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GOVERNMENT AND THE MEDIA: REGULATING A FIRST AMENDMENT VALUE SYSTEM

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A constitutional proscription against government abridgment of freedom of speech and of the press[1] would seem to be an improbable parent of policies that directly regulate the media. Nevertheless, the first amendment has become a viable source for such media-oriented offspring. Although the first amendment, since its drafting, has remained unaltered the operational circumstances have changed substantially. It is unlikely that the constitution's framers anticipated the circumstances compelling government intervention for efficient use of the broadcast medium.[2] Nor could they have foreseen the evolution of economic conditions and institutions that eventually forced consideration of an affirmative government role in protecting free expression.[3]

When the free press clause was drafted the primary hindrance to information channels was underdeveloped distribution technology. The media had not yet acquired the capacity to transmit electronically the spoken word or to voluminously reproduct the printed word.[4] Speech and publishing in 1791 emanated from relatively fragmented sources rather than from integrated, highly organized media forms.

These barriers to efficient communication have been overcome during the intervening decades. Several newspapers have circulation figures exceeding half a million.[5] Moreover, radio and television networks have acquired the capacity to reach virtually the entire nation at once.[6]

But absent such centralized media forces during the first amendment's conception, government seemed to pose the only potential threat to a free

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1. U.S. CONST. amend. I.

2. The Radio Act of 1927 authorized the Federal Radio Commission to provide "fair, efficient and equitable radio service." Pub. L. No. 69-169, §9, 44 Stat. 1166 (1927). Previously, radio stations had used any frequency they desired and increased their power and hours of operation without regard to the interference they caused other stations, thus resulting in "confusion and chaos." H.R. Doc. No. 481, 69th Cong., 2d Sess. 10 (1926).

3. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3-4 (1970).

4. In 1810, the average circulation of a daily newspaper was 550. B. BAGDIKIAN, THE INFORMATION MACHINES 57 (1971).

5. *Circulation of Daily Newspapers of the U.S.A. by Circulation Group*, [1978] EDITOR & PUBLISHERS Y.B. 7.

6. By 1978, 98.6% of the nation's homes had at least one radio and 98% of them had at least one television. [1979] BROADCASTING Y.B. C, at 341.

flow of information. That perception seemed well-founded given the colonial experience with prior restraints under English licensing acts.[7] Consequently, a first amendment emerged that kept public information purveyors free from potential intellectual control by the government, and thus the media was left free to stimulate public discussion on its own terms.[8]

It is doubtful that any clues to the distant transformation of atomized and unlinked media enterprises into pervasive economic and social forces could be found in the late 18th century. The economic development and technological progress in intervening years, however, yielded new media forms and a commercialized and concentrated media industry. Late 18th century newspapers published only a scattering of most insignificant advertisements, and publishers considered their publications vehicles for influencing public thought.[9] Advertisers, rather than consumers or publishers,[10] have emerged from the media concentration process as the primary subsidizers of information transmission. Media coverage of controversial or sensitive matters, for example, may be influenced by real or perceived dangers of alienating revenue sources.[11] Thus advertisers have become a potent counterpoint to diversity. Such purse string power is a form of leverage probably not contemplated by the constitution's framers, but is as consequential a threat to diversity as government abridgment.

The transition of communications enterprises from persuasion tools to profit instruments has been characterized by a substantial decline in competition and an accompanying increase in concentration. Between 1910 and 1978, the number of daily newspapers shrank from about 2,600 to about 1,750.[12] From 1923 to 1973, the percentage of newspapers with direct competition from another newspaper declined from 60 to 5.4 percent.[13]

As concentration increased, newspaper publishing shifted from editor ownership to group ownership. By 1971, about half of the nation's daily newspapers were absentee-owned by corporate chains.[14] A notable surge in

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7. Long, *Freedom of the Press*, 5 VA. L. REV. 225, 232-34 (1918).

8. Ervin, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 872 (1972).

9. E. EMERY, THE PRESS AND AMERICA 68 (1972).

10. Advertising revenue may provide from 75 to 80% of most newspapers' income. M. FRANKLIN, MASS MEDIA LAW 81 (1977).

11. Air time is a broadcaster's only asset and, therefore, a licensee may hesitate to risk presenting controversial programming that may be linked with an advertiser's product against the advertiser's wishes. Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137, 148-50 (1975). *See also* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 230-32. In attempting to maximize audience and profits, a broadcaster may conclude that "angry customers are not good customers, . . . it is simply 'bad business' to espouse — or even allow others to espouse — the heterodox or controversial." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 187 (1973) (Brennan, J., dissenting).

12. Comment, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948, 949 n.12 (1952); [1968] EDITOR & PUBLISHER INT'L Y.B. pt. 1.

13. B. OWEN, ECONOMICS AND FREE EXPRESSION 49 (1975).

14. H. BRUCKER, COMMUNICATION IS POWER 333 (1973). The Times-Mirror Company, for instance, which publishes such major dailies as the Los Angeles Times, the Dallas Times-Herald and Newsday, has diversified into other fields and has grown large enough to rank

group acquisitions occurred throughout the 1970's, when the Gannett newspaper chain pursued a nationwide growth program. From 1967 to 1979, Gannett increased its holdings from 27 to more than 80 newspapers — and at the same time diversified into broadcasting.[15]

The hallmark of newspaper publishing became newspaper chains, national newspapers, and national wire services.[16] At the same time, a concentrated radio and television industry was being shaped by government policies that limited and allocated broadcasting frequencies.[17]

A first amendment analysis rooted in a free marketplace of ideas may be appropriate when citizens actively meet and discuss matters of local and national concern. Such community participation requires a free exchange of thoughts and ideas.[18] But community forums, which afforded self-fulfillment opportunities[19] and provided a social safety valve,[20] have been transmuted into media markets that make "[a]nswering back . . . systematically impossible."[21] A centralized and concentrated communications system has reduced the communicant to recipient ratio, subordinated face-to-face exchange, and created an inequality of bargaining power in the communications marketplace.[22] The predominance of one-way data transmission, rather than two-way information exchange, suggests that although the press was originally conceived to further individual liberty, the individual may now need liberation from the mass media.[23]

Since fragmentized public debate and easy entry into community forums have been largely supplanted by centralized information outlets and limited entry into frequently national and global forums, the free marketplace of ideas concept is a principle that has lost touch with reality. A first amendment analysis that overstates the vitality of personal interaction, rather than acknowledging pervasive and influential information force, is outmoded as a policymaking foundation. The emergence of a modern mass media invites analysis that is predicated not on a marketplace of ideas theory presuming direct citizen participation, but upon recognition of an increasingly centralized mass media, with economic and organizational barriers to entry[24] that make individual participation virtually impossible.[25]

Although the first amendment originally was designed to protect against

in the upper half of Fortune's top 500 corporations. D. HALBERSTAM, THE POWERS THAT BE 720-23 (1979). In 1977, it earned more than $500-million dollars. *Id.* at 723.

