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THE INFORMATION SUPERHIGHWAY: A FIRST AMENDMENT ROADMAP†

DONALD E. LIVELY*

Press freedom over the past half century has reflected a primary sense that media are distinguishable in their nature and effect. Consistent with an understanding of the unique nature of each method of communication, constitutional principle has been driven by the premise that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."¹ Medium-specific analysis comports with Justice Jackson's observation, nearly half a century ago, that media "have differing natures, values, abuses, and dangers. Each, in my view, is a law unto itself."² Attention to difference has resulted in as many First Amendment standards for media as there are identifiable media forms.³ This focus on media distinction, however, has become miscalibrated, as media structure and capability increasingly reflect convergence rather than divergence. At a time when modern means of communication tend toward common characteristics⁴ and merger into new methods,⁵ constitutional and reg-

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¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (broadcasting); *accord FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (broadcasting); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (motion pictures); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1447-48 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (cable).

² *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (agreeing with Court in upholding regulation of sound trucks using public thoroughfares).

³ Variable standards of First Amendment protection are evidenced, for instance, by the regulatory management of broadcasting even as similar controls are struck down for the print media. *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down right to reply law enabling victims of personal editorial attack to respond); *Red Lion*, 395 U.S. at 370, 400-01 (upholding fairness regulation that among other things requires right to reply in the event of personal editorial attack).

⁴ Exemplifying common capabilities is the increasing use of satellite technology by both newspapers and broadcasters to disseminate information from the editorial origination point to a print out on paper, computer monitor or television screen. The printed word and graphic imagery also are propagated by teletext and videotext services that blur traditional distinctions between print and electronic media.

⁵ Merged characteristics are evidenced by the evolving combination of activities by cable and telephone companies that, although historically viewing each other as adversaries, are moving toward joint ventures for the establishment of new interactive communication systems. *See, e.g.*,

ulatory premises etched and adhered to over the past several decades merit reexamination.

As technology and market dynamics reshape the contours and capabilities of media, constitutional and regulatory theory becomes captive to a dated ritual. Differentiation, as noted, is central to determination of a medium's First Amendment standing. In terms of broadcasting, for example—still considered scarce from a medium-specific perspective in an age of expanding information resources⁶—the public's First Amendment right to receive diverse views and voices is "paramount."⁷ The constitutional glossing reflects the reality that broadcasting has historically received the most limited First Amendment protection.⁸

This constitutional status of broadcasting is a function of regulatory assumptions that seriously lag behind economic and technological circumstances. In reality, broadcasters, cablecasters, common carriers and even publishers aspire toward or already provide broadband interactive services enabling users to originate, access and exchange a wide range of data, voice and video services.⁹ Reinvention of established media occurs at the same time wireless technology introduces new, expanded and possibly superseding methods of interactivity and choice.¹⁰

As technology enhances and redefines the information marketplace, old questions of power, control and opportunity are destined to acquire fresh meaning. Historically, the advent of a new medium, or significant enhancement of an established medium's capability, has been the occasion for a First Amendment crisis.¹¹ Unlike significant developments of the past, which shaped a mass media controlled by a

Harry A. Jessell, *Telco to Compete Head to Head with MSO in N.J.*, BROADCASTING, Dec. 21, 1992, at 4; see also *infra* notes 92–93 and accompanying text.

⁶ *Red Lion*, 395 U.S. at 388.

⁷ *Id.* at 390.

⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

⁹ The trend toward convergence of function was anticipated in the seminal works of ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983); M. ETHAN KATSH, *ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* (1989). Increasingly, it is commanding the attention of popular media. *E.g.*, *Entertainment and Technology*, WALL ST. J., Mar. 21, 1994, at R22.

¹⁰ In many communities and countries not yet wired for cable, for instance, a likely option seems to be one of leapfrogging from traditional broadcasting to enhanced choice and interactivity as a function of rapidly evolving wireless technology. Such an option avoids the time-consuming and costly process of establishing a wire network—a task that in the United States is still unfinished despite the cable industry's longevity. See *infra* note 19.

¹¹ The initial official response to motion pictures was to deny them status as part of the press. See *infra* note 17 and accompanying text. Broadcasting even now is the "least protected" medium. See *supra* note 8 and accompanying text. At least through the 1970's, cable was burdened by federal regulation largely protective of the broadcast industry. See DONALD E. LIVELY, *MODERN COMMUNICATIONS LAW* 257–61 (1991).

relative few, current trends of choice and interactivity introduce market driven conditions for diversity and participation. Modern economic and technological forces encourage convergence, rather than differentiation, of media and foster conditions that may reclaim significant aspects of a soapbox culture. These trends render a rethinking of basic constitutional assumptions essential. This Article will (1) examine the historical premises of media regulation and note their mounting deficiencies in the context of evolving technology; (2) consider trends toward media convergence and the implications for a regulatory order based upon difference; and (3) inventory the constitutional choices for reckoning with common denominators of interactivity and expanded choice.

I. TOWARD AN INTEGRATION OF FUNCTION AND COMMONALITY OF STANDARDS

Contemporary media regulation reflects perceptions and assumptions that, contrasted with the rapidly evolving conditions over which it presides, seem profoundly stale. The notion that different media present "peculiar problems,"¹² and thus should be governed by divergent constitutional standards,¹³ assumes that methods of processing and distributing information are distinguishable in meaningful ways. For the better part of the twentieth century, attention to difference has been facilitated by obvious structural dissimilarities among media. Even though each medium has the overarching function of disseminating information, distinctions based on notions of relative scarcity,¹⁴ impact¹⁵ and market leverage¹⁶ have been drawn.

Medium-specific standards, as developed over the course of this century,¹⁷ have resulted in a First Amendment hierarchy of the press.

¹²Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

¹³*Id.* at 502; see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("differences in the characteristics of new media justify differences in the First Amendment standards applied to them").

¹⁴See, e.g., *Red Lion*, 395 U.S. at 388 ("it is idle to posit an unbridgeable First Amendment right to broadcast . . . [w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate").

¹⁵See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (upholding regulation of broadcast indecency pursuant to concern with medium's pervasiveness and effect on children).

¹⁶See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2466 (1994) (cable operator's "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home . . . [creates] potential for abuse . . . over a central avenue of communication [that] cannot be overlooked").

¹⁷Mass media are primarily a twentieth century phenomenon. As new media have evolved, their constitutional credentials have been challenged. Motion pictures initially were denied status

Within that order, the printed word enjoys the most constitutional protection,¹⁸ broadcasting the least,¹⁹ and other media fit somewhere between.²⁰ As media capabilities converge, therefore, a critical constitutional choice looms. Whether freedom of the press is to be defined in the expansive terms that have governed print or in the pinched manner that has applied to broadcasting hangs in the balance.²¹

Attention to difference and consequent variances in constitutional conditions and regulatory possibilities²² have facilitated medium-specific regimes of editorial management. Governance of broadcasting historically has been inspired by the sense that broadcasting is a scarce medium.²³ Understanding of the broadcast spectrum as finite, with "substantially more individuals who want to broadcast than there are frequencies to allocate,"²⁴ has resulted in regulation marked by basic

as part of the press. *Mutual Film Co. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915), *overruled by Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Broadcasting, although never denied First Amendment status, is characterized by diminished interests in editorial freedom. *See, e.g., Red Lion*, 395 U.S. at 390. Cable's First Amendment credentials are still in the process of being sorted. *See Turner*, 114 S. Ct. at 2456; *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1984). Although the Court has noted that the rationale for less rigorous First Amendment analysis of broadcast regulation does not apply to cable, *Turner*, 114 S. Ct. at 2456, it has stressed "that the unique physical characteristics of cable transmission should [not] be ignored when determining the constitutionality of regulations affecting cable speech." *Id.* at 2457.

¹⁸ *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1973) (White, J., concurring) (noting a "virtually insurmountable barrier between government and the print media").

¹⁹ *See, e.g., Pacifica*, 438 U.S. at 748 ("of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"). Although the least protected, broadcasting is the most dominant medium. Radio and television programming is received respectively in 99% and 98.2% of the nation's homes. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, No. 919, at 556. Daily newspapers in 1991 had a per capita circulation rate of .251. *Id.* In 1992, 61.5% of the nation's households subscribed to cable. WORLD ALMANAC AND BOOK OF FACTS 295 (Robert Famighetti ed., 1994).

²⁰ Cable, for instance, has been analogized both to broadcasting and to print for purposes of determining its First Amendment status. *See, e.g., Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449-50 (D.C. Cir. 1985) (analogizing cable to print), *cert. denied*, 476 U.S. 1169 (1986); *Berkshire Cablevision of R.I., Inc. v. Burke*, 571 F. Supp. 976, 986-87 (D.R.I. 1983) (analogizing cable to broadcasting), *vacated on other grounds*, 773 F.2d 382 (1st Cir. 1985).

²¹ The constitutional model for broadcasting, in particular, allows for redistribution of First Amendment rights at the expense of traditional notions of editorial freedom. *Compare Miami Herald*, 418 U.S. at 258 (invalidating state law providing for content balance) *with Red Lion*, 395 U.S. at 400-01 (upholding rule providing for content balance).

²² *See, e.g., Miami Herald*, 418 U.S. at 258; *Red Lion*, 395 U.S. at 400-01.

²³ *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 1050 (1990) (upholding minority preferences in licensing process pursuant to concern with spectrum scarcity); *Red Lion*, 395 U.S. at 390 (upholding fairness doctrine pursuant to concern with spectrum scarcity).

²⁴ *Red Lion*, 395 U.S. at 388.

licensing requirements²⁵ and public interest duties.²⁶ Regulatory details include basic qualifying standards and comparative criteria for licensure,²⁷ limitations on the number of stations an individual or entity may own,²⁸ restrictions on cross-ownership of media properties,²⁹ and provisions to enhance the number of minority licensees.³⁰ In addition to such structural dictates, Congress and the Federal Communications Commission ("FCC") have imposed programming controls that, if applied to other media, would not pass constitutional muster.³¹ Regulation of content has been calculated both to promote³² and limit³³ expressive pluralism. Prevailing constitutional standards accommodate such tension.³⁴

The premise of spectrum scarcity results in an "unusual order" of First Amendment interests.³⁵ A quarter of a century ago, the Supreme

²⁵ The requirement of a license to broadcast is established by the Communications Act of 1934, 47 U.S.C. §§ 301, 307 (1988 & Supp. 1992).

²⁶ The fundamental obligation of a licensee, and basic consideration for a licensing decision, is service of the "public convenience, interest, or necessity." 47 U.S.C. § 307(a).

²⁷ Basic licensure qualifications include American citizenship, technical know-how, good character, and sufficient capital. 47 U.S.C. § 308(b) (1988). When competing applications are made for a license, selection criteria include ownership diversification, ownership participation in management and any past performance. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965).

