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Televised Trials: Can the Government Market Electronic Access

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Howard: Televised Trials: Can the Government Market Electronic Access

TELEVISED TRIALS: CAN THE GOVERNMENT MARKET ELECTRONIC ACCESS?

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I. INTRODUCTION

Although the problems associated with the conflict between publicity and a defendant's right to a fair trial "are almost as old as the Republic,"¹ innovations in electronic technology have altered the focus of the analysis. The improved methods and equipment available to deliver a message to mass audiences have "greatly expand[ed] the sphere of the press."² Technological advances allow instantaneous transmission of events with relative ease. The media has expanded coverage of "high-profile" trials with these capabilities.³

1. The Author is currently a judge on the South Carolina Court of Appeals. He presided over the Susan Smith trial as a South Carolina circuit court judge. The Author would like to extend his deepest appreciation to Roxy Beagley, Helen Ann Harper, Amy Mathisen, Patrick McCarthy, and Sally Wallace for their help in researching this project and for their insight.

1. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976).

2. PATRICK M. GARRY, *SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT 44* (1994). As Garry points out by example, "Fiber optic cable, capable of transmitting electronic, voice, and video messages over the same cable, promises to bring customized news and information into the home over the telephone." *Id.* News would "appear on the home computer, television screen, or video phone." *Id.* Additionally, "[n]ewspapers may well evolve into some electronic format in which their contents appear on some form of computer screen"—as they already do through Internet programs—to be printed by the individual at home. *Id.* at 45. Should this evolution take place, the capability for instantaneous update would be only a computer keystroke away. Garry observes that these technological advances are producing new kinds of media, including interactive capability. *Id.* at 45-48. The camera is no exception to this technological revolution. Cameras are now available which are about the size of a stick of butter. Conclusions previously drawn about the potential for disruption of courtroom proceedings by the physical presence of cameras must be re-evaluated in light of current technology.

3. A high-profile trial is one which "captivates public attention in a compelling way," commanding the "bright light of intense media scrutiny." TIMOTHY R. MURPHY ET AL., A

Naturally, the influx of people and equipment generated by this attention creates logistical issues for the judicial system that are not encountered in a typical case.⁴ Not surprisingly, the expanded television coverage of trials has increased debate over the appropriateness of procedural safeguards implemented to protect a defendant's due process right of a fair trial⁵ because these same safeguards potentially restrict media access to the court proceeding in violation of First Amendment protection.⁶

The introduction of new modes of media communication into the courtroom also brings new associated costs. The trial judge has sometimes handled allocating these costs on an ad hoc basis, with minor mechanical costs of cameras in the courtroom borne by the affected media. However, in at least one instance, legislative action has been proposed to recoup these administrative costs from the media by charging a fee for electronic access to the courtroom.⁷ Stephen D. Easton⁸ extends charging a fee for electronic access beyond the governmental purpose of recouping administrative costs⁹ to redistributing the profits of electronic media to crime victims as subsidized damages payments. The Easton Model goes another step, proposing that the trial court auction the exclusive television camera rights in high-profile cases to the highest bidder.¹⁰ In typical cases not having the audience draw to

MANUAL FOR MANAGING NOTORIOUS CASES XIII (1992). Examples of high-profile trials include the Oklahoma City Bombing Trial and cases involving O. J. Simpson, the Menendez brothers, Susan Smith, William Kennedy Smith, and Polly Klaas.

4. For example, initial media estimates of the number of satellite trucks which would converge on Union, South Carolina, to cover the trial of Susan Smith were in excess of one hundred, according to the presiding judge.

5. Cf. *Sheppard v. Maxwell*, 384 U.S. 333, 358-60 (1966) (noting appropriate limitations, including restrictions on the number and placement of reporters allowed, that should have been made by the trial judge); *Estes v. Texas*, 381 U.S. 532, 544-49 (1965) (discussing the negative impacts of television on trials).

6. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (reversing a courtroom closure order because the trial judge made no findings that alternative means "would have met the need to ensure fairness" and failed to recognize the constitutional right of the public and press to attend the trial).

7. A. 1733, 1st. Sess. (Cal. 1995).

8. Stephen D. Easton, *Whose Life Is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. REV. 1 (1997).

9. See *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (holding that a government cannot ordinarily profit by imposing licensing or permit fees on the exercise of a First Amendment right when the licensing tax "is not . . . imposed . . . to defray the expenses of policing the activities in question"); *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941) (allowing local governments flexibility in fixing licensing fees based on applicable administrative costs); see also *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 774 (2d Cir. 1984) ("Only fees that cover the administrative costs of the permit or license are permissible." (citing *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d. Cir. 1983))).

10. Easton, *supra* note 8, app. at 52.

command high bids for the television rights, Easton proposes a fee for daily access set by the trial judge, presumably governed by the judge's determination of what the market will bear.¹¹

This article discusses the most probable attack which Easton's model would encounter under a First Amendment analysis. This discussion of the Easton Model focuses on the governmental fee for access as a selectively imposed economic burden. Other issues posed by the Easton Model which are mentioned, but not treated in depth, include intermedia discrimination, equal protection, and forum-based discrimination.

