ARTICLES

The First Amendment at Its Third Century: Reckoning with the Ravages of Time

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Introduction

Freedom of speech[1] and freedom of the press[2] have been explicit constitutional commands for precisely two hundred years. Despite its prominence in the Bill of Rights and status as an essential condition of ratification,[3] the First Amendment did not begin to figure meaningfully in the nation's jurisprudence until this century. The guarantee's effective dormancy did not owe to an absence of prior circumstances implicating constitutional interests. The Alien and Sedition Acts,[4] official segregation,[5] and media censorship[6] are prominent examples of oppressive and

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1. U.S. CONST. amend. I.
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3. The Bill of Rights, enumerating basic individual guarantees that would be protected from the powers of government, essentially represents an antifederalist legacy. The promise that itemized rights and liberties would be incorporated into the Constitution induced enough support to secure ratification. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 4 n.7 (2d ed. 1988).
4. The Alien and Sedition Acts were the works of President Adams' administration and a federalist Congress. The laws respectively authorized the President to deport aliens "judge[d] dangerous to the peace and safety" of the nation, 1 Stat. 58 (1798), and prohibited "publishing any false, scandalous and malicious writings . . . against the government of the United States, or . . . Congress . . . or the President . . . with intent to defame [or subject them to] contempt or disrepute." 1 Stat. 74 (1798).
5. Segregation as a matter of law not only contravenes modern notions of equal protection but also is at odds with freedom of association, which has become regarded as implicit in the First Amendment. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).
6. Censorship of motion pictures, for instance, was not even considered a constitutional problem insofar as the medium was considered more "spectacle" than press. Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915). Not until the middle of this century

suppressive action capable of eliciting cognizable first amendment claims pursuant to standards that eventually evolved. Still, expressive freedom was at best a subject of passing reference for nearly two-thirds of the nation's history.[7] Not until 1919 and 1931, respectively, did the Court expound seriously upon freedom of speech[8] and account meaningfully for freedom of the press.[9]

Modern conventional wisdom holds that the First Amendment's legacy has been distinguished. As recently as the debate over flag desecration,[10] a determinative premise was that the guarantee has served the country well and tampering with it risked disastrous consequences.[11] The point may have been politically effective in defeating initiatives inimical to imperatives of cultural pluralism. The flattery is essentially misleading, however, insofar as it not only discounts the marginal relevance of the precept for most of its existence but also glosses over the dark side of first amendment jurisprudence. The clear and present danger test,[12] for instance, was constructed upon the backs of individuals who paid heavily in terms of personal liberty for their criticism of government.[13]

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was film afforded first amendment status, and even then on a qualified basis leaving it susceptible to censorship by review boards. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).

7. In finding Congress without authority to bar slavery, the Court adverted to the First Amendment as an example of a general constitutional scheme curtailing federal power. Scott v. Sanford, 60 U.S. (19 How.) 393, 449-50 (1857). The Court later expounded upon the meaning of the Fourteenth Amendment shortly after its ratification and, without amplification, identified "[t]he right to peaceably assemble and petition for redress of grievances" as a privilege of federal citizenship. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

8. *See* Schenck v. United States, 249 U.S. 47 (1919) (affirming convictions of political dissidents for violation of Espionage Act).

9. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (freedom of the press safeguards against prior restraint).

10. Congress rejected a proposed constitutional amendment that would have enabled Congress and the states to enact legislation to protect the flag's physical integrity. *See Congress: The Flag Boosters Get Burned*, NEWSWEEK, July 2, 1990, at 24. The debate followed the Court's rulings that existing federal and state laws violated the First Amendment. United States v. Eichman, 110 S. Ct. 2404 (1990) (invalidating federal law against flag desecration); Texas v. Johnson, 109 S. Ct. 2533 (1989) (invalidating state law against flag desecration).

11. *See* NEWSWEEK, *supra* note 10.

12. The standard first enunciated by Justice Holmes merely concerned itself with perceived "bad tendency" of expression. *See* Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting). It eventually evolved so that advocacy of unlawful conduct could not be prohibited unless speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

13. Eugene Debs, the Socialist candidate for president in 1920, received nearly one million votes while imprisoned for antiwar expression. *See* Debs v. United States, 249 U.S. 211, 213-16 (1919); Kalven, *Ernst Freud and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 237 (1973). Debs' conviction has been equated to imprisoning "George McGovern . . . for his criticism of the [Vietnam] War." *Id.*

Multiple categories of expression have been juridically excluded from constitutional purview.[14] Official restriction or management of protected speech is permissible under various circumstances,[15] and the most dominant modern medium of broadcasting is accorded the least security from official abridgment.[16] Compounding the narrowing influence of jurisprudence has been society's own developmental coursing, which has altered significantly the context of expressive freedom.

Constitutional inadequacy, if not obsolescence, is evidenced both by the emergence of expressive territory uncovered by the First Amendment and by basic terminology that has become susceptible to dispute as modern reality has unfolded. Given the relative ease of speaking and disseminating expression two centuries ago, the speech and press clauses for practical purposes were largely redundant. As media industries evolved and recontoured the dimensions of the press, the case developed for attaching independent significance to the clauses. Consistent with such analytical bifurcation, Justice Stewart articulated an institutional definition of the press that directed special constitutional attention to the industry whose business it is to communicate.[17] Stewart thus would have accounted for the emergence of mass media that two centuries ago were nonexistent or underdeveloped. Specifically, the institutional focus would acknowledge that publishing is no longer a function of individual predilection but of capitalization costs that make effective communications prohibitively expensive to all but a few.[18] Despite the altered landscape that the First Amendment governs, Chief Justice Burger propounded a competing functional definition that denies "special status

14. Obscenity and fighting words constitute categories of expression entirely beyond the First Amendment's ambit. *See* Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity exempt from First Amendment's reach because it has no social value); Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) (fighting words are "no essential part of any exposition of ideas" and thus regulation presents no constitutional problem).

15. Expressive freedom may be curtailed because the speech is devalued, Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) (society has a lesser interest in protecting "offensive" expression), because the medium has diminished constitutional status, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (broadcasting is the least protected of all media), or pursuant to reasonable time, place, or manner restrictions, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (state may enforce such regulations to the extent they are content neutral, narrowly tailored to serve significant governmental interest, and leave open ample alternative channels of communication).

16. FCC v. Pacifica Found., 438 U.S. at 748.

17. Stewart, *Or of the Press*, 26 HAST. L.J. 631, 633-34 (1975).

18. "Adequate capitalization . . . is the primary factor excluding the vast majority of the citizenry from even considering publishing, broadcasting or cablecasting." Lively, *Deregulatory Illusions and Broadcasting: The First Amendment's Enduring Forked Tongue*, 66 N.C.L. REV. 963, 968 (1988). *See* Telecommunications Research & Action Center v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

[for] a limited group"[19] and thereby negates any practical distinction between speech and the press. Pertinent jurisprudence has yet to factor in any special role, status or service of the press. Whatever current distinctions might be identified between speech and press owe mostly to realities that did not exist and were not even foreseeable when the First Amendment was framed. One modern response to the passage of two centuries is that "modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete."[20] The perception reflects the consequent concern that freedom of speech has been reduced largely to an "abstract,"[21] and effective communication is determined not merely by constitutional guarantee but by access to resources for media ownership.

What initially was considered a singular threat to expressive freedom posed by centralized authority is now compounded by subsequent perils of state regulation and, according to some observers, even more recent concentrations of private power.[22] Jurisprudence responded to the possibility of state abridgment of speech and the press by incorporating the First Amendment into the Fourteenth Amendment.[23] Thus far, it has refused to invest in state action doctrine that might make modern mass media more accountable to allegedly endangered speech interests.[24] Although the Court has been willing to countenance particularized regulation that would subject newer media to standards of fairness,[25] it has been hostile to methodologies that would afford the citizenry actual access for self-expression.[26] The Court also has encouraged reexamination

19. First Nat'l Bank v. Bellotti, 435 U.S. 765, 801-02 (1978). *See* Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 99 (1975).

20. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 196 (1973) (Brennan, J., dissenting).

21. *Id.* at 102.

22. The Court has adverted to "vast changes . . . plac[ing] in a few hands the power to inform the American people and shape public opinion" and denying "the public . . . any ability to respond or to contribute in a meaningful way to the debate on issues." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 (1974).

23. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925).

24. A state action theory, premised upon the federal government's licensing and detailed regulation of broadcasters, failed to win the Court's support in Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. at 119 (plurality opinion) (regulatory scheme does not create symbiotic relationship or other basis rising to level of state action).

25. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding fairness doctrine obligating broadcasters to devote time to controversial issues of public importance and to afford balanced coverage of such matters).

26. The Court denied a general public right of access in Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. at 110-11. The Court, however, has upheld a limited statutory right of reasonable access for political candidates. Columbia Broadcasting Sys-

of previously endorsed criteria requiring content balance and editorial accountability.[27]

Given a basic guarantee that has existed for two centuries, has established an actual track record covering approximately one-third of that time, and has been subject to profound forces and realities beyond the ken of original contemplation, it is legitimate and timely to reflect upon whether freedom of speech and freedom of the press for practical purposes have become functionally anachronistic. Contrary to the sense that the First Amendment should be untouchable, deficiencies in its coverage and abiding debate over its inspiring values merit critical reappraisal. Glorifying the First Amendment to the point that its nature and function are tamper proof is incongruous with its underlying message of free inquiry and consequent but assumed risk. This Article will: (1) depict the First Amendment's true identity under modern circumstances and examine the reasons for its contemporary bearing, (2) consider how values that inspire first amendment jurisprudence tend to be underdeveloped, unrealistic and even inverted, and (3) suggest how the First Amendment might be recontoured to account more effectively for expressive freedom as the guarantee enters its third century.

