NEW MEDIA, OLD DOGMA

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Mass communication, during the past half century especially, has been substantially augmented and altered. Changes in the nature of mass communications have caused revisions in how information is disseminated and received and have engendered new first amendment principles and policies. First amendment analysis concerning the press[1] has traditionally emphasized and favored editorial autonomy.[2] The advent of new media,[3] however, has led to the creation of new first amendment rights,[4] the elevation of those rights above editorial freedom[5] and the construction of special rules governing their function and influence.[6]

Modern worries regarding the operation of new media and their possible effect upon society were presaged by worries articulated in response to the changing ways of the print media. Louis Brandeis, for instance, expressed his distress with "[i]nstantaneous photographs and newspaper enterprise" and an industry which traded not in matters of "real interest" but "idle gossip."[7] Brandeis's concern with a medium that catered to "prurient taste" and "occup[ied] the indolent,"[8] was reincarnated in the later characterization of television as "a vast wasteland."[9] His urgings that the press focus upon "matters of real interest to the community"[10] foreshadowed the "public interest" standard that now governs broadcasting.[11]

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1. References to the "traditional press" in this article advert to the print media.

2. The Court has observed that "[i]t has yet to be demonstrated how governmental regulation of [editorial control and judgment] can be exercised consistent with First Amendment guarantees as they have evolved to this time." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

3. References to "new media" refer to media such as motion pictures, radio, television and cable, which have emerged in the twentieth century.

4. Unlike results obtained from constitutional analysis of the print media, *see supra* note 2, the public has a "right to have the [broadcasting] medium function consistently with the ends and purposes of the First Amendment." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

5. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*

6. *See infra* notes 16, 23, 44 and accompanying text.

7. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890).

8. *Id.* at 196.

9. Speech by Federal Communication Commission Chairman Newton Minow to the National Association of Broadcasters, May 9, 1961.

10. *See* Brandeis & Warren, *supra* note 7, at 196.

11. The Federal Communication Commission is empowered to regulate broadcasting "as public convenience, interest, or necessity requires." Communications Act of 1934, 47 U.S.C. § 303 (1982). Early on, it was noted that the standard "means about as little as any phrase that the drafters of the

Official concern with the possible effect of motion pictures upon society significantly delayed their recognition as a medium for communication protected by the first amendment.[12] The emergence and development of radio and television caused an even higher level of anxiety. Broadcasting has engendered worry tied not only to perceptions that it is a dangerous influence,[13] but to the reality that it is an opportunity available only to a relative few.[14] As a result of these concerns, radio and television are governed by incongruent principles reflecting the official desire to promote the effective use of broadcasting[15] but control its potentially bad effect.[16]

The press, as constituted when the first amendment was drafted, was governed by the concept of editorial freedom.[17] Although broadcasting emerged as the dominant medium during the twentieth century, the Court refused to recognize "an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[18] The subordination of the propagator's right to freely disseminate information to the interest of the audience in receiving diverse views and voices[19] not only created new constitutional rights for the public but also reflected a perceived need to revise first amendment structure in an effort to promote first amendment values.[20]

The creation and unusual ordering of first amendment interests and consequent formulation of derivative policies are attributable to media-specific analysis. Essentially, the Court has determined that "differences in the

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Act could have used." Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930).

12. Concern with film's "capab[ility] of evil" was a basis for originally refusing to recognize the medium as part of the press and thus denying it first amendment protection. *See* Mutual Film Corp. v. Industrial Comm. of Ohio, 236 U.S. 230, 244-45 (1915). Nearly forty years elapsed until the Court acknowledged "that motion pictures are a significant medium for the communication of ideas" protected by the first amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).

13. Concern that broadcasting is "uniquely pervasive" and "uniquely accessible to children" seems akin to the anxiety, discussed *supra* note 12, with a medium's "cap[ability] of evil." FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978). The mere presence of radio and television "in the air" troubled one court. Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

14. The Court, noting that all persons do not have an equal opportunity to broadcast, observed that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Red Lion*, 395 U.S. at 388.

15. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 214-15 (1943); Communications Act of 1934, 47 U.S.C. § 303(g) (1982).

16. Although the principle that "one man's vulgarity is another's lyric" has been used to protect expression in a public context, *see* Cohen v. California, 403 U.S. 15, 24 (1971), the Court has refused to adapt it to the electronic forum. It thus affirmed the FCC's power to regulate speech it found indecent, even if the expression constituted political or social satire. *See Pacifica Foundation*, 438 U.S. at 726. The FCC has since expanded and reinforced controls upon purportedly indecent, offensive or shocking expression. *See New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 F.C.C. 2726 (1987) [hereinafter *New Standards*]; *In re Infinity Broadcasting Corp. of Pennsylvania*, 2 F.C.C. 2706 (1987).

17. *See supra* note 2 and accompanying text.

18. *Red Lion*, 395 U.S. at 388.

19. The emergence of broadcasting led to the creation of the first amendment rights for viewers and listeners. It was "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which [became] crucial." *Id.* at 390.