II. CHARACTERISTICS OF THE EASTON MODEL

Easton suggests that charging for electronic access to the courtroom is justified to reallocate large television profits derived from the telecast of high-profile trials because trials are drama, and drama is a form of entertainment—not education.¹² Under Easton's proposal, fees are driven by the television market. They are not related to the administrative costs of having cameras in the courtroom. In a high-profile case, the setting of fees is modeled on an auction process using sealed bids, with exclusive access granted to the highest bidder.¹³ In a typical case, the trial judge would set television access fees, which are charged to all media desiring to televise the proceeding.¹⁴ These access fees compensate the victim in the particular trial being televised if the victim has not otherwise been compensated by the legally responsible parties.¹⁵ Any excess funds would be paid into a victim compensation fund for the benefit of other victims of crime.¹⁶

Easton argues that his proposal does not offend the Constitution because the Supreme Court has refused to recognize a right of electronic access to courtroom proceedings under the free speech or free press clauses of the First Amendment.¹⁷ This argument may not pass constitutional scrutiny.¹⁸ Al-

11. *Id.*

12. *Id.* at 20-25.

13. *Id.* at 52.

14. *Id.* at 43, 52.

15. *Id.* at 44-48.

16. Easton, *supra* note 8, at 45.

17. *Estes v. Texas*, 381 U.S. 532, 539-40 (1965); *see also Chandler v. Florida*, 449 U.S. 560, 573-74 (1981) (noting that allowing television access to courtroom proceedings was not an inherent violation of due process under the Constitution, thereby opening the door to state experimentation with television access to court proceedings).

For an excellent discussion of the weaknesses in this argument, see David W. Burcham, *High-Profile Trials: Can Government Sell the "Right" to Broadcast the Proceedings?*, 3 UCLA ENT. L. REV. 169 (1996).

18. Burcham describes arguments like Easton's as a classic syllogism:

First, the Supreme Court has not recognized a right to broadcast [courtroom]

though the Court has not recognized a constitutional right of access for the electronic devices which would permit broadcasting of courtroom proceedings, this lack of recognition should not be confused with the First Amendment protection of the press from differential application of economic burdens.¹⁹ This article discusses the First Amendment concern raised by a proposal to charge a fee for electronic access to criminal court proceedings—unrelated to any associated, direct administrative cost—as in the Easton Model. Because such a model proposes a financial burden singularly applicable to the press, it constitutes an unconstitutional economic regulation selectively applied to the press, which impermissibly burdens First Amendment rights.²⁰

III. SELECTIVE ECONOMIC BURDEN

The evolution of tax discrimination analysis in the area of First Amendment law may be viewed as one part of the Court's struggle to define rights afforded under the free press clause. Proponents of the organized press as the "fourth estate" have argued from both a historical and contemporary standpoint for recognition of independent rights under the free press clause²¹ and for the broadening of the protection of press from governmental restriction.²² Although arguably the Court has never expressly ruled that the

proceedings. . . . Second, the imposition of fees for the right to broadcast a trial is necessarily less burdensome on the electronic media than complete denial of access to the feed from the courtroom. It follows, *a fortiori*, that because the power of courts to deny total access to the electronic feed is not limited by the Constitution, the power to impose lesser burdens on the media, such as conditioning access to the feed on the payment of a fee, is similarly unrestrained.

Burcham, *supra* note 17, at 180-81 (footnote omitted); cf. Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1529 (1996) (stating that the allowance of electronic access may be mandated by "the public's well-established constitutional right of access to the courts and the prohibition against discriminatory treatment of different members of the media").

19. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S.Ct. 2510, 2522 (1995) (to be published at 515 U.S. 819).

20. *Id.*; see also Burcham, *supra* note 17, at 180 n.36 (discussing First Amendment implications of fees for electronic access).

21. See, e.g., Geoffrey Marshall, *Press Freedom and Free Speech Theory*, 1992 PUB. L. 40 (discussing the theoretical foundations of the freedom of speech and the press); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996) (discussing the history of First Amendment jurisprudence); Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 261-72 (1985) (discussing the importance of historical and modern financial conditions on free speech).

22. See, e.g., GARRY, *supra* note 2, at 149-54 (discussing emerging media technologies and the need for greater public participation and fewer government restraints); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 930 (1992)

free speech clause and the free press clause are distinct,²³ the Court has clearly recognized the democratic value of free expression,²⁴ which "prohibits the state from interfering with the communicative processes through which its citizens exercise and prepare to exercise their rights of self-government."²⁵

The fee proposed in Easton's article is a monetary exaction on the access of electronic devices used by members of the media to gather information in a format suitable for public broadcasting. Under his proposal, the government assesses a fee for electronic access to a public courtroom in order to subsidize an unrelated government interest. If the legislation is structured so as to earmark the money for the sole purpose of compensating crime victims, rather than as revenue for the general support of the government, it is arguably not a "tax" as that term is specifically used in the Constitution.²⁶ Still, in the general sense, the Easton fee is an "exaction for the support of the Government" because it subsidizes a government interest.²⁷ Regardless of whether it is labeled a user fee, a license fee, or a tax, it is still an economic burden charged as a prerequisite to electronic access, controlled in amount by the government and targeting only the electronic media. As such, it is an economic regulation directed at the press, which raises First Amendment concerns.²⁸

Recognizing an access fee as a monetary burden when it is unrelated to associated costs does not necessarily render it unconstitutional. The Supreme Court has continued to affirm the principle that the press can be subjected to economic regulation consistent with the First Amendment when it is either generally applicable to all businesses or is justified by a special characteristic of the press.²⁹ However, beginning with *Grosjean v. American Press Co.*³⁰

(stating that the press should have a greater right of access in order to protect the public from the government).

