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MODERN MEDIA AND THE FIRST AMENDMENT: REDISCOVERING FREEDOM OF THE PRESS

Donald E. Lively*

Abstract: Freedom of the press, like other constitutional guarantees is not an absolute. Nor does it have the same meaning for all media. For more than a century after the constitution was framed and ratified, the press was coextensive with publishing. Over the course of the twentieth century, electronic media have emerged and extended the contours of the press. At the same time, however, liberty of the press has developed in idiosyncratic terms that have fostered a First Amendment hierarchy. While print media continue to be afforded maximum constitutional security, newer communications methodologies have been more susceptible to official management and control. Broadcasting, although the dominant mass medium, is the least protected segment of the press. The diminished First Amendment status of radio and television reflect dubious assumptions about their scarcity and impact that, especially given the advent of even newer media and sources of competition, are increasingly obsolete. As constitutional decisions concerning emerging media represent a forced choice between respective models for print and broadcasting, the risks to traditional concepts of editorial autonomy have compounded. Particularly as the diluted constitutional standards have become accepted for the nation's most pervasive medium, the danger is that oversight rather than freedom will become habitual and normative rather than exceptional. This Article suggests that constitutional and general policy interests would be better served by foregoing balkanization and dilution of First Amendment principles in favor of universal standards reflecting traditional assumptions that minimize official monitoring and management of the press.

Broadcasting over the past half-century has become the nation’s dominant mass medium. Radio and television’s penetration into the modern information marketplace is nearly universal.1 The potential of newer media such as cable is bounded by investment and capitalization requirements.2 Access to older media such as newspapers and magazines remains conditioned by unit costs and literacy require-

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1. In 1992, a total of 9,572 radio and 1,136 VHF and UHF television stations operated commercially in the United States. Summary of Broadcasting and Cable, BROADCASTING, March 9, 1992, at 52. Radio service in 1988 reached 99 percent of the nation’s households, which contained an average of 5.6 radios per home. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, No. 919, at 556. Television service was received in 98.2 percent of the nation’s households, which averaged 2.0 television sets per home. Id. Cable in 1989 had penetrated 56.4 percent of the nation’s television households. Id. Daily newspaper circulation in 1990 was 63 million and thus had a per capita exposure rate of .251. Id.

2. Cable systems require relatively high start-up costs for wiring a community. Militating against universal cable service are the possibilities of unprofitable returns from investment in rural areas and the emergence of newer technologies, such as multipoint distribution service (MDS), which may provide channel multiplicity in urban areas without expensive wiring costs.
ments. Broadcasting thus seems destined to retain its primacy into the foreseeable future.

Despite and perhaps because of its prominence, the United States Supreme Court has determined that "of all forms of communication, it is broadcasting that . . . receive[s] the most limited First Amendment protection." This appraisal preceded any attention by the Court to whether newer media, specifically cable television, had First Amendment status. Subsequent jurisprudence has revealed that cable not only is constitutionally protected, but may have more expressive latitude than radio or television. As a consequence, programming that may be identical or at least displayed on the same terminal is distinguished for regulatory purposes on the basis of how it was transmitted.

Ordinarily, relative influence or effectiveness of expression is not an apt consideration in determining freedom of speech. To account for such factors would result in constitutional security only for ineffective or inconsequential expression. The diminished constitutional status of broadcasting, however, results in a deviation from such First Amendment norms. It also establishes a model that competes with traditional First Amendment precepts for purposes of determining the meaning of press freedom for emerging media.

For a discussion of cable economics and other new media, see Donald E. Lively, Modern Communications Law 257-87, 527-29 (1991).

3. Expenditures of money, time and effort establish costs that some "may not be able to afford." FCC v. Pacifica Found., 438 U.S. 726, 775 (1978) (Brennan, J., dissenting). Literacy is a threshold requirement for access to the print media.

4. Id. at 749 (upholding federal regulation of indecent programming).


6. From a viewer's perspective, it is unlikely that broadcast and cable transmissions are significantly distinguishable. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), cert. denied, sub nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986) ("table and broadcast television appear virtually indistinguishable" to viewer).


8. Telecommunications Research, 801 F.2d at 508.
Constitutional analysis of broadcasting was obsolete even when the scarcity premise was introduced as a basis for content regulation. As new media continue to evolve and expand, however, the selective attention to and limitation of broadcasting seems even more anachronistic and counterproductive. During the nation’s first century, official editorial oversight was exceptional rather than normative. The emergence of new media in the republic’s second century presented an opportunity for reconsidering and eventually delimiting press freedom. As the nation courses into its third century, and especially as evolving media integrate the capabilities of multiple communications technologies, a fundamental constitutional choice emerges between analytical models that respectively prohibit and favor official management of the information marketplace. The purpose of this Article is to (1) review the conventional wisdom with respect to regulation of broadcasting; (2) demonstrate how the managing of public interests in broadcasting has proved to be a treacherous exercise and unworthy model for media regulation; and (3) suggest that constitutional standards and analysis should be guided not by medium-specific standards but by First Amendment norms that nonetheless may account for unique problems presented by a particular communications methodology.

I. HISTORICAL OVERVIEW

Reduction of radio and television’s First Amendment interests is grounded historically in concern that broadcasting is a scarce medium. Nearly a decade after the Communications Act of 1934 was enacted, the Supreme Court recounted broadcasting’s chaotic formative years
and identified what it considered to be "certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody."\(^{13}\) In articulating the scarcity rationale as a basis for federal regulation of radio and television, the Court emphasized that governmental authority was not limited to establishing a rational allocation scheme for broadcast frequencies.\(^{14}\) It thus determined that the Federal Communications Commission (FCC) not only could direct traffic but could take into account its composition.\(^{15}\)

A quarter of a century later, the Court alluded to the scarcity premise in refusing to recognize "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."\(^{16}\) In so doing, it introduced as an overarching constitutional interest the public's "collective right to have the medium function consistently with the ends and purposes of the First Amendment... which is paramount" to the rights of broadcasters.\(^{17}\) Scar-
city, which originally had justified regulation to create order out of confusion, thus became a basis for content control calculated to promote First Amendment values of diversity and fairness.\(^{18}\)

Attention to these constitutional goals engendered what even the Court acknowledged to be an "unusual order" of First Amendment interests.\(^{19}\) In identifying a new set of constitutional rights and elevating them above the editorial freedom of broadcasters, it established a dubious analytical predicate. The Court in other contexts has acknowledged that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the constitution."\(^{20}\) Reaction to

\(^{13}\) National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943) (noting that regulation was essential to ensure that "potentialities of radio were not to be wasted").