20. The first amendment on its face emphasizes safeguarding the right to express or disseminate rather than receive information. It reads in terms of speakers and purveyors rather than audiences. U.S. CONST. Amend. I.

characteristics of new media justify differences in the first amendment standards applied to them."[21] Such media-specific thinking constituted the analytical departure point for an affirmative governmental role calculated to promote diversity through regulatory means rather than through protection of journalistic discretion. The determination that spectrum scarcity was a unique problem of broadcasting bred, among other things, fairness regulation.[22]

The fairness doctrine,[23] until the Federal Communications Commission ("FCC") recently abolished it,[24] was a primary example of deviation from editorial autonomy traditionally relied upon to facilitate the first amendment objective of creating an informed public.[25] Identification of a medium's peculiar characteristics proved to be a treacherous process, however, as evinced by the inadequacies of the scarcity rationale itself.[26]

The need to identify a medium's unique characteristics as a prelude to a regulatory response creates multiple problems and concerns. The assumption that government regulation is appropriate, once a unique characteristic is identified, invites official interference. Even if unique problems are accurately noted, the regulatory response may be misdirected or responsible for more harm than the evil it was intended to correct.[27] Policy, moreover, may become obsolete as a medium evolves, as it is augmented by even newer media, and as past perceptions become dated.

Experience with the fairness doctrine evinces how difficult it is to abandon regulation even when it has outlived its utility. The FCC ardently endorsed the principle[28] in the face of massive criticism detailing its deficiencies and dangers.[29] Fifteen years passed from the constitutional validation of the fairness doctrine[30] until the FCC's concession that "the multiplicity of voices in the marketplace today" had eliminated the problem of spectrum scarcity, so the regulation no longer was a "necessary . . . or appropriate means by which to effectuate this interest."[31] Still, instead of being

21. *Red Lion*, 395 U.S. at 386.

22. Spectrum scarcity is a characteristic attributable to the limited number of frequencies reserved for broadcasting and the consequence that more prospective licensees exist than available frequencies. *See id.* at 388-89. Radio and television licensing was introduced as a rational allocation scheme that would avoid the chaos and confusion of early broadcasting when operators competed on the same frequency and merely generated interference. For a discussion of that period and its problems, see *National Broadcasting*, 319 U.S. at 210-13.

23. The nature and operation of the fairness doctrine are discussed *infra* at notes 58-71 and accompanying text.

24. *See In Re Complaint of Syracuse Peace Council*, 2 F.C.C. 5043 (1987).

25. Instead, the Court approved the concept of broadcasters as public trustees or fiduciaries. *See Red Lion*, 395 U.S. at 389-90. It was assumed that, if obligated "to present views and voices . . . representative of his community," broadcasters would serve the first amendment interest of diversity. *Id.*

26. The dubious nature of the scarcity premise is discussed *infra* at notes 46-52 and accompanying text.

27. Harm caused by regulation aimed at alleviating perceived problems with broadcasting, newspapers and cable is discussed *infra* at notes 97-98, 111-13 and 132-44.

28. *See, e.g., Red Lion*, 395 U.S. at 385; *In the Matter of 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) [hereinafter *Fairness Report*]; *Reconsideration of Fairness Report*, 58 F.C.C.2d 691 (1976).

29. *See infra* notes 63 and 69-70.

30. *See Red Lion*, 395 U.S. at 367.

31. *In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations*

dropped, and despite extensive evidence that fairness regulation disserved its stated first amendment purposes,[32] Congress favored its perpetuation.[33] It was only after proposed fairness legislation was vetoed[34] that the FCC finally abandoned it.[35]

The history of and continuing controversy over fairness regulation exemplifies how first amendment thinking has looked toward official promotion of results which unfettered editorial discretion was intended to facilitate. Contemplation of official regulation in place of editorial discretion has characterized modern assessment of other media.

The purpose of this article is to: (1) examine how the advent of new media has engendered revisionist first amendment thinking calculated to promote, but invariably harming, first amendment ends; (2) illustrate how emphasis upon promoting first amendment values may affect official policy toward the traditional media and thus further disserve first amendment interests; and (3) demonstrate, focusing upon cable television as an even newer medium, why a media-specific analysis is misguided.

NEW MEDIA AND NEW FIRST AMENDMENT DOCTRINE

New media, as they evolve, are subject to the assumption that each "tends to present its own peculiar problems."[36] The notion that first amendment standards should reflect the problems of, and differences between, each medium originated with Justice Jackson, in *Kovacs v. Cooper*,[37] which concerned the constitutionality of sound truck regulations.[38] The Court later embraced the precept and has since used it to calibrate the first amendment protection of broadcasting,[39] motion pictures,[40] billboards[41] and most recently cable television.[42]

The principle, by its terms, steers attention toward structural dissimilarities and subtly invites disparate constitutional treatment. It directs thinking away from the media's general function similarities that merit common constitutional regard. Identification of unique media characteristics, nonetheless, is the necessary first step toward specialized regulation that begets customized first amendment parameters.

