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Fear and the Media: A First Amendment Horror Show

Donald E. Lively*

Since its adoption in 1789, the language of the first amendment has not changed.1 The press whose freedom it protects, however, has changed radically. The printed word, which constituted the press in 1789,2 is today but one element of a media assemblage that looks to the free press clause for security in disseminating information. The press, originally a vehicle for political intercourse, now communicates both visual and aural messages affording a more extensive menu of information.3

Freedom of the press, in turn, has evolved into a concept that varies with the nature of the medium.4 Although modern media, such as motion pictures, radio, television, and cable television, did not exist at the time of the Constitution's framing, they are considered part of the press and have received first amendment recognition.5 Because of "peculiar characteristics"6

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

2. When the first amendment was drafted, the press consisted largely of partisan publications engaged in political debate. Newspapers had not yet even emerged as important vehicles for advertising goods and services. At the time, they carried only a smattering of small, almost inconspicuous advertisements. E. EMERY, THE PRESS AND AMERICA 68-69 (1962).

3. The mass media's role in disseminating commercial and other forms of nonpolitical information has been constitutionally recognized. Cf., e.g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (citing decisions protecting dissemination of truthful commercial speech); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384-85 (1973) (citing cases and noting that speech is not rendered commercial, losing first amendment protection, merely because contained in advertising).


5. See, e.g., id. at 502 (granting motion pictures limited first amendment protection); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943) (commenting that first amendment recognition has been conferred upon broadcasting but with the qualification from the outset that "it is subject to governmental regulation").

6. See National Ass'n of Indep. Television Producers & Dists. v. FCC, 516 F.2d 526, 531 (2d Cir. 1975); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d
attributed to them, however, the constitutional protection afforded them is more limited than the print media's.\(^7\)

Beginning with the appearance of motion pictures\(^8\) more than half a century ago, and continuing with the emergence of electronic media,\(^9\) fear of a new medium's potential for evil\(^10\)


7. For example, government regulation of certain editorial functions is countenanced with respect to radio and television but not newspapers. Compare Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969) (upholding constitutionality of the "fairness doctrine" as applied to broadcasters and noting that the scarcity of spectrum space allows the government to regulate the content of broadcast editorials) with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down state statute requiring newspapers to give political candidates equal space to reply to editorial attacks).

Although the variable standards of first amendment safeguards have been criticized, see Goldberg & Couzens, supra note 6, it has also been argued that a system that regulates newer media forms, such as radio and television, and more fully protects the print media actually maximizes first amendment values. See Bollinger, Jr., Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 26-37 (1976) (explaining, inter alia, that access regulation equalizes opportunities for speakers to command an audience, spread diverse points of view, and mobilize public opinion). Such a rationalization loses much of its appeal, however, on recognition that the newer and less protected media have become dominant.

8. Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915) (excluding motion pictures from the first amendment's protections because of their "capability for evil"), overruled by Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

9. See Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850, 853 (D.C. Cir. 1932) (noting that broadcasting could be used to "obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality."); cert. denied, 288 U.S. 599 (1933). This rationale survives as a continuing regulatory basis, at least for purposes of excluding "use of words suggestive of sexual immorality" or those that might "offend youth." See FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978).

Justice Frankfurter, who authored the seminal opinion on the scarcity rationale for broadcast regulation in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), also echoed the concerns expressed in the Trinity decision. See infra note 10. He expressed fear "that broadcasting is capable of increasing perhaps the most serious of all dangers which threaten democracy and free institutions today—the danger of passivity—of acceptance by masses of orders given to them and of things said to them." Radio Corp. of Am. v. United States, 341 U.S. 412, 426 n.* (1951) (Frankfurter, J., dissenting) (quoting Report of Broadcasting Committee, 1949).

has been a consistent rationale for either denying new media first amendment recognition or circumscribing their first amendment freedom. Although notions that film is mere "spectacle"\textsuperscript{11} or that the broadcasting spectrum is a scarce resource\textsuperscript{12} have been articulated as regulatory rationales, government control remains largely a product of the fear that the media are "fraught with possibilities for service of good or evil."\textsuperscript{13} To the extent that such social anxiety and suspicion create a scheme of constitutional relativity for the newer media, the traditional first amendment notions offering societal security through multiplicity of expression are replaced by those offering comfort through a process more akin to authoritarian selection. Constitutional history, as discussed below, is fraught with episodes of danger created and damage caused by similar shifts in orientation.

The first amendment brooks few grounds for abridging freedom of the print media.\textsuperscript{14} Content diversity in print is regarded, at least by the judiciary, as both essential to and a barometer of society's health.\textsuperscript{15} Diversity in the electronic forum, however, is viewed as somehow a threat to the health of society, and it therefore arouses fear and distrust.\textsuperscript{16} Different char-

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(Frankfurter, J., dissenting) (arguing that the possibilities that "[j]udgment may be confused," that "feeling may be agitated," and that "reason" may be "deflected" are sufficient grounds for distinction between broadcasting and writing or speaking) (emphasis added). Justice Frankfurter's articulation of concern reflects a common perception that the electronic media possess some unidentified, but nevertheless unique, capacity to shape opinion in ways unrelated to the merits of the arguments presented.

11. See Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915), overruled by Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
13. See National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1202 (D.C. Cir. 1984) (quoting the legislative history of the Radio Act of 1927, 67 Cong. Rec. 5557, 5558 (1926) (statement of Rep. Johnson)). The court observed that direct broadcast satellite systems, with the power to reach into every home in the United States, have "a potential impact on Americans far in excess of the limited radio services that prompted passage of the Radio and Communications Act." 740 F.2d at 1202.
14. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (noting that government regulation of newspaper's editorial control and judgment is inconsistent with first amendment free press guarantees); cf. Near v. Minnesota, 283 U.S. 697, 716 (1931) (observing that a newspaper may be subjected to prior restraint, the most invasive form of suppression, only in exceptional cases).
characteristics of different media have created for "[e]ach method of communicating . . . a 'law unto itself,' " reflecting the " 'differing natures, values, abuses and dangers' of each method."17

Fear and anxiety over potential media influence are reflected in the wide array of regulations that govern nonprint media but are constitutionally inapplicable to the print media.18 Such controls and their philosophical underpinnings are antithetical to the "marketplace of ideas"19 and the risk-taking principles20 of the first amendment. Because of the expansion of newer and more strictly regulated electronic media,21 absolute protection of only the print media has yielded an increasingly narrower ambit of press freedom overall.

