There are standard elements to chronicles of identity, just as there are in other kinds of dramas. These elements, usually managed by the government or dominant groups in society, include histories of origins, of blessedness, of chosenness, of victimness, and of redemption—the basic ingredients of successful nationhood. The traditional task of communication is to adapt these elements, invigorate them, alter focus, and provide new tropes of legitimacy. In the socialist period, as part of the redemptive mode, the media carried stories of economic progress and accomplishment central to projections of pride and virtue: five-year plans, great hydroelectric structures, happy

68. See Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT'L L. 675, 678–84 (1993); Peter Krug, *The Abandonment of the State Radio-Television Monopoly in the Soviet Union: The First Step Toward Broadcasting Pluralism?*, 9 WIS. INT'L L.J. 377, 377–78 (1991).

69. See, e.g., *Shakeup at Russian Federal Press Committee, Mironov Dismissed for Nationalist Boasts*, POST-SOVIET MEDIA L. & POL'Y NEWSL., Sept. 10, 1994, at 1 (recounting firing of press committee chief previously attacked "for pro-nationalist sentiments and intemperate calls for more government control of the media").

70. See *On Covering the Duma: A Parliamentary Dialogue with Mikhail Poltoranin*, POST-SOVIET MEDIA L. & POL'Y NEWSL., Mar. 31, 1994, at 12.

71. Committee of Experts on Media Concentrations and Pluralism, *Study on Media Concentrations in Central and East-European Countries* (updated version), MM-CM(94)17 app. at 49.

72. *Id.* at 52.

73. *Id.* Under the Polish scheme, domestically produced primetime and first-run programs counted for a multiple of the minutes they were on the air, while re-runs counted for less. This scheme further encouraged new domestic production. *Id.*

collective farms. And art reinforced this pervasive message: photographs of brave workers, sculptures of soaring muscular figures, buildings designed in a massive Stalinist style.⁷⁴ In the early days of the transition, images of the Berlin Wall coming down saturated the airwaves. Now, the state-regulated media of the transition societies carry the imagery of the new economic progress: conventions of foreign investors, ribbon-cutting ceremonies announcing the opening of joint ventures to manufacture Western products, and the arrival of American rock stars or French officials.

Renata Salecl, the Slovenian sociologist, has discerned another pattern among the media of Central and Eastern Europe, finding replications of stories of the communist period on the postcommunist screen. During the communist period, for example, state-sponsored imagery cast the development of socialism as a two-stage process. Through the images, "the terror and the sacrifices of the . . . first stage are legitimized as a necessary moment on the path towards the future opulent society."⁷⁵ This familiar approach is echoed, Salecl suggests, in modern depictions of two stages of democracy, in which it is necessary to "limit democracy in current society for the sake of future democracy."⁷⁶ Today's economic sacrifices lead the way to the free-market abundance of tomorrow. In both instances, the account justifies arguments for unity against impatience and caution in criticizing public officials.⁷⁷

Relative to other eras, the socialist period had the luxury of monopoly.⁷⁸ At present, the question is whether new national identities can compete with foreign popular imagery. During the early period of the transition, identity found voice in the folk songs of the past, in the vaunting of ethnicity, in the resurrection of neglected languages, and in the projection of positive images of suppressed minorities. But these images, which tend to be amateur depictions, face devastating competition from the more technologically sophisticated Western music videos and motion pictures. Without restrictions upon competition, they cannot compellingly capture an audience and succeed in the task of building loyalties. Without high-quality local production,

74. See MATTHEW CULLERNE BOWN, *ART UNDER STALIN* 81–82, 168–69 (1991).

75. RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 98 (1994).

76. *Id.*

77. In the fragments of the former Yugoslavia, the media, presumably under some form of state influence, played a crucial role by filling the mental vacuum "not only with images of hatred of other nations but also with images of the 'happy' future which was to arrive with national liberation." *Id.* at 73. A letter to the editor of *The New Yorker* in 1994 emphasized the first part of the equation.

Federal Yugoslavia had six media monopolies—one in each republic. When the Slovenian, Croatian, and Serbian ones fell under chauvinist control, Yugoslavia's fate was sealed. In addition to the propaganda barrages of distortions and lies mounted by all three television networks, every possible measure was taken to hermetically isolate their respective captive audiences. . . . An independent Yugoslav journalist writing on media gangsterism in the murder of Yugoslavia called television "the cathode of evil."

Karolina Udovicki, *NEW YORKER*, May 23, 1994, at 10, 12.

78. See SALECL, *supra* note 75, at 41 ("The 'restoration of order' [in the socialist state] also required purges in the media and the regaining of total control over information.")

repetitious advertising messages and other versions of Western imagery will occupy much of the psychic space.

It is popular now to suggest that the state, in these transitional societies, should play virtually no role in the market for loyalties. Especially from an American perspective, the claim is that a rigorous free speech regime, in which government does not play a role in managing or organizing the market, is the desired outcome. But merely calling for a free market for programming ignores the need to consider the proper role of the state and the relationship of imagery to sovereignty. Nor does this argument adequately consider the complex relationship between the government and the market within the United States, the bastion of First Amendment freedoms.

II. THE UNITED STATES AND THE MARKET FOR LOYALTIES

Law affects narratives of identity in the United States, but in far less apparent ways than in Europe and elsewhere. Basic to the American sense of itself is the historical aversion to the idea that government shapes, or has any role in mediating, national identity. In other words, the state's role in the structure of speech and media is and ought to be minimal. From its revolutionary beginnings, America's concept of central government was different from that of its European counterparts. Limitation was at the heart of the founding vision. The articulation of denial, an injunction against abridgment, shaped the constitutional role of Congress in relation to free speech. The nineteenth-century frontier mentality, still flaunted and still generative of the American character, was framed in antigovernment terms. Gritty independence, in action as well as speech, remains one of the key elements of American national identity.

Great spaces, protected by the insular nature of the continent, contribute to a history in which a comfortable dominant narrative of national identity persists, though now and then it is challenged by competitors. Unlike its European counterparts, the United States was buffered from attack. In the twentieth century, the continental United States has not suffered the debilitating wounds of bombardment, actual invasion, or occupation, either physically or culturally. Until recently, an isomorphic relationship between dominant language and space existed in America. There was less of a perceived need for the state to intervene and mediate among contending cultures, except, as in the great periods of immigration, to engage in a process of acculturation.

Beneath the calm of a set of accepted stories, however, the national identity of the United States has always been subject to dispute. The disputes range from contested colonial settlement to sharp regional disparities, through the Civil War, and the rise and decline of cities, to the current contests over race, gender, and language. For most of the twentieth century, broadcasting has provided an envelope of seeming homogeneity, helping to produce and

reinforce a national identity of domestic security and economic growth. Even now, as history is told and retold, we see a struggle to redefine American national identity, to determine how plural it should be.⁷⁹ Because each formulation of national identity has consequences for the distribution of power, the contest for the regulation of images arouses great passion.⁸⁰

A. *The First Amendment and the Market for Loyalties*

In considering the place of law in structuring the market for loyalties in the United States, the First Amendment is the appropriate starting point, particularly because it is so commonly thought to limit, if not bar, a forceful governmental role in organizing and disciplining speech.⁸¹ Throughout American history, however, the interpretation and application of the First Amendment has had a vital role in shaping the market for loyalties.⁸² The First Amendment can be read as an allocation of regulatory authority among those who control the market for loyalties rather than a mandate for unfettered speech. Under this interpretation, the First Amendment represents an agreement among existing governors of identity (i.e., the states and private enforcers of moral rectitude) to prevent Congress from competing with them.⁸³ The First Amendment, read literally, precludes only Congress from "abridging freedom of speech and of the press." Despite the celebration of reason and liberty in the late eighteenth century, there were severe local limitations to permissible

79. See, e.g., Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986) (proposing means by which the Constitution can aid outsiders in search for cultural identity both through allowance of inward focus and outward acculturation); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (proposing Title VII doctrinal scheme intended to promote linguistic pluralism).

80. See Monroe E. Price, *Controlling Imagery: The Fight over Using Art To Change Society*, AM ART, Summer 1993, at 2; see also EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 16-18 (1988) (critiquing pervasive control of national narrative).