I. The Real First Amendment

A. The First Amendment Guarantee

The First Amendment, like other constitutional rights and liberties, has evolved as a relative rather than absolute guarantee.[28] Its defeasible nature is manifested not only in jurisprudence, which candidly endorses content and media regulation in diverse circumstances, but in limiting principles that convert even purported absolutism into a bounded rather than unchecked notion. Justice Black, perhaps the foremost exponent of unequivocal first amendment liberty, ultimately if not admittedly demon-

tem, Inc. v. FCC, 453 U.S. 367, 381 (1981) (affirming application of such access as codified by 47 U.S.C. § 312(a)(7) (1988)).

27. In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Court noted that it was prepared to abandon the fairness doctrine if the scarcity premise was demonstrated to be obsolete and the regulation undermined rather than advanced first amendment interests. *Id.* at 376-79 nn.11-12. A few years later, the Federal Communications Commission terminated the fairness doctrine on grounds that it was inconsonant with freedom of the press and disserved first amendment interests. Syracuse Peace Council v. Television Station WTVH Syracuse, 2 F.C.C. Rcd. 5043, 5055-57 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989). In recently upholding minority preferences in the licensing process, however, the Court noted that it has "long recognized" that spectrum scarcity justifies special restraints on broadcasters. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3010 (1990).

28. Konigsberg v. State Bar, 366 U.S. 36, 49-51 (1961) (rejecting absolutist concept of First Amendment).

strated that lines must be drawn with respect to the guarantee's actual meaning.[29] Black's distinction between speech and conduct and the exclusion of symbolic expression may have charted different constitutional perimeters than the Court etched, but the analysis was no less qualifying of freedom in both function and effect.

Denominating a right or liberty as conditional permits analytical reference points to be introduced that otherwise would be precluded if the guarantee were absolute. The practical meaning of such a qualified freedom is defined not by what the Constitution commands but by what is found tolerable despite the Constitution. At least to the extent not allowed to speak for itself, the First Amendment, like other sweeping constitutional terms,[30] is dependent upon external values for inspiration and actuation. The law of the First Amendment thus has become a function of jurisprudentially selected ideals which have engendered a classification process and ranking system for speech and press. If edited to account for such engineering, the First Amendment would have a more detailed and equivocal cast than appears documentarily. In pertinent part, the First Amendment provides that "Congress shall make no law . . . abridging freedom of speech, or of the press."[31] As qualified by accumulated expoundment and gloss, the guarantee would read as follows:

> No branch of government, federal, state or local, shall legislate or act in a way that abridges freedom of speech or of the press except: (1) when expression categorically excluded from the First Amendment is implicated;[32] (2) when expression presents a direct, imminent and probable danger of inciting unlawful conduct;[33] (3) to protect reputational interests, provided claims by public officials and public figures are subject at least to an actual malice standard;[34] (4) to safeguard privacy interests under a variety of circum-

29. Black would have regarded "(s)tanding, patrolling or marching" even to make a political point beyond the purview of speech. Cox v. Louisiana, 379 U.S. 559, 581 (1965). He also regarded the message "Fuck the Draft," inscribed on the back of a jacket to make a political statement, as unprotected conduct. Cohen v. California, 403 U.S. 15, 27 (1971) (Black, J., dissenting).

30. The Bill of Rights is replete with terminology that is open-ended and dependent upon values as a source of inspiration. *E.g.*, U.S. CONST. amend. IV ("unreasonable searches"); U.S. CONST. amend. VI ("speedy trial," "impartial jury" and "Assistance of Counsel for his Defence"); U.S. CONST. amend. VIII ("Excessive bail" and "cruel and unusual punishment").

31. U.S. CONST. amend. I.

32. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity not protected by First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words not protected by First Amendment).

33. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

34. *See* Curtiss Publishing Co. v. Butts, 388 U.S. 130 (1967) (plurality opinion) (defamation action by public figure requires showing of actual malice), as recognized by Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation action by public official requires showing of actual malice).

stances;[35] and (5) to effectuate legitimate and substantial governmental interests pursuant to narrowly drawn regulation of commercial expression.[36] Nothing in this guarantee should be construed as exempting otherwise protected expression from reasonable time, place and manner restriction.[37] Protection also may be dependent upon or vary according to the context of expression, especially insofar as either the government's special interest in protecting children is implicated[38] or the unique characteristics of a particular medium require special attention.[39]

B. Classification and Valuation of Expression

Freedom of expression may be esteemed as a means of facilitating the general liberty experience, but much dispute over practical terms and operation exists. Because the actual meaning of speech and press freedom is a function of values rather than charter ordination, first amendment theorizing is a highly competitive exercise. Given ideals that are debatable and classifications that are often imprecise, actuation of principle may feed rather than resolve controversy. Notwithstanding the reality that some Framers helped fashion draconian schemes hostile to political dissent,[40] the Court has ascribed the highest value and afforded utmost constitutional attention to "speech relating to informed self-government."[41] By so doing the Court has invested in theory—identified most closely with Alexander Meiklejohn—that emphasizes the significance of expression relating to the democratic process.[42] Even with respect to expression afforded the highest constitutional status, valuation is a function of perceived significance for the society rather than for the

35. Privacy actions may be grounded in a right of publicity, unreasonable intrusion into a person's privacy, unreasonable publicity of an individual's private life, and false-light privacy. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (right of publicity); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (unreasonable intrusion); Florida Star v. B.J.F., 109 S. Ct. 2603 (1989) (unreasonable publicity); Time Inc. v. Hill, 385 U.S. 374 (1967) (false-light privacy).

36. *See* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 344 (1986).

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

38. *See* Ginsberg v. New York, 390 U.S. 629 (1968) (First Amendment's significance diminished to the extent children may be adversely affected by otherwise protected expression).

39. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (unique characteristics of each medium require customized regulation).

40. *See supra* note 4 and accompanying text.

41. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 18-19, 22-27 (1948).

42. *See* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 561-63 (1980); *id.* at 579-83 (Stevens, J., concurring); *id.* at 595-99 (Rehnquist, J., dissenting) (emphasizing primacy of political expression).

individual.[43] Rival notions contest both the premise and perspective. Instead of a focus upon collective worth, speech alternatively would be valued according to its capacity to advance personal knowledge, engender self-development, and facilitate self-realization.[44] Although operative theory has evolved to account for expression not strictly related to the political process,[45] a reference point of societal rather than personal utility has significant consequences for the First Amendment's reach. Despite rhetoric emphasizing the virtues of autonomous selection,[46] the perspective for practical purposes may favor, or at least be hospitable to, a system of authoritative selection defining what speech is fit for public consumption.

1. Speech Classification and Consequences

Classifying expression as an extension of selected values creates numerous problems and anomalies. Categorization has translated not only into diminished protection in some instances but also into exclusion of certain speech forms altogether from the First Amendment's protective ambit. Obscenity, for example, has been devalued and constitutionally dismissed on the grounds that it entirely lacks social value.[47] In explaining obscenity's unprotected status, the Court observed that "modern societies do not leave disposal of garbage and sewage to 'free will.' "[48]

Appraisal couched in terms of a societal interest and perspective might yield different results if pitched instead toward personal utility. When obscenity is examined on a basis of worth to the individual rather than according to general tendencies or values, constitutional respect may be warranted to the extent it may afford pleasure, help establish sexual identity, or promote the exercise of personal autonomy.[49] No cat-

43. *See* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 73-75 (1960) (freedom of expression facilitates informed decision-making necessary for democratic viability).

44. *See* M. REDISH, FREEDOM OF EXPRESSION 11-12 (1984); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

45. Meiklejohn himself eventually acknowledged that constitutional protection must be afforded literature, art, science, and philosophy. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257.

46. The First Amendment has been depicted as "presuppos[ing] that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

47. Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity entirely lacking in redeeming social value).

48. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973).

49. *See Roth*, 354 U.S. at 509 (Douglas, J., dissenting) (devaluation of obscenity presumes that "arousing of sexual thoughts and desires [which] happens every day in normal life in

egory of expression is more susceptible to jurisprudential disparagement than obscenity.[50] The combination of an intractable definitional problem[51] and questionable valuation premises creates a treacherous analytical potential that compounds as more universally valued expression becomes implicated.

Value-driven constitutional line-drawing and imprecision of resultant classifications present risks even to the most esteemed variants of expression. Charting a line between political speech and supposedly less worthy expression may be neat in theory but is perilous in practice. Commercial speech has been defined as expression proposing an economic transaction[52] or relating to economic self-interest.[53] Neither depiction is exact enough, however, to avoid ensnaring political expression and similarly diminishing its status. Political fund-raising and advocacy inspired by economic considerations, for instance, have significant commercial dimensions. Chief Justice Rehnquist actually would characterize solicitation of money for a political action group as commercial speech.[54] The ramification of such a one-dimensional focus is diminished constitutional status in the hierarchy of protected expression.