\(^{14}\) Id. at 217.

\(^{15}\) Id. at 215–16 (FCC is more than a "traffic officer, policing the engineering and technical aspects of broadcasting").

\(^{16}\) Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969) (upholding fairness doctrine pursuant to premise of spectrum scarcity).

\(^{17}\) Id. at 390.

\(^{18}\) Fairness regulation, including provisions for balancing of controversial public issues and replies to personal attacks and political editorials, was premised upon the notion that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." Id.

\(^{19}\) Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) (spectrum scarcity necessitates "an unusual order of First Amendment values").

judicial delineation of fundamental rights pursuant to the Fourteenth Amendment almost invariably elicits criticism that the Court has "creat[ed] rights out of whole cloth that are not in the constitution." 21 Such review, however, at least attempts to discern what is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." 22

Introduction of a paramount public right capable of trumping editorial freedom was the function of no such analytical limiting principle. Although perhaps a constitutional interest or even, arguably, a compelling concern, public access to or receipt of diverse information is not provided for by a text that concerns itself with editorial discretion. 23 What the Court has referred to as an "unusual order" is a euphemism for turning the First Amendment on its ear.

Especially problematic has been the concept of scarcity insofar as it is selectively applied to broadcasting. As one appeals court has noted, scarcity is a universal phenomenon. 24 It also, at least arguably, is a more profound reality in the print media, where content regulation considered fit for broadcasting has been rejected as constitutionally inapt. 25 Given their status as an endangered species, major daily newspapers receive preferential treatment under the antitrust laws, which evokes complaints that First Amendment interests are actually undermined. 26

21. See Ronald Brownstein, With or Without Supreme Court Changes, Reagan Will Reshape the Federal Bench, 49 NAT'TL J. 2338, 2341 (1984) (noting criticism of fundamental right to elect abortion on grounds that identification of it "creat[ed] rights out of whole cloth that are not in the Constitution").


23. The text of the First Amendment refers to "freedom of the press" rather than its intended consequences which may include diversity of expression. U.S. CONST. amend. I.


25. Even when spectrum scarcity was constitutionally approved as a basis for fairness regulation in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), the sum of daily newspapers was 1,838, contrasted with a total of 6,519 radio stations and 862 television stations. U.S. DEPT. OF COMMERCE, supra note 1, at 556; U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, No. 932, at 560.

26. The Newspaper Preservation Act allows competing newspapers to merge their production, advertising and business operations when one of the publications is in probable danger of economic failure. Newspaper Preservation Act, 15 U.S.C. §§ 1802(2), 1803(b) (1988). The resultant combines are exempt from antitrust laws and have been challenged, albeit unsuccessfully, on grounds they effectively prevented or deterred competition. See Committee for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 482–83 (9th Cir.), cert. denied, 464 U.S. 896 (1983) (claim that antitrust exemptions diminished First Amendment interests rejected on grounds they "lacked substantial merit"); Bay Guardian Co. v. Chronicle Publishing Co., 344 F.
A common and more pertinent characteristic of all mass media is the reality that the primary impediment to ownership and operation is the requirement of substantial capital. Modern jurisprudence has yet to factor in that reality, even as the economic and competitive realities of broadcasting have dampened investor and entrepreneurial interest in radio and television. In the meantime, new rationales for limiting the First Amendment status of broadcasters have materialized. Unlike regulatory premises that were intended to enhance diversity, concern with the medium's pervasive nature and accessibility to children have been used to limit expressive pluralism. Although the "unusual order" and its attention to diversity is confounded by such content limitation, recent jurisprudence suggests persisting prioritization of the right to receive rather than disseminate information. In subscribing to the scarcity principle, the Court indicated it would reconsider if future circumstances warranted reevaluation. Acquired habit has indicated a capability of becoming established custom, however, at the expense of constitutional principle.

II. MEDIA CHARACTERISTICS AND CONSTITUTIONAL INVERSION

Broadcasting's use of what is characterized as a scarce public resource has had uniquely profound constitutional implications. Because broadcasting frequencies are finite and considered within the


27. Relevant jurisprudence maintains that, in theory, anyone can publish, and that the primary impediment to doing so is economic reality. See Miami Herald Publishing Co. v. Tornillo, 412 U.S. 241, 250–52 (1974). Even in broadcasting, persons otherwise interested in obtaining a license may be precluded by officially prescribed financial qualifications. See Financial Qualifications, 45 Rad. Reg. 2d 925 (P & F 1979) (prospective licensee must have resources to operate station for three months without any advertising revenue).

28. The diminished profitability of broadcasting has prompted the FCC to raise ownership caps from twelve AM and twelve FM stations nationwide and no more than one AM and one FM station in a single market to thirty of each total and up to six in a single market. Joe Flint, Radio’s Magic Numbers, BROADCASTING, March 16, 1992, at 4, cols. 1–3.


32. Tradition and custom may impede objective assessment of constitutional requirements. Official segregation was upheld, for instance, pursuant to a sense that it merely reflected established customs and usage. Plessy v. Ferguson, 163 U.S. 537, 550 (1896), overruled by, Brown v. Board of Educ., 347 U.S. 483 (1954). Overlooked was the ascertainable reality that such a system established a dominant class, grounded in the ideology of white supremacy, that defeated constitutional interests in civil equality. Id. at 560 (Harlan, J., dissenting).
public domain, government has been allowed “to tell some applicants that they could not broadcast at all because there was room for only a few.” 33 From allocational realities requiring selection of licensees in a competitive process, and consequent exclusion of some applicants, has followed the proposition that “it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” 34