81. As in most markets for loyalties, federal and state governments have been called upon to set the outer limits of who can compete and who presents a sufficiently "clear and present danger" to require exclusion. *Schenck v. United States*, 249 U.S. 47, 52 (1919); see, e.g., 18 U.S.C. § 2385 (1988) (criminalizing advocacy of overthrow of government). For state statutes on sedition, see ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 909-11 (1976). For a recent general discussion, see Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885 (1993).

82. See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699 (1991) (tracing understandings of First Amendment in different periods). See generally LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985). Consider, for example, the Free Exercise Clause's specific protection of the right of religions to participate in the market for loyalties. The Clause, as interpreted, has both expanded and limited the range of techniques religions may utilize. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (holding that while Free Exercise Clause protects beliefs, it does not protect all practices). The Establishment Clause precludes Congress from following the British example of tying national identity to a single church. Yet there is no similar explicit prohibition against "establishing" a press or set of speakers through subsidy.

83. Cf. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 3-7 (1986) (discussing jurisdictional and linguistic interpretations of First Amendment).

speech and conduct as well as harsh sanctions for breaching local bounds.⁸⁴ The adoption of the First Amendment did not halt the ongoing process of setting and implementing standards. To the young states and other cultural regulators like the eighteenth-century churches, the power to control speech and behavior was too important to be shared with the new central administration. The early First Amendment, as an artifact of federalism, defined the forum for erecting barriers to entry, restricting output, or dividing markets. Without the First Amendment, a new federal congress, reflecting a new assortment of interests, might have threatened the existing power relationships between states, other cultural forces, and the press.⁸⁵

The structuring role of the First Amendment changed as society changed. While the Amendment reinforced the decentralized regulation of speech in the eighteenth century, by the twentieth century it served to promote a national market for speech. Through its incorporation into the Fourteenth Amendment and its application to state and local governments, the Free Speech Clause became a mechanism to inhibit the states and facilitate the development of a national market for speech and identity. As a result, the Clause blocks state and local governments from prohibiting specific points of view and diminishes their capacity to shield and nurture regional audiences.⁸⁶ In this new environment, the erosion of local impediments to the national market for speech was virtually inevitable.⁸⁷

America's television service grew in soil so remarkably nourishing that the process of psychic integration took place much earlier and more rapidly in the United States than in Europe. That process has largely been successful, for better or worse, in the United States, yielding the internal "cultural space" that is the aspiration of the Council of Europe. The creation of an interstate broadcast medium reinforced the whole's triumph over the identity of its local

84. See Yassky, *supra* note 82, at 1702, 1710–17.

85. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 135–36 (1993); see Wilfrid E. Rumble, *James Madison on the Value of Bills of Rights*, in 20 *NOMOS* 122, 136 (J. Roland Pennock & John W. Chapman eds., 1979) (discussing rejection by Senate of bill limiting state restrictions on rights of press); see also Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1147–52 (1991) (considering First Amendment's structural and historical purpose of safeguarding rights of popular majority against Congress); Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 85, 87 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978) (examining differing attitudes of Framers and Anti-Federalists toward state sovereignty).

86. The practice of Southern states censoring abolitionist literature, for example, is traced in W. SHERMAN SAVAGE, *THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830–1860* (1938); see also RUSSELL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830–1860* (1949); Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 *CHI.-KENT L. REV.* 1113 (1993).

87. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (limiting state-authorized defamation and libel actions). Obscenity, as considered in *Miller v. California*, 413 U.S. 15 (1973), is also affected by a "national" constitutional standard that limits the scope of local standards. See also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding federal regulations preempted application of Oklahoma's alcoholic beverages advertising ban to out-of-state signals carried by cable operators).

parts. Not only has the First Amendment created a common market for speech within the United States,⁸⁸ it has also insulated internal competitors for loyalties from foreign competition. Ultimately, the First Amendment allows the government to limit the entry of voices from abroad under specifically circumscribed powers.⁸⁹ For example, the United States sought in 1950 to limit, by multilateral treaty, directional broadcasting emanating from Mexico, Canada, and elsewhere, partly as a control on content.⁹⁰ Officials of the United States Information Agency (USIA), under legislation implementing the 1949 Beirut Agreement, must certify the "authenticity" and "accuracy" of American-made documentary films for duty exemptions in their intended country of import, prior to their export.⁹¹ Under the Foreign Agents Registration Act (FARA),⁹² Congress has required, *inter alia*, the labeling of certain imported films as "political propaganda."⁹³ National security

88. In my view, the First Amendment is, in this narrow sense, a predecessor of the European Union's Broadcasting Directive.

89. See generally Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719 (1985) (looking at America's national border as barrier to free trade in ideas). In the Immigration and Nationality Act of 1952, Congress authorized the denial of visas to aliens who "advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship." 8 U.S.C. § 1182(a)(28)(D) (1988); see also *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding denial of visa to Ernest Mandel, Marxist author invited to Stanford University conference). Justice Blackmun reasoned that to rule in favor of Mandel because of his professional accomplishments might reinforce a discriminatory bias in First Amendment protection for "the articulate, the well known, and the popular." *Id.* at 768. This incident was no mere Cold War anomaly. In 1917, Congress had already enacted a law requiring deportation of "any alien who at any time after entry shall be found advocating or teaching" forcible overthrow of the government. See Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

90. North American Regional Broadcasting Agreement (NARBA), Nov. 15, 1950, 11 U.S.T. 413; see Stephen D. Bayer, Comment, *The Legal Aspects of TV Martí in Relation to the Law of Direct Broadcasting Satellites*, 41 EMORY L.J. 541 (1992); Pamela S. Falk, Note, *Broadcasting from Enemy Territory and the First Amendment: The Importation of Informational Materials from Cuba Under the Trading with the Enemy Act*, 92 COLUM. L. REV. 165 (1992). According to Radio Cuba, the United States had intensified its invasion of Cuba's airwaves, first promoting illegal emigration and then deterring it. The broadcast claimed that the U.S. policy was in violation of International Frequency Registration Board regulations and that U.S. telecommunications authorities "allowed unlicensed short-wave stations to broadcast from the United States and to use frequencies intended for amateur radio and civil defence purposes." Roberto Morejon, Radio Havana Cuba, Sept. 6, 1994, quoted in British Broadcasting Corporation, Evening Information Review, Sept. 9, 1994, available in LEXIS, News Library, Curnws File; see also Fidel Castro, Address, CNN Transcript 914-2, Aug. 24, 1994, available in LEXIS, News Library, Curnws File. Competitors of Fox Broadcasting Corporation filed a petition with the Federal Communications Commission (FCC) in 1994 opposing waiver applications for delivery of signals originating in the United States to be beamed back into the country by its Mexican VHF affiliates (who could reach large populations in San Diego and El Paso). Fox, which sought the waivers for the broadcast of professional football games, claimed that any prohibition on transborder affiliation agreements was inconsistent with NAFTA. Jube Shiver Jr., *Fox's Live NFL Telecasts May Violate FCC Trade Rules*, L.A. TIMES, Aug. 17, 1994, at D1; see also *Application of American Broadcasting Cos.*, 35 F.C.C.2d 1, 5 nn.10-11 (1972).

91. See Scott Lewis Landsbaum, Note, *How To Censor Films Without Really Trying: The Beirut Agreement and the Foreign Agents Registration Act*, 62 S. CAL. L. REV. 685 (1989). For example, Bullfrog Films, Inc. was rejected for an export certificate because the USIA found that its documentary *In Our Own Backyards: Uranium Mining in the United States* was unrepresentative, misleading, and inaccurate. *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492, 496 (C.D. Cal. 1986), *aff'd*, 847 F.2d 502 (9th Cir. 1988).

92. 22 U.S.C. §§ 611-621 (1988)

93. *Id.* § 614(b). For a discussion of FARA, see *Meese v. Keene*, 481 U.S. 465, 469 (1987); see also Brian C. Castello, Note, *The Voice of Government as an Abridgement of First Amendment Rights of*

considerations limit the flow of information into or out of the United States.⁹⁴ Thus, the extent of Congress' power to limit the flow of ideas into or out of the United States is greater than its power to constrain and organize the internal market for loyalties. Nonetheless, the First Amendment continues to protect the internal dominant suppliers of national identity from challenges within and outside of the national territory. The ability of the national government and the First Amendment to continue to do so will be seriously challenged with advancements in communication technology.

