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Same-Sex Union Announcements: Precis on a Not so Picayune Matter

James M Donovan

COMMENT

SAME-SEX UNION ANNOUNCEMENTS: *PRÉCIS* ON A NOT SO PICAYUNE MATTER

*James M. Donovan**

The last half of 2002 saw a quantum advance in the cultural acceptance of a disparaged minority. While the previous years had recorded major improvements in the protection of homosexual persons as individuals, very little in the public forum displayed a similar concern with gay relationships. The last major events on that score, in fact, were the defeats of the federal Defense of Marriage Act ("DOMA"),[1] as well as a succession of state initiatives either rejecting legislation that would broaden marriage to include same-sex couples, or enacting state-level DOMA legislation. While the gay person no longer felt as ostracized as before, the gay couple was as isolated as ever.

Then, on August 18, 2002, the *New York Times* announced that it would publish same-sex union announcements on par with those of heterosexual weddings.[2] Qualified couples are selected according to the "newsworthiness and accomplishments of the couples and their families,"[3] the same criteria used to select heterosexual couples. "Qualified" means that the couple will "[c]elebrate their commitment in a public ceremony," and "enter into a legally recognized civil union (currently available only in Vermont) or register their domestic partnership (in those

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1. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); *see generally* James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335 (1997) (scrutinizing the constitutionality of the intent of the Defense of Marriage Act).

2. *Times Will Begin Reporting Gay Couples' Ceremonies*, N.Y. TIMES, Aug. 18, 2002, at A30 [hereinafter *Times Will Begin*].

3. *Id.*

localities, including New York City, that offer registration)."[4] With this step the *New York Times* became the first major metropolitan daily to offer this access to gay couples.[5] That decision marked a sea change in the cultural attitude toward the relationships of gay men and lesbians.

Although some newspapers have voluntarily begun to publish same-sex union announcements, others will continue in their traditional exclusionary practices. Some of those papers can anticipate being accused in court of unlawful discrimination where the law allows that cause of action. Reflexively, those newspapers will in turn erect a defensive shield from such charges by appealing, at least in part, to the First Amendment.

This comment examines the viability of that defense. The set-piece for that discussion are the details of a complaint, described in Part I, lodged against the *Times-Picayune* by a lesbian couple that was denied access to its society pages for the purpose of announcing their commitment ceremony. Part II identifies the interests at stake in the debate over whether same-sex union announcements should appear in local newspapers. The public recognition that accrues through such announcements is a necessary constituent of any healthy and enduring romantic relationship, and its denial exposes gay couples to an increased risk of dissolution.

The present examination restricts its attention to those legal environments offering a public accommodations law that encompasses protections for sexual orientation. With that restriction, the first issue becomes whether or not that particular newspaper falls within the scope of a "public accommodation" as locally defined, the focus of Part III. If the newspaper is not a

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4. *Times Will Begin*, *supra* note 2, at A30. The first same-sex announcement appeared on September 1, 2002. Daniel Gross and Steven Goldstein, N.Y. TIMES, Sept. 1, 2002, at I12. The first announcement from a lesbian couple appeared the following week. Leslie Miller and Alicia Salzer, N.Y. TIMES, Sept. 8, 2002, at I12.

5. According to the Gay & Lesbian Alliance Against Defamation [GLAAD], as of May 8, 2003, 205 newspapers offer access to the weddings section. *See* GLAAD, *Announcing Equality Project: Newspapers that Publish Same-Sex Union Announcements*, May 8, 2003, *at* http://www.glaad.org/action/campaigns (last visited May 8, 2003); *see also Gay Unions to Appear in Sentinel*, ORLANDO SENTINEL, Aug. 24, 2002, at C3 (discussing different approaches to publishing announcements from gay couples used by Florida newspapers).

public accommodation, the charge is presumably resolved in favor of the newspaper because the basis for the complaint does not reach to that institution.

But if that newspaper is indeed found to be a public accommodation, proper resolution of the dispute would then focus on the kind of speech embodied in a society announcement. If announcements are not "news," then one kind of analysis is appropriate; if they rise to the level of protected "news," a different tact is required. The issues in each of these approaches are parsed in Part IV. Against this theoretical background, the defense actually mustered by the *Times-Picayune* is briefly outlined in Part V.

I. THE *TIMES-PICAYUNE* REFUSES A SAME-SEX UNION ANNOUNCEMENT AND RECEIVES A COMPLAINT

In June of 1994, Donna Bird and Leslie Nehring asked to publish a wedding announcement in the *Times-Picayune*, the sole daily newspaper for the New Orleans area.[6] The editor of the Living Section of the paper forwarded the request to James Amoss, the Editor-in-Chief.[7] Although Amoss told the couple that the *Times-Picayune* "does not have guidelines for 'this type' of announcement,"[8] he nevertheless declined their request,[9] stating that "such publication was not in the Picayune's best interest at this time."[10]

Believing this rejection to be discriminatory, Bird and Nehring took their complaint to the New Orleans Human Relations Commission [NOHRC]. The NOHRC filed with the *Times-Picayune* a notice that a complaint had been lodged that charged the newspaper for violations of then-Chapter 40C of the City Code of New Orleans. That ordinance stated in pertinent part that it

> shall be an unlawful discriminatory practice . . . for any public accommodation . . . to discriminate by refusing, withholding, or denying to such person any of the services . . .

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6. New Orleans Human Relations Commission Charge of Discrimination Number 1024940001 (February 6, 1995) [hereinafter NOHRC Charge].

7. Mem. in Supp. of Mot. for T.R.O. and Prelim. Inj., Civil Action 95-518N [hereinafter Mem.], Ex. B: Affidavit of James Amoss, at 3.

8. *Id.* Ex. C, at 4.

9. *Id.* Ex. B, at 3.

10. *Id.* Ex. C, at 3.

> or privileges offered by the public accommodation . . ., by placing . . . any person in a separate class of customers, patrons . . ., or users . . ., because of race, color, creed, religion, national origin, ancestry, or unreasonably, because of age, sex, sexual orientation, physical condition, or disability.[11]

The *Times-Picayune* rebutted this charge, arguing that the complaint constituted a "frontal assault on the First Amendment freedoms generally and the freedom and independence of the press in particular."[12]

On first impression the weight of the law might appear to favor the *Times-Picayune*'s posture, such being our society's high regard for the free press guarantees of the First Amendment. At the very least, it can claim to have the persuasive benefit of the sole court decision directly on point.

A virtually identical legal complaint as that against the *Times-Picayune* did go to trial in Portland, Oregon, in 1996. Portland, like New Orleans, enforces an ordinance forbidding discrimination in public accommodations on the basis of sexual orientation.[13] *The Oregonian* refused to accept a same-sex wedding announcement "based on dictionary definitions of 'wedding' and 'marriage.'"[14] The newspaper further argued that the state and federal constitutions "protect its right to decide not to publish same-sex wedding announcements."[15] Significantly, the state district judge implied that the wedding announcement pages are "news space," and that "[t]here is no precedent holding news space to be a 'public accommodation.'"[16] Because both sides' definition of "wedding" was reasonable, and therefore either choice was rational, the court ultimately denied the plaintiffs' motion for a preliminary injunction ordering the paper to publish

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11. NEW ORLEANS, LA., CODE art. III, § 40C-102(1) (1977) (amended and recodified at § 86-33) (1999)). The analysis below will proceed under the new version of the ordinance, which was adopted June 17, 1999, many years after the NOHRC complaint. The definition of *public accommodation* is discussed *infra*, Part III(A).

12. Mem., *supra* note 7, at 2.

13. *See* PORTLAND, OR., CODE § 23.01.070, *cited in* Linebarier v. Oregonian Publ'g Co., No. 96C 875554, slip op. at *2 (Dist. Ct. Multnomah, Ore. Aug. 5, 1996). I thank the plaintiffs' attorney in this case, Renée E. Jacobs, for copies of her Memorandum and the court's opinion.

14. *Id.*

15. *Id.* at *3.

16. *Id.* at **3-4.

the announcement.[17] *The Oregonian* eventually agreed to publish same-sex wedding announcements for a fee.[18]

Despite the outcome of the *Oregonian* case, the legal posture of the *Times-Picayune* may not be completely secure. In other contexts First Amendment rights have yielded to anti-discrimination statutes.[19] The viability of the NOHRC complaint may therefore prove to be stronger than some might initially expect. This comment will conclude that to be the case.

II. WHY PUBLICATION OF UNION ANNOUNCEMENTS MATTERS

Complaining that a newspaper has refused to publish same-sex union announcements may seem to verge on the petty.[20] Aren't there more important concerns for society in general and the gays' rights[21] movement specifically, such as attaining the right for gay men and lesbians to marry?[22] That view, however, obscures what is truly contested in the battle over same-sex marriage: public recognition of gay relationships.

Joe Varnell and Kevin Bourassa have been at the forefront of the same-sex marriage battle in Canada.[23] Although they had

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17. *Linebarier*, No. 96C 875554 at 4.

18. *See* Renée E. Jacobs, *Something New* [Letter to the Editor] THE ADVOC. (Baton Rouge), Oct. 29, 1996, at 8. The *Times-Picayune* offered to "consider" a paid advertisement when it rejected Bird's and Nehring's announcement. Mem., *supra* note 7, at 9 n.2. The *Oregonian* would later, under the example of the *New York Times*, capitulate to the demand to publish same-sex union announcements. *See Ore. Paper to Print Same-Sex Unions*, ASSOCIATED PRESS, Oct. 27, 2002.

19. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (holding that the right to freedom of expressive association must yield to the compelling state interest in eradicating sex discrimination).

20. *See* Holly J. Morris & Vicky Hallett, *Public Displays of Affection,* U.S. NEWS & WORLD REP., Sept. 9, 2002, at 42 (quoting gay activists that the publication of same-sex union announcements is "the lighter, fluffier side of gay issues").

21. Although *gay rights* is the more common term, it is inaccurate and misleading. It connotes a species of rights, "gay rights," which are different from other kinds of rights. This language plays into the hands of opponents who argue that "gay rights are special rights" and thus undemocratic. *Gays rights* refers to rights that gay people possess, which are the same rights that nongay people possess.