15. [1978] EDITOR & PUBLISHERS Y.B. I, at 305; Shaw, *The News Mogul Who Would be Famous*, ESQUIRE, Sept. 1979, at 62-70.

16. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249 (1974).

17. 17 Fed. Reg. 3905 (1952).

18. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22 (1948).

19. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1967).

20. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

21. C. MILLS, POWER, POLITICS AND PEOPLE 581 (1953).

22. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647-48 (1967).

23. Noelle-Neumann, *Mass Communications Media and the Public Opinion*, JOURNALISM Q. 402 (Fall 1959).

24. B. SCHMIDT, FREEDOM OF THE PRESS V. PUBLIC ACCESS 37 (1976).

25. CBS v. Democratic Nat'l Comm., 412 U.S. at 196 (Brennan, J., dissenting).

abuses from centers of public power, an equally portentious danger is now posed by "centers of private power."[26] A first amendment that safeguards only against government interference affords little protection against the hazards of concentrated centers of communication.

The evolution of the communications media[27] has not escaped judicial attention and reaction.[28] Three decades ago, the Supreme Court concluded that "[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the first amendment should be read as a command that government was without the power to protect that freedom."[29] Consequently, the original purpose of the first amendment became enlarged so that information marketplace monopolization, whether by government or private forces, may be controlled.

In attempting to counteract the effect of media concentration, some policies have operated under difficult working conditions. Nonproliferation of newspapers and a limited number of broadcasting frequencies, for instance, have predetermined a considerable degree of media concentration.[30] Other policies have created new problems by establishing pecking orders of first amendment rights and shuffling those orders in different media settings. Although the public's right to be informed is paramount in the electronic forum,[31] for instance editorial discretion is preeminent in the print media.[32]

Different sets of rules for different media forms betray a dissociated view of the media and a presumption that the information marketplace is comprised of unrelated, non-interacting elements. This article's purpose is to evaluate the compartmentalized perspectives that attend orderings of first amendment rights and to consider alternate paths for pursuing first amendment values without neglecting first amendment rights.

PAST AND PRESENT POLICIES: DIFFERENT RULES FOR DIFFERENT FORUMS

Although the first amendment bars Congress from abridging freedom of the press,[33] it allows government promotion of first amendment values in a manner that does not impose restraints upon expression.[34] Even if the first amendment was intended to protect communication[35] by denying government the power to abridge freedom of the press, government may still protect and further first amendment values.[36]

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26. C. MILLS, *supra* note 21.
27. Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 250.
28. *Id.* at 250 n.15.
29. Associated Press v. United States, 326 U.S. 1, 20 (1945).
30. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 249-50.
31. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).
32. Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 258.
33. U.S. CONST. amend. I.
34. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 193 (1946).
35. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 389.
36. *See* Associated Press v. United States, 326 U.S. at 20; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 604 (1978).

Constitutional freedom of speech rhetoric would seem to contemplate a broad generic freedom for expression and the media. First amendment policies and protections, however, have varied significantly among different media and thus have become more compartmentalized than uniform and comprehensive.[37] Different policies for different media forms have generally fallen into one of two categories: indirect or direct content regulation. Indirect content regulation consists of those policies designed to structure the media so that it is more responsive to diversification. Policies allowing newspapers to improve their economies of scale by a grant of antitrust immunity[38] and rules promulgated to diversify ownership and control of broadcasting outlets[39] are prominent examples of indirect content regulation. Direct content regulation focuses on the electronic forum, where broadcasters are obligated to conform their programming to such requirements as fairness[40] and ascertained community needs.[41]

INDIRECT CONTENT REGULATION

The general objective of indirect content regulation has been to offset the threat to diversity posed by media concentration.[42] Actual policymaking has generated radically different approaches to that problem in the newspaper and broadcast industries. The Newspaper Preservation Act (NPA),[43] for instance, attempts to maintain a competitive press while accepting concentration as unavoidable. Broadcasting regulation, however, has mounted a frontal assault

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37. A sample of such compartmentalization was demonstrated when the Supreme Court struck down a state statutory right of reply for individuals personally criticized by a newspaper. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 244 (1974). In so doing, the Court did not make even a single reference to its willingness to uphold such a personal attack rule in the electronic forum. *Id. See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

38. *See* NEWSPAPER PRESERVATION ACT, 15 U.S.C. §§1801-1804 (1976).

39. The Federal Communications Commission has forbidden ownership or control of more than one station of the same type in the same market. 47 C.F.R. §§73.35(a), .240(a)(1), .636(a)(1) (1979). A single entity is limited to ownership of seven AM, seven FM and seven television stations anywhere. A single network is barred from affiliating two or more stations of the same type in the same market. *See* NBC v. United States, 319 U.S. 190 (1943). The Commission also has imposed limitations on cross-ownership of newspapers and broadcast stations in the same community. Second Report and Order, 50 F.C.C.2d 1046 (1975), *aff'd in part, vacated in part sub nom.*, National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1978), *aff'd in part, rev'd in part*, 436 U.S. 775 (1978).

40. *See* In the Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standard of the Communications Act, 48 F.C.C.2d 1 (1974) [hereinafter cited as Fairness Report].

41. Broadcast licensees are required to list annually 10 problems or issues they have ascertained in their communities. Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 445 (1975). At license renewal time, the FCC measures how much programming the broadcaster has devoted to those ascertained needs. *Id.*

42. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 780 (1978); NEWSPAPER PRESERVATION ACT, H.R. REP. No. 91-1193, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3547, 3548.