The purpose of this Article is to trace the origins of the distrust, suspicion, and fear of the newer media; to demonstrate how fear of potential but poorly defined evil is a dominant force in shaping the perimeters of freedom of the press; and to consider opportunities for rejecting fear-based impulses in favor of sentiments more consistent with the purpose of the first amendment.

I. THE EMERGENCE OF NEW MEDIA AND CONTRACTION OF THE FIRST AMENDMENT

The emergence of the twentieth century media was neither

regulation of indecency in broadcasting because radio invades the privacy of people’s homes and because indecent broadcasts may reach and harm youthful or purportedly captive audiences).


18. Licensing systems for motion picture exhibition are an obvious example of abridgment that would be intolerable if applied to the print media. See Freedman v. Maryland, 380 U.S. 51, 53-54 (1965). A double standard for offensive language was manifested by the Supreme Court’s decision that a satirical review of “dirty words” was inappropriate for daytime radio but could be properly reprinted in the appendix to the Court’s opinion. See FCC v. Pacifica Found., 438 U.S. 726, 751-55 app. (1978).


20. The first amendment traditionally requires society to take many risks in allowing free speech. For instance, speech that urges violence may be suppressed only upon an actual showing that it is designed to produce a real and imminent lawless action and that it is likely to succeed. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

21. See infra notes 80-81 and accompanying text.
foreseen nor foreseeable by the framers of the Constitution. It thus is speculative to consider whether movies, radio, television, and cable, had they existed in 1789, would have been afforded the full panoply of first amendment rights given the print media. Perhaps concerns over the scarcity of broadcasting frequencies, the pervasiveness of radio and television, the threats to individual privacy, the effect of the media on children, or even the framers' own visceral fears of possible harm would have resulted in limited constitutional protection for nonprint media. On the other hand, the framers might have shunned differentiation among media and opted for the same broad language that characterizes the first amendment. Whatever course the framers would have chosen, the direction in which the law has evolved is clear, albeit not openly articulated. First amendment analysis is rooted in the notion that newer media have improper or indecent tendencies or powers of persuasion that the original press lacked.

If the print media's technological capabilities had been more developed at the time of the Constitution's drafting, newspapers and magazines might well have confronted the reactive attitudes that greet the emergence of new media today. Indeed, in the late nineteenth century, when the print media developed the capability to reproduce photographs and thus to appeal to the eye in a dramatic fashion, such attitudes toward print began to surface. Multisensory communication drastically altered the public's perception of the print media, and newspapers and magazines came to be regarded as tools of intrusion, impropriety, and indecency. Concern over those possibilities...

22. It has been suggested that "[h]ad James Madison met Chuck Barris, he might have changed his whole concept of the Bill of Rights"—not only with respect to the first but also the eighth Amendment. Robinson, *Cable Television and the First Amendment*, 6 Com. & L. 47, 48 (1984).

23. The advent of radio, for instance, aroused fear that, among its limitless possibilities for evil, the medium could "mold and crystallize sentiment as no agency in the past has been able to do." 67 Cong. Rec. 5557, 5558 (1926) (statement of Rep. Johnson). Similar anxieties have been occasioned by the emergence of motion pictures, television, and direct broadcast satellite systems. See, e.g., Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915) (motion pictures), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Radio Corp. of Am. v. United States, 341 U.S. 412, 425 (1951) (Frankfurter, J., *dubitante*) (television); National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1202 (D.C. Cir. 1984) (direct broadcast cable systems).

24. See Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'What is whispered in
may have arisen too late to alter the constitutional guarantees for the print media, but they colored the context in which later media would emerge and be governed. By the late nineteenth century, social currents, which a hundred years earlier sought security through a free press, were shifting toward excuses and formulas for press control that would guard against the media's new discomforting tendencies.

Since early in the twentieth century, an undifferentiated phobia of a potential for some evil, rather than a palpable fear of demonstrable social harm, has been the initial response to the emergence of each major new medium. Anxiety has been consistently translated into an identification of certain "peculiar characteristics," which purportedly offer a principled ground for exclusion of the medium from the full sweep of the first amendment. These characteristics, the central bases for regulation, have created troublesome first amendment reasoning and results and have left the newer media subject to significant regulation.

the closet shall be proclaimed from the house-tops.'


26. See Goldberg & Couzens, supra note 6, at 25-38.

27. At times, the regulatory impulse has been aided by other media, whose interests in first amendment gains, potentially shared with the new medium, have been outweighed by economic concerns and competitive fears. During the 1960's and 1970's, for instance, broadcasters strongly supported the Federal Communications Commission's imposition of special programming restrictions on cablecasters that burdened the growth of the cable industry and its promise of diversity. Such an alliance of broadcasters and regulators sought, in part, to protect radio and television from competition. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 28 (D.C. Cir.) (recognizing that the purpose of FCC regulation was to prevent pay-television competition with conventional television), cert. denied, 434 U.S. 829 (1977), after remand, 587 F.2d 1248 (D.C. Cir. 1978). Most such restrictions eventually were struck down by the courts or repealed by the FCC. See Home Box Office, 567 F.2d at 28. Other limitations were vacated in FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979).

28. Films, for instance, are subject to regulation by censorship boards, if certain procedural safeguards are provided. See Freedman v. Maryland, 380 U.S. 51, 58 (1965). Radio and television are subject to regulation based upon the "public convenience, interest or necessity." Federal Communications Act of 1934, 47 U.S.C. §§ 307(a), 309(a) (1982). As many commentators have agreed, "'[p]ublic interest, convenience or necessity' means about as little as any phrase that the drafters of the Act could have used." Caldwell, The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927, 1 Air L. Rev. 295, 296 (1930). Such breadth and vagueness aid the translation of social anxieties and concerns about the media into policies designed to comfort those fears.
The recurrent sequence—in which a new medium emerges, generalized fear of its potential for evil is aroused, analysis that differentiates it from the print media is established, and rationales evolve for crafting some device for governmental control of it—first appeared in response to the advent of motion pictures. Judicial recognition that film was even an element of the press was delayed until long after the medium became popular. For nearly forty years after the Supreme Court’s decision in Mutual Film Corp. v. Industrial Commission of Ohio, denying first amendment status to motion pictures, movies were considered apart from rather than a part of the press. During those forty years, film emerged not only as a vehicle of entertainment but also as an important information source.