Even if problems are correctly recognized, experience has shown that regulatory recourse or compensation is perilous. Rules, even if initially help-

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Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 147 (1985) [hereinafter the *Fairness Report of 1985*].

32. *See id.*

33. *See* N. Y. Times, June 21, 1987, at 1, cols. 5-6.

34. *See id.*

35. *See In re Complaint of Syracuse Peace Council*, 2 F.C.C. 5043 (1987).

36. *Joseph Burstyn*, 343 U.S. at 503.

37. 336 U.S. 77 (1949).

38. Justice Jackson, in analyzing the constitutionality of a sound truck ordinance, observed that "[t]he moving picture screen, the radio, the newspaper, the handbill, the soundtruck and the street corner orator have differing natures, values, abuses, and dangers. Each, in my view, is a law unto itself." *Id.* at 97 (Jackson, J., concurring).

39. *See Red Lion*, 395 U.S. at 386.

40. *See Joseph Burstyn*, 343 U.S. at 503.

41. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

42. *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

ful, may linger after initial problems vanish.[43] Although the Court originally upheld the fairness doctrine[44] as a permissible regulatory response to the problem of spectrum scarcity,[45] the scarcity rationale from its inception was a dubious premise. The number of radio and television stations in most any population center exceeds the quantity of daily newspapers.[46] The Court's effort in *Miami Herald Publishing Company v. Tornillo*[47] to distinguish newspaper scarcity attributed to economic realities from spectrum scarcity attributed to allocational limitations[48] was unconvincing. Because broadcasting licenses can be sold and their availability hinges upon quoting an acceptable price, scarcity in broadcasting may be reducible to economic terms. The primary barrier to entering broadcasting or publishing, moreover, is adequate funding. In affirming the fairness doctrine in *Red Lion Broadcasting Co., v. F.C.C.*,[49] the Court relied upon the argument that "[s]carcity is not entirely a thing of the past."[50] Insofar as scarcity is a common characteristic of modern media,[51] however, its selective employment is irrational.[52] Utilization of a "universal fact as a distinguishing principle necessarily [fosters] analytical confusion if not unprincipled results."[53]

The FCC, as noted previously,[54] eventually acknowledged that the fairness principle had become obsolete and thus eliminated it. The Court already had intimated that it would be sympathetic to its repeal.[55] Yet despite abandonment of what the FCC itself characterized as inimical to first amendment rights and values,[56] congressional efforts to resurrect the doc-

43. The premise that the fairness doctrine overstayed its welcome is discussed *supra* at notes 27-31, *infra* at notes 58-70, and in the accompanying text.

44. The fairness doctrine obligates broadcasters to (1) set aside reasonable amounts of air time for the coverage of public issues, and (2) provide opportunities for contrasting points of view. *Fairness Report*, *supra* note 28, at 7. The regulation allows broadcasters to determine how controversial programming will be balanced and thus creates no right of access to interested parties. General fairness concerns nonetheless underlie rights of access, in the event of an attack upon personal character, or the opportunity for a political candidate to respond to a broadcaster's endorsement of a rival. *See* 47 C.F.R. § 73.1920 (1987). The Court, in upholding the fairness doctrine, also affirmed the right-to-respond provisions as part of a broader scheme of fairness regulation. *See Red Lion*, 395 U.S. 367.

45. *See Red Lion*, 395 U.S. at 388.

46. In 1985, 8593 commercial radio stations operated in the United States. STATISTICAL ABSTRACT OF THE UNITED STATES 1987, No. 906, at 531. A total of 1235 television stations and 7600 cable systems operated in 1986. *Id.* During 1985, 1676 newspapers published on a daily basis. *Id.* at 536.

47. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

48. *Id.*

49. 395 U.S. 367 (1969).

50. *Red Lion*, 395 U.S. at 396.

51. Even cable, which affords channel and thus content diversity, has had a scarcity problem attributed to it. Insofar as cable systems constitute natural monopolies, and editorial judgment is centralized, some courts have found scarcity to be as significant for cable as for broadcasting. *See, e.g.*, Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Berkshire Cablevision of Rhode Island v. Burke, 571 F. Supp. 976, 985-88 (D.R.I. 1983). *But see* Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

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

53. *Id.*

54. *See supra* notes 24, 31 and 35.

55. The Court invited the FCC or Congress to assert that technology had rendered the fairness doctrine obsolete. *See* FCC v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984).

56. *See In Re Complaint of Syracuse Peace Council*, 2 F.C.C. at 5055-57.

trine seem likely to persist.[57] Although having outlived any utility that it may have possessed, the doctrine eventually may resurface pursuant to the notion that the first amendment ensures fairness in the electronic forum. Such a premise would be misplaced, however, insofar as the guarantee of a free press does not ensure a fair one.

