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DEREGULATORY ILLUSIONS AND BROADCASTING: THE FIRST AMENDMENT'S ENDURING FORKED TONGUE

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In 1987 the Federal Communications Commission abandoned the fairness doctrine which subjected radio and TV to a unique system of content control. The doctrine, and the Supreme Court's endorsement of it, typified the second class constitutional citizenship of broadcasters.

In this Article Professor Lively criticizes the individualized approach to media regulation represented by the fairness doctrine. He argues that a "uniform" and "strict" approach to official intrusion upon editorial freedom is an absolute requirement of any sensible first amendment jurisprudence. The demise of the fairness doctrine, Lively observes is merely one step toward the necessary goal of according broadcasters the same first amendment guarantees as print journalists.

The first amendment, although crafted in absolute terms,¹ has begotten divergent standards for different sectors of the press. Generally the United States Supreme Court has been vigilant toward official efforts to control the influence or impair the editorial autonomy of publishers.² The Court has observed, however, that "broad statements of principle . . . are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached."³ It thus has been more inclined to balance regulatory concerns against the editorial freedom of newer nonprint media⁴ and thereby brook governmental interference with them.⁵ Consistent with such analytical malleability and disparity, the Federal Communications Commission (FCC) recently pronounced that broadcasters should have the same first amendment status as publishers,⁶ but that special governance of indecent or offensive programming is not incongruent with such

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1. The first amendment's guarantee against "law[s] . . . abridging freedom . . . of the press," U.S. CONST. amend. I, has an absolute cast to it. Many other fundamental constitutional guarantees are less precise in their wording. See, e.g., *id.* amend. IV (protection against unreasonable search); amend. VI (right to impartial jury and assistance of counsel); amend. VIII (guarantee against excessive bail and cruel punishment); amend. XIV, § 2 (privileges and immunities, due process, and equal protection clauses).

2. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

3. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 65-66 (1976).

4. For purposes of this article "new media" include cable, television, radio, and film. These media, unlike the older print media, do not rely exclusively or primarily upon the written word.

5. See *infra* notes 42-46, 63-64, 71-75 and accompanying text.

6. See *Syracuse Peace Council*, 2 F.C.C. Rec. 5043, 5055-57 (1987); *infra* notes 18-23 and accompanying text.

constitutional parity.⁷

The evolution of variable freedom of the press standards was prefaced at the turn of this century by the unsettling effects of advancing media technology and capability. Louis Brandeis, for example, expressed concern that the print media, with its evolving photojournalistic capacity, was becoming increasingly intrusive and indelicate.⁸ Brandeis observed that the press, by trading in gossip and effrontery, was displacing matters of genuine public interest and overstepping its bounds.⁹ Although acknowledging that motion pictures were an "increasingly important [medium] . . . for spreading . . . knowledge and . . . molding . . . public opinion,"¹⁰ the Court initially characterized them as a "business" and "spectacle" rather than part of the press, and expressed worry about their "capab[ility] for evil."¹¹ The consequences of these depictions persisted until the midpoint of the century.¹²

The response to media not in existence at the time of the first amendment's drafting has generated constitutional jurisprudence that is more convoluted than coherent. Diminished protection has been afforded some media merely because they are structurally different from, even if functionally similar to, other media.¹³ Although the framers did not specifically anticipate film, television, radio, and cable, diverse media existed when freedom of the press was adopted as a constitutional principle.¹⁴ Despite the first amendment's composition in generic rather than media-specific terms, the Court nonetheless has charted variable rather than uniform standards.¹⁵

Until its recent abolition, the fairness doctrine represented an especially intrusive form of media-specific content regulation.¹⁶ Fairness responsibilities were tied to the premise that broadcasting was a uniquely scarce medium.¹⁷ After half a century of consistently, if not dogmatically, endorsing the concept of fairness, the FCC concluded in 1987 that the scarcity premise was obsolete.¹⁸ The Commission, in abandoning the fairness principle,¹⁹ concluded that content diversity would be better promoted by an unregulated marketplace of ideas.²⁰

7. See *Infinity Broadcasting Corp.*, 2 F.C.C. Rcd. 2706, 2706-07 n.16 (1987).

8. See Brandeis & Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890).

9. See *id.*

10. See *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 237 (1915).

11. See *id.* at 244.

12. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (the exhibition of motion pictures to entertain and for profit does not deprive them of first amendment status).

13. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

14. Pamphlets, posters, books, leaflets, and newspapers were variants but nonetheless elements of the press in 1791. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248 (1974).

15. Perceived differences among media have engendered for "[e]ach method of communicating . . . a 'law' unto itself." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

16. See *infra* notes 42-50 and accompanying text.

17. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969).

