A Free Press: The Forgotten Issue in *Home Placement v. Providence Journal*

I. INTRODUCTION

The first amendment guarantees freedom of speech and of the press.[1] Justice Cardozo described these as the freedoms upon which nearly all of our liberties are based,[2] a view supported by the elevated position accorded free speech throughout our history. The rights created are not absolute—government interests in regulating nonspeech activity may prevail in certain well-defined instances—but neither are they easily put aside. When the government interest is in enforcing the Sherman Antitrust Act,[3] a number of special difficulties arise. Congress provided treble damages[4] and injunctive relief[5] to ensure the effectiveness of the Act. Yet these sanctions could have a devastating effect on free speech if used to regulate the content of a newspaper. The Supreme Court has avoided this constitutional dilemma by only applying the Sherman Act to the business side of a newspaper; the content or editorial side has been left alone.[6] Nowhere is this line between protected speech and unprotected commercial activity more difficult to discern than in the classified advertisements. A court required to make these distinctions should do so with sensitivity to the first amendment interests which adhere whenever the content of a newspaper is involved. Core first

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1. The first amendment reads in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

3. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), is used generically in this Note to denote antitrust law in general.

4. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." 15 U.S.C. § 15 (1976 & Supp. IV 1980).

5. "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ." 15 U.S.C. § 26 (1976).

6. *See* Associated Press v. United States, 326 U.S. 1, 19-20 (1945) (membership rules of the Associated Press limiting dispersal of news held to be in restraint of trade); *accord*, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (joint operating agreement which provided for price fixing, profit pooling, and market control held in violation of §§ 1 and 2 of the Sherman Act).

amendment rights are no less important because they are exercised through editorial control of the classified advertisements. Only the most compelling of state interests can overbalance their free exercise.[7]

Home Placement Service, Inc. v. Providence Journal Co.[8] involved a private antitrust action brought against a newspaper to compel the publication of proffered advertisements. The First Circuit Court of Appeals reversed the District Court decision[9] and held that the newspaper had violated sections one[10] and two[11] of the Sherman Act. Since Senior Circuit Judge Aldrich's opinion never mentioned free speech, free press, or the first amendment, the implication is that, in the court's view, first amendment issues were not present.

This Note will demonstrate that the court's decision in *Home Placement* did infringe upon protected first amendment activity. Since free speech and free press guarantees were threatened by the government's action, the court should have balanced the competing interests and held in favor of Home Placement only upon a showing of a compelling state interest. After examining the interests of the advertiser, the reader, the government, and the newspaper, this Note concludes that the newspaper's right to control its message and to make editorial decisions free from the threat of governmental interference overbalance the antitrust claim made in this case. A Sherman Act claim should not be upheld where the anticompetitive effect is the unintended result of the exercise of protected speech activity. A contrary result would elevate antitrust law at the denigration of constitutional rights.

Home Placement arose out of a dispute between a Rhode

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7. *See* NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (state must demonstrate a compelling interest before it can require an association to disclose membership lists when disclosure entails a substantial likelihood of restraining the exercise of associational rights).

8. Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 8, 1983) (No. 82-227).

9. Home Placement Service, Inc. v. Providence Journal Co., No. 77-158, slip op. (D.R.I. Sept. 24, 1981).

10. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

11. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1976).

Island newspaper and a rental listing service. The *Providence Journal* is the sole daily newspaper in its market.[12] Its print competition comes from suburban daily and weekly newspapers.[13] Home Placement sold lists of rental housing to prospective renters.[14] It attracted customers by placing advertisements for specific homes in the newspaper's classified section.[15] When a reader responded to the advertisements he was encouraged to purchase the full list. Only then would the service release additional information about the house.[16] In response to an earlier experience with another rental listing service,[17] the *Journal* had formulated a policy of rejecting advertisements from advertisers who charged the reader a fee before releasing additional information about the advertised property. When the *Journal* discovered that Home Placement charged such a fee, it refused to accept additional advertisements. Home Placement then removed the fee and the *Journal* accepted several advertisements.[18] Shortly thereafter, however, Home Placement ceased doing business and filed suit.[19]

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12. *Home Placement*, 682 F.2d at 280.

13. *Id.* at 280. For the purposes of this case, the relevant product was limited to daily newspaper rental advertising. Because electronic media do not carry this product they were not considered competitors in the market.

14. *Id.* at 276.

15. Typical of the advertisements placed in the Journal by Home Placement was this: "SLOCUM: New duplexes, two bedrooms, 1½ baths, carpeted, built-in, $250 a month, lease. Home Placement. 828-9020." Petition For a Writ of Certiorari to the United States Court of Appeals for the First Circuit at 8 n.4, Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982) [hereinafter cited as Petition for Writ].

16. *Home Placement*, 682 F.2d at 276.

17. This service, doing business as Homefinders of America, Inc., placed advertisements in the newspaper for highly desirable homes at attractive rates. Upon investigation, these homes were never available. Renters were instead encouraged to purchase the rental list. These homes in turn were often not for rent, not of the same character as the advertised home, or had been listed without the landlord's permission. Some simply did not exist. *Home Placement*, 682 F.2d at 276. In response to what it described as a "torrent" of complaints, the Journal instituted its policy of rejecting this type of advertisement.

The Journal's problems with Homefinders resulted in two cases upholding the listing service policy. Walker v. Providence Journal Co., 493 F.2d 82 (1st Cir. 1974) and Homefinders of America, Inc. v. Providence Journal Co., 621 F.2d 441 (1st Cir. 1980). The parties in the present case, *Home Placement*, agreed that the record of these two cases could be considered for all purposes in *Home Placement* with the additional fact that Home Placement had no record of fraudulent practice. Home Placement v. Providence Journal, No. 77-158, slip op. (D.R.I. Sept. 24, 1981).