22. Indeed, according to recent polls, attaining the right to marry has become the top priority of the gays' rights movement. *See* Deb Price, *Marriage Law Becomes Gay Priority*, DETROIT NEWS, May 20, 2002, at A9 (discussing poll finding that 83% of survey respondents said marriage should be one of the movement's top three priorities; 47% said it should be the top priority).

23. *See generally* KEVIN BOURASSA & JOE VARNELL, JUST MARRIED: GAY MARRIAGE AND THE EXPANSION OF HUMAN RIGHTS (Univ. Wisconsin 2002)

commemorated their relationship in private ceremonies, they still felt a void that could be filled only by a traditional ceremony that would be recognized by their government. A couple can legally marry in Canada by first receiving a license from the government; but Ontario law also allows a valid license to issue automatically – i.e., without the need for a clerk's intervention – to any couple who has had their intention to marry published by their church for three consecutive Sundays.[24] These marriage banns, once accomplished, result in a license that is presented to the civil officers, but only for registration, not for validation.[25] In January 2001, Varnell and Bourassa had their banns published and were thereafter wed in a church ceremony. Their fight for recognition of the legal validity of this ceremony began a long trek through the Canadian courts.[26]

After the wedding – and this is the important point for present concerns – "their family treated them *differently*. . . . They really viewed Kevin and Joe as a real couple after they got married."[27] Despite having shared many years together, and having previously celebrated a purely religious union ceremony, only after the ritual with potential legal significance did even their closest family members begin to take them seriously as a couple. This "difference" constitutes a primary benefit of marriage: the social approval and support extended to the married couple.[28] Social support of the relationship is demonstrated in innumerable little gestures, all of which reinforce the collective presumption that the couple is a *couple*

(discussing personal stories of the authors).

24. *See* BOURSASSA, *supra* note 23, at 4.

25. The refusal of the government to register the licensed marriage does not affect its legality, it being "open to the church and the couples to simply ignore the registration requirement . . . ." *See id.* at 272-73.

26. On July 12, 2002, a three-judge panel unanimously declared that the exclusion of same-sex couples from marriage is discriminatory and unconstitutional in Canada. *See* Halpern v. Attorney General of Canada, [2002] S.C.J. No. 39/01 (Div. Ct.) (unpublished), *available at* 2002 C.R.D.J. Lexis 122 (holding that the common law definition of marriage must be reformulated). The effect of this decision has been suspended for up to twenty-four months to allow a legislative response and a possible appeal. According to the decision, a failure to respond appropriately to the concerns of the court within this time period would result in a redefinition of the common law understanding of marriage from "a man and a woman" to "two persons." *Id.* at *7.

27. Christopher Hutsul, *Marriage Limbo*, THE STAR (Toronto, Ontario), June 25, 2002, at E1 (emphasis added).

28. *See* Andrew Sullivan, *State of the Union*, THE NEW REPUBLIC, May 8, 2000, at 18 (stating that marriage is not merely an accumulation of benefits, but a fundamental mark of citizenship).

and that their couplehood is presumed to be permanent.[29]

Critical to the success of the relationship, then, will be this public expectation. "It is the public recognition of the status of 'married' that constitutes the most important benefit of marriage, and what is most crucially abridged when the State discriminates against gay couples who want to marry."[30] When public recognition is withheld, that denial fundamentally weakens the relationship that society ignores.[31]

Further underscoring the importance of the married state is data showing that married persons enjoy a higher quality of life than do the merely cohabitating couples.[32] As compared to married couples,

> cohabitating couples report lower levels of happiness, lower levels of sexual exclusivity and poorer relationships with parents. Annual rates of depression among cohabitators are more than three times higher than among married couples. By almost every measure, married couples are better off than cohabitators: On average, they live longer, have better physical and mental health, and are more productive in the labor force.[33]

If public support is an important factor for the maintenance of relationships, then withholding that support from gay and lesbian couples significantly decreases the chances for homosexuals to achieve those kinds of relationships, even if all of

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29. *See also* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Partners*, 8 TUL. J.L. & SEXUALITY 649 (1998).

30. Ralph Wedgwood, *What Are We Fighting For?*, 4 HARV. GAY & LESBIAN REV. 32, 33 (1997).

31. One study found the relationship between "satisfaction with social support" was highly related to relationship satisfaction for both gay male and lesbian couples. Lawrence A. Kurdek, *Relationship Quality of Gay and Lesbian Cohabiting Couples*, 15(3/4) J. HOMOSEXUALITY 93, 108-09 (1988).

32. *See* Jonathan Rauch, *The Marrying Kind: Why Social Conservatives Should Support Same-Sex Marriage*, THE ATLANTIC MONTHLY, May 2002, at 24 (stating that "[c]ohabitation tends to be both less stable and less happy than marriage, and this appears to be true even after accounting for the possibility that the cohabiting type of person may often be different from the marrying kind. Research suggests that marriage itself brings something beneficial to the table.").

33. Katherine Kersten, *The Danger of Viewing Marriage as Just a Lifestyle Choice*, STAR TRIBUNE (Minneapolis), July 17, 2002, at A13 (summarizing conclusions from David Popenoe & Barbara Defoe Whitehead, *Should We Live Together? What Young Adults Need to Know about Cohabitation before Marriage* (June 2002), *at* http://marriage.rutgers.edu (last visited May 12, 2003)).

the purely economic and legal benefits of those relationships are otherwise available to same-sex couples. Therefore, the policy decision to withhold public recognition from same-sex relationships consigns gay and lesbian citizens to a lower quality of life.

Public acknowledgment of the union is therefore a critical foundation upon which long-term, rewarding romantic relationships are built. An important symbol of that public acknowledgment is the announcement of the union in the newspapers serving the celebrants' home. Publication of same-sex union announcements in community newspapers touches upon issues perhaps more central to the struggle to achieve equality for same-sex couples than even the economic benefits, which are so often the sole focus of the legal and social debate. For this reason, how newspapers treat announcements of newly-formalized same-sex relationships merits the fullest examination under all applicable constitutional analyses.

III. APPLYING PUBLIC ACCOMMODATION NONDISCRIMINATION LAW TO NEWSPAPERS

Both the NOHRC complaint against the *Times-Picayune* and the complaint against *The Oregonian* invoke a public accommodations law that prohibits discrimination on the basis of sexual orientation. In that environment the threshold issue will be whether that public accommodations law extends to include the newspaper. If not, the legal basis for the complaint fails and the complaint must be dismissed.

On that question the court, when dismissing the complaint against *The Oregonian*, observed that "[t]here is no precedent holding news space to be a public accommodation."[34] The *Times-Picayune* similarly asserts that it fails to qualify under the New Orleans ordinance as a public accommodation.[35] The implication of both of these assertions is that newspapers have not been found to be public accommodations because such a result would be somehow antithetical to the nature of newspapers, if not to the understanding of what should be a "public accommodation." This section demonstrates that while the first claim is largely correct – newspapers have only in the rarest instances been construed to

34. Linebarier v. Oregonian Publ'g Co., No. 96C 875554, slip op. at **3-4 (Dist. Ct. Multnomah, Ore. Aug. 5, 1996).

35. Mem., *supra* note 7, at 11 n.4.

be public accommodations – the basis for this outcome depends upon the technical details of the applicable law and not upon the nature of newspapers. Nothing intrinsic to newspapers as a class protects them from classification as public accommodations if the law permits.

A. ARE NEWSPAPERS "PUBLIC ACCOMMODATIONS"?

The plaintiff in union announcement complaints will need to interpret "public accommodation" to include newspapers despite the fact that the statute or ordinance does not explicitly include newspapers. To examine the feasibility of that claim, analysis must begin with the text of an actual public accommodations law. The New Orleans ordinance reads as follows:

> "Public accommodation" is currently defined in the New Orleans City Code to mean: [a]ny place, store, or other establishment or means of transportation, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds.[36]

Although the definition of "public accommodation" lists several exemptions, none of these extend to newspapers. Newspapers, in other words, are not expressly exempted from inclusion by the accommodations law. On the other hand, a newspaper could arguably fall within the scope of an "establishment . . . that solicits or accepts the patronage . . . of the general public."

A public accommodation of any kind must be accessible to the public on a nondiscriminatory basis. It is forbidden, on the basis of sexual orientation, from:

> (1) [discriminating] . . . by refusing, withholding or denying to such person any of the goods, services, accommodations, advantages, facilities or privileges offered by the public accommodation, . . . by:
>
> > a. Placing or attempting to place any person in a separate class of customers, patrons, . . . in a separate section or area of the . . . facilities of the public accommodation . . . .
>
> (2) [publishing or] circulat[ing] . . . any . . . communication, notice or advertisement to the effect that any of the services,

36. NEW ORLEANS, LA., CODE § 86-1.5 (1999).

> accommodations, advantages, facilities or privileges of any public accommodation . . . will be refused, withheld, or denied to any person.[37]

If a newspaper is a public accommodation, its refusal to grant equitable access to its services constitutes a prima facie violation of the nondiscrimination ordinance. The withholding of that service violates section (1), and any notice in advance of the newspaper's intent to withhold that service violates section (2). In other words, if the paper announces beforehand that it will not accept same-sex announcements, it violates section (2); if it does not provide that prior notice, but rejects the notices after submission, it violates section (1).

The *Times-Picayune* denies that it qualifies under this ordinance as a public accommodation.[38] Buttressing its assessment is the fact that no court has found a newspaper to be a public accommodation. However, significant for present purposes is the further fact that no court has held that newspapers are inherently immune from classification as public accommodations. The reasons that newspapers have avoided being treated as public accommodations, despite frequent suits seeking that outcome, have always hinged upon the specific language of the local ordinance or statute defining the public accommodation, and not upon the protected status of newspapers.