The distinction between broadcasting and print represents a crucial departure point in charting the constitutional status and protection of a mass medium. Such differentiation is relatively recent in its formalization but discernible in early responses to the emergence of mass media as an industry. As new communications methodologies began to evolve in the early part of this century, the Court’s initial response was wariness. 35 Such caution with respect to the advent of motion pictures translated into a refusal to recognize the medium as part of the press. By the middle of the century, the Court acknowledged that “expression by means of motion pictures is included within the . . . guaranty of the First and Fourteenth Amendments.” 36 This determination, however, denoted an analytical beginning rather than an end point. The Court thus related that even if constitutionally protected, “each [new medium] tends to present its own peculiar problems” that justify variances in First Amendment standards. 37

The focus upon distinguishing characteristics, rather than functional similarity, has engendered a First Amendment hierarchy for the press analogous to the ranking of expression. In the freedom of speech context, expression is classified and protected according to its perceived value. 38 For freedom of press purposes, media are categorized

34. Id.
35. See Mutual Film Corp. v. Industrial Comm’n, 236 U.S. 230, 244 (1915) (motion pictures “not to be regarded . . . as part of the press of the country”).
and ranked pursuant to identification of unique problems. Among modern mass media, broadcasting is the least protected, print is the most secure, and cable is in between. Characteristics of broadcasting identified as constitutionally distinguishing, however, are not necessarily unique.

The Court has recently reminded that "[w]e have long recognized that "[b]ecause of scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." Identification of the supposedly peculiar characteristic of scarcity has been the basis for both structural and content control in radio and television. The FCC has required and the Court has upheld, for instance, fairness regulation, ownership ceilings and minority preferences in the licensing process on grounds that it is necessary to manage the interests of diversity.

If justified only on grounds of using a scarce public resource, scarcity-based regulation should logically extend to other mass media. Newspapers and magazines, for instance, distribute their product by


39. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (the departure point for identifying constitutional status of broadcasting is the principle that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952) (the departure point for identifying constitutional status of motion pictures is the principle that each medium "tends to present its own peculiar problems"); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1448 (D.C. Cir. 1985), cert. denied sub nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986) (the departure point for identifying constitutional status of cable television is the principle that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them" (quoting Red Lion Broadcasting, 395 U.S. at 386)).

40. See FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("governmental regulation of this crucial process [of editorial discretion] can[not] be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time"); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-95 (1986) (cable shares characteristics of both print and broadcast media).

41. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009-10 (1990) (upholding minority preferences in licensing process pursuant to scarcity premise and concern with content diversity).

42. See Red Lion Broadcasting Co., 395 U.S. at 367 (upholding fairness regulation).


use of public highways, street corners and especially newsstands and
newsracks that are subject to zoning and placement controls. Modern
production and distribution processes also implicate the airwaves and
allocation of satellite time for transmitting the editorial product to dis-
tant printing facilities. Scarcity is also a phenomenon with respect to
cable insofar as pole attachment space is limited and subject to com-
peting uses by utilities and, where competition is present, by other
cable companies.45

The notion of scarcity, while not unique to any medium, may pres-
ent special problems that merit customized attention. Analysis of
such problems, however, requires sensitive appraisal rather than
wholesale judgment. Licensing systems for the press, for instance,
generally have been disfavored as a constitutionally impermissible
form of prior restraint.46

Although such control is presumed to be unconstitutional and sub-
ject to a heavy burden of justification,47 a compelling argument exists
with respect to broadcasting that spectrum scarcity requires a rational
allocation scheme for distributing frequency access and use. A pre-
regulatory history of chaos and confusion, ensuing from ungoverned
competing uses, provides support for at least that governmental inter-
est and involvement.48 Similarly, cable franchising may be justified by
limited pole space and concern for disruption of other public interests
such as efficient use of thoroughfares and rights of way and aesthet-
icas.49 Except perhaps for content-neutral vending licenses that limit
street and sidewalk congestion, the interest in managing the distribu-
tion of printed information seems neither extensive nor profound.
Although such common sense distinctions among media exist, and
provide a reasonable basis for regulatory variances, constitutional
analysis has extended the differentiations beyond the point of logic.
Regulation promoting content diversification, for instance, was upheld

(franchising city refers to "physical scarcity of available space on public utility structures").
46. See Near v. Minnesota, 283 U.S. 697, 713 (1931) (noting that English licensing laws were
eventually recognized as offensive to the central meaning of liberty of the press).
47. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (system of
prior restraint subject to "heavy presumption against its constitutional validity" and "heavy
burden of showing justification").
48. The early history of broadcasting, when competing uses of frequencies resulted in
widespread interference and consequent "confusion and chaos," is discussed in National
49. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1449 (D.C. Cir. 1985), cert. denied sub
nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Omega
Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982).
for broadcasters,\textsuperscript{50} foreclosed for newspapers,\textsuperscript{51} and left open for cable operators.\textsuperscript{52} With respect to radio and television, the Court observed that

[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.\textsuperscript{53}

Without even mentioning that special responsibility of broadcasters, the Court soon thereafter concluded that similar demands for fairness in the print media "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors."\textsuperscript{54} The Court later suggested that it might reconsider the scarcity premise as a justification for content control in broadcasting, if Congress or the FCC signaled its deficiency or obsolescence.\textsuperscript{55} Despite the FCC's eventual abandonment of the fairness doctrine,\textsuperscript{56} and divestment of the underlying scarcity premise, the Court reaffirmed the vitality of spectrum scarcity as a principle for "[s]afeguarding the public's right to receive diverse views and information over the airwaves."\textsuperscript{57}

Experience with the fairness doctrine itself proved problematic on both practical and constitutional grounds. Instead of facilitating, it impeded diversity, insofar as broadcasters avoided programming that would require balancing, might alienate controversy-sensitive advertisers and could result in administrative and litigative burdens.\textsuperscript{58}

Although the FCC regularly deferred to reasonable and good faith

\begin{itemize}
  \item 52. Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1549 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990) (upholding local origination requirements on grounds they promote substantial interest in content diversity without excessively burdening First Amendment interests).
  \item 53. Red Lion Broadcasting Co., 395 U.S. at 389.
  \item 54. Miami Herald Publishing, 418 U.S. at 258 (invalidating right of reply statute on grounds it invades constitutionally protected editorial autonomy).
  \item 55. See FCC v. League of Women Voters, 468 U.S. 364, 376–77 n.11 (1984) (noting widespread criticism of scarcity rationale but unwilling to reexamine it minus signal from FCC or Congress that it is obsolete).
  \item 58. See Syracuse Peace Council, 2 F.C.C.R. at 5049–50 (particularizing reasons for eliminating fairness doctrine).
\end{itemize}
judgments of licensees, its emphasis upon the overarching significance of fairness obligations and availability of sanctions, including license revocation or denial of renewal, presented the potential for dangerous regulatory abuse. Because the doctrine was seldom enforced in actuality, but possibly could be used in a way that profoundly undermined First Amendment interests, official policy offered the worst of constitutional and regulatory principles.