23. GARRY, *supra* note 2, at 107.

24. *Id.* at 111.

25. *Herbert v. Lando*, 441 U.S. 153, 184-85 (1979) (Brennan, J., dissenting). Although the self-government principle is, perhaps, most literally reflected in the concurring opinion of Justice Brennan in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980), the theme is also a foundation for the majority opinion in the context of open criminal trials. *Id.* at 573; *see also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

26. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S.Ct. 2510, 2522 (1995) (to be published at 515 U.S. 819) (stating mandatory student fees are an exaction on students, but are not considered a general tax because they do not raise general funds for the university); *see also United States v. Butler*, 297 U.S. 1, 61 (1936) (asserting that taxes "ha[ve] never been thought to connote the expropriation of money from one group for the benefit of another").

27. *Butler*, 297 U.S. at 61.

28. *See supra* text accompanying notes 19-20.

29. *Cf. Grosjean*, 297 U.S. at 250 (stating that newspapers are not completely immune from

and culminating with *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,³¹ the Court has definitively ruled that a selective tax—for example, one which is applicable only to the press—places an impermissible burden on First Amendment rights unless the government can prove the tax is necessary to achieve an overriding governmental interest.³²

The *Grosjean* Court struck down a Louisiana license tax levied on the gross receipts of advertisements carried in newspapers having a circulation of more than twenty thousand copies per week.³³ Discussing *Near v. Minnesota*,³⁴ the Court observed that “the object of the [First and Fourteenth Amendment] was to prevent previous restraints on publication; and the [*Near*] court was careful not to limit the protection of the right to any particular way of abridging it.”³⁵

Additionally, the *Grosjean* Court reviewed the English attempts at censorship using “taxes on knowledge” and the pre-First Amendment Massachusetts stamp and advertising taxes, the former being a major cause of the American Revolution and the latter meeting with such great rebellion that the taxes were almost immediately repealed.³⁶ The Court found these taxes to be unequivocal evidence that the drafters of the First and Fourteenth Amendments intended to preclude the national and state governments “from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods.”³⁷ The Court explained that “[t]he evils to be prevented were not the censorship of the press merely, but any action of the government [that] might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.”³⁸

After making these observations, the *Grosjean* Court found the license tax imposed on newspapers to be a direct violation of the First Amendment’s freedom of speech and press. Having concluded England’s censorship motivation in the taxes on knowledge to be a foundational impetus for the First Amendment, the Court described the Louisiana license tax as “suspicious.”³⁹

taxation).

30. 297 U.S. 233 (1936).

31. 460 U.S. 575 (1983).

32. *Id.* at 582.

33. *Grosjean*, 297 U.S. at 244.

34. 283 U.S. 697 (1931).

35. *Grosjean*, 297 U.S. at 249.

36. *Id.* at 246-48.

37. *Id.* at 249.

38. *Id.* at 249-50 (quoting 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 886 (Walter Carrington ed., 8th ed. 1927)).

39. *Id.* at 251. The tax was enacted by the Louisiana legislature after Senator Huey Long felt

This language led to confusion about the application of *Grosjean* in situations where no censorship motivation could be discerned.⁴⁰

In the subsequent case of *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*,⁴¹ the Court held unconstitutional a selective use tax on ink and paper, which burdened only a small number of newspaper publishers because it exempted the first \$100,000 of revenue.⁴² Without reference to an improper motive of the Minnesota Legislature, the Court stated that “[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”⁴³ The selective use tax exempting newspapers was not structured in the manner of a traditional use tax as a complement to any sales tax.⁴⁴ Instead, it was a tax only on the cost of paper and ink products consumed in the production of a publication, and it applied no matter where the paper or ink was purchased.⁴⁵

The Court found the use tax violated the limitations of both the First Amendment and Equal Protection Clause because it selectively taxed the press and because it differentially treated members of the press.⁴⁶ The majority noted that previous cases in which the Court had allowed economic regulation of the press involved regulations which were generally applicable to all businesses.⁴⁷ The Court recognized,

A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its

himself unfairly criticized by the larger newspapers. He circulated to each member of the state legislature a handout describing the “lying newspapers” and the tax as a “tax on lying.” *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 579-80 (1983) (quoting Brief of Appellees at 9).

40. *Cf. Houchins v. KQED, Inc.*, 438 U.S. 1, 9-10 (1978) (suggesting purpose was irrelevant in *Grosjean*); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 383 (1973) (finding no censorship motive and noting the holding of *Grosjean*); *United States v. O’Brien*, 391 U.S. 367, 384-85 (1968) (finding the legislative purpose was irrelevant because the inevitable effect was an abridgement of constitutional rights).

41. 460 U.S. 575 (1983).

42. *Id.* at 591.

43. *Id.* at 592.