For example, in *Treanor v. Washington Post Co.*[39] the newspaper was found not to be a public accommodation as that term is defined in the Americans with Disabilities Act (ADA). The ADA identifies public accommodations largely by using a list of exemplars.[40] The ADA list does not include newspapers, and the court could not analogize newspapers to anything on the list.[41] The same search for analogies precluded a Wisconsin newspaper from falling within the scope of a state public accommodations law when the paper refused an advertisement from a gay and

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37. NEW ORLEANS, LA., CODE § 86-33.

38. Mem., *supra* note 7, at 11 n.4.

39. Treanor v. Washington Post Co., 826 F. Supp. 568 (D.D.C. 1993).

40. 42 U.S.C. § 12181(7) (1995).

41. *Treanor*, 826 F. Supp. at 569. *See also* Brown v. Tenet ParaAmerica Bicycle Challenge, 959 F. Supp. 496 (N.D. Ill. 1997) (holding that in ADA cases defendant must be analogous to one of the law's explicitly identified examples of public accommodations).

lesbian organization.[42] But because the New Orleans ordinance does not use lists to define *public accommodation*, these cases do not support the *Times-Picayune*'s claim.[43]

At least one court has left open the possibility that a newspaper could be a public accommodation.[44] A newspaper sued to enjoin the state Equal Opportunities Commission from pursuing a complaint from a labor union after the newspaper refused to accept its ad, arguing that it was not a "public place of accommodation."[45] The court granted the Commission's motion to dismiss.[46] That grant implied that the court was willing to consider the Commission's argument.[47]

Admittedly, no newspaper has been definitively held to be a public accommodation, but the reasons to avoid finding newspapers to be public accommodations have been linked to the definition of public accommodation. Typically, laws include a list of exemplary public accommodations, leaving the court to decide if a newspaper is analogous to these. Almost always it is not. However, because the New Orleans ordinance does not include a list of exemplars, that use of analogical reasoning does not apply. Additionally, it has not been held that finding newspapers to be public accommodations is intrinsically inimical to the First Amendment. The status of newspapers must be concluded to be open and dependent on the technical language of the applicable public accommodations law. In that environment, the *Times-Picayune* and similarly situated papers are more easily argued to be a public accommodations.

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42. *See* Hatheway v. Gannett Satellite Info. Network, Inc., 459 N.W.2d 873, 876 (Wis. Ct. App. 1990) (concluding that "the newspaper's classified advertising section is so dissimilar from the businesses listed in the statute that it does not come within the purview of the public accommodation act.").

43. NEW ORLEANS, LA., CODE § 86-1.5 (1999).

44. *See* P. Cameron DeVore & Steven G. Brody, ADVERTISING AND COMMERCIAL SPEECH, 119, 337-38 (Practicing Law Institute Patents, Copyrights, Trademarks, and Literacy Property Course Handbook Series No. GO-00Q1).

45. *Id.*

46. *Id.*

47. *Id.* Because the matter was then settled out of court, no definitive ruling was made on whether the newspaper indeed fell within the ambit of the definition of *public accommodation*. *Id.*

B. IS THE FIRST AMENDMENT A COMPLETE SHIELD FOR NEWSPAPERS?

If the threshold criterion of the public accommodation status of the newspaper has been satisfied, then a newspaper that uses sexual orientation to regulate access to its pages has violated the law. Scrutiny then shifts to whether the paper may assert an affirmative defense to rebut charges of illegal discrimination. That defense would take the form of a constitutional safe-harbor for the newspapers actions.

Contrary to what some might think, despite having special protections under the Free Press Clause, and general protections under the Free Speech Clause, "all 'speech' by the press – all words, for example, that the press publishes – is not protected . . . ."[48] Two cases demonstrate the point that the expressive rights of the newspaper do not extend equally to all sections; what it can say on the editorial pages it cannot say in other sections, such as the classified advertisements. In *Ragin v. New York Times Co.*,[49] the newspaper was accused of violating the Fair Housing Act because the models used in the illustrations in the housing advertisements sections where mostly white.[50] When black models were used, they were in association with less desirable real estate locations.[51] Against the *Times*' claim that the order to bring its ads into compliance with the Fair Housing Act "will compromise the unique position of the free press,"[52] the Second Circuit held that "real estate advertisements that indicate a racial preference 'further an illegal commercial activity' . . . [and as such] are constitutionally unprotected."[53] While the newspaper is free to use its editorial space to advance an opinion that housing should be racially segregated, even against a congressional law to the contrary, here the court held that noneditorial sections of the paper could not be enlisted to advance that same opinion.[54]

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48. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 759 (1999).

49. Ragin v. New York Times Co., 923 F.2d 995 (N.Y. 2d Cir. 1991).

50. *Id.* at 998.

51. *Id.*

52. *Id.* at 1003.

53. *Id.* at 1002.

54. *Id.* at 1003-04.

Ragin based its holding in part on a U.S. Supreme Court case, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*.[55] In *Pittsburgh Press*, the Court found that the segregation of employment advertisements into male-preferred or female-preferred columns violated a local human relations ordinance and that this was not an activity protected by the newspaper's First Amendment rights.[56] This case provides a clear precedent for the requirement that the press in some circumstances must conform its noneditorial content to a human relations ordinance such as the one the NOHRC invokes in its complaint against the *Times-Picayune*. The present question pertaining to same-sex union announcements, therefore, does not break entirely new ground, but only seeks to extend established rules to a new factual context.

The *Times-Picayune* might try to distinguish these cases from the present scenario in that they both involve "illegal commercial activity"[57] whose regulation is not prohibited by the First Amendment.[58] Union announcements, in this rebuttal, are not commercial speech, and therefore these decision are not applicable.

Yet if *Pittsburgh Press* requires categorizing society announcements as one or the other, the better choice will be the former, commercial speech (this claim is defended below). Second, while the decisions do speak in terms of commercial speech, the facts of the cases complicate such a simple analysis. In both, the issue was not the commercial speech of the advertisers, but the treatment of that commercial speech by the newspapers – in the case of *Ragin*, attaching racially discriminatory illustrations, and in *Pittsburgh Press*, arranging the employment ads into sexually exclusive columns. The appropriateness of the ads themselves, when that became an issue, was severable from the elements of the complaints directed toward the newspapers. From this perspective, the regulable speech in *Ragin* and *Pittsburgh Press* was not strictly commercial, but more precisely it was speech that did not rise to

55. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

56. *Id.* at 391.

57. *Id.* at 388.

58. *See id.* at 391 (holding that commercial speech could be regulated under the First Amendment).

the standard of protected editorial speech. Any rebuttal relying upon the argument that union announcements are not commercial speech therefore misses the point; the true issue is not whether they positively qualify as commercial speech, but whether they fail to meet the higher standard for protected editorial speech.

Newspapers, in summary, may be categorized as public accommodations depending upon the specific details of the applicable law. If it includes a list of representative public accommodations, and if that list includes neither newspapers explicitly nor some other example to which newspapers can be analogized, then categorizing newspapers as public accommodations will be difficult. In situations where the law does not include such a list, that outcome is more easily obtained. While no court has found a newspaper to be a public accommodation, neither has one reasoned that this result is precluded due to the unique status that newspapers enjoy under the Constitution. If a newspaper is a public accommodation, it cannot expect a blanket exemption due to its expressive activities; protection of one section is severable from protection of any other, as shown by *Pittsburgh Press*. Therefore, whether the *Times-Picayune* must comply with the NOHRC demand, will depend upon the appropriate classification of society announcements into either expressive and protected "news," or unprotected commercial speech.

IV. THE NEWS STATUS OF SOCIETY ANNOUNCEMENTS

Where newspapers can qualify as public accommodations, the validity of the discrimination complaint will depend upon the kind of speech that the rejected announcement represents. The critical distinction is whether it qualifies as "news," that is, whether a social announcement constitutes protected expressive or editorial speech. While it can be possible for the claimant to prevail in both situations, the grounds for that outcome are distinct. Section A considers the situations where announcements are not news, and as such are not protected against government regulation by either the Free Press or Free Speech Clauses of the First Amendment. Section B considers what arguments might apply in situations where society announcements do rise to the level of protected news.

One result of this discussion will be that the status of

announcements is not an abstract determination, but instead a fact intensive determination. The announcements of one newspaper may not qualify as editorial speech, while those of another may qualify, according to the degree of editorial judgment underlying the finished product. That the issue is one of fact and not law is important because these complaints rarely receive a full hearing on the facts, but instead have been dismissed on the purported legal merits of the complaint itself. If proper judicial treatment of the complaint requires a finding of the relevant facts, then summary judgment would be improper. Gaining that concession alone would be a significant improvement.

A. SOCIETY ANNOUNCEMENTS ARE NOT "NEWS"

1. THE CRITERION OF EDITORIAL JUDGMENT

David Anderson identified two unique rights recognized for the press: taxation[59] and editorial autonomy.[60] Under his analysis, a newspaper would have refuge under the Free Press Clause of the U.S. Constitution[61] against demands that it comply with nondiscrimination ordinances to publish same-sex union announcements only to the extent that that order undermines the editorial autonomy of the newspaper.[62]

The primary authority for the privileged status for editorial judgment is *Miami Herald Publishing Co. v. Tornillo*.[63] In *Tornillo*, a Florida political candidate invoked a state statute granting him a right to reply to a negative editorial. The U.S. Supreme Court articulated two reasons explaining its holding that such statutes are unconstitutional. First, they could act as a prior restraint on the press, so that if an editor knows that he may bear the expense of printing replies, he might decide to forego the critical editorial entirely.[64] The more relevant rationale is the second offered by the *Tornillo* Court:

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59. The issue of taxation is not addressed by this article, as it is beyond the article's scope.

60. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 493-95 (2002).

61. "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." U.S. CONST. amend. I.

62. Anderson, *supra* note 60, at 495.

63. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

64. *See id.* at 256-57 (recognizing the costs imposed on newspapers if forced to print replies from governmental agencies).