43. 15 U.S.C. §§1801-1804 (1976).

on concentration by adopting strict rules on the quantity and categories of station ownership.[44]

The NPA represents a congressional effort to preserve newspapers that otherwise might fail due to economic difficulties. Under the NPA, endangered newspapers may combine their business operations with those of a competing newspaper to reduce costs.[45] So long as one of the newspapers is in danger of probable failure,[46] and editorial functions are maintained separately,[47] such combinations are afforded antitrust immunity.[48] Although the NPA attempts to minimize further losses to diversity in the newspaper industry,[49] it is not designed to attract new publishing voices. The antitrust exemption allows publishing combinations to realize economies of scale and advertising rate-to-circulation ratios that may keep established newspapers afloat. But those same preservationist policies may also place prospective publishers at a competitive disadvantage and thus discourage them from entering and diversifying the marketplace.[50] Although the NPA erects a barrier to new competition, Congress and the courts have not been persuaded that those costs outweigh its benefits.[51] Nonetheless, it is arguable that the NPA's net result is an ordering of first amendment rights affording established voices priority over prospective ones.

Essentially, the NPA acknowledges the reality of concentration while striving to secure a measure of diversity. Indirect content regulation of broadcasting diverges from that philosophy by attacking the very conditions of concentration themselves. Manifestations of that approach include rules limiting the number and types of stations that a single licensee may own and restricting cross-ownership of newspapers and broadcasting stations.[52] The concept underlying such regulation is that ownership diversity will promote idea diversity.[53] In practice, however, the operation of diversification guidelines suggests realization of that objective is improbable.[54]

The fundamental flaw with such structural anticoncentration strategies is that they operate in a context within which extensive concentration is preordained. By severely limiting the number of television stations that can serve a given market,[55] the Federal Communications Commission (FCC) insures an oligopolistic industry structure. Although Commission rules may facilitate

44. *See* note 41 *supra.*

45. 15 U.S.C. §1803 (1976).

46. *Id.*

47. *Id.* §1802(2).

48. *Id.* §1803.

49. The decline in the number of daily newspapers apparently has been halted since the NPA's enactment. In 1979, a total of 1,744 dailies were being published, AYER DIRECTORY OF PUBLICATIONS viii (1979), contrasted with 1,728 in 1970. Ervin, *supra* note 8, at 892.

50. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

51. Bay Guardian Publishing Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Cal. 1972).

52. *See* note 41 *supra.*

53. Second Report and Order, 50 F.C.C.2d 1046, 1108 (1975).

54. Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, 273 (D.C. Cir. 1974) (Bazelon, C. J., concurring).

55. *See* 17 Fed. Reg. 3905 (1952).

diverse ownership, and thus help minimize concentration at the local level, they do not address or remedy the horizontal concentration problem that gives national network services control over viewer choice.[56] Thus the agency's own allocation scheme, limiting the number of broadcasting outlets in a given market, undermines its anti-concentration policies. Diversity thereby has become a captive of conflicting regulatory policies.

Given the physical scarcity of broadcasting frequencies, the FCC has imposed special responsibilities upon those receiving a license to broadcast. In addition to regulations controlling media ownership and structure, broadcasters are obligated to operate as public trustees[57] and to provide programming that is fair[58] and responsive to ascertained community needs.[59] Such regulation is unique to broadcasting and translates into direct content regulation.[60]

DIRECT CONTENT REGULATION

Radio and television because of their "peculiar characteristics,"[61] are governed by FCC regulations in the public interest.[62] The constitutional requirement of a standard to guide administrative decisions in licensing could hardly be met by less meaningful principles.[63] Nonetheless, a fundamental exercise of the Commission's administrative responsibilities is to factor the public interest into licensing decisions.[64]

Such "public interest" regulation has endeavored to balance the first amendment interests of broadcasters in self-expression and the public in being informed. Since the broadcast media utilize "a valuable and limited public re-

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56. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 260 (1978).

57. A broadcast license is considered "a public trust subject to termination for breach of duty." Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). The Supreme Court's interpretation of the Communications Act of 1934 and concept of licensee responsibility has helped cast broadcasters into a fiduciary relationship with the public. *See* CBS v. Democratic Nat'l Comm., 412 U.S. at 118; Red Lion Broadcasting Co. v. FCC, 395 U.S. at 383, 389.

58. *See* Fairness Report, *supra* note 37.

59. *See* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1975).

60. Another form of direct content regulation has been proposed in an FCC staff report recommending a mandatory 7.5 hours per week of educational and instructional programming for children. This proposal is designed to correct the alleged failure of broadcasters to serve the needs of children viewers. BROADCASTING, Nov. 5, 1979, at 24.

61. Broadcasting's "peculiar characteristics" have been found to "require the application of constitutional standards to their regulation which differ from those applicable to other types of communication." Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971). Among those characteristics are broadcasting's "uniquely pervasive," FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), and intrusive nature, CBS v. Democratic Nat'l Comm., 412 U.S. at 128, its access to children, 438 U.S. at 749, and the scarcity of broadcasting frequencies, Red Lion Broadcasting Co. v. FCC, 395 U.S. at 388-92.

62. 47 U.S.C. §303 (1976).

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

64. FCC v. Pacifica Foundation, 438 U.S. at 736.

source,"[65] a hierarchy of first amendment rights has been established in which "the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences"[66] is paramount. From this "unusual order of first amendment values,"[67] established in *Red Lion Broadcasting Co. v. FCC*,[68] have emerged fairness obligations and limited access opportunities[69] triggered by the airing of either controversial views, or personal attacks or the appearance of a political candidate. Although broadcasters retain a degree of journalistic discretion,[70] it is a lesser freedom than that enjoyed by publishers[71] and subordinate to the public interest.[72]

The fairness doctrine requires broadcasters to make an evenhanded presentation of public concern information.[73] Specifically, licensees must devote a reasonable percentage of programming to public issues, which "must be fair in the sense that [it provides] an opportunity for the presentation of contrasting points of view."[74] If a broadcaster makes an on-the-air personal attack upon a group or individual, the party criticized is entitled to respond.[75] Likewise, if a legally qualified candidate makes a broadcast appearance, the licensee must afford equal air time for opposing candidates.[76]

While government endeavors to promote diversity in the electronic forum, by encouraging the presentation of contrasting and balanced viewpoints, licensees retain considerable discretion in determining how to fulfill their programming obligations.[77] Except for their affirmative duties under the fairness doctrine,[78] broadcasters are not required to present controversial ideas. This duty of balanced broadcasting may however be attenuated by reluctance to alienate audience or advertisers.[79] Broadcasters also are not obligated to air personal attacks and can deny air time to all political candidates.[80] Absent

65. CBS v. Democratic Nat'l Comm., 412 U.S. at 101.

66. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 390.