B. *Regulation of Media and the Market for Loyalties*

The day-to-day work of shaping and regulating the broadcast market for loyalties falls to the Federal Communications Commission (FCC), an organization with a tight and traditional relationship with Congress, the White House, and the industry it oversees. While the Communications Act of 1934 prohibits the FCC from engaging in censorship,⁹⁵ the very process of licensing radio and television stations acts as a major constraint on the competition for loyalties.⁹⁶ Competition for federal licenses and the requirement of a renewal (every three years in television's "golden age") inevitably affect the range of views expressed. While that range has been quite wide, and renewal of licenses is typically automatic, the possibility that a valuable asset could be lost is an effective argument for conformity. The powers of the FCC, Congress, and the White House have all been used as weapons in the battleground for competing notions of the good, the ideal model for organizing and directing society, basic ideas of cohesion, and the definition of community.⁹⁷

Government-mediated actions have had important consequences for the narrative of national identity.⁹⁸ During the McCarthy era, the authority of

Speakers: Rethinking Meese v. Keene, 1989 DUKE L.J. 654; Anne Dorfman, Note, *Neutral Propaganda: Three Films "Made in Canada" and the Foreign Agents Registration Act*, 7 COMM/ENT L.J. 435 (1985); Note, *Government Exclusion of Foreign Political Propaganda*, 68 HARV. L. REV. 1393 (1955).

94. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 200-01 (1990); see, e.g., Falk, *supra* note 90, at 170-71, 182-84; Thomas G. Havener, Note, *Assault on Grenada and the Freedom of the Press*, 36 CASE W. RES. L. REV. 483 (1986).

95. 47 U.S.C. § 326 (1988).

96. Much of American regulation of broadcasting has rested on scarcity grounds. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969). Commentators have derided this rationale because of the manufactured nature of the shortage. See, e.g., BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA EXPRESSION AND THE FIRST AMENDMENT* 91 (1975).

97. See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 74 (1991) (discussing regulatory efforts to protect "quality of public discussion and decision making"); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 156-57 (1990) (discussing social engineering in the First Amendment area). Cass Sunstein's "New Deal" for speech explicitly proposes a closer match between permissible regulation and the objective of achieving certain societal goals. See SUNSTEIN, *supra* note 3, at 81-88.

98. One could start with the issue of whether licenses should have been granted locally or regionally and what role government had, or could have had, in determining how powerful the national networks would become. Thus, an FCC action as mundane as determining whether to enforce an obligation for local

Congress and the FCC was enlisted to sanitize the airwaves of left-wing sentiment. In the 1960's, Presidents Lyndon Johnson and Richard Nixon used the "fairness doctrine" and the licensing process to intimidate broadcasters who challenged their views. Nixon, for instance, sought to punish *The Washington Post* by threatening the economic security of the television stations owned by its parent company.⁹⁹ Nixon also sought to reduce the central power of public broadcasting because, in his view and that of Vice President Spiro Agnew, the noncommercial system was creating allegiances hostile to conservative values.¹⁰⁰ In the 1980's, through the introduction of preference rules, the FCC sought, at least cosmetically, to assure minority ownership of broadcast media on the understanding that ownership has implications for on-screen narratives.¹⁰¹ In addition, during the 1960's and 1970's, groups used the FCC's licensing process—which permits challenges to the renewal of a broadcaster's license—to change the practices (in terms of employment and representation of groups) of licensees and networks.¹⁰² In these ways, to the extent they could manage to bring the power of the state behind their perspectives, law and regulation were deployed to strengthen the interests of one interest group or another and to limit entry by ideological competitors.¹⁰³

Despite widespread government involvement in the market for loyalties, American jurisprudence is deep in denial of the relationship between

stations to serve as an outlet for local voices could favor Hollywood over Main Street, and in so doing, affect the mix of imagery.

99. See MARILYN A. LASHNER, *THE CHILLING EFFECT IN TV NEWS: INTIMIDATION BY THE NIXON WHITE HOUSE* 189 (1984) (describing presidential requests for retributive antitrust investigation, threat of antitrust action, FCC monitoring, and tax investigation); WILLIAM E. PORTER, *ASSAULT ON THE MEDIA: THE NIXON YEARS* (1976) (describing wide-ranging government effort to intimidate, harass, regulate, and damage news media).

100. See PORTER, *supra* note 99, at 145 (describing Nixon White House attitude and efforts). Public broadcasting remains under severe attack from critics who seek to restrain it from being "nonobjective, unbalanced, indecent, or elitist." Howard A. White, *Fine Tuning the Federal Government's Role in Public Broadcasting*, 46 FED. COMM. L.J. 491, 501 (1994). The Corporation for Public Broadcasting now is obliged to review national public broadcasting programming and take necessary steps to facilitate objectivity and balance. 47 U.S.C. § 396 (Supp. IV 1992).

101. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (holding that FCC minority ownership program does not violate due process).

102. Cf. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). A television station in Jackson, Mississippi, in violation of the FCC's "fairness doctrine," determined, at the height of the civil rights movement, that it would favor programs advocating the preservation of racial segregation. When national news reports showed civil rights leaders in a favorable light, the station would put a card on the screen saying that weather, or circumstances beyond its control, interfered with the delivery of the national signal. The Citizens Communications Center sued, arguing that the station, a supposed instrument of discourse on the key issues facing the public, was in fact blocking discourse. The court found that representatives of the listening public did have standing to challenge the renewal of the license.

103. Patrick M. Fahey, Comment, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647 (1991). Fahey primarily deals with boycotts as mechanisms to mobilize advertisers to affect content, but implicitly deals with the power of government to withdraw valuable licenses. Cf. Ronald K.L. Collins & David M. Skover, *Colloquy: The First Amendment and the Paratroopers' Paradox: The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990) (discussing paradox in conflict between First Amendment values and amusement-centered culture).

government and imagery. The most recent example is Justice Kennedy's opinion for the Court last term in *Turner Broadcasting*.¹⁰⁴ The Court's decision upheld (albeit narrowly and grudgingly) the power of Congress to mandate by statute that cable operators use some of their abundant channels to transmit the signals of both commercial and noncommercial over-the-air broadcasters.¹⁰⁵ Justice Kennedy could only reach this result by including an account of broadcasting regulation that, at least from the point of view of those concerned with "public interest" considerations, devastatingly rewrote the history of federal practice. The issue before the Court was whether Congress could require cable operators to carry one set of speakers (broadcasters such as NBC or PBS) at the expense of cable networks such as Disney or Discovery or CNN.¹⁰⁶ To satisfy his own reading of the First Amendment, Justice Kennedy needed to demonstrate that the statute was content-neutral¹⁰⁷ by showing that there was no content-related basis for either federal broadcasting regulation or the congressional obligation imposed on cable operators. As a result, Justice Kennedy pushed aside long-standing congressional efforts to make broadcasters publicly accountable. By reconstructing the past to show that the FCC had only minor functions with respect to the impact of broadcasting on society, Justice Kennedy avoided the notion that broadcasters have a special content-related purpose in society. According to Justice Kennedy, "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."¹⁰⁸ Furthermore, "given the minimal extent to which the FCC and Congress actually influence the programming offered by broadcast stations, it would be difficult to conclude that Congress enacted must-carry [rules] in an effort to exercise content control over what subscribers view on cable television."¹⁰⁹

To be sure, the FCC has never been a very heavy regulator of the television medium and has been subject to intense criticism for its occasionally sweetheart relationship with the industry. The FCC has also been at the deregulatory end of its administrative scale for the last fifteen years. Throughout the history of broadcasting, however, commercial licensees have felt indirect as well as direct pressure from the government to give meaning

104. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994).

105. The Court vacated the judgment below and remanded the case for further factual determinations. *Id.* at 2472.

106. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460, 1471-81 (1992) (to be codified at 47 U.S.C. §§ 614-15); see Donald Hawthorne & Monroe E. Price, *Rewiring the First Amendment: Meaning Content and Public Broadcasting*, 12 CARDOZO ARTS & ENT. L.J. 499 (1994).