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.[65]

For *Tornillo* to apply to the *Times-Picayune*, the newspaper must demonstrate that society announcements are the end product of editorial judgment (i.e., falls within "function of editors"). Editorial judgment requires that something be added to the information.[66] Without this "something extra," the press is indistinguishable from other information providers in today's market. In a word, the Free Press Clause protects "news" where it may not protect merely entertainment, fiction, or other forms of expressive works.[67]

The question then reduces to the issue of whether or not social announcements constitute "news" in the sense required by the Free Press Clause. Determination of what qualifies as "news" can be problematic, but analysis should inquire whether announcements serve the intention of the Free Press Clause, which has been argued to be the protection of "activity that reflects independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes."[68]

The answer proposed here is that announcements do not typically satisfy these criteria. Contributing to this claim is the observation that the need served by the announcements is private and not public (they serve to buttress the couple's relationship by eliciting public recognition and support),[69] and that the purpose behind the newspaper's decision to publish such announcements may not be "non-self-interested" but, instead, relates to economic considerations either directly by charging publication fees or

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

66. Anderson, *supra* note 60, at 445.

67. *See* Bezanson, *supra* note 48, at 855 (arguing that works of fiction, history, poetry, entertainment and art are protected as speech but not as "press" publications). *See also Tornillo*, 418 U.S. at 259 (White, J., concurring) (declaring that "the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with *news and editorial content* is concerned") (emphasis added).

68. Bezanson, *supra* note 48, at 856.

69. *See supra*, Part II.

indirectly by generating an audience for its advertisers.[70] But the chief reason to claim that announcements do not serve the interests of the Free Press Clause is that the process of creating the announcement is usually devoid of *editorial* judgment.

The lack of an editorial opinion embedded in the publication of announcements is demonstrated by the fact that, at least in the case of the *Times-Picayune*, there is little or no "choice" in the decision to publish or as to the content of the announcement. The first is dictated by mechanical acceptance of materials that are properly and timely submitted, and the second is formulaic in its composition, requiring perhaps artistry but not subjective editorial judgment.

Justifying this characterization of the limited nature of society announcement composition is the following description given by the Editor-in-Chief of the *Times-Picayune*:

> After the form is filled out and submitted, a Times-Picayune editorial assistant writes an article announcing the wedding or engagement based upon the information contained in the form. After the article is drafted, an Assistant Editor of the Living Section checks the article against the form to ensure the accuracy of the article as well as its conformity with the Times-Picayune's format for such articles . . . .
>
> [The] Times-Picayune personnel determine the order in which information provided on the form will be presented in the article. In addition, information submitted which is not called for by the form or which is considered inappropriate or extraneous is not published. Articles of engagement announcements submitted too late to be published prior to the wedding date are not published; articles of wedding announcements submitted too late after the wedding date are not published. Articles which make inaccurate statements about the parentage of the engaged or wedded couple (*e.g.*, identifying a stepfather as a biological father) are not published. Articles which evidence no connection between the couple and the New Orleans area are not published. Until approximately three years ago, only articles announcing first marriages were published. And finally, only a wedding article or an engagement article, not both, is published for each couple.

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70. *See infra*, Part IV(A)(2).

> Occasionally, persons wishing to have articles published in a manner inconsistent with the policies described above have offered to pay for publication of the articles in the manner they desire. The Times-Picayune has refused to deviate from its policies under these circumstances and has advised such persons that desired announcements which do not conform to the Times-Picayune's policies for wedding and engagement articles can be published only as paid advertisements.[71]

Noticeably absent in this long description of the creation of published announcements are the very criteria necessary to qualify those announcements as news. First, no mention is made of any "choice" about whether or not to publish. That decision is based on mechanical application of established guidelines. Second, no deviations of form are tolerated in the section on wedding announcements, even if the party is willing to pay for the added expense, proof that editorial judgment has been eliminated from the process. All announcements, according to the *Times-Picayune* Editor, conform to this cookie-cutter production process. Whatever the virtues of this process, it demonstrably lacks the requisite editorial judgment to qualify the end product as "news" for the simple reason that judgment of any kind has been excised from the process. That lack of editorial judgment removes these announcements from the protections of the Free Press Clause.

2. Society Announcements Analogized to Commercial Speech

It would appear that no more editorial judgment goes into society announcements in newspapers such as the *Times-Picayune* than into their classified advertising. As cases such as *Pittsburgh Press* have held, the classified ads can indeed be the subject of governmental regulation. If society announcements can be further and explicitly analogized to the commercial speech of classified advertisements, the power of government to regulate their publication would be rendered more secure.

Speaking to this issue is the only appellate-level decision on a charge of illegal discrimination in access to a newspaper's society pages. *Cook v. The Advertiser Co.*,[72] a case from the

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71. Mem., *supra* note 7, at 5-6.

72. Cook v. The Advertiser Co., 458 F.2d 1119 (5th Cir. 1972).

Times-Picayune's own Fifth Circuit, rendered its decision on broadly similar facts to those presented in the NOHRC complaint. In *Cook* the plaintiff sued to have a Texas newspaper accept for publication his wedding announcement. He sought to have the announcement included on the white-only society page and "not the black page."[73] The Fifth Circuit held that it lacked jurisdiction "over the content and arrangement of the *society pages* of a newspaper"[74] and affirmed the lower court's dismissal of the complaint.

The *Cook* plaintiff based his complaint on a theory of contract. He argued that the paper's solicitation of material for the society page amounted to a standing offer that became binding when the plaintiff accepted that offer by submitting his announcement. The paper's subsequent refusal to honor this contract violated the federal law preventing racial discrimination in the enforcement of contracts.[75]

The Fifth Circuit found that no contract had been formed with anyone, black or white, because (1) there was no explicit agreement that every submission to the society page would be published, and (2) the paper "received no pecuniary consideration" for its publication of material on the society page.[76] Because "[t]here was no agreement to publish and there was no consideration received for any publication actually made," no binding contract existed between the parties.[77] The court pointedly never reached the First Amendment aspects of the case.[78]

The Fifth Circuit reached its result because "no pecuniary consideration" was tendered to the paper for publication of the announcement. As Louisiana lacks the consideration doctrine,[79]

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73. *Cook*, 458 F.2d at 1120.

74. *Id.*

75. 42 U.S.C. § 1981 (1994).

76. *See Cook*, 458 F.2d at 1122 (failing to reach the First Amendment issue).

77. *Id.*

78. *Id.*

79. *See* SAÚL LITVINOFF, THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE 68 (4th ed. 1997) (discussing option contracts).

> In connection with the contract of sale one article of the Louisiana Civil Code asserts that it is possible to purchase for "any consideration" the right or option to accept or reject an offer or promise to sell. That assertion allows the question whether the common law requirement of consideration has been introduced into the law of Louisiana in order to make an option valid. The answer is negative.

Id.

arguably the same result could not have been reached had the newspaper been located in that state, which operates under the alternative civil law theory of "cause." Further scrutiny of this question will be useful not solely because of its legal implications – after all, only Louisiana, of the fifty states, follows the civil law – but moreso because this discussion can bring to light why newspapers are motivated to publish these announcements at all, recalling the criterion that publication must be "non-self-interested" if the material is to be categorized as protected "news."[80]

a. Common Law Doctrine of Consideration

The *Cook* court found the lack of "pecuniary consideration" to be a fatal flaw in the plaintiff's argument that a binding contract existed between himself and the newspaper.[81] This doctrine of consideration has, according to one contracts scholar, "long been the bane of law students."[82] He synopsizes the Restatement's approach to contract enforceability as follows:

> 1. A contract is an enforceable promise (§§1 and 2);
>
> 2. With some exceptions (§17(2)), to be enforceable a promise must be supported by a consideration (§17(1));
>
> 3. A promise is supported by a consideration if it is bargained for (§71(1));
>
> 4. A promise is bargained for "if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." (71(2))[83]

"[T]o find that a commitment is legally enforceable on the

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80. *See supra*, Part IV(A)(1).

81. For a case where the exchange of consideration was found to create a binding contract, precluding a newspaper from later refusing to publish a political advertisement it had first accepted, see *Herald Telephone v. Fatouros*, 431 N.E.2d 171, 176 (Ind. Ct. App. 1982) (finding that "once a newspaper forms a contract to publish an advertisement, it has given up the right not to publish the ad unless that right is specifically reserved or an equitable defense to publication exists.").

82. RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW 159 (1995). *See also* James D. Gordon III, *A Dialogue about the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 987 n.2 (1990) (relating that "[c]onsideration is to contract law as Elvis is to rock-and-roll: the King."). Revisionists, however, have questioned Elvis's greatness. "They have wrestled with one disturbing issue: if Elvis is so great, how come he's buried in his own backyard – like a hamster." *Id.*

83. RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 653 (2d ed. 1999).

grounds that it is supported by consideration one must determine that it has been bargained for."[84] This assemblage of elements is precisely what the *Cook* court failed to find in the facts before them. The court's emphasis on the pecuniary consideration shows where it believed the primary failing to be: "Under the doctrine of consideration, *A*'s promise is enforceable only if *A* gets something of value in return."[85] The paper's offer was unenforceable because it got nothing of value in return for Cook's acceptance.

Significantly, "[n]ot every bargained-for thing counts as consideration. Even if it has value to the parties themselves, it must also have value in the eyes of the law."[86] While money is not the only form of consideration, it is a common and obvious instantiation of the required consideration, and one easily appreciated by courts. Because no money changed hands to run the wedding announcements, the court concluded that nothing of value had been exchanged, thus no bargain struck, and therefore no enforceable contract entered into.[87]

It is important to understand that consideration is not the same as motive. Why a promise is extended or accepted is distinguishable in this doctrine from the consideration bargained for in the contract.[88] Illustrating the distinction will tip my hand about the argument to follow: Suppose that the motive of the newspaper in offering to publish wedding announcements is to cultivate the goodwill of the readers in the community. Granting that motivation, the paper then solicits submissions for publication. If the newspaper charged a fee for publication, however nominal, the fee would be the required consideration to create an enforceable contract, but its motive remains the community goodwill and interest. If the newspaper does not charge a fee, it would still be motivated to solicit and publish the announcements even though it no longer received a consideration to perform this service. Without consideration – even with motive – the invitation to submit is not an enforceable promise to publish.

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84. BARNETT, CONTRACTS, *supra* note 83, at 653.

85. Gordon, *supra* note 82, at 1002.

86. *Id.* at 989-90.