The risk of classifying speech in singular terms, when expression may have multidimensional characteristics, is also evident in jurisprudence that identifies and devalues indecent expression. Political speech, at least when clearly discernible, is jurisprudentially revered to the point that vilification and even falsehood may be countenanced in deference to "the profound national commitment to the principle that debate on pub-

dozens of ways" is worthless); Lockhart & McClure, *Literature, the Face of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 380 (1954) (stimulation of sexual thoughts not inherently wrong and may elevate sexual consciousness in positive fashion); Levine & Curry, *Whip Me, Beat Me, and While You're at it Cancel My N.O.W. Membership*, THE WASHINGTON MONTHLY, June 1987, at 17-19 (anti-obscenity efforts would impose one-dimensional standards upon diverse citizenry).

50. Fighting words also are excluded from the First Amendment's ambit but, insofar as regulation is defeasible as vague or overbroad, have proved a less prolific source of suppression. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (reversing, on vagueness and overbreadth grounds, conviction based upon use of abusive or opprobrious language).

51. The treacheries of objectifying obscenity led to Justice Stewart's characterization of the classification process as "trying to define what may be undefinable" and confession that "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). For like reasons, Justice Brennan would have prohibited obscenity controls except to the extent children and unconsenting adults are implicated. Paris Adult Theatre I v. Slaton, 413 U.S. at 112-13 (Brennan, J., dissenting).

52. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-62 (1976).

53. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

54. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 641-42 (1980) (Rehnquist, J., dissenting).

lic issues should be uninhibited, robust and wide open."[55] Political or social commentary that may be officially perceived as distastefully expressed, however, may be subject to devaluation.[56] Speech, even if protected, is subject to nuisance analogies if perceived as " 'a right thing in the wrong place—like a pig in the parlor instead of the barnyard.' "[57] With respect to sexually explicit but not obscene expression, the Court has observed that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice."[58] Neither the appraisal nor the prediction accounts, however, for the consequences when allegedly indecent expression is mixed with more esteemed speech and suppression ensues.[59] Nor does analysis reveal awareness of, much less distress with, a procrustean labeling system. To the extent speech interests of societal subgroups may be slighted,[60] and micromanagement of speech detracts from the dynamics of free expression, the classification process is at odds with rudimentary imperatives of cultural pluralism and personal autonomy.

The selection of values that inspire first amendment principles also influences whether purportedly content neutral criteria are impartial in reality. The Court has enunciated the general principle that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[61] Time, place and manner controls are permissible, however, provided they are reasonable.[62] Determining what is reasonable and thus permissible requires consideration of whether the regulation is "narrowly tailored to serve a significant governmental interest, . . . leave(s) open ample alternative channels of communication" and is unrelated to con-

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55. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

56. A satirical monologue lampooning society's attitudes toward common vulgarities thus was subject to time-channeling because its style of presentation was offensive. *See* FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978).

57. *Id.* at 750 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

58. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976).

59. Political and indecent expression merged, for instance, when a draft protester expressed his sentiments by emblazoning "Fuck the Draft" on the back of his jacket. *See* Cohen v. California, 403 U.S. 15 (1971).

60. Regulation of expression denominated as indecent disregarded, for instance, how "[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in [black] vernacular except in particular contextual situations and when used with certain intonations." FCC v. Pacifica Found., 438 U.S. at 776 (Brennan, J., dissenting) (quoting C. Bins, *Toward an Ethnography of Contemporary African American Oral Poetry*, Language and Linguistics Working Papers No. 5, at 82 (Georgetown University Press (1972))).

61. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

62. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

tent.[63] As the classification process has evolved, time, place, and manner analysis has proceeded pursuant to a sliding scale which the judiciary has created but does not openly acknowledge. It is difficult to imagine the Court allowing a zoning ordinance to impose the same restrictions upon political expression, for instance, that are tolerated upon speech if also regarded as indecent.[64] Consideration of what constitutes reasonable regulation may factor out or diminish the significance of neutrality considerations if the worth of expression is perceived to be slight. Official control that is supposedly not permitted if related to content, therefore, may operate precisely because of content.[65]

The consequences of classification might be more tolerable if the presumption underlying speech differentiation were valid and compelling. The premise that political speech is of paramount importance, however, is at least controvertible. If actual electoral participation is a touchstone, political expression has limited rather than comprehensive societal pertinence.[66] Participation in the economic marketplace, by contrast, is a much more universal phenomenon. The Court itself has observed that a person's "interest in the free flow of commercial information . . . may be as keen, if not keener by far, than [one's] interest in the day's most urgent political debate."[67] Assignment of the highest constitutional ranking to political expression reflects an exercise that delimits autonomous selection and development. It also reveals a paternalistic bent to pertinent review and inspiring values which are incongruent with general first amendment imagery.[68]

The status of political speech as the most revered form of expression actually may present an argument for close rather than diminished regulatory attention. Justice White has observed that false speech, even of a political nature, presents serious enough dangers to merit stricter con-

63. *Id.*

64. *E.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

65. *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1341 (D.C. Cir. 1988) (vacating FCC time-channeling of indecent programming on grounds it was concerned with, rather than neutral toward, content).

66. In the 1988 presidential election, only half of eligible voters actually cast ballots. 1989 STATISTICAL ABSTRACT OF THE UNITED STATES, No. 433, at 258. The 1986 congressional election elicited participation by 33.4% of the voting public. *Id.*

67. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

68. Conventional first amendment wisdom contemplates and accepts the possibility that the public will respond unwisely to expression or incur harm as the cost of a system of free speech. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92 (1978).

trol.[69] If expression is valued insofar as it facilitates informed decisions relating to self-government, falsehood may undermine the paramount aims to the extent it misinforms the public and pollutes the stream of information.[70] Augmenting White's position is the premise that misleading expression breeds cynicism among the citizenry and alienates persons who otherwise would participate in the political process. Such contentions challenge traditional notions that the First Amendment assumes the risk of the public being duped, manipulated into unwise decisions, or apathetic.[71] Assignment of responsibility for "ultimate judgment . . . [to] the people [lest they] lose their ability to govern themselves"[72] anticipates a rational information marketplace. To the extent the forum is dysfunctional, the dependability of autonomous judgment is impaired and the utility of free market controls is compromised.

2. *Media Classification and Consequences*

The touchstone of a rational marketplace of ideas is the time and opportunity to respond.[73] Modern political advertising, especially in the electronic media however, presents some serious impediments to effective counterspeech. Claims that lack substantiation,[74] obscure the agenda being promoted,[75] mislead,[76] or perpetuate a harmful stereotype[77] have be-

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69. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985) (White, J., dissenting) (arguing for abandonment of actual malice standard in defamation actions).

70. *Id.*

71. *See supra* note 68 and accompanying text.

72. *First Nat'l Bank*, 435 U.S at 791 n.31.

73. Justice Brandeis thus observed, "If there be time to expose through discussion the falsehood . . . the remedy to be applied is more speech." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

74. Typical of such advertising was the tobacco industry's opposition to a California ballot proposition to increase cigarette taxes on the grounds that passage would result in increased violent crime. The general theme that the proposal "would create major crime," and specific question whether it was "worth taking the chance that one more innocent person may be killed," were unsubstantiated. The premise, that gangs would become involved in cigarette smuggling if the tax were approved, was advanced pursuant to polling data showing no other arguments to which the public would respond. One of the advertisement's architects conceded that no evidence existed of cigarette-related murders. *See* Hinerfeld, *How Political Ads Subtract*, THE WASHINGTON MONTHLY, May 1990, at 14.

75. A Los Angeles proposition, competing with a ballot measure that would stop coastal drilling in a nearby area, was sponsored by the Los Angeles Public and Coastal Protection Committee. Despite the environmental agenda implied by the sponsor's name, the committee actually was a front for a major oil company which was interested in drilling on land near the coast. *Id.* at 18.

76. During the last presidential election, the Bush campaign ran an advertisement showing the filth of Boston Harbor and attributing responsibility to Democratic candidate Michael Dukakis. The spot omitted the important points that Dukakis was the first governor to at-

come common currency in political campaigns. The effectiveness of negative and deceptive political advertising owes in large part to the nature of mass media. Impressions and implications effectively communicated in seconds may require much more time to explain away or undo.[78] Commercial advertising is subject to the checking influence of consumer or investor protection regulation and private legal action. Dubious or erroneous political assertions may circulate without challenge, unless their victim can command or the media can provide sufficient public attention to clarify, correct, and thereby restore rationality. Several factors confound effective balancing in modern times. Carefully structured political spots may massage facts in a way that does not constitute outright falsification but nonetheless misleads. An assertion that "Candidate A voted to let corporate polluters off the hook," for instance, may be technically accurate in depicting a vote against a particular measure. However, it may distort an otherwise strong environmental record or the candidate's support for even stricter legislation. Even a truth deceives if not presented fully and accurately. Such expressive trade invariably facilitates perceptions which are distorted, incomplete, and incongruent with traditional notions of informed decision-making on matters pertaining to self-government.

Accounting for the truth is perplexing insofar as the response to deception may require more time, prove less galvanizing, and perhaps even reinforce the misleading assertion. Given such impediments to effective counterspeech, the press' exercise of its watchdog function would seem especially apt.[79] Modern realities, however, also impair the media's role in providing insight and balance. Institutional interests in profit-maximization, and consequent incentive not to alienate viewers and sponsors,[80] present powerful reasons not only to be but also to appear objective even at the expense of incisiveness. Actual performance suggests a dedication to evenhandedness to the point that objectivity is com-

tempt a cleanup but was denied necessary assistance by the Reagan Administration. *Id.* at 12-13.

77. A prominent example is the Willie Horton advertisement by the Bush campaign which pandered to racial anxieties and stereotypes.