107. *Turner Broadcasting*, 114 S. Ct. at 2459.

108. *Id.* at 2463.

109. *Id.* at 2464.

to the 1934 Act's terms "public convenience, interest, or necessity."¹¹⁰ Whether Congress can exert such pressure in the future is another matter, given the Court's view that the existence of scarcity, now apparently resolved, justified whatever morsel of regulatory power previously existed.

From the perspective of maximizing freedom, the description of federal power contained in *Turner Broadcasting* is a desirable one, even if it is not authentic. Its problematic nature, however, comes to the fore where the issue of public or noncommercial television is concerned. Here is an area in which the government, through subsidy, licensing, and congressional oversight, plays an active role in the marketplace for loyalties. One could consider public television a preeminent example of government trying to determine what voices must be added to the mix, either for reasons of justice or to provide outlets for expression that help legitimate the status quo. But here, too, Justice Kennedy was rigid and narrow in his description of the relationship of government to content. As questionable as was the Court's "history" of the relationship between the FCC and commercial broadcasting, its review of the function of noncommercial television was even more puzzling. Given the last decade of tumult, sweat, congressional interference, and use of funding priorities to shape public broadcasting, it probably came as a surprise to public broadcasters that "the Government is foreclosed from using its financial support to gain leverage over any programming decisions."¹¹¹ Congress can require cable systems to carry public broadcasting stations because they augment something called a free broadcasting service, and no other reason—quality, education, impact on children, multiculturalism—is relevant. Indeed, Justice Kennedy stated that if any other reason had been relevant to Congress, the statute might have raised serious constitutional problems.¹¹²

C. *Boycotts and Group Action*

Justice Kennedy's opinion in *Turner Broadcasting*, so grudging in its acknowledgment of state power to create and maintain public space, is part of a general shift in the regulation of imagery. There is a new ordering of the market for loyalties—one that relies on a set of powers and constraints that are more ephemeral, less visible, and less subject to the old forms of analysis. With a diminution in the government's overt power to regulate markets, an enriched interaction between private organizations and government influence occurs. Government pressure to change television's stories takes the shape of

110. 47 U.S.C. § 307(a) (1988). For an exhaustive history of the section and its relation to government shaping of the medium, see Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103 (1993).

111. *Turner Broadcasting*, 114 S. Ct. at 2463.

112. Compare *id.* at 2477–78 (O'Connor, J., dissenting) (arguing that goal of broadcast diversity is not content-neutral) with White, *supra* note 100, at 498–99 (describing congressionally anticipated benefits of broadcast diversity in public broadcasting legislation).

the bully pulpit, not the censorial stick. George Bush's Vice President, Dan Quayle, and Bill Clinton's Secretary of Health and Human Services, Donna Shalala, both decry the television character, Murphy Brown, as an overly romanticized depiction of single parenthood and out-of-wedlock birth.¹¹³ Congress votes antitrust immunity to the networks so that they can negotiate an agreement to lessen violence during the hours of family viewing. Meanwhile, well-organized private groups, each with its own agenda, have established outposts in Los Angeles with the aim of influencing the content of programming and using, or threatening to use, contacts with government if their objectives are not reached. Kathryn Montgomery, the historian of this movement, attributes the expansion of intense, effective, and well-financed advocacy to television's power as "the central storyteller for the culture."¹¹⁴ According to Montgomery, groups such as the Population Institute, the Alliance for Gay and Lesbian Artists, the Solar Lobby, the American-Arab Anti-Defamation League, and Justicia have engaged in intense lobbying efforts because "fiction programming, even more than news and public affairs . . . most effectively embodies and reinforces the dominant values in American society."¹¹⁵ More important, the impact of fiction may be so powerful as to alter those dominant values. These groups would hardly be the first to believe that those who write a nation's stories need not worry about who makes its laws.¹¹⁶

Examples of this phenomenon are legion. In newspapers across the United States in early 1993, a full-page advertisement placed by the American Family Association asked television viewers to be part of a "grass roots advertiser notification campaign." The function of the Association would be to publicize as "irresponsible advertisers" those companies that were "top sponsors of violence, sex, and profanity on prime-time, network TV."¹¹⁷ The Association would periodically inform the companies of how many families object to the shows that were supported by their advertisements.

American Family Association director Reverend Donald Wildmon, who placed the ad, is from the frequently vilified Christian Right, but he is far from alone.¹¹⁸ In 1994, the National Organization for Women and the National

113. See Philip Berroll, *Cultural Elites, Closet Values*, TIKKUN, Sept.-Oct. 1993, at 39 (discussing liberal affinities and Quayle's comments); William J. Eaton, *Shalala Revives "Murphy Brown" Pregnancy Issue*, L.A. TIMES, July 15, 1994, at A1 (discussing Donna Shalala's disapproval of the television character).

114. KATHRYN C. MONTGOMERY, *TARGET: PRIME TIME* 6 (1989).

115. *Id.*

116. "Scottish patriot Andrew Fletcher once said that if he were permitted to write all the ballads, he need not care who makes the laws of a nation." George Gerbner, *Liberal Education in the Information Age*, CURRENT ISSUES IN HIGHER EDUC., 1983-84, at 14.

117. *E.g.*, American Family Association advertisement, N.Y. TIMES, Dec. 5, 1993, at E22.

118. Nor was he a pioneer. In the early 1970's, the National Citizens Committee for Broadcasting, under the leadership of the charismatic former FCC Commissioner Nicholas Johnson, established a thorough guide to violence on television and, with careful scrutiny, declared what programs were most harmful and which companies were their major advertisers. Montgomery, *supra* note 114, at 108-10.

Education Association successfully threatened a boycott of the Florida Citrus Commission. The boycott apparently contributed to the Commission's decision to cancel its one million dollar campaign on conservative commentator Rush Limbaugh's show.¹¹⁹ Using whatever leverage they can, through pressure on advertisers, corporate boards, and politicians, associational representatives establish an agenda for public discussion and help to determine the limits of the ensuing debate.¹²⁰ From all sides of the political spectrum, they are concerned with the handling of environmental issues, the depiction of gays and lesbians, the construction of narratives concerning race, the representation of Jews and Catholics, and the stories that affect the agenda of the Christian Right. They engage in the process of jawboning and friendly persuasion, often using friendship ties and peer pressure. So effective have these advocacy groups been that, in the 1990's, it has become the practice, where sensitive questions are raised, for producers to vet scripts and seek input from the relevant organizations even before a program is shot.

Disputes arise over the ethical distinctions that can be made between boycotts. Nat Hentoff, criticizing the threats against the Florida Citrus Commission over the use of Rush Limbaugh as spokesperson, argued that boycotts are a form of McCarthyism and speech should be countered with more speech, not economic action.¹²¹ Alan Dershowitz has argued that "'it is more appropriate to boycott an advertiser who plays an active role in determining content than one who plays no role.'"¹²² Another analyst of the constitutionality of boycotts has suggested—without irony—that a neutral line might be drawn between boycotts on behalf of conservative and antiviolence groups and boycotts on behalf of "social-activist and status-based interest groups."¹²³ The first groups, in his view, "restrict the public's viewing options" by bringing pressure on producers to reject certain themes, while the second are "concerned with the lack of visibility of their views . . . [and] seek increased access."¹²⁴

119. Nat Hentoff, *Boycotting Free Speech*, WASH. POST, Aug. 13, 1994, at A17

120. For a discussion of the constitutionality of boycotts of media for their editorial policies, see *Environmental Planning & Info. Council v. Superior Court*, 680 P.2d 1086 (Cal. 1984)

121. See Hentoff, *supra* note 119, at A17. Hentoff quotes Floyd Abrams to distinguish between an appropriate boycott of grape growers to support César Chavez and an inappropriate boycott of the Citrus Commission over its use of Anita Bryant, who had voiced homophobic views in other fora, as a spokeswoman:

The boycotts of California grape growers . . . are against actions by those employers in their business—when they resist workers' attempts to get a fair wage or violate collective bargaining rights. But Anita Bryant is being boycotted because she has engaged in speech, political speech, that has nothing to do with her work advertising orange juice.

Id.