87. Cook v. The Advertiser Co., 458 F.2d 1119 (5th Cir. 1972).

88. *See* BARNETT, CONTRACTS, *supra* note 83, at 668 (stating motive or inducing cause in contracts is consideration).

b. Civil Law Doctrine of Cause

Louisiana does not adhere to the doctrine of consideration outlined in the previous section. Instead, it applies a theory of cause.[89] The Civil Code defines *cause* as "the reason why a party obligates himself."[90] The official commentary denies what the doctrine of consideration explicitly asserts: "Under this Article, 'cause' is not 'consideration.' The reason why a party binds himself need not be to obtain something in return or to secure an advantage for himself."[91] The next sentence is especially important for present purposes: "*An obligor may bind himself by a gratuitous contract, that is, he may obligate himself for the benefit of the other party without obtaining any advantage in return.*"[92] In other words, the fact that the *Times-Picayune* did not receive "pecuniary consideration" for publication of announcements, even if fatal in a common law jurisdiction, is not especially relevant under the civil law.

Two cases illustrate the operation of the theory of cause in obligations. In *Bordelon v. Kopicki*,[93] Buyer and Seller executed a written purchase agreement for a house. Buyer then learned that a servitude prevented the building of an addition to the house, so he refused to close. The Seller subsequently sued for damages. The trial court ruled that the buyer must pay the seller the difference between the contract and the market price.[94] The Buyer appealed, arguing that he would not have bought the house if he had known of the inability to build the addition. The decision was affirmed because the buyer did not communicate his cause (the desire to add on) to Seller.[95] Note that, although *consideration* was exchanged, *cause* failed.[96] The buyer was obligated to make good the damages resulting from his failure to close not because consideration had changed hands (as might have been the reasoning under the common law), but because he had not made known his cause in buying the house.

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89. LA. CIV. CODE ANN. art. 1966 (West 1987) (stating that "[a]n obligation cannot exist without a lawful cause").

90. LA. CIV. CODE ANN. art. 1967, para. 1 (West 1987).

91. LA. CIV. CODE ANN. art. 1967, cmt. c (West 1987).

92. *Id.* (emphasis added).

93. Bordelon v. Kopicki, 524 So. 2d 847 (La. App. 3d Cir. 1988).

94. *Id.*

95. *Id.* at 849.

96. *Id.*

This rule is again central in *Carpenter v. Williams*.[97] Williams lived in Lafayette but commuted daily to Cameron, a trip of 110 miles each way.[98] His employer initially required him to move to Cameron. Seeking to comply with this order, Williams promised to buy a house in Cameron from Carpenter. Later, however, the employer rescinded the order to move and Williams in turn declined to buy the house. Carpenter sued for specific performance. Williams argued a failure of cause, rendering the contract unenforceable. The court reviewed the applicable law surrounding the rescission of contract due to error in cause,[99] which it summarized as follows: "In these cases the parties entered a contract assuming certain facts or conditions to exist. When the assumed fact or condition was found not to exist or did not come into existence even through the act of third parties . . . the contracts have been rescinded."[100] Applying this standard to the facts of the case before it, the court concluded

> that the principal, and only, cause or motive Williams had for entering into the buy-sell agreement with Carpenter was to comply with Transco's orders. We further find that Carpenter was aware of this fact. Thus, when Transco rescinded its order to Williams the cause or motive for entering the contract ceased to exist or failed and the contract became unenforceable.[101]

In both of these cases, the outcome hinged on whether or not the first party knew of the cause motivating the second party to incur the obligation. This requirement, according to Litvinoff, is embedded in the use of "reason" rather than "motive" in the codal definition of *cause*: "'reason' carries the connotation of something supposed to be understood . . . ."[102] The code requires only that the cause be understood, not that it be explicitly articulated: "An obligation may be valid even though its cause is not expressed."[103]

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97. Carpenter v. Williams, 428 So. 2d 1314 (La. App. 3d Cir. 1983).

98. *Id.*

99. Error as to cause is currently codified at LA. CIV. CODE ANN. arts. 1949, 1950 (West 1987).

100. *Williams*, 428 So. 2d at 1318.

101. *Id.*

102. LITVINOFF, *supra* note 79, at 99.

103. LA. CIV. CODE ANN. art. 1969 (West 1987). *See also* LA. CIV. CODE ANN. art. 1949 (West 1987) (stating that "[e]rror vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause *was known or should have been known to the other party*.") (emphasis added).

If the cause behind the newspaper's offer to publish is understood, it need not be expressed. Moreover, if that cause were understood, then a binding contractual obligation could arguably be formed with the submission of material in compliance with published instructions.

Cause creating a gratuitous contract such as that at issue here is illustrated by *Louisiana College v. Keller*.[104] A donor promised to contribute $500 to a college, provided that the college was established at the next legislative session. Although the condition was fulfilled, the donor refused to pay, alleging that there had been no consideration for the promise.[105] Holding the donor bound to honor his pledge, the court explained that:

> [A]n obligation, according to the Code is not the less binding though its consideration or cause is not expressed. We are not informed as to the consideration of this promise, by any thing on the face of the papers. It may have been the advantage the defendant expected to derive from the establishment of a college at his own door, by which he would save great expense in the education of his children, or it may have been a spirit of liberality and a desire to be distinguished as the patron of letters. Whatever it may have been, we see nothing illicit in it; nothing forbidden by law, and the promise binds him, if he consented freely, and the contract had a lawful object. *In contracts of beneficence, the intention to confer a benefit is a sufficient consideration.*[106]

Under the rule from *Keller*, it may be the case that even if the *Times-Picayune* had no other desire in making the offer to publish announcements than to be favorably viewed by the community or merely to perform a valued service to its community, then that desire would be sufficient to bind it to fulfill the agreement to publish. In that light, it may be dispositive that the *Times-Picayune* has itself identified its purpose in running the announcements: it is "a free service offered to our readers."[107]

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104. College v. Keller, 10 La. 164 (1836).

105. *Id.*

106. *Id.* at 167 (emphasis added).

107. The solicitation of announcements from the *Times-Picayune* reads in full as follows:

> Engagement photos and announcements must be received no later than five weeks before the day of the wedding; wedding photos and stories, no later than 10 calendar days after the wedding.

c. Applicability of *Cook* to the *Times-Picayune*

The *Times-Picayune* is a Louisiana newspaper, consequently subject to the civil law of that jurisdiction and not the common law of the other forty-nine United States. As discussed, contracts are enforceable in that jurisdiction not under a theory of consideration, but of cause.[108] Whereas *consideration* is the thing bargained for, *cause* is the primary reason one enters into the contract.[109] Setting aside for the moment the question of whether the paper in fact received consideration for its promise to run announcements, we can see that there may have been cause – a cause that was understood although not expressed – and as such the obligation to publish those announcements should be enforceable.

What might that obligation-creating cause be? At the very least, the newspaper has cause to extend the offer to publish announcements of this type in its desire to cultivate the goodwill of the community. The paper admits as much in its solicitation where it points out that the paper is providing a public service through these publications. As discussed in Part II, *supra*, public announcement of personal commitments plays an important role in the health of those relationships. The newspaper would be seen by its readers as providing a valued service, one for which the paper could anticipate the readers to be appreciative. Conceivably readers will buy the paper out of a sense of loyalty or out of a desire to read these items of social and community interest even if they are uninterested in the editorial content.

> A printed or typed announcement (please use all full names, no initials or nicknames) should be brought to The Times-Picayune Building, 3800 Howard Ave., New Orleans, or to any Times-Picayune bureau. Forms are available on request by calling 826-3440, but their use is not required. Office hours are 9:30 a.m. to 4:30 p.m. Monday through Friday.
>
> Engagement announcements must be signed by both the bride-elect and the prospective bridegroom, or by a parent of either. For further verification of the information, we also require each signer's daytime phone number.
>
> Photos should be 5-by-7-inch glossy prints, either color or black and white. No computer-generated prints or copies will be accepted. A photo may be of one person alone (either bride or bridegroom) or the couple together. It should be a clear, close-up shot of the face(s). Sorry, but no photos can be returned.
>
> We will publish only one announcement, either engagement OR wedding, with or without a picture. This is a free service offered to our readers. We cannot guarantee use of every photo or all information submitted.

TIMES-PICAYUNE (New Orleans), Oct. 25, 2002, at E4. Notably absent in this solicitation is any reservation of the right *not* to publish a submitted announcement.

108. LA. CIV. CODE ANN. art. 1967 (West 1987).

109. *Id.*

That consumer pattern in turn raises the readership above the level of those whose interest in the paper is largely informative and makes the paper more attractive to advertisers. By soliciting these materials, the newspaper can fill more pages and obtain greater advertising revenue, especially from businesses connected to the topics of the announcements – weddings, real estate agencies, and other providers of goods and services a newly-bonded couple could be expected to need.[110]

This goodwill may be gratuitous, but is not therefore non-self-interested. The community goodwill ultimately serves the self-interest of the newspaper and not the public. The offer to publish is not a gift, but a smart business decision given the customer base that most community-based newspapers wish to cultivate, equivalent perhaps to the "loss leaders" stores use to lure customers. The announcement here similarly serves the commercial self-interest of the paper, and not an editorial, public good function. While this distinction becomes stark in the civil law search for cause, it certainly describes the motivations of newspapers in common law jurisdictions as well, where it would tend to be obscured by those jurisdictions' attention to the pecuniary consideration.

The results, then, are two-fold. The first strictly pertains to the contractual elements of these complaints. Unlike the facts of *Cook*, most union announcements today are not a free public service, but rather paid advertisements.[111] That exchange of payment introduces the consideration absent in *Cook*, an absence the court found determinative. Although the contract argument of *Cook* has not been reasserted since that case, its reintroduction may not be completely unfeasible under the appropriate facts.

The *Times-Picayune* numbers among the minority of papers that still publish announcements for free, without "pecuniary consideration." By the foregoing analysis, the *Times-Picayune* might still be bound by cause to an enforceable obligation with someone who submits publication information. Yet we should also reconsider the *Cook* court's conclusion that there is no

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110. One estimate places the cost of the average wedding at $15,500, making the announcements section of great interest to advertisers. Neil G. Williams, *What to do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1037 (1995).