Regulatory formulas may disserve the interests they were designed to promote not only because they have become outmoded but because they were misguided from the outset. The fairness doctrine was supposed to promote content diversity,[58] but it actually had the opposite effect.[59] Although designed to advance first amendment values, moreover, fairness regulation enhanced the danger of undue government influence upon the editorial process.[60]

The fairness doctrine directed broadcasters to raise "controversial issue[s] of public importance" and augment them with balancing viewpoints.[61] But a broadcaster wanting to maximize profitable air time could shun controversy and thus undermine diversity goals.[62] First amendment goals also were subverted when programming decisions reflected concern that controversy would alienate audiences and advertisers[63] or beget unwanted administrative, reputational and legal costs.[64] The Court, responding to the possibility that broadcasters may shirk their duty, warned that the FCC was "not powerless to insist that they give adequate and fair treatment to public issues."[65] Fairness policing, however, constituted a cure worse than the disease. To the extent licensees were obligated to provide opportunities for competing viewpoints, the FCC could displace the editorial judgment of broadcasters with its own. A central problem with fairness regulation thus was "the fact that someone other than the speaker . . . with far-reaching enforcement powers . . . ha[d] the task of [administering] it."[66]

It is well-established that the FCC is "more than a traffic policeman concerned with the technical aspects of broadcasting and that it [may interest] . . . itself in" content-related matters.[67] If the agency concluded that a broadcaster had been too timid and failed to satisfy its fairness obligation, it had the power to impose sanctions including a fine, or nonrenewal or revocation of a license.[68] Given an industry highly susceptible to regulation by

57. *See* N.Y. Times, Aug. 25, 1987, at 20, col. 4.

58. *See Fairness Report, supra* note 28, at 7.

59. *See infra* notes 62-64 and accompanying text.

60. *See infra* notes 66-70 and accompanying text.

61. *See Fairness Report, supra* note 28, at 10.

62. *See Syracuse Peace Council*, 2 F.C.C. at 5049-50; *Fairness Report of 1985, supra* note 31, at 1151-74; Jaffe, *The Editorial Responsibility of the Broadcasters: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773 n.26 (1972).

63. *See* CBS v. Democratic National Comm., 412 U.S. 94, 187-89 (1973) (Brennan, J., dissenting); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 229 (1982); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 231-32.

64. *See Syracuse Peace Council*, 2 F.C.C. at 5049-50.

65. *Red Lion*, 395 U.S. at 393.

66. *Reconsideration of the Fairness Report, supra* note 28, at 707-08 (Commissioner Robinson dissenting).

67. *Red Lion*, 395 U.S. at 395.

68. *See* Communications Act of 1934, 47 U.S.C. §§ 307(d), 312(b) (1982).

"lifted eyebrow,"[69] the mere presence of potent enforcement tools (putting aside the potential for their misuse) was troublesome. Fairness regulation, as one presidential administration after another has demonstrated, enabled government "to toy with radio or TV in order to serve . . . sordid or . . . benevolent ends."[70]

More disastrous first amendment consequences, pursuant to the fairness doctrine, were avoided by the FCC's relatively consistent restraint in administering it.[71] But abandonment of the doctrine only reflects elimination of a symptom rather than cause of flawed first amendment analysis. Even if the fairness doctrine is not revived, related principles of fairness regulation such as personal attack and political right-to-reply rules still survive.[72] The unique-characteristics formula, moreover, enabled the FCC recently to adopt new restrictions upon purportedly offensive and indecent programming.[73] Incongruously, therefore, the FCC, in abandoning the fairness doctrine, could assert that broadcasters should have the same first amendment status as publishers, yet find no inconsistency in perpetuating a double standard for content.[74] So long as media-specific analysis endures, justifications will evolve to enable government to meddle in or experiment with the editorial process. Even before the fairness doctrine was abandoned, the scarcity rationale had been largely supplanted by notions that radio and television are intrusive, pervasive and highly accessible to children.[75]

Present concern regarding the fairness doctrine's demise is generally focused not on spectrum scarcity, which originally justified it, but on worries regarding balance and influence.[76] Such distress exposes a troubling disposition to persist with regulation long after its justification has vanished. The consequence is even more disturbing when the original regulatory justification was a contrived one. To the extent its conceptual underpinnings have been debunked and it undermines rather than promotes first amendment interests,[77] the fairness principle is best left as a doctrinal relic.

THE UNIQUE CHARACTERISTICS STANDARD AND TRADITIONAL MEDIA

The obligation to identify and address the unique problems and charac-

69. Administrative browbeating, which may take the form of a letter, telephone inquiry or expression of concern by the FCC staff, is particularly effective given the financial stake in a license to broadcast. *See* Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119-20 (1967).

70. *Democratic National Comm.*, 412 U.S. at 154 (Douglas, J., concurring). The temptation to manipulate the regulatory process in an effort to promote political agendas is one that administrations generally have found difficult to resist. *See Fairness Report of 1985*, *supra* note 31, at 1174-78; S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 219-20 (1978); Bazelon, *supra* note 63, at 244-51.

71. The FCC generally has deferred to what it denominates as "reasonable and good faith" licensee judgment. *Fairness Report*, *supra* note 28, at 11. Rarely has the Commission even made a finding against a broadcaster. *See Reconsideration of the Fairness Report*, *supra* note 28, at 709.

72. *See* N. Y. Times, *supra* note 57, at 1, col. 6. The personal attack and political right to reply rules are discussed at *supra* note 44.