122. Quoted in MONTGOMERY, *supra* note 114, at 162.

123. Fahey, *supra* note 103, at 655.

124. *Id.* at 654–55; cf. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 447 (1990) (Brennan, J., dissenting) ("Expressive boycotts have been a principal means of political communication since the birth of the Republic.").

The ethical and legal issues in the entertainment field are designed to balance conflicting pressures. Some groups have more favorable access to writers and producers than others—a consequence of wealth, ideology, or the familiar networks of neighborhood and class. Other groups use their power not only to threaten consumer boycotts, but also to secure the intervention of the state (Congress or the courts).¹²⁵ Whenever advocacy groups passionately articulate ideas, matters of wealth or access to power lurk beneath the surface. In the era of deregulation, the impact of the government on the market for loyalties may become more difficult to detect, but it is not necessarily reduced.

D. *Laissez Faire and the Legal Structure*

The most important way in which law impacts the market for loyalties is not through the explicit actions of Congress and the FCC, but through the tolerance and protection of the status quo. Modern interpretations of the First Amendment maintain and enlarge the field for advocates of consumerism. Television now showcases a series of stories that celebrate the consumption of goods, promoting an idea of self that dominates competing allegiances and ancient ideas of citizenship.¹²⁶ The idea that commercial speech is to be treated identically to noncommercial speech, that cable television operators are speakers just as publishers of newspapers, leads to a set of narratives that emphasize commercials while infomercials replace documentaries and celebrities replace civic leaders.¹²⁷

A First Amendment theory that denies the very absence of the capacity to regulate, or at least to regulate positively,¹²⁸ becomes the basis for structuring the market for loyalties in the United States. American television may provide more channels and choices than any other system, but, ironically, it provides less diversity and a more uniform perspective on national identity than television in some countries with fewer channels. The United States, internally, could be viewed as the first example of globalization, a test run for some of the technological consequences now felt throughout the world. An institutional history of broadcasting in the United States, one that traced its national and

125. The molding of narrative through collective action has become virtually institutionalized in terms of informal relations between groups and government. Pressure is placed on government officials, government officials put pressure on industry, and industry responds "voluntarily." Following the model now so well established in the motion picture industry, Senator Joseph Lieberman recently introduced legislation requiring regulation of imagery in video games. See S. 1823, 103d Cong., 2d Sess. (daily ed. Feb. 24, 1994). In what is now a familiarly orchestrated set of actions and responses, the video-game industry established self-regulatory machinery to avoid more intrusive governmental intervention. See *Makers Say They'll Rate Video Games*, N.Y. TIMES, Mar. 5, 1994, at 48 (discussing video industry's proposed voluntary rating system).

126. See generally NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* 125-41 (1985) (describing television's contribution to rise of image politics).

127. In sum, this leads to what I call a home shopping of the mind.

128. See *supra* note 104 and accompanying text (discussing Justice Kennedy's opinion in *Turner*).

international dimensions, would emphasize the development of the radio chains or networks that crossed local American cultures. In so doing, broadcasting exploited the trappings of localism but established a national market that eventually encompassed the vast and disparate regions of the land. The oft-told story—in which “American television” is the aggressor, becomes global, and engulfs the rest of the world with the United States as the subject, not the object, of cultural change—may be too simple.¹²⁹ Broadcasting in America itself can be reinterpreted as a dress rehearsal for globalization, altering identities here first. It is as comedian Jay Leno joked during the inauguration of NBC’s European Super Channel, “We’re going to ruin your culture just like we ruined our own.”¹³⁰

A recent legal dispute illustrates the way First Amendment theory protects the status quo. In 1992, Congress charged the FCC with redetermining whether licensees who converted their stations into “predominantly commercial” channels, the round-the-clock home shopping stations that specialize in ruby earrings and diamond-cut fourteen karat gold chains, met the “public interest” standard set for broadcasters in the 1934 Communications Act. The FCC, which only a few decades before had found that overcommercialization—measured in minutes of commercials per hour—was inconsistent with the public interest, determined that current home shopping channels, with upwards of ninety-percent commercial content per hour, met the licensees’ obligation.¹³¹ If people watched, the FCC reasoned, a need was being met. The vision of the country contained in the “public interest” standard hinged on the number of viewers, not on an independent vision of the relationship between programming and the common good.¹³²

III. NEW TECHNOLOGY, GLOBALISM, AND THE MARKET FOR LOYALTIES

I have tried to show how law and technology interact and affect a state’s power to organize the market for loyalties, and how a governing entity’s use of law and regulation of technological advances allow it to foster or impede

129. See HERBERT I. SCHILLER, *COMMUNICATION AND CULTURAL DOMINATION I* (1976) (“What does it matter if a national movement has struggled for years to achieve liberation if that condition, once gained, is undercut by values and aspirations derived from the apparently vanquished dominator?”); *id.* at 24 (“The genesis and extension of the free flow of information concept are roughly coterminous with the brief and hectic interval of U.S. global hegemony . . .”); JEREMY TUNSTALL, *THE MEDIA ARE AMERICAN* 38–40 (1977).

130. Richard W. Stevenson, *Lights! Camera! Europe!*, N.Y. TIMES, Feb. 6, 1994, § 3, at 1.

131. Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 5321 (1993) (Home Shopping Station Issues). See generally Limitations on Commercial Time on Television Broadcast Stations, 8 F.C.C.R. 7277 (1993) (notice of inquiry) (recounting history of commercial regulation).

132. In its recent decision in *Turner Broadcasting*, the Supreme Court embraced a minimalist view that not only justified the FCC position, but rendered it a necessary outcome given Justice Kennedy’s theory of the case. See *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994).

particular promoters of competing loyalties.¹³³ New and changing technologies—direct-to-home satellites, the spread of cable, and the rich potential of the electronic highway—increasingly limit one of the most important aspects of state power: the effectiveness of intervention by governments to protect an internal cartel from the destabilizing cacophony of the world. Even internally, government media policies that explicitly shape narratives seem to be throwbacks to another era, one in which competition for national identity could be contained.¹³⁴ Even more in jeopardy is the “bubble,” the power of law to contain debate within traditional physical boundaries. The consequences for law are intriguing because the passion for using law to regulate loyalties, fence out competition, and fabricate or reinforce national identities will not disappear. The market for loyalties persists; what changes are the market’s players, the mechanisms for control, and, finally, the future of the state.

A. *Global Competitors and State Responses*

As the earlier illustrations from the Netherlands and Belgium demonstrate, the world is now moving from a well-regulated and divided market for loyalties to one in which constraint by national governments is almost impossible. If one way of understanding the political essence of society is to examine and calibrate its internal web of message sending,¹³⁵ then as codes of interconnection are modified we must change our view of society. The satellite, the most modern form of communication, echoes “the older imagining,” ancient forms of social organization “where states were defined by centres, borders were porous and indistinct, and sovereignties faded imperceptibly into one another.”¹³⁶ Then, the technology and organization of imaginings contributed “paradoxically enough [to] the ease with which pre-modern empires and kingdoms were able to sustain their rule over immensely heterogeneous, and often not even contiguous, populations for long periods of time.”¹³⁷ Now, again, kingdoms outside the established order have a similar capability to surmount self-contained national identities.

133. The destruction of European capacities to enforce barriers to entry (at least among European countries themselves) has been caused partly by the decisions of the Court of Justice of the European Community holding broadcasting service, by and large, to the same Community competition standards as other services. See, e.g., *Ad Van Loon, National Media Policies Under EEC Law Taking into Account Fundamental Rights*, 14 MEDIA L. & PRAC. 17 (1993).

134. At a time when the United States seeks to open markets for its entrepreneurs worldwide, there is something anachronistic about a statute that prohibits aliens and corporations organized under the laws of foreign governments from acquiring a broadcast or common carrier radio license. See 47 U.S.C. § 310(b) (1988).