44. Normally, a use tax is a charge on out-of-state sales equivalent to the sales tax on in-state sales, the purpose of which is to treat uniformly the transactions and thereby curtail out-of-state purchasing designed to avoid sales tax. *See id.* at 577.

45. *Id.* at 582.

46. *Id.* at 591.

47. *Minneapolis Star & Tribune Co.*, 460 U.S. at 583.

constituency.⁴⁸

In what the majority described as a pure First Amendment analysis, the Court concluded: "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."⁴⁹

Although revenue raising was the main interest asserted by Minnesota as justification for its statute, the Court found this reasoning to be insufficient to sustain the tax because the state clearly had alternative means of furthering its purpose (for example, general taxation) without raising concerns under the First Amendment.⁵⁰

In addition to singling out the press as a whole, the special use tax also violated the First Amendment because it targeted a subset of the press, a small group of newspapers.⁵¹ The \$100,000 exemption essentially limited the application of the tax to only eleven publishers in 1974 and thirteen publishers in 1975, with Minneapolis Star ("Star Tribune") paying roughly two-thirds of the revenue raised by the tax.⁵² This effect was discrimination within the same medium, which was impermissible for essentially the same reasons as selective taxation of the press in general.⁵³ The Court also observed that allowing a state to tailor a tax so that it burdens only a few members of the press "presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."⁵⁴

Following *Minneapolis Star*, the Court in *Arkansas Writers' Project, Inc. v. Ragland*⁵⁵ concluded, under a strict scrutiny analysis, that a facially general sales tax was unconstitutional when its exemptions were based on the content of magazines.⁵⁶ Even though the sales tax had general application, Arkansas exempted newspapers⁵⁷ and "religious, professional, trade and

48. *Id.* at 585.

49. *Id.* Moreover, "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment." *Id.* at 588.

50. *Id.* at 586.

51. *Id.* at 591.

52. *Id.* at 578-79.

53. *Minneapolis Star & Tribune Co.*, 460 U.S. at 592-93.

54. *Id.* at 592.

55. 481 U.S. 221 (1987).

56. Although in *Minneapolis Star & Tribune Co.* the majority concluded that a *pure* First Amendment analysis was proper rather than an equal protection analysis, the majority in *Arkansas Writers' Project, Inc.* did not distinguish as clearly. The Court recognized that "First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause. However, since Arkansas' sales tax system directly implicates freedom of the press, we analyze it primarily in First Amendment terms." *Id.* at 227 n.3 (citations omitted).

57. *Id.* at 224 (citing ARK. STAT. ANN. § 84-1904(f),(j) (Michie 1980) (recodified as ARK.

sports journals and/or publications . . . when sold through regular subscriptions.”⁵⁸

The Court concluded that the application of the sales tax in *Arkansas Writers' Project, Inc.* was content-based, and thus required strict scrutiny analysis,⁵⁹ because it distinguished between publications based on subject matter.⁶⁰ The tax discriminated among different types of magazines,⁶¹ similar to the discriminatory effect of the \$100,000 exemption in *Minneapolis Star*. As in *Minneapolis Star*, the state countered that raising revenue was an interest important enough to sustain differential taxation. Noting that the *Minneapolis Star* Court had determined that this interest alone could not justify different treatment among members of the press, the *Arkansas Writers' Project, Inc.* Court held the same was true of a tax which differentiates between magazines.⁶² Although *Arkansas Writers' Project, Inc.* raised the issue of differential treatment between newspapers and magazines, the Court found it unnecessary to address this issue.⁶³

The Easton proposal suffers from the same constitutional infirmity as the unconstitutional use tax on ink and paper in *Minneapolis Star*. It is a monetary exaction by the government which selectively places an economic burden on the press, and more specifically, one segment of the press. The government may argue that no First Amendment rights are implicated when a television reporter has the same right of access to observe courtroom proceedings as other members of the public. However, this argument disregards the underlying potential for censorship inherent in a scheme which places a selective economic burden on this press activity.

The seminal case cited for the proposition that there is no constitutional right of television camera access to criminal proceedings is *Estes v. Texas*.⁶⁴ The *Estes* Court considered the impact of television in the context of the defendant's right to a fair trial, concluding that the extensive impact in that case violated due process.⁶⁵ As Justice Harlan opined in what later proved to be a pivotal concurring opinion,⁶⁶ “The rights to print and speak, over

CODE ANN. § 26-52-401(4) (Michie 1992))).

58. *Id.* (quoting § 84-1904(j) (recodified as § 26-52-401(14) (Michie 1992) (amended in 1993 to read: “sales of publications sold through regular subscription, regardless of the type or content of the publication” (Michie Supp. 1995))).

59. *Id.* at 231.

60. *Id.* at 229-30. *But see supra* note 58 (1993 amendment of quoted code section).

61. *Arkansas Writers' Project, Inc.*, 481 U.S. at 229.

62. *Id.* at 231-32.

63. *Id.* at 233.

64. 381 U.S. 532 (1965).

65. *Id.* at 541-44, 550-52.