18. *Home Placement*, 682 F.2d at 279.

19. Petition for Writ, *supra* note 15 at 8-9.

The *Journal* believed that Home Placement's style of advertising was inherently misleading. It argued that Home Placement's scheme was a classic bait and switch: the objective was to sell rental lists and the bait was the advertisement for a single home. The reader, expecting to speak with someone authorized to rent the house, was instead put in contact with someone whose sole objective was to sell him a different product.[20] The *Journal* felt that this practice was inconsistent with the expectations of its readers and its advertisers.[21] As a result, it decided not to print this type of advertisement.

Home Placement argued that the *Journal's* policy violated section two of the Sherman Act, and that the *Journal's* refusal to accept the advertisements, coupled with Home Placement's subsequent removal of the fee, amounted to a conspiracy in restraint of trade in violation of section one. The District Court rejected both claims.[22] The Court of Appeals reversed, finding violations of sections one and two.[23]

Judge Aldrich held that the *Journal's* refusal to print was an unreasonable business decision. Home Placement was a new company with no history of deceptive practice. Its method of advertising was not "inherently and unfailingly deceptive,"[24] nor was fraudulent practice shown. Until Home Placement actually succumbed to deceptive practice, the Court ruled that the *Journal's* policy could not be applied to it.[25] In contrast to the District Court, Judge Aldrich found that the facts plainly indicated monopoly power.[26] The parties were competitors because a rental listing service could conceivably draw advertising away from the newspaper.[27] Intent to exclude competition was irrelevant.[28] It was sufficient that the *Journal's* action, taken for

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20. *Home Placement*, No. 77-158, slip op. (D.R.I. Sept. 24, 1981).

21. *Home Placement*, 682 F.2d at 277 n.4.

22. *See supra* note 20.

23. *Home Placement*, 682 F.2d at 274.

24. *Id.* at 277.

25. The Circuit Court rejected the Journal's view that this type of advertising was inherently deceptive merely because the item advertised was not the principal item to be sold. *See supra* text accompanying notes 20-23. Instead, the decision characterized the practice as more akin to the common practice of advertising loss leaders. *Home Placement*, 682 F.2d at 277.

26. *Home Placement*, 682 F.2d at 279. The exact scope of the monopoly was unimportant; it was enough that the Journal had the apparent power to raise prices and exclude competition. *Id.*

27. *Id.* at 281.

28. Specific intent is only required for attempt to monopolize. *Id.* at 281.

whatever reason, had the effect of excluding competition.[29]

The Court of Appeals also accepted Home Placement's argument that the *Journal's* refusal to accept the advertisements with a fee, and Home Placement's subsequent removal of the fee, amounted to a conspiracy in restraint of trade.[30] The combination fixed a price of zero for Home Placement's sale of rental information. The newspaper's refusal was a unilateral action, but the refusal, the removal of the fee, and the consequent acceptance of the advertising formed a conspiracy in violation of section one.[31]

As noted previously, the Court's opinion was notably void of first amendment analysis. The right of a newspaper to refuse advertising was limited by the court to the common law right of any business to choose with whom it will deal. In fact, the scope of this right has been sufficient in most cases to protect a newspaper's interests.[32] The exception to the common law rule is that the refusal cannot further an illegal monopoly.[33] The First Circuit held that the *Journal's* refusal fell within the exception. The court's mistake, however, was in assuming that its analysis

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29. *Id.*

30. *Id.* at 279.

31. *Id.*

32. The court cited a single case, PMP Assocs. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915 (1975), to substantiate what it described as the presumptive right of a newspaper to choose which advertising or type of advertising it will carry. In fact the weight of this authority is rather more substantial. *See* Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Staff Research Assocs. v. Tribune Co., 346 F.2d 372 (7th Cir. 1965); Person v. New York Post Corp., 427 F. Supp. 1297 (E.D.N.Y. 1977), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *In re* Wohl, Inc., 50 F.2d 254 (E.D. Mich. 1931); Carpets by the Carload, Inc. v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973); America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972); Approved Personnel, Inc. v. Tribune Co. 177 So. 2d 704 (Fla. Dist. Ct. App. 1965); Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); Bloss v. Federated Publications, Inc., 380 Mich. 485, 157 N.W.2d 241 (1968), *aff'g* 5 Mich. App. 74, 145 N.W.2d 800 (1966); Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc., 205 Misc. 982, 131 N.Y.S.2d 515 (N.Y. Sup. Ct. 1954); Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913); Newspaper Printing Corp. v. Galbreath, 580 S.W.2d 777 (Tenn. 1979), *cert. denied*, 444 U.S. 870 (1979); Wisconsin Ass'n. of Nursing Homes v. Journal Co., 92 Wis. 2d 709, 285 N.W.2d 891 (1979). As interpreted by the courts, this doctrine generally provides that no reason for the refusal to deal need be given. It may be the result of caprice or whim. It makes no difference that the advertiser needs access to the newspaper's advertising space to survive, nor is it affected by the virtual monopoly position of many major newspapers. The exception is that the refusal cannot further an illegal monopoly. *See infra* note 33.

33. *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) and Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1957).

was complete.