78. The impact of some advertisements never may be undone. President Johnson's televised spot showed a girl counting petals on a flower which transmutes into a mushroom cloud. The message implied a precipitate action by Barry Goldwater and proved disastrous to the latter's fortunes.

79. The watchdog function of the press, as a check on political abuse and overreaching, is discussed in Blasi, *The Checking Value in First Amendment Theory*, AM. B. FOUND. RES. J. 521, 527 (1977).

80. *See* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 187-89 (1973) (Brennan, J., dissenting).

promised and deception effectively is favored and rewarded.[81] Further deterring meaningful evaluation of political claims is the press' practical aversion to antagonizing sources of information.[82] A truly objective story that criticized an individual or entity thus might be softened to avoid loss of future information. Compounded with other realities defining the modern marketplace of ideas, the net consequence is a diminished capacity of normal counterpoints for false speech and further grounds for dissatisfaction with conventional first amendment wisdom.

Just as speech is classified on the basis of perceived value, the press is categorized according to concern with its impact. The analytical departure point in determining the constitutional status of various media is that "[e]ach method of communicating ideas is 'a law unto itself' [reflecting the] 'differing natures, values, abuses and dangers' of each method."[83] Distress over the function and influence of the press predates actual jurisprudence addressing a contemporary oligopolistic mass media industry. Louis Brandeis, responding to technology preceding electronic modernization of the press, expressed concern with what he perceived as the media's intrusive potential and frivolous ways.[84] Brandeis maintained that the press was devoting increasingly too much attention to sensationalism and gossip, neglecting "matters of genuine community concern" and consequently inverting public priorities.[85] His notion of a right to privacy was advanced as a means of accounting for altered circumstances that, in part, the media both produced and influenced.

Brandeis' seminal concerns are enduring sources of justification for delimiting freedom of the press. Formative jurisprudence this century was quick to account for worries over the effect of newly emerging media. In *Mutual Film Corp. v. Industrial Commission*,[86] the Court upheld censorship of motion pictures.[87] Consonant with impact considerations, review focused upon the medium's "capability and power" for "evil," which was enhanced by its "attractiveness and manner of exhibition"[88] and availibility to children. Depicting film as a medium that merely rep-

81. *See* Hinerfeld, *supra* note 74, at 20-21.

82. *See id.*

83. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (billboard regulation) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949)).

84. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life").

85. *Id.*

86. 236 U.S. 230 (1915), *overruled in* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

87. *Id.* at 244-45.

88. *Id.* at 244.

resented "events, . . . ideas and sentiments published and known,"[89] the Court denied motion pictures press status and effectively excluded them from constitutional purview.[90] Not until mid-century was the decision overturned and film "included in the press whose freedom is guaranteed by the First Amendment."[91]

By then even newer media had evolved, others were emerging, and freedom of the press analysis was rooted in the premise that "each [medium] tends to present its own peculiar problem."[92] Radio and television in particular were subject to a comprehensive federal regulatory system that required broadcasters to function as public trustees.[93] Contrary to traditional first amendment expectations, content regulation became normative to the extent considered necessary to facilitate fairness and balance,[94] to protect impressionable children from negative influence,[95] and to account for pervasive and intrusive ways.[96] Uniting those rationales at least with respect to governance of broadcasting is the statutory obligation to serve the public interest.[97] As history demonstrates, a public interest standard "means about as little as any phrase that [can be constructed]."[98] It introduces to freedom of the press analysis, moreover, precisely the problem of valuation and subjectivity that plagues freedom of speech jurisprudence. Fairness requirements have operated unevenly[99] and, as evidenced by persistent criticism and recent divestment of the fairness doctrine itself, without persuasive justification.[100] Regulation of indecent expression purports to account for the interests of

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89. *Id.*

90. *Id.*

91. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). The *Mutual Film* decision itself was overruled in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

92. *Joseph Burstyn, Inc.*, 343 U.S. at 503.

93. *See* Communications Act of 1934, 47 U.S.C. §§ 151-332, 390-510 (1988). The general obligation of licensees to operate in the public interest is set by *id.* § 307(a).

94. The fairness doctrine, obligating broadcasters to raise controversial issues of public importance and balance their coverage, was upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

95. FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

96. *Id.* at 748.

97. *See supra* note 93 and accompanying text.

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

99. At the time the Court endorsed the fairness doctrine, daily newspapers were scarcer than radio and television stations. *See* 1989 STATISTICAL ABSTRACT OF THE UNITED STATES No. 900, at 544, No. 913, at 549 (1,838 daily newspapers as opposed to 7,196 commercial radio and television stations in 1970, one year after *Red Lion Broadcasting*). Nonetheless, the Court rejected the proposed fairness obligation for publishers as an unconstitutional invasion of editorial discretion. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

100. Scarcity is a universal feature of all media, rather than a unique characteristic of a particular medium, given capital requirements for mass communicating. *See* Telecommunica-

children and privacy[101] but simultaneously cuts against parental autonomy[102] and concepts of privacy concerned with personal decision-making.[103] Despite debatable terms and conditions of control, regulation of what has become the most dominant facet of the press is countenanced because "of all forms of communication, it is broadcasting that . . . receive[s] the most limited first amendment protection."[104]

Modern first amendment theory, assessed against a backdrop of expression and media not contemplated two centuries ago, assumes too much and too little. The notion that the First Amendment is inviolable because it has served the nation so well exaggerates the quality of actual performance. It also diverts attention from deficiencies in analytical structure and consequences that disserve or underserve interests of cultural pluralism associated with the First Amendment. Most importantly, complacency retards recognition of intervening problems of a compelling order, confounds understanding of actual first amendment dynamics, and deters intellectual initiative that might facilitate a more profound guarantee.

II. The First Amendment and Lost Opportunity

A. Historical Premises

The First Amendment, in an early stage of its jurisprudential development, was characterized as "the matrix, the indispensable condition of nearly every other form of freedom."[105] A sense that expressive freedom was crucial to the vitality of other basic rights and liberties engendered notions that the First Amendment's status within the constitutional order was unique and judicial review should reflect its special role.[106] The Court itself invested in the premise, at least for a time, in declaring that "[f]reedom of press, freedom of speech . . . are in a preferred position."[107] The concept, if fully and persistently subscribed to, would have profound implications for a system of freedom of expression. Recognition that the First Amendment is not merely an end in itself but a means of facilitating

tions Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

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

102. *See id.* at 770 (Brennan, J., dissenting) (some parents may wish to have their children exposed to expressions offensive to others).

103. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (expounding concept of constitutional privacy which incorporates personal decisions with respect to intimate matters).

104. FCC v. Pacifica Found., 438 U.S. at 748.

105. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

106. *See* Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting).

107. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

the general liberty experience directs attention to values and emanations pertinent to personal freedom generally. Rights of the public to access the media for purposes of self-expression or for the press to obtain and disseminate information may be rational extensions of the First Amendment[108] insofar as they help accommodate expressive freedom, individual autonomy and democratic robustness. Modern jurisprudence generally has repudiated the predicate of a preferred status,[109] however, and accordingly delimited analytical potential.

A particularly notable feature of first amendment law, as it has evolved, is the multiple opportunities presented for effectuating constitutional aims that have been bypassed. Enduring investment in the concept of a preferred constitutional status, for instance, might not have steered jurisprudence entirely away from the classification processes and balancing methodologies which now dominate modern review. Consistently strong presumptions in the First Amendment's favor, however, likely would alter the actual weight of competing interests. The outcome-determinative potential of such calibration is evidenced most aptly by the law of prior restraint. Because prior restraint is presumptively invalid and imposes a heavy burden[110] of justification, constitutional survival of such regulation is the exception.[111]

Despite missed opportunities for reinforcing the First Amendment's general fabric, possibilities for adaptation still exist. Freedom of speech and of the press were incorporated into the Bill of Rights when primary identity and allegiance were to the state, not to the federal republic.[112] Within that context the soapbox and street corner were common platforms for speech, and pamphlets and leaflets were viable instrumentalities for communicating to a larger audience.[113] Original concern that expressive freedom might be compromised was directed exclusively to-

108. *See infra* notes 121-37 and accompanying text (public access) and notes 169-82 and accompanying text (freedom of the press emanations).

109. Justice Frankfurter articulated the Court's discomfort with a premise suggesting "that any law touching communication is infected with presumptive invalidity." Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

110. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

111. In one district court the presumption was overcome and the burden of justification was satisfied when a magazine sought to publish an article on how to assemble a hydrogen bomb. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). The court found that the risk to human life outweighed interests in expressive freedom. *Id.* at 995. A subsequent appeal was dismissed after newspapers published the same article. United States v. Progressive, Inc., 610 F.2d 819 (7th Cir. 1979).

112. *See* D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 300-01 (1990).

113. For a discussion of the early press and relative ease of entry into mass communication then, see E. EMERY, THE PRESS AND AMERICA 68 (1972).

ward a national government generally perceived as the dominant threat to personal liberty.[114] The cumulative consequences of early federalist policies, subsequent civil war, eventual constitutional amendments revealing and responding to exercises of state power,[115] and later emergence of a mass media industry, however, have ushered the First Amendment into a radically different societal context. Expressive freedom may be imperiled not only by the federal government but by state authority and private concentrations of power including the press itself. Despite judicial accounting for state encroachment upon freedom of expression,[116] the Court largely has declined invitations to manage doctrine in ways that would reckon directly with the influence of private power.[117] A few decades ago, it identified freedom of association as a constitutional implication necessary to effectuate core first amendment freedom.[118] Nonetheless, the Court consistently has passed up opportunities to identify other emanations that would vitalize explicit guarantees of expressive freedom.[119]

B. Access to the Media

The emergence of mass media has prompted concern that individual speaking opportunities have diminished inversely to institutional growth and concentration. Such distress reflects the general sense that, for practical purposes, "[f]reedom of the press is guaranteed to those who own one."[120] Although presented with opportunities to heighten the significance of individual speech, the Court largely has been resistant to the methodology of direct enhancement. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[121] the Court rejected the concept of an unqualified right of public access that would have enabled individuals to purchase time on radio or television for self-expression purposes.[122]

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114. *See supra* note 3 and accompanying text.