The distinction used to justify different treatment of motion pictures and “the press” in Mutual Film rested on a finding that motion pictures represented “a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded . . . as part of the press of the country.” Motion pictures thus were denied the recognition necessary for even minimal first amendment protection. Government had a free hand to assuage society’s fear and anxiety without regard to first amendment principles, and it actively did so with regulation designed “to patrol the highways of the mind.” Denying the first amendment status of the medium devalued all categories of protected expression that could be communicated by film. A Memphis, Tennessee, censorship board, for instance, used its authority to ban a motion picture “as the south does not permit negroes in white school nor recognize social equality between the races even in children.”

In trying to distinguish movies from the press, the

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29. Although a nineteenth century creation, movies did not receive their initial first amendment test until the twentieth century.
31. Mutual Film Corp. v. Industrial Comm’n, 236 U.S. at 244.
32. As the Court later acknowledged: “It cannot be doubted that motion pictures are a significant medium for the communication of ideas.” Joseph Burstyn, Inc. v. Wilson, 343 U.S. at 501.
33. Mutual Film Corp. v. Industrial Comm’n, 236 U.S. 230, 244 (1915).
34. RD-DR Corp. v. Smith, 89 F. Supp. 596, 598 (N.D. Ga. 1950) (noting that, absent first amendment protection, such regulatory power was unchecked).
35. United Artists Corp. v. Board of Censors, 189 Tenn. 397, 401, 225 S.W.2d 550, 551-52 (1949).
Supreme Court noted that movies offered a "mere representation of events, of ideas and sentiments published and known."\textsuperscript{36} Such a distinction was misplaced on its face, because many publications, even then, merely represented events, ideas, and sentiments previously published and known.\textsuperscript{37} Such publications, however, have never been bedeviled by any doubt regarding their first amendment status. The Court's concern with motion pictures thus may have been less a matter of function than effect.\textsuperscript{38}

The \textit{Mutual Film} decision, despite the infirmity of its reasoning, nonetheless articulated a concern that has proved to be enduring. The Court focused on motion pictures' "capability and power" for evil.\textsuperscript{39} Although the Court "conced[ed] the praise[s]" of motion pictures offered by film distributors,\textsuperscript{40} it concluded that the potential for evil was greater in motion pictures than in print "because of [film's] attractiveness and manner of exhibition."\textsuperscript{41} The Court thus established a link between the evil and the method of disseminating the information. It did so not upon proof of actual harm but in a style suggesting that the associated evil could be presumed from common wisdom. The perceived connection and vague underlying assumption would become critical in justifying regulation of all new media,\textsuperscript{42} even though \textit{general} first amendment principles reject

\begin{itemize}
\item \textsuperscript{36} Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915), overruled by Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
\item \textsuperscript{37} The \textit{Reader's Digest} genre of publications provides examples of these.
\item \textsuperscript{38} \textit{Cf.} Young v. American Mini Theatres, Inc., 427 U.S. 50, 60-61 (1976) (allowing zoning restrictions on "adult" theatres despite first amendment coverage of films).
\item \textsuperscript{39} \textit{Mutual Film,} 236 U.S. at 244.
\item \textsuperscript{40} \textit{Id.} at 241. In seeking first amendment recognition, film distributors maintained that movies "play[ed] an increasingly important part in the spreading of knowledge and the molding of public opinion upon every kind of political, educational, religious, economic and social question." \textit{Id.} at 237. Moreover, they alluded to film's capacity for "graphic expressions of opinion and sentiments, as exponents of policies, as teachers of science and history, as useful, interesting, amusing, educational and moral." \textit{Id.} at 241. The Court acknowledged those virtues but noted that the medium "may be used for evil" and declined to extend it first amendment protection. \textit{Id.} at 242.
\item \textsuperscript{41} \textit{Id.} at 244. The Court, in effect, had acknowledged that film had the capacity to inform and educate and that it thus shared the attributes of the traditional press. \textit{Id.} at 241-42. The Court's refusal to confer first amendment protection upon motion pictures thus evinces a fairly forthright acknowledgment that a medium, having structural and functional attributes of the press, was being dismissed as an element of the press because of the fear and anxiety it aroused.
\item \textsuperscript{42} \textit{See} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("[e]ach [medium] tends to present its own peculiar problems"); \textit{see also} Columbia
equating evil with enhanced attractiveness or influence. The *Mutual Film* decision was overturned in the 1950's, but the "capacity for evil" theme that it embraced survived. In *Joseph Burstyn, Inc. v. Wilson,* the Court rejected its *Mutual Film* holding and conceded that "expression by means of motion pictures is included within the . . . guaranty of the First and Fourteenth Amendments." The Court nonetheless retained the medium-specific analysis that characterized the *Mutual Film* decision. Although *Joseph Burstyn* was generally hailed as a major first amendment victory for new media, it actually constitutionalized their "second-class citizenship" and enshrined media fear as a basis for regulation. Under the guise of expanding the first amendment's ambit, the Court affirmed a scheme of constitutional relativity. Thus, even if "potential for evil" was no longer a basis for total first amendment deprivation, it remained a predicate for content regulation.

The consequent accommodation, affording first amendment recognition at the price of regulation, has served as the model for limiting the freedom of all other nonprint media. Using that analysis, the Court first observes that first amendment recognition "is not the end of [the] problem." It then concludes

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44. The Court actually had telegraphed its rejection of the *Mutual Film* holding a few years before *Joseph Burstyn.* A preview of the change came in *United States v. Paramount Pictures, Inc,* 334 U.S. 131, 166 (1948), in which the Court observed: "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."
45. 343 U.S. at 502.
48. *See Joseph Burstyn,* 343 U.S. at 502-03. A preview of the theory was suggested in an earlier concurring opinion by Justice Jackson, which commented that each medium had characteristics warranting unique formulations of governance. See *Kovacs v. Cooper,* 336 U.S. 77, 97 (1949) (Jackson, J., concurring).
that a new medium is not subject to the same rules governing other forms of expression because "each tends to present its own peculiar problems." Investment in such distinctions permits the Court to uphold types of regulation that would be unconstitutional if imposed on the print media.