²⁸ Ownership rules generally restrict broadcast holdings to a maximum of 18 AM, 18 FM and 18 television stations. *In re* Revision of Radio Rules and Policies, 7 F.C.C.R. 6387 (1992). Broadcasters traditionally have been prohibited from owning more than one station of the same type in a given market. *Id.* Duopoly rules have been relaxed to enable radio broadcasters to own multiple stations in a single market, subject to limitations on market dominance and cumulative audience share. *Id.*

²⁹ Cross-ownership rules preclude collocated holdings of newspapers and broadcast properties and collocated cable systems and television stations or common carriers. 47 U.S.C. § 533 (1988 & Supp. 1992).

³⁰ Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). Minority preferences in the broadcast licensing process were upheld in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 1050 (1990).

³¹ See *supra* note 23 and accompanying text.

³² Fairness regulation, for instance, has attempted to promote "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

³³ Regulation of indecent expression limits the public's programming choices. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1341 (D.C. Cir. 1988) (noting that rules limiting time when indecent programming may be aired "curtail[] . . . broadcaster freedom and adult listener choice").

³⁴ The Court has upheld both diversity enhancement and restrictive schemes. See *Metro Broadcasting*, 497 U.S. at 599-600 (upholding racial preferences in licensing process); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (upholding regulation of indecent programming); *Red Lion*, 395 U.S. at 390 (upholding fairness doctrine as means of promoting content diversity).

³⁵ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

Court determined that fairness obligations imposed upon broadcasters did not abridge freedom of the press.³⁶ The fairness doctrine and related rules,³⁷ by design and effect, redistributed First Amendment power in the electronic forum.³⁸ Until abandonment of the fairness doctrine in 1987,³⁹ broadcasters were obligated to devote a reasonable amount of programming to controversial issues of public importance and provide balanced attention to such matters.⁴⁰ Through the fairness doctrine, the Court identified a medium-specific exception to the general principle that government may not diminish the expressive freedom of some to enhance the speaking opportunities of others.⁴¹ Finding "it idle to posit an unbridgeable First Amendment right to broadcast comparable to the right . . . to . . . publish,"⁴² the Court concluded that "the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount."⁴³ Such a constitutional order illuminates broadcasting's second-class First Amendment status.⁴⁴

Courts and commentators alike have contested scarcity assumptions and implications,⁴⁵ and the FCC itself has abandoned the fairness doctrine in favor of First Amendment parity for broadcasters and publishers.⁴⁶ Modern constitutional review, however, continues to use

³⁶ *Red Lion*, 395 U.S. at 389-90.

³⁷ The fairness doctrine itself obligated broadcasters to cover controversial issues of public importance and provide for balanced treatment of them. See *infra* note 40 and accompanying text. Rules designed to promote the interests of balance and diversity include reasonable access to airtime and equal time provisions for political candidates, 47 U.S.C. §§ 312(a)(7), 315 (1988), the right to reply to personal attacks, 47 C.F.R. § 73.1920 (1990), and political editorial rules, 47 C.F.R. § 73.1930 (1990).

³⁸ The net result is that the public's right "to have the medium function consistently with the ends and purposes of the First Amendment" is made "paramount" to the First Amendment rights of broadcasters. *Red Lion*, 395 U.S. at 390.

³⁹ The fairness doctrine was abandoned in 1987. *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Since then, Congress has unsuccessfully moved to codify the fairness doctrine. Legislation to that effect was passed but vetoed by President Reagan. Bill Holland, *It's Back*, *BILLBOARD*, Feb. 2, 1991, at 2 (discussing the veto and subsequent fairness initiatives by Congress).

⁴⁰ *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 7 (1974).

⁴¹ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-92 (1978).

⁴² *Red Lion*, 395 U.S. at 388.

⁴³ *Id.* at 390.

⁴⁴ See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (broadcasting has "the most limited First Amendment protection").

⁴⁵ See, e.g., *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 *DUKE L.J.* 213, 223-29; Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *TEX. L. REV.* 207 (1982).

⁴⁶ *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5055-57 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

the scarcity premise to perpetuate broadcasting's subordinate status.⁴⁷ Administrative observations to the effect that broadcasters occupy the same First Amendment plane as publishers, moreover, seem primarily of rhetorical significance.⁴⁸ At the same time that the FCC has repudiated fairness principles and ideology, for example, it has fortified its resolve to curb indecent programming.⁴⁹ Such a content restrictive initiative derives not from concern with scarcity but rather from an official sense of the pervasiveness and unique accessibility of the broadcast medium to children.⁵⁰ Medium-specific assumptions and consequences thus persist, with regulatory change reflecting some discretely redirected attention rather than wholesale recalibration of analytical perspective.

The advent of technology facilitating reproduction of the printed word begot mass communication.⁵¹ For more than four centuries, publishing exclusively defined mass media methodology. Systems of comprehensive control initially defined official response to the capabilities of print.⁵² Although concepts of press freedom eventually evolved, and in the United States became constitutionally enshrined,⁵³ regulatory impulses reflecting concern with impact have continued to manifest themselves and vie against press freedom. Not even the most constitutionally prioritized media have been immune from regulatory pressure. As print methodology obtained the capacity to disseminate pictures in addition to words, the medium's focus, reach and methods

⁴⁷Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994) (reaffirming that "justification for our distant approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium"); Metro Broadcasting, Inc. v. FCC, 497 U.S. 1050 (1990) (stressing paramount First Amendment interests of public).

⁴⁸See *supra* note 46 and accompanying text.

⁴⁹For all of the criticism directed at fairness regulation as an abridgment of editorial freedom, it seldom was enforced vigorously. See *infra* note 133 and accompanying text. Over the past decade, decency enforcement has been pursued seriously and with major consequences for some broadcasters. *E.g.*, Joe Flint, *FCC Fines Stern \$600K; OK's Deal*, BROADCASTING, Dec. 21, 1992, at 5; Kim McAvoy, *FCC Hands Out \$80,000 in Fines*, BROADCASTING & CABLE, Oct. 25, 1993, at 42.

⁵⁰See, *e.g.*, Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

⁵¹The printing press was a mid-15th-century invention of Johann Gutenberg. See BEN BAGDIKIAN, *THE INFORMATION MACHINES* 7-9, 192 (1971).

⁵²The English Licensing Act, abandoned in 1694, established printing monopolies under the authority of the Crown. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1876 (1833); Thomas Emerson, *The Doctrine of Prior Restraint*, 2 LAW & CONTEMP. PROBS. 648, 650 (1955). Even after the Act's repeal, taxation and seditious libel were used effectively to control the process. LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 8-17 (1968).

⁵³Freedom of speech and of the press is secured by the First Amendment to the United States Constitution and by various provisions of state constitutions.

became grounds for concern. Even before electronic media became subject to extensive regulation,⁵⁴ prominent scholars and commentators sounded an early warning with respect to the press's intrusive nature and priorities.⁵⁵

Differences among media have not been difficult to discern, even if they have not always been significant.⁵⁶ Practical considerations such as literacy requirements and product immutability, for instance, qualify the function of print media. Distribution methods requiring, for instance, the use of public rights of way may implicate local police power interests.⁵⁷ Newer media such as broadcasting, however, differ structurally insofar as radio and television transmissions are "in the air"⁵⁸ and defeasible by signal range and interference. Early experience with broadcasting, characterized by "confusion and chaos," generated demands for a system of governmental oversight that would establish and maintain efficient usage of the broadcast spectrum.⁵⁹ Central to modern regulation of broadcasting is a system of licensing that, although unallowable for publishing, provides the basis for extensive controls upon radio and television operators.⁶⁰ Notwithstanding its longevity as a regulatory premise, scarcity represents a misplaced concern and a principal discredit to medium-specific analysis. The primary impediment to the existence or functioning of any mass medium is sufficient capital.⁶¹ The scarcity phenomenon that has excluded the vast majority

⁵⁴ Congress originally regulated broadcasting pursuant to the Radio Act of 1927 and then by the Communications Act of 1934. The regulatory background of broadcasting is discussed in *NBC v. United States*, 319 U.S. 190, 210-16 (1943).

⁵⁵ Brandeis' seminal work on a right of privacy reflected a concern with journalistic values that favored gossip, sensationalism and intrusion into personal lives over matters of genuine community concern. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

⁵⁶ Scarcity, insofar as it is recognized for broadcasting but not for print, represents "a distinction without a difference." *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). As the court observed, an "attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion." *Id.* Concern that broadcasting compromises privacy interests, to the extent that it is pervasive or intrusive, actually cuts against privacy concerns of personal autonomy and choice. *See FCC v. Pacifica Found.*, 438 U.S. 726, 764-66 (1978) (Brennan, J., dissenting).

⁵⁷ Zoning regulations may affect the placement of news vendors and stands and, to the extent content may be sexually explicit, may significantly limit distribution points. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976). Local authorities also have an interest in the physical structure of a cable system, insofar as it may implicate land use and assignment of pole space. *See generally City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1984) (considering city's refusal to grant cable system access to poles or underground conduits).

⁵⁸ *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

⁵⁹ *NBC v. United States*, 319 U.S. 190, 212-17 (1943).

⁶⁰ *See supra* notes 25-30, 37-38 and accompanying text.

⁶¹ *See* Donald E. Lively, *Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue*, 66 N.C. L. REV. 963, 968 (1988).

of persons from media ownership, therefore, primarily reflects economics rather than physics. Inattention to that reality, unfortunately, has resulted in persisting emphasis upon difference in the face of similarity.⁶²

Courts advert to spectrum scarcity,⁶³ pervasiveness⁶⁴ and easy access to children⁶⁵ in rationalizing broadcasting's status as the medium with the "most limited First Amendment protection."⁶⁶ Although cable derives and retransmits significant amounts of programming from broadcasters,⁶⁷ it often has been analogized to print media.⁶⁸ Unlike broadcasting and more like publishing, the analogy goes, access to cable requires affirmative acts of engagement on the part of the viewer.⁶⁹ Concern with cable's impact on children is minimized, moreover, by affordable methods of blocking access to specific channels.⁷⁰ Similarly, when the Supreme Court invalidated a federal law prohibiting indecent transmissions by telephone, it cited adequate and affordable means to control access as a significant factor.⁷¹

An especially disturbing aspect of cable, at least from a regulatory perspective, is the "bottleneck, or gatekeeper" phenomenon.⁷² The ability of cable operators to control program menu has generated legislative and judicial concern with the potential for market abuse that might impair the free flow of information.⁷³ The Cable Television Protection Act of 1992⁷⁴ imposed must-carry obligations upon broad-

⁶² See *supra* notes 45, 59 and accompanying text.

⁶³ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90 (1969).

⁶⁴ *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

⁶⁵ *Id.*

⁶⁶ *Id.* at 748.