67. CBS v. Democratic Nat'l Comm., 412 U.S. at 101.

68. 395 U.S. 367 (1969).

69. A limited access opportunity merely means that an individual or an idea has a right to air time upon the occurrence of a condition precedent. Such an access right arises for a balancing viewpoint upon the airing of a statement regarding a controversial issue of public importance, for equal time if a political candidate makes a broadcast appearance and for a right to reply in the event of an over-the-air attack upon a person or group's honesty, character, integrity or like personal qualities.

70. CBS v. Democratic Nat'l Comm., 412 U.S. at 124-25.

71. *Id.* at 117-18.

72. *Id.* at 110.

73. *Id.* at 112.

74. Fairness Report, *supra* note 40, at 7.

75. 47 C.F.R. §73.1920 (1979).

76. 47 U.S.C. §315 (1976).

77. CBS v. Democratic Nat'l Comm., 412 U.S. at 118-19. In discharging their duty to provide "full and fair coverage of public issues," broadcasters may determine "what issues are important, how fully to cover them, and the format, time and style of the coverage." Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 656 (D.C. Cir. 1972), *rev'd sub nom.*, CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

78. Fairness Report, *supra* note 41, at 7.

79. *See* note 11 *supra*.

80. In refusing to sell half-hour slots to a presidential candidate nine months before

licensee initiative to permit airing of a controversial idea that would require balancing, the need for public debate on controversial issues may go unfulfilled.[81] If left to their own devices, licensees may not provide the "ample play" required "for the free and fair competition of opposing views. . . ."[82]

Although scarcity has served as a fundamental rationale for content regulation in the electronic forum, the traditional capacity of that forum has been enlarged by the emergence of such technologies as cable television. The multiple channel capacity of cable television can convert spectrum scarcity into abundance. Despite cable's potential for "diverse programming at reasonable cost to the public, . . ."[83] the overall goal of diversity again has been obstructed by conflicting regulatory policies. In spite of the FCC's announced commitment to diversification,[84] it also has sought to protect "information and entertainment programming now provided by conventional television at no direct cost."[85]

To protect conventional broadcasters from raids by new technologies,[86] the FCC has imposed programming restrictions to prevent migration of popular programming from free television[87] and to "maintain present levels of public enjoyment."[88] Ironically, despite cablecasting's natural capacity for diversity, cable operators until recently have been subjected to more stringent content regulation than over-the-air broadcasters.[89] Such regulation may have been obstructionist for the purposes of diversity, but it has not been entirely without logic. Cable systems ordinarily operate under franchises granted by local governments and, therefore, multiple channels are concentrated into the hands of a single cable operator. Such monopolization of a potentially pervasive medium[90] helped justify a local origination requirement as one form of diversity insurance.[91] To the extent that such a rule governed retransmission cable operators, it was upheld as "reasonably ancillary" to the Commission's responsibility to regulate broadcast television.[92]

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the 1980 political conventions, the national networks contended that their regular schedules would be disrupted and the public interest disserved by such early politicking. BROADCASTING, Nov. 12, 1979, at 62.

81. 395 U.S. at 385.

82. *Id.* at 377.

83. Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 134 (1976).

84. Amendment of the Multiple Ownership Rules, 9 R.R. 1563, 1568 (1953).

85. First Report and Order, 52 F.C.C.2d 1, 43 (1975).

86. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 28 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

87. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 197 (D.C. Cir. 1969).

88. Home Box Office, Inc. v. FCC, 567 F.2d at 28.

89. Rules restricting cablecasting program content were struck down in the *Home Box Office* case. Special requirements for public, leased and educational access channels were vacated in FCC v. Midwest Video Corp., 99 S. Ct. 1435 (1979).

90. Barrow & Manelli, *Communications and Technology—A Forecast of Change (Part I)*, 34 LAW & CONTEMP. PROB. 205, 238 (1969); Robinson, *supra* note 56, at 255.

91. First Report and Order, 20 F.C.C.2d 201, 208-15 (1969).

92. United States v. Midwest Video Corp., 406 U.S. 649 (1972), *rehearing denied*, 409

A subsequent requirement that cablecasters set aside public, governmental, educational and leased access channels, however, was found to exceed the agency's authority.[93] Since a broadcaster is not considered a common carrier,[94] the Supreme Court in *FCC v. Midwest Video Corp.*[95] concluded that the FCC's "reasonably ancillary" jurisdiction does not include imposition of common carrier obligations.[96] Nonetheless government efforts to provide direct access to the electronic forum marked a significant departure from a philosophy of direct over-the-air broadcasting regulation. Instead of having first amendment interests hinge upon a triggering mechanism, such as licensee initiative, a personal attack or the appearance of a political candidate, the FCC's cable policy carved out an absolute right of access.

The Commission maintained that its access rules were justified because they encouraged an exchange of ideas in accordance with first amendment values.[97] Such diversification rationales and efforts, now have fallen before editorial discretion barriers. The Supreme Court's disapproval of the FCC's access rules thus has elevated and protected the journalistic prerogatives of cablecasters. At the same time, the FCC has been advised that it cannot prescribe stronger diversity requirements for cable operators than broadcasters.[98] The Court, however, has not foreclosed the possibility of requiring cablecasters to observe the same content-oriented regulations, such as fairness, that broadcasters must obey.[99] Nevertheless, still needed and still not considered are constitutionally neutral policies which still enhance diverse first amendment rights without overlooking the first amendment itself.[100]

Pursuing First Amendment Values but Losing Sight of First Amendment Rights

Inherent in any fairness or access system is a government established hierarchy of rights that enhances some first amendment interests by abridging other first amendment rights. The constitution admonishes that government may not abridge freedom of the press, but a content-oriented pursuit of first amendment values may lose track of that underlying protection.

At least for the print media, the Supreme Court has expressed a deep-rooted fear of fairness and public access schemes because first amendment press protections may be endangered by government regulation.[101] Although the Court,

U.S. 898 (1972). The Communications Act of 1934, 47 U.S.C. §151 (1976), is silent on the Commission's authority to regulate cable television. Thus its regulatory jurisdiction in this area has been limited to that which is reasonably ancillary to the agency's jurisdiction over broadcast television. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

93. FCC v. Midwest Video Corp., 99 S. Ct. 1435, 1445 (1979).

94. 47 U.S.C. §153(h) (1976).