The overruling of Mutual Film's fear-based holding has, in the long run, been meaningless to the extent that the affirmation of media-specific first amendment analysis has ensured the vitality of fear-based regulatory rationales. Concerns virtually identical to those expressed in Mutual Film have been sounded with the emergence of radio, television, and cable television and have become the policy foundations for each new medium's governance. For each medium, the Court has qualified constitutional protection by focusing on purported differences between the natures of the new, mostly electronic and old print media. A mechanism for maintaining some measure of control over new media thus has been maintained. Although the device may operate less heavy-handedly than Mutual Film's complete denial of first amendment protection, it is equally effective.

II. FEAR-BASED REGULATION OF THE ELECTRONIC MEDIA

The Mutual Film Court's concern with film's potential for...
unique influence, rather than with any demonstrable tendency of film to induce illegal or otherwise regulable conduct, has been imported and restated in support of regulating the electronic media. Like motion pictures, radio and television offered the prospect not only of political discourse but of novelty, expanded breadth of content, and mass and multisensory appeal. Motion pictures, with their capacity to project movement, and later sound, had magnified the fear and anxiety first aroused by the reproduction of still pictures in newspapers and magazines. Radio, and then television, which were "in the air" and thus perceived as even more intrusive, exacerbated those fears. Not surprisingly, therefore, first amendment protection for broadcasting, like that for film, was qualified.

The limited first amendment protection of the electronic media has permitted regulation that would be unconstitutional if applied to the print media. One of the most prominent examples is the "fairness doctrine," which was endorsed by the Supreme Court in Red Lion Broadcasting v. FCC. The fairness doctrine imposes on broadcasters a two-part requirement consisting of an affirmative duty to present controversial issues and a consequent responsibility to provide contrasting perspectives. Although the fairness doctrine has been persistently and persuasively criticized in recent years, the Supreme Court has not altered its favorable disposition toward it. Whatever the advantages or disadvantages of the fairness doctrine, the imposition of a similar content regulation on the print media is

55. See supra note 24 and accompanying text.
56. See cases cited supra note 5.
57. Other areas in which the FCC has imposed content specific regulations include licensing, see REPORT AND STATEMENT OF POLICY RES: COMMISSION en banc Programming Inquiry, 44 F.C.C. 2303, 2312-16 (1960), and the broadcasting of "offensive materials," Pacifica, 438 U.S. at 735-38. For an analysis and criticism of the FCC's role in content regulation by an incumbent chairman of the FCC, see Fowler & Brenner, supra note 51.
59. Id. at 377.
prohibited by the first amendment.\textsuperscript{62}

Content regulation such as the fairness doctrine is counte-
nanced by, if not in part a product of, a less stringent standard
of constitutional review for the electronic media than for print
media. Generally, governmental content regulation of the print
media will survive constitutional scrutiny only if it serves a
"compelling governmental interest."\textsuperscript{63} The Court, however, has
allowed the FCC considerable latitude to regulate the elec-
tronic media in or for the "public convenience, interest, or ne-
cessity."\textsuperscript{64} Although the precise standard of review for
regulation of the electronic media has not been clearly deline-
ated, the Court has conceded that, "because broadcast regula-
tion involves unique considerations, our cases have not followed
precisely the same approach that we have applied to other me-
dia and have never gone so far as to demand that such regula-
tions serve 'compelling' governmental interests."\textsuperscript{65} To the
extent that new regulatory rationales have been articulated,
therefore, they still have been capable of surviving on a show-
ing of potential rather than demonstrable harm.

At first glance, regulation of the electronic media appears
schizophrenic. For instance, concern over spectrum scarcity
has been used to justify imposing fairness obligations on broad-
casters.\textsuperscript{66} Fairness regulation purportedly seeks to encourage
content diversity and thus promote first amendment values.\textsuperscript{67}

Tornillo, a right of reply requirement and fairness standard, similar to that
which survived constitutional scrutiny in Red Lion, was struck down when ap-
plied to a newspaper because it invaded the publisher's first amendment
rights. See id. at 247-48.

\textsuperscript{63} FCC v. League of Women Voters, 104 S. Ct. 3106, 3115 (1984); FCC v.

\textsuperscript{64} 47 U.S.C. § 303 (1982).


\textsuperscript{66} Scarcity of spectrum space refers to the fact that, "[u]nlike other
modes of expression, radio inherently is not available to all." National Broad-
casting Co. v. United States, 319 U.S. 190, 226 (1943). Thus, "there are substan-
tially more individuals who want to broadcast than there are frequencies to
criticism of the continuing validity of the concerns about spectrum space, see
infra notes 72-79 and accompanying text.

\textsuperscript{67} Because of the limited number of radio and television frequencies
available and the presumed constraints upon viewpoint diversity, the Supreme
Court has concluded that balanced programming of controversial issues, as
mandated by fairness regulation, is consistent with first amendment values
and rights, given their "unusual ordering" in the electronic forum. See Red
Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-92 (1969); see also infra note
72.
Yet such content-enhancement schemes coexist with content-restrictive ones that evince fear of true diversification.68

Upon closer examination the contradiction becomes illusory. The ineffectiveness of the fairness doctrine in serving its stated purpose, along with the willingness of the Supreme Court to adhere to a rationale hopelessly detached from reality, suggests that fairness regulation may actually mask a darker fear and regulatory impulse. Critics have long argued that fairness regulation diserves the interests of diversity,69 and the FCC itself recently proposed its repeal.70 Evidence suggests that the fairness doctrine actually chills speech by discouraging broadcasters from presenting controversial programming.71

From its inception, the spectrum scarcity rationale used to distinguish broadcast from print media, and thereby justify fairness regulation,72 was flawed. Even at the time of Red Lion,

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69. See, e.g., Fowler & Brenner, supra note 51, at 713-21.
71. See Fowler & Brenner, supra note 51, at 229. Although the courts continue to uphold the fairness doctrine, Justice Brennan has observed that broadcasters assume "angry customers are not good customers and . . . it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial." Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 187 (1973) (Brennan, J., dissenting).
72. Fairness regulation, as discussed earlier, purportedly seeks to insure that viewpoints are not excluded from the electronic media. The result is an "unusual order of First Amendment values." Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973). Paramount in the hierarchy is "the right of the public to receive suitable access to social, political, esthetic,
broadcasting outlets were more numerous than daily newspapers. In 1970, a total of 1748 daily newspapers were in existence. The number decreased to only 1744 by the end of the decade, contrasted with 10,239 radio and television stations operating in 1982. Especially in metropolitan areas, most of which may be characterized as one or two newspaper towns, the number of broadcasting outlets far exceeds the number of operating daily newspapers.