⁶⁷ Retransmission of television programming has been a continuing source of friction between broadcasters and cablecasters. In cable's early years, the FCC imposed restrictions on the importation of distant signals, *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), and required cable operators to originate programming as a condition for retransmitting over-the-air signals. *United States v. Midwest Video Corp.* 406 U.S. 649 (1972). Over the past decade, FCC rules mandating the carriage of local broadcast signals have been invalidated twice. *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1462-63 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The Supreme Court has remanded must-carry's third incarnation to the district court with instructions to determine whether it actually is supported by an important governmental interest. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2472 (1994).

⁶⁸ See, e.g., *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1112 (D. Utah), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd without opinion*, 480 U.S. 926 (1987).

⁶⁹ See *id.* at 1112-14.

⁷⁰ See *id.* at 1113.

⁷¹ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28, 131 (1989).

⁷² *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2466 (1994).

⁷³ *Id.* at 2461.

⁷⁴ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

casters requiring them to distribute local broadcast signals.⁷⁵ The legislation reflects concern that cable has attained "undue market power" attributable to having displaced broadcast reception in more than sixty percent of the nation's households.⁷⁶ Because franchising requirements and capital costs have conspired toward establishing monopolistic conditions in the cable industry, Congress determined that "market position gives cable operators the power and incentive to harm broadcast competitors."⁷⁷

As the Court has noted in reviewing the must-carry provisions, the risk that broadcasters might be dropped from or adversely repositioned on a cable system's menu is heightened by mounting competition for advertising revenue and vertical integration favoring affiliated programmers.⁷⁸ Much like the Newspaper Preservation Act's⁷⁹ aim to rescue failing urban newspapers, pressed competitively by suburban dailies and other media,⁸⁰ must-carry regulation reflects official management and real location of the economic power and information marketplaces. Both regulatory schemes represent First Amendment affirmative action plans that redistribute editorial power in an attempt to forestall obsolescence, despite consequential burdens upon competing media.⁸¹ They seem inspired by the premise that "[f]reedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."⁸²

Mixed regulatory models and results reflect the medium-specific perspective that has increasingly driven constitutional, statutory and administrative analysis over the course of the twentieth century. Medium-specific review, however, fails as a means of reckoning with modern methods of communication. As noted previously,⁸³ discernment of

⁷⁵ 47 U.S.C. § 534 (Supp. 1992).

⁷⁶ *Turner*, 114 S. Ct. at 2454.

⁷⁷ *Id.*

⁷⁸ *Id.* at 2454-55.

⁷⁹ 15 U.S.C. §§ 1801-05 (1988).

⁸⁰ See Donald E. Lively, *New Media, Old Dogma*, 30 ARIZ. L. REV. 257, 265-66 (1988).

⁸¹ Allowing a failing newspaper to enter into a joint operating agreement with its healthier rival, 15 U.S.C. § 1803(b) induces economies of scale that may make it difficult for other newspapers in the community to compete. See *Times-Picayune Publishing Co. v. United States*, 354 U.S. 594, 604-05 (1953). Must-carry obligations, designed to ensure the availability of free local television, may result in costs both to the editorial freedom and the profits of cable operators.

⁸² *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁸³ See *supra* notes 45, 59 and accompanying text.

difference is less a science than an art and thus is imprecise. For long-term purposes, such an analytical construct has little to recommend it.

The full dimensions of future communications methods may be impossible to chart. What today appears futuristic becomes obsolete tomorrow as a function of rapid technological progress.⁸⁴ As all media, currently distinguished on the basis of appearance, method or impact, course toward broadband services—with common capabilities for data, voice and video transmissions⁸⁵—analysis that stresses difference has diminishing relevance and justification.

Media convergence, although eliminating one set of constitutional and regulatory issues, introduces questions that are no less profound. Although the case for distinguishing media becomes increasingly less persuasive, issues will persist at a more general level. The power of network operators and the integration or separation of content and carriage functions, for example, will draw increasing attention.⁸⁶ Interactivity will likely renew issues of access which as a methodology of promoting First Amendment values in the context of print,⁸⁷ broadcasting⁸⁸ and cable,⁸⁹ mostly has been denied. As media reconstruct the information marketplace, and speaking and input opportunities augment the existing role of passive viewer or listener,⁹⁰ inversion of First Amendment rights to promote First Amendment values may become even less compelling. Rather than ignore concern with the distribution

⁸⁴ The recent history of personal communications systems aptly illustrates the rapidity, consequences and market risks of compounding innovation. Within months of the American Telephone & Telegraph Company's decision to purchase McCaw Cellular Communications, for purposes of capitalizing upon a coming market for advanced portable wireless systems, MCI Communications purchased Nextel Communications. Edmund L. Andrews, *MCI Plans Big Nextel Stake As a Move Into Wireless*, N.Y. TIMES, Mar. 1, 1994, at C1. In so doing, MCI anticipated developing Nextel's specialized mobile radio capabilities into a digital system that would leapfrog existing cellular technology and carry digital communications. Market response to the system's poor sound quality was so negative, however, that the deal collapsed. Mark Lewin, *How MCI Got a Bad Connection*, Bus. Wk., Sept. 12, 1994, at 34.

⁸⁵ See Andrew Barrett, *The Telecommunications Infrastructure of the Future*, 23 U. TOUL. L. REV. 85, 86 (1991).

⁸⁶ See *id.* ("policy issues" of future "will focus on the divisions and safeguards between content and transport").

⁸⁷ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁸⁸ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-13 (1973).

⁸⁹ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979). Although broad access rights have been rejected, federal law allows franchising authorities to establish public, educational and governmental access, 47 U.S.C. § 531 (1988), and requires cable operators with 36 or more channels to designate up to 15% of their capacity to commercial access. 47 U.S.C. § 532 (1988 & Supp. 1992).

⁹⁰ The public's paramount First Amendment rights encompass an interest in receiving diverse views and voices. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90 (1969).

of First Amendment power and opportunity, regulators and courts may condition participation on cost and availability.⁹¹

Tactical decisions of existing media to redefine or realign themselves underscore the movement toward a new communications order. Strategic alliances between cable systems and telephone companies⁹² and of hardware operators and software producers herald a future in which convergence is a defining trait.⁹³ The advent of video dialtone service previews the crumbling of established structural models.⁹⁴ Such developments foreshadow an era in which a regulatory structure, focused upon difference, chronically lags or becomes a drag upon progress. As reality pressures the existing regulatory order, the question of what constitutional model(s) will govern the new information marketplace becomes crucial. One set of First Amendment standards, as noted previously,⁹⁵ brooks little interference with editorial autonomy. Constitutional review of broadcasting⁹⁶ and cable⁹⁷ has accommodated significant management of editorial functions. Common carrier regulation, although providing for equal access to all potential users on a nondiscriminatory basis,⁹⁸ denies any editorial interest of or function by the network provider.⁹⁹ Part II of this Article will examine models

⁹¹ First Amendment norms, except in the area of broadcasting, disfavor redistribution of expressive opportunity. See *supra* note 41 and accompanying text.

⁹² See Jessell, *supra* note 5, at 4.

⁹³ Participants in the processes of alliance, merger and acquisition include both an extensive line-up of telephone companies, cable systems and computer manufacturers, and product sources such as movie studios, cable programmers and software producers. Richard Turner, *Hollywired*, WALL ST. J., Mar. 21, 1994, at R1. By relaxing cross-ownership rules prohibiting cross-ownership of networks and cable systems, 47 C.F.R. § 76.501 (1993), and allowing video dialtone service, 57 Fed. Reg. 41,106 (1992), the FCC has made it possible for networks and broadcasters to expand their potential as software suppliers. Joe Flint, *FCC Lets TV Networks into Cable Ownership*, BROADCASTING, June 22, 1992, at 4; Gerald E. Udwin, *Monday Memo*, BROADCASTING, July 27, 1992, at 18.

⁹⁴ See Harry A. Jessell, *FCC Calls for Telco TV*, BROADCASTING, July 20, 1992, at 3. Video dialtone is a service provided by a local exchange carrier that creates a transport facility with "channel capacity . . . leased to unaffiliated programmers on a common carrier basis." Barrett, *supra* note 84, at 96.

⁹⁵ See *supra* note 18 and accompanying text.

⁹⁶ See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 1050 (1990) (upholding minority preferences in licensing process); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 827-28 (1978) (upholding cross-ownership rules governing broadcasters and newspaper publishers); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 409-10 (1969) (upholding fairness regulation).

⁹⁷ See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994) (rules forcing cable operations to carry local broadcast signals may be permissible if they truly promote substantial governmental interest unrelated to speech and are narrowly drawn). The Cable Communications Policy Act of 1984, 47 U.S.C. § 531, authorizes franchising authorities to establish requirements for public, educational or governmental access to channel capacity.

⁹⁸ 47 U.S.C. § 201(a) (1988).

⁹⁹ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-02 (1979).

of media governance in the context of rapidly changing and converging technology.

II. TECHNOLOGIES OF CONVERGENCE: THE IMPLICATIONS OF CHOICE AND INTERACTIVITY

Choice and interactivity represent defining characteristics of future media.¹⁰⁰ Progress toward expanded program diversity can already be attributed to cable's penetration into the majority of the nation's households and the development of technologies such as wireless cable¹⁰¹ and direct broadcast satellites.¹⁰² Interactivity, albeit a primary feature of computer on-line services and a significant magnet for investment, has yet to expand pervasively beyond basic telephone service.¹⁰³ These evolving attributes of and conditions for media have profound significance for methods of power distribution and exercise in the information marketplace, as well as the governance of mass communications.

Print media function in a constitutional order that prioritizes editorial autonomy.¹⁰⁴ The prioritized First Amendment status of newspapers and other nonelectronic textual media seems to reflect a heavy factoring of historical tradition.¹⁰⁵ As digitalized satellite and fiber-optic systems allow the transmission of electronic newspapers, magazines and books,¹⁰⁶ and publishers enter into strategic alliances for electronic delivery of their product,¹⁰⁷ any logic in the Court's tradition-based rationale further diminishes.

¹⁰⁰ Choice is a function of multichannel capacity. Interactivity provides both input and receiving opportunities for subscribers.

¹⁰¹ Wireless cable, referred to technically as multipoint distribution service, has evolved as a competitor to the cable industry primarily in urban areas. Transmission is via microwave signals carried over a short distance that are converted and displayed on open VHF channels. DONALD E. LIVELY, *ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW* 345 (1992).

¹⁰² Direct broadcast satellite service provides not only choice but, to the extent linked with telephone lines, can provide interactivity. Sean Scully, *Hubbard says DBS is Highway Enough*, *BROADCASTING & CABLE*, May 24, 1993, at 72; see also Mark Robichaux, *The Players*, *WALL ST. J.*, Mar. 21, 1994, at R16 (noting multibillion dollar investments in interactivity).