18. See Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 58 R.R.2d 1137 (1985) [hereinafter *Fairness Report of 1985*].

19. See *Syracuse Peace Council*, 2 F.C.C. Rec. 5043 (1987).

20. See *id.* at 5055-57; Inquiry into Section 73.1910 of the Commission's Rules and Regulations

The FCC noted that the roles of the electronic and print media and the reasons for protecting against governmental interference were identical.²¹ It also asserted that constitutional analysis should focus on functional similarities rather than physical differences.²² Pursuant to that formulation, the Commission purported to afford broadcasters the same first amendment guarantees as print journalists.²³

Abandonment of the fairness doctrine, however, has not elevated the broadcast media to constitutional parity with the print media. The demise of the scarcity rationale has been accompanied by the rise of new predicates for content control. In justifying regulation of broadcast expression characterized as offensive or indecent, the United States Supreme Court concluded that the medium has a pervasive and intrusive nature, encroaches on personal privacy, and is uniquely accessible to children.²⁴ As the scarcity premise has unraveled, those new regulatory rationales have assumed increasing prominence. Even as the FCC purported to equalize the first amendment status of broadcasters and publishers, it perpetuated a double standard by finding that some expression, although "fit to print," is too indecent for the airwaves.²⁵

If the first amendment rights of broadcasters and publishers are to be identical, abrogation of the fairness doctrine merely represents a step toward that objective rather than an effectuation of it. Unlike publishers, broadcasters remain governed by a panoply of rules that not only control content but condition the opportunity to broadcast upon citizenship,²⁶ personal integrity,²⁷ and ownership of other media.²⁸ Customized and recently reinforced controls on pur-

Concerning Alternatives to the General Fairness Doctrine of Broadcast Licensees, 2 F.C.C. Rec. 5272, 5293-94 (1987) [hereinafter Fairness Alternatives].

21. "The First Amendment was adopted to protect the people not from journalists, but from government." Syracuse Peace Council, 2 F.C.C. Rec. at 5057.

22. *See id.* at 5055.

23. *See id.* at 5055-57.

24. *See* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

25. The FCC has expanded its enforcement of indecency regulation to cover references to sexual or excretory functions and activities or deliberate and repetitive use of expletives when a reasonable risk exists that children are in the audience. *See* New Indecency Enforcement Standards To Be Applied To All Broadcast and Amateur Radio Licensees, 2 F.C.C. Rec. 2726 (1987). Such regulation covers so-called "shock radio," which is characterized by humor laden with sexual innuendo. *See* Infinity Broadcasting Corp., 2 F.C.C. Rec. 2706 (1987). Although found offensive by contemporary community standards, shock radio nonetheless has attracted substantial audiences.

26. Communications Act of 1934 § 310, 47 U.S.C. § 310 (1982).

27. Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179 (1986).

28. Multiple ownership rules forbid a single entity from owning more than one station of the same type in the same market. 47 C.F.R. § 73.3555 (1986). It is possible to own stations providing different services in a single market. Although the licensee of an AM station may not hold another AM station in the same market, for instance, he may own an FM, VHF, or UHF station. Common ownership of a broadcast station and cable television system in the same market is prohibited. *See id.* § 73.501. Moreover, a single entity may own no more than 12 AM, 12 FM, and 12 television stations regardless of their locale. *See id.* § 73.3555(d). Finally, newspaper-broadcasting combinations are prohibited except for a few grandfathered by the rule. *See* Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *aff'd*, FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

portedly indecent or offensive broadcasting²⁹ further reflect how freedom of the press analysis continues to proceed on separate tracks. Such media-specific thinking, however, fails to apprehend the relationship and interaction of broadcasting with other media and the availability of marketplace checks and balances. Consequently, such reasoning continues to breed more constitutional treachery than security.

The purpose of this Article is to assess persisting jurisprudential wisdom necessitating individualized rather than collective assessment of the media. The Article proposes an analytical departure point that focuses more on similarities and less on differences among media. Finally, the Article explains why uniform strict scrutiny of official intrusion on editorial freedom, regardless of medium, is essential to safeguard a system of autonomous rather than authoritative selection.