135. KARL W. DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION 70–71 (1953).

136. ANDERSON, *supra* note 66, at 19.

137. *Id.*

Who are the candidates for these new kingdoms? They can include dynamic and charismatic religious forces—Islamic or Christian. The possibilities also include a rejuvenated Voice of America, a BBC World Service given a new charter by Parliament, or other modernized extensions of a national and propagandistic past. But mostly, these new producers, reaching past boundaries, embrace the kind of ideology that springs from MTV, the recognizable Western package in which the appeal to the individual is the underlying drumbeat of advertising. Sometimes these potentates have names in the fashion of the monarchs of old, like Murdoch or Disney. Already, a global competition exists among the BBC, CNN, NBC Superchannel, and Murdoch to establish hegemony over global news. Not all of these are kingdoms that have the emotional power to sustain the imagination of far-flung peoples, thereby replacing the current order. There is no national identity of Murdoch, no flag or loyalty to Disney. But between religious faith and consumerism, there seems to be passionate battle enough. The global contest of imagery, in the next generation, more likely will not be among nation states, but rather among clashing civilizations, defined by history, language, ethnicity, and religion.¹³⁸

The distinguishing characteristic of this market for loyalties is the decrease in state control. Countries that for religious or political reasons oppose the content of messages coming from the outside must search either for mechanisms that have a more direct impact on the behavior of the suppliers of programming, or for harsher, though less effective, measures directed at households. In the spring of 1994, after discussions between Rupert Murdoch and the People's Republic of China, Murdoch dropped carriage of the BBC from the relevant AsiaSat transponder.¹³⁹ Murdoch's action came in the wake of his statement in late 1993 that advanced technologies such as satellites "have proved an unambiguous threat to totalitarian regimes everywhere."¹⁴⁰ The regimes with which he was dealing presumably did not appreciate the sentiment. In particular, China protested Star TV's carriage of the BBC, which had been critical of the regime. Star's penetration in the China market was threatened, and Murdoch acquiesced. In Singapore, a ban on the purchase or use of satellite receiving dishes, absent a hard-to-obtain license, is designed to keep out those programs that are unapproved.¹⁴¹ Several regional governing

138. See Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF., Summer 1993, at 22. One response, although apparently difficult to accomplish, would be for the government to invest more in its own narrative of national identity. In Western democracies, however, the commitment to public broadcasting seems to be declining. Cf. PORTER & HASSELBACH, *supra* note 17, at 170 (suggesting a renewed role for Germany's public service broadcasters).

139. See Raymond Snoddy, *Murdoch Cut BBC To Please China*, FIN. TIMES (London), June 14, 1994, at 6.

140. *Id.* at 6; see also Philip Shenon, *A Repressed World Says, "Beam Me Up"*, N.Y. TIMES, Sept. 11, 1994, § 4, at 4 (discussing Saudi Arabia and Singapore).

141. See Kieran Cooke, *Singapore Caught in Media Dilemma*, FIN. TIMES (London), Sept. 6, 1994, at 4 ("On one hand, Singapore's planners see the economic necessity of being plugged into the global

bodies in Egypt, under pressure from the local imam, have established similar ordinances prohibiting the use of satellite dishes.¹⁴² In many corners of the former Soviet Union, a strong central government has renewed its efforts to maintain a monopoly over imagery. This has entailed censoring newspapers, precluding the distribution of dissenting papers, tightly policing the entry of foreign broadcast television signals, and monitoring those thought to be attentive to foreign messages.¹⁴³ Not surprisingly, Iran vigorously attempts to fence out foreign signals and criminalizes the watching of some foreign programs. In these and other places, states attempt a partial or complete withdrawal from the mainstream of world communications commerce in order to maintain national identity and culture.¹⁴⁴ It is often thought that censorship, the ancient and indispensable tool in shaping the market for loyalties, is rendered obsolete by the abundance of technology and ease of access. Intense partisans, however, will seek ways to enforce their norms. Where signals penetrate, snooping and snitching may replace systematic exclusion. Terror, too, may become the weapon of antimodernists whose views technology has rendered unenforceable.

While it seems certain that advanced technology and multiple channels will be introduced, it is less certain how quickly and in what technical form they will come.¹⁴⁵ States concerned with controlling loyalties will prefer the

information network. . . . But, on the other hand, the government is deeply concerned about losing control over information flows within Singapore." Control over receiving technology to alter market structure is not new. In the 1960's, Congress forced manufacturers of television sets to ensure that both UHF and VHF channels were available in order to increase the possibility of competition and to help support public broadcasters. During the Third Reich, Goebbels ordered the manufacture of extremely low-cost radios, achieved the mass distribution of People's Radio Receivers (*Volksempfänger*), and assured communal listening through an elaborate network of Wireless Wardens (*Funkwarte*). ERNST K. BRAMSTED, GOEBBELS AND NATIONAL SOCIALIST PROPAGANDA 1925-1945, at 74-75 (1965); RICHARD GRUNBERGER, THE 12-YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY 1933-1945, at 401 (1971).

142. Mamoun Fandy, *Who Is Afraid of the Satellite Dish?*, CHRISTIAN SCI. MONITOR, Dec. 15, 1993, at 23. The public pressure resulting in the prohibition of satellite dishes is only a small part of the general hatred that is aimed at the impact of foreign signals. *Id.*

143. See, e.g., Jeri Laber, *The Dictatorship Returns*, N.Y. REV., July 15, 1993, at 42 (describing persecution and censorship of dissenters by ruling regime in Turkmenistan).

144. The easiest and most obvious barrier to entry is a limitation on the number of television channels available for public viewing. A dramatic example of cultural protectionism achieved through a maintained scarcity occurred in apartheid South Africa, where the government banned television until 1976. The National Party felt that American and British programming would threaten the Afrikaans language and undermine the "multinationalism" of its Bantustan system. See Rob Nixon, *Keeping Television Out: The South Africa Story*, INTERMEDIA, Aug.-Sept. 1992, at 35.

145. In Turkey, for example, as elsewhere, the first break in the state media monopoly resulted from satellite technology and was tolerated because the new channels carried commercial and entertainment programming that reinforced the secular mandate of the parties in power. But the new channels were also used by a deported imam, fueling fear of political splintering and an intense fear of competition among the ruling parties. In early 1993, the Ministry of the Interior issued a directive banning all private television and radio stations. Within days, the Ministry reversed part of its ruling, exempting broadcasting via satellites from abroad. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 1100 (1994). Those who favored the Ministry of Interior's action argued that the closures were necessary to pave the way for a more orderly scheme for broadcasting regulation; those against it argued that the decision was based on "the government's inclination to create a single-voiced democracy." Aksoy & Robins, *supra* note 27, at 16 (quoting *Türkiye'yi Susturuyorlar*, HÜRRİYET, Apr. 1, 1993).

introduction of cable television to the spread of home satellite dishes, which can receive signals directly from abroad.¹⁴⁶ Since a cable monopolist is a domestic intermediary, states can more easily influence it.¹⁴⁷ Electronic information-delivery systems allow creative governments to monitor messages effectively. The United States government has sought, so far unsuccessfully, to insert decoding chips into the new information infrastructure to enable eavesdropping when judicially or legislatively authorized.¹⁴⁸ Other less liberal governments may introduce such monitoring technology without public debate.

Because news programming is such an important bearer of public narratives, the evolution of journalism in the era of new technology attracts special attention. If states have less control over news accounts that come across borders, they will seek to exercise more control over journalists and the reports they export. In 1992, Doordarshan, the Indian public broadcaster, sought to prevent rioting by refusing to air footage of the destruction of the Babari mosque at Ayodhya by Hindu fundamentalists; the BBC, however, which had received satellite footage in London, immediately broadcast the news into India through Star TV.¹⁴⁹ As a result of such destabilizing influences, formal or informal arrangements between states and large-scale international news organizations may become more frequent. CNN, for example, has contractual ties to governments to operate terrestrial transmitters, to broadcast via the national system, or merely to gather information. Implicit in these agreements is CNN's commitment to include, among the images projected, those images more likely to reinforce prevailing governments. The arrangement between Rupert Murdoch's News Corporation and the People's Republic of China is a harbinger of a new kind of negotiation over the content

Finally, in July 1993 the constitutional provision establishing the state's monopoly was repealed, U S DEP'T OF STATE, *supra*, at 1100, and a new provision was adopted allowing the possibility of nongovernment radio and television if enabling legislation is enacted. *Id.* While some private stations have been reintroduced, laws securing their existence have not yet been passed. *Id.* Regardless, the secular state of Turkey has other weapons that lead to censorship, such as the Anti-Terror Law and the Penal Code provisions that criminalize insulting, among other things, Kemal Ataturk (the secular state's founding figure), secularism, Islam, the security forces, and the President. *Id.* at 1096

146. In rural villages, even the location of receivers has hierarchical implications. Communal reception will impact authority less than if each home has its own television set. In the distant world of the interactive information structure, loyalties to the virtual communities of affinity groups will replace loyalties to the authority figures of the physical place. See DAVID MORLEY, *TELEVISION, AUDIENCES AND CULTURAL STUDIES* 214-15 (1992) (implying position of receiver is expression of hierarchy in both "advanced" and "primitive" cultures). According to Aksoy and Robins, in Turkey, satellite dishes became "symbols of how taboos and prohibitions [we]re being dismantled," see Aksoy & Robins, *supra* note 27, at 16 (quoting Hasan Cemal, *Islamların Televizyon Atagi*, SABAH, Jan. 13, 1993), and informal, squatter-type radio stations soon followed.