The Court has used scarcity to justify fairness regulation only in the electronic forum but has recognized that the problem also exists in the print media. Although it is true that not everyone who wants to broadcast can do so, economic factors make "entry into the marketplace of ideas served by the print media almost impossible." Nevertheless, the Court has forcefully rejected urgings for fairness regulation of newspapers. The access problems of both media, contrasted with their radi-
cally different constitutional protections, evince little logic but perhaps much sensitivity to popular concerns.

When the Court embraced the premise that spectrum space was limited, it created a rationale on a collision course with itself. Many agree the collision has already occurred. Technological progress has yielded additional and alternative forms of "broadcasting" to such an extent that scarcity arguments ring hollow.80 Except for the Supreme Court, the fairness doctrine has few contemporary supporters. The bankruptcy of fairness rationales thus may reveal more than judicial errancy in accepting them. What may be evinced is a long-standing mindset, traceable to Mutual Film, that the risk of abandoning control premises, no matter how unpersuasive or irreconcilable with the first amendment, is unacceptable.

If so, the illusory nature of the contradiction between content-restrictive schemes and purportedly content-enhancing fairness regulation is more easily seen. Because fairness regulation serves its stated objectives ineffectively and from a dubious predicate, its real value to defenders may be as a means of content control rather than enhancement. Consequently, a common thread tying together all content-oriented broadcasting regulation may be the notion that some restraining device is necessary to ensure that the medium does not unduly influence society's direction or engulf its values.

The lengthy interval between the Mutual Film decision and its reversal in Joseph Burstyn may also offer insight into the continuing vitality of fairness regulation. Abandoning an available regulatory rationale, however deficient, requires the sacrifice of control pending a replacement. The Court took many years to develop a theory that would allay the fears underlying the Mutual Film decision but not so nakedly abridge the first amendment. A reading of the Court's initial decision on fairness regulation, Red Lion Broadcasting Co. v. FCC,81 in the context of later content-oriented broadcasting decisions sug-

80. Although cable television is the most obvious new development, many other substitutes for over-the-air distribution, for both radio and television, are currently available. See Fowler & Brenner, supra note 51, at 225-28. Even the Court noted an expectation "that the advent of cable television will afford increased opportunities for the discussion of public issues." Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973). The Court is unwilling to change its approach, however, "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters, 104 S. Ct. 3106, 3116 n.11 (1984).

gests that the Court may have been responding to the same visceral fears it first expressed in Mutual Film. As it did in Mutual Film, the Court in Red Lion may have adopted a relatively unsatisfactory rationale in anticipation of eventually locating more palatable and persuasive reasons for control.82

The search in that direction continues to yield concerns that, reminiscent of the Mutual Film decision, seem to be presumed from common wisdom rather than proved by a showing of actual harm.83 Thus, one court has observed that written messages require the affirmative act of reading, whereas broadcast messages are "in the air."84 Implicit in that distinction seems to be the notion that the public has a self-defense mechanism against offensive materials in the print media but is vulnerable to insidious and subversive transmissions of the electronic media.85 With that premise as a starting point, the Court has recognized several peculiar characteristics supporting

82. The Court has hinted that it might reexamine its support of fairness regulation if Congress or the FCC signals that technology has rendered the scarcity premise obsolete. See FCC v. League of Women Voters, 104 S. Ct. 3106, 3116 n.11 (1984). In the same breath, the Court reaffirmed the pertinence of more recently articulated concerns that broadcasting is pervasive, intrusive, and accessible to children. Id. at 3117 n.13 (citing Pacifica, 438 U.S. at 748-50. The court has thus positioned itself to abandon a demonstrably unsatisfactory rationale in favor of one it finds more persuasive. Although this alternative basis for regulation is more sweeping, because it is concerned with the perceived general nature and effect of the medium rather than the medium's supposed scarcity, the rationale is even more patently fear-motivated, evincing discomfort with a medium's capacity for evil. The alternative rationale is thus no more genuinely persuasive or satisfactory than the spectrum scarcity rationale was, and, to the extent that the alternative has fewer pretenses about distancing itself from the Mutual Film type of reasoning, it may be a sign of regression.

83. The Court, when confronting constitutional issues with major social implications, has relied heavily on medical, psychological, or sociological expertise and findings. See, e.g., Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2461, 2492 n. 11 (1983); (abortions); Roe v. Wade, 410 U.S. 113, 149 n. 44, 161 n. 62 (1973) (same); Brown v. Board of Educ., 347 U.S. 483, 493-94 & n. 11 (1954) (school segregation). Despite extensive social science research on the electronic media's effect on children, the Court referred to no such authority in connection with its articulated concern regarding the accessibility of radio and television to children. See FCC v. Pacifica Found., 438 U.S. 726 (1978).


85. Courts thus have expressed concern with "the subliminal impact of this pervasive propaganda [commercials], which may be heard even if not listened to, [and] may reasonably be thought greater than the impact of the written word." Id. at 1100-01.
"special treatment of indecent broadcasting." Those factors include the ready access of unsupervised children to radios; the presence of radio receivers in the home, where privacy interests are entitled to extra deference; and the possibility that unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast. None of those articulated concerns, however, translates into a demonstrable or particularized harm or is supported by empirical evidence of cause and effect. Instead, each concern is traceable to the breeding ground of social fear and anxiety that spawned the Mutual Film decision and thus may serve primarily to disguise mediaphobic regulatory impulses.

Even if distinctions can be made among and rational concerns raised about the various media, the difficulty of uniform application and the absence of profound differences cautions against constitutional generalizations. Making distinctions among media is not a particularly taxing exercise, because each medium is in fact different in structure, operation, and impact. If it were useful to identify tenable "peculiar characteristics," the actual substantive capabilities of the media would provide the necessary focal point. Newspapers are better able to capture and communicate the multiple dimensions and nuances of an issue. Television's substantive content, by contrast, often is either diminished in favor of visual emphasis necessary for audience appeal or lost altogether because it flashes by too rapidly.