95. 99 S. Ct. 1435 (1979).

96. *Id.* at 1442, 1445-46.

97. *Id.* at 1439.

98. *Id.* at 1444 n.14.

99. *Id.*

100. *See generally* CBS v. Democratic Nat'l Comm., 412 U.S. at 132-46 (Stewart, J., concurring).

101. Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 258.

in *Miami Herald Publishing Co. v. Tornillo*,[102] observed that growing newspaper concentration threatened the public's interest in diversity of information, it nevertheless upheld the invalidity of a publisher's editorial judgment.[103]

The Court has delayed, if not precluded, a general right of public access in broadcasting.[104] A public access system would invite diversity by drawing upon competing views within the community and by reducing government oversight of the broadcaster's editorial output.[105] Although the Court regards the FCC's power as expansive,[106] in *CBS v. Democratic National Committee*[107] it reasoned that the public's right to be informed already is adequately protected by the fairness doctrine.[108] A right-of-access system therefore was rejected as extreme and beyond the scope of the Commission's authority.[109] Thus, although the Court in *Red Lion Broadcasting* had pronounced as paramount the public's right to be informed by the electronic medium,[110] it has left broadcasters in a position of controlling how and by whom information is presented.[111] While the Court refused to carve out new access opportunities, it did not preclude expanded access rights in the future. Rather, it suggested that "at some future date Congress or the Commission — or the broadcasters — may devise some kind of limited access that is both practicable and desirable."[112] Despite the Court's and Commission's emphasis upon licensee discretion in editorial decision-making, future prospects for access rights hinge upon finding practicable and desirable access proposals.[113]

If forced to meet that same standard of practicability and desirability, the fairness doctrine would have little basis for continuation in broadcasting or extension to other media. Aside from constitutional blemishes, fairness concepts suffer from practical drawbacks that even supporters of such content

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102. 418 U.S. at 241.

103. *Id.*

104. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

105. Goldberg & Couzens, *"Peculiar Characteristics:" Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COM. L.J. 1, 46 (1978). The Supreme Court expressed the fear that the FCC would be drawn into a "continuing case-by-case determination of who should be heard and when," if the agency were to supervise a public access system. CBS v. Democratic Nat'l Comm., 412 U.S. at 126-27. But the Commission already makes case-by-case editorial judgments when it decides fairness complaints. Its regulatory role in a public access system would be a non-direct content-oriented one of assuring that stations set aside time for unedited messages. Goldberg & Couzens, *supra*, at 46.

106. 395 U.S. at 380; NBC v. United States, 319 U.S. 190, 219 (1943).

107. 412 U.S. 94 (1973).

108. *Id.* at 102-03.

109. *Id.* at 127.

110. 395 U.S. at 390.

111. 412 U.S. at 130-31.

112. *Id.* at 131.

113. Although the FCC has continued to stand upon the fairness doctrine, the agency has set forth criteria for what would constitute an acceptable voluntary access system. Those requirements include assurance that important public issues do not escape timely discussion, preservation of licensee discretion, protection against any right of access accruing to particular persons and groups and assuring that government is not drawn into the role of deciding who receives air time and when. Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 699 (1976).

regulation acknowledge.[114] Fairness imposes an affirmative duty upon licensees to raise controversial issues. Broadcasters, however, may interpret that obligation as narrowly as possible to avoid perceived audience or advertiser distaste for controversy.[115] Moreover, fairness enforcement requires the FCC to choose between intruding into program content determinations or retreating into relative noninfluence for diversity purposes.

In attempting to balance diversity desires and government restraint mandates, the Commission has adopted broad guidelines relying heavily upon licensee discretion to carry out the fairness requirements. A broadcaster is only obligated to provide a reasonable opportunity in his overall programming for opposing viewpoints on controversial issues of public importance.[116] Because the FCC has recognized the possibility of unlimited controversies arising in a given community, it has backed away from formulating detailed standards and has chosen to rely on licensee judgment.[117] The agency thus has concluded "that the public is best served not by having the agency make decisions as to what is desirable in each situation [but] by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation."[118]

This deference to licensee discretion may be the inevitable by-product of subjective regulatory standards and the administrative impossibility of constantly having the FCC monitor stations for fairness violations. Nonetheless, the pattern of agency deference possesses considerable sensibility and advantage. The price of more aggressive fairness enforcement would be a more activist agency role in editorial and programming decisions.[119] It already is well established that the FCC "is more than a traffic policeman concerned with the technical aspects of broadcasting"[120] and that it may consider a licensee's program format and specific programs. A simple lifting of the Commission's eyebrow frequently may be sufficient to influence a broadcaster's programming.[121] But the more ominous hazards of government manipulation of regulatory machinery, for the explicit purpose of influencing program content, has been demonstrated by past presidential administrations.[122] The

114. Chief Justice Burger, although supporting the fairness doctrine, acknowledged that it does not always deliver "perfect or . . . consistently high-quality treatment of all public events and issues." 412 U.S. at 130-31.

115. See note 11 *supra.*

116. Fairness Report, *supra* note 37, at 19.

117. *Id.* at 11.

118. *Id.* at 16.

119. The FCC's enforcement tools include the powers to revoke a station's license, issue a short-term license renewal, impose a fine or order the licensee to balance his programming. 47 U.S.C. §§307(d), 321(b), 503(b) (1976). Furthermore, the Commission simply may refuse to reissue a license at renewal time. *Id.* §307(a).

120. 395 U.S. at 395.

121. Regulation by lifted eyebrow may take the form of a "concerned" letter or phone call from the agency's staff to a licensee. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 69, 119-20 (1967).

122. For examples of how presidential administrations have abused, or considered

potential use of such tools as the fairness doctrine, to exact reprisals against chosen broadcasters, illustrates the considerable leverage available for media intimidation.

Despite the utility of the fairness doctrine as a political device, the FCC, by deferring to licensee discretion, has endeavored to minimize government intrusion into program content.[123] Such agency restraint serves to illustrate the fairness doctrine as a losing proposition no matter how it is applied. Fairness concepts cannot effectively serve diversity unless energetically enforced. However, enforcement inevitably threatens the free and fair flow of information, especially if a government chooses to use fairness as a self-serving exploitative device.