115. The transition from a predominantly state to national identity was commenced by jurisprudence developed during the first third of the Nineteenth Century. This movement largely advanced Chief Justice Marshall's federalist vision of a strong central government and national economy. *See* D. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS 35-45 (1990). Adoption of the post-Civil War amendments, particularly the Fourteenth Amendment, denoted the paramount significance of national citizenship. *See* D. FARBER & S. SHERRY, *supra* note 112.

116. *See supra* note 23 and accompanying text.

117. *See infra* notes 120-67 and accompanying text.

118. *See supra* note 5.

119. *See infra* notes 168-81.

120. Liebling, THE NEW YORKER, May 14, 1960, *reprinted in* THE GREAT THOUGHTS 243 (G. Seldes ed. 1985).

121. 412 U.S. 94 (1973).

122. *Id.* at 126-27.

Faced with a choice between promoting free speech values or protecting free press interests, the Court determined that public access was constitutionally inconsonant and unwise as a matter of policy. The cardinal first amendment problem was that the methodology would erode editorial discretion—the traditional concern of the free press guarantee.[123] Even if the constitutional difficulty were not so acute, the Court was bothered by the practical consequences of allowing individuals to exercise editorial power.

The Court expressed concern that access programming would be slanted in favor of the wealthy or dominated by particular political views.[124] By rejecting a lower court determination that individual speakers "are the best judge of what the . . . public ought to hear,"[125] the Court implicitly recognized a unique function of the press. Beyond defeating free speech interests, however, a special role has yet to translate into special constitutional status that might enhance the media's performance and consequent significance of press freedom.[126]

One year after largely foreclosing public access to broadcasting, the Court in *Miami Herald Publishing Company v. Tornillo*[127] invalidated a contingent right of access provision affording political candidates an opportunity to respond to a newspaper's editorial criticism.[128] The Court observed that the newspaper industry had become less competitive, media ownership and control had become more concentrated, and power to inform and shape public opinion now reposed "in a few hands."[129] It further acknowledged that economic realities had made entry into the modern publishing business "almost impossible"[130] and noted that reliance upon competition for diversity and balance was no longer feasible.[131] Despite recognizing the First Amendment's modern circumstances, the Court depicted the qualified access provision as the functional equivalent of a prior restraint.[132] The Court thus found the measure constitutionally defective "because of its intrusion into the function of editors."[133]

123. *Id.*
124. *Id.* at 123.
125. *Id.* at 124.
126. *See infra* notes 168-75 and accompanying text.
127. 418 U.S. 241 (1974).
128. *Id.* at 244, 254-55.
129. *Id.* at 250.
130. *Id.* at 251.
131. *Id.*
132. *Id.* at 258.
133. *Id.*

The access decisions reveal that the Court largely was unmoved by claims that the public has lost capacity to respond or to contribute in a meaningful way to the debate on the issues.[134] Justice Brennan would have redirected analysis, at least in the broadcast context, to account for intervening realities which he perceived as blunting the First Amendment's original meaning.[135] Brennan considered it "imperative that citizens be permitted at least *some* opportunity to speak for themselves as genuine advocates on issues that concern them."[136] Without attention to free speech values emphasizing input opportunity, he maintained that the "profound national commitment to . . . uninhibited, robust, and wide-open" debate risked devolving into an inaccessible ideal.[137]

Concern that individual speech may be consigned to a fate akin to a tree falling in the forest may have sounded a compelling note initially but now may be coursing toward obsolescence. If the Court's aim is to replicate the functional opportunity for speech as it existed two centuries ago, it is arguable that technology that imperiled meaningful individual speech now may facilitate it. Methodologies such as desktop publishing, computer networks, two-way cable, fax machines and talk radio actually may present avenues for effective self-expression that are more numerous and effective than the Framers themselves contemplated.

1. The Fairness Doctrine

Despite rejecting direct access schemes that collide with editorial freedom, the Court has not been entirely resistant to theories and schemes for reconciling free speech and free press interests. To account for societal change which has tested the First Amendment's utility, the Court attempted to balance competing speech and press concerns to enhance diversity of information without unduly compromising editorial autonomy. Broadcasting, emerging as the most dominant medium of the century,[138] already had become subject to unique demands for fairness and accountability that would have been constitutionally impermissible

134. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 195-96 (1973) (Brennan, J., dissenting).

135. *Id.* at 187-89 (noting how transition to mass media society diminished opportunity for and significance of individual speech).

136. *Id.* at 189-90 (emphasis in original).

137. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

138. Television and radio in 1988 reached respectively 98% and 99% of the nation's homes. 1989 STATISTICAL ABSTRACT OF THE UNITED STATES, No. 900, at 544. In 1987, a total of 9,911 commercial radio and television stations were in operation, *id.*, compared to 1,646 daily newspapers. *Id.*, No. 913, at 549.

elsewhere.[139] Consistent with the notion that each medium has unique characteristics justifying special regulatory attention,[140] the fairness doctrine was formulated to promote diversity and balance.[141] Not surprisingly, this doctrine was challenged as an invasion of first amendment rights. In *Red Lion Broadcasting Co. v. FCC*,[142] the Court endorsed the fairness principle. Noting that the demand for broadcast frequencies exceeded the supply,[143] and that some views and ideas might be denied access to the information marketplace,[144] the Court constructed a first amendment public right "to receive suitable access to social, political, esthetic, moral and other ideas and experiences."[145] By upholding the fairness doctrine, the Court thus elevated constitutionally glossed viewing and listening rights above traditional notions of freedom of the press.[146] As noted previously,[147] the Court ultimately refused to expand viewpoint access into a personal access regime that would have defined the public's right in terms of input as well as output.

The resultant accommodation, occupying a middle ground between access and absolute editorial autonomy, proved constitutionally and practically troublesome to the point that it represented the worst of both worlds. In practice, the fairness doctrine[148] deterred rather than facilitated robust and unfettered debate. Regulatory assumptions failed to account for the industrial reality that broadcasting's profitability is dependent upon market share, and strategies for maximizing audiences favor programming toward mainstream tastes and away from issues or ideas that would be unsettling or antagonistic thereto.[149] Barring asser-

139. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("[i]t has yet to be demonstrated how governmental regulation of this crucial process can be [reconciled] with the First Amendment").

140. *See supra* notes 83 and 92 and accompanying text.

141. The fairness doctrine essentially obligated broadcasters to devote a reasonable amount of time to controversial issues of public importance and, in so doing, afford opportunity for contrasting views. *See In re* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communication Act, 48 F.C.C.2d 1, 7 (1974) (hereinafter Fairness Report).

142. 395 U.S. 367 (1969).

143. *Id.* at 388 ("substantially more individuals who want to broadcast than there are frequencies to allocate").

144. *Id.* at 389.

145. *Id.* at 390.

146. The Court determined that "the right of the viewers and listeners, not the right of the broadcasters, . . . is paramount." *Id.*

147. *See supra* notes 121-36.

148. *See* Syracuse Peace Council v. Television Station WTVH Syracuse, 2 F.C.C. Rcd. 5043, 5052 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

149. *See* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 229 (1982); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE

tive enforcement, the fairness dotrine under such circumstances at most could facilitate orthodox or safe controversy.[150] Concern that unpopular sentiments might alienate viewers, listeners, and sponsors represented a significant deterrent to meaningful diversity.[151] Compounding the disincentive to "uninhibited, robust, and wide-open" debate[152] was recognition that a fairness complaint eventuated administrative, reputational, and legal costs.[153]

The fairness doctrine was problematic not only with respect to its own regulatory aims but also with respect to first amendment concerns. By requiring coverage of, and balanced attention to, controversial issues, the FCC reserved significant content-based control over the dominant mass medium. Fairness enforcement afforded latitude to broadcasters insofar as the FCC generally assumed good faith licensee judgment and discretion.[154] Broadcasters also were significantly indulged "in selecting the manner of coverage, the appropriate spokesmen, and the technique of production and presentation."[155]

To the extent meaningfully enforced, the fairness doctrine was a regulatory charade. Insofar as it might be activated, however, the regulation was constitutionally perilous. The fairness doctrine in principle assigned content responsibility to official authority rather than editorial autonomy.[156] The FCC's power already had been recognized as exceeding the authority to govern the engineering and technical aspects of broadcasting.[157] Jurisprudential investment in the scarcity rationale enabled the FCC to concern itself with "program format and the kinds of programs broadcast by licensees."[158] Even if not regularly exercised,

L.J. 213, 231-32. Justice Brennan has noted 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 System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 187 (1973) (Brennan, J., dissenting).

150. *See Syracuse Peace Council*, 2 F.C.C. Rcd. at 5049.

151. *See supra* note 149.

152. New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1974).

153. *See Syracuse Peace Council*, 2 F.C.C. Rcd. at 5050.

154. *See* Fairness Report, *supra* note 141, at 8, 23.