Jurisprudential emphasis upon scarcity as a unique characteristic of broadcasting remains unqualified by principles needed to limit or focus its operation. Analytical acuity is compromised further by a failure to grasp more significant common attributes. Scarcity is a characteristic common to all mass media for the same overarching reason. Notwithstanding reasoning that attempts to distinguish allocational and economic scarcity, ownership and control of any mass medium is primarily a function of available capital. Case law suggests that at least in theory anyone can publish, or perhaps obtain a cable franchise, and that the only restrictions upon such opportunity are economic realities. Even minus the panoply of factors that enter into broadcast licensing decisions, however, most persons could not acquire a radio or television station because they lack the necessary and substantial resources for capitalization.

The concept of scarcity nonetheless has been critical to a unique understanding of the First Amendment, which has identified and ele-

59. Over a two-year period, for instance, the FCC received 4,280 fairness complaints but found only 19 actual violations. Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691, 709 (1976) (Comm'r Robinson, dissenting).

60. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393–94 (1969) (if licensees prove “timorous” in executing fairness responsibilities, FCC “need not stand idly by” but may use full range of sanctions associated with license as “temporary privilege”).

61. One court has observed that “[a]ll economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism.” Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

62. Allocational scarcity is a phenomenon attributed to regulatory intervention that assigns frequencies in a scarce spectrum. Economic scarcity is a reality that results when conditions do not afford profits to justify an investment. The variants of scarcity have been critical in charting disparate medium-specific standards. See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985) (cable distinguished by economic rather than allocational scarcity), cert. denied sub nom. National Ass’n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Community Television, Inc. v. Wilkinson, 611 F. Supp. 1099, 1112 (D. Utah 1985) (cable may be economically scarce but not limited to finite number of channels and thus more akin to newspaper than broadcasting), aff’d sub nom. Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986).

63. See supra note 61.

64. See supra notes 60–62 and accompanying text.
vated the rights of viewers and listeners above those of broadcasters.\textsuperscript{65} In abandoning the fairness doctrine, the FCC suggested that the rights of broadcasters and publishers should be coextensive.\textsuperscript{66} The premise may be apt, but its articulation is incongruous with reality. By emphasizing that the paramount rights of the public would be served better by fairness deregulation, the Commission did not entirely dismantle the "unusual order" of constitutional rights which inverts traditional precepts of editorial freedom.\textsuperscript{67} Concurrently, it also enunciated new standards for indecency regulation that impose medium-specific content restrictions.\textsuperscript{68}

In a series of actions culminating in a statement of principle and subsequent appeals,\textsuperscript{69} the FCC determined that sexually oriented expression found to be "patently offensive as measured by contemporary community standards for the broadcast medium" was actionable when "a reasonable risk [exists] that children may be in the audience."\textsuperscript{70} To balance the competing interests of adults and children, the FCC limited indecent programming to post-midnight hours.\textsuperscript{71}

\textsuperscript{65} See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").


\textsuperscript{67} Id. at 5057 ("the right of viewers and listeners to receive diverse viewpoints is achieved by guaranteeing them the right to receive speech unencumbered by government intervention").

\textsuperscript{68} New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987) (reaffirming authority to regulate indecent broadcasting).

\textsuperscript{69} The FCC found actionable indecency in: In re Infinity Broadcasting Corp., 2 F.C.C.R. 2705, 2706 (1987) (expression at issue was "patently offensive, and [its] sexual and excretory import . . . clear"); In re Regents of the Univ. of Calif., 2 F.C.C.R 2703 (1987) (sexually referenced lyrics on university radio station "patently offensive . . . by contemporary community standards for the broadcast medium"); In re Pacifica Found., 2 F.C.C.R. 2698, 2700 (1987) (theatrical references to sexual and excretory organs or functions were patently offensive). Upon petition for reconsideration, the FCC reaffirmed its finding that the "indecent broadcasts were aired when there was a reasonable risk that children may have been in the audience." In re Infinity Broadcasting Corp., 3 F.C.C.R. 2700, 930, 934 (1987) (identifying violation but providing warning for broadcast indecency that ran after midnight). Id. at 937–38 n.47. The court of appeals approved the Commission's attention to indecent expression but found that the time channeling was too restrictive and remedied for more precise standards for permissible hours. Action for Children's Television v. FCC, 852 F.2d 1332, 1341 (D.C. Cir. 1988). The Commission responded with a comprehensive ban on indecent programming, pursuant to the rationale that the risk of children being in the audience was omnipresent. Enforcement of Prohibitions Against Broadcast Indecency, 18 U.S.C. § 1464 (1988), 5 F.C.C.R. 5297, 5306 (1990). The court of appeals found the standard constitutionally inadequate and remedied with a demand for accommodation of indecent expression at specified times. Action for Children's Television v. FCC, 932 F.2d 1304, 1510 (D.C. Cir. 1991), cert. denied, 60 U.S.L.W. 1359 (1992).

\textsuperscript{70} Infinity Broadcasting Corp., 3 F.C.C.R. at 934; New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licenses, 2 F.C.C.R. 2726 (1987).