Nevertheless, the fairness doctrine continues to exist due to the belief that it "enhance(s) rather than abridge(s) the freedoms of speech and press protected by the first amendment."[124] Even if the fairness doctrine clearly enhanced the supply and balance of information and information sources, its selective application to broadcasting perpetuates the myth that spectrum scarity necessitates such special regulation.[125] Newspapers, in fact, had become more scarce than radio and television stations before the scarcity rationale was invoked to justify fairness regulation.[126] Government efforts to promote diversity, if pursued properly, must be preceded by more enlightened rationales. Otherwise, existing regulation may continue to invite criticism for ineffectiveness and losing sight of, or nakedly abridging, freedom of the press.[127]

Even if direct content regulation did not erode some rights of self-expression, the practical shortcomings of such endeavors as fairness regulation militate for alternate policies. The Supreme Court, at the same time it endorsed the fairness doctrine in *Democratic National Committee*, acknowledged that it "has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues. . . ."[128]

Essentially, direct content regulation has upgraded the first amendment rights of some by downgrading the first amendment rights of others. Such redistributive efforts attempt to serve all interests through a carefully balanced regulation system.[129] Balance, however, has proved difficult to establish and the results generally have been unsatisfying to competing concerns.

A hierarchy of free speech rights "does not embrace a right to snuff out

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manipulating the regulatory process in an effort to influence broadcast programming. See S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 219-20 (1978) and Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 244-51; Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 763-64 (1974).

123. Fairness Report, *supra* note 37, at 8, 23.

124. 395 U.S. at 375.

125. *See, e.g., id.* at 388-89.

126. Robinson, *supra* note 56, at 157.

127. Although the Supreme Court has considered allegations that fairness requirements abridge broadcasters' free speech and press rights, it has yet to be swayed by such criticism. *See* 395 U.S. at 386.

128. 412 U.S. at 130.

129. *Id.* at 102.

the free speech of others."[130] To escape the general proscription that "government may (not) restrict the speech of some elements of our society in order to enhance the relative voice of others,"[131] and to avoid a legislative directive precluding FCC interference with the right of free speech,[132] such an ordering of rights must stand upon a dubious scarcity rationale to survive.[133] A government policy that promotes first amendment values need not favor one competing right over another, and thus prolong unnecessarily any unusual ordering of first amendment rights. An effective promotion of first amendment values must recognize and strive to harmonize at least three competing first amendment interests.[134] Those concerns include: (1) self-expression by media owners and operators;[135] (2) access for the ideas of individual citizens and groups;[136] and (3) an informed public.[137]

Policymaking affirming each of these interests, without disaffirming the others, would herald the emergence of non-restrictive alternatives for promoting first amendment values without endangering first amendment rights. It also would be a positive response to the recognition, at least for the electronic forum, that solutions may evolve from changing circumstances.[138]

THE SIMULTANEOUS PURSUIT OF FIRST AMENDMENT VALUES AND FIRST AMENDMENT RIGHTS

Government policies toward different media forms have reflected an underlying premise that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[139] That principle has fostered a tendency to consider each media form individually, rather than as part of a broader communications universe. Consequently, policymaking has been conducted on a piecemeal and usually inconsistent basis.

Existing broadcasting regulations, for instance, have been upheld because

130. 395 U.S. at 387.

131. Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

132. 47 U.S.C. §326 (1976).

133. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799-800 (1978); Buckley v. Valeo, 424 U.S. 1, 50 n.55 (1976).

134. Ervin, *supra* note 8, at 888.

135. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. at 258; CBS v. Democratic Nat'l Comm., 412 U.S. at 120-21.

136. Although a general right of public access was rejected in *Democratic Nat'l Comm.*, limited rights of access for ideas or individuals exist under the fairness umbrella.

137. 395 U.S. at 389-90; Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

138. 142 U.S. at 102.

139. 395 U.S. at 386. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The Supreme Court, for instance has suggested that a medium's "greater capacity for evil" may justify a more "permissible scope of . . . control . . . ," 343 U.S. at 502 (discussing first amendment protections for motion pictures), and has concluded that limited spectrum space warrants an ordering of first amendment rights in the electronic forum. 395 U.S. at 388-90. Such media analysis focuses upon perceived shortcomings or the impact of a given media form isolated from other media forms. Consequently, such a perspective is blind to any balancing or countering effect resulting from the influence of other media forms and intermedia competition.

the Supreme Court embraces the notion that, despite rapid technological advances, limited spectrum space prevents accommodating all potential uses.[140] Although conditions for diversity within a given medium may be a valid basis of inquiry, an equally appropriate but neglected consideration is the extent and quality of intermedia competition. Technological advances within a particular medium may not create a climate wherein diversity thrives.[141] But technological progress that delivers new media forms[142] may enlarge mass media contours enough for diversity to prosper anyway. Given such a prospect, atomized policymaking would not only be unreasonably parochial but would approach obsolescence.

The government, in considering new avenues for promoting diversity, can choose from two general options. It may enforce diversity by making content decisions itself,[143] or it may encourage diversity creating or facilitating new media outlets and new opportunities for expression. Past experience in direct content regulation by the government reveals the bankruptcy of such endeavors.[144] But the demonstrated futility of those efforts, and the reasons against such government control, does not obscure the lingering dilemma of too much concentration and too many unheard "views and voices"[145] that those policies have addressed.

The failure to build diversity into the existing system, and difficulty in rationalizing direct content regulation, evince the need for policies that expand the present system or create competing systems. Such an expansionist direction ideally would be a springboard to policy and decision-making that considered not just whether individual media forms served diversity, but how well those media forces collectively interacted toward the multiformity goal.

An activist government role in promoting first amendment values does not necessitate government intrusion into editorial decision-making. A simple postal subsidy, for instance, effectively promoted those values for many years in the American magazine industry.[146] By providing a special low cost postage rate, government enhanced the magazine industry's ability to serve broad or discrete audiences.[147] Although the magazine postal subsidy has been discontinued,[148] congressional funding of public television, fostering an alterna-

140. 395 U.S. at 399.

141. So long as the FCC adheres to its scheme for allocating television frequencies, for instance, it is economically infeasible for a fourth network to compete with the established three and provide an additional information source. "[A]lthough many markets have more than three stations, there are not enough across the nation to support an additional competitive network." Robinson, *supra* note 56, at 259 n.222.