66. *See, e.g.*, *Chandler v. Florida*, 449 U.S. 560, 571-74 (1981) (interpreting Justice Harlan's opinion as specifically addressing the facts of the case and *not* announcing a per se ban

television as elsewhere, do not embody an *independent* right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom."⁶⁷

Each of the justices writing opinions in *Estes* grappled in his own way with the constitutional implications of the effects of televising criminal trials in the context of a defendant's Sixth Amendment right to a fair trial. However, none of the justices attempted to articulate a bright line or clear method for distinguishing permissible governmental regulation of the electronic access from impermissible regulation of press in the First Amendment context. The subsequent case of *Chandler v. Florida*⁶⁸ again evaluated the effects of television on the trial process, concluding that *Estes* did not construe the televising of criminal trials to be an inherent violation of due process.⁶⁹

Any interpretation of these cases concluding that the regulation of television cameras employed in the news-gathering function has no First Amendment implications is overly broad. In other settings, the Supreme Court has clearly included the television media as speakers entitled to the protection of the First Amendment.⁷⁰ Although restrictions on the placement of "the mechanical facilities of the broadcasting . . . industries" in a criminal trial proceeding may not infringe on a constitutional right,⁷¹ they do have First

of televising trials on the grounds of an inherent denial of due process).

67. *Estes*, 381 U.S. at 589 (Harlan, J., concurring) (emphasis added).

68. 449 U.S. 560 (1981).

69. *Id.* at 570-74.

70. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores and Reader's Digest, no less communication than is creating the speech in the first place.

Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 674 (1994) (O'Connor, J., concurring and dissenting) (citation omitted); see also *id.* at 636 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'"). If cable operators and programmers are speakers, then certainly other forms of electronic communication, including broadcasters, are speakers protected by the First Amendment.

71. *Estes*, 381 U.S. at 589. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) is also illustrative. There, copies of tapes containing presidential conversations were introduced into evidence in the criminal prosecution of White House officials for obstruction of justice. *Id.* at 591-92. Twenty-two hours of tape were played to the jury and members of the public in the courtroom, including the media; and transcripts, which were not introduced as evidence, were nonetheless made available and widely copied and published by the press. *Id.* at 594. At the end of the trial, the media requested access to the published portion of the tapes in order to copy them for further broadcast. *Id.* Because several defendants appealed their convictions, the trial judge

Amendment implications.⁷² This conclusion stems from the fact that restrictions adversely impact the electronic media's ability to gather information in a format capable of being broadcast, just as a tax on ink and paper indirectly impacts a newspaper's ability to publish.⁷³ Consequently, a charge for electronic access to the courtroom, in addition to being selective, indirectly burdens the First Amendment rights of the press.

The tax in *Minneapolis Star* was unconstitutional because it had the potential of placing an indirect financial burden on a few newspapers by increasing their cost of publication.⁷⁴ The Court recognized that a tax of general application impacts a government's constituency, which greatly reduces the risk of an improper motive.⁷⁵ Conversely, the Court observed:

When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the

denied access, finding that the widespread broadcast of actual tapes to mass audiences, with attendant editing and commentary, could jeopardize the defendants' rights upon retrial if their appeals were successful. *Id.* at 595.

Although the appeals were concluded by the time the case reached the Supreme Court, the Court agreed that a common-law right of access to judicial records exists; however, it also affirmed the notion that the trial judge has discretion to deny access if necessary to satisfy the demands of due process. *Id.* at 598. In addition, the Court determined that making a judicial due process determination was unnecessary because Congress had established an administrative process to take custody of presidential tapes and materials, evaluate the parties' competing interests, and disseminate recordings found to be proper for public scrutiny. *Id.* at 603.

The Court also rejected Warner Communications's argument that the denial of access to the tapes was violative of the First Amendment simply because the denial prohibited the media from determining the inflection and emphasis of the voices. *Id.* at 610. Citing *Estes v. Texas* for the proposition that "a reporter's constitutional rights are no greater than those of any other member of the public," the Court concluded no truncated flow of information existed because those members of the public present in the courtroom, including the press, were allowed to listen to the tapes during the trial and were provided with transcripts. *Id.* at 609. Consequently, the Court implicitly declined to recognize a qualitative difference in the information.

72. *See, e.g.,* *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972) ("[N]ews gathering is not without its First Amendment protections . . .").

73. *See supra* text accompanying notes 37-44.

74. Justice Rehnquist dissented, concluding that the tax was actually less burdensome than a sales tax of general application on the final product. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 597-98 (1983). However, the majority found this argument to be short-sighted, observing that differential taxation allowed for possible censorial effects—even if the current tax scheme was more favorable—because of the threat of future, more burdensome treatment. *Id.* at 587-89 & nn.10-11.

75. *Id.* at 585 ("We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.").

press will often serve as an important restraint on government.⁷⁶

The Court concluded that differential treatment, not “justified by some special characteristic of the press,” suggests that the goal of the regulation is not unrelated to suppression of expression, and therefore it is presumptively unconstitutional.⁷⁷ Furthermore, the Court found that the inherent danger of censorship in differential taxation of the press violates the First Amendment unless the State justifies the means as necessary with a counterbalancing interest of compelling importance.⁷⁸ Just as the State’s important interest in raising revenue could clearly be achieved without differential taxation in *Minneapolis Star*,⁷⁹ the compelling interest of compensating crime victims, which is the purpose of Easton’s proposal, is similarly capable of being achieved without differentially burdening the electronic press.