A. The First Amendment Rights of the Advertiser

With certain well established exceptions, the Supreme Court has recognized that an advertiser has a first amendment right to disseminate his message.[34] If his message is political or, as it is sometimes described, "public," he enjoys the same degree of protection as any other speaker.[35] If his message is "commercial," his protection is somewhat less.[36] Until 1975, commercial speech was considered to be outside the first amendment.[37]

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34. Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). In *Central Hudson* the Court struck down a regulatory ban on promotional advertising by electric utilities and enunciated a four-part test for analyzing commercial speech problems:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. Although this test is essentially a strict scrutiny analysis, it is tempered by the lesser level of importance accorded to commercial speech. *See infra* note 36.

35. New York Times Co. v. Sullivan, 376 U.S. 254 (1964), involved an "editorial advertisement" attacking the "wave of terror" which met Negro students demonstrating for their rights at Alabama State College in Montgomery. The Supreme Court rejected the plaintiff's argument that a paid commercial advertisement deserved no constitutional protection:

> It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existance and objectives are matters of the highest public concern. . . . [To deny the advertisement protection] would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources."

Id. at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

36. *Central Hudson*, 447 U.S. at 562. "[O]ur decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.' " *Id.* (citing Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). In a footnote the majority elaborated further:

> This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech. As we stated in *Ohralik*, the failure to distinguish between commercial and noncommercial speech "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech."

Id. at 562 n.5.

37. The first commercial speech doctrine originated with Valentine v. Chrestensen, 316 U.S. 52 (1942). In *Chrestensen*, the Court ruled that the distribution of "purely com-

Along with certain other categories of speech—fighting words,[38] obscenity,[39] shouting fire in a theatre[40]—commercial speech was thought too removed from the quest for truth to deserve first amendment protection.[41] Beginning with *Bigelow v. Virginia*[42] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[43] a new commercial speech doctrine evolved. It recognized that, although speech might relate to products or services, it could be a valuable part of the marketplace of ideas.[44] Even a purely commercial message can be helpful in making many of the daily decisions of life.[45] On the other hand, the Court has noted that commercial speech is "hardier" than classic public speech.[46] As such, it needs fewer protections to assure its place in the market, and, since there is an economic incentive behind the message, it is more likely to find an alternative medium if one is foreclosed.[47]

As with all first amendment rights, the advertiser's protection for his commercial message is only secured against government action.[48] He has no first amendment rights against private parties.[49] For an advertiser to claim that a newspaper's refusal to

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mercial advertising" could be regulated. *Id.* at 54. In later cases it was often cited as holding that commercial speech was entitled to no first amendment protection at all.

38. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

39. Roth v. United States, 354 U.S. 476 (1957).

40. Schenck v. United States, 249 U.S. 47, 52 (1919).

41. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.

Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (1968).

42. 421 U.S. 809 (1975) (conviction of an editor for publishing an advertisement for an abortion referral agency violated the first amendment).

43. 425 U.S. 748 (1976) (ban on price advertising by pharmacists violated first amendment rights of the speaker and the recipient).

44. *Bigelow*, 421 U.S. at 826.

45. *Virginia Pharmacy*, 425 U.S. at 765.

46. *Id.* at 771-72 n.24.

47. *Id.*

48. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 461 (1952) (the first amendment restricts the federal government, not private persons). It should be noted that as the antitrust claim derives from federal law there is no question of "state" action under the 14th amendment.

49. *But see*, Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973). Prof. Barron is a leading advocate of a first amendment right of access to the press. His theories are based largely on the expansive language of Red Lion Broad-

deal violated his first amendment rights, he would have to prove that the refusal involved some cognizable form of state action.[50] A number of advertisers have attempted to prove state action without success.[51] State action exists only when one is "clothed with the authority of the state and . . . purporting to act thereunder."[52] As the history of the state and the press is of disassociation,[53] it is difficult to prove that they act as one. In fact, state action by a newspaper has never been found absent actual state ownership.[54] Thus an advertiser has no first amendment right to have his advertisement printed in a newspaper.[55] His right to

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casting Co. v. F.C.C., 395 U.S. 367 (1969), *see infra* notes 77-78 and accompanying text, and were dealt a mortal blow by the Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Although Prof. Barron has a great deal to say about who should benefit from the first amendment, he has very little to say about state action. He seems to believe that it is an archaic doctrine which has outlived its usefulness.

50. Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971). *See infra* note 51.

51. *Id.*; Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (1971). In *Chicago Joint Board v. Chicago Tribune*, a trade union sought to force the Tribune to print a union advertisement. The union had been picketing a number of large department stores to protest the importation of foreign clothing. All four of Chicago's major newspapers refused to carry the advertisement. The union alleged state action arguing that the "special relationship" between the newspapers and the State, arising out of certain statutory provisions which conferred an economic benefit upon the newspapers, amounted to "state involvement" in the operation of the newspapers. The court did not accept this argument. "[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision." *Chicago Joint Board*, 435 F.2d at 474. In *Associates & Aldrich*, a motion picture producer sought to enjoin the Los Angeles Times from "screening, censoring or otherwise changing" his motion picture advertisements, in particular his advertisement for the film, "The Killing of Sister George." 440 F.2d at 133-34. The Times had a screening code for advertisements which listed guidelines for such things as "bust measurements" and "vulgar displays of anatomy." The newspaper had insisted on changes before it would run the advertisement. The plaintiff argued that this constituted state action. Instead of pointing to preferential treatment by the government as the union had in *Chicago Joint Board*, the plaintiff here argued that state action arose out of the monopoly position of the Times in southern California and its quasi-public position. The court was unpersuaded and rejected plaintiff's claim. 440 F.2d at 135-36.

52. Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1961).

53. *Chicago Joint Board*, 435 F.2d at 474.