¹⁰³ The interactive nature of on-line computer services is adverted to in note 142. Investment in interactivity is discussed in note 159.

¹⁰⁴ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government regulation of editorial processes of newspaper inimical to freedom of the press).

¹⁰⁵ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50-51 (1982).

¹⁰⁶ For instance, the *Washington Post* has developed an electronic newspaper prototype that displays a picture much like the front page of a newspaper. Sean Scully, *Comes the Revolution: Digital Wireless PCS*, *BROADCASTING & CABLE*, Sept. 27, 1993, at 22. Subscribers obtain additional information, in the form of video, sound or text, by touching the screen. *Id.* The electronic newspaper is capable of being transmitted via personal communications services, for which the FCC recently has set aside a new band of radio frequencies. *Id.*

¹⁰⁷ The nation's second largest newspaper chain, Knight-Ridder, Inc., is working with a

A multilayered First Amendment, with medium-specific implications, may strike some as reasonable in consequence even if contorted in theory.¹⁰⁸ The defense of medium-specific analysis, however, tends to discount two significant factors. First, as newer media become the dominant instruments of communication, traditional protection of print covers shrinking territory.¹⁰⁹ Second, as media converge in their nature and capability, courts or policymakers must eventually choose between competing traditions.¹¹⁰ The Court's sense that unrestricted First Amendment freedom would consume First Amendment interests is central to broadcasting's status as the least protected medium, even as it has become the most dominant medium.¹¹¹ This "benign" regimen of content control, which already has its own legacy of strained logic, is becoming even more attenuated as media reconstruct themselves with a common denominator of increased diversity and interactivity.¹¹²

regional telephone company, Bell Atlantic, to develop news, entertainment and advertising for home delivery by means of a \$15 billion interactive system that is being constructed. Robichaux, *supra* note 102, at R16.

¹⁰⁸ Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976) (arguing that legislated access to some but not all of the press achieves the best of both constitutional and regulatory worlds).

¹⁰⁹ DE SOLA POOL, *supra* note 9, at 1-10 (noting how First Amendment tradition stressing editorial autonomy is subject to shrinkage as electronic media supersede print media).

¹¹⁰ *Id.* Discounted First Amendment standards for newer media, even if initially regarded as exceptional, have the potential to become normative. Preliminary indications that criteria dilution could extend to print media are evidenced in the Court's review of rules requiring cable systems to carry local broadcast signals. Although reaffirming the unconstitutionality of statutory right to reply for a political candidate whose character was attacked by a newspaper, the Court now stresses that the law "exact[ed] a penalty on the basis of content." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2465 (1994) (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974)). In so doing, the Court distinguished what it described as the content-neutral nature of the must-carry rules. *Turner*, 114 S. Ct. at 2464. To the extent that *Tornillo* is understood as concerned primarily with viewpoint-based burdens, rather than with a general proscription against compelling publishers or editors "to publish that which 'reason' tells them should not be published," *Tornillo*, 418 U.S. at 256, it is conceivable that viewpoint-neutral speech control of the print media may be upheld. For purposes of ensuring the economic viability of broadcasters, for instance, newspaper publishers might be required to print program listings even if they preferred not to print such listings.

¹¹¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-91 (1969) (stressing need to accommodate other views when access to medium is limited); see *supra* note 19 and accompanying text.

¹¹² Even before the advent of new technologies that provided expanded program choice, scarcity was a dubious premise. At the time that the Court endorsed the scarcity rationale, the number of radio and television stations exceeded the number of daily newspapers by a factor of 4.5. STATISTICAL ABSTRACT OF THE UNITED STATES, nos. 906, 920, at 531, 536 (1994) (in 1970, there were a total of 1,748 newspapers, 6,519 radio stations and 862 television stations). Insofar as scarcity of all media is an economically driven phenomenon, arguments tied to this premise must operate on a wholesale rather than discrete basis. Modern concern with broadcasting's intrusive nature is selective if not tortured. Regulation that prevents exposure to offensive

The finite nature of all resources, including the raw material, capital and processes for publishing newspapers, exposes the weak foundation of efforts to distinguish broadcasting as a scarce medium.¹¹³ Because the Court refuses to forsake scarcity as a constitutional factor,¹¹⁴ however, it persists as a source of analytical confoundment. When the Court rejected the extension of fairness principles to print media,¹¹⁵ even after upholding them for broadcasters,¹¹⁶ it indicated that entry into the newspaper business theoretically is unlimited.¹¹⁷ Realistically, the same could hold true for broadcasting.¹¹⁸ Diminished demand for traditional broadcast usage,¹¹⁹ as well as enhancement methodology such as digital compression,¹²⁰ suggests that economics is the primary factor in determining who broadcasts and what program choices exist.¹²¹ Even at the height of regulatory attention to spectrum scarcity, both the transferability of radio and television licenses and cost factors diminished the significance of limited space.¹²² Scarcity accordingly fails both as a source of legitimate regulatory concern and as a basis for a special constitutional order.

Compelling logic to the contrary has not undone official resolve for a redistribution of speaking rights in the electronic forum. Even though the FCC has abandoned the fairness doctrine,¹²³ scarcity con-

programming interferes with the competing privacy interest of personal choice. *See supra* note 56.

¹¹³ *See* Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

¹¹⁴ Metro Broadcasting, Inc. v. FCC, 497 U.S. 1050 (1991) (upholding minority preferences pursuant to understanding of spectrum scarcity).

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

¹¹⁶ Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 400-01 (1969).

¹¹⁷ *Tornillo*, 418 U.S. at 247-56; *see also* Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

¹¹⁸ Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

¹¹⁹ Demand for AM broadcasting over the past decade, for instance, has decreased significantly. The profitability of broadcasting, and market interest in radio and television properties, also have declined as a function of inroads by new media into audience and revenue bases. Joe Flint, *Radio's Magic Numbers*, BROADCASTING, Mar. 16, 1992, at 4.

¹²⁰ Compression technology essentially enables distributors of voice, data or video transmission to squeeze more information into a medium such as a wire and thus increase its carrying capacity.

¹²¹ Any applicant for a broadcast license must satisfy financial qualification standards. 47 U.S.C. § 308(b) (1988). Such requirements, along with the marketability of licenses and the economic conditions alluded to at note 122 and accompanying text, define an industry to which access is conditioned by affordability.

¹²² *See* Donald E. Lively, *Broadcasting and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599, 604 (1992).

¹²³ Syracuse Peace Council, 2 F.C.C.R. 5043 (1987).

cerns continue to inspire content control in the form of personal attack, political editorial, political access rules¹²⁴ and structural schemes calculated to enhance diversity.¹²⁵ Moreover, despite administrative repudiation of the fairness doctrine,¹²⁶ Congress continually threatens to reintroduce it.¹²⁷ For a Court that demonstrates profound hostility to notions of redistributive justice,¹²⁸ a First Amendment affirmative action plan making the rights of "viewers and listeners, not the right of the broadcasters, . . . paramount,"¹²⁹ seems anomalous.

The "unusual order" of First Amendment rights¹³⁰ has been a primary source of constitutional mystery, for ideological as well as technical reasons. Arguably, the Court could have achieved similar results through traditional strict scrutiny, without the need to manufacture a constitutional liberty interest. Radical construction and redistribution of rights notwithstanding, purported beneficiaries of a glossed First Amendment have realized little beyond formalistic gain. Except under discrete circumstances, viewers and listeners have no real speaking rights,¹³¹ and broadcasters have shied away from controversy.¹³² Administrative enforcement of fairness obligations historically has been exceptional rather than normative.¹³³ Indeed, regulatory underachieve-

¹²⁴ See *supra* note 37.

¹²⁵ Rules establishing ownership ceilings, cross-ownership restrictions and minority preferences, for instance, reflect a common sense that ownership diversity facilitates program diversity. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 1050 (1991) (upholding minority preferences in licensing process as means of achieving program diversity); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795, 814-15 (1978) (upholding cross-ownership rules prohibiting ownership of co-located newspapers and broadcast properties); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (noting diversification purposes of ownership caps).

¹²⁶ *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5057 (1987).

¹²⁷ Since President Reagan's veto of legislation reestablishing the fairness doctrine, attempts to codify it have become almost an annual exercise that at times has come close to succeeding. Holland, *supra* note 38, at 2 (discussing history of legislative efforts to reintroduce fairness doctrine).

¹²⁸ *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (racial preferences an impermissible means of accounting for societal discrimination).

¹²⁹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹³⁰ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

¹³¹ The limited conditions for personal access are identified at note 37 and accompanying text.

¹³² Trading in orthodoxy has been attributed to broadcaster concern with economic costs of controversy which could alienate advertisers and generate administrative and litigative expenses. *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5055 (1987).

¹³³ See, *e.g.*, *Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 58 F.C.C.2d 691, 709 (1976) (Comm'r Robinson dissenting) (noting that in 1973 and 1974, FCC received 4,280 fairness complaints but found against licensee in only 19 instances).

ment, attributable to perceived risks of intrusion into the editorial process, helped drive the FCC toward abandoning the fairness doctrine.¹³⁴

The limited and even negative returns of diversity enhancement schemes derive in significant part from their operation against an easily intimidated industry.¹³⁵ Rhetoric concerning the facilitation of expressive pluralism and balance, moreover, emanates against a backdrop of official anti-diversity commitment. When first confronted with the broadcast of sexually explicit language on radio, the FCC determined that offended viewers could exercise their autonomy to avoid such programming and did not "have the right . . . to rule such programming off the air."¹³⁶ Any other decision, the FCC noted, would surrender to the "wholly inoffensive, the bland."¹³⁷ Even as audiences in some markets have propelled what the FCC characterizes as patently offensive programming to eminent ratings status,¹³⁸ regulation has disregarded the concept of viewer or listener preference or subordinated it to concern with the medium's pervasive nature or accessibility to children.¹³⁹ Pressure to expand the scope of content regulation, to control indecent expression in other media contexts, previews the competition among First Amendment models that will ultimately govern a converged media universe. Although the Court has thus far rejected indecency control for cable and common carriers,¹⁴⁰ the case for expanding

¹³⁴The unusual order of rights, especially in the context of fairness regulation, actually functioned as an instrument of leverage against, rather than for, diversity. *Syracuse Peace Council*, 2 F.C.C.R. at 5055 (noting that economic, administrative and litigative costs deterred presentation of controversial programming).

¹³⁵It is in broadcasting that regulation by "lifted eyebrow," for instance, is especially effective. Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119 (1967). Because licensure is a condition for doing business, broadcasters tend to be especially sensitive to official concern even when informally expressed. *Id.* at 119-20.

¹³⁶*Pacifica Found.*, 36 F.C.C. 147, 151 (1964).