73. *Syracuse Peace Council*, 2 F.C.C. at 5055-57.

74. *See New Standards*, *supra* note 16, at 2727.

75. *See Pacifica Foundation*, 438 U.S. at 748-49.

76. N.Y. Times, *supra* note 57, at 20, cols. 1, 4.

77. *Id.*

teristics of each medium was crafted in response to the emergence of new media. Although traditional media predate that analytical formula, it apparently contemplated the possibility that they would be evaluated in a like fashion.[78] To the extent the focus has become a fixed departure point in charting first amendment perimeters for the dominant media,[79] its utilization in connection with less dominant media might more readily be countenanced.[80] Although not explicitly guided by the "unique characteristics" formula, at least one legislative experiment consonant with media-specific analysis has demonstrated that official promotion of first amendment interests is as perilous for the print media as it has been for broadcasting.[81]

The newspaper industry, like the electronic media, has been the subject of well-motivated regulatory efforts. During the course of the twentieth century, it has become increasingly characterized by economic scarcity.[82] One dimension of the problem[83] has been the phenomenon of failing newspapers.[84] In 1970, Congress responded to that "unique characteristic" of the modern newspaper industry by enacting the Newspaper Preservation Act ("NPA").[85] Like the fairness doctrine which the Court approved in 1969,[86] the NPA has been rendered obsolete by changing realities and is a potential threat to first amendment interests.[87]

The NPA was conceived as a rescue device for failing newspapers.[88] Its stated purpose is to "maintain[ ] a newspaper press editorially and reportorially independent and competitive"[89] and thus "preserve the publication of newspapers . . . [pursuant to] a joint operating agreement . . . affected in

78. *See supra* note 38.

79. As the electronic media evolve beyond radio and television to include cable and other new technologies, traditional protection of editorial autonomy only for the print media further shrinks the first amendment ambit.

80. *But see* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

81. Congressional enactment of the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1970), discussed *infra* at notes 84-89 and accompanying text, did not advert specifically to any need to identify unique problems of the print media. To the extent it perceived and responded to special problems, however, the legislative action is consonant with new media analysis.

82. The number of daily metropolitan newspapers had declined from about 2,600 in 1910 to 1,676 in 1985. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 46, at 536; Comment, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948, 949 n.12 (1952). The Court noted that " 'one newspaper towns have become the rule, with effective competition operating in only four percent of our large cities.' " *Tornillo*, 418 U.S. at 249 n.13, *quoting* Balk, *Background Paper* in TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL: A FREE AND RESPONSIVE PRESS 18 (1973).

83. Although it made no reference to its decision reaching an opposite result concerning the electronic forum, see *Red Lion*, 395 U.S. 367, the Court implicitly distinguished spectrum scarcity from the economic scarcity of daily newspapers. *See also Tornillo*, 418 U.S. 241.

84. A failing newspaper is a publication caught in a "downward spiral effect," which occurs when "a newspaper's declining circulation and lessening advertising revenue feed off one another, eventually forcing it to close." Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 471 (9th Cir. 1983).

85. 15 U.S.C. § 1801-1804 (1970).

86. *See Red Lion*, 395 U.S. 367.

87. *See infra* notes 97, 111-13 and accompanying text.

88. *See Committee For an Independent P-I*, 704 F.2d at 473-74; Bay Guardian Co. v. Chronicle Publish. Co., 344 F. Supp. 1155, 1157 (N.D. Cal. 1972); Newspaper Preservation Act, 15 U.S.C. § 1801 (1970).

89. 15 U.S.C. § 1801.

accordance with the provisions of this [Act]."[90] Effectuation of a joint operating agreement is conditioned upon findings by the Attorney General that a newspaper is in probable danger of financial failure,[91] and a partial merger would promote "the policy and purpose" of the NPA.[92] If approved, a joint operating agreement enables newspapers to merge their business operations, while maintaining independent editorial staffs and receiving general antitrust immunity.[93]

The NPA thus reflects legislative judgment that retention of more than one metropolitan daily newspaper facilitates content diversity and a better informed public.[94] But assumptions that first amendment values are promoted by cooperation rather than competition have not proved to be entirely correct.[95] A newspaper may be propped up, but even then it may not survive.[96] Even if a single newspaper town does not result, the antitrust exemption for a newspaper combine places would-be competitors at such a disadvantage that they are deterred from entering and diversifying the marketplace.[97] The NPA can be used as a bludgeon to the extent a publisher threatens to shutdown a newspaper absent approval of a joint operating agreement.[98]

Enactment of the NPA also has proved to be insensitive to the social dynamics of the past few decades. During that period, enhanced personal mobility, freeways, modern public transportation systems and other social and economic forces including white flight[99] have fostered a massive migration to suburban communities.[100] The decline of daily metropolitan newspapers mirror social, governmental and corporate divestment in cities and investment in suburbs.[101] Consequent demographic changes have created

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90. *Id.*

91. *Id.* at § 1803(b).

92. *Id.*

93. *Id.* at § 1803(a).