54. *See* Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971) (campus newspaper conceded to be a state facility); Radical Lawyers Caucus v. Pool, 324 F. Supp. 268 (W.D. Tex. 1970) (refusal of proffered advertisement by the *Texas Bar Journal*, an official state publication, amounted to state censorship of speech); Zucher v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school newspaper held to be a public forum for certain purposes); Portland Women's Health Center v. Portland Community College (Civil Action No. 80-558) (D.Or Sept. 4, 1981) (state college newspaper held to be a public forum).

55. *Chicago Joint Board*, 435 F.2d at 478.

speech is not enforceable against the private press.

Home Placement did have a right not to have its message refused in restraint of trade.[56] Antitrust claims have been upheld in cases involving a newspaper's refusal to deal.[57] The Supreme Court has refused to accept the first amendment as an absolute bar to these claims. It has even noted that at times antitrust and first amendment concerns may coincide.[58] But it is important to distinguish the two.

The Sherman Act was not designed as a vehicle for reaching first amendment values. Congress created a means of regulating large aggregations of economic power.[59] The sanctions built into antitrust law were meant to assure compliance, but their potential for chilling speech in the process is immense.[60] The editor who prints possibly prohibited speech risks treble damages and extensive court interference through the injunctive process. Only the most principled or the most foolhardy would ignore such a threat. Moreover, the Sherman Act is predicated upon the need for government intervention in the marketplace. Yet the first amendment is above all a restriction on government action. The Sherman Act casts government in a role never contemplated for it by the framers of the first amendment.[61] As a weapon to cure the worst excesses of anticompetitive fervor in the press, antitrust law might act in concert with free speech interests. But when it is used to regulate the content of a newspaper—to actually overturn editorial decisions—it is no longer a friend to free speech. It is a foe.[62]

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56. *See supra* notes 32-33 and accompanying text.

57. *See supra* note 33.

58. Associated Press v. United States, 326 U.S. 1 (1944). *See infra* note 84.

59. *Cf.* Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). "The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 141.

60. *See infra* notes 74-75 and accompanying text.

61. *See infra* note 70.

62. *See generally*, Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 537 (1965). Chafee recognized that the enforcement of antitrust legislation was one of the most important and difficult problems facing the modern press.

> As yet the Antitrust Laws have not interfered with the freedom of newspapers to say what they please. Still, it is an odd fact that the recent enormous growth of the media of communications has called into play a method of legal control which might be as effective as the censorship. The Antitrust Laws are far more drastic in their potentialities than the sporadic prosecutions of eighteenth-century England. The size of newspapers has made them weaker as against the government. In more ways than one, concentration of power in the press endangers its freedom.

B. The First Amendment Interests of the Reader

Some justifications for the preferred status of the first amendment stress the right to individual self-expression.[63] Others emphasize the public's right to know—to receive the messages.[64] In truth, there is value in both; one could not exist without the other. It would be idle to exalt the reader's interest in receiving a message apart from the speaker's interest in expressing it. If the right to express an idea is limited, the reader's right to receive it is necessarily lessened. The reader is denied the opportunity to evaluate the message for himself and to use it in comparison to other ideas he may receive. Protection for the expression of ideas preserves the public's right to hear those messages expressed.[65]

The Supreme Court has traditionally theorized that the first amendment guarantees a free marketplace of ideas, where truth and falsehood are free to grapple.[66] In *New York Times Co. v. Sullivan*, the Court spoke of a profound national commitment that debate should be "uninhibited, robust, and wide-open."[67] The Court's concerns here can be evaluated from both a quantitative and a qualitative point of view. Quantitatively, the first amendment seeks a broad range of inputs. Even a falsehood adds to the market under this view because it makes the truth stand out in bold relief.[68] Analyzed on this level, the reader

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Id. at 674. Chafee concluded that "sparing" use of antitrust law to attack the "glaring tendancies toward monopoly" should continue, yet he hoped that antitrust law would never be applied against content. *Id.*

63. Whitney v. California, 274 U.S. 357 (1927), *rev'd sub nom*, Brandenburg v. Ohio. 395 U.S. 444 (1969) (Brandeis, J. concurring). "Those who won our independence believed that the final end of the state was to make men free to develop their faculties. . . ." 274 U.S. at 375.

64. "[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." Globe Newspaper v. Superior Court, 102 S. Ct. 2613, 2619 (1982). "Those guarantees [of a free press] are not for the benefit of the press so much as for the 'benefit of us all.' " Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

65. "A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time v. Hill*, 385 U.S. at 389.

66. Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J. dissenting). "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Id.* at 630.

67. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

68. *New York Times v. Sullivan*, 376 U.S. at 279 n.19 (citing J.S. MILL, ON LIBERTY (1947)). The concept here is that the marketplace will take care of itself. As Justice Brandeis wrote in *Whitney*, "the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. at 377. In a footnote, Brandeis quoted Thomas

would seemingly benefit only if Home Placement's advertisement were printed. No advertisement means no information and no benefit. Yet, the *Sullivan* Court was clearly concerned with the functioning of the marketplace. The falsehoods contained in the *Times* advertisement did not have any constitutional value in themselves.[69] The Court protected these falsehoods because of the ill-effect state action against the speaker would have on the vigor of the marketplace. Thus, it is appropriate to ask whether compelling the *Journal* to print a message that its editors refused would have a similar deleterious effect on the market.