¹³⁷*Id.*

¹³⁸Three radio stations carrying the sexually explicit programming of Howard Stern in New York, Philadelphia and Washington D.C., for instance, were fined \$600,000. Nat Hentoff, *How the FCC Saves You From Indecency*, VILLAGE VOICE, May 25, 1993, at 28.

¹³⁹*Infinity Broadcasting*, 3 F.C.C.R. 930 (1989), *vacated*, *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339-41 (D.C. Cir. 1988) (affirming FCC's interest in protecting children but remanding for more precise standards regarding permissible hours for indecent programming); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (explicating concerns regarding children and pervasive nature of broadcasting).

¹⁴⁰*Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (invalidating ban on dial-a-porn services); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D.

the speech-restrictive model in the age of convergence will likely persist, at least until a final constitutional reckoning.¹⁴¹

To the extent attention remains devoted to difference, First Amendment standards for new media will remain a function of trial by analogy. As media shatter their traditional molds and evolve toward common characteristics and capabilities, such analysis becomes a dubious exercise. Early indications of convergence, in the form of strategic alliances among media concerns and ventures such as video dialtone,¹⁴² foreshadow a future in which media will have more, rather than less, in common.

To the extent that interactivity becomes a defining trait, distortions of the information marketplace caused by one set of economic and technological factors may be ameliorated by competing realities. Telephone service until recently has provided the only electronic medium characterized by meaningful interactivity, even if limited traditionally and primarily to two-way voice or data transmissions. Interactivity has been enhanced over the past decade as computer networks and on-line services have begun to utilize telephone service.¹⁴³ Notwithstanding the hybrid media that may be the offspring of strategic alliances or technological innovation, it is not inconceivable that an established medium may emerge as a primary source of interactivity. Repeal of relevant cross-ownership rules enables broadcast networks to merge with or acquire telephone companies and cable systems.¹⁴⁴ Even without such structural change, the impending advent of high definition television ("HDTV") will provide additional bandwidth to broadcasters.¹⁴⁵ To the extent broadcasters receive permission to use

Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

¹⁴¹ *E.g.*, *Sable*, 492 U.S. at 133 (Scalia, J., concurring) (arguing that equal access obligation of common carriers does not extend to indecent messages); *Information Providers Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 877 (9th Cir. 1991) (carrier may terminate service to dial-a-porn operators).

¹⁴² A computer network is a matrix of interconnected computer systems such as Internet, which originally was intended to link government and academic communities but now has broader public uses. Leslie Cauley, *Does Anybody Speak English?*, WALL ST. J., Mar. 21, 1994, at R4. On-line services, such as Prodigy, CompuServe and America On-Line, provide information, forums and a vast array of services to subscribers. Michael Meyer, *The On-Line War Heats Up*, NEWSWEEK, Mar. 28, 1994, at 38-39.

¹⁴³ See *supra* note 142 and accompanying text.

¹⁴⁴ FCC relaxation of rules, prohibiting cross-owned broadcast network cable systems, enables networks "to acquire cable systems serving up to 10% of homes passed nationwide and up to 50% of homes passed in a market." Flint, *supra* note 93, at 4.

¹⁴⁵ Kim McAvoy & Chris Stern, *Broadcasters Gaining More Spectrum Opportunities*, BROADCASTING, Mar. 21, 1984, at 6.

broadband channels for purposes other than HDTV, individual broadcasters could offer expanded program choices and some measure of interactive service.¹⁴⁶ Digital technology also serves as a significant factor in blurring traditional differences and facilitating multimedia and interactive capability.

Convergence facilitates both enhanced diversity of content and enhanced roles for viewers. Rules that effectively segregate media, and disable them from merging their resources or expanding their function, compete against market efficiencies.¹⁴⁷ Even so, telephone company entry into the cable business both domestically and overseas, as well as innovative usage of copper wire technology to provide video services, evidences the obscuring of traditional differences among media. Although prohibited from owning cable systems in their own service areas, telephone companies may do so elsewhere.¹⁴⁸ Accordingly, either independently or in conjunction with cable companies, common carriers have ventured increasingly into functions traditionally performed by other hardware and software operators. Cable systems, meanwhile, have indicated an interest in providing telephone service, which they now may also offer outside their service areas.¹⁴⁹ The trend toward multimedia function and convergence is accelerated in less regulated circumstances, as software distributors such as movie studios, computer program manufacturers, video suppliers and newspaper companies form strategic alliances or merge with hardware operators such as direct broadcast satellite systems, cable companies and even common carriers.¹⁵⁰

Economically and technologically driven change in the nature and capability of media presents a serious challenge to static regulatory premises. In the conflict between technological change and static regulation, the existence of significant market demand for new services

¹⁴⁶ *Id.*

¹⁴⁷ A planned merger between Tele-Communications, Inc. and Bell Atlantic fell through, for instance, after the FCC rolled back cable rates pursuant to legislation requiring enhanced economic regulation of the cable industry. Christopher Stern, *Abrupt end to the Beginning*, BROADCASTING & CABLE, Feb. 28, 1994, at 6. The new rate controls reduced the cable company's cash flow and prompted Bell Atlantic to insist on a lower take-over price. *Id.* The deal fell through when neither side could agree on "a mutually acceptable price." *Id.* Rate regulation also has caused Southwestern Bell to renegotiate a \$4.9 billion alliance with Cox Enterprises. Rich Brown, *Cox, Southwestern Bell Restructure Deal*, BROADCASTING & CABLE, Mar. 14, 1994, at 6-7. As with the Bell Atlantic deal, rate control diminished cash flow and thus altered the cable system's value. *Id.*

¹⁴⁸ Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b) (1988).

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* notes 92-94 and accompanying text.

places the dynamics of technology at a significant advantage. Video dialtone, for instance, has already penetrated the wall separating cable and telephone service. Although initial video dialtone systems are capable of carrying only a single video signal to homes within one mile of a central office,¹⁵¹ video dialtone serves as an important wedge enabling telephone companies both to test and gain experience in new markets and to defuse resistance to their full-fledged entry as competitors therein. The law of common carriage requires telephone companies to provide nondiscriminatory access to their lines and denies them any content or programming function.¹⁵² Video dialtone rules have compromised that tradition by allowing telephone companies to establish their own program subsidiaries.¹⁵³ The phenomenon of hybrid technology eliminating distinctions between preexisting structures conjures visions of a media universe in which televisions "act like phones, and computers and phone lines . . . carry TV shows and PC information, [and] cable and phone companies . . . compete more directly and . . . cooperate."¹⁵⁴

Even as traditional differences among media vanish or diminish, however, the pace of change may provide some breathing room for the development of well-deliberated policy. Contrary to public and political hyperbole about the construction of an information superhighway, much of the fiber optic pathways are already in place.¹⁵⁵ The final yards of line from curb to terminal represents the primary missing link in broadband capability and is a significant investment when compounded by each home and office in the nation. Given uncertain demand for a panoply of interactive possibilities,¹⁵⁶ the primary barrier to superhighway traffic is economic rather than technological. As uncertain economics slow the technological pace, however, policymakers are afforded time and opportunity to fashion a regulatory environment that responds to reality, rather than one that attempts to anticipate it.

A reference to history may be useful in gauging not only the impact but the rate of change. To reach half of the nation's house-

¹⁵¹ See *supra* note 94 and accompanying text.

¹⁵² See *supra* notes 98-99 and accompanying text.

¹⁵³ The separation of program and carriage functions is a condition for telephone company entry into the field. 57 Fed. Reg. 41106 (1992).

¹⁵⁴ JOHN NAISBITT, *GLOBAL PARADOX* 65 (1994).

¹⁵⁵ Over the past several years telephone companies have laid over 95,000 miles of fiber optic lines. Robert J. Samuelson, *Lost on the Information Highway*, *NEWSWEEK*, Dec. 20, 1993, at 111.

¹⁵⁶ Despite the reservations of skeptics who anticipate "a lot of disappointments," Michael Meyer, *The Hyperactive Highway*, *NEWSWEEK*, Nov. 29, 1993, at 56, a survey of industry executives shows that a majority of them predict that "40% of American homes . . . will be wired to take full advantage of new multimedia services from 1998 to 2000." Turner, *supra* note 93, at R6.

holds, it took cable four decades, color television two decades, and radio one decade.¹⁵⁷ Although invented in 1876, the telephone existed in only forty percent of American households by the beginning of World War II.¹⁵⁸ Despite market uncertainty, some hardware operators have announced aggressive wiring plans that will establish interactive service in the near future.¹⁵⁹ Whether the positioning that such investment represents materializes sooner or later, however, it invariably will implicate considerations of constitutional significance.

To the extent that interactivity redefines future media, it will similarly recalibrate the relationship between operators and audiences. As mass communication has evolved over the past century, its dominant characteristics have been centralized editorial decision-making and generally passive reception. Interactivity offers the potential for an information marketplace in which input is not just the province of a few. A primary advertisement for interactivity, in fact, is viewer control. Equipment and subscription costs, along with education and the sense of a stake in the society, may determine the actual extent and quality of interactivity. Disparities in access to and usage of interactive media also might result in broadened but still limited input opportunities in an economically determined speech order.¹⁶⁰ Widespread access to such enhanced communications methods could heighten pressure to redistribute power in the information marketplace.

Irrespective of whether courts or policymakers opt for more or less governance, broadband media are capable of significantly expanding editorial sources. Viewers, listeners or readers traditionally consigned to a receiving role in theory would experience unprecedented editorial opportunities. Two decades ago, Justice Brennan favored a right of public access in broadcasting on the ground that it was impor-

¹⁵⁷ Meyer, *supra* note 156, at 56.

¹⁵⁸ Robert J. Samuelson, *Lost on the Information Highway*, WASH. POST, Dec. 16, 1993, at A25.

¹⁵⁹ Bell Atlantic, for instance, is spending \$15 billion over five years to wire 1.2 million homes for interactive service next year and 1.5 million homes annually thereafter. Robichaux, *supra* note 102, at R16. US West Communications, which provides telephone service to 13 million customers, is spending \$1,000 per customer to provide interactive service to 100,000 subscribers by the end of this year and 500,000 annually thereafter. Rich Brown, *US West Answers Video Dialtone Call*, BROADCASTING, Feb. 8, 1993, at 14. The nation's largest cable company, Tele-Communications, Inc., expects to wire about 20% of the nation's homes for interactivity by mid-1996. Meyer, *supra* note 156, at 45.