142. Newly developed or impending media technologies include satellite, laser, videocassettes and videodiscs, and subscription and cable television. Barrow and Manelli, *supra* note 90, at 205.

143. 395 U.S. at 390. *See* note 56 and text accompanying notes 68-71 *supra*.

144. *See* 412 U.S. at 154-55 (Douglas, J., concurring); text accompanying notes 105-24 *supra*.

145. 395 U.S. at 389.

146. Ervin, *supra* note 8, at 926-29.

147. *Id.* at 927.

148. *Id.*

tive to commercial broadcasting, represents another experiment in subsidizing first amendment values.

Public television's dependence upon federal funding has left it vulnerable to government pressure and interference.[149] Since the federal government controls public television's purse strings, a strong incentive exists to avoid controversial programming that may provoke congressional or presidential wrath. In public television's short history, it appears that neither Congress nor the president has successfully resisted manipulating those strings to influence public television's programming.[150]

Unlike direct content regulation, subsidization requires no ranking of first amendment rights and entails no government interference with editorial decision-making. But if subsidization is to be a safe and effective tool for promoting first amendment values, funding must be immune from political influences. An alternative to congressional appropriation might take the form of a trust fund consisting of private grants and revenue collected from excise taxes upon television and radio sets.[151] Some such funding mechanism appears essential for ensuring that a subsidization program did not become a subterfuge for government control.

Government support for diversity also could translate into government participation in the media marketplace as a media operator. Although the federal government does not have its own domestic media outlet,[152] it is a producer of information in the form of speeches, publications, official reports and records, and radio, television and film productions.[153] Government operation of its own media network could be a boon to first amendment values. Skeptics might argue that such a government function would open the floodgates for government distortion of information. The hazards of undue government influence, however, may be more illusory than inevitable. It has been suggested that undue influence, in the form of government efforts to manipulate or intimidate the private media, is "too potent to escape public notice and political, if not judicial, reaction."[154] If the government were to operate its own media outlets toward self-serving ends, it probably could not escape public recognition and the consequent undermining of its own believability.

The fear of information management also would be unreasonable unless the government were the sole or dominant information source. Although the federal government has endeavored to regulate private media in the electronic forum, it has consistently rejected the notion of owning or controlling all broadcasting facilities.[155] Given a partially content-regulated electronic media and indirectly content-regulated print media, a government information

149. *Hearings on H.R. 6736 and S. 1160 before the House Comm. Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 31-33 (1967).

150. Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1155-58 (1974).

151 *Id.* at 1123.

152. The government is authorized to broadcast internationally on the Voice of America. 22 U.S.C. §1461 (1976).

153. T. EMERSON, *supra* note 3, at 697.

154. Robinson, *supra* note 56, at 209.

155. T. EMERSON, *supra* note 3, at 654.

system's influence would be counterbalanced effectively by competition from privately owned media. By operating its own media outlets, therefore, government would enlarge media forum boundaries but would not necessarily control the forum itself. Such action would be consistent with the idea that the forum's freedom and existence does not require separation from government. In fact, government constitutes a forum element and should not be precluded, in the name of free speech, from interaction within the forum.[156]

Nevertheless, apprehension created by the prospect of a strong centralized government competing in the media marketplace enshrouds a valid concern that a pervasive media force may intrude upon autonomous decision-making. Since the public in a mass media society is primarily a receiver of information, a potential danger is that public opinion could become a mere reflection of media impressions made upon the recipient public.[157]

The danger of undue government influence in shaping public opinion, though, should not become a serious threat if vigorous competing outlets are maintained. Even if the government were reluctant to report a story, coverage by the private sector would force the government to acknowledge and cover the issue thus maintaining governmental reputability and competitiveness. "So long as the media are not completely monopolized, . . . and have varying contents, [the public] can play one off against the other; . . . (and) compare them."[158]

A government operated media thus would remain subject to scrutiny and correction by competing media, and diversity would be served more effectively by allowing the public and private media sectors to function as a check upon and competitive prod to the other. If government increased rather than limited information flow, the pursuit of first amendment objectives would be facilitated.[159] So long as government tolerated rather than drowned out private communications, therefore, it would operate on behalf of the "first amendment goal of producing an informed public capable of conducting its own affairs"[160] without burdening other first amendment rights. Government subsidization of the media, or operation of government media outlets, would require substantial public funds to advance first amendment values. Such remedies make the most sense in a static structural context. But these solutions could be unnecessarily grandiose in a media environment open and receptive to the evolutionary and revolutionary impact of technological change.

Competition may be limited within certain established media. The emergence of new media technologies,[161] however, may afford government the option of selecting first amendment policies that foster competition among many different media forms. Rather than choosing between costlier alternatives of government subsidization or media outlet operation, it may be sufficient

156. J. TUSSMAN, GOVERNMENT AND THE MIND 99 (1977).
157. C. MILLS, *supra* note 21.
158. *Id.* at 592.
159. P.A.M. News Corp. v. Butz, 514 F.2d 272, 278 (D.C. Cir. 1975).
160. 395 U.S. at 392.
161. *See* Barrow & Manelli, *supra* note 90, at 205.

simply to ensure that new and existing media technologies may compete equally upon their own merits.

Government regulation so far has inhibited rather than facilitated promising media technologies. For instance, the 30 year old cable industry[162] has had its growth stunted throughout most of its existence by FCC rules that have protected established over-the-air broadcasters.[163] At the same time that the Commission has unsuccessfully endeavored to promote diversity in the electronic forum, through direct and indirect content regulation, it ironically has promulgated rules effectively preserving the status quo and withholding the fruits of technological improvements.[164]

The reduction or elimination of regulatory barriers to new media forms should help promote inter-media competition. Conversely, more media forms would help curb the influence of any single medium. Such possibilities could make regulatory rationales, such spectrum scarcity frequencies and captive audiences, conclusively unproductive and unnecessary. Deciding what new and existing technologies deserve first amendment protection, and to what extent, may already be an illogical exercise in classification.[165]

Congress has directed the FCC "to encourage the larger and more effective use of broadcasting of radio in the public interest."[166] That mandate should not be read as obligating the Commission to protect existing broadcasting forms from new competition, unless perhaps dictated by compelling public interest reasons.[167] Agency deregulation goals[168] and proposed legislation that would promote "diversity [by] . . . removal of all barriers to the introduction of new communications technologies"[169] could be philosophical precursors of policymaking that permanently abandons favoritism toward traditional media forms and leaves open the door to new and developing technologies. Court decisions that have struck down preferential policies for conventional broad-

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162. *Id.* at 238.