In *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*,⁸⁰ the Court struck down a crime victim compensation scheme enacted by the state legislature in response to the celebrated Son of Sam serial killer case.⁸¹ The New York Legislature had attempted to ensure that monies received by criminals for selling their stories would be available to compensate the crime victims.⁸² To effectuate this purpose, the statute required “any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to [the] New York State Crime Victims Board . . . and to turn over any income under the contract to the Board.”⁸³ The Court found that the State possessed “a compelling interest in ensuring that victims of crime are compensated by those who harm them,”⁸⁴ but less restrictive means are available.⁸⁵ Additionally, the statute in question supplemented “pre-existing statutory schemes authorizing the Board to compensate crime victims for their losses.”⁸⁶ “The Board [could not] explain why the State should have any greater interest in compensating victims [of crime] from the proceeds of such ‘storytelling’ than from any of the criminal’s other assets.”⁸⁷ As in *Minneapolis Star*,⁸⁸ the interest of the State had

76. *Id.* at 585.

77. *Id.*

78. *Id.*

79. *Id.* at 586-87.

80. 502 U.S. 105 (1991).

81. *Id.* at 123.

82. *Id.* at 108.

83. *Id.* at 109.

84. *Id.* at 118.

85. See *infra* note 91 and accompanying text.

86. *Simon & Schuster, Inc.*, 502 U.S. at 111.

87. *Id.* at 119.

88. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 592

nothing to do with its regulatory classification.⁸⁹

Similarly, the Easton Model fails to connect the governmental interest in compensating crime victims with the fee imposition on camera access because “[e]very State has a body of tort law serving exactly this interest.”⁹⁰ More importantly, increasing general taxation can be employed for this purpose⁹¹—differential taxation of the press is unnecessary. Consequently, the Easton proposal cannot survive analysis under the First Amendment principles recognized in *Minneapolis Star*.

IV. INTERMEDIA DISCRIMINATION

If Easton’s proposal is not an impermissible, selective economic burden on the press under *Minneapolis Star*, constitutional analysis becomes more problematic. The subsequent decision of *Leathers v. Medlock*⁹² is generally recognized as a significant retreat from the sweeping principles developed in *Minneapolis Star*.⁹³ The Arkansas general sales tax was again at issue.⁹⁴ The tax specifically exempts subscription and over-the-counter newspaper sales and subscription magazine sales,⁹⁵ but includes cable television as an industry subject to the tax.⁹⁶ After suit was filed alleging intermedia discriminatory treatment and intramedia discrimination because satellite broadcast television was not taxed, Arkansas amended the sales tax statute to cover satellite broadcast television services.⁹⁷

Rejecting the contention that the tax was discriminatory, the Court articulated three situations in which a tax which discriminates among speakers is suspect under First Amendment scrutiny: (1) if it “single[s] out the press for special treatment,” as in *Minneapolis Star*;⁹⁸ (2) if “it threatens to suppress the expression of particular ideas or viewpoints,” as in *Arkansas Writers’ Project, Inc.*;⁹⁹ and (3) if “it targets [such] a small group of speakers” that it resembles a penalty for particular speakers or particular ideas, as in *Grosjean*

(1983); see also *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (holding the state failed to show a compelling justification for a content-based, selective taxation of magazines).

89. *Simon & Schuster, Inc.*, 502 U.S. at 117.

90. *Id.* at 118.

91. See *Minneapolis Star*, 460 U.S. at 586.

92. 499 U.S. 439 (1991).

93. See *supra* text accompanying notes 41-54.

94. *Medlock*, 499 U.S. at 442.

95. ARK. CODE ANN. §§ 26-52-401(4), (14) (Michie 1992).

96. *Medlock*, 499 U.S. at 442 (citing § 26-52-301(3)).

97. *Id.* at 442-43 (discussing the content of § 26-52-301(3)(D)(i)).

98. *Id.* at 445.

99. *Id.* at 447.

and *Minneapolis Star*.¹⁰⁰ Finding none of those circumstances present, the Court upheld the tax, remanding to the Arkansas Supreme Court to determine whether the interim, differential treatment of cable television and satellite television violated equal protection principles.¹⁰¹

The *Medlock* Court is seemingly more deferential to state taxing authority, reflecting the views expressed in Justice Rehnquist's dissenting opinion in *Minneapolis Star*.¹⁰² The Court observed that "[i]nherent in the power to tax is the power to discriminate in taxation."¹⁰³

In the wake of *Medlock*, the Easton proposal would probably withstand a challenge based on intermedia discrimination. Unless the description of television coverage of high-profile trials as entertainment is viewed as an underlying censorship motivation, the proposal is clearly content-neutral. Because the fee in most cases would be charged to all electronic media seeking access to a normal trial, that part of the Easton Model does not impermissibly target a specific group of speakers. Consequently, Easton's proposal would probably withstand this constitutional analysis.