¹⁶⁰ Some telephone companies planning to construct video dialtone networks already have been criticized for plans that allegedly would bypass lower income and minority neighborhoods. Christopher Stern, *Telco Charged with Redlining on Info Highway*, BROADCASTING & CABLE, May 30, 1994, at 55. The regional Bell operating companies thusly complained of have denied the allegations. *Id.*

tant to factor in speaking as well as viewing or listening interests.¹⁶¹ Lamenting that a soapbox society had been displaced by a mass media culture, Justice Brennan endorsed redistribution and enhancement of expressive opportunity.¹⁶² As electronic media, including broadcasting, acquire the capability to recreate an information marketplace characterized by expanded speaking opportunities, constitutional doctrine cannot logically stay locked in past understanding. Failure to adapt, especially to the extent speaking opportunities multiply, would generate results even more distorted than the existing "unusual order."¹⁶³ Diminished First Amendment status for media evolving toward interactivity paradoxically would reduce protection at a time when technology is expanding the opportunity for expressive input. A decade ago, the Court suggested that it would revisit the unique premises of broadcast regulation and would abandon those underpinnings if they proved outdated.¹⁶⁴ As interactivity and choice become more significant characteristics of modern media, the opportunity exists not only to avoid anomaly in a discrete context but to decide what the First Amendment means in a comprehensive sense for the future.

III. FACTORING THE FIRST AMENDMENT

Conventional constitutional wisdom indulges the notion that a tradition of less defeasible freedom for print preceded diminished First Amendment status for newer communications technologies.¹⁶⁵ Although the constitutional legacy of electronic media reflects a reduced First Amendment status for new media, that rank is not a divergence from a prior norm. Content control of the print media compromised the unabashed goal of federal regulation within a decade of the Constitution's ratification.¹⁶⁶ Regulation of content also was the focus of antebellum laws prohibiting abolitionist speech and publications.¹⁶⁷ Proposed tort reform in the late nineteenth century, urging attention to

¹⁶¹ *CBS v. Democratic Nat'l Comm.*, 418 U.S. 94, 182-83 (1973) (Brennan, J., dissenting).

¹⁶² *Id.*

¹⁶³ The Court has referred to the creation of viewer and listener rights in radio and television, and their prioritization over the editorial freedom of broadcasters, as an "unusual order" of First Amendment interests. *Id.* at 101.

¹⁶⁴ See *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n.11 (1984).

¹⁶⁵ *E.g.*, *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1378 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982).

¹⁶⁶ The Sedition Act of 1798 was a Federalist inspired scheme to suppress criticism of political officials and the Government and thus to silence their Jeffersonian rivals. See LEVY, *supra* note 52, at 196-97.

¹⁶⁷ State laws prohibiting abolitionist speech and publications are discussed in WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 172-82 (1977).

privacy interests and their prioritization over press freedom, foreshadowed broadcast regulation a century later, even as it responded to the impact of print.¹⁶⁸ To suggest that a tradition of relatively unimpaired press freedom precedes the electronic media's diminished First Amendment status misreads history. In fact, the Supreme Court never meaningfully interpreted the First Amendment until newer media assumed a significant presence.¹⁶⁹ By the time the Court incorporated the Press Clause into the Fourteenth Amendment,¹⁷⁰ the Federal Government had already enacted a comprehensive federal scheme to regulate broadcasting.¹⁷¹

Over the second half of this century, a formal constitutional sorting process has rated media based on an official sense of the unique problems each presents.¹⁷² Investment in a model of broadcast regulation sharing the methods, if not the goals, of the English system for licensing printers (abandoned in the late seventeenth century) prefaced formalization of the ordering scheme.¹⁷³ Soon after the Court repudiated a regime of prior restraint that had shut down a controversial newspaper,¹⁷⁴ Congress constructed the comprehensive regulatory scheme that to this day revolves around the licensing of broadcasters.¹⁷⁵ By the same enactment, common carriers became subject to terms of governance defined by equal access requirements and denial of First Amendment status.¹⁷⁶ Amendments to the Communications Act of 1934, half a century later, subjected the cable industry to laws and rules pertaining, among other things, to franchising,¹⁷⁷ rates,¹⁷⁸ access¹⁷⁹ and signal carriage.¹⁸⁰

As future media present themselves for regulatory and constitutional analysis, therefore, they do so not against a backdrop of older and newer First Amendment traditions. Rather, they emerge in tandem

¹⁶⁸The "right to privacy" was proposed in part as a response to intrusive journalistic practices. Warren & Brandeis, *supra* note 55, at 195.

¹⁶⁹The Court's first serious examination of press freedom was in response to the advent of motion pictures. *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915), *overruled by Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

¹⁷⁰*Near v. Minnesota*, 283 U.S. 697, 707 (1931).

¹⁷¹The Radio Act of 1927, which established the Federal Radio Commission and radio licensing, was the precursor to the Communications Act of 1934, which created the FCC.

¹⁷²See *supra* notes 1-3 and accompanying text.

¹⁷³See LIVELY, *supra* note 11, at 19.

¹⁷⁴*Near*, 283 U.S. at 721.

¹⁷⁵Communications Act of 1934, 47 U.S.C. §§ 301-509 (1988 & Supp. 1992).

¹⁷⁶*Id.* at § 201(a).

¹⁷⁷Cable Communications Policy Act of 1984, 47 U.S.C. §§ 541-46 (1988 & Supp. 1992).

¹⁷⁸47 U.S.C. § 543.

¹⁷⁹47 U.S.C. §§ 531-32.

¹⁸⁰Mandatory signal carriage rules, as discussed in note 67, at best have an uncertain future.

with constitutional legacies that have evolved coincidentally along divergent paths. Insofar as some commentators have understood media as structurally different and a source of unique problems, they have minimized the significance of a constitutional order defined by variable burdens.¹⁸¹ Even if such reasoning may have been appealing in the past, it has outlived its utility in a media universe evolving away from difference and toward convergence.

The future, as contemporary circumstances already indicate, belongs not to fixed structures lending themselves to differentiation, but to digitalization and compression capabilities that facilitate convergence. Emergence of a new (or redefinition of an existing) medium generates significant pressure upon established regulatory regimes conditioned to respond to recognized forms and experiences. The strain upon existing regulatory frameworks already has been evidenced by the consequences of technological mutation and innovation. Regulatory barriers to some extent have been cracked by the advent of video dialtone service¹⁸² and merger and acquisition activity¹⁸³ reflecting the inexorable pressure of market dynamics. Further erosion of barriers establishing medium-specific restrictions on function may result from legislative reaction to new communications realities.¹⁸⁴

Significant legal reform, essential if communications technology is to achieve its potential, poses hard questions about media regulation in general and the First Amendment in particular. For a small but growing segment of the population, traditional distinctions between cable, telephone and computer systems already have diminished significance.¹⁸⁵ As noted, market opportunity has precipitated strategic

¹⁸¹ *E.g.*, Bollinger, *supra* note 108, at 1 (arguing that variations in First Amendment freedoms afford a mix of constitutional and regulatory positives).

¹⁸² *See supra* note 94 and accompanying text.

¹⁸³ *See supra* notes 92-93 and accompanying text.

¹⁸⁴ Congressional initiatives, for instance, include proposals to relax rules prohibiting telephone companies from offering cable within their own service areas, to allow regional operating companies to offer long distance service and manufacture telecommunications equipment, and to permit broadcasters to use part of their channels to provide digital voice, data and video services. Kim McAvoy, *Senate Opens Superhighway Lane for Broadcasters*, BROADCASTING & CABLE, Feb. 7, 1994, at 6. Although such legislation stalled out in a Senate committee after approval by the House, Michael Dresser, *Telecommunications Bill Dies in Senate's Endgame*, BALTIMORE SUN, Sept. 24, 1994, at C13. Even if Congress does not adapt regulatory procedures to evolving technological and economic reality, the present order may be weakened by other means. Some telephone companies, for instance, have bypassed restrictions on providing video programming in their service area by challenging them in court. *E.g.*, U.S. West, Inc. v. United States, 855 F.Supp. 1184 (W.D. Wash. 1994). Such regulatory developments represent an early sense of impending if not yet actualized convergence.

¹⁸⁵ *See supra* notes 142, 159 and accompanying text.

alliances between and among media sectors that historically have had antagonistic relationships.¹⁸⁶ Legislative reform may expand the opportunities for cable companies and common carriers to compete on the same field. Contemporary merger and alliance activity at minimum illustrates a heightened awareness of common interest and mutual opportunity within the industry.

In their present condition, cable and telephone systems offer one another a significant asset that the other lacks. Despite extensive multichannel capacity, cable is currently unable to provide significant interactivity.¹⁸⁷ Telephone systems, despite the limited capacity of copper wire, possess switching capability essential for interactive technology.¹⁸⁸ A mutual attraction leading to working relationships between cable and telephone is not likely to occur in a competitive vacuum. Instead, significant interactive capacity will likely define broadcasting and even the newspaper industry in the foreseeable future.¹⁸⁹ Significant fallout from faltering cable-telephone company deals, moreover, may include increased attention to the logic of strategic alliances between common carriers and broadcasting or other methodologies.¹⁹⁰

For a future defined by convergence, the crucial question is not whether the First Amendment is relevant but which version of it should apply. Separate freedom of press models for print and broadcasting have resulted in contest-like circumstances for newer communications technologies which must demonstrate which established medium they resemble most.¹⁹¹ Historically, attention to difference has been problematic because of the confusion, uncertainty and even incongruity it has generated.¹⁹² Even assuming that medium-specific analysis eventually gives way, the critical issue that looms is what First Amendment tradition will prevail.

Interactive media are emerging at a time when traditions of authoritative selection and autonomous selection are respectively expanding and contracting.¹⁹³ Because editorial management of electronic media is so culturally ingrained, the legacy may carry over to governance of

¹⁸⁶ Strategic alliances between cable and telephone companies in particular bring together industries that have been bitter rivals dedicated to keeping each out of the other's business and driven by concern that the other might obtain a competitive edge. *E.g.*, Harry A. Jessell, *Cities, Cable Unite Against Video Dial Tone*, BROADCASTING, Nov. 4, 1991, at 57.

¹⁸⁷ JOHN NAISBITT, GLOBAL PARADOX 65 (1994).

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* notes 106-07 and accompanying text.

¹⁹⁰ Brown, *supra* note 147, at 6.

¹⁹¹ See *supra* note 20.

¹⁹² See *supra* notes 61-62, 113-22 and accompanying text.

¹⁹³ Because electronic media are a major growth industry, contrasted with a static and even

future communications methodology as a matter of habit. Reflexive regulation may prove unfortunate, however, on both constitutional and pragmatic grounds. Established models of managing expressive pluralism have been criticized for "misconceiv[ing] and underestim[ing] the public's interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen."¹⁹⁴ Interactivity and multichannel capacity, at least in theory, respond both to conditions that spawned regulation of the electronic media and to identified deficiencies in their governance.¹⁹⁵

The benefits of interactivity, at least for now, may be overblown. Research suggests that, where interactive media are in use, much more traffic moves from a central distribution point to subscribers than in the other direction.¹⁹⁶ Given the relative novelty of interactivity, such patterns may reflect the conditioning of historically passive viewing roles. Early returns on usage tendencies, however, do not factor in the consequences of greater experience that will accrue with the passage of time and increased exposure. Interactive media thus retain an unprecedented structural capability for replicating a soapbox culture.