155. Fairness Report, *supra* note 141, at 16. Of 4,280 fairness complaints received in 1973 and 1974, for instance, the FCC made findings against licensees in only 19 instances. *In re* Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691, 709 (1976) (Robinson, Comm'r, dissenting) (hereinafter Reconsideration of Fairness Report).

156. Reconsideration of Fairness Report, *supra* note 155, at 707-08 (Robinson, Comm'r, dissenting).

157. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943).

158. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 395 (1969).

broad and intrusive enforcement powers[159] were judicially countenanced if licensees proved unresponsive to fairness imperatives.[160] Given a broadcaster's interest in retaining a license to remain in business, the mere existence of powerful enforcement devices imperiled editorial autonomy and independence.[161] The fairness doctrine invited interference with, and abuse of, the editorial process as a function of political convenience and expediency.[162] Although fairness could not be effectuated unless regulation was forceful, such methodology itself was inimical to basic precepts of editorial freedom.

Investment in the scarcity premise reflected the sense that a subtraction of first amendment liberty was essential for advancing first amendment interests.[163] Eventually, the Supreme Court invited the FCC to reexamine the foundation of and the need for the fairness doctrine.[164] Adverting to many of the criticisms that its policy had engendered,[165] the FCC concluded that scarcity was no longer an apt regulatory predicate.[166] It further determined that constitutional interests would be better accounted for by applying "full First Amendment protections against content regulation . . . equally to the electronic and the printed press."[167] Pending reintroduction of fairness or any comparable duty, the contours

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159. Violation of the Communications Act of 1934 or rules promulgated thereunder may result in revocation of a broadcasting license, short-term renewal, nonrenewal, or fine. *See* Communications Act of 1934, 47 U.S.C. §§ 307(d), 312(b) (1982).

160. *See Red Lion Broadcasting*, 395 U.S. at 395.

161. Broadcasters thus were especially vulnerable to "regulation by the lifted eyebrow." Robinson, *The FCC and the First Amendment: Observation on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119 (1967) (quoting Miami Broadcasting Co. (WQAM), 14 R.R. 125, 128 (1956) (Doerfer, Comm'r, dissenting)). An informal inquiry or expression of official concern may have a profound chilling effect on the creativity and flexibility of an industry dependent upon official authorization of existence. *See id.* at 119-20.

162. *See* S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA 219-20 (1978) (discussing manner in which fairness regulation invited misuse by several presidential administrations). *See also In re* Inquiry into § 3.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 145, 192-94 (1985) (hereinafter Fairness Inquiry).

163. The Supreme Court openly acknowledged its construction of an "unusual order of First Amendment values." Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973).

164. When cable was still in a relatively formative stage, the Supreme Court noted that it would "afford increased opportunities for the discussion of public issues." *Id.* at 131. A decade later, the Court intimated its readiness to discard the scarcity rationale if it received a "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 of California, 468 U.S. 364, 377 n.11 (1984).

165. *See* Syracuse Peace Council v. Television Station WTVH Syracuse, 2 F.C.C. Rcd. 5043, 5049-58 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

166. *See id.* at 5054-55.

167. *Id.* at 5057.

of public discourse in theory as well as in actuality, and within perimeters of protected speech, remain a function of the mass media's editorial judgment.

2. *Effect on Freedom of the Press*

Dependence upon the mass media for basic information pertinent to self-governance and personal development raises society's stake in an energetic and effective press. As the republic has grown, citizens have become increasingly remote from centers of official policy and decision. First amendment jurisprudence generally has been reluctant to invest in concepts that would enhance the media's utility, even when functioning as the citizenry's agent and trading in "ideas essential to intelligent self-government."[168] In a variety of contexts, the Court has refused to find implicit in freedom of the press the right to gather news.[169] Despite arguments that freedom to publish has little meaning without the ability to protect sources[170] or to access information,[171] the Court has afforded both the press and the public identical measures of constitutional privilege.[172] As the media's role as a proxy has expanded, therefore, the press' capacity to perform its representative function has been confounded by an absence of doctrinal support.

At least for constitutional purposes, the Court has resisted implications of a special media function. Accordingly, the press is not immune to the workings and demands of the criminal justice system, regardless of the consequent impact upon the flow of information. In *Zurcher v. Stanford Daily*,[173] the Court upheld the use of a search warrant to obtain evidence from a newsroom even though the newspaper was not suspected of any crime.[174] It thus rejected the notion that first amendment interests require use of a less intrusive subpoena duces tecum.[175] Concerns over chilling sources and impairing the flow of information also were dismissed when, in *Branzburg v. Hayes*,[176] the Court refused to acknowl-

168. Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

169. *See infra* notes 172-80 and accompanying text.

170. *See infra* notes 176-80 and accompanying text.

171. *See infra* notes 173-77.

172. *E.g.*, Branzburg v. Hayes, 408 U.S. 665, 674 (1972) (criminal justice system entitled to receive "everyman's evidence").

173. 436 U.S. 547 (1978).

174. *Id.* at 556-68.

175. *Id.* at 559-62. Congress responded to the *Zurcher* decision by enacting the Privacy Protection Act of 1980, which limits the circumstances in which police may search a newsroom. 42 U.S.C. §§ 2000aa, 2000aa-7 (1988).

176. 408 U.S. 665.

edge a first amendment privilege from testifying before a grand jury.[177] The Court thereby affirmed the premise that the press is not entitled to special privilege or attention incident to the First Amendment.[178]

Arguments that the press should have access rights to information unavailable to the general public likewise have been impaled by principles denying special status. Contrary sentiment maintains that, given the media's evolution into a surrogate role, a right to obtain information is a logical emanation of the right to communicate. Consistent with that notion, Justice Powell observed that an

> informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. . . . The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right.[179]

Justice Powell effectively stated the case for jurisprudential identification of first amendment emanations essential to vitalizing the First Amendment's core guarantees. Still, the Court has refused to define access in terms of doctrine that would respond to modern circumstances and facilitate a more functional information marketplace. Access for both the public and the press is determined pursuant to the same standard: whether a venue is traditionally open.[180] Such review not only repudiates any meaningful distinction between the press and the public but also risks holding future review captive to custom rather than evolving imperative.[181] The analysis also is susceptible to criticism for blinding itself to contemporary realities as they impinge upon basic aims of an

177. *Id.* at 688.

178. *Id.* at 690-91 ("reporters, like other citizens," must respond to the needs of grand jury).

179. Saxbe v. Washington Post Co., 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting) (criticizing decision upholding ban on press interviews with prison inmates).

180. *See* Globe Newspaper Company v. Superior Court, 457 U.S. 596, 605 (1982) (criminal trial traditionally open to public).

181. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577-78 (1980) (plurality opinion) (right of access "to places traditionally open to the public . . . assured by the amalgam of the First Amendment guarantees of speech and press"); Houchins v. KQED, Inc., 438 U.S. 1, 15-16 (1978) (plurality opinion) (right of access extends coextensively to press and public).

informed and enlightened public.[182]

From accumulated jurisprudence emerges a First Amendment that is criticized simultaneously for being too expansive and too constrained. Freedom of the press in one instance is broadly defined to the point of engendering distress that freedom of speech interests are suffocated. The First Amendment is a reference point too for schemes that erode both free press interests and free speech values. When the media's own potential for effective agency is implicated, freedom of the press has been pinched to the point that its functional capabilities are undermined. The result is a First Amendment mired in uncertain values, unsynchronized in significant part to contemporary circumstances and ill-equipped to confront the future.

III. Rehabilitating the First Amendment

A commonly identified virtue of the Constitution is its capacity to speak comprehensively while actually saying relatively little.[183] The advantage of documental compactness and efficiency is exaggerated, however, insofar as constitutional law becomes increasingly convoluted. To the extent basic law becomes detached from contemporary imperatives, constitutional interpretation also risks disengagement from moral standards and prevailing values that afford credibility and legitimacy. The law of expressive liberty, as it courses into a third century, risks devolving into a condition inviting cynicism rather than esteem. Freedom of speech already is knotted and cramped by classification and micromanagement systems that subtract from the maximum possible sum of expressive freedom. For the press, the ambit of constitutional security effectively has narrowed even while the media universe has expanded. Because first amendment standards are now calibrated to afford maximum protection to traditional media with diminishing influence and demand enhanced scrutiny for newer media that are dominant,[184] the basic guarantee is more circumscript now than ever before. The general notion of freedom of the press is further discounted when the press' performance as a proxy of the citizenry is most implicated.[185] Warnings not to tamper with the First Amendment thus are hard to take seriously when the guarantee appears so substantially compromised. To make

182. *See supra* notes 41-44 and accompanying text.

183. Textual economy results in majestic principles that nonetheless must be amplified and particularized. *See* L. TRIBE, GOD SAVE THIS HONORABLE COURT 48 (1985).

184. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (broadcasting is the least protected of all media).

185. *See supra* notes 168-82 and accompanying text (freedom of press delineated narrowly so as to deny arguable emanations).

contemporary sense out of the First Amendment, it is impossible to turn the clock back to 1791 or to the earlier part of this century to the origins of expressive freedom jurisprudence.[186] Reality is that not only the media but also society has experienced profound changes in circumstances which demand constitutional attention.