When government compels the publication of a message, it is assuming a role specifically denied it by the first amendment.[70] A number of consequences flow from this action which may affect the quality of speech available to the public. First, it immediately undermines the trustworthiness of the information itself. The greater the role played by government in the market, the more suspect is the information in the market that may be of self interest to government. The assumption here is that government would allow only self-serving statements. As noted by Justice Douglas, "The dominant purpose of the First Amendment was to prohibit the widespread practice of government suppression of embarassing information."[71] It is the press' role to uncover and publish that information: to act as a check on

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Jefferson, "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors, and especially when the law stands ready to punish the first criminal act produced by the false reasoning; these are safer corrections than the conscience of the judge." *Id.* at 372 n.3.

69. *New York Times v. Sullivan* involved a libel action by a public official brought against the New York Times for a paid advertisement attacking police treatment of black students protesting segregation. Some of the statements made in the advertisement were admittedly false. *Id.* at 258.

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration . . . and even to false statement. But the people of this nation have ordained in the light of history, that . . . these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 271 (quoting Cantwell v. Connecticut, 310 U.S. 296 (1940)).

70. *Cf.* Thomas v. Collins, 323 U.S. 516 (1945) (Jackson, J. concurring).

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Id. at 545.

71. New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971) (Douglas, J. concurring).

government misconduct.[72] To the extent that the government can control the flow of information through the press, press independence, and hence its value to the public, is undermined. That independence can be compromised through government interference with editorial decisions concerning advertising as well as news.[73]

The second problem concerns the chilling effect on free speech. Editors may steer so wide of the possibly offending activity that protected speech will be compromised.[74] In a situation such as exists in *Home Placement*, editors could either exclude all advertisements (an unlikely response) or accept everything and relinquish editorial control of their advertising. The Supreme Court has specifically recognized editorial discretion as a protected speech activity.[75] When editors stop functioning as

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72. By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. . . . Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one. . . . [I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.

Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2619-20 (1982). *See generally*, Blasi, *The Checking Value in First Amendment Theory*, 3 A.B.F. RES. J. 521 (1977).

73. *See supra* note 37. *But cf.*, Note, *Regulation of Commercial Speech: Commercial Access to the Newspapers*, 35 MD. L. REV. 115, 124 (1975) (argues that editorial discretion concerning advertising should receive no more protection than the advertising itself).

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

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . "self censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." [citation omitted] The rule thus dampens the vigor and limits the variety of public debate.

Id. at 279.

75. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *Tornillo* concerned the constitutionality of a right of reply statute. The case arose when a political candidate demanded that the Miami Herald publish his reply to an editorial attacking his candidacy as required by Florida statute. The Supreme Court reversed the Florida decision on two grounds: 1) it exacted a penalty based on the content of a newspaper, and 2) it intruded into the function of editors.

We see that beginning with *Associated Press* . . . the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not other-

editors, speech is chilled.

The public is not served by a system in which government makes decisions properly left to editors. The interests of the reader are better served by respecting the integrity of the press than by compelling publication of these advertisements. The benefit would be more than offset by the loss.

C. The Government's Interest

The government's interest in this case is limited to enforcement of the Sherman Act. It has no first amendment interest of its own nor does it have an affirmative first amendment role to play.[76] Critics have argued that such a role exists under *Red Lion Broadcasting Co. v. F.C.C.*,[77] but the *Red Lion* doctrine has never been applied to print media and, in truth, has not evolved within broadcasting as some may have wished.[78]

The Supreme Court has consistently interpreted the first amendment as prohibiting government from regulating the content of speech.[79] To be sure, certain categories of ideas are considered to be without first amendment protection precisely because of their content.[80] But within the realm of protected

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wise print. The clear implication has been that any such compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. *Id.* at 256. *See also infra* note 105.

76. "[I]t is not the right . . . of the state to protect the public against false doctrine." Thomas v. Collins, 323 U.S. at 545 (Jackson, J., concurring).

77. 395 U.S. 367 (1969). *See infra* note 78.

78. *See supra* note 49. *Red Lion* upheld the limited right of access to the airwaves created by the FCC's Fairness Doctrine and its right of reply rules. The importance of the decision lies in the expansive language used by the court. It emphasized the first amendment rights of the public and the interests of those speakers who could not use the airwaves without government assistance. The first amendment rights of the broadcasters were relegated to a secondary position. Although it has been argued otherwise, *Red Lion* is clearly a broadcast case. It is predicated on the unique characteristics of that medium: the finite nature of the airwaves, and the public ownership thereof. While arguably limited access exists in both broadcasting and print, the limitation in broadcasting concerns a public resource, not private printing presses. This essential difference has led to a variety of regulations in broadcasting which would never pass constitutional muster if applied to print.

79. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (right of reply statute struck down as it interfered with the rights of editors to control content); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (regulation restricting picketing near school to labor disputes violated requirement of government neutrality concerning content); Cohen v. California, 403 U.S. 15 (1971) (usual rule is that government may not prescribe the form or content of individual expression).

80. *See supra* notes 38-41 and accompanying text.

speech, government regulations must be content neutral.[81] Despite seemingly reasonable purposes for governmental regulation of speech, the courts have consistently upheld the first amendment rights of individuals and the press to choose the content of their messages.[82] It is not the role of the state to choose among the messages that will enter the market.[83]

Limiting the governmental interest to the enforcement of antitrust law does not preordain that the newspaper's first amendment rights will prevail. In *Associated Press v. United States*, the Court refused to recognize the first amendment as an absolute bar to the application of antitrust law.[84] The courts

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81. *But see* Young v. American Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance aimed at adult theaters does not violate first amendment although it makes a classification based on the content of speech); *cf.* FCC v. Pacifica Found., 438 U.S. 726 (1978) (broadcast of "dirty words" could be restricted although words were not obscene).