Traditionally, significant unknowns have been an inspiration for erring on the side of too much rather than too little control.¹⁹⁷ To the extent history repeats itself, it risks not only retarding the benefits of technological progress, but also establishing the authoritative rather than autonomous selection model pursuant to instinct rather than reflection. Concern with the possibility of official overreaction, however, does not negate the interest in devising a logical and sensitive balance between legitimate regulatory interests and constitutional imperatives. At minimum, the technology of interactivity and enhanced choice should put to rest historical concern with scarcity.¹⁹⁸ Extension

declining print sector, curtailment of editorial freedom to account for diversity and fairness and quality of discourse have become more normative than exceptional.

¹⁹⁴ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 188-89 (1973) (Brennan, J., dissenting).

¹⁹⁵ Regulations grounded in scarcity concerns, in some notable instances, have defeated underlying objectives of content diversification. See *supra* notes 132-33.

¹⁹⁶ Recent research indicates that 99% of traffic on interactive systems moves toward rather than from subscribers. Sean Scully, *Hubbard Says DBS is Highway Enough*, BROADCASTING & CABLE, May 24, 1993, at 72.

¹⁹⁷ The phenomenon is discussed in Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN L. REV. 1071, 1078-91 (1985) (noting regulatory overreaction to motion pictures, broadcasting and cable).

¹⁹⁸ Input opportunity overcomes the problem, which the Court stressed in the broadcasting context, of "more individuals . . . than . . . frequencies to allocate". *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). Expanded programming options responds to interests in content diversity. See *id.* at 390.

of such regulatory premises might disclose once and for all that, rhetoric notwithstanding, power and impact have been and continue to be the real cause for attention to difference.

Concern with a medium's "capacity for evil" inspired the Court's initial review of video service when it denied press status to motion pictures.¹⁹⁹ A like worry permeates contemporary regulation of broadcast indecency, insofar as the Court stresses harm to children and offended adults.²⁰⁰ Official counteraction of power and immediacy is technically impermissible as a general strategy, even if now routine in certain medium-specific contexts.²⁰¹ In determining the rights and obligations of those who will operate and use future media, attention to the distribution of power in the information marketplace is probably inevitable. Turf battles, such as whether television networks should have a financial interest in syndicated programming, whether cable companies should provide telephone service and vice-versa, and whether long-distance and regional telephone companies should compete with each other, center precisely upon that issue²⁰² and herald a concern likely to appreciate as media course toward convergence. For a culture in which power and equality interests are locked in persistent struggle, the relative influence of and relationship between carriers and content providers will become a primary constitutional (and economic) focal point. Regulatory precedent exists for responding in the event that vertical integration and anti-competitive practices compromise access, choice or interactivity.²⁰³ Interest in the conditions and use of power finds support in historical experience and, recently, in heightened awareness that cable and telephone systems may be logical construction partners for an information highway.²⁰⁴ Given their size, history and advantage, neither the telephone nor cable industry will escape judicial or legislative scrutiny begotten by concern with the potential

¹⁹⁹ *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

²⁰⁰ *See FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

²⁰¹ The illegitimacy of such concern, at least in theory, is noted in *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 502, 508, 517-19 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). For examination of how such concerns have influenced policy nonetheless, see Lively, *supra* note 197, at 1078-91. A classic scheme for redistributing expressive power is fairness regulation. *See supra* notes 37-40 and accompanying text.

²⁰² Rules limiting network financial interest and ability to syndicate programming, adopted pursuant to concern with the relative economic power of networks and program suppliers, were struck down in *Schurz Communications v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

²⁰³ Pursuant to concern that the cable industry was using its market leverage to stunt the growth of new technology, such as wireless cable and direct broadcast satellite systems, Congress and the FCC prohibited pricing schemes that discriminated among distributors. 47 U.S.C. § 521.

²⁰⁴ *See supra* notes 186-88.

abuse of power in the economic and information marketplace.²⁰⁵ Barring monopolistic conditions, however, medium-specific premises are not a logical analytical departure point.

Given the societal stakes, attention to the constitutional context and consequences of media convergence is surprisingly scarce and underdeveloped. Initial factoring of multimedia structure and interactive capability has yet to uproot itself from traditional models of premature medium-specific reaction. The suggestion that interactive media should be subject to public forum analysis typifies such response.²⁰⁶ Consistent with the historical experience of motion pictures, broadcasting and cable, such thinking presumes pathology rather than reacts to identified problems.²⁰⁷ In anticipating a need of managed access for diverse expression, this response seems to reflect a focus upon discrete operator proclivities minus the influence of a competitive environment.

A primary deficiency of medium-specific analysis has been its failure to factor context. On first blush, the public forum model at least facially projects logic and appeal insofar as an information highway conjures venues traditionally held open to speech.²⁰⁸

Even assuming the need for access facilitation, however, public forum doctrine threatens constitutional interests. Depending in part upon how the forum is characterized, a strategy to secure public access against the risks of private content control could result in official intrusion into editorial processes and diversity aims. Not all public forums are the same for constitutional purposes. The Court affords maximum constitutional protection to speech "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate."²⁰⁹ For streets and parks, therefore, "the rights of the State

²⁰⁵ Industry practice is not without disturbing precedent. When the nation's largest cable company (Tele-Communications, Inc.) was unable to reach a rate agreement with one community, for instance, it "cut off service one weekend and ran the names and phone numbers of city officials on the screen." Paul Farhi, *Cable Pioneer Dug Its Roots in the West*, WASH. POST, Jan. 23, 1992, at A16. A trial jury later hit the company with a \$45 million jury award for "excessive and intimidating conduct" toward a cable consultant who recommended ending its franchise in another city. *Id.* Such bullying tactics may elicit concern with the potential for abuse, insofar as self-interest was prioritized over the need or sensitivity toward and tolerance of competing perspectives.

²⁰⁶ Allen S. Hammond, IV, *Regulating Broadband Networks*, 9 YALE J. REG. 181, 217-21 (1992).

²⁰⁷ The presumption, prior even to the meaningful development of broadband interactive service, is that the market will be dysfunctional and inimical to First Amendment values.

²⁰⁸ Public highways are among those traditional forums that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

²⁰⁹ *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

to limit expressive activity are sharply circumscribed."²¹⁰ In such "quintessential public forums," content-based exclusion is permissible only when "necessary to serve a compelling state interest and . . . [the regulation] is narrowly drawn to achieve that end."²¹¹

A like standard of nondiscriminatory access applies when government, although not obligated to keep the venue open, makes public property available for expressive activity.²¹² To the extent a public place is not a forum by tradition or designation, the Court does not constitutionally guarantee access. The state thus may reserve the forum for "intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression" on the basis of content.²¹³

Despite the suggestive imagery of an information highway, recognition of interactive media as the functional equivalent of a public street may prove to be inaccurate. Unsuccessful efforts to equate city utility posts,²¹⁴ public employee mailboxes²¹⁵ and public airport terminals with streets and parks²¹⁶ illustrate the circumscribed nature of the traditional public forum. Even to the extent that a court acknowledges a traditional public forum, "reasonable time, place, or manner restrictions" have been a basis for sidetracking or diluting speech interests.²¹⁷ Time, place and manner controls can provide pretexts for official determinations of what is fit for public discourse.²¹⁸ Such pretextual difficulty might be avoided if the Court equates the information highway to public places where "one man's vulgarity is another's lyric,"²¹⁹ or to modern media that require significant individual initiative for access.²²⁰ The risk inheres, however, that a competing perspective stress-

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 45-46.

²¹³ *Id.* at 46.

²¹⁴ *E.g.*, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

²¹⁵ *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-55 (1983).

²¹⁶ *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2708-09 (1992).

²¹⁷ *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984).

²¹⁸ Offensive expression, especially speech that is sexually explicit, has been subject to time channeling in broadcasting and place channeling (zoning) in communities. *See* *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976) (upholding zoning regulation governing the siting of such uses as adult theaters); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1341 (D.C. Cir. 1988) (upholding concept of time channeling but invalidating its specific application).

²¹⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²²⁰ *E.g.*, *Sable Communications v. FCC*, 492 U.S. 115, 128 (1989) (stressing rule requiring credit cards, codes and scrambling devices to access dial-a-porn services).

ing dubious or disingenuous concern with a non-speech related interest or denying equal access requirements will prevail.²²¹

Case law erects other significant barriers to an understanding of interactive media as a traditional public forum. For a forum to rate at the same level as a public street or park, the Court must be satisfied that the forum "has traditionally been made available for public expression."²²² Given the editorial functions of media, and despite discrete access requirements in some instances, reality undermines the suggestion that media have traditionally been open to the public. Even for the least protected medium, the general proposition of public access has been formally rejected.²²³

To the extent interactive media were characterized as a designated forum, principles of equal access governing traditional forums would apply provided the forum were kept open.²²⁴ Even then, designation of interactive media as a public forum raises problems that transcend First Amendment and management concerns. Unlike government venues that may be set aside for expression, interactive media implicate significant private activity. Designated forum status not only may conflict with public understanding, but could also represent a taking.²²⁵ As the Court has noted, a public access requirement denies "the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"²²⁶ Four Justices, although unwilling to confront it yet, at least have acknowledged a takings issue when government imposes carriage obligations upon a medium otherwise vested with editorial discretion.²²⁷

Such a redistribution of power and interest would place the Government in the role of editor, subject to equal access obligations.²²⁸ It

²²¹ *E.g., id.*; see also *Sable*, 492 U.S. at 133 (Scalia, J., concurring) (suggesting that common carriers are not obligated to carry indecent expression); *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (upholding regulation of indecent expression to protect children and because medium is pervasive and intrusive); *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 877 (9th Cir. 1991) (carrier may terminate service to dial-a-porn operators).

²²² *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2705 (1992).

²²³ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-11 (1973).

²²⁴ See *supra* notes 219-20 and accompanying text.

²²⁵ U.S. CONST. amend. V ("private property [shall not] be taken for public use, without just compensation").

²²⁶ *Dolan v. Tigard*, 114 S. Ct. 2309, 2320 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

²²⁷ *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2480 (1994) (O'Connor, J., dissenting, joined by Scalia, Ginsburg & Thomas, J.J.) ("[s]etting aside any possible Takings Clause issue" in reasoning that Congress might require cable operators to function as common carriers).