\textsuperscript{71} Infinity Broadcasting Corp., 3 F.C.C.R. at 937–38 n.47.
Although charting a safe harbor, the rule was invalidated by an appeals court which considered it inadequately justified.\textsuperscript{72} Thereafter, the Commission adopted a comprehensive ban on indecency, which it attempted to justify on grounds that technology did not afford a less restrictive alternative for protecting the interests of children.\textsuperscript{73} That proscription also was vacated by the court of appeals, which found that "neither the commission's action [totally] prohibiting the broadcast of indecent material, nor the Congressional mandate that prompted it, can pass constitutional muster."\textsuperscript{74} The FCC thus has been required to determine when indecent expression may be broadcast, to define the class of children to be protected and what constitutes a risk to them, and to amplify the nature and scope of the government's interests in regulating such programming.\textsuperscript{75}

Competing policies for advancing and defeating diversity are notable primarily for their departure from traditional First Amendment norms. Initiatives for managing expressive pluralism considered endangered by scarcity at best were ineffectual and at worst constitutionally subversive. Persisting efforts to curb indecent expression have been detached from the scarcity premise and its diversification ideal. Such content restriction, especially insofar as constitutionally protected expression is implicated, suggests the possibility that regulation has become a function of habitual attitude accustomed to diminishing First Amendment pertinence rather than serious justification that accounts for constitutional imperatives.

### III. THE PERILS OF PUBLIC INTEREST MANAGEMENT

The Freedom of the Press Clause traditionally has been understood as a safeguard of editorial discretion.\textsuperscript{76} At least in theory, unfettered editorial autonomy has been valued as a means of facilitating "uninhibited, robust and wide-open" debate\textsuperscript{77} and as a check upon govern-

\textsuperscript{72} \textit{Action for Children's Television}, 852 F.2d at 1341.


\textsuperscript{75} \textit{Id.} at 1510.

\textsuperscript{76} \textit{See}, e.g., \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241, 258 (1974) (official intrusion into editorial control and judgment not "consistent with First Amendment guarantees of a free press as they have evolved to this time").

mental authority. Even for traditional media, the First Amendment is subject to compromise when a significant reason exists for limiting editorial freedom or expression is classified as less valuable or unprotected. First Amendment principles are not irrelevant to broadcasting. What is different about their operation with respect to newer media such as radio and television, however, is that they must compete against explicit regulatory demands that may determine not only content but, by the process of licensing, may select the editors themselves.

Regulation of broadcasting for the past half-century has been a function of the Communications Act of 1934. The enactment created the FCC which is empowered to set and enforce standards for broadcasting. The FCC's general charge is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges..." Centralization of regulatory authority contemplated a panoply of responsibilities that were to be exercised with reference to the "public interest, convenience or necessity."

The public interest standard has evolved as the touchstone criterion for regulating broadcasting. The concept is manifestly amorphous,

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80. Despite abandonment of the fairness doctrine, see supra note 56 and accompanying text, special content provisions govern personal attacks, 47 C.F.R. § 73.1920 (1990), political editorials, 47 C.F.R. § 73.1930 (1990), and response time for political candidates when a competitor has appeared, 47 U.S.C. § 315(a) (1988), and access opportunities for political candidates, 47 U.S.C. § 312(a)(7) (1988). Content regulation in the form of local origination requirements and access provisions also governs cable. See Cable Communications Policy Act of 1984, 47 U.S.C. § 531(a) (1988) (public, governmental and educational access); id. § 532(b) (commercial access); Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1549 (7th Cir. 1989) (origination requirements), cert denied, 493 U.S. 1044 (1990).
84. Id. § 303 (specifying regulatory duties that include classifying radio stations, prescribing type of service to be rendered by each class of licensees, assigning frequencies, setting technical standards for equipment, preventing interference, and making rules and regulations necessary to effectuate congressional aims).
but the Supreme Court has considered the standard to be "as concrete as complicated factors for judgment in such a field of delegated authority permit." Although resistant to precise definition, the public interest has been characterized as "the interest of the listening public in the 'larger and more effective use of radio.'"

From the public interest criterion have emerged a multiplicity of rules and regulations that in other First Amendment contexts would be constitutionally unacceptable. Central to the Communications Act of 1934 is a scheme for licensing broadcasters. The licensing process is the primary methodology for avoiding the chaos and confusion experienced in an unregulated electronic marketplace. Basic qualifications with respect to citizenship, character, financial and technical qualifications, restrictions upon total broadcast holdings, and employment practices represent elements of a selective process. The exclusive nature of the system may be somewhat reminiscent of

91. 47 U.S.C. § 310(b)(1) (1988) ("[n]o ... license shall be granted to or held by ... any alien or the representative of any alien.").
92. Id. § 308(b) ("[a]ll applications ... shall set forth such facts as the Commission by regulation may prescribe as to the ... character ... of the applicant to operate the station").
93. Id. ("[a]ll applications ... shall set forth such facts as the Commission by regulation may prescribe as to the ... financial ... qualifications of the applicant to operate the station").
94. Id. ("[a]ll applications ... shall set forth such facts as the Commission by regulation may prescribe as to the ... technical ... qualifications of the applicant to operate the station").
95. FCC regulations, establishing national and local ceilings upon ownership of radio and television stations, recently have been relaxed to allow common ownership in up to 60 radio stations nationwide and up to 6 radio stations in a single market. Joe Flint, supra note 28, at 4, cols. 1–3. Legislation has been proposed, however, that would reintroduce multiownership caps of twelve AM and twelve FM stations and duopoly rules restricting ownership to one AM and FM station per market. Id. A single person or entity may own no more than twelve television stations. 47 C.F.R. § 73.5555(d) (1990).
96. 47 C.F.R. § 73.2080 (1990) (prohibiting broadcasters from engaging in discrimination against designated minorities and requiring broadcasters to establish affirmative action plans).
the English system of licensing printers, a practice that was abandoned in the 17th century and condemned in seminal freedom of the press jurisprudence. Although specific components may be open to challenge, the broadcast licensing process itself would likely survive the strong presumption against systems of prior restraint.

More problematic are policies that, in purported service of the public interest, have regulated content. Fairness regulation, as discussed in the preceding section, originated from the premise that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public. The FCC eventually determined that new technologies provided diversity in the general information marketplace, the fairness doctrine retarded rather than facilitated diversity, and a system of official review presented inherent First Amendment risks. It thus concluded that the public interest was served better by affording broadcasters the same First Amendment protections extended to the print media.

The determination that radio and television should have the same constitutional status as newspapers is the function of a possibly transient policy decision rather than First Amendment ordination. Deregulatory trends that characterized FCC governance of broadcasting during the 1980s are subject to agency reconsideration and congressional reversal. The Supreme Court has acknowledged widespread criticism of spectrum scarcity as a basis for broadcast regulation.