82. Gore Newspapers Co. v. Shevin, 397 F. Supp. 1253, 1257 (1975). "However commendable the purpose in the exercise of the police power by various legislatures, the Supreme Court has consistently struck down statutes which restrain the content of publication."

83. *New York Times v. Sullivan*, 376 U.S. at 269. "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " *Id.* at 270 (citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). *But see*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). The leading case on state regulation of advertising, *Pittsburgh Press* was decided shortly before the advent of the new commercial speech doctrine. *See supra* notes 32-47 and accompanying text. At issue was a city ordinance forbidding the use of sex-designated columns in the help wanted section of a newspaper. The Press argued that the ordinance violated its editorial discretion and hence its constitutional rights. The Court rejected this argument for two reasons: 1) the advertisement and its placement were commercial speech unprotected (at that time) under *Chrestensen*, and 2) the commercial activity proscribed was illegal. Although the opinion itself seemed to emphasize the unprotected nature of the speech, the case is most often cited because of the illegal activity rationale. *See Central Hudson*, 447 U.S. at 564.

84. 326 U.S. 1 (1944). *Associated Press* involved an antitrust suit brought against the AP because of its restrictive membership rules. The competitive advantages of membership were so great that it was difficult for a newspaper to survive financially without it. In defense, the AP argued that the first amendment shielded the organization from antitrust law. This argument was soundly rejected:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some.

Id. at 20.

have consistently interpreted *Associated Press*, however, as applying only to the business or commercial functions of a newspaper.[85] Any incursion into the area of content encounters much more substantial first amendment difficulties.[86] The Court itself was careful to note that *Associated Press* was not a compulsion to print case. "The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published. It only provides that after their reason has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication."[87]

Seven years after *Associated Press*, in *Lorain Journal Co. v. United States*,[88] the Supreme Court decided an antitrust case which did result in a court order compelling the publication of advertisements. This case was not inconsistent, however, with *Associated Press*. The *Lorain Journal* was refusing to accept advertisements from businesses which advertised on a local radio station. The admitted purpose of this action was to exclude the radio station from the Lorain advertising market. The *Lorain Journal* neither claimed that it was trying to present a message through its advertising policy nor that it exercised editorial judgment in excluding advertisers.[89] In other words, this was a purely business decision and fell within the scope of the Court's decision in *Associated Press*.

The only first amendment claim considered by the *Lorain* Court was whether the resulting injunction against the newspaper would violate the first amendment's guarantee of a free press.[90] The newspaper had argued that the injunction amounted to a prior restraint on its future actions. The Court rejected this contention holding that, under the facts of that case, antitrust law and its remedies applied to the *Lorain Journal* as it would to any other business.[91]

The government's interest in assuring a competitive business environment may not be thwarted by blanket claims of first

85. *See* Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969).
86. *See supra* notes 79-83 and accompanying text.
87. *Associated Press*, 326 U.S. at 20 n.18.
88. 342 U.S. 143 (1951).
89. *Id.* at 154 n.8.
90. *Id.* at 155-56.
91. *Id.*

amendment protection.[92] Where no first amendment rights are exercised, no first amendment protection attaches. The Supreme Court has consistently recognized the governmental interest in regulating the business aspects of a newspaper.[93] When that regulation reaches beyond business, however, it may trod upon protected speech activity. Should that occur, government should bear a heavy burden in proving that its interest is sufficient to warrant the infringement.[94]

D. The Newspaper's Interest

The compelled publication of an advertisement by a newspaper, in spite of an editorial decision to exclude such advertisements, infringes upon the newspaper's rights of free speech and free press. First among these are the right of a speaker, any speaker, to choose the message he will convey.[95] A second interest, the institutional integrity of the press, recognizes the special function of the press in our constitutional system and protects

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92. Another infamous antitrust case involving anticompetitive activity similar to that present in *Lorain*, but on an even grander scale, was Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957), *cert. denied*, 354 U.S. 923 (1957). The Kansas City Star Company owned two newspapers, a radio station, and a television station. Although seven other dailies were published in the area, the two papers owned by Star received 94 percent of the advertising revenue. An extensive list of exclusionary practices was detailed at trial. Advertisers had been forced to purchase advertising space in all the Star Company's editions—morning, evening, and Sunday—or not at all. Some advertisers had received notices that they would be dropped if they continued to patronize competitors; others were just dropped without notice. Access to television time was predicated on newspaper advertising. Quotas were set up to divide advertising dollars between print and broadcasting. A baseball player was even told that he would disappear from the sports page unless a florist shop he owned stopped advertising with a competitor. The Star argued that the Sherman Act endangered freedom of the press by subjecting newspapers to prosecution at the whim of public officials. *Id.* at 665. The Court of Appeals, relying on Justice Black's opinion in *Associated Press* concluded otherwise:

> Freedom to print does not mean freedom to destroy. To use the freedom of the press guaranteed by the First Amendment to destroy competition would defeat its own ends, for freedom to print news and express opinions as one chooses is not tantamount to having freedom to monopolize. To monopolize freedom is to destroy it.

Id. at 666. The Court of Appeals decision resulted in fines of $5,000 against the Star Company and $2,500 against its advertising editor.

93. *See e.g.*, Citizens Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (antitrust law applied to joint operating agreement); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act applied to press); Mabee v. White Plains Publishing, 327 U.S. 178 (1946) (Fair Labor Standards Act); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act).

94. *See infra* note 123.