I. DIFFERENT MEDIA, DIFFERENT STANDARDS

Established first amendment analysis requires the formulation of customized constitutional standards in response to the emergence of any new medium. Developing communications methodologies first may be evaluated to determine whether they are even part of the press.³⁰ Motion pictures, for example, were excluded from the first amendment's purview for nearly forty years after the Court originally denied them press status.³¹

Eventually, in *United States v. Paramount Pictures, Inc.*,³² the Court concluded there was "no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."³³ A few years later, the Court formally rejected its original finding and held that film was a constitutionally protected part of the press.³⁴ Despite retracting its original disparagement of film and conferring constitutional status upon it, the Court concluded that first amendment recognition was not an analytical endpoint.³⁵ Rather, the Court observed that because "each [medium] tends to present its own peculiar problems," constitutional rules should be variable rather than uniform.³⁶

The Supreme Court, in calibrating the first amendment standards for other new media, likewise has focused on structural differences rather than functional similarities. Identification of unique attributes thus has represented the analytical departure point in the Court's formulation of constitutional principles gov-

29. See *supra* note 25.

30. See, e.g., *Mutual Film Corp. v. Indus'l Comm'n of Ohio*, 236 U.S. 230, 244 (1915) (motion pictures originally adjudged to be business and spectacle rather than press), *overruled on other grounds by Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

31. *Id.*

32. 334 U.S. 131 (1948).

33. *Id.* at 166.

34. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

35. See *id.*

36. See *id.* at 503.

erning radio, television, cable, and other modern media.³⁷ Because the orientation regards the possibility of "abuses and dangers"³⁸ inimically rather than as risks assumed by a system of freedom of expression, the construction of standards is predisposed toward official rather than marketplace regulation.

Media-specific analysis is responsible for an increasingly permeable first amendment. When the freedom of the press clause was drafted, newspapers were the most prominent medium.³⁹ Although publishing still is the most protected communications methodology, broadcasting has displaced it as the dominant mass medium.⁴⁰ Radio and television, however, are the least protected components of the press.⁴¹ In a real sense, therefore, media-specific analysis has resulted in a shrinkage of the first amendment's protective mantle.

First amendment standards for radio and television evolved largely from the determination that the broadcasting spectrum was a uniquely scarce resource.⁴² The scarcity rationale begat a licensing scheme to ensure orderly use of frequencies⁴³ and a consequent concern that the public might not be exposed to diverse information and views.⁴⁴ The FCC thus formulated the fairness doctrine, and the Supreme Court, in *Red Lion Broadcasting Company v. FCC*,⁴⁵ endorsed it.⁴⁶ Essentially, the fairness principle required broadcasters to air controversial issues and ensure that coverage of them was balanced.⁴⁷ During its existence, the fairness doctrine was subject to persistent criticism to the effect that it disserved both constitutional interests and regulatory goals.⁴⁸ In recently abandoning it, the FCC conceded that the fairness doctrine had deterred rather than promoted diversity⁴⁹ and had constituted an intolerable invasion of edito-

37. See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (billboards); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (broadcasting); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438 (D.C. Cir. 1985) (cable), *cert. denied*, 106 S. Ct. 2889 (1986).

38. See *Metromedia*, 453 U.S. at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

39. See E. EMERY, *THE PRESS AND AMERICA, AN INTERPRETIVE HISTORY OF THE MASS MEDIA* 68 (1972).

40. Nearly 100% of the nation's households have at least one radio and television, with most possessing multiples of both. See Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States* No. 906 at 531 (107th ed. 1987) [hereinafter *Statistical Abstract*].

41. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

42. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-89 (1969).

43. The Radio Act of 1927 was enacted to provide "fair, efficient and equitable radio service." Radio Act of 1927, Pub. L. No. 69-169, § 9, 44 Stat. 1162, 1166 (1927) (codified as amended at 47 U.S.C. § 119 (1982)). Prior to its enactment, "confusion and chaos" resulted because broadcasters used any frequency they wanted without regard to interference with competitors. See H.R. Doc. No. 481, 69th Cong., 2d Sess. 10 (1926); see also *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943) (regulation of radio was vital to its development).

44. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943).

45. 395 U.S. 367 (1969).

46. See *id.* at 388-90.

47. See *The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974).

48. See, e.g., Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); see also *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 187-89 (Brennan, J., dissenting) ("[T]he Fairness Doctrine, standing alone, is insufficient . . . to provide the kind of uninhibited . . . exchange of views to which the public is constitutionally entitled.").

49. See *Fairness Report of 1985*, *supra* note 18, at 1151-74.

rial discretion.⁵⁰

Although the fairness doctrine no longer operates,⁵¹ the media-specific thinking that engendered it endures as a predicate for regulation that would be constitutionally unacceptable if directed at the print media.⁵² Even when officially subscribed to as a basis for fairness regulation, scarcity was a shared characteristic rather than a differentiating feature.⁵³ Daily newspapers at the time were, and continue to be, more scarce than radio and television stations.⁵⁴ If the scarcity problem is regarded in allocational rather than numerical terms,⁵⁵ barriers to entering broadcasting or publishing remain primarily economic.⁵⁶ Even cable television, which is characterized by abundant channel space, is beset by a scarcity problem.⁵⁷ Adequate capitalization in any circumstance is the primary factor excluding the vast majority of the citizenry from even considering publishing, broadcasting or cablecasting. Scarcity's presence as a common characteristic of modern media betrayed the irrationality of its selective employment.⁵⁸ Reliance on what was a "universal fact as a distinguishing principle necessarily [bred] analytical confusion."⁵⁹