97. See Donald Lively, supra note 2, at 19 (Crown's licensing of printers terminated in 1694).
98. See Near v. Minnesota, 283 U.S. 697, 716 (1931) ("liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship").
99. See supra notes 46–47 and accompanying text.
102. The FCC during the 1980s not only abandoned the fairness doctrine, see id., but eliminated regulation duplicating federal or state law, see Elimination of Unnecessary Broadcast Regulation, 59 Rad. Reg. 2d 1500 (P & F 1986), and diminished various reporting requirements and obligations to ascertain important community issues. See Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076 (1984); Deregulation of Radio, 84 F.C.C.2d 968 (1981). The possibility of eliminating racially preferential licensing policies was checked by congressional directive, and such provisions were upheld in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990) (upholding preferences for designated minorities in comparative licensing process and distress sales).
so doing, the Court asserted that it was “not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.” Pursuant to mixed messages from the FCC and Congress, which respectively have repudiated and reintroduced the fairness doctrine, the Court has maintained its investment in established regulatory premises as being “essential to the welfare of the public.”

Continuing efforts to regulate indecent programming further evidence how public interest perceptions continue to deviate from constitutional norms, notwithstanding official assertions “that the same first amendment principles should be equally applicable to both” the broadcast and print media. Sexually explicit expression, to the extent not obscene, is constitutionally protected speech. Even so, the dissemination of such expression is subject to reasonable time, place and manner restrictions. Accordingly, zoning ordinances requiring either the concentration or dispersal of adult bookstores and movie houses have been upheld. Official efforts to restrict indecent programming, however, have included not only time channeling but a comprehensive prohibition. A total ban was invalidated because

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104. Id.
105. The FCC abandoned the fairness doctrine on grounds that scarcity premises were obsolete. See In re Syracuse Peace Council, 2 F.C.C.R. at 5043; see also supra note 56.
106. Congress reintroduced the fairness doctrine but the president vetoed it. See Kenneth Noble, Reagan Vetoes Measures to Affirm Fairness Policy for Broadcasters, N.Y. TIMES, June 21, 1987, at 1, cols. 4–5.
108. See supra notes 69-75 and accompanying text.
112. See Playtime Theatres, 475 U.S. at 52; Young, 427 U.S. at 50.
114. Upon remand of its time channeling initiative, the FCC established a total ban on grounds that children are present in the broadcast audience at all hours and thus no less restrictive means of accounting for regulatory interests exists. Enforcement of Prohibitions Against Broadcast Indecency, 18 U.S.C. § 1464, 5 F.C.C.R. 5297, 5306–08 (1990).
the expression was constitutionally protected, and the FCC had not satisfied "the strict constitutional standard" for its regulation.\textsuperscript{115} The reviewing court maintained that First Amendment interests could not be accommodated without a reasonable safe harbor rule.\textsuperscript{116} Even such time channeling sweeps more broadly than supposedly comparable zoning interests, however, insofar as the broadcast content that is subject to such restraints may be freely available from other sources.\textsuperscript{117} The result is a levy on expressive pluralism that uniquely burdens broadcasting and which courts have repudiated for even newer technologies.\textsuperscript{118}

The public interest standard is a congressional command that the FCC is obligated to effectuate.\textsuperscript{119} Government power to promote First Amendment aims is not established in precise constitutional terms comparable, for instance, to congressional capacity to enforce the civil war amendments.\textsuperscript{120} Regulatory authority instead radiates from the power to regulate commerce, which establishes plenary federal control of the field.\textsuperscript{121} Introduction of the public interest standard has enhanced the possibilities for regulation beyond the primarily economic restrictions that may be imposed upon the print media. Because its meaning is so susceptible to diverse understandings, however, the public interest standard has proved to be a risky regulatory premise.

A few decades ago, the chair of the FCC defined the public interest in terms of promoting the "character, citizenship and intellectual capacity of the people."\textsuperscript{122} The depiction was accompanied by charac-

\begin{itemize}
  \item \textsuperscript{115} Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991).
  \item \textsuperscript{116} Id. at 1509–10.
  \item \textsuperscript{117} A satirical recording of George Carlin, for instance, became the basis for sanction when broadcast. See FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC's determination that broadcast was indecent and subject to sanction). The recording, however, would be freely available to adults and children alike on the commercial market.
  \item \textsuperscript{119} See supra notes 84–101 and accompanying text.
  \item \textsuperscript{120} See U.S. CONST. amend. XIII (prohibiting slavery and providing that "Congress shall have power to enforce this article by appropriate legislation"); \textit{id.}, amend. XIV (securing privileges and immunities, due process and equal protection and providing that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article"); \textit{id.}, amend. XV (prohibiting race dependent burdens upon right to vote and providing that "Congress shall have power to enforce this article by appropriate legislation").
  \item \textsuperscript{121} U.S. CONST. art. I, § 8, cl. 3 (vesting Congress with power to regulate commerce among the several states). The Communications Act of 1934 regulates "interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 (1988).
  \item \textsuperscript{122} Address of FCC Chairman Newton Minow to the National Association of Broadcasters (May 9, 1961) (on file with Washington Law Review).
\end{itemize}
terization of television as "a vast wasteland." Such an understanding of the public interest is reminiscent of Louis Brandeis' concern that the print media at the turn of century had degenerated into purveyors of "idle gossip" that displaced "matters of real interest to the community." Brandeis' suggestion of a right to privacy responded to the advent of photojournalism and attention to subjects other than partisan political debate, which largely had occupied the media when the First Amendment was framed. For traditional media, the presumption exists that unrestricted editorial discretion, generally identifying and responding to market demands, will provide for the public interest. The Brandeis focus upon "matters of real interest to the community," however, is mirrored by regulatory premises defining the public interest in terms that deviate from a norm of autonomous rather than authoritative selection. Contemporary attention to broadcasting as a possible corrupter of morals, especially for children, is reminiscent further of early jurisprudential responses to the emergence of new media perceived as potentially dangerous influences. Even during the Lochner era of substantive due process review, when fundamental liberties were expansively glossed upon the Constitution, such concern dampened the Court's usual generosity in delineating the contours of freedom.