95. Wooley v. Maynard, 430 U.S. 705 (1977). *See infra* note 102.

its independent role as an institution or, more accurately, a series of institutions.[96] Institutional integrity encompasses such concerns as editorial autonomy,[97] economic viability,[98] and freedom from undue governmental intervention into the operating and policy decision making functions of the press.[99] This is not to be confused with special rights for the institutional press,[100] for the above concerns are as valid when applied to the "lowly pamphleteer" as to the large institutions.[101] The interest simply recognizes that some concerns might apply more uniquely to the press than to all speakers in general.

Free speech protects the right to choose, as well as to express, a message.[102] Indeed without the former, the latter is worth little. Without the right to choose a message, an exercise of speech may not reflect belief and be no more than a recitation of a state-created message. Thus, school boards cannot compel

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96. *See* Minneapolis Star v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1372 (1983) (state "use tax" on ink and paper impermissably singled out the press for special treatment in violation of the first amendment).

> When the State singles out the press (for differential taxation) . . . 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 press will often serve as an important restraint on government.

Id. See also Grosjean v. American Press, 297 U.S. 233 (1935) (discriminatory tax on newspapers held in violation of the first amendment). "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.* at 250.

97. *Tornillo*, 418 U.S. at 258.

98. *Minneapolis Star*, 103 S. Ct. 1365. Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976); *Tornillo*, 418 U.S. 241; *Grosjean*, 297 U.S. 233; Near v. Minnesota, 283 U.S. 697 (1930).

99. *Tornillo*, 418 U.S. 241.

100. *See* Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

101. Lovell v. Griffin, 303 U.S. 444 (1938).

102. Wooley v. Maynard, 430 U.S. 705 (1977). In *Wooley* the Supreme Court reviewed the conviction of a Jehovah's Witness who removed the state motto, "Live Free or Die," from his automobile license plate contrary to state law. He claimed that the motto conflicted with his religious and moral beliefs. The Supreme Court upheld the three judge District Court and reversed the original conviction holding that the State may not force an individual to participate in the dissemination of an ideological message. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of the mind.'" *Id.* at 714. The Court went on to use *Tornillo* as an example of the fundamental right "to decide what to print or omit." *Id. See supra* note 75.

students to salute the flag,[103] and a state cannot compel a person to display a state motto against his will.[104]

Should a newspaper wish to express a message through its advertising section, choice is the only mechanism of control it has. The newspaper creates the message by choosing among the offered advertisements. One might expect to find advertisements for sexual liaisons in the *Village Voice*, but would be shocked to find the same in the local suburban weekly. These advertisements convey a message which is associated with the newspaper. They set a tone or an image and can attract or repel readers. If the choice is removed, so is the message. The right to speak is effectively denied.

The interest of the press' institutional integrity assumes that free speech guarantees apply to the press as a whole, and cannot be parcelled out at varying levels among its functional units.[105] Arguably, courts cannot accord a lesser level of protection to editorial decisions concerning advertising than to similar decisions concerning the editorial page.[106] Otherwise the level of

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103. West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1948).

104. *Wooley*, 430 U.S. 705.

105. *See Tornillo*, 418 U.S. at 258.

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of the crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id.; *See also* New York Times v. Sullivan, 376 U.S. at 265-66, where the Court refuses to accord a lesser level of protection to a message simply because it was contained in an advertisement. *See supra* note 35. *Cf. Globe Newspaper*, 102 S. Ct. at 2613. "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Id.*

106. *Cf.* Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973). In *Pittsburgh Press* a city ordinance prohibiting employment discrimination was construed as forbidding sex-designated columns in the help wanted section. The Pittsburgh Press appealed to the U.S. Supreme Court arguing that the decision violated the first amendment by restricting editorial discretion. The Court ruled that in this case the combination of placement and the advertisement itself were an "integrated commercial message." *Id.* at 388. The advertisements themselves never mentioned gender. Only by their placement in a sex-designated column was it clear that there was a gender preference. In *Home Placement* there is no such confluence of placement and message. The Providence Journal is asserting a right to reject the advertisement because it does not wish to repeat its message. Moreover, the Journal has a message of its own it wishes to convey, apart from the message contained in the advertisement. *See infra* text accompanying notes 110-11. This separate, severable message was lacking in *Pittsburgh*

protection would be determined by the content of the speech itself.[107] As questionable as this practice would be on its face, it is important to realize that control of the message may be as important to the institutional integrity of the press as the message itself.[108] Decisions concerning content should be made from within the institution, not from without.[109]

The difficulty in *Home Placement* is in determining whether this was an editorial decision deserving of judicial deference or a simple business decision amenable to reasonable government regulation. In assuming that first amendment rights were not implicated, the First Circuit apparently viewed the classified section as no more than a commercial forum in which the newspaper simply acted as a conduit. To the court, whatever decisions the newspaper made in this area were necessarily business decisions.

The newspaper, on the other hand, claimed to have more than an economic stake in the messages it conveyed. By choosing its messages, the *Journal* conveyed a separate message of its own. It considered Home Placement's advertisements inherently misleading.[110] The editors did not want to repeat them or place the credibility of the institution behind them. By publishing their policy for rejecting these advertisements, the editors were informing their readers that certain standards had to be met before an advertisement would be printed. In their view, this made the advertisements which were published more credible.[111]

It is the very assertion of the first amendment right to convey a message which separates the business from the editorial decision. It cannot be denied that there are business aspects to the *Journal's* decision.[112] Yet, by placing the *Journal's* editorial decision in the fixed category of business activity, the First Circuit used these business aspects to facially invalidate a first amendment claim. The court recast and judged the *Journal's* editorial decision solely in terms of antitrust law. Thus, the

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Press.