Freedom of expression was enshrined in a decentralized, political and economic setting rather than in the organized and developed industrial and commercial framework that subsequently emerged. Earlier exercises of speech and press freedom are notable for their lack of commercialism.[187] Commercial speech not only would become the foundation upon which modern mass media were erected[188] but also a significant and valued form of expression in its own right.[189] Since 1791, society also has moved in the direction of cultural pluralism attributable both to immigration patterns and to social factors that have reinforced group identity.[190] Even within subgroups, diversity manifests itself in varying degrees of expressive taste and tolerance. Pertinent standards meanwhile have become fixed as a function of dominant preference and a perspective that fails to look forward and inadequately comprehends the present.[191] Freedom of speech theory fastened on the overarching importance of political expression thus is bound in a romanticized but nonexistent state. Such premises are susceptible to criticism for disregarding a dysfunctional marketplace of ideas[192] and failing to construct principles

186. *Cf.* Brown v. Board of Education, 347 U.S. 483, 492 (1954) (modern equal protection cannot be defined by "turn[ing] the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when" segregation was upheld).

187. Early publishing emphasized persuasion rather than profit, as many organs of opinion were the information arms of political parties. *See* F. HUDSON, JOURNALISM IN THE UNITED STATES FROM 1690 TO 1782 141-42 (1969).

188. Advertising provides the primary revenue base for newspapers, which sell space, and radio and television, which sell time. Consequent influence of sponsors over program content and diversity interests has evoked distress from critics of jurisprudential response so far. *See* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 187-89 (1973) (Brennan, J., dissenting).

189. Commercial speech attained constitutional status pursuant to the sense that interest in it was "as keen, if not keener" than in political expression. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

190. Racial distinctions until the middle of this century, for instance, were a matter of official ordination reflecting the dominant culture's customs, traditions and preferences. *See* Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

191. Justice Brennan has criticized the Court's intolerance of purportedly indecent or offensive expression as reflecting an "acute enthnocentric myopia" and "depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of the Court, and who do not share their fragile sensibilities." FCC v. Pacifica Found., 438 U.S. 726, 775 (1978) (Brennan, J., dissenting).

192. *See supra* notes 73-80 and accompanying text.

that account effectively for even that narrow range of speech interests.[193] Freedom of press analysis is subject to claims it protects and binds the media in the wrong ways at the wrong times.[194]

Renovating the First Amendment so that it serves the expressive interests of contemporary society can be accomplished either by rewriting or by reinterpreting the First Amendment. Given the general resistance to overt tampering with documental structure, jurisprudential revision is likely to be the more practical alternative. To proceed in that direction, however, it is necessary to identify a general analytical departure point that is principled and thus conducive to credible results. Insofar as the First Amendment is not an absolute, expoundment of expressive freedom becomes a process analogous to fathoming the meaning of liberty under the Fourteenth Amendment.[195] Modern fundamental rights[196] have emerged not from constitutional explication but pursuant to inquiries into what is "implicit in the concept of ordered liberty"[197] or "deeply rooted in this Nation's history and tradition."[198] As guides for charting the contours of the First Amendment, such reference points afford a respectable basis for reexamining some stale assumptions, updating the visage of pertinent jurisprudence, and accounting more effectively for modern realities that impair expressive pluralism. A candid and objective inquiry into the implications of ordered liberty and the content of the nation's conscience affords a first step in fashioning doctrine congruent with societal moral development and expectations.

In assessing the various speech classifications recognized by the Court, it is immediately evident that the status of political expression would not change significantly pursuant to a new analytical regime. Even if the political process is not characterized by comprehensive citi-

193. Foreclosing logical radiations of freedom of the press, such as the right to acquire information or protect sources, confounds effectuation of informed self-government. *See supra* notes 168-82 and accompanying text.

194. *See supra* notes 168-82 and accompanying text.

195. U.S. CONST. amend. XIV § 1 ("No state shall . . . deprive any person of . . . liberty . . . without due process of law").

196. Jurisprudence has glossed upon the fourteenth amendment rights which, although not documentally enumerated, are accorded constitutional status. *E.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (marital rights); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (familial liberty); Roe v. Wade, 410 U.S. 113 (1973) (liberty to elect abortion). Fundamental rights also have been constructed upon nonspecific constitutional footing. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote).

197. Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

198. *Id.* at 192 (quoting *Moore*, 431 U.S. at 503).

zen participation,[199] governance nonetheless remains a function of electoral choice and representative decision-making. Expression relating to informed self-government, even if acted upon by only half of the population,[200] is impossible to detach from the implication of ordered liberty. Given the value placed upon such expression in shaping the republic, and the tolerance of falsehood and vilification of a political nature that exists today,[201] a relatively unbridled freedom of speech pertaining to self-government is well-rooted in societal tradition. Even assuming an increasingly dysfunctional information marketplace,[202]reforms that require official accountability may be a more treacherous alternative. Although methodologies of manipulation and distortion have become more sophisticated, it is doubtful that the nation's traditions or conscience would support departure from the First Amendment's original assumption of risk that the public would be misinformed or apathetic.[203]

It is also likely that modern renderings with respect to defamation and privacy fairly approximate what the law should be. Even acknowledging Justice White's concern that false speech pollutes the stream of information,[204] deception and misrepresentation are well-established customs.[205] Because injury to reputation and violation of privacy are viewed less hospitably by society, to the extent government officials and famous or influential persons are not implicated, standards that narrowly define public figures in terms of prominence or power and that are more sensitive to ordinary persons[206] fairly reflect tradition and conscience.

Commercial expression for modern purposes, as previously noted, may be more pertinent to the general citizenry than any other variant of

199. *See supra* note 66 and accompanying text.

200. *See id.*

201. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (constitutional protection of expression does not depend on truth, popularity, or social utility of ideas or belief).

202. *See supra* notes 66-70 and accompanying text.

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

204. *See supra* notes 69-70 and accompanying text.

205. Modern political campaigning is conducted pursuant to well-established strategies for both manipulating and distorting the truth. *See supra* notes 74-80 and accompanying text. President Johnson in 1964, for instance, gave his pledge not to send American troops "to do what Asian boys ought to be doing for themselves." S. KARNOW, VIETNAM, A HISTORY 395 (1983). While making such promises for public consumption, Johnson was informing the military of his intent to escalate troop levels after the election. *Id.* at 326. The episode fits a consistent pattern that accounts for broken promises by other politicians such as: Lincoln not to tamper with slavery, Franklin Roosevelt not to enter into war and Bush not to raise taxes.

206. "Public figures," for purposes of activating the actual malice standard in a defamation action, are restricted to persons with widespread fame or who inject themselves into a particular public controversy for purposes of influencing the outcome. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 456-57 (1976).

speech.[207] Assessment of the proper constitutional status for commercial speech is complicated by the varying results that depend upon the standard of measurement used by the Court. Examined from the perspective of tradition and conscience, commercial expression discloses a history of assumption that such speech was unprotected and therefore regulable.[208] Given the centrality of commercial considerations to the nation's formation, however, it is arguable that unfettered expression concerning economic transactions or self-interest is a logical condition of ordered liberty.

Resolution of the apparent conflict requires a deeper understanding of why expression is subject to regulation even within the existing framework of governance. Despite the Court's intimation that the possibility of content control is a function of speech value, the significance of the regulatory interest may be more determinative. Even political speech may be prohibited if the danger it presents is considered too profound.[209] Tolerance of political falsehood may reflect less the expression's significance than public perceptions, evidenced by electoral participation, that politics are less important than commerce. Deception in commercial transactions generally has a more palpable and personalized impact, contrasted with political lies that tend to be diffused rather than particularized.[210] Given the relative differences of participation in the economic and political marketplaces, commercial misrepresentations directly affect more persons. They have the potential, depending on context, to endanger life or health[211] or to undermine societal confidence necessary for economic vitality.[212]

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207. *See supra* notes 67 and 189 and accompanying text.

208. Until 1976, commercial speech was excluded from the First Amendment's purview pursuant to Valentine v. Chrestensen, 316 U.S. 52 (1942) (First Amendment no barrier to regulation of commercial speech).

209. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (speech can be regulated upon showing of direct, imminent and likely harm against which government has power to protect). Even the presumptive invalidity of prior restraint has been surmounted when strong reasons are identified. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (publication of article on how to make hydrogen bomb enjoined when danger to first amendment interests outweighed by danger to life and national security).

210. A political lie almost invariably exists for mass consumption and may be irrelevant to a voter's actual choice. Injury, moreover, stems from the combined voting preferences of a majority. A deceptive sales pitch that fails to satisfy what was promised, however, has definable adverse consequences manifestly attributable to the falsehood.

211. The promotion of products which endanger health typifies such advertising.

212. False and misleading representation in connection with the offer, sale or purchase of securities typifies such expression. Maintenance of investor confidence is at the center of comprehensive regulation of the field. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953); Preamble to Securities Act of 1933, ch. 38, tit. I, § 1, 48 Stat. 74 (1933).

The reality that commercial expression possesses more value and utility for society than political speech reveals a significant truth about the First Amendment. Constitutionality of content regulation actually seems to be determined by how dangerous and potentially disruptive expressive freedom would be to a profound societal interest, not by the importance of the speech. Given a society shaped by the need for a viable economic union, and centrally concerned with material progress individually and collectively, first amendment traditions must compete with even longer standing concern with economic integrity, opportunity, and vitality.

Assessing the proper constitutional status of sexually explicit expression is a thorny exercise regardless of the employed standards. Inquiries into the implications of ordered liberty or into the content of tradition and conscience almost invariably produce disputed and inconclusive results. The evaluative process breaks down because efforts to define universal principles are impossible when no consensus exists. The central lesson of obscenity and indecency review is that these concepts are elusive and the first amendment problem is intractable. Because premises for content control remain largely speculative,[213] but significant regulatory support exists nonetheless, a practicable resolution requires a compromise between cultural inclinations to foreclose such expression and the interest in constitutional damage control.