Given the contemporary constitutional mode of evaluating newer media, such a difference might support the case for fairness regulation to promote breadth and diversity. Elevating such a distinguishing characteristic to a level at which it is pivotal for first amendment purposes, however, remains troublesome. Distinctions, even real ones, that are based on "peculiar characteristics" foster generalization and do not serve well as springboards for constitutional policymaking. For example,

87. Id. at 749-50.
88. Id. at 748 (citing Rowan v. Post Office Dep't, 397 U.S. 728 (1970)). By 1984, more than 98% of the nation's homes had at least one television set, and more than 470 million radio sets were in operation. ASSOCIATED PRESS BROADCAST SERv., supra note 75, at A-2.
90. Swan, "Buying the Bomb" reveals the gap between print and TV journalism, Christian Sci. Monitor, Mar. 4, 1985, at 39, col. 1. Walter Cronkite's frequent lament was that the information squeezed into a half-hour newscast would fill only one quarter of a page in the New York Times. Id. at 40.
even if newspapers as a medium are better suited for comprehensive offerings, probably only a few major newspapers actually try to maximize such service. Even then, editorial discretion favors exhaustive coverage of some issues but not others. Unevenness within a given media sector, therefore, tends to diminish the utility of even insightful generalizations about media characteristics.

Notwithstanding such problems even with sound distinctions, the much less persuasive distinctions discussed earlier are used to justify disparate standards for broadcasting. "Special treatment of broadcasting" is a euphemism for regulation. Because broadcasting, like motion pictures, has received first amendment recognition, the Mutual Film-type concerns alone are analytically insufficient to support content regulation. Anxiety, therefore, may be combined with some perceived peculiarity of the medium—such as pervasiveness, intrusiveness, or accessibility to children—to justify regulation. Consistent with constitutional analysis of the fairness doctrine, regulation of what may be defined as offensive programming is countenanced because the Court applies a less stringent standard of review for regulation of the nonprint than for the print media. Less exacting scrutiny affords a more hospitable environment for regulatory rationales that are deficient and antithetical to first amendment values.

A diminished standard of review also has insulated the judiciary from the necessity of choosing, pursuant to stricter scrutiny, between the embarrassment of being indelibly identified with flawed regulatory rationales and the discomfort of rejecting all content-specific regulations. For example, the Court has not had to explain why children must be protected from offensive broadcasting when the same children may have access to adult-oriented books, magazines, and other printed material or may be exposed to offensive playground epithets or stories. Instead, it has pursued an exercise in line drawing that yields

91. For example, the Pacifica case itself upheld the right of the government, through the FCC, to punish broadcasters for airing material defined as "indecent" by Congress and the FCC. See Pacifica, 438 U.S. at 731-32, 738-41.

92. See id. at 748; United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); see also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) ("broadcasting is clearly a medium affected by a First Amendment interest").

93. See supra notes 63-65 and accompanying text.

94. FCC v. Pacifica Found., 438 U.S. 726, 767-70 (1978) (Brennan, J., dissenting). Some parents, in fact, may desire to expose their children to expression that may be offensive to others. See id. at 770 (Brennan, J., dissenting).
more confoundment than constitutional consonance. A recording of an offensive monologue may be freely available in a record store for electronic playback at home. Its electronic transmission to the home, however, may be punished, even though the same premises and sound system are implicated.

Equally incongruous and difficult to understand is why the statement "Fuck the Draft" would be any less objectionable when it appears on the back of a jacket, on which a curious child may focus a prolonged gaze, than when it is communicated electronically. Although the former means of expression may not be prohibited, the latter may. Such disparate treatment demonstrates the ease with which facile differentiations among media and speech forms can aid fear and anxiety in purging, from the most dominant media, expression traditionally considered at the core of first amendment protection. Use of a lesser standard of review has at least allowed the Court to escape the problem.

The Court has also been able to avoid the issue of whether the special privacy interest conferred upon the home cuts more deeply against regulation than for it. For example, just as an indecent or offensive guest can be ordered to leave the home, so too can a television or radio, without special regulation, be switched to a more desirable program.

96. The statement at issue in Cohen was political and thus fell within a category of speech that the Court has been most inclined to protect. See Stromberg v. California, 283 U.S. 359, 369 (1931); cf. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 18-19, 22-27 (1948) (arguing that the first amendment "is not the guardian of unregulated talkativeness," it is the protector of the community thinking process).
98. For a related discussion concerning special regulations of the broadcast media in the interest of children, not because of offensiveness but because of children's susceptibility to advertising, see Pauker, The Case For FTC Regulation of Television Advertising Directed Toward Children, 46 BROOKLYN L. REV. 513 (1980).
100. See Pacifica Found. v. FCC, 556 F.2d 9, 26 (D.C. Cir. 1977) (Bazelon, C.J., concurring), rev'd, 438 U.S. 726 (1978); cf. Erznoznik v. City of Jackson- ville, 422 U.S. 205, 209 (1975) (holding that government may selectively shield the public from offensive speech only when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure").

When expression intrudes upon the privacy of the home, government regulation generally has been countenanced. See, e.g., Rowan v. Post Office Dep't, 397 U.S. 728, 737-38 (1970). Reliance on such authority is misplaced, or at least unpersuasive, when the offended person has the means and authority effectively to silence the source of offensiveness.
interest of the home, and the very notion of privacy in the sense of autonomy, are more affronted by government regulation, which dictates what the occupants can and cannot see and hear, than by the absence of regulation, which preserves their autonomy to make such decisions themselves.

In upholding content specific regulations, the courts generally make the obligatory "importance of the first amendment" recitations and then focus on the effect of the offensive broadcast on the unconsenting viewer or listener. Left unexplained is why the interests of those unconsenting persons require depriving others in the audience of what those others want to see or hear. Consent to the risk of being offended can be presumed from a person's decision to place a radio or television in his or her home. Further, assuming that thin-skinned viewers and listeners can obtain knowledge of available programming, they can adequately guard against offensive programming simply by refusing to watch or listen to it. Even if caught off-guard, the viewer or listener is able to silence the offensive material.