163. *Id.* at 242-43; Robinson, *supra* note 56, at 245-49.

164. Programming requirements and restrictions for cablecasters were struck down in FCC v. Midwest Video Corp., 99 S. Ct. 1435 (1979) and Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977). However, programming limitations remained in effect for over-the-air subscription television, which could not broadcast any commercial advertisements, nor devote more than 90% of its air time to feature films and sports programming or present sport events which were available on free television within the five previous years. 47 C.F.R. §§73.643(b)-(d) (1977). Those rules have since been superseded so that "the rules and policies applicable to regular television broadcast stations are applicable to subscription television operations." 47 C.F.R. §73.643(b) (1978).

165. BROADCASTING, Nov. 12, 1979, at 65 (remarks of Charles D. Ferris, Chairman, FCC).

166. 42 U.S.C. §303(g) (1976).

167. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir. 1977).

168. BROADCASTING, May 8, 1978 at 32 (remarks of Charles D. Ferris, Chairman, Federal Communications Commission, before the 27th Annual Convention of the National Cable Television Association). Other signs of cable deregulation include the FCC's discontinuation of rules against importation of distant signals, and the Supreme Court's rejection of minimum channel requirements and public, educational and leased access rules. FCC v. Midwest Video Corp., 99 S. Ct. 1435 (1979).

169. BROADCASTING, Jan. 2, 1978, at 46-48.

casters[170] already have helped facilitate a more even handed regulatory orientation.[171]

Even though a new media form may be a potentially significant contributor to diversity it should not automatically be precluded from regulation. Any regulatory policy, however, should reflect government's learning experience in promoting diversity. A long-standing and non-peculiar departure point for such policymaking is that "[f]reedom of the press from governmental interference does not sanction repression of that freedom by private interests."[172] That precept has been recognized almost from the outset in broadcasting, where early warnings were sounded against allowing any individual to reach a "position where [he] can censor the material broadcast to the public."[173] Both first amendment and antitrust values have been proper foundations for FCC regulation in the public interest.[174] Cablecasting, which has been proffered as the potentially complete communications system,[175] and other new technologies, may be no more immune from such concerns. Although cable can deliver more channels, and thus more diversified information, the industry ordinarily enjoys a natural monopoly status[176] and tends to be vertically integrated. Quite possibly, therefore, a cable operator could control both channel capacity and content.[177] Under such circumstances, other media forms in the community would furnish an operator's only competition. So if the cablecasters' program offerings were non-multi-dimensional, and intermedia competition did not compensate sufficiently for the lack of diversity, government action might be warranted.

The preferred regulatory response, however, should not be a direct content-oriented one that has distorted first amendment rights in broadcasting, and likely would do the same in a cable casting medium.[178] Only if the combined efforts of cable and competing media failed to serve diversity would indirect content regulation, such as separation of programming and distribution functions, seem appropriate. If, however, cable became the dominant medium

170. FCC v. Midwest Video Corp., 99 S. Ct. 1435 (1979); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

171. Shortly after the FCC's cable programming rules were struck down in the *Home Box Office* case, the Commission's chairman at the time, Richard Wiley, announced that the agency "now agrees with the appeals court decision as it applies to the rule designed to bar the siphoning of movies from conventional television." BROADCASTING, April 25, 1977, at 49.

172. Mansfield Journal Co. v. FCC, 180 F.2d 28, 33 (D.C. Cir. 1950).

173. *Hearings on H.R. 7357 before the House Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 8 (1924) (statement of Secretary of Commerce Herbert Hoover).

174. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1978).

175. Barnett & Manelli, *supra* note 90, at 238; Robinson, *supra* note 56, at 245.

176. A local government ordinarily grants a franchise for one cable operator to serve the community. Once the cablecaster wires the community, and establishes his toehold, a natural monopoloy tends to arise. *See* Barnett & Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROB. 562, 572-73 (1969). For a description of how different localities award cable franchises, and an examination of the jurisdictional bases for local cable regulation, see Albert, *The Federal and Local Regulation of Cable Television*, 48 COLO. L. REV. 501, 508-13 (1977).

177. Goldberg & Couzens, *supra* note 105, at 50.

178. *Id.*

and failed to deliver on its promise of diversity,[179] cable operators again might have to bear some of the special responsibilities of a common carrier.[180]

Given the current and impending developments in mass media technology, successful promotion of first amendment values simply may demand fair policies that recognize and appreciate the potential for converting spectrum and source scarcity into abundance. Instead of an interventionist policy aimed and source scarcity into abundance. Instead of an interventionist policy designed to extract diversity from a relatively intractable system, a regulatory philosophy amenable to less fettered intermedia competition might prove to be a more satisfactory facilitator of expanded speaking opportunities and accomodator of constitutionally protected speaking rights.

CONCLUSION

The classical concept that government may not abridge freedom of the press has limited worth as a basis for addressing a concentrated media industry unforeseen by the first amendment's framers. Nonetheless, it has been determined that the interest in dissemination of news from many different sources,

> [i]s closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly, but we have staked upon it our all.[181]

So long as government uses direct content regulation to deter media concentration and to enhance diversity, dissemination of information will tend to be the product of authoritative selection by government, as well as private power centers. Given the rapidly changing shape of mass communications, and the potential impact of emerging communications technologies, assumptions underlying much existing regulation may soon be obsolete. Consequently, a search for policies that are more responsive to first amendment interests might best be directed toward policies that would facilitate a more expansive selection of information sources.

Efforts to promote diversity of information and information sources have operated to rank rather than harmonize different first amendment rights and interests while failing to serve any of them fully or fairly. In attempting to reconcile rather than order those concerns, it may be more fitting to consider the availability, interplay and competition of assorted media forms as a basis for broader policymaking. Such a reorientation would demand acknowledgment of an entire media forest rather than just the individual trees therein. Accordingly, it would furnish an underpinning for policymaking that pursued first amendment values without sacrificing first amendment rights.

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179. Robinson, *supra* note 56, at 255.

180. Common carrier duties include "furnish[ing] common service upon reasonable request therefor." 47 U.S.C. §201 (1976).

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