111. David Zeeck, *Same-Sex Announcements Not Yet Common in Newspapers*, NEWS-TRIBUNE (Tacoma, Wash.), Sept. 22, 2002, at A2.

consideration in the classic, common law sense. First, consideration need not be pecuniary, as the Fifth Circuit intimates, but need only be something of value.[112] The exchange of mutual promises, for example, can serve as consideration.[113] Moreover, the common law already enforces other promises without consideration, including "certain promises made in recognition of a benefit previously received by the promisor."[114] Past customer patronage, for example, in the form of newspaper subscriptions, could arguably count as a "benefit previously received" by the newspaper, and therefore constitute consideration. The point is that the doctrine of consideration is sufficiently problematic and confusing, riddled with inconsistencies and numerous exceptions such that finding consideration in the present facts – while not in the mainline of consideration theory because it does not involve an exchange of money for the service – is a possibility. A sympathetic court could find consideration in these facts, or at least recognize that the question is sufficiently nebulous to require the case go to trial for a full hearing.

The more important result concerns the proper classification of society announcements. If the motivation for a newspaper to publish announcements can be shown to be primarily economic in nature, then that fact – whether or not it suffices to constitute either cause or consideration – would support a conclusion that the announcements are not "news" deserving of free press protections. Announcements should be more closely analogized to the commercial speech of advertisers, in which case *Pittsburgh Press* would be more on point to the NOHRC complaint than would *Tornillo*. If announcements are not news, then regulations impacting their appearance cannot be argued to be interfering with the interests that the Free Press Clause was intended to protect[115] and that *Tornillo* was penned to preserve.

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112. *See* Gordon, *supra* note 82, at 990 (stating "[e]ven if it has value to the parties themselves, it must also have value in the eyes of the law").

113. *Id.* at 1002 (stating that the rule that mutual promises serve as consideration for each other is a common law paradox).

114. *Id.* at 1001.

115. The newspaper, to rebut the above argument, might look to the concurring opinion of *Cook*: "Mechanical layout is not a reliable indicator that the paper is not exercising some form of editorial discretion in deciding what to print." Cook v. The Advertiser Co., 458 F.2d 1119, 1124 (5th Cir. 1972) (Wisdom, J., concurring). Judge Wisdom goes on to say, "I see nothing to be gained by requiring a trial which might enable Cook to prove that the editorial techniques which lead to publication of

B. SOCIETY ANNOUNCEMENTS ARE "NEWS"

Although most announcements will fall outside the category of protected "news," some others will not. Some, such as the *New York Times*, treat society announcements as true articles, and the foregoing argument would not apply to these. This section considers whether, even in that situation, newspapers can be compelled to publish same-sex union announcements.

1. ANNOUNCEMENTS AS EXPRESSIVE SPEECH

The earlier argument was that society announcements do not rise to the standard of "news" because of the mechanical and formulaic method by which announcements are generated, a process devoid of editorial judgment and discretion. Other newspapers, however, treat their society announcements as they do any other article. The *New York Times* is one example, actually using reporters to interview selected couples rather than relying on submitted forms.[116] To the extent that process determines the classification of the product, then at least some society announcements will qualify as "news."

Some commentators would go even further, claiming that even where ordinary heterosexual announcements do not qualify as news, same-sex announcements will always belong to that category. These writers argue that anything openly gay is intrinsically a "message," even lacking an intent to communicate anything.

The U.S. Supreme Court considered the issue of unintended messages in *Boy Scouts of America v. Dale*.[117] In that case the Boy Scouts sought an exemption from a New Jersey public

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wedding announcements in the Advertiser are mechanical. Those stories are still news stories and they are not commercial advertising." *Id.* The problem with Judge Wisdom's analysis is that he conflates the terms of analysis of the Press and Speech Clauses. Having decided in *Cook* that announcements are not commercial speech, he implies that they are, by default, free press-protected news when they may be little more than general interest information that should be evaluated under the lesser standard of free speech.

116. One writer describes the notices this way: "Modelled on the [*Times*'] popular 'Vows' column, which has, each week since 1992, taken a particularly felicitous coupling and turned it into a soft-news story, these wedding announcements were courtship narratives in miniature, each, like a Jane Austen novel, ending at the moment when married life begins." Rebecca Mead, *Gay Old Times*, NEW YORKER, Sept. 2, 2002, at 31.

117. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

accommodations law that prohibited discrimination on the basis of sexual orientation. The state had interpreted that law to require the organization to reinstate a scoutmaster whose membership had been revoked after it became known that he was homosexual.[118] The Boy Scouts argued that *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[119] granted it the right to exclude homosexuals because admitting them would send a message of acceptance.[120] The Court sided with the Boy Scouts, arguing that Dale's mere presence was sufficiently communicative to send a message equal to the *Hurley* sign-carrying gay paraders.[121] On the principle that speakers should be allowed to control the message they send, the Court allowed Dale's exclusion from the organization.[122]

Nancy Knauer, agreeing with the outcome of *Dale*, articulated the "uniquely expressive character of the openly gay individual"[123] presumed by the Court. Both sides of the culture war, she argued, "strongly agree on the expressive and distinctly political value of openly gay role models – an openly gay individual sends a message of gay pride, encourages others to embrace homosexuality, and puts an ordinary face on homosexuality for the non-gay majority."[124] Because society has an embedded assumption of "heteronormativity," defined as "the largely unstated assumption that heterosexuality is the essential and elemental ordering . . . [principle] of society,"[125] any unapologetic presence of an "openly gay" individual indeed communicates a message, just as the majority in *Dale* concluded.

According to Knauer's thesis, the announcement of same-sex unions communicates a message in addition to the overt surface content, one that is not carried by heterosexual announcements. Consequently, same-sex union announcements will qualify as

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118. *Dale*, 530 U.S. at 645-46.

119. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

120. *Dale*, 530 U.S. at 647.

121. *Id.*

122. *Id.* at 654 ("[T]he presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.").

123. Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After* Boy Scouts of America v. Dale, 89 KY. L.J. 997, 997 (2001).

124. *Id.* at 1051-52.

125. *Id.* at 1020.

"news" in the sense that they contain an expressive message that under the holdings of *Hurley* and *Dale* a newspaper could not be compelled to carry. This section considers whether there exist policy grounds to carve an exception to these holdings, an exception that would require compliance with governmental anti-discrimination ordinances even when society announcements fall into the category of "news."

2. REGULATORY PRECEDENTS IN OTHER MEDIA

If the argument is that government may not require media to carry messages against their will, the response must begin with the realization that that kind of governmental control over editorial content is already exerted over other media, specifically broadcast media.

In *Red Lion Broadcasting Co. v. FCC,*[126] the U.S. Supreme Court upheld the FCC's "fairness doctrine" against arguments that it infringed broadcaster's First Amendment rights.

The fairness doctrine – repealed in 1987 – required that targets of personal attacks be given an opportunity to respond,[127] at the broadcaster's expense if necessary.[128] The Court justified the governmental interference in programming content by arguing that broadcast frequencies are a limited resource.[129] The government licenses the frequencies that remain public property.[130] Because frequencies are a limited resource, this "difference[ ] in the characteristics of the new media justify differences in the First Amendment standards applied to them."[131]

Motivating this conclusion is the "public debate" interpretation of the First Amendment. The public debate perspective presumes that a vital democracy requires an informed citizenry, and that the government has a role to play in assuring that citizens have access to the information and viewpoints necessary for the formation of intelligent political choices.[132] The *Red Lion* Court adopts this public debate

126. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

127. *Id.* at 373-74.

128. *Id.* at 377.

129. *Id.* at 383.

130. *Id.*

131. *Id.* at 386.

132. *See* Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1718-

understanding of the First Amendment when it pronounces that, in the case before it, "the right of the viewers and listeners, not the right of the broadcasters . . . is paramount."[133] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[134]

The scarcity of broadcast frequencies justifies the regulation of the licenseholders of those frequencies, allowing access not to all persons, but to all views. But scarcity is not the only rationale that the Court has invoked to regulate content in nonprint media. In *FCC v. Pacifica Foundation*,[135] the Court justified regulation of "indecent" programming not on the grounds that broadcast frequencies are scarce, but because broadcast programming is "uniquely pervasive."[136]

In a series of decisions,[137] the Court upheld "must-carry" provisions for cable television, again over protestations from media representatives that these regulations interfered with their editorial programming choices in contravention of their First Amendment rights.[138] The rationale for these regulations was derived from the threat cable posed to the viability of broadcast stations in markets where the cable network chose not to carry the local over-air programming.[139] The burden on cable programming was deemed minimal when considered against the interest in "preserv[ing] a multiplicity of broadcast stations for the 40 percent of American households without cable,"[140] again showing the Court's preference for the public debate interpretation of the First Amendment.

These examples demonstrate that the issue is not whether the government can interfere with the decisions about content made by publishers, but only when and to what extent that interference is appropriate. Against the background of these precedents, the question becomes whether the rationale for this regulation of nonprint media could encompass the print media.

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19 (1997) (describing the public debate model of the First Amendment).

133. *Red Lion*, 395 U.S. at 390.

134. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

135. FCC v. Pacifica Found., 438 U.S. 726 (1978).

136. *Id.* at 748.

137. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

138. *Id.* at 189.

139. *Id.* at 199.

140. *Id.* at 216.

The scarcity principle remains "the primary basis for upholding the constitutionality of broadcast regulation . . ."[141] despite being attacked by academic commentators[142] and having alternatives offered by the Court. Yet this rationale for subjecting broadcast but not print media to governmental regulation is today a fiction: almost any locality has far more broadcast outlets than it does newspapers, typically three public broadcast channels to only one daily newspaper.[143] If scarcity were truly the rationale for the differential regulation, then print media today should be regulated more heavily than broadcast so as to assure access to that limited resource to the widest possible public.[144]

If scarcity fails to justify the current distinction between media, then perhaps the regulatory discrepancy between them should be eliminated as well. That possibility raises the question of whether print should be regulated like broadcast, or broadcast protected from regulation like print.[145] Justice Douglas would extend to broadcast media the generous protections of the First Amendment currently enjoyed by print media.[146] Alternatively, the regulatory doctrine of *Red Lion* could be extended to include newspapers. All signs show an increased tendency to regulate broadcast media, including the internet, as shown by the creation of cable "must-carry" regulations, leading to the conclusion that if

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141. Logan, *supra* note 132, at 1697.