The most sensible accommodation would be to eliminate any official proscription of sexually explicit expression except to the extent necessary to protect unconsenting adults and children.[214] The interests of adults wishing to avoid exposure to such expression largely can be effectuated by regulation that goes no further than requiring warnings and advance disclosure. Although the problem may be more complicated with respect to children, protection may be afforded with minimum damage to expressive interests by imposing significant penalties for distribution to minors and reliance upon inexpensive technology for customized restriction of access to the electronic media.[215]

Given a definitional problem akin to that which confounds obscenity

213. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (prohibition of obscenity permissible pursuant to "unprovable assumptions").

214. *See id.* at 112-13 (Brennan, J., dissenting) (urging redaction of prevailing obscenity doctrine).

215. Channel blockers and similar technological devices are an available and inexpensive alternative to taxing expressive pluralism. *See* Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2837 (1989); Lively, *supra* note 18, at 974 n.104.

law,[216] fighting words should be eliminated altogether as a discrete category of expression. Liquidation of the classification would not pretermit actionability on the alternative grounds that speech was defamatory or injurious to a point warranting official intervention.[217] Elimination of the category would reduce constitutional clutter and steer review toward a common point of assessment that, regardless of how speech might be classified, merely inquires whether a compelling reason existed for its regulation.

The simplified analysis would displace the classification process, which consistently subtracts from the sphere of expressive freedom, and minimize investment in disputable values. Consequent review would function as a general balancing process that, instead of making procrustean assessments of speech value, would focus primarily upon the profundity of regulatory interests. Balancing in the context of the First Amendment is not an analytical methodology immune to criticism.[218] So long as freedom of speech and of the press are not regarded as absolutes, balancing is a necessary consequence. The treachery of the existing analytical regime's operation is compounded by a valuation process that diminishes the significance of some speech and excludes other variants entirely from constitutional purview. Review analogous to strict scrutiny of racial classifications in the equal protection context would regard content control as the first amendment equivalent of a suspect classification.[219] As evidenced by fourteenth amendment jurisprudence,[220] insistence on a compelling state interest safeguards trenchant constitutional concerns against compromise absent exigent circumstances.[221]

216. Classification of speech as fighting words, like obscenity, is "susceptible of application to protected expression." Gooding v. Wilson, 405 U.S. 518, 523 (1972).

217. As even the most ardent of absolutists has conceded, the First Amendment is less of a barrier to official intervention "when speech is brigaded with conduct." *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 456-57 (1969) (Douglas and Black, JJ., concurring).

218. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 60-61 (1964) (Black, J., dissenting) (Framers performed all balancing required and permitted by First Amendment).

219. The term "suspect classification" is lifted from the lexicon of equal protection and affords the basis for strict judicial scrutiny. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500-01 (1989).

220. Strict scrutiny of racial classifications, at least before the issue of affirmative action, was described as " 'strict' in theory and fatal in fact." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

221. Outside the affirmative action context, and since Brown v. Board of Educ., 347 U.S. 383 (1954), the closest the Court has come to supporting a racial classification is plurality endorsement of segregating prisoners in emergency circumstances. *See* Lee v. Washington, 390 U.S. 333 (1968) (Black, Harlan and Stewart, JJ., concurring).

Suspectness and close scrutiny do not foreclose regulation,[222] but control is considered in a particularized fashion and allowed only when explained in exceptionally persuasive terms.

Full accounting for expressive freedom under modern circumstances requires attention to the charge that speaking opportunities have been lost or significantly diminished as a consequence of transition into a mass media society. Enhancement of individual speech interests, pursuant to access or any comparable remedial formula, invariably conflicts with freedom of the press. Because it is no more an absolute than any other constitutional guarantee, freedom of the press is susceptible to review when a compelling justification exists. In the abstract, effectuation of first amendment aims and values may intimate a trenchant premise. The peril inherent in ordering expressive interests perceived to be in conflict is that one freedom may be bruised in advancing another, and the object of rescue may be transferred merely from private to official captivity.

History has demonstrated that fairness concepts create significant constitutional risks and few practical rewards.[223] Access notions may be relatively less threatening to editorial freedom insofar as input opportunity, rather than output management, is emphasized. Instead of requiring qualitative evaluation of whether coverage is comprehensive and balanced,[224] government oversight would be limited to whether the minimum required space or time was set aside for the public. By recognizing the right of viewers and listeners as paramount,[225] the Court already has completed much of the doctrinal travel necessary to account for the problems of a mass media society. In rejecting the case for public access nearly two decades ago, the Court observed that "[c]onceivably at some future date Congress or the [Federal Communications] Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."[226] Public access is already a legislated feature of cable.[227] Justification for official intervention on behalf of first

222. Racial classification of a remedial nature is permissible, for instance, to redress provable instances of past discrimination. City of Richmond v. J.A. Croson Co., 488 U.S. at 504.

223. *See supra* notes 148-62 and accompanying text.

224. Fairness regulation was problematic in large part because it required precisely such content oversight. *See supra* notes 159-62 and accompanying text.

225. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1987). The paramount right of viewers and listeners has not been cast aside with the fairness doctrine. *See* Syracuse Peace Council v. Television Station WTVH Syracuse, 2 F.C.C. Rcd. 5043, 5055-57 (1987) (deregulated information marketplace better serves public's paramount right), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

226. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973).

227. *See* Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-605 (1984).

amendment values, however, may be even less compelling as time passes. As long as alternatives exist for effectuating a profound interest in a way less burdensome to a fundamental freedom, the less restrictive option must be chosen.[228] As noted previously, modern technology is affording new opportunities for speech that may equal or surpass participation contemplated when the First Amendment was crafted.[229] Official intervention now, therefore, may be both belated and premature.

Attention to the facilitation of first amendment values would be better directed toward facilitating the media's role as the citizenry's proxy. Given society's general evolution, the average citizen not only has limited influence upon public debate but also is increasingly remote from actual sources of policy and decision. First amendment functions and interests, whether defined in terms of an informed citizenry, checking official power, or individual development, depend heavily upon institutional procuring and processing of information. It is myopic to determine that the press and public have coextensive rights to access official facilities and information when individuals generally have neither the time, resources, nor knowledge to investigate the multifold venues and archives of modern governance. The touchstone for identifying a constitutional emanation is whether the interest at issue is essential for effectuating the core guarantee.[230] Viewed from that perspective, meaningful freedom of the press is not merely a function of liberty to publish but a guarantee that extends to acquisition of data and protection of sources. Federal law concerning open records[231] and meetings[232] statutorily accounts for news gathering interests and may be qualified only by specific exemption.[233] While affording protection for material subject to traditional privilege claims,[234] the enactments do not provide the media with confidentiality for information sources. The law of privilege reflects a general sense, however, that countervailing policy reasons merit departure from normal

228. *See* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).

229. *See supra* notes 137-38 and accompanying text.

230. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

231. Freedom of Information Act, 5 U.S.C. § 552 (1967), *amended by* 5 U.S.C. § 552 (Supp. V 1987).

232. Government in the Sunshine Act, 5 U.S.C. § 552b (1976).

233. The Freedom of Information Act contains exemptions from a statutory duty to disclose in specified instances pertaining to national security, internal personnel practices and rules, exemption by congressional enactment, trade secrets, matters that would be nondiscoverable within the legal system, medical files, investigative records, bank examiner reports, and geological and geophysical data. 5 U.S.C. § 552(b)(1)-(9).

234. 5 U.S.C. § 552(b)(5).

demands of process.[235] If immunity can be justified pursuant to traditional assumptions of common or statutory law, the case for variance is even more powerful when constitutional interests are present.

Constitutional revitalization is an essential exercise if the First Amendment is to account satisfactorily for realities that have intervened to complicate expressive freedom over the past two centuries. Such an event initially requires expanding the frontiers of discourse concerning the reference points by which constitutional principle is charted. Existing boundaries of debate, comprehending disputes over the general value of free expression, appraisal of specific speech variants, and assessments of various media, largely fail to accommodate concerns that are even more paramount to the First Amendment's utility. Theory and principle that speak more to the past than to the future are logical extensions of the conviction that the First Amendment is untouchable and its revision unthinkable. A sense that debate should be limited or avoided creates a profound incongruity when the topic is the guarantee of free trade in ideas. Notions that the First Amendment should be insulated from the very risks it assumes represent grounds for concern, not constitutional complacency.

IV. Conclusion

The concept of a living constitution implies significant responsibility for ensuring that its guarantees, which are neither self-defining nor self-executing, do not become anachronistic or dysfunctional. Notions that the First Amendment is beyond restructuring or serious reconsideration are inimical to that obligation. Such sentiment wrongly assumes that the guarantee has functioned at a consistent level of excellence and continues to do so. Reflecting upon and retooling the First Amendment, jurisprudentially or otherwise, are exercises consonant with, rather than subversive of, constitutional governance. Monitoring and if necessary recontouring basic first amendment law are essential for a society that, although historically connected to circumstances which engendered the First Amendment, is defined by further personality, values and needs. Jurisprudence that acknowledges and at least attempts to account for evolving realities ultimately redeems rather than rebukes the meaning and significance of the Constitution itself.

235. *See* Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (privileges allowable to extent they promote "a public good transcending the" needs and ends of legal process).