94. *Committee for an Independent P-I*, 704 F.2d at 474; *Bay Guardian Co.*, 344 F. Supp. at 1158.

95. *See infra* notes 103-08 and accompanying text.

96. Merger of the St. Louis Post-Dispatch and Globe-Democrat, for instance, did not avert the latter publication's demise. *See St. Louis Blues*, EDITOR & PUBLISHER, Dec. 14, 1985, at 14-15. Such a result contravenes "the whole tenor of the [NPA, which] is the preservation of existing papers." *Bay Guardian*, 344 F. Supp. at 1159. A joint operating agreement in San Francisco actually provided for the closure of a third newspaper. *Id.* at 1157. Negotiations to save failing newspapers in Washington, Houston, and Indianapolis were not consummated and the papers were allowed to die. *See Remarks of Senator Fong*, 116 CONG. REC. 1999 (1970); *see also* EDITOR & PUBLISHER, July 25, 1981, at 12.

97. Newspapers immunized from antitrust standards may attain such economies of scale and favorable advertising rate-to-circulation ratios that new competition is effectively precluded. *See* Times-Picayune Publish. Co. v. United States, 345 U.S. 594, 604-05 (1953).

98. *See* Detroit News, February 17, 1988, at 1, cols. 1-6; *see also* Detroit News, February 17, 1988, at 6A, cols. 1-2; Metro Times, February 17-23, 1988, at 20-22.

99. L. BOGART, PRESS AND PUBLIC 10-22 (1981). Many of the same forces which have contributed to segregated schools and neighborhoods thus have been responsible for the decline of metropolitan newspapers. *See* Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 1, 6-8 (1987).

100. *See* U.S. Bureau of the Census, Reflections of America: Commemorating the Statistical Abstract Centennial 136-37, Tables I, II (1980).

101. The trend is tied to economic, social and demographic forces including urban deterioration and white flight. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 480-81 (1979) (Powell, J., dissenting).

new information needs in response to which a suburban press has evolved.[102] Because a metropolitan newspaper is geared toward a broader audience and more generalized coverage of its region, a suburban newspaper, without necessarily sacrificing coverage of national or world events,[103] actually may serve the interests of localism more effectively.[104]

The viability of the modern suburban press has been ensured by its ability to draw upon an advertising base that is too discrete for a metropolitan publication.[105] Concern that the print media suffers from diminishing competition is offset further by the emergence of national newspapers which have become an increasing force since enactment of the NPA.[106] The disappearance of metropolitan newspapers consequently has resulted not in a net loss but in an expansion and diffusion of editorial voices.[107] Competition has not faded but has merely been reconfigured. Newspaper scarcity, like spectrum scarcity,[108] thus has been overrated and, in any event, mitigated by forces apart from rather than pursuant to government regulation.

Given the altered circumstances in which it functions, the NPA perpetuates an outdated model of how to promote first amendment values. It ignores the reality that commuting patterns tied to demographic changes have helped displace afternoon and evening newspapers from their once prominent role.[109] Multiple radio, television or cable newscasts, moreover, constitute competitive sources of information. The suburban press, as noted above,[110] has emerged to augment and compete with metropolitan newspapers, and thus improve the quality and extent of coverage. The NPA, in seeking to perpetuate an industry based upon dated imagery, disregards the broader media galaxy in which newspapers exist.

Insofar as the NPA creates artificial barriers and ignores the modern forces and realities of diversification,[111] it demonstrates how even well-intended regulatory methodology may be subverted by influences unrecognized or unforeseen by its architects. Misguided legislation that seeks to promote first amendment values is especially perilous given the judiciary's apparent disinclination to second-guess legislative judgment that purportedly promotes rather than abridges first amendment interests.[112] Regulation such as the NPA, even if it impedes the emergence of new voices or gives an

102. While circulation figures and advertising revenues for metropolitan daily newspapers have declined, those for suburban newspapers have increased. L. BOGART, *supra* note 99, at 15.

103. Suburban newspapers may draw upon wire and other news services to supply readers with such information.

104. Given a discrete coverage area, a suburban newspaper's resources can be targeted more precisely toward news of immediate interest.

105. *Interview With Dean Lesher*, DIABLO 46-47 (April 1987).

106. Newspapers such as USA Today, The N.Y. Times, and The Wall Street Journal have combined satellite technology with regional printing and distribution to reach a national market.

107. *See* L. BOGART, *supra* note 99, at 15.

108. *See supra* note 31 and accompanying text.

109. L. BOGART, *supra* note 99, at 10-23, 185-87.

110. *See supra* notes 99-102 and accompanying text.

111. The likelihood that the NPA nonetheless would "stifle competition in ideas by crippling the growth of small newspapers and preventing establishment of competing dailies" and thus disserve first amendment interests, was forecast by some of its legislative critics. H.R. REP. NO. 1193, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3547, 3558 (remarks of Reps. MacGregor and Mikva). *See* 116 CONG. REC. 1815-17 (remarks of Sen. McIntyre).