It is doubtful that any programming could be so offensive that a fleeting glimpse or overheard sound would justify depriving an entire audience of an expression that, if disseminated by another medium, would be constitutionally protected. Ordinarily, if privacy considerations have been found to justify protection against unwanted exposure to offensive expression, the

102. In Stanley v. Georgia, 394 U.S. 557, 564-65 (1969), the Supreme Court recognized a person's "right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."
104. Although some may argue that radio and television have become necessities, see supra note 88, and therefore any consent is illusory, such an argument seems premised on an overbroad definition of necessity. More importantly, such an argument ignores an individual's motives—most people purchase radios and televisions because they enjoy listening to or watching them, not because of a felt necessity.
individual has still been responsible for initiating the insulating procedure.\textsuperscript{106} Given viewers' and listeners' inherent autonomy and control over broadcast reception, the burden on them of assuming responsibility for exposure to offensive material seems far less than the burden imposed on first amendment concerns by prohibiting or curtailing the expression.

III. NEW MEDIA AND THE OPPORTUNITY TO REAPPRAISE OLD FEARS

Cable television, as one of the newer major media, is in the initial stage of having its first amendment status defined. Given the early point in the medium's constitutional evolution, a convenient opportunity exists for reexamining the bases of new media regulation. The emergence of cable television presents at least two issues that reveal further the inadequacies of established media-specific analysis. The first is whether and how differences between cable and other media are constitutionally significant. The second is whether the appropriate standard for determining permissible expression, in a medium characterized by channel multiplicity and thus catering to specialized audiences, is the tastes of a general or a particular audience.

The nature of cable television enhances doubt about the validity of articulated distinctions between broadcast and print media. Cable is essentially a hybrid medium, capable of delivering a daily newspaper or transmitting programming offered by broadcasters. It thus could make academic, both practically and philosophically, the question of whether the print and electronic media should be subject to variable regulation.\textsuperscript{107} An assessment of cable might be most profitable if regarded as an opportunity for reexamining fear-based regulatory rationales and reconsidering whether "peculiar characteristics" justify disparate first amendment treatment or simply ensure constitutional mischief.

Despite evidence that cable and other media are more alike

\textsuperscript{106} See Rowan v. Post Office Dep't, 397 U.S. 728, 735-38 (1970) (householder may direct postal service to order disseminator of offensive material not to mail it to him).

\textsuperscript{107} It may be argued that reading an electronic newspaper requires the same engagement of the mind that reading a regular newspaper does and thus invites active participation rather than mere passive reception by the viewer. Such a behavioral focus, however, is unlikely to yield principles for differentiation that are compatible with a general proscription against abridging freedom of the press.
than different, however, the courts persist in searching for differences and trying to determine whether cable is more like newspapers or more like radio and television.\footnote{See, e.g., Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376-80 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054-57 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976, 984-86 (D.R.I. 1983).} The pursuit of classification forces courts into the precarious, if not apostate, exercise of calibrating a medium's first amendment protection according to its "peculiar characteristics." However courts eventually classify cable, the choice would seem to increase pressure for reevaluation of those media that cable is found to be less "like."

If cable were afforded press liberties comparable to those of the print media, denying such freedom to broadcasters would seem more difficult. At least to the extent that broadcasters' programming is the same as that offered by cable operators, the imposition of content restrictions on one but not the other would seem anomalous. Regulation of cable by a scheme similar to that which presently governs broadcasting, however, might endanger the broader freedoms traditionally enjoyed by the print media. Subjecting the electronic but not the printed edition of a daily newspaper to content regulation, even though both contained offensive material or did not comport with fairness notions, would be inconsistent.\footnote{Regulating electronic editions of newspapers in the same manner as broadcasting might also resuscitate the now-lifeless argument that the printed version should be similarly governed. See, e.g., Barron, Access to the Press—A New First Amendment Right, 80 HARV. L. REV. 1641, 1656-60 (1967). This argument was rejected in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-58 (1974) (citing Barron).}

The vexation such a dilemma fosters for the logic of media-specific analysis is evinced by the conclusions of courts that have diligently sought "peculiar characteristics" to differentiate cablecasting from other media.\footnote{See, e.g., Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377-79 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Berkshire Cablevision of Rhode Island v. Burke, 571 F. Supp. 976, 980-87 (D.R.I. 1983). The Supreme Court has concluded that cable television should not be regulated as a common carrier but otherwise has largely avoided an exploration and explication of the first amendment rights of cable operators. See FCC v. Midwest Video Corp., 440 U.S. 689, 708, 709 n.19 (1979).} By its nature, cable clearly cannot be saddled with the scarcity rationale associated with broadcasting. Similarly, arguments that cable is a natural mo-
nopoly do not offer a principled basis for distinguishing it from the economic monopoly present in a one-newspaper city. Recognizing that any scarcity in cable results from franchising and natural monopoly rather than spectrum shortage, several courts have concluded that such a result "solely of economic conditions is apparently insufficient to justify even limited government intrusion into the first amendment rights of the conventional press." Despite cable's electronic nature, therefore, some courts have been inclined to regard a cablecaster's first amendment rights as more akin to a publisher's than a broadcaster's.

Efforts to divine whether cable is more like newspapers than radio or television ultimately must confront a lurking paradox fostered by fear-based media regulation. Having been compelled to seek differences that necessitate special forms of regulation, courts must consider whether cable's unique capacity for diversity diminishes its first amendment standing. Unlike broadcasters, cablecasters do not profit from programming that appeals to the least common denominator and therefore need not select programming that tends to minimize offensiveness. Instead, cable operators must appeal to many discrete audiences with diverse programming tastes. The formula for cable success thus ensures, and has delivered, programming that appeals to certain audiences and offends others. Because multiplicity of expression is mandated by cable's profit strategy and facilitated by its nature, a confrontation between first amendment values and the anxiety that diversity arouses seems unavoidable.

The emergence of cable television thus offers a challenge to the fear-based "recognition but regulation" legacy of Joseph Burstyn and an opportunity to develop a new constitutional theory consistent with the language and spirit of the first amendment. One possible starting point for rethinking and retooling constitutional perspectives is recognition that the absence of today's dominant media at the time of the Constitution's drafting does not justify affording them less pro-

111. See Community Communications Co., 660 F.2d at 1379.
112. See supra notes 73-79 and accompanying text.
114. See, e.g., Midwest Video Corp., 571 F.2d at 1055.
115. See supra note 105.
tection. The architects of the first amendment were not confronted with such diverse media as movies, television, radio, and cable when they articulated the principle of freedom of the press. Still, an extensive variety of media existed at the time of the first amendment’s drafting. Newspapers, pamphlets, posters, and leaflets, for instance, possessed different characteristics, resulted from divergent values, invited different abuses, and presented various dangers. Each, therefore, had its own capacity for evil. Even given such potential, however, the first amendment was drafted in generic rather than differentiated terms. Whether the Constitution is read as a rigid or adaptive instrument, a compulsive reliance on differences among media as a basis for disparate protection of content seems at best an improper and at worst dangerous posture.