142. *Id.* at 1700-01 (acknowledging that "it is fair to say that the [scarcity] rationale 'has lost credibility in the contemporary legal literature'").

143. *Turner*, 520 U.S. at 207.

144. The economics of establishing a competing newspaper are today prohibitive. *See id.* at 211 ("[U]ntil these economic facts change, competing newspapers are not going to spring up, whatever the theoretical possibility that they might do so."). To the extent that the freedom of the press from regulation was originally based upon the presumed ease of entering the media marketplace with a competing message, that rationale is no longer valid. In this context, see *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 159 (1973) (Douglas, J., concurring) (stating that "in practical terms the newspapers and magazines, like TV and radio, are available only to a select few."). For a powerful argument for a right to access to the press, see Jerome A. Baron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

145. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 207 (1991) (stating that the Court has consistently treated broadcasting as something special).

146. *See CBS, Inc.*, 412 U.S. at 159.

a merging of regulatory schemes were to occur, print would come under the umbrella of the regulatory burden currently shouldered by broadcast media,[147] and not vice-versa.

One can, in fact, see some indications that government already mandates some content in print media. Courts and legislatures both behave as though local newspapers are resources at their disposal. A recent example from a court occurred in Ohio. "A couple who had sex on a popular lakeside beach . . . were ordered by a judge to apologize to shocked beachgoers *in newspaper advertisements*, or go to jail."[148] Here a court ordered a newspaper to carry content, although the paper was reimbursed for the costs by the content provider (i.e., the *in flagrante delicto* beachgoers). Is the newspaper free to reject the ad with the penalty of jail time for the couple? The court seems to think not, and the paper did not register an objection on principle, even if it had no objection to this specific ad.

Legislatures take similar liberties. Many versions of state "Megan's law"[149] specify notification by publication of offenders' pictures and addresses in local newspapers. Again, the First Amendment issue is whether papers are free to reject these statutorily mandated advertisements, perhaps feeling that they are not suitable subject matter for their audiences, even at penalty to the rejected submitter.

In sum, municipal or state ordinances prohibiting discrimination in society pages will insert government into some content decisions made by newspapers. But such regulation already pervades other media, and the fence currently distinguishing these media from the sacrosanct print medium is today irrelevant. At best, all media are equally scarce, and the smoothing of any discrepancy favors regulation of print instead of deregulation of broadcast media. Moreover, at least minor

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147. This merging of the media could not occur without some significant overhauls of existing rules. "*Tornillo* embraced a Fourth Estate checking model and rejected the right-to-know model for the print media. It thus stands as a bar to imposing broadcast-like obligations on the press." POWE, *supra* note 145, at 248.

148. *Pair Must Run Ads as Apology for Beach Sex*, SAN DIEGO UNION TRIBUNE, June 29, 2002, at A10 (emphasis added).

149. *See e.g.*, LA. REV. STAT. ANN. 15:542 (West Supp. 2003) (requiring community notification by convicted sex offenders); *see also* Hillard "Trey" Kelly, Comment, *Louisiana's "Megan's Law": The Need for a Principled Approach*, 58 LA. L. REV. 1169 (1998) (discussing the constitutionality of applying "Megan's Law" to ex post facto violations of sex offenses).

precedent already exists for just such governmental mandate of newspaper content. The only remaining issue, then, is whether the final step can be taken to include the prohibition of discrimination in the publication of society announcements, and on what basis.

3. NEWSPAPERS AS PUBLIC FORUMS

Charles Logan recognized the tenuous place of the scarcity rationale in First Amendment analysis,[150] and attempted to find a new justification for the regulation of broadcast media by resort to the public forum doctrine.[151] If he is correct, and public forum analysis can support the current practice of regulating broadcast media, then to the extent that newspapers serve the same role as a public forum, by extension, newspapers could be subject to the same kind of limited governmental regulation over aspects of their content.[152]

a. Public Forum Doctrine

Any suggestion that the public forum doctrine could aid this discussion seemingly crashes on the simple fact that the public forum doctrine applies only to *public* forums, and newspapers, as privately owned businesses, clearly fall outside this category. While this assumption captures the conventional understanding, the doctrine is sufficiently complex and problematic that such a simple assertion may belie the intuition binding the individual examples of the doctrine. The present section presents an alternative to this conventional property oriented approach to the public forum doctrine.

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[153] the Supreme Court reviewed the public forum doctrine from the Free Speech cases. The Court identified three kinds of forums and the level of judicial scrutiny appropriate to each.[154] First are the "places which by long tradition or by government fiat have been devoted to assembly and debate, [wherein] the rights of the

150. *See* Logan, *supra* note 132, at 1704-05 (pointing out that courts continuously decline to endorse the scarcity rationale).

151. *See id.* at 1714 ("The public forum doctrine thus provides an independent basis for upholding broadcast regulation under the First Amendment.").

152. In fairness to Logan, he would probably not support this extended application of his thesis. *See id.* at 1714-15.

153. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

154. *Id.* at 45-47.

state to limit expressive activity are sharply circumscribed."[155] Speech in this forum can be limited only by "regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[156]

At the other extreme is the nonpublic forum that "the State may reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[157] Between the traditional and nonpublic forums are the "limited public forums." These are properties that are not traditional public forums, but ones that the state can open to serve that purpose. This decision is discretionary, but as long as the forum exists the state "is bound by the same standards as apply in a traditional public forum."[158]

Robert Post has described the problematic nature of the public forum doctrine.[159] The problem with contemporary public forum doctrine, Post decided, is its reliance on a property distinction that lacks any articulated relationship to the First Amendment principles at issue.[160] The more meaningful vector of analysis in public forum cases has instead been

> whether a resource is subject to a kind of authority 'like' that characterized by the government's relationship to a newspaper editorial, which is to say like that involved in the *governance* of the general public, or whether it is subject to a kind of authority 'like' that characterized by the government's control over the internal management of its own institutions, which is say to the authority of *management*.[161]

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155. *Perry*, 460 U.S. at 45.

156. *Id.*

157. *Id.* at 46.

158. *Id.*

159. *See generally* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987) (offering a fundamental reappraisal of the origins and purposes of the public forum doctrine). Other scholars have similarly critiqued the public forum doctrine. *See also* Steven G. Gey, *Reopening the Public Forum: From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998) (suggesting various ways the public forum doctrine could be revised to be more speech-protective).

160. Post, *supra* note 159, at 1777.

161. *Id.* at 1782 (emphasis added).

If the government's relationship to the forum is "managerial," then the deferential level of scrutiny for nonpublic forums is appropriate; if, however, "the government exercises the authority of governance over a resource which a member of the general public wishes to use for communicative purposes, the resource is a public forum."[162]

In combination, Logan's and Post's arguments produce the following result: media can be regulated by the government to the extent that they are subject to the public forum doctrine. "Public" refers not to governmental ownership, but rather to a relationship of governance over the resource. The state clearly has a governing relationship over newspapers, as decisions such as *Ragin* and *Pittsburgh Press* demonstrate. Therefore, newspapers can be regulated by government under the public forum doctrine in a way that will assure nondiscriminatory access to the society pages. If a newspaper chooses to publish announcements, it cannot restrict those announcements on the basis of the kind of announcement that it is.[163]

b. Newspapers as "Quasi-Public"

Newspapers would fall under the public forum doctrine if "public" is understood in Post's nonconventional sense. The same result, however, can be achieved by bringing newspapers into the more ordinary understanding of what kinds of things qualify as "public."

Private property subject to the burdens normally associated with public properties fall into the category of the *quasi-public*. A "quasi-public" corporation is defined as a "for-profit corporation providing an essential public service."[164] Examples of typical quasi-public entities include banks,[165] hospitals,[166] and utilities.[167] Classification as a quasi-public entity entails that the corporation, despite being privately owned, is subject to greater

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162. Post, *supra* note 159, at 1717.

163. For example, the newspaper could not restrict announcements according to the messages that the announcement may be thought to communicate.

164. BLACK'S LAW DICTIONARY 344 (7th ed. 1999).

165. *Id.* at 139.

166. Valley Hosp. Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969 (Alaska 1997).

167. BLACK'S LAW DICTIONARY 344 (7th ed. 1999).

governmental regulation due to its function to provide "an essential public service."

Especially if the public debate interpretation of the First Amendment is adopted, it is clear that the newspaper provides just such an essential public service. The healthy maintenance of our participatory democracy requires an informed citizenry. The role of the newspaper within the community is to foster the necessary debate, and to provide the vital information about the community, the nation, and the world that will allow the reader to form intelligent opinions about topics of public interest. If that description of the newspaper's role is valid, then the newspaper provides a service essential to the public good, and consequently qualifies as a quasi-public entity.[168] If that result can be sustained, then as a consequence of this status newspapers can be regulated to assure access to this forum on a nondiscriminatory basis, even as to the society pages.

Several courts have ruled that newspapers have the quasi-public status argued here. In *Herald Co. v. Seawell*,[169] the court, when considering a derivative suit over the treatment of stock, had this to say:

> A corporation publishing a newspaper such as the Denver Post certainly has other obligations besides the making of profit. It has an obligation to the public, that is, the thousands of people who buy the paper, read it, and rely upon its contents. Such a newspaper is endowed with an important public interest . . . . The readers are entitled to a high quality of accurate news coverage of local, state, national, and international events . . . . Because of these relations with the public, a corporation publishing a great newspaper such as the Denver Post is, in effect, a quasi-public institution.[170]

The earlier case of *Uhlman v. Sherman*[171] considered the issue even further. *Uhlman* concerned a complaint by a businessman that the community newspaper had refused to accept his

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168. But note Justice Potter's skepticism on this point when he mused whether "[t]he press should be relegated to the status of a public utility." Potter Stewart, *"Or of the Press,"* 50 HASTINGS L.J. 705, 710 (1999).

169. Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

170. *Id.* at 1094-95.

171. Uhlman v. Sherman, 31 Ohio Dec. 54 (1919), 1919 WL 1009, at *1 (Ct. Com. Pl. Ohio Sept. 1919).

advertisement. Relying in part upon the conclusion from the U.S. Supreme Court that "'[p]roperty . . . does become clothed with a public interest, when used in a manner to make it of public consequence and affect the community at large,'"[172] the judge addressed the claim that the newspaper was "so 'affected with public interest' that it is a *quasi* public corporation."[173] In holding that the newspaper that has opened its pages to advertising had no right to discriminate against a submission that complied with its published criteria, the court found that:

> [T]he growth and extent of the newspaper business, the public favors and general patronage received by the publishers from the public, and the general dependence, interest and concern of the public in their home papers, has clothed this particular business with a public interest and rendered them amenable to reasonable regulations and demands of the public.[174]

Seawell and *Uhlman* demonstrate the reasonableness of the treatment of newspapers as quasi-public corporations. In that circumstance, the newspaper could not discriminate against persons who comply with its submission criteria, especially where local laws and ordinances expressly forbid that form of discrimination. At an even more general level, the status of a newspaper as a quasi-public entity removes the largest obstacle to the application of public forum doctrine to these media, that they are privately owned and are therefore not "public."

V. FORMAL RESPONSE OF THE *TIMES-PICAYUNE* TO THE NOHRC COMPLAINT

The preceding sections provide the legal background against which the formal response of the *Times-Picayune* to the NOHRC discrimination complaint can be assessed. This section describes the arguments offered by the *Times-Picayune* hoping to obtain a temporary restraining order to prevent the NOHRC from investigating the complaint of discrimination.[175]

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172. *Uhlman*, 1919 WL at *4 (quoting Munn v. Illinois, 94 U.S. 113 (1876)).

173. *Id.* at *2.

174. *Id.* at *6.

175. The author queried the *Times-Picayune* whether it still stood by its arguments as articulated in its Memorandum, or whether subsequent events—such as the creation of the Vermont civil unions and the decisions by many other papers to publish such announcements – had caused it to reconsider its position. No reply was ever received.

In order to obtain a TRO, the petitioner must demonstrate, among other criteria, that he is likely to succeed on the merits. Its first argument was that *Tornillo* "is dispositive" because Amoss exercised his "editorial discretion not to publish an article announcing Ms. Nehring's and Ms. Bird's commitment ceremony."[176] The apparent soundness of this argument plays upon a mischaracterization of the facts. At issue is not "an article," implying that reporters have interviewed the couple and composed an original account – as is the process at the *New York Times*[177] – but only a clerical transcription from a submitted application, as described by Amoss in his affidavit. Indeed, the newspaper might not invest even this degree of effort. The application form for announcements invites the submitter, in lieu of providing the raw data, to "prepare your own article using an announcement in the Living Section as a guide."[178] The announcements at issue fall far short of an "article," and of the editorial news discussed by *Tornillo*.

The *Times-Picayune* next cites to *Treanor*,[179] which found a newspaper not to be public accommodation for purposes of the Americans with Disabilities Act. As already discussed,[180] this outcome depended upon the statute's use of an illustrative list to define *public accommodation*, and the inability of the court to analogize newspapers to any item on that list. That problem does not exist in the New Orleans public accommodation ordinance applicable to the *Times-Picayune*.

The *Times-Picayune* also attempts to minimize the relevance of *Pittsburgh Press*[181] by concluding that it "has no relevance whatever."[182] According to the *Times Picayune's* lawyers, that case "merely stands for the narrow proposition that the state has limited authority to restrain the publication of purely commercial speech . . . which is related to illegal activity."[183] This presents a

176. Mem., *supra* note 7, at 9.

177. Margery Eagan, *New Week's Times: Mr. Rich Weds Mr. Famous*, BOSTON HERALD, Aug. 25, 2002, at 13.

178. Mem., *supra* note 7, Exhibit 1.

179. Treanor v. Washington Post Co., 826 F. Supp. 568 (D.D.C. 1993), *cited by* Mem., *supra* note 7, at 10.

180. *See supra*, Part III(A).

181. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

182. Mem., *supra* note 7, at 11 n.5.

183. *Id.*

shallow reading of the case. The speech at issue in *Pittsburgh Press* was not the commercial speech of advertisers, but the noneditorial speech of the newspaper when it chose to segregate employment ads into sex-specific columns.[184] The suit was not over *employers* illegally advertising only to one sex, but over the *newspaper* sending the message that some jobs are appropriate to only one sex. This speech is only "commercial speech" in the sense that it is not editorial speech, and thus it was not protected by the Free Press and Free Speech Clauses. But if being noneditorial speech is enough to classify it as commercial speech, as the *Times-Picayune* argues to be the meaning of *Pittsburgh Press*, then by that same standard union announcements, also not being editorial speech, must also be commercial speech for these purposes.[185] If "commercial speech" can stretch to include the layout of the commercial speech of others, then it can also include speech that the paper prints for its own economic self-interest. Assertions by the *Times-Picayune* to the contrary, notwithstanding, *Pittsburgh Press* (and not *Tornillo*) is the dispositive case for the NOHRC complaint.[186]

These are the only arguments marshaled by the *Times-Picayune* to demonstrate why it is likely to prevail on the merits of the complaint lodged against it, and why, therefore, it deserves a TRO against the NOHRC to prevent it from investigating further into the alleged discrimination. Against the background of the foregoing sections, the newspaper's arguments seem surprisingly thin.[187]

The primary shortcoming of the *Times-Picayune* arguments is its failure to consider whether any special legal or constitutional issues are raised by the fact that these are *announcements* that are being contested, and not, as most of the cited cases have considered, editorial articles, opinions, or straight commercial advertisement. The *Times-Picayune*

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184. *See supra* Part III(B).

185. *See supra* Part IV(A)(2)(c).

186. The remainder of this section of the Memorandum concerns the question of whether the *Younger* doctrine should apply in this case. The *Younger* doctrine holds that a federal court should abstain from interfering in state proceedings of any kind if certain conditions apply. Mem., *supra* note 7, at 12. Because this issue is not germane to the present discussion, it will not be considered further.

187. The complaint against the *Times-Picayune* was withdrawn by the plaintiff before a court had an opportunity to rule on the merits of the newspaper's memorandum.

assumes that announcements are editorial when, in fact, its own description shows this not to be the case. But neither are they commercial speech as conventionally understood because they propose no economic transaction. Yet announcements must either be analogized to one or the other, or a new hybrid category needs to be recognized. In either case, the arguments presented in the *Times-Picayune's* Memorandum fail to recognize the subtlety of the subject matter it discusses.

VI. CONCLUSIONS

Newspapers appear increasingly willing to allow gay couples equitable access to their society pages. Even *The Oregonian*, the newspaper whose efforts to resist the demand for publication of a same-sex union announcement produced the only court opinion on the issue, has capitulated and agreed.[188] Such progress was unimaginable even one decade ago. But of the estimated 1600 metropolitan newspapers, only about 144 are known to have formally opened their announcements sections to gay men and lesbians. Many will certainly follow the example set by the *New York Times*. But others will remain adamant in their refusal, and these can expect legal action by the denied parties. Because public recognition is so very important, it is worth the energy and resources to compel newspapers to publish announcements on a nondiscriminatory basis.

Whether this outcome can be achieved depends on a collection of facts specific to each instance in which the problem arises. The threshold consideration is whether there exists a public accommodations law that prohibits discrimination on the basis of sexual orientation, and whether that law can be applied to newspapers. If that criterion is satisfied, the next step asks how announcements in that newspaper are to be classified, as protected editorial news or as noneditorial speech analogized to comparatively unprotected commercial advertising.

One criterion to make this distinction will be the degree of editorial judgment exercised in the creation of the announcement. If little judgment is exercised, then the announcement should be excluded from the editorial speech that the Free Press Clause and

188. *Ore. Paper to Print Same-Sex Unions*, ASSOCIATED PRESS, Oct. 27, 2002.

Tornillo are intended to protect, and the announcements should be subjected to anti-discrimination regulation by public accommodations laws.

In other environments, however, society announcements will qualify as news because they do evidence editorial judgment in their creation, requiring a different analysis. Such newspapers should be construed to be quasi-public corporations, and, therefore, subject to scrutiny as public forums. Here again, the newspapers should be found to be vulnerable to reasonable regulation of generally applicable anti-discrimination regulations.

Most of the arguments that newspapers expect to shield them from this obligation, although usually unquestioned, are not as unquestionable as they might hope. Some newspapers, such as the *Times-Picayune*, will be especially vulnerable to government oversight because of the locally variable conditions that define public accommodations to include newspapers and because their internal procedures minimize the editorial judgment involved in such announcements. Specifically, they publish all that they receive and compose the announcements according to routine formula or even take the announcements directly from the submitters. Others, concededly, will be more protected on these considerations. They exist in jurisdictions whose public accommodation laws cannot be extended to include newspapers; they publish announcements only on a genuinely selective basis, and the announcements that they do publish are true articles composed by reporters. The *New York Times* is an example of a newspaper inhabiting this end of the spectrum, adding to the irony that it should be this newspaper that has led the way, since it, among all other papers, was particularly free to rebuff the request.

Finally, whether any particular newspaper can be compelled to accept these announcements is a fact intensive inquiry, not one to be decided as a matter of law. Motions for summary judgment or a temporary restraining order should be refused. The facts must be developed in full for each individual environment before

a just determination can be rendered. No longer should newspapers expect to rely on abstract and poorly understood constitutional principles to shield them from a demand that they treat all members of their community on a fair and equitable basis.[189]

189. The issues analyzed in this comment are examined in greater detail in *Same-Sex Union Announcements: Whether Newspapers Must Publish Them, and Why We Should Care*, 68 BROOK. L. REV. 721 (2003).