V. EQUAL PROTECTION ANALYSIS

The Equal Protection Clause does not guarantee a fundamental right; it prevents differential treatment by the government of those attempting to exercise the right.¹⁰⁴ As the Court observed in *Arkansas Writers' Project, Inc.*, First Amendment claims can be intertwined with equal protection considerations.¹⁰⁵ In that case the Court held "that the State's selective application of its sales tax to magazines is unconstitutional."¹⁰⁶ The content-

100. *Id.* at 447-48.

101. *Id.* at 453.

102. Justice Rehnquist analyzed the use tax in *Minneapolis Star* from an equal protection standpoint, arguing strict scrutiny is only required when the classification impermissibly interferes with the exercise of a fundamental right. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 600 (1983) (Rehnquist, J., dissenting). He disagreed with the majority's conclusion that courts were not capable of evaluating the relative burdens of differing methods of taxation. *Id.* at 600-01. According to his calculations, the use tax actually benefited the newspapers, thus no fundamental right was infringed. *Id.* at 603. Therefore, neither strict nor intermediate level scrutiny was required: Rather, the state need only establish a rational basis for the classification. *See id.* at 602. Rehnquist noted that the Court had in the past shown the greatest deference to state legislatures regarding the drafting of their tax schemes. *Id.* at 599.

103. *Medlock*, 499 U.S. at 451.

104. *See, e.g., Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (discussing right-to-travel cases with "distinctions between newcomers and longer term residents").

105. 481 U.S. at 227 n.3; *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("Of course, the equal protection claim in this case is closely intertwined with First Amendment interests.").

106. *Arkansas Writers' Project, Inc.*, 481 U.S. at 233.

based regulation required the State to show that the regulation was narrowly drawn to achieve a compelling state interest.¹⁰⁷

In *Turner Broadcasting System, Inc. v. FCC* the Court observed “laws that single out the press, or certain elements thereof, for special treatment, ‘pose a particular danger of abuse by the State,’ and so are always subject to at least some degree of heightened First Amendment scrutiny.”¹⁰⁸ Because the Court has rejected the argument that electronic access to criminal proceedings is constitutionally protected, denial of that access would not, by itself, raise a colorable First Amendment challenge.¹⁰⁹ However, the Easton proposal does single out particular members of the press for special treatment, which raises an equal protection challenge because it “poses a particular danger of abuse by the State.”¹¹⁰

Although Easton’s categorization of televised trials as entertainment may have appeal to the public and a legislative body considering his concept, it is not advanced as a necessary legal premise for his proposal. If it were, it would almost certainly raise an additional First Amendment concern as being a content-based distinction.¹¹¹ Any governmental attempt to restrict speech

107. 481 U.S. at 231; *see also* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640-41 (1994) (adopting implicitly the tiered equal protection analysis employed in *Arkansas Writers’ Project, Inc.*, 481 U.S. at 231 (content-based/strictscrutiny) and in *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (content-neutral/intermediate scrutiny)). *But cf.* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring) (condemning the use of the equal protection strict scrutiny test by the majority as unnecessary and incorrect in the analysis of a content-based restriction).

108. 512 U.S. at 640-41 (quoting *Arkansas Writers’ Project, Inc.*, 481 U.S. at 228) (alteration in original).

109. *Supra* text accompanying notes 70-72.

110. *Arkansas Writers’ Project, Inc.*, 481 U.S. at 228.

111. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”); *cf.* *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (“Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign.”); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (plurality opinion) (“Whether [the municipal ordinance permits] individuals [to] picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not.”).

Turner Broadcasting illustrates the difficulty in drawing the line between content-based and content-neutral regulation of speech. There, cable operators and programmers contested the constitutionality of sections four and five of the Cable Television Consumer Protection and Competition Act of 1992 which, *inter alia*, required that they set aside cable channels to carry broadcast television transmissions (“must-carry provisions”). *Turner Broad. Sys., Inc.*, 512 U.S. at 630-32. The Court concluded Congress’s justifications for these provisions—ostensibly to protect “‘public affairs programming and other local broadcast services critical to an informed electorate’”—did not reflect a content-based purpose for the regulation. *Id.* at 648 (quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(11), 106 Stat. 1460, 1461 (1992)). Despite the congressional acknowledgement that local and

based upon content would require the application of the strictest scrutiny, which places the burden on the government to prove the restriction is narrowly tailored to a compelling state interest.¹¹²

The Easton Model clearly raises a colorable First Amendment claim. Freedom of press and speech imply that access must be afforded to the public. Any regulation or denial of that access is subject to scrutiny by the courts, and the Supreme Court has adopted a three-tiered analysis of constitutionally suspect restrictions on individual liberties.¹¹³

The Easton proposal could not survive intermediate scrutiny. This standard is met ““so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.””¹¹⁴ As treated previously, the governmental purpose of compensating crime victims is compelling, however no nexus exists between this interest and an electronic access or no access regulation.¹¹⁵ Because no basis exists for the assertion that the governmental interest here (the compensation of crime victims) can be achieved less effectively absent the Easton regulation (a charge for electronic access to criminal proceedings), the classification is patently underinclusive.¹¹⁶

VI. FORUM ANALYSIS

Government can act in a proprietary manner when it is properly engaged in a commercial enterprise.¹¹⁷ Forum analysis allows “balancing, based on

noncommercial stations aid in educating the public, “Congress [does not necessarily] regard[] broadcast program as *more* valuable than cable programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.” *Id.* (emphasis added). The dissent disagreed, concluding the must-carry provisions were a result of a preference for broadcasters and were justified by Congress on explicit findings which were content-based. *Id.* at 675-76.