Having recognized the deficiency of the fairness doctrine's premise and the resulting constitutional difficulties, the FCC abandoned it.⁶⁰ In so doing, the Commission noted "that full first amendment protections against content regulation should apply equally to the electronic and the printed press."⁶¹ This broad statement of principle, however, is much less than it appears to be. The gap between official articulation and reality was vividly demonstrated by the virtually simultaneous pronouncement of fairness deregulation and fortified control of indecent and offensive expression.⁶²

50. See Fairness Alternatives, *supra* note 20.

51. See Syracuse Peace Council, 2 F.C.C. Rec. 5043 (1987).

52. See *infra* text accompanying notes 95-98.

53. In 1970, a year after the Court endorsed the fairness doctrine and underlying scarcity rationale, only 1,748 daily newspapers existed. See Statistical Abstract, *supra* note 40, no. 920, at 536. During the same year, 862 television stations and 6,519 radio stations operated. See *id.*, no. 906, at 531.

54. In 1985 a total of 1,676 daily newspapers, as opposed to 9,775 radio and television stations, were in operation. See *id.*, no. 906, at 531, no. 920, at 536.

55. Allocational scarcity refers to the notion that only a finite number of broadcasting frequencies are available, whereas the opportunity to enter publishing theoretically is unlimited.

56. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 211, 250-52 (1974). Because a license may be transferred, a central obstacle to publishing or broadcasting is the cost of entering, establishing, or doing business. See *id.* at 251.

57. To the extent cable systems constitute natural monopolies, and editorial decision making is the responsibility of a single entity, some courts have found a scarcity problem in cable as significant as that in broadcasting. See, e.g., *Omega Satellite Products Co., Inc. v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Berkshire Cablevision, Inc. v. Burke*, 571 F. Supp. 976, 985-86 (D.R.I. 1983), vacated, 773 F.2d 382 (1st Cir. 1985) (franchise awarded to another cable company, making this action moot). But see *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1450 (D.C. Cir. 1985) (standard of review reserved for occupants of physically scarce airways inapplicable to cable because of unlimited channel capacity), *cert. denied*, 476 U.S. 1169 (1986).

58. See *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987).

59. *Id.*

60. See Fairness Report of 1985, *supra* note 18, at 1196-98.

61. See Syracuse Peace Council, 2 F.C.C. Rec. 5043 (1987).

62. See *supra* note 25 and *infra* text accompanying notes 95-97.

Even before its official demise, the scarcity premise had been overshadowed by emerging concerns about children's access to broadcasting, privacy interests implicated by electronic transmissions into the home, and the pervasive nature of the medium.⁶³ As newly identified unique characteristics of broadcasting, they have been relied on to justify stricter content controls and to perpetuate a constitutional double standard.⁶⁴ However, just as scarcity is a universal characteristic of the press,⁶⁵ all media have indecent or offensive capabilities. Regulation on such grounds is troublesome especially because indecency and offensiveness are malleable concepts and are susceptible to subjective evaluation.⁶⁶ Official denomination of "one man's lyric" as vulgarity⁶⁷ not only may beget devaluation and impedence of expression—even if political in nature⁶⁸ and thus otherwise officially regarded as the most exalted speech variant⁶⁹—but it may facilitate cultural imperialism.⁷⁰

Consistent with the diminished first amendment status of radio and television, the Court does not employ strict scrutiny in reviewing broadcasting regulation.⁷¹ Nor does the level of scrutiny vary depending on whether regulation endeavors to promote or patently impair content diversity.⁷² Thus, regulatory interests need not be compelling to prevail, provided they are perceived as simply outweighing the importance of expressive freedom in a given instance.⁷³ This level of review has allowed constitutional interests to be offset by rationales that may be speculative or otherwise insufficient. The concern that children have ready access or are peculiarly vulnerable to the influence of radio and television never has been translated into conclusive findings of adverse effects.⁷⁴ Even if a linkage existed, it is not apparent why such a determination necessarily should

63. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

64. The satirical monologue, which the Court found indecent, was reproduced in its entirety in the appendix to the Court's opinion. See *id.* at 751-55.

65. See *supra* text accompanying notes 53-59.

66. See *Pacifica Found.*, 438 U.S. at 772 n.6, 775-77 (Brennan, J., dissenting).

67. *Cohen v. California*, 403 U.S. 15, 25 (1971).