112. The NPA has been regarded as a mere economic regulation which thus merits judicial

advantage to others, seems likely to endure so long as it is not regarded as abrogating the freedom of existing newspapers to publish.[113]

A particular danger in attempting to promote first amendment values by official action, therefore, is that regulation which shortchanges the interests of diversity will not be measured in meaningful first amendment terms. Pursuit of first amendment goals by official enactments that do not factor in the possibility of or adapt readily to changed circumstances is itself a dangerous exercise. Given the deferential nature of judicial review, when official action is nobly motivated and not an overt abridgement, the hazards are magnified.

NEWER MEDIA AND PAST MISTAKES: LESSONS FOR THE FUTURE

Experience with both the NPA and fairness doctrine has demonstrated how pertinent official responses to perceived problems of media tend to lag behind changes in circumstance. The obsolescence of regulatory solutions to perceived problems further has demonstrated the risk that an identified difficulty will be compounded rather than redressed. It is now evident that the newest mass medium (cable television) will be subject to an evaluation of how it is unique and what regulatory responses are appropriate given these unique features. In *City of Los Angeles v. Preferred Communications, Inc.*,[114] the Court intimated how cable might share characteristics associated with other media.[115]

Lower courts, in attempting to formulate appropriate first amendment principles for cable, have been "(m)indful that . . . [they] must remain sensitive to the 'differing natures, values, abuses and dangers' " of the medium.[116] In so doing, they have considered primarily whether cable is more analogous to the print media, or to radio and television.[117] Efforts to determine what cable is more akin to, however, have yielded conflicting results.[118] Because it is a hybrid medium, which can transmit programming aired by a broadcaster or publish an electronic newspaper,[119] such variances are understandable regardless of how principled the accompanying reasoning is. They enhance the suspicion, nonetheless, that the search for unique media characteristics is more likely to engender constitutional mischief than a satisfactory constitutional formula.

Divergent results have been especially evident in decisions considering whether cable is characterized by scarcity akin to that which has been attributed to broadcasting or to newspapers.[120] Such an analytical exercise may be academic to the extent that the scarcity rationale in broadcasting has been

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deference to legislative judgment. *See Committee for an Independent P-I*, 704 F.2d at 483; *Bay Guardian Co.*, 344 F. Supp. at 1158.

113. *Committee for an Independent P-I*, 704 F.2d at 481-83; Honolulu v. Hawaii Newspaper Agency, Inc., 7 Media L. Rep. (BNA) 2495, 2497 (D. Haw. 1981).

114. 106 S. Ct. 2034 (1986).

115. *Id.* at 2037.

116. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1444 (D.C. Cir. 1985).

117. *Id.* at 1450.

118. *See supra* note 51 and *infra* notes 120-26 and accompanying text.

119. *See* M. FRANKLIN, MASS MEDIA LAW 908, 941-42 (1986).

120. *See supra* note 51, *infra* notes 122-26 and accompanying text.

displaced.[121] Some courts have focused upon cable's capacity to carry a multitude of channels and consequently distinguished it from broadcasting's ability to transmit only a limited number of signals.[122] In so doing, they also have noted that cable, unlike broadcasting, is not saddled with the problem of "physical interference and scarcity requiring an umpiring role for government."[123]

A competing determination has been made that constraints upon competition in the cable industry create scarcity analogous for legal purposes to what has been officially perceived in broadcasting.[124] Monopoly status effectively has been conferred upon many cable operators as a consequence of franchising and the cost of constructing and operating a competing system.[125] Yet the scarcity theory has been discounted elsewhere in decisions adverting to the Court's observations that economic scarcity does not warrant "intrusions into first amendment rights."[126]

It probably is accurate that, "(f)rom the perspective of the viewer, . . . cable and broadcast television . . . appear virtually indistinguishable."[127] Warnings that formulation of first amendment standards should not be reflexive,[128] although perhaps not leading to the worst practical result,[129] nonetheless are peculiar. Cable may have the potential to be a medium that is diverse, pluralistic, open and thus less like broadcasting.[130] If promotion of first amendment values is designed to further the public's interests and concerns, however, casual public perceptions that favor more media-comprehensive than media-specific analysis probably are more sensible than distinctions that increasingly are technical or legalistic.

Attempting to discern whether cable is more akin to broadcasting or the print media, like the identification of any other media-specific characteristic, may be a treacherous exercise. The history of cable regulation is sufficiently disquieting to suggest that skepticism of official sensitivity to first amendment interests may be healthy. The FCC originally asserted jurisdiction over cable during the 1960s, despite having no explicit congressional author-

121. *See supra* note 31 and accompanying text.

122. "Unlike ordinary broadcast television, which transmits the video image over airwaves capable of bearing only a limited number of signals, cable reaches the home over a coaxial cable with the technological capacity to carry 200 or more channels." *Quincy Cable TV*, 768 F.2d at 1448.

123. *Id.* at 1449, *quoting* Home Box Office, Inc. v. FCC, 567 F.2d 9, 45 (D.C. Cir.), *cert. denied*, 456 U.S. 1001 (1982).