Such accountings for the public interest have demonstrated a peril to traditional concepts of editorial freedom that, to a certain extent, even the Court and the FCC have acknowledged. What may be identified as an imperative of the public interest may be inconsonant with freedom of the press. Definition of the public interest ultimately is reducible to expressions of subjective preference that are as debatable as natural law and no more legitimate than if denominated in terms of

123. Id.
125. Id.
127. See United States v. Associated Press, 52 F. Supp. 362, 372 (1943) ("right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection"), aff'd, 326 U.S. 1 (1945).
128. See infra notes 137–46 and accompanying text.
129. See Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915) (denying motion pictures press status). The Lochner era, which characterized Fourteenth Amendment jurisprudence during the first third of this century, is notable for its identification and expansion of fundamental rights that limited the exercise of state power. See Laurence Tribe, American Constitutional Law 567–86 (1988) (discussing nature and criticism of Lochnerism).
public popularity. To the extent criteria for the selection of editors and editorial content implicate official enforcement, autonomy of the press remains at risk.

IV. RECLAIMING THE FIRST AMENDMENT

Abandonment of the fairness doctrine suggested the possibility that broadcasting might evolve finally to fully protected constitutional status and that medium-specific analysis might be repudiated.\textsuperscript{130} The FCC noted that “[d]espite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both.”\textsuperscript{131} Official policy as thus redefined indicated attention to functional similarity rather than structural difference, and preference for constitutional parity rather than hierarchy.\textsuperscript{132} The FCC emphasized that the policy “is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act.”\textsuperscript{133} Constitutional parity for broadcasting, however, is an incomplete and potentially fleeting condition when used merely to advance the public interest rather than rooted in the First Amendment itself.\textsuperscript{134} Because perceptions of the public interest are competitive and mutable, expressive liberty in broadcasting remains hostage to regulatory inclination and the model of governance itself remains available for adaptation to other media.

The overarching constitutional question, now as when new media began to emerge earlier this century, is whether the First Amendment will be a comprehensive or selective guarantee. Some theorists have suggested that partial immunity of the press is a desirable develop-

\textsuperscript{130} See FCC v. League of Women Voters, 468 U.S. 364, 377-78 n.12 (1984) (noting FCC reservations about fairness doctrine and indicating it may “be forced to reconsider the constitutional basis of our decision” upholding it). But see Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3010 (1990) (“[w]e have long recognized” that spectrum scarcity requires unique limitations on broadcast licensees).


\textsuperscript{132} See id. (despite differences in “physical” nature of media, “their roles in our society are identical”).

\textsuperscript{133} Id.

\textsuperscript{134} Id. (“[i]t is . . . to advance the public interest that we advocate these rights for broadcasters”).
To the extent that the dominant medium is the least protected, however, the reality tends to mock the notion of press freedom. Reinforcing that impression is the sense that actual regulatory concerns are not necessarily as they appear but more sophisticated variants of constitutional insensitivity or misperception.

Early analysis of motion pictures, although acknowledging the medium's efficacy in expressing opinion, disseminating information and educating, dwelled primarily upon its potentially dangerous impact. The Supreme Court emphasized that "they may be used for evil," and their "pretense of worthy purpose" combined with their availability to children "make them the more insidious in corruption." Because motion pictures were "capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition," the Court concluded that they were never intended to be regarded "as part of the press of the country."

Although subsequent case law extended constitutional protection to motion pictures, First Amendment protections remained subject to media specific regulation and variable First Amendment standards. With respect to broadcasting, tendencies for regulatory oversight have led not only to scarcity theories notable primarily for their deficiencies. They also have engendered regulation premised upon the same concern with a corrupting impact that characterized original denial of press status to motion pictures. The weakness of the scarcity

136. See Ithiel de Sola Pool, Technologies of Freedom 1-3 (1983) (noting how regulation of newer but dominant media effectively narrows scope of First Amendment relative to its original ambit).
138. Id. at 242.
139. Id. at 244.
140. Id.
141. See supra note 36 and accompanying text.
142. See supra note 37 and accompanying text.
144. See Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 242–244 (1915) (medium's capacity for evil aggravated by accessibility to children and thus militates against press status).
rationale, coupled with historical concern for the media's effects, leads to a reasonable perception that "it is the immediacy and the power of broadcasting that causes its differential treatment." Such concern, even if a basis for regulation calculated to promote First Amendment values, is at odds with basic imperatives of freedom of the press.

Repairing the damage to editorial discretion, caused by decades of constitutional deprivation, requires a comprehensive reinvestment in traditional principles of press freedom. Regulatory intervention to advance diversity, if ever acceptable, is not justified by present circumstances. Even the FCC, which developed regulation pursuant to scarcity perceptions, has acknowledged "that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media." Despite that suggestion, the Court continues to subscribe to scarcity notions and their regulatory implications.

The FCC has revised its understanding of the public interest and consequently expanded the latitude of expressive freedom for licensees. To minimize the possibility of a paternalistic reversion, however, it is essential to establish such liberty as a function of the constitution rather than of administrative principle. Effectuation of that end requires eliminating the "unusual order" of First Amendment interests in favor of universal constitutional standards. By making "the right of the viewers and listeners, not the right of the broadcasters . . . paramount," the Court established a departure point for the erosion of editorial discretion. Identification and elevation of the public's First Amendment interests in the context of broadcasting has prompted expansive notions that would further undermine traditional notions of press freedom but which largely have been resisted. The prioritiza-


146. One court upheld fairness requirements on grounds that broadcast messages, unlike those in print, are "in the air." Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). Given what was perceived as the medium's pervasive nature and an impact difficult to calculate, the court found that it reasonably might be subject to special regulatory attention. Id. at 1100-01.


148. See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009-10 (1990) (upholding minority preferences in licensing process on grounds they promote content diversity in medium affected by spectrum scarcity).


150. The Court has rejected arguments, for instance, that the public's paramount First Amendment rights justify official preservation of a particular entertainment format or a system
tion of interests, however, affords a continuing predicate for minimizing the First Amendment's true significance as a guarantor of expressive liberty.