68. The Court itself acknowledged that the expression at issue in *Pacifica* was a social satire. *Pacifica Found.*, 438 U.S. at 746 n.22. The susceptibility of expression to control, pursuant to subjective taste regarding how the message is presented, was evinced by the narrow one vote margin enabling the bearer of the message "Fuck the Draft" to escape conviction. See *Cohen v. California*, 403 U.S. 15 (1971).

69. The Court traditionally regarded political expression as the most protected form of speech. See, e.g., *Central Hudson Gas & Elec. Co. v. Public Serv. Comm.*, 447 U.S. 557, 561-63 (1980).

70. See *Pacifica Found.*, 438 U.S. at 776-77 (Brennan, J., dissenting).

71. Although judicial review of official burdens on fundamental constitutional guarantees normally demands a compelling justification, regulation of broadcasting may be subject to scrutiny that is less probing and insistent on sensitive controls. See *FCC v. League of Women Voters*, 468 U.S. 364, 375-80 (1984).

72. Fairness regulation, even if unsuccessful, has endeavored to promote diversity, while controls on indecent or offensive expression manifestly have curtailed it. Equal protection analysis, in contrast, sets less exacting standards for government action that promotes rather than directly and purposely impairs equal protection rules. See, e.g., *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978); *Korematsu v. United States*, 323 U.S. 214 (1944).

73. See *FCC v. League of Women Voters*, 468 U.S. 364, 375-80 (1984).

74. See, e.g., *Videoculture*, *Christian Science Monitor*, Aug. 25, 1985, at 25.

make a constitutional difference.⁷⁵ Access and exposure concerns are relative and lend themselves toward fashioning infinitely variable standards for different types of media. Insofar as such concepts dominate, constitutional standards become structured in response to the least mature elements of the citizenry. Parental governance, which was the primary control on at least one generation's exposure to comic books and adult literature, is itself a constitutionally recognized interest⁷⁶ and affords a more sensitive response under the first amendment than official content control.

Privacy concerns, although officially adverted to in support of content regulation,⁷⁷ actually would seem to cut in an opposition fashion. Privacy, as a constitutionally protected interest, embraces personal autonomy.⁷⁸ A system of freedom of expression, favoring autonomous over authoritative selection,⁷⁹ would appear to strengthen a preference for personal rather than official control. Worries associated with a medium's pervasiveness, however, may betray underlying visceral concerns that "it is the immediacy and power of broadcasting that [warrant] different treatment."⁸⁰ If so, the consequent regulatory response deviates from the principle that expression should not be penalized merely because of its force.⁸¹ Less exacting scrutiny that does not demand compelling justification for content control, however, may countenance such disreputable consequences.

Standards for fairness regulation in broadcasting originally were constructed, at least in principle, to enhance content diversity. The scarcity premise, which was the underpinning for official efforts to promote first amendment values, has been superseded by rationales that overtly impair expressive pluralism. Although in rhetoric it may have elevated the first amendment status of broadcasters, therefore, the FCC by its actions has reinforced their diminished constitutional standing.

75. Some parents may want their children to be exposed to expression that others find offensive. *FCC v. Pacifica Found.*, 438 U.S. at 770 (Brennan, J., dissenting).

76. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (parental authority in the "household to direct the rearing of . . . children is basic in the structure of our society"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (parents have liberty to direct upbringing and education of their children). See generally *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (parental discretion regarding a child's education has "a high place in our society").

77. See *supra* text accompanying notes 63-64.

78. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1973) (right of privacy protects autonomy in making fundamental personal decisions); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (privacy concerns in the sense of personal choice are even more profound to the extent they implicate receipt of information in sanctity of home).

79. See *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

80. *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).

81. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978) (personal power and influence do not affect setting of first amendment standards); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (restricting the speech of some to enhance the relative voice of others is alien to the first amendment); *Telecommunications Research*, 801 F.2d at 508 (effectiveness of speech is not a justification for according it less first amendment protection).