²²⁸ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 149-50 (1973) (Douglas, J., concurring).

also would establish the operation of interactive media as a function of state action—a result that the Court avoided two decades ago in the context of broadcasting.²²⁹ Nonresolution of the state action issue followed a court of appeals decision to the effect that, because they enjoy use of the public domain and are regulated as “fiduciaries of the people,” broadcasters serve as instrumentalities of the Government.²³⁰ Although official licensing by itself has been rejected as a basis for state action in other contexts, the court of appeals depicted a symbiosis of public and private activity that it considered sufficient to implicate constitutional interests.²³¹

Had the Supreme Court upheld the state action finding, “few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny.”²³² To the extent prohibitions against content discrimination superseded editorial autonomy, media operators would have been subject to obligations associated with common carriers.²³³ As Justice Douglas noted, editorial freedom would be fettered with respect to powers of exclusion— “[p]olitics, ideological slants, rightist or leftist tendencies . . . [would] play no part in its design of programs.”²³⁴ From Chief Justice Burger’s perspective, a state action determination would have been a travesty for the “traditional journalistic role.”²³⁵ Even if free to pick and choose what they wished to present, media operators would have been denied the freedom to exclude others on the basis of content.²³⁶

Provided that other channels of information exist, and competing voices are not drowned out, a government editor function may not pose policy problems. Equal access facilitates broad spectrum input and it can be debated whether a system of diffused presentation would be a worthy successor to the resources and organized perspective of journalistic enterprise. Mass media realities over the course of this century have heightened the journalistic function at the expense of soapbox opportunity. A condition of state action may result in millions

²²⁹ Three justices refused to recognize broadcasting as state action. *Id.* at 119 (Burger, C.J., joined by Stewart, J., and Rehnquist, J.). Two would have found state action. *Id.* at 172–77 (Brennan, J., dissenting, joined by Marshall, J.).

²³⁰ *Business Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642, 652 (D.C. Cir. 1971), *rev’d*, 412 U.S. 94 (1973).

²³¹ *See id.* at 652–53. The Supreme Court had previously found a symbiotic relationship between a city-owned garage and a restaurant owner who leased space therein and provided service on a racially exclusive basis. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

²³² *CBS*, 412 U.S. at 120.

²³³ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700–02 (1979).

²³⁴ *CBS*, 412 U.S. at 149 (Douglas, J., concurring).

²³⁵ *Id.* at 116.

²³⁶ *See id.* at 117.

of platforms but no filtering or focusing mechanism. For an interactive future, a system that accommodates editorial interests, facilitates subscriber input and ensures "that everything worth saying shall be said," provides the ideal constitutional and social achievement.²³⁷ The future may not be entirely predictable, but maximum accommodation is unlikely to be achieved by premature response and trade-off.

The interests of optimization, accordingly, hinge upon avoiding a precipitate response and minimizing the risk of repeating rather than learning from history. Typically, as new media have emerged, regulation prematurely has anticipated and magnified purportedly unique problems and bypassed attention to overarching commonality of function.²³⁸ The Court denied motion pictures First Amendment status for the first half of this century, and, even now, films are not constitutionally immune to official censorship.²³⁹ Broadcasting similarly faced structural and content restrictions that induced a culture of caution and orthodoxy.²⁴⁰ Cable, especially during its early years, struggled under regulation that slowed its development and limited its capacity to compete with other media.²⁴¹ Cellular telephone service in the United States suffered a delay of nearly a decade, as it fought official constriction of its role and development.²⁴²

Such a legacy warns against the danger of regulation that presumes dangers rather than responds to identified realities. One may argue that the entrenchment of industrial presence and practice will render any necessary regulatory response too little and too late. The dismantling of AT&T a decade ago, however, refutes the notion that regulatory initiative cannot reckon with even well-established agglomerations of private power.²⁴³ History actually suggests that the undoing of misconceived or dated regulation presents a much more vexing challenge. The long-standing concern with spectrum scarcity in broadcasting exemplifies the difficulties of undoing miscalibrated policy and its consequences. Despite extensive, persistent and compelling chal-

²³⁷ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1948).

²³⁸ See *supra* note 197 and accompanying text.

²³⁹ Even after being afforded First Amendment status, see *supra* notes 17, 201 and accompanying text, motion pictures have remained susceptible to the possibility of official censorship, provided adequate and speedy review procedures are afforded. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

²⁴⁰ See *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5055 (1986).

²⁴¹ See *supra* note 11 and accompanying text.

²⁴² Edmund L. Andrews, *Technologies to Watch: From Anti Sense and CD Rom to Ultrafast Data Transmissions That Can Find You*, N.Y. TIMES, Jan. 3, 1994, at C15.

²⁴³ See generally *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

lenges to its validity,²⁴⁴ the fairness doctrine survived for decades before the FCC finally acknowledged its deficiencies and jettisoned it.²⁴⁵ Even now, the underlying premise of spectrum scarcity survives as a regulatory rationale notwithstanding persuasive criticism illuminating its inaptness.²⁴⁶

If policy toward interactive media is to be a function of lessons learned rather than ignored, a fitting departure point is that operators have a full measure of First Amendment freedom. Arguments for access, whether based upon public forum doctrine or legislative enactment, assume that subscribers may encounter roadblocks that limit their opportunities. The economics of interactive media, however, may work against exercises of editorial discretion that exclude or discriminate on the basis of content. Unlike broadcasting, which traditionally has generated revenues by appealing to a mainstream audience and thus has a vested interest in orthodoxy,²⁴⁷ interactive media must appeal to diverse and discrete audiences. As with cable, interactive media's total revenues derive from subscriptions by members of many discrete audiences.²⁴⁸ A media operator, for ideological, moral or even economic reasons, might implement content exclusionary or discriminatory policies. A regulatory response to such practice, however, should be made in the light of reality rather than in anticipation of the possibility.

As interactive media evolve; the field may become crowded and highly competitive.²⁴⁹ To the extent effective alternative avenues of expression remain open, a specific roadblock should not be the basis for a comprehensive system of expressive management. Insofar as

²⁴⁴ Representative literature from a large volume of critical writing on the subject is cited in note 45.

²⁴⁵ Syracuse Peace Council, 2 F.C.C.R. at 5041.

²⁴⁶ *E.g.*, *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) ("Since scarcity is a universal fact, it can hardly explain regulation in one context and not another."), *cert. denied*, 482 U.S. 919 (1987).

²⁴⁷ *See CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 187-88 (1973) (Brennan, J., dissenting) (broadcasters' interest in audience maximization, to optimize revenues from the sale of time to advertisers, causes them to shy away from heterodoxy because "angry customers are not good customers").

²⁴⁸ SHEILA MAHONY ET AL., *KEEPING PACE WITH THE NEW TELEVISION* 101 (1980).

²⁴⁹ Potential providers of interactive media services include not only existing computer on-line services, *see supra* note 142, but also long distance telephone companies, local exchange carriers, *see supra* notes 94, 159, 186-88 and accompanying text, cable companies, *see supra* notes 147, 186-88 and accompanying text, direct broadcast satellite systems, *see supra* note 93 and accompanying text, broadcasters, *see supra* notes 144-46 and accompanying text, wireless service, *see supra* note 189 and accompanying text, and even print, *see supra* note 158 and accompanying text.

access problems emerge as an industry-wide phenomenon, the time might come for a regulatory accounting. In that context, a system of equal access might arise in response to real and identified need. Adherence to traditional standards of First Amendment review, requiring proof of a compelling regulatory interest instead of ad hoc constitutional inventions, would seem to be the best strategy for satisfying interests of efficiency, legitimacy and progress.

Even if the social implications of interactive media remain undiscernible, at least for purposes of framing a regulatory response, experience supports commitment to the highest level of judicial review. The Court reserves strict scrutiny for those instances in which the profundity of constitutional interests demands avoidance of guesswork.²⁵⁰ At stake in society's response to evolving circumstances of media convergence is what the Court itself has characterized as "the matrix, the indispensable condition of all other rights and liberties."²⁵¹

Transition from medium-specific to broad spectrum First Amendment principle will yield both long-term and comprehensive consequences. Given a jurisprudential record that did not directly begin to consider the First Amendment until several decades ago, an unprecedented imperative exists for policy derived from reason rather than reflex. Pending a convincing showing to the contrary, the multiplicity of speech and press interests with a stake in media policy will be best served by principles capable of facilitating rather than consuming a system of autonomous editorial selection.

IV. CONCLUSION

Experience with new media will define in significant part the long-term meaning of the Press Clause. Over two centuries, much First Amendment doctrine has been serendipitous. Like other provisions of the Bill of Rights, the First Amendment was enshrined as a politically expedient afterthought.²⁵² Its extension to check more than the work of Congress has been the function of an incorporation process of debatable premises.²⁵³ A medium-specific menu of options, with respect

²⁵⁰ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (strict scrutiny used to smoke out policy inimical to constitutional interests).

²⁵¹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁵² The Bill of Rights was proposed to appease antifederalist concern that, after the constitution was drafted, threatened its ratification. DONALD E. LIVELY, *FORESHADOWS OF THE LAW* xv (1992). Federalist support for the Bill of Rights was tactical, given the sense that such protection was better accounted for by a system of representative governance and itemization might be understood as an exclusive charting of rights and liberties. *Id.*

²⁵³ Although its terms prohibited abridgment of speech or press freedom by "Congress," U.S.

to the First Amendment's meaning, has been a regimen indulged by emphasis upon difference. As media converge, circumstances now conspire to force a comprehensive reckoning with the meaning of the First Amendment.

Responding to official management of modern broadcasting, Justice Douglas observed that the First Amendment's authors would have been "shocked . . . at [the] intrusion of Government into a field which in this Nation has been reserved for individuals."²⁵⁴ Despite a recognized potential two centuries ago for private accumulation and abuse of editorial power, official control was perceived as a more serious evil.²⁵⁵ Perhaps the framers could not contemplate the dynamics that transformed a cottage industry into media empires and profoundly heightened the press's impact. The history of media regulation over the course of this century, however, provides much to support the warning that "(t)he development of constitutional doctrine should not be based on . . . hysterical overestimation of media power and underestimation of the good sense of the American public."²⁵⁶ As an era of interactivity and choice presents itself, it may be that some of the oldest and most basic assumptions about press freedom are the least obsolete.

CONST. amend. I, the Speech and Press Clauses eventually were incorporated into the Fourteenth Amendment and thus applied to the states. *See supra* note 170 and accompanying text. Incorporation of the Bill of Rights had been rejected by the first Supreme Court decision interpreting the Fourteenth Amendment. *Slaughterhouse Cases*, 83 U.S. 36, 77-78 (1873). The incorporation controversy, for practical if not academic purposes, largely has been resolved by selective incorporation over the past half century of all but three Bill of Rights provisions—the Second Amendment's guarantee regarding the right to bear arms, the Fifth Amendment's provision for grand juries and the Seventh Amendment's guarantee of a jury trial in civil cases. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW*, § 10.2, at 315-18 (3d ed. 1986).

²⁵⁴ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 151 (1973) (Douglas, J., concurring).

²⁵⁵ *See id.* at 151-52.

²⁵⁶ Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 787 (1972).