An abiding need of the electronic marketplace is for standards of review that account more sensibly and sensitively for constitutional and regulatory concerns. Rather than focusing upon and attempting to balance competing First Amendment rights, the Court would better serve constitutional and regulatory interests by applying traditional analytical criteria favoring editorial freedom. Government regulation of broadcasting, like the print media, thus should be conditioned upon identification of a compelling state interest, close relationship between regulatory means and objectives, and the unavailability of any option less burdensome to expressive interests.\footnote{151}

Pursuant to such a standard, licensing on the whole would survive as a necessary means for a rational allocation system.\footnote{152} Although financial and technical qualifications may serve significant interests, the operation of alienage restrictions\footnote{153} and character qualifications\footnote{154} may be at least debatable. Limitations on a person's total broadcast
holdings might be challenged to the extent that a uniquely compelling interest fails to justify such a restriction.\textsuperscript{155} Similarly, the government may lack the basis for enacting rules that specially regulate the employment practices of broadcasters.\textsuperscript{156}

With respect to content regulation, it is doubtful that fairness demands would survive. Even if diversification is a compelling interest, experience with the fairness doctrine has demonstrated that it does not effectively advance regulatory aims and thus is not closely related to its objective.\textsuperscript{157} Ironically, a less restrictive alternative may be a system of public access, which the FCC and the Court previously rejected in favor of a scheme of trustee broadcasting.\textsuperscript{158} Even if a less burdensome option is chosen, it is doubtful that such a policy could be justified without extension to all mass media that do not afford practical opportunity to all for ownership and operation.

The possibility exists that indecency regulation might survive more constitutionally apt standards. It is well established that regulation may be justified by an interest in the moral development of children.\textsuperscript{159} Governance, however, also must guard against "reduce[ing] the adult population . . . to [receiving] only what is fit for children."\textsuperscript{160} At a minimum, therefore, regulation should not proscribe indecent expres-

\textsuperscript{155.} The dominance of group ownership in the newspaper industry has been rejected as grounds for special regulatory attention. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249–50 (1974) (noting that "vast changes" have placed in a few hands the power to inform the American people and shape public opinion). To the extent a newspaper may claim that it is in danger of failing, it may effect a partial merger with another publication and obtain immunity from antitrust norms. See Newspaper Preservation Act, 15 U.S.C. §§ 1801–04 (1988).

\textsuperscript{156.} Especially to the extent that a broadcaster employs at least fifteen persons, it is covered by Title VII of the Civil Rights Act of 1964, which forbids employment discrimination. 42 U.S.C. § 2000e(b) (1988). In any event, publishers are not governed by medium-specific regulation of their employment practices. It is doubtful whether a compelling reason could be identified for regulating employment in one sector of the press but not another.

\textsuperscript{157.} See supra notes 58–60, 100–01 and accompanying text.

\textsuperscript{158.} If regarded as an alternative to fairness regulation, a system of public access simply would have required the FCC to make quantitative assessments of whether adequate time was afforded rather than quantitative evaluations of content balance. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (rejecting public right of access in favor of fairness regulation); National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977) (discussing merits and conditions for system of public access), cert. denied, 436 U.S. 926 (1978).


sion entirely from broadcasting. 161 Time channeling may be a more fitting response, despite resulting in disparities between the broadcast and print media. 162 The regulatory variance, however, would be attributable to actual differences that were established by particularized inquiry rather than a function of wholesale assumption and ordained result. Such analytical redirection may avoid arbitrary attention to unique characteristics and factor truly pertinent differences into determination of whether an interest is compelling, whether regulatory means advance their ends, and whether less restrictive alternatives are available.

Regulatory attention to the broadcast media over the past half-century has been reminiscent of equal protection theory that has evolved over the same period. As the Lochner era of substantive due process review wound down, the Court indicated that proper standards of constitutional review required deference to legislative judgment unless express rights were implicated or classifications burdened “discrete and insular minorities.” 163 Courts thereafter predicated strict scrutiny of racially segregative and discriminatory policies upon an understanding of process defect that resulted when groups were formally excluded from or underrepresented in the political system. 164 As previously unrepresented minorities have acquired influence in the legislative branch, evidenced by their ability to form coalitions that enable former pariah groups to account for their interests in rough proportion to their fair influence upon the process, 165 justification for exacting review has diminished. 166 Similarly, as communications technology has expanded the possibilities for disseminating and


162. See supra notes 117-18 and accompanying text.


166. The Court, however, continues to apply strict scrutiny to defeat policies calculated to remedy the nation’s legacy of societal discrimination. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494–95 (1989) (all racial classifications are suspect even if remedial). Exacting review thus is exercised as minorities have acquired political power and positions and political dysfunction to a significant extent has been eroded. See id. at 739–40, 752–53 (Marshall, J., dissenting) (objecting to invalidation of racially preferential policies adopted by minority dominated city council seeking to remedy past discrimination).
acquiring information, justification for managing the interests of diversity has abated. Modern reality accordingly demands not standards that account for illusory defects in the information marketplace, but criteria connected to the central meaning of the First Amendment.

CONCLUSION

Freedom of the press was not a subject of direct jurisprudential attention until the twentieth century. Since then, First Amendment standards have evolved to allow official management of results in a major sector of the information marketplace. Such regulatory latitude has been justified by limited opportunity for media ownership and operation but incongruously has exempted the print media. As new communications methodologies continue to diminish or alter the role of publishing, which itself acquires characteristics of regulated media, a choice with respect to the First Amendment’s comprehensive meaning seems unavoidable. The eventual decision likely will have to factor the foreseeable reality that broadcasting may offer service that is fungible with cable and common carriers.167 Regulatory rationales, as developed so far, have uniform rather than unique pertinence. Unless providing compelling reasons for official intervention, however, they should operate neither universally nor selectively in transforming the editorial process from a system of autonomous choice to authoritative selection.

167. While cable and telephone companies develop identical capabilities for delivery of video and data services, a transition to high definition television during the 1990s affords broadcasters the opportunity to “use digitalization to compete directly with telephone and cable companies, offering voice and data services from their broadcast towers.” Peter Lambert, HDTV: A Game of Take and Give, BROADCASTING, April 20, 1992, at 6.