147. In most cable systems, even those in the United States, whether there are 50 or 500 channels might be less important than whether there is just one determiner of what is shown on those channels

148. See Jaheen Nelson, Comment, *Sledgehammers and Scalpels: The FBI Digital Wiretap Bill and Its Effect on Free Flow of Information and Privacy*, 41 UCLA L. REV. 1139, 1139-43 (1994)

149. See generally Molly Moore, *When the Mob Turns Against the Messengers: After Mosque Assault, Hindus Attack Journalists*, WASH. POST, Dec. 9, 1992, at C1 (describing assaults by Hindu fundamentalists on Western journalists during attack on mosque, possibly motivated in part by "biased" coverage)

of global news.¹⁵⁰ In the new hegemony of image makers and states, the most acceptable accounts will be those of fierce crusades against commonly defined infidels; we can anticipate the continued Saddamization of international reporting.

Thus, those who ring the death knell of the state may ring too soon. I have already suggested that increased acceptance of commercialization and a denationalization of the media are also possible responses to imagery without boundaries. If confronted with a choice between a national identity that competes for authority and the weak product loyalties created by consumerism, governments will choose an influx of MTV over messages sponsored by meaningful, passionate critics of the existing political arrangements. Those in power prefer commercials to alternate identities offered by groups such as Islamic fundamentalists in Egypt, Basque separatists in France, or Kurds in Turkey. Commercialization may undermine historic cultures, but it may well be far less subversive than destabilizing political messages. In this sense—at least in the short run—governments benefit from allowing the entry of new and attractive commercial programming. Such programming fills the social space into which a hauntingly competitive national identity otherwise might emerge.

B. *Global and Regional Regulation*

In indistinct yet vital ways, global signals create more than unimpeded invasion of local markets for loyalties. They also create a global competition with a search for global rules, global cartels, and global regulation. For most of this century, as I have indicated, the international order was based on the assumption that national interests, constrained by borders, should be the overriding regulatory concern.¹⁵¹ This assumption is changing. Commentators criticize public international institutions, which exist to serve their sovereign members, for failing to cope with transnational developments.¹⁵² After a long period of desuetude, principles of human rights, which have always included a right to receive and impart information across borders, are reappearing as the basis for striking down national ordinances.¹⁵³

150. See Snoddy, *supra* note 139, at 6.

151. See *supra* text accompanying note 30.

152. See, e.g., Walther Richter, *Wanted: A Satellite Communications Board To Sort out the ISOs*, INTERMEDIA, Aug.–Sept. 1994, at 40 (noting need for more centralized authority over International Satellite Organizations); Yoshio Utsumi, *Why the ITU Has Taken Only the First Step Towards Transformation*, INTERMEDIA, Aug.–Sept. 1994, at 36 (arguing that International Telecommunication Union must resolve many issues to maintain its leading role in the face of recent international developments). For a general study of the International Telecommunication Union's reform efforts, see Audrey L. Allison, *Meeting the Challenges of Change: The Reform of the International Telecommunication Union*, 45 FED. COMM. L.J. 491 (1993).

153. See Case 353/89, *Commission v. Netherlands*, 1991 E.C.R. I-4049; *Informationsverein Lentia v. Austria*, No. 36/1992/381/455-459 (Eur. Ct. H.R. Nov. 24, 1993) (holding that Austrian cable monopoly

Communication specialists talk of enlarging the powers of existing international bodies, such as the ITU, or creating a new body that can establish and enforce rules in a global market.¹⁵⁴ Because of new needs, substantially redesigned institutions for dealing with the new technology are most likely to emerge from this transformative period. Regional multilateral arrangements, epitomized by the 1989 European Convention on Transfrontier Television,¹⁵⁵ demonstrate how new technology spurs supranational forms of regulation. These arrangements are designed to facilitate division of and to police global markets,¹⁵⁶ as well as to undermine national measures that attempt to preserve monopolistic control of the media. In a recent case challenging a prohibition on private broadcasting, the Austrian government argued that its legislation was "aimed at preventing manipulation of the population and the concomitant serious disturbances of the public order."¹⁵⁷ The European Court of Human Rights, however, ruled that the public monopoly could not be maintained.¹⁵⁸ Thus, the locus for making decisions about the extent and nature of permissible competition for audience has shifted from the national level to the Council of Europe.

This shift has not been sudden. The United Nations deliberations over international regulation of the direct broadcasting satellite twenty years ago foreshadowed such a change.¹⁵⁹ A central question of those meetings, particularly for the Western democracies, was whether a state should or could take responsibility for subversive or unwanted communications merely because the signals originated within its frontiers. A great number of countries, most fervently those of the Soviet bloc and the nonaligned members of the United Nations, sought a convention that would do one or more of the following: bar

violated freedom of expression guaranteed by European Convention of Human Rights)

154. See sources cited *supra* note 152.

155. See Television Without Frontiers Directive, *supra* note 23 (implementing European Convention on Transfrontier Television); see also Television Without Frontiers Green Paper, *supra* note 24 (reviewing existing and foreseen developments in television broadcasting and outlining European response)

156. Under Article 2.2 of the Television Without Frontiers Directive, a receiving state may provisionally suspend broadcast transmissions after consultation with the transmitting state when certain limited standards are not met. Television Without Frontiers Directive, *supra* note 23, art. 2.2, 1989 O.J. (L 298) at 26. Article 22 requires member states to "ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality." *Id.* art. 22, 1989 O.J. (L 298) at 29, see TRANSFRONTIER TELEVISION IN EUROPE: THE HUMAN RIGHTS DIMENSION 39 (Antonio Cassese & Andrew Clapham eds., 1990).

157. Informationsverein Lentia v. Austria, No. 36/1992/381/455-459 (Eur. Ct. H.R. Nov. 24, 1993). This argument was fashioned to meet the standards provided by the European Convention on Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, para. 2, Europ. T.S. No. 5 (providing for "such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of . . . morals")

158. Informationsverein Lentia, slip op. at 12.

159. See The Georgetown Space Law Group, *DBS Under FCC and International Regulation*, 37 VAND. L. REV. 67, 98-140 (1984) (discussing international regulation of direct broadcasting satellites), Monroe E. Price, *The First Amendment and Television Broadcasting by Satellite*, 23 UCLA L. REV. 879, 883-86 (1976) (discussing U.S. role in negotiations). See generally SARA F. LUTHER, *THE UNITED STATES AND THE DIRECT BROADCAST SATELLITE* (1988).

certain kinds of programs from direct broadcast satellites;¹⁶⁰ require consultation with the government of any state whose audience the broadcast targeted;¹⁶¹ and require the prior consent of any such state before transmitting signals.¹⁶² The deliberations produced only a nonbinding General Assembly Resolution, which lacked a formal multilateral mechanism for enforcement.¹⁶³ The United States opposed the creation of an international standard that would establish prohibited categories of programming because it considered such regulation incompatible with human rights and First Amendment principles.¹⁶⁴ Exhausting discussions revealed the difficulty—in the face of technology indifferent to national borders—of achieving social control of new instruments of communication.