107. *See supra* notes 79-83 and accompanying text.

108. *See supra* text accompanying notes 71-73.

109. *See supra* note 105.

110. *See supra* notes 20-21 and accompanying text.

111. *Id.*

112. The fact that an editorial decision or message has a business impact or a profit motive does not negate first amendment protection. The issue is strictly whether a message is involved, not the presence or absence of a business purpose. *See supra* note 35. *See also* Thomas v. Collins, 323 U.S. at 545 (Jackson, J., concurring).

Journal's exercise of editorial discretion was transformed into an "apparently paternal judgment" for which "no valid business reason" existed.[113] The court essentially reviewed and passed judgment on the reasonableness of a newspaper's editorial decision. It used the Sherman Act to dictate the content of a newspaper.

As a society, we have decided that we do not want government regulating the content of speech.[114] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[115] Absent compelling reasons to the contrary, editorial decisions are reserved for editors.[116] Government involvement in the editorial process is simply anathema to the interests of a free press.[117] That involvement is no more palatable when directed at advertising.[118] Newspapers are institutions. Attacks on a part of that institution can affect the whole. In *Grosjean v. American Press*, the Court recognized that economic attacks on the institutional viability of the press violated the first amendment.[119] In *Mills v. Alabama*[120] it invalidated a statute resulting in the arrest of a newspaper editor for an editorial printed on election day. In *Miami Herald v. Tornillo*, it invalidated a Florida statute granting a right of reply to political candidates.[121] These all represent assaults on separate but nonseverable dimensions of the institutional integrity of the press. The present attack, directed toward editorial policy concerning the acceptance of advertising, is no less offensive. Liberty in a multidimensional activity must have breathing space to survive.[122] To allow government to compel a message, even an advertisement, takes that space away.

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113. *Home Placement*, 682 F.2d at 277.

114. *See supra* notes 68, 79-83 and accompanying text.

115. *Mosley*, 408 U.S. at 95.

116. *See supra* note 105.

117. Prior restraint, the classic prohibition, is in essence a guarantee that editors alone will decide a newspaper's content. *See Near*, 283 U.S. 697 (1931). *See also Nebraska Press Assoc.*, 427 U.S. 539 (1976) "[A]t least in the context of prior restraint on publication, the decision of what, when, and how to publish is for editors, not judges." *Id.* at 613 (Brennan, J., concurring).

118. *See supra* note 105.

119. *Grosjean*, 297 U.S. 233 (1936).

120. 384 U.S. 214 (1966).

121. *Tornillo*, 418 U.S. 241.

122. *See New York Times v. Sullivan*, 376 U.S. at 271-72.

E. The Balance

We must begin by recognizing that first amendment concerns are primary. As important as antitrust legislation is in our statutory hierarchy, the policies it promotes are not sanctioned by constitutional right. To overcome this presumption, the state must prove a compelling interest in regulating the protected activity.[123] In *Associated Press*, the Supreme Court held that the Sherman Act applied to business functions of a newspaper.[124] In *Lorain*, the Court held that government could use the Sherman Act to compel a newspaper to publish an advertisement when the advertisement had been rejected for an anticompetitive purpose.[125] Now in *Home Placement*, the First Circuit has used the Sherman Act to compel the publication of an advertisement absent any showing of anticompetitive purpose. This intrusion into the realm of protected speech ignores the line respected in the past between the business functions of the press and the content of the newspaper. The former is protected by the free press guarantee only to the extent that the institution of the press is threatened by government action; the latter enjoys more extensive first amendment protection. The *Home Placement* decision would deny the *Journal* the right to speak through its own advertising pages under the guise of ordinary business regulation. Such a distinction does violence to the first amendment. *Home Placement* is not a case of purposeful anticompetitive activity. No allegation was made that its declared purpose was untrue. Whatever anticompetitive effect the *Journal's* activity had, it was the indirect result of a newspaper exercising its rights under the first amendment.[126] While the government may

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123. NAACP v. Alabama, 357 U.S. 449 (1958).

124. *See supra* notes 84-87 and accompanying text.

125. *See supra* notes 88-91 and accompanying text.

126. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). *Noerr* involved an antitrust claim brought by truckers charging that a railroad association had conducted a publicity campaign designed to facilitate the passage of legislation harmful to the trucking industry. The Court held that the Sherman Act could not be interpreted to apply to restraints of trade which resulted from legislative action or to efforts to encourage the passage of such legislation.

> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination(s) . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act. Such a construction of

at times have a compelling interest in maintaining a competitive business environment, it did not have a compelling interest in this case. Anticompetitive effect without more cannot overbalance the exercise of protected press freedoms.[127] The First Circuit should have recognized the *Journal's* right to control its content and held in its favor.

II. CONCLUSION

Home Placement is an unprecedented extension of antitrust law into the realm of protected speech. Ignoring the distinction made in previous decisions between business and editorial functions, the First Circuit Court of Appeals used the Sherman Act to review and overturn an editorial decision. The decision effectively allowed government to regulate the content of classified advertising. Since the opinion never referred to the first amendment, it is impossible to know the court's exact position on the constitutional issues. It is only clear that the major import of this decision will be in regard to the issues it never addressed.

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> the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 136-38.

127. It should be noted that the situation in *Home Placement* is easily duplicated. An adult theater operator can run advertisements between features and qualify as a newspaper's competitor. A newspaper which rejected the theater's advertisements would run a serious risk of violating antitrust law. Although in the past, antitrust violations have been the relatively rare exception to the rule, *see supra* text accompanying notes 32-33, this decision threatens to make allegations of such violations much more frequent.