Setting principled perimeters of press freedom thus requires abandoning the perspective that each medium is a separate forum and problem. Instead of straining for differences among media, it is simpler and more perceptive to acknowledge that information is disseminated from a variety of sources in the media marketplace and that every medium may be influential in shaping public thought. Each medium competes and interacts with other media and the influence of any one normally is balanced by the presence of others. Focusing on the me-
dia, rather than on a particular medium, offers a useful perspective from which to begin restoring the free press clause to a healthier state.

IV. FEAR AND UNLEARNED LESSONS

The history of restricting freedom of expression to ease social discomfort teaches that fear of potential evil is a treacherous basis for control and, in the absence of strict constitutional standards, a potent chilling force. The Supreme Court eventually recognized the undesirability and unconstitutionality of regulating political expression merely on the basis of some remote harm or ill-defined evil. Earlier speech controls based upon generalized fear thus have been "thoroughly discredited." Still, those hard lessons have not instructed sufficiently against like mistakes in the area of content-specific broadcast regulations. The Court, in sanctioning and effectively encouraging fear-based media regulation, has not insisted on a showing of palpable and imminent harm, nor has it insisted on compelling state interests to justify regulation of programming that some find offensive. It has instead accepted poorly defined assertions of potential evil as bases for regulation.

Parallels with the early cases limiting political speech are vivid and discomforting. In each instance, the Court failed to distinguish between potential and actual danger, thereby relieving the government from the burden of articulating genuine hazards that might justify control. The consequence in both settings is a first amendment that affords only limited security


Some of the most glaring abuses of first amendment freedom of speech protections occurred during World War I and in the immediate postwar years, when generalized but rampant fear of radicalism occasioned suppression or punishment of expression merely because the words used were potentially "keys of persuasion . . . [and] triggers of action." Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917); see also Gitlow v. New York, 268 U.S. 652, 668 (1925) (giving great deference to legislative determination of dangers of certain utterances advocating overthrow of government).

122. See Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (requiring a showing of serious and likely harm before speech with unacceptably evil tendencies could be forbidden).


124. See FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978); see also supra notes 63-65 and accompanying text.

125. See Pacifica, 438 U.S. at 748-49.

126. See supra notes 121-122 and accompanying text.
for unpopular expression and subverts a truly uninhibited marketplace of ideas. In both instances, the temptation to cleanse public dialogue in the interest of protecting the squeamish or insecure should be resisted.\textsuperscript{127} Succumbing to the bait of content control would be more in keeping with a system of authoritarian selection than one premised on a multitude of tongues.\textsuperscript{128}

If the first amendment is to operate as a constraint on official power and overreaching,\textsuperscript{129} government standards for acceptable dialogue seem no more permissible for the media than for the idea marketplace. Government is required to state clearly a specific, significant danger before it may regulate protected speech.\textsuperscript{130} Missing from the judicial scrutiny of fear-based electronic media regulation, however, is any equivalent insistence that the government identify and establish the existence and compelling nature of the dangers against which it seeks to protect. Whether the underlying premise is children in the audience or limited space on the broadcasting spectrum, rationales proffered for content regulation of broadcasting should be scrutinized by the courts to determine whether the substantive evil feared is a likely consequence.\textsuperscript{131} Particularly when first amendment interests are implicated, "a big difference [exists] between the danger of an abuse and the abuse itself."\textsuperscript{132}

The first amendment assumes that the public may react wrongly to information, be antagonized, or even be duped or

\textsuperscript{127} See Brandenburg, 395 U.S. at 447-49; id. at 453-57 (Douglas, J., concurring).


\textsuperscript{129} See Schauer, Public Figures, 25 WM. & MARY L. REV. 905, 924 (1984) ("The premise is not that speech is especially good, but that its regulation is especially dangerous.").


\textsuperscript{131} See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978) (quoting Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring)). Still, two justices have noted that the FCC has been given the initial responsibility for determining whether speech may be banned from the airwaves and suggested that "its judgment is entitled to respect." FCC v. Pacifica Found., 438 U.S. 726, 759-60 (1978) (Powell, J., concurring).

\textsuperscript{132} Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 128 (7th Cir. 1982); see also Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968) (speculating that some FCC regulatory policies may not withstand constitutional scrutiny in the light of contemporary first amendment analysis), cert. denied, 396 U.S. 842 (1969).
misled. Those risks or consequences perhaps may be minimized by the existing preference for identifying peculiar characteristics of a medium, regulating the medium based on those peculiar characteristics, and subjecting the regulations to lesser standards of review. Such analytical pursuit, however, represents a radical departure from the first amendment notion of diverse expression, abuse, and ultimate balance. Unpopular or offensive expression is an inescapable consequence of free expression, and any power to sanitize public discourse on the basis of fear is in effect limitless. To the extent fear of potential evil underlies media control, "a substantial risk of suppressing ideas in the process" exists. Given the dominance of newer media, fear-based regulation whittles away traditional first amendment freedom to a shred of its original fabric.

Although the specific forms of the twentieth century media were not foreseen by the framers, the possibility that one person's expression would be offensive or discomforting to another was anticipated and accepted as the inevitable consequence of free speech. Contemporary media regulation reflects a trade-in of the values underlying the first amendment for security against the risks the regulation contemplates. Such a commissioned exchange represents a philosophy more consistent with sufferance of pluralism only within tolerable, middle-of-the-road bounds than one that supports and values pluralism's implications. The trade is an uneven one and at least as costly now as it would have been at the Constitution's drafting.

The arrival of each new medium reintroduces the choice between media regulation and media protection and renews the question of whether freedom of the press should exist with or without regard to the form of the press. Much energy is wasted, and enormous constitutional damage done, by focusing on differences that are inconsequential and evil that is not demonstrated. If it is asking too much that candor and compelling interests justify media regulation, it may be that too little is demanded of the first amendment.

135. Cf Moore v. City of East Cleveland, 431 U.S. 494, 506-13 (1977) (Brennan, J., concurring) (overturning zoning ordinance that narrowly defined "family" according to the pattern found in "white suburbia").