124. *See, e.g.*, Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976, 985-88 (D.R.I. 1983).

125. *See* Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

126. *See, e.g., Quincy Cable TV*, 768 F.2d at 1450, *citing Tornillo*, 418 U.S. at 2147-56.

127. *Quincy Cable TV*, 768 F.2d at 1448.

128. *Id.* at 1444.

129. To the extent such analysis leads to the conclusion that it is more like the print media, *id.* at 1444-50, cable would be afforded a higher level of first amendment protection than if found more like broadcasting. "[O]f all forms of communication, it is broadcasting that has received the most limited first amendment protection." *Pacifica Foundation*, 438 U.S. at 748.

130. *See Quincy Cable TV*, 768 F.2d at 1450 (quoting Cabinet Committee on Cable Communications, Report to the President, ch. 1, at 14 (1974)); SLOAN COMM'N ON CABLE COMMUNICATION, ON THE CABLE 92 (1971).

ization to do so.[131] Consistent with a focus upon a medium's unique characteristics, the FCC perceived in cable the potential to undermine its ability to regulate and promote broadcasting in the public interest.[132] The FCC responded to the potential problem by adopting a panoply of rules that protected the "system of [free] local broadcasting"[133] but stunted cable's growth.[134] Cable operators, for instance, have been prohibited from importing distant signals that would compete with local broadcasters[135] and presenting certain feature films and sports events.[136] They have also been obligated to originate programming;[137] provide public, educational and leased access channels;[138] and carry the signals of local broadcasters.[139]

Although many of these regulations have been displaced by subsequent court[140] or administrative[141] action, their creation and operation demonstrate again how regulatory responses to a perceived problem may be misguided or obsolete when adopted. Unlike broadcasters, cablecasters generally profit not from programming aimed at the lowest common denominator,[142] but by catering to multiple discrete audiences with diverse tastes.[143] By impairing the development of cable, in the purported interest of promoting effective broadcasting service,[144] the FCC actually slowed an industry whose profits depend upon diversity.

Cable, like broadcasting and newspapers, provides information, disseminates original or retransmitted programming, and has an interest in edito-

131. The FCC's authority was upheld as "reasonably ancillary" to its power to regulate broadcasting. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

132. *See id.* at 170-171; *Rules re Microwave-Served CATV, First Report and Order in Docket No. 14895*, 38 F.C.C. 683-85, 697-716 (1965).

133. United States v. Southwestern Cable Co., 392 U.S. at 174. The FCC's articulated concern was that an unregulated cable industry would endanger the economic validity of broadcasting and thus undermine the FCC's responsibility to ensure that "all communities of appreciable size [will] have at least one television station as an outlet for local expression." *Id.*, *quoting* H.R. REP. NO. 87-1559, 87th Cong., 2d Sess. 3 (1962).

134. *See* H.R. REP. No. 98-934, 98th Cong., 2d Sess. 22 (1984). A more critical observation of the FCC's role suggests that it was "more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology." Bollinger, *supra* note 80, at 40.

135. *See* 47 C.F.R. § 76.59 and § 76.61 (distant signal rules), *deleted, Report and Order in Docket Nos. 20988 and 21284*, 79 F.C.C.2d 663 (1980), *petition to set aside denied in* Malrite TV v. FCC, 652 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); 47 C.F.R. §§ 76.92-76.99 (non-duplication rules).

136. *See* 47 C.F.R. §§ 76.643 and 76.67, *vacated*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

137. *See* 47 C.F.R. § 76.205(a) (1972), *aff'd*, United States v. Midwest Video Corp., 406 U.S. 649 (1972), *deleted*, 49 F.C.C.2d 1090, 1106 (1974).

138. *See* 47 C.F.R. §§ 76.252-76.256 (1977), *vacated*, FCC v. Midwest Video Co., 440 U.S. 689 (1979).

139. *See* 47 C.F.R. §§ 76.57-76.61, *vacated*, Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 2889 (1986).

140. *See, e.g.*, *supra* notes 136, 138-39.

141. *See, e.g.*, *supra* notes 135 and 137.

142. A broadcaster's profits generally reflect the ability to maximize audience size, so programming is likely to be directed toward majoritarian rather than diverse tastes. *See Pacifica Foundation*, 438 U.S. at 765-66 (Brennan, J., dissenting); *Pacifica Foundation*, 556 F.2d at 26 (Bazelon, J., concurring).

143. *See* S. MAHONEY, N. DEMARTINO, & R. STENGEL, KEEPING PACE WITH THE NEW TELEVISION 101 (1980).

144. *See supra* notes 132-33 and accompanying text.

rial discretion.[145] The formulation of first amendment standards for cable thus affords an opportunity to rethink the analytical criteria for all media and to recognize that even if structurally different, they are functionally similar. Such a reevaluation might acknowledge that information is disseminated from many sources and that competition is not only intramural, but extramural. Given the deficiencies of official efforts to promote first amendment values, the vitality of competing expressive forces, which traditionally was relied upon to promote diversity, still may be the best guarantor of first amendment interests.

145. *See* City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. at 2037.