No match yet exists between a global market for loyalties and a global regulating entity. We are still at an early, frontierlike stage in the overarching competition among global voices, and as a consequence, the underlying consensus—the market-shaping impulse that is at the root of media law—does not exist. Familiar instruments of change—banks, giant telephone companies,

160. One draft convention provided:

States Parties to this Convention undertake to exclude from television programmes transmitted by means of artificial earth satellites any material publicizing ideas of war, militarism, nazism, national and racial hatred and enmity between peoples as well as material which is immoral or instigative in nature or is otherwise aimed at interfering in the domestic affairs or foreign policy of other States.

Draft Convention on Principles Governing the Use by States of Artificial Earth Satellites for Direct Television Broadcasting, U.N. Doc. A/8771 (1972), art. IV [hereinafter *Draft Convention on Artificial Satellites*]. One of the taboo subjects was "[b]roadcasts undermining the foundations of the local civilization, culture, way of life, traditions or language." *Id.* art. VI(e).

161. The Committee on the Peaceful Uses of Outer Space (COPUOS) proposed the following principles:

1. A direct television broadcasting service by means of artificial earth satellites specifically directed at a foreign State, which shall be established only when it is not inconsistent with the provisions of the relevant instruments of the International Telecommunication Union, shall be based on appropriate agreements and/or arrangements between the broadcasting and receiving States or the broadcasting entities duly authorized by the respective States, in order to facilitate the freer and wider dissemination of information of all kinds and to encourage co-operation in the field of information and the exchange of information with other countries.

2. For that purpose a State which proposes to establish or authorize the establishment of a direct television broadcasting service by means of artificial earth satellites specifically directed at a foreign State shall without delay notify that State of such intention and shall promptly enter into consultations with that State if the latter so requests.

Report of the Legal Sub-Committee, U.N. GAOR Comm. on Peaceful Uses of Outer Space, 17th Sess., Annex 2, at 6, U.N. Doc. A/AC.105/218 (1978) (containing draft principles on direct television broadcasting).

162. *Draft Convention on Artificial Satellites*, *supra* note 160, art. V; see *Broadcasting from Satellites*, U.N. GAOR Comm. on Peaceful Uses of Outer Space, 2d Sess. 32–34, U.N. Doc. No. A/AC.105/PV.62 (1969) (discussing Soviet position); The Georgetown Space Law Group, *supra* note 159, at 115; see also MARIKA N. TAISHOFF, *STATE RESPONSIBILITY AND THE DIRECT BROADCAST SATELLITE* 34 (1987) (describing Soviet fear of harmful propaganda).

163. The final vote was 108 to 13. The debate in the United Nations was related to the general controversy over a new international information order. See ANTHONY SMITH, *THE GEOPOLITICS OF INFORMATION: HOW WESTERN CULTURE DOMINATES THE WORLD* 111–47 (1980).

164. See The Georgetown Space Law Group, *supra* note 159, at 71–89 (discussing development of United States regulation of direct broadcast satellites in context of First Amendment).

international trade organizations—are beginning to find their way. Being more plastic, they mediate transborder markets for loyalties, responding to economic and political forces, providing technical and financial assistance, assuring step-by-step change. Since sovereignty is a difficult thing to cede, candidates for greater international power, such as the ITU, face the obstacle of reluctant sponsors. At some point, in the not-too-distant future, participants in the global market for loyalties will require a stronger regulatory presence, a global hand, invisible or not. But that moment is not yet here.

IV. CONCLUSION

National identities are, of course, quizzical imaginings: a combination of the aesthetics of patriotism, romantic searches through the past, and the reinvention of old myths for sometimes benign, sometimes malevolent purposes. They can change rapidly. The nation state has always been, as Eli Noam has written, “at tension with cross-border allegiances—whether proletarian international solidarity, rebellious youth culture, international financial capital, or ethnic minorities.”¹⁶⁵ Now, however, new networks can weaken national cohesion while strengthening and internationalizing particular allegiances (often among globally distributed communities). Noam notes, “It is difficult for a state to extend its powers beyond traditional frontiers, but it is easy for the new networks to do so.”¹⁶⁶ Thus, the audiocassettes with the recorded voice and message of the exiled Ayatollah that were smuggled from France to revolutionary strongholds in Iran immediately transported the fiery zeal of the Ayatollah and helped unite opposition to the Shah. Radio gave to the people of Moscow the sense that they were a community, stronger and more independent than the organizers of the reactionary coup. The lesson demonstrated by these examples is not only one of freedom; it is also the lesson of imperiled narratives and susceptible regimes. A global market for loyalties increasingly supplements its local counterparts, and participants in the local markets tend, as in the market for goods, to be increasingly transnational. Great corporations, religious entities, and programmers of signals bind together scattered ethnic populations and others with defined interests.

The global drama of the programs and narratives that have been beamed through the skies as a technique of the new era may have been captured best by the gifted Polish journalist and author Ryszard Kapuściński. Although describing Iran's turn to Khomeini after Westernization under the Shah, his words have a more general truth:

165. ELI M. NOAM, BEYOND TERRITORIALITY: ECONOMICS AND POLITICS IN TELESOCIETY 10 (Columbia Inst. for Tele-Information Working Paper No. 690, 1994).

166. *Id.*

A nation trampled by despotism, degraded, forced into the role of an object, seeks shelter, seeks a place where it can dig itself in, wall itself off, be itself. This is indispensable if it is to preserve its individuality, its identity, even its ordinariness. But a whole nation cannot emigrate, so it undertakes a migration in time rather than in space.¹⁶⁷

In this passage Kapuściński was writing of resistance to messages from the West, a "walling in" that must use every technique possible to block the compelling, attractive, permeating voices from without. This atavistic theory, this turn against modernity, also suggests one of the strong motivations, conscious or not, for the West to project the enveloping narratives of its contemporary radio and television. There is a key here to the importance of the stories that are pumped into the transition societies and the periphery of the developed world, a key to the impact of the dream factories of Hollywood on the villagers of the Carpathians, pub keepers in Wales, shepherds in the Basque country, or workers in Azerbaijan. The rhythm and music of Western radio and television push modernity against competing forces. Alan Rusbridger of *The Guardian* caught this "full surreality of the New Media World Order" in a village located an hour from New Delhi.¹⁶⁸ There, while young people chant at the temple of the monkey-god, Hanuman, the family of Yogbal Sharma watches MTV with its "[l]egs, lipstick, kisses, jeans, fast cars, beaches, cafes, drink, [and] waterfalls," a representative sample of Star TV fare.¹⁶⁹ In the years to come, Rusbridger observes, children will choose whether to spend Tuesday evening singing to Hanuman or watching *Dynasty*.¹⁷⁰

Imagine a world of hyperbolic interactivity, a home shopping network not just of consumer goods, but of ideologies and movements. In this mythological telecommunications future, the boundaries that will count will be the footprints of satellites and the reach of computer system operators. They will demarcate the sway of the empires of production exerting their influence over the fealties of mere consumers. It is a future in which the Third World becomes even more marginalized, unless it becomes more of a market for goods and therefore more relevant to the producers and distributors of imagery. The wiring of the world, and the expansion of the technology that enables the allegiances of consumerism, is akin to establishing the infrastructure for resource extraction in the colonies of old. Modern broadcasting devices, once the perfect instruments for capturing loyalties and maintaining the state, are becoming consummate devices for undermining the established order. The new technologies and the mechanisms that are evolving for their exploitation are

167. RYSZARD KAPUŚCIŃSKI, *SHAH OF SHAHS* 113 (William R. Brand & Katarzyna Mroczkowska-Brand trans., Harcourt Brace Jovanovich 1985) (1982).

168. Alan Rusbridger, *The Moghul Invasion*, *THE GUARDIAN* (London), Apr. 8, 1994, at T6.

169. *Id.*

170. *Id.*

reducing the capacity of existing states to regulate political discourse. Even in an era of more limited broadcast entry, some argued that Radio Free Europe, Radio Liberty, and Voice of America helped destabilize the Soviet regime. If abundant channels become easily accessible, universally available, and used by powerfully charismatic, unmediated voices, then the potential for novel, widespread, populist alliances will certainly be realized. Whether the competitors will be the industries of faith, the distributors of blue jeans and alcohol, or empires yet unborn, the point remains the same. The ascendancy of the new players, the new media structure and allegiances, will weaken and ultimately replace the now-reigning oligopolies. It is in this transformed market for loyalties that the possibilities, however dim, of global coordination and regulation must be realized.

