

ernment to broadcast licensees affords other opportunities to explore the breadth of “governmental action.”<sup>403</sup>

### Freedom of Expression: The Philosophical Basis

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guarantee of freedom of expression.<sup>404</sup> The argument has been fought out among the commentators. “The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.”<sup>405</sup> Some commentators argue on behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression.<sup>406</sup> Others would limit the basis of the First

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effective only “for purposes of matters that are within Congress’s control,” the Court explained. “[I]t is not for Congress to make the final determination of Amtrak’s status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.” 513 U.S. at 392.

<sup>403</sup> In *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973), the Court held that a broadcast licensee could refuse to carry a paid editorial advertisement. Chief Justice Burger, joined only by Justices Stewart and Rehnquist in that portion of his opinion, reasoned that a licensee’s refusal to accept such an ad did not constitute “governmental action” for purposes of the First Amendment. “The First Amendment does not reach acts of private parties in every instance where the Congress or the [Federal Communications] Commission has merely permitted or failed to prohibit such acts.” *Id.* at 119.

<sup>404</sup> Although “expression” is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, that are covered by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with “speech,” as the following discussion will reveal. The term seems well settled, *see, e.g.*, T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970), although it has been criticized. F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 50–52 (1982). The term also, as used here, conflates the speech and press clauses, explicitly assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended in the next topic.

<sup>405</sup> T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 15 (1970). The practice in the Court is largely to itemize all the possible values the First Amendment has been said to protect. *See, e.g.*, *Consolidated Edison Co. v. PSC*, 447 U.S. 530, 534–35 (1980); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978).

<sup>406</sup> T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970). For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an “eclectic” approach, *see* Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983). A compressive discussion of all the theories may be found in F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* (1982).