II. THE FUNCTIONAL SIMILARITIES OF THE PRESS: CONSTRUCTING A COMMON FIRST AMENDMENT STANDARD

Identification of features that may be unique to a given medium is not a taxing exercise. Different media possess manifestly distinct structural characteristics. The printed word, for example, generally affords depth and detail, allows the reader to set his rate of exposure to information, and affords immediate opportunity for review and retrieval. Electronic media and motion pictures, because of their graphic nature and multisensory reach, project images or words that may either create lasting impressions or escape perception because they flash by too quickly or are not absorbed by an inattentive mind. Research has yielded mixed results on the issue of whether broadcasting promotes antisocial behavior.⁸² Exposure to radio and television may facilitate a child's capacity for parallel processing of information.⁸³ Because access to broadcasting does not have a literacy prerequisite, moreover, it arguably is more democratic.⁸⁴

Even within the electronic media, differences beyond the obvious structural ones may readily be discerned. Profit maximization strategies of broadcasting and cablecasting, for instance, facilitate divergent programming tactics and results. Because television profits are tied to a single mass audience, programming is calculated to attract the most viewers and offend the least.⁸⁵ The consequence is relatively unadventurous, middle-of-the-road programming.⁸⁶ A cable system's multichannel capacity is directed toward fragmented audiences and thereby is structurally disposed toward offering more diverse programming.⁸⁷

Even though differences among media exist, reliance on these differences for constitutional variances is problematical. Such a focus may breed procrustean results or disregard significant exceptions that undercut a general rule's viability. The scarcity principle, for example, actually may afford more persuasive support for regulating publishing than broadcasting.⁸⁸ Moreover, even if a medium such as newspapers or cable television may be better structured for maximizing content diversity, actual performance may fall short of potential. Thus, media-specific analysis may suffer from generalizing too little and too much.

The practical futility of fashioning constitutional distinctions among communications methodologies, moreover, is suggested by the overlapping if not merging capabilities of modern media. Cable is a hybrid medium that has defied easy depiction under present analytical standards. Courts, charged with the responsibility of identifying unique characteristics, have disagreed on whether it is more akin to broadcasting than publishing.⁸⁹ Cable can electronically

82. See *Videoculture*, Christian Science Monitor, Aug. 25, 1985, at 25.

83. See *id.*

84. See *id.*

85. See *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 187-89 (Brennan, J., dissenting); Bazelon, *supra* note 48, at 230.

86. See Bazelon, *supra* note 48, at 230.

87. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-01 (1984); *Quincy Cable TV, Inc.*, 768 F.2d 1434, 1438-39 (D.C. Cir. 1985).

88. See *supra* note 54 and accompanying text.

89. See *supra* note 57.

reproduce a publication for home viewing and retransmit a radio or television signal. Given such combinant attributes, different standards for electronic and printed newspapers would be artificial and contrived.

Although it is easy to identify differences among media, it is more difficult to explain satisfactorily why such distinctions should be drawn. Moreover, the search for distinguishing characteristics risks being reflexive and self-perpetuating rather than rationally motivated. The scarcity rationale was not merely abandoned when finally determined to be obsolete, for instance, but was supplanted by newly identified concerns.

The justification for disparate first amendment formulas is especially problematical because media have the overarching functional similarity of disseminating information. Structural methodology or public preferences for a particular medium should have little relevance toward the fashioning of first amendment protection.⁹⁰ Nonetheless, the obligation to search for constitutionally distinguishing traits has fostered an analytical process that is hypersensitive to perceived imperfections⁹¹ and, contrary to normative first amendment expectations, disposed toward official intercession.⁹²

A focus on unique characteristics and the consequent operation of official rather than marketplace controls not only slights the notion of autonomous selection, but discounts the significance of media interaction and competition. Even if a particular medium does not provide fair coverage, for example, most individuals are exposed to multiple sources of information that compete and balance one another. The effect of undesired exposure to indecent or offensive expression also can be diluted or even offset to the extent media compete with or augment one another.⁹³ The public's receipt of information from diverse sources and the citizenry's pluralistic nature and interests suggest the need for caution in considering government regulation that respectively would overlook and disregard those realities. Because media function in a conjunctive rather than disjunctive fashion, the general marketplace affords diversity and remedies for abuses or excesses, even if a particular medium may not. The quality of first amendment results thus would be enhanced to the extent analysis was calibrated toward the media collectively rather than specifically.

90. In abandoning the fairness doctrine, the FCC purported to favor an analytical focus on functional similarities rather than structural differences among media and consequent elevation of new media to the constitutional level of old media. See *Syracuse Peace Council*, 2 F.C.C. Rec. 5043, 5557 (1987). Despite that articulation, and as discussed *supra* notes 24-29 and *infra* notes 95-98 and accompanying text, however, disparate regulatory approaches persist.

91. Focusing on distinctive characteristics might be more tolerable to the extent it was a prelude to diversity enhancement rather than restrictive schemes. See *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1448 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Even then, however, the danger of misguided efforts to promote expressive pluralism, such as the fairness doctrine, would persist.

92. See *Lively, Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1093 (1985). See generally *Quincy Cable TV*, 768 F.2d at 1448 (distinguishing cable television from ordinary broadcast television for first amendment purposes).

93. Insofar as concerns relate to a medium's accessibility to children, competing or augmenting sources of information may include parental input. See *supra* note 76 and accompanying text.