112. *Boos*, 485 U.S. at 321.

113. Under the three-tiered scrutiny approach, a governmental restriction which is content-based requires strict scrutiny analysis: The government must demonstrate a compelling governmental interest which cannot be achieved in a less restrictive manner. Regulations which pose a colorable First Amendment challenge without regard to the content of the conduct or speech being regulated are subject to an intermediate level of scrutiny, requiring that the government show the regulation is narrowly tailored to an important or substantial governmental interest. Finally, regulations which do not implicate the First Amendment are subject only to the rational basis analysis, permitting governmental regulation if rationally related to a governmental interest.

114. *Id.* at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 791, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))).

115. *Supra* text accompanying notes 87-91.

116. *Cf. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (Blackmun, J., concurring) (noting that the *Son of Sam* law was underinclusive).

117. *See Burcham, supra* note 17, at 208-09 (discussing *Gannett Satellite Info. Network, Inc.*

the nature of the forum, the governmental interest in enforcing the restrictions against the inhibitions the restrictions impose on the speech-related activity."¹¹⁸ The concept of allowing the government to act in a proprietary manner to sell electronic access to criminal trials by charging a fee unrelated to the direct administrative costs is antithetical to the "common core purpose of assuring freedom of communication on matters relating to the functioning of government."¹¹⁹

The genesis for Easton's concept is the assumption that commercial television programmers advertise, format, and broadcast criminal trials as entertainment.¹²⁰ Logically, the Easton proposal has the potential for cultivating this premise (assuming this generalization is accepted as true) by favoring those stations which have the largest profit margins. Such favor is antagonistic to the core governmental purpose articulated in *Richmond Newspapers, Inc.*¹²¹ and to the underlying reason which motivated state courts to adopt rules allowing cameras in the first place—for educational purposes.¹²²

The concept of government acting in a proprietorship role to sell electronic access to criminal trials for profit, either by auction or fee, presents a further danger of constitutional dimension. It places the State's compelling interest of compensating crime victims in direct conflict with its fundamental responsibility to assure the defendant a fair trial.

David W. Burcham argues persuasively in his article *High-Profile Trials: Can Government Sell the "Right" to Broadcast the Proceedings?*¹²³ that forum analysis is a more suitable format for consideration of these concepts.¹²⁴ He recommends forum analysis because it "focuses the constitutional inquiry on the nature of the governmental property involved and the government's conduct in managing that property, the type of burdens government seeks to impose, the interests underlying those burdens, and the First Amendment values at stake."¹²⁵

v. Metropolitan Transp. Auth., 745 F.2d 767 (2d Cir. 1984)).

118. Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767, 775 (2d Cir. 1984) (quoting *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 473-74 (2d Cir. 1980)).

119. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

120. Easton, *supra* note 8, at 20-25.

121. 448 U.S. at 573.

122. See, e.g., *In re Extension of Media Coverage*, 472 A.2d 1232, 1234 (R.I. 1984) ("[T]he reason for allowing broadcasting and photographing of trial procedures is the potential contribution that the media can make in the area of wider public understanding . . . of judicial proceedings . . .").

123. Burcham, *supra* note 17.

124. *Id.* at 198-206.

125. *Id.* at 217.

Under forum analysis, public property is divided into three different categories, each of which is governed by different First Amendment standards: (1) property which has historically been dedicated to the public and used for assembly and expression; (2) property which has not been so dedicated, but is opened by the government for such expressive activity; and (3) property which has not been traditionally designated as a forum for public communication.¹²⁶ Burcham argues that when government proposes a "fees-for-feed" program, it should not be viewed as regulating the broadcast of courtroom proceedings, but as leveraging its control over certain governmental property to generate revenue.¹²⁷

VII. CONCLUSION

Although the government may constitutionally deny access to the electronic methods by which the media collect news for broadcasting when those methods may interfere with the right of a defendant to a fair trial, this ability does not mean that government is free to discriminate in its grant of electronic access. Thus far, the Court has rejected recognition of a qualitative distinction between electronic methods of news-gathering from more traditional news-gathering. However, the Court has recognized that electronic broadcasters and programmers are speakers engaged in First Amendment activity. When the government singles out the electronic media to pay a fee based on the commercial value of the courtroom proceedings as a prerequisite to electronic access, the government places selective economic conditions on an element of the press which indirectly burdens First Amendment activities. When the fee is charged to produce revenue for a purpose only tangentially related, rather than to recoup direct administrative costs associated with the electronic access, it is an unconstitutional tax.

Even if the access fee or bid process is not considered to be taxation because it is voluntarily paid for access transcending the right of the general public, it is still a law selectively applicable to an element of the press. Because it has no nexus to the compelling governmental purpose of compensating crime victims, no evidence demonstrates that compensating crime victims would be achieved less effectively absent the regulation. Consequently, the proposal violates the Equal Protection Clause.

126. *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 772-73 (2d Cir. 1984) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983)).

127. Burcham, *supra* note 17, at 217-18.