III. FROM PARTIAL TO COMPREHENSIVE CONTENT DEREGULATION

The purported elevation of broadcasters to the same first amendment status as publishers constitutes rhetoric that surpasses reality. Abandonment of the fairness doctrine has not been accompanied by a rejection of media-specific analysis. So long as this thinking is subscribed to, it will engender constitutional variances and delimit the first amendment's reach. The FCC has declared that broadcasters should have the same first amendment status as publishers, and the public rather than government should determine what expression is fit for consumption.⁹⁴ It finds no inconsistency, however, between its market-oriented rhetoric and simultaneous fortification of controls on indecent or offensive expression.⁹⁵ The consequent disparity in first amendment law, however, is manifest. Despite the FCC's assertion that indecency controls merely constitute reasonable "time channeling" akin to "place channeling" effectuated by the zoning of adult bookstores and movie theatres,⁹⁶ the analogy is more a product of convenience than principle. Zoning restrictions on adult expression are less comprehensive than curbs upon indecent broadcasting. The George Carlin monologue in *FCC v. Pacifica Foundation*, although subject to time channeling, is not place channeled but instead is freely available in print including in the appendix to the court's opinion.⁹⁷ Elevation of broadcasting to the same constitutional status as publishing requires more than a rejection of obsolete regulatory premises. Parity cannot be realized until the persisting conflict between first amendment interests and officially perceived public interest is reconciled.

In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court determined that the right of viewers and listeners to receive diverse viewpoints superseded that of broadcasters to exercise full editorial autonomy.⁹⁸ Official content control impairs that paramount public right, however, as the FCC finally recognized in its abandonment of the fairness doctrine.⁹⁹ Comprehensive relaxation of content controls would further promote editorial and public interests. Consistent emphasis on the first amendment's basic function as a preclusion against, rather than a justification for governmental interference would create a less hospitable climate for antipluralistic mechanisms. The public's interest in receiving diverse information and self-selection are advanced insofar as the flow of information is less filtered.

The first amendment interests of the press and the public can and should be regarded as complementary rather than competitive. Comprehensive protection rather than selective purification of expression may facilitate offensive and inde-

94. See *supra* notes 18-23 and accompanying text.

95. See *Infinity Broadcasting Corp. of Pa.*, 2 F.C.C. Rec., 2706-07 n.16 (1987).

96. See *New Indecency Enforcement Standards to Be Applied To All Broadcast and Amateur Licensees*, 2 F.C.C. Rec. 2726 (1987). The Court has determined that indecent or offensive expression, such as adult books or movies, may not be prohibited but is subject to location controls. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

97. See *FCC v. Pacifica Found.*, 438 U.S. 726, 751-55 (1978). Unrestricted availability in other media actually is critical to the special susceptibility to regulation in broadcast form. See *id.* at 760 (Powell, J., concurring).

98. See *Red Lion*, 395 U.S. at 390.

99. See *Syracuse Peace Council*, 2 F.C.C. Rec. 5043, 5055-57 (1987).

cent expression. Instead of being worrisome to the point of triggering a regulatory response, however, such a consequence should serve as a reminder that the first amendment not only creates opportunities but assigns responsibilities. The first amendment, in theory, trusts the public to make sound decisions and assumes the risk that it will not.¹⁰⁰ A system of official control designed to curb expression that may offend or affront has the potential for reaching views that merely are unpopular or unorthodox.¹⁰¹ The transfer of responsibility for content evaluation thus has more profoundly subversive potential than any harmful tendencies of indecent or offensive expression.

In a constitutional value system that supposedly favors pluralism and autonomous over authoritative selection,¹⁰² adverse consequences of expression may be addressed or remedied by preemptive or reactive personal action. Official catering to the tastes of some to dictate what information is available to others represents inverted thinking. Individuals wanting to see or hear what may not be broadcast, it is true, have alternative means of obtaining access to such material.¹⁰³ The burden and cost of practical private regulation that would effectively screen out unwanted expression, however, would be incurred only once and consequently be less imposing than the tariff on multiple diversity-motivated purchases.¹⁰⁴ Despite the disparity of costs, which seem to favor first amendment concerns, the Court essentially has favored the taxing of pluralism rather than intolerance.¹⁰⁵ Especially to the extent that private governance readily and effectively may be exercised, self-help is preferable to official controls that promote majoritarian or subjective interests at the expense of constitutional values.

Comprehensive rather than partial deregulation of the information marketplace must be preceded by a recognition that, despite their structural differences, media are functionally similar. That realization would translate into the assessment of all media pursuant to a like standard of review. Instead of being evaluated pursuant to a less searching standard of review enabling the Court to engage in routine balancing of competing interests,¹⁰⁶ broadcast regulation should beget the exacting scrutiny employed when more established first amendment interests are burdened.¹⁰⁷ Identical first amendment standards of review would not necessarily ensure identical results. Licensing, generally an intolerable form of prior restraint,¹⁰⁸ still might be justified in the electronic forum as a

100. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978) (first amendment contemplates the danger that people will act unwisely). See generally *Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("free expression is powerful medicine in a [pluralistic] society" that disfavors official restraint in the hope that citizenry will render informed judgments).

101. See *id.* at 26.

102. *Id.* at 24.

103. See *FCC v. Pacifica Found.*, 438 U.S. 726, 760 (1978) (Powell, J., concurring).

104. Lock boxes and channel blockers are commercially available devices that, for minimal cost, enable parents to control television consumption.

105. See *Pacifica Found.*, 438 U.S. at 774-75 (Brennan, J., dissenting).

106. See *supra* notes 71-73 and accompanying text.

107. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

108. See *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

necessary means for ensuring orderly use of frequencies.¹⁰⁹ The media-specific survival of the licensing process would owe its continued use not to a fixed double standard, however, but to a demonstration of a compelling interest.

Stricter scrutiny not only would require a reevaluation of controls on indecent or offensive broadcasting but may necessitate a wholesale reassessment of radio and television regulation. Limited resources, for instance, normally are not a constitutionally permissible basis for excluding aliens from other opportunities available to citizens.¹¹⁰ Moreover, alienage restraints represent an official preference that may impede genuine diversity maximization, and thus interfere not only with equal protection but first amendment interests.

Conditioning of a broadcasting license on personal character likewise would require a compelling justification. If a crook may publish but not broadcast, the implication is that the danger to the public interest is more acute in the latter setting. Concern with relative influence, however, is contrary to normative first amendment expectations.¹¹¹ Even if broadcasting remains governed by a public interest standard, good character does not necessarily translate into admirable service.

Restrictions on a person's or entity's media holdings¹¹² presume that diverse ownership will promote expressive pluralism.¹¹³ Such a premise may be valid, but it never has been tested by searching judicial inquiry.¹¹⁴ The Court already has determined that a heavily concentrated newspaper industry does not justify first amendment encroachment.¹¹⁵ Arguably, the resources associated with large and concentrated ownership may afford higher quality radio and television programming than is provided by less capitalized ownership.¹¹⁶ Size, corporate diversification, and absentee ownership also may afford more resistance to pressures from local vested powers and interests. Such possibilities, that would have been assessed in the event of comparably direct constraints on publishing, remain unexamined for broadcasting.

Closer scrutiny of broadcasting regulation would assign to government the burden of proving the need for such control.¹¹⁷ It thus would be necessary to demonstrate convincingly that alternatives less burdensome to first amendment interests, including private remedies, were inadequate. Even if some disparate

109. Licensing of broadcasters was adopted as a means for creating order out of the confusion and chaos that existed when frequencies were utilized pursuant to private whim. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 212-13 (1943).

110. *See Graham v. Richardson*, 403 U.S. 365, 379 (1971) (state's interest in preserving limited welfare benefits does not justify excluding noncitizens from eligibility).

111. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

112. *See supra* note 28 (discussing multiple ownership rules).

113. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 780 (1978).

114. *See id.* at 803.

115. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

116. *See Combined Communications Corp.*, 72 F.C.C.2d 637, 685 (1979) (financial health of media chain may encourage initiative and risk-taking in news reporting, diminish concern for sponsor reaction, facilitate challenges to local parochial views, and provide a major media source to compete with national news media).

117. *See FCC v. League of Women Voters*, 468 U.S. 364, 375-80 (1984).

results might persist, therefore, the citizenry's interest in selecting what it watches and hears, as well as what it reads, would be enhanced.

CONCLUSION

The Supreme Court has observed that "'dissemination of news from as many different sources, and with as many different facets and colors as . . . possible,'" is a first amendment ideal.¹¹⁸ It thus has noted that "'right conclusions are more likely to be gathered out of a multitude of tongues'" than through official screening.¹¹⁹ By engendering standards that allow official judgment to supplant self-determination, however, media-specific analysis has strayed from these fundamental notions. Offensiveness and indecency are among the "different facets and colors" that constitute expressive pluralism. Diminished regard for such speech, pursuant to the notion that it can be sensitively identified, has treacherous potential. A system of freedom of expression would be better served if analysis focused less on perceived characteristics of speech and the structural nature of the media and instead uniformly demanded compelling reasons for official intervention.

118. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 602-03 (1953) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

119. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd* 326 U.